

**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CIVIL CAUSE NO. 1 OF 1996**

**BETWEEN:**

**MACKENZI T.C. NGOSI t/a**

**COSMOS INSURANCE BROKERS ..... PLAINTIFF**

and

**ELVIS MJUMA MUNTHALI ..... DEFENDANT**

CORAM : CHIMASULA PHIRI, j.

T.C. Nyirenda of counsel for the plaintiff

M.G. Chisanga of counsel for the defendant

Mr Kamanga - Official Interpreter

Mrs Katunga - Recording Officer

**JUDGMENT**

The plaintiff's claim is for a declaration that partnership between the plaintiff and the defendant evidenced by certificate of registration of business name be dissolved from date of issue of writ herein. Further, that for the purposes aforesaid all necessary accounts and inquiries be taken. Furthermore a receiver be appointed to receive debts now due and accruing and other assets belonging to the partnership. Finally the plaintiff wishes the assets of the said partnership to be shared equally.

The defendant denies that the plaintiff was a partner in the firm of Cosmos Insurance Brokers and consultants. Further that if the plaintiff was a partner, the said partnership was **void ab initio** in that the plaintiff has never possessed insurance professional qualification. The defendant has contended that the licence to practice under the Insurance Act was solely issued to the defendant. The defendant further denied that the plaintiff was a signatory to some bank account by virtue of being a partner and furthermore the defendant denied that there was an agreement that the parties hereto should be joint signatories to all Bank accounts. The defendant denied operating secret Bank accounts. He contended that accounts at the Leasing and Finance Company of Malawi and the First Merchant Bank were opened with knowledge of the plaintiff and he consented that he should not be a signatory. The defendant objected to the prayer made by the plaintiff.

Plaintiff gave evidence as PW 1 and he stated that he is an insurance broker of 23 years experience. He explained with ease about his experience in insurance as well as his contacts with the defendant. The plaintiff explained how the partnership was formed in April 1994. He stated that the partnership was on the basis of 50:50. Since both did not have capital, both made small payments for buying insurance certificates. The plaintiff said each contributed 50% of such expenses. Exhibits P1 and P3 were tendered as evidence for existence of partnership. PW1 explained about Bank Accounts at Commercial Bank as well as Leasing and Finance which were jointly operated by the plaintiff and jointly operated by the plaintiff and the defendant. The plaintiff also explained how the defendant was assigned to be managing the bank accounts. Later the plaintiff became suspicious on how the defendant was operating the bank accounts of the partnership. The plaintiff discovered some account at First Merchant Bank being operated by the defendant without the knowledge of the plaintiff. During further inquiries the plaintiff discovered that the defendant was building a dwelling house in Chilomoni Township. This confirmed the plaintiff's suspicions that the defendant was misusing money from the partnership. The plaintiff mentioned of huge deposits and withdrawals from partnership account by the defendant without knowledge of the plaintiff. Since the relationship between the two had turned sour the matter was even reported to Fiscal Section of the Police Force by the plaintiff. Furthermore, the plaintiff tendered a lot of documents in support of his case including a writ issued in Civil Cause No. 189 of 1996 where NICO sued the plaintiff and defendant jointly as Cosmos Insurance Brokers and Consultants for K111,192.75 being insurance premium received but not remitted.

PW2 was Fletcher Nova Mkandawire who works for First Merchant Bank as an officer responsible for Current Accounts, Savings Accounts and Deposit Accounts. He confirmed having some access to an account for Cosmos Insurance Brokers opened on 11th July 1995 with opening balance of K10,000.00. Thereafter it had total credits of K257,582.33 and total debits of K189,348.93 and at the time of Court injunction order there was credit balance of K66,378.72. The Account earns interest. He explained about the paid up cheques and tendered copies as part of his evidence. This witness was firm in his testimony and cross-examination elaborated his evidence.

