

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
IN BANKRUPTCY
BANKRUPTCY CAUSE NO. 5 OF 2001**

Re Alex Tchongwe, a debtor

Ex parte Finance Bank of Malawi Limited, a Creditor

BETWEEN:

FINANCE BANK OF MALAWI LTD.....PETITIONER

and

ALEX TCHONGWE.....RESPONDENT

CORAM: HON. JUSTICE A.C. CHIPETA

Changwamnjira, of Counsel for the Petitioner

Respondent and Counsel - Absent

Matekenya (Mrs), Official Interpreter

RULING

The Petitioner, Finance Bank of Malawi Limited, has presented before this court a Creditor's Bankruptcy Petition. The Respondent therein is a Mr Alex Tchongwe, who is said to be the Petitioner's Judgment Debtor. The petition is verified by an affidavit sworn by a Mr Peter White, Deputy Managing Director of the Petitioner.

I heard this petition on 11th May, 2001. At the time of hearing neither the Respondent nor his Legal Practitioner was present. At some point in the morning of that day Counsel for the Petitioner had advised that he was waiting for the Respondent's Counsel who was then appearing before another Judge. As Motion Judge of the day I had some other eight matters pending at that same time including Judicial Reviews a winding up petition and some Habeas Corpus applications and so I was well occupied. Later that same morning Counsel, for the Petitioner sought to be heard. He had just learnt that his colleague had left for a matter in the Magistrate's Court. I decided it would be better to postpone the matter to 2.00 p.m. so that both sides should be present and I so adjourned the case. In the afternoon the Respondent's side did not turn up. Counsel who happened to be the message carrier, Mr Nyimba, reported that the matter in the subordinate court was still

proceeding as at the time he went to pass on word of the adjournment. Mr Changwamnjira, Counsel for the Petitioner; then moved and insisted that he be heard. Noting that the petition had been duly served, that Counsel for the Respondent had even been to court earlier in the day for the matter, and that the order of precedence demanded that the subordinate court business give way to this High Court matter, I found no

justification for further adjourning the matter and so I proceeded to hear the petition in the absence of the Respondent and his Advocate.

In presenting the petition Mr Chagwamnjira, of Counsel, said that the Respondent owes the petitioning Bank sums of money on basis of which it sued him and obtained judgment. All efforts to recover the judgment debt having yielded nothing for the Bank, Mr Chagwamnjira said that on 8th February, 2001 the Petitioner applied for a Bankruptcy Notice to issue and that the Registrar issued one that same day. This notice, he said, was served both under Order 10 of the Rules of Supreme Court and by substituted service.

Mr Chagwamnjira further argued that the notice required the Respondent to pay K10,797,465.42 within 30 days unless he could satisfy the court that he has a counterclaim, set off or cross-demand equal to or exceeding the sum due. By the expiry of the time limited he said the Respondent had not complied with the requirements of the notice in either of the modes available and that he had thus in terms of Section 3(1)(g) of the Bankruptcy Act (Cap 11:01) committed an act of bankruptcy. This, it was argued, then entitled the Petitioner to the filing of the petition for bankruptcy herein.

With reference to Section 6 of the Bankruptcy Act it was argued that the Petitioner is well entitled to present the petition it has presented. The debt owing by the Respondent, it was said, amounts to more than £50.00, and that it is a liquidated sum that is due and payable immediately and further that being the subject of a judgment dated 16th August, 1999 one of the acts of bankruptcy in relation to it was occurred within three months of the presentation of the petition. Mr Tchongwe, it was added, is a Malawian who is based in Blantyre and is domiciled in Malawi.

As regards Section 7 of the same Act, it was advanced by Mr Chagwamnjira, that here too the Petitioner has complied with all the necessary legal requirements. The debt, he said, has been proved both through the judgment on file and the affidavit spelling out its details. It was thus submitted that the Petitioner has done all that is required if it to obtain a receiving order against the Respondent and that this court should therefore grant such order.

Over and above the absence prayer the court was asked to appoint the Petitioner's Deputy Managing Director, Mr Peter White, as Interim Receiver. On this point the court was also asked to exercise its discretion not to require any deposit or bond from Mr White. As this for these is only one creditor, it was argued, that there is no danger that the estate of the Respondent could be administered to the detriment of any other creditor. It was contended that at a Creditor's Meeting which following the receiving order, if made, questions whether to confirm the Interim Receiver or not or whether to appoint another

one would surface and would be resolved.

I listened with great care to all the petitioner presented at the hearing of this petition. I have taken time to match all that presentation with the details on the court record as well as the requirements of the law as spelt out under the Bankruptcy Act. It is clear to me that in a case like this it is essential, inter alia, that be satisfied about the existence of a creditor - debtor relationship between the petitioner and the respondent, that the debtor has committed at least one act of bankruptcy prior to the presentation of the petition, and that there has been due service of the petition on the Respondent. (See: Sections 3 and 5 of the Bankruptcy Act).

In my observation the fact that the Respondent is a debtor of the Petitioner has been well demonstrated by the judgment in Civil Cause No. 1225 of 1999 between these same parties dated 16th August, 1999 for the sum of K4,584,962.11. This judgment is on the file and it is also referred to in the Bankruptcy Notice issued by the Registrar on 8th February, 2001 as well as in the accompanying request for issue of Bankruptcy Notice.

Similarly the issue of service of petition appears to me to be beyond question in this matter. There is on record an order granted by the Registrar on 23rd April, 2001, with its formal order signed on 25th April, 2001 by the same Registrar, allowing for service of the petition through a single advertisement of the same in the Daily Times and in the Nation newspapers. There is following this an affidavit of service which I accepted unfiled on 11th May, 2001 on undertaking by Counsel that he would duly file it subsequently. This was on the basis of injunction to the effect that the High Court Accounts office was that day not open and that it was thus impossible to pay filing fees. This affidavit is to the effect that service herein was achieved both through the post on 26th April, 2001 per Order 10 R.S.C. and through the authorized advertisement on 1st May, 2001.

What has however exercised my anxiety in this case is the question whether or not the Petitioner has proved to me that the Respondent debtor has been guilty of the act of bankruptcy alleged herein. In seeking an answer to this question I have throughout been mindful that it was submitted that the Respondent was duly served with the Bankruptcy Notice. In the words of the learned Counsel for the Petitioner this notice was served both under Order 10 R.S.C. and by substituted service. I must point out that no specific dated were ascribed to these acts of service.

Now while I have acknowledged receipt and sight of an affidavit of service in respect of the petition I must confess that I see none on the file in respect of the Bankruptcy Notice. I know whether there was omission to file such affidavit or such was filed and then misplaced. What is clear, however, is that in the form the file was passed on to me from the Civil Registry between the Bankruptcy Notice and the application to serve petition by substituted service there is no affidavit explaining how the Bankruptcy Notice was served. The only word I have on that service is that from learned Counsel during his presentation, but there is no supporting documentary confirmation.

Now proof of service of Bankruptcy Notice is quite important in these proceedings. It is

important because it is from the date of service of the notice and not from the date of its issue, that time begins to run for either satisfying the debt or satisfying the court about the existence of a counterbalancing counterclaim, set-off, or cross-demand. Proof of commission of an act of bankruptcy prior to the presentation of a petition like the present thus solely depends on when this time begins to run and when it ends and company that with the time the Petition is then filed. In this case the question remains in the air whether the Notice, once it was issued, was served on the debtor and, if so, when then arises the concern why no affidavit of such service is on the court file.

Of the debtor was indeed served in February or March, or April and per Section 3(1)(g) did nothing to settle the debt or to exempt himself from settling it as was open to him as specified in the notice and seven days elapsed from the day of service the petitioner then earned a right to file this petition soon that period elapsed. If, however the debtor was not served then he could not have been in default of compliance with the demands in a notice that he was not aware of and to say that he then committed an act of bankruptcy would not be true. The position I find myself in is that much as I would be happy to accept the word of Counsel as word of honour, in the absence of affidavit of service to buttress that word I cannot positively conclude that the Respondent has in this matter committed the act of bankruptcy as complained of herein. The rules require an affidavit for proof of service and here there is none vis a vis the notice (See Rules 103 and 116 of the Bankruptcy Rules).

It is clear from Section 5 of the Bankruptcy Act that my jurisdiction to make a receiving order very much depends on the debtor committing such type of act.

In this case therefore much as I am amply satisfied about the debt the respondent owes the petitioning creditor, and that in line with the Registrar's Order the respondent was duly served with the petition herein, I entertain reasonable doubts as regards proof of the act of bankruptcy alleged as it is not quite plain if and when the Bankruptcy Notice allegedly disregarded by the Respondent was served, if at all. Section 7(3) of the Bankruptcy Act in these circumstances directs me to dismiss the petition, which I do. As the Respondent did not even attend, I need not award him any costs. I thus make no order on costs.

Made in Chambers the 14th day of May, 2001 at Blantyre.

A.C. Chipeta

JUDGE