**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 1204 OF 2002**

**BETWEEN:**

**JOHN PAUL.....PLAINTIFF**

**-and-**

**CRISPEN BENJAMIN.....DEFENDANT**

**CORAM: HON. JUSTICE A.C. CHIPETA**

**Nyimba, of Counsel for the Plaintiff**

**Kainja, of Counsel for the Defendant**

**Mzungu (Miss), Official Interpreter**

**RULING**

From the look of things this matter commenced on 12th April, 2002. I say so because the writ issued in it by the court is not dated. The Statement of Claim annexed to the writ, however, was signed by the Legal Practitioners of the plaintiff on 12th April, 2002. On issue of writ the plaintiff was the same John Paul as is still plaintiff now, but his defendant then was a man called Christian Benjamin.

There is also on the file an ex-parte application which, per Registry date stamp, reached the court on 11th April, 2002, and which was set down for hearing on 12th April, 2002. It was an application lodged by the plaintiff for an order of arrest of Christian Benjamin or for the attachment of his goods under O.VIII of the Rules of High Court made under S. 67 of the Courts Act (Cap 3:02) of the Laws of Malawi. Again on issue this application was not dated by the court but the affidavit in support thereof similarly shows that it was sworn by the plaintiff on 12th April, 2002. What is surprising is that like the application it supports, it bears a filing date stamp of the day before, which would appear to suggest that it was filed before it was sworn.

The prayer the plaintiff sought in this ex-parte application was granted by a Judge on the face of the application papers and this order too was not dated although it was duly signed for. In like manner even the formal order that followed does not bear any date of issue, but like the ex-parte application and the supporting affidavit preceding it this

formal order also shows that it was filed on 11th April, 2002.

Despite the consistent omission of entry of dates of issue starting from the writ, proceeding to the ex-parte application, and extending to the order for arrest/attachment, it is quite plain to me from the way matters stand on the court file that the commencement of the action herein through issue of the writ and the granting and issuing of the order the plaintiff obtained ex-parte herein, were all done simultaneously on 12th April, 2002.

There is after this an affidavit of a bailiff, sworn on 2nd May, 2002. The contents of this affidavit, which is an affidavit of service, are that on 12th April, 2002 the said bailiff served on "Crispen Benjamin aka Collins Benjamin" a Writ of Summons with acknowledgment of service, an ex-parte application for arrest/attachment, and the Order for arrest/attachment before judgment at the Malawi Immigration Post at Mwanza Border.

It is significant I think at this point to note that on 12th April, 2002 the defendant who was addressed by the writ that was issued in this matter, as well as by the ex-parte application that was lodged, and by the Order of arrest/attachment that was granted and issued herein was one Christian Benjamin. Yet, as becomes obvious from the affidavit of service, the person served with these documents was not Christian Benjamin but "Crispen Benjamin aka Collins Benjamin" as deponed in paragraph 3. The person attended by the bailiff for service therefore was, without a doubt, not the person that was named in the case and in the processes served. Unfortunately the affidavit in question does not go so far as to explain the puzzle this style of service creates in the case.

As a general rule under O.10 rule 1 of the Rules of Supreme Court, a writ must be served personally on the defendant named in it. Now if Christian Benjamin's writ was served on the person named in the affidavit of service, who is not himself Christian Benjamin, the manner of service adopted in the case directly flies in the face of that rule of procedure. In addition to the writ, however, there was, inter alia in this case, an order which had been obtained by the plaintiff ex-parte i.e. without the knowledge of the defendant, which needed to be executed on Christian Benjamin or on Christian Benjamin's property.

As the affidavit of service does not explain how a person called Crispen or Collins Benjamin was on 12th April, 2002 targeted for arrest in place of Christian Benjamin or how the goods of this same differently named Benjamin were targeted for attachment in place of those of the person named in the order, although in his presentation learned Counsel tried to become a witness and to fill the gaps left open by the affidavit on this point, it remains a mystery to me how such a bizarre scenario could ever be viewed as amounting to effective service of writ or to lawful execution of the order obtained. All in all, the affidavit of service notwithstanding, in my honest view there is a cloud hanging over the service of writ and ex-parte application herein as well as over the execution of the order of arrest/attachment herein. In a way therefore when paragraph 5 of the same affidavit of service discloses that the man approached for service, even as the police were present, refused to sign for the said documents, that information does not come to me with any sense of surprise. Rather it tends to confirm to me the doubts I have been entertaining regarding whether the service or execution done or attempted herein was at

all legally acceptable and effective.

It will be noted that in reaching the level of doubt I have just expressed above, I have strictly gone by a mere examination of the court record as projected by the processes and other documents filed on it and that I have so far avoided featuring the arguments I recorded from the parties. I must mention that on the point surrounding this strange mode of service my neglect of the arguments advanced is quite deliberate and it is because I found the arguments in question tainted to quite a large measure.

It was my observation as the present application, which is an application to set aside order of attachment, was being argued that in their zeal to clarify the respective positions of their clients both learned Counsel somewhat threw all caution to wind and failed to sufficiently guard their arguments within acceptable limits. Thus in certain respects they went overboard and virtually testified from the bar on matters that cannot be sustained by the depositions in the affidavits they filed in court. Indeed as we all know or ought to know I cannot act on such "extra" information even if it comes in the form of arguments of Counsel or as background information during the presentation of such arguments. The court processes on record, it thus dawned on me, as officially dealt with and the affidavits filed, as unadulterated by these "arguments," actually speak volumes on what really happened in this case. I sincerely felt therefore that it was safer to be guided by them than by the "evidence" learned Counsel, unwittingly perhaps, volunteered to me as they spiritedly argued their sides of the application at hand.

Moving on from here it next transpires that four days after the feat just described above, to wit on 16th April, 2002, the plaintiff was back at court with a second ex-parte application. This time round he was seeking to amend the writ and the Statement of Claim he had earlier filed. On close examination this application had a number of shortfalls. To begin with the title of the case, both in the application and in the supporting affidavit, bore a different name in place of the original defendant. The substitute defendant was now Crispen Benjamin.

Further, apart from the application being headed as being for amendment of Writ and Statement of Claim, there was no specification within the Summons in issue of what amendments the plaintiff was after. The nearest clue to this came up in the affidavit in support, which referred to an exhibit marked "VN1" as depicting the proposed amendments and yet no such exhibit appears to have been attached to the copy of affidavit on the court record. Moreover it will be noted that there was no harmony between the application in question and the affidavit filed in its support in terms of the prayers they each covered. It so happens that beyond seeking to effect amendments to the Writ and Statement of Claim in line with the application filed, the affidavit in support had its own extended prayer concerning the amendment of the order of arrest/attachment.

The shortfalls pointed out above notwithstanding, the learned Registrar granted this ex-parte application for amendment and as the formal order shows, all three documents, including the one only covered in the prayer of the affidavit in support, were allowed to be amended. Hence that same day the plaintiff filed an amended writ, an amended ex-parte application for order of arrest/attachment, and an amended order for arrest/attachment with all three documents this time featuring Crispen Benjamin as

defendant in the case in lieu of the original Christian Benjamin.

The amendments herein having duly sailed through and the earlier service, as found above, having basically amounted to a disaster, a second chance arose as a result of the amendments for the plaintiff to set his record right through proper service of these amended documents. Indeed vis-a-vis the writ, it will be seen at Note 20/1/7 under Order 20 rule 1 of the Rules Supreme Court, that where it has been amended, unless the court otherwise directs, it ought to be personally served on the named defendant. Thus if on 12th April, 2002 Crispen Benjamin was visited with court documents in the name of Christian Benjamin which he refused to sign for, after the 16th April, 2002 amendments it was necessary to show him that the case in question had now become his by serving him with documents properly bearing his name as defendant in the case.

The changes herein having been effected ex-parte, service of all the amended documents was in fact unavoidable because even though amendments take effect from the date of the original documents (which in this case were not dated), the new defendant could not have been expected to dream that such change had taken place and that the court papers for Christian Benjamin had now become his so that they had now to be read as if the name Crispen Benjamin had been on them from the very start.

Indeed quite in line with the dictates of procedure in its paragraph 2 the formal order directed that the plaintiff should serve the amended documents on the defendant within seven days of the order. The order having been issued on 16th April, 2002 the plaintiff therefore had up to 23rd April, 2002 to effect the directed service. An examination of the record does not however reveal any sign that any such service was undertaken or attempted at any point in time either within or without the seven days to date.

In the circumstances it seems that up to now the changes that have taken place in the matter by virtue of these amendments are only known to the plaintiff and to the court. As far as the man approached at Mwanza Border post on 12th April, 2002 is concerned, whether he is indeed Crispen Benjamin or Collins Benjamin or both, the court papers forced on him still show Christian Benjamin as the defendant in the case and he has not yet through proper channels been informed of the substitution of the defendant's name. As I see it therefore, the plaintiff has not yet rectified the mistakes he made in his initial service or attempted service in the matter.

At long last I must now turn my attention to the application at hand. As I have earlier indicated it is an application aimed at the setting aside of the order of attachment herein. The application has been taken out by Crispen Benjamin (forename spelt slightly differently from the spelling adopted by the plaintiff in the amended documents). There is an affidavit in support sworn by Mr Dzonzi, a Legal Practitioner in the firm Kainja and Roberts, on behalf of the defendant. The affidavit refers to 15th April, 2002 as the day instructions were received and it exhibits an order of arrest/attachment in the name of Christian Benjamin.

The amendments herein having been secured by the plaintiff the day after these instructions and the said amendments having