The defendant gave his evidence and had indicated that he would call other witnesses. However, he failed to bring that witness. The testimony of the defendant is very lengthy and lasted several days with adjournments in between starting from 6th August 1996 to 11th April 1997. The defendant stated that he knew the plaintiff in 1968 as Secondary School peers and they met again in Chancellor College in 1972/1973 as co-students. Subsequently, in 1986 and 1988 both were employed by the then Hogg Robinson Insurance Brokers. That probably was the only positive evidence the defendant could give about the plaintiff. Thereafter, the defendant's evidence took another twist castigating the plaintiff as a lazy and inefficient person who constantly lost employment. Furthermore, the plaintiff is portrayed as a person with no insurance professional

qualifications. The defendant says in February/March 1994 he approached G.R. Ngosi for business venture. However, G.R. Ngosi stated he was too busy for that and advised the defendant to approach the plaintiff. This he did. The defendant indicated that this was his plan. He explained almost repeating what the plaintiff had stated about their humble beginning. The only difference in their testimony is that the defendant emphasised that it was his business. However, the defendant did not explain that the plaintiff was his employee, servant or agent. I wish to state that the defendant was evasive and secretive whenever asked about the details of the partnership. There are times even he refused to answer questions about this partnership. I doubt the truthfulness of the defendant. I am sorry to use a strong term that I found the defendant to be selfish.

As a matter of fact on the evidence before this court, there is abundant evidence proving existence of partnership between the plaintiff and the defendant. Apart from the application and registration certificate of the business and absence of employment or agency contract between the plaintiff and the defendant the other evidence provides sufficient pointer to existence of a partnership. I would not even doubt the evidence of the plaintiff of his equal participation in this partnership. A partnership is defined in Section 3 of the Partnership Act - Cap 46:04 as a relationship which subsists between persons carrying business in common with a view to making profits. It is clear evidence of the plaintiff and the defendant that despite their humble beginning they were able to withdraw profits and advance payments to each other for accommodation and up-keep. No where does the defendant allege that he paid the plaintiff salary or commission. Obviously this was a partnership. Partnership need not be in writing all the time. Sometimes it can be inferred from the conduct of the parties. In this particular case the court would apart from the operation of the business of selling premiums attach great weight to the evidence on how the Bank accounts were operated by the joint signatories namely the plaintiff and the defendant. There was no evidence from the defendant to suggest that in Insurance Broking business it is common practice to pick on any servant as a co-signatory to Bank Account. Having found that these were partners it is equally the law that each partner is deemed to be an agent of the other and may bind the other partner. Similarly an act or instrument relating to the business of the firm done or executed in the firm name showing an intention to bind the firm is binding on the firm and on the other partner.

The defendant has indicated that he could not have made a partnership with a person who was not qualified in insurance. Apparently this would be correct for Insurance agents but not insurance brokers. The Insurance Act does expressly prohibit persons who are not qualified in insurance law and practice from operating as brokers. At law brokers are agents of the insured and have no authority to bind the insurer although the Insurance forms they assist the insured to complete are that of the Insurer. Therefore, I find nothing illegal in the partnership between the plaintiff and the defendant. As a result the duties of a partner set out in Sections 30, 31 and 32 of the partnership Act apply. Each partner is required to observe the utmost fairness and good faith towards his fellow partner. There must be mutual confidence. From the evidence before me in this court the defendant has breached this bench mark requirement of a partnership. He has not been fair to the

plaintiff. He has not admitted that he operated an account at First Merchant Bank on his own. He moved substantial sums of money from partnership account at Leasing and Finance Company to First Merchant Bank. The evidence of PW2 Mkandawire was very clear.

In the circumstances can this Court dissolve the partnership. It appears both parties would like to have it dissolved although in one breath the defendant contends that there is no partnership to be dissolved. Looking at Section 37 of the Partnership Act particularly paragraphs (c), (d) and (f), I have no problems in ordering that this partnership be dissolved from the date the writ was issued i.e. 2nd January 1996. There must be an account and inquiry into the operation of this partnership up to date. A receiver should be appointed following the dissolution who should take charge of the assets and liabilities of the dissolved partnership for purposes of winding up and sharing of assets and profits to the partners. These must be shared equally.

The defendant is condemned in costs of these proceedings.

**PRONOUNCED** in open Court this 16th day of February 2000 at Blantyre.

**CHIMASULA PHIRI**  
**JUDGE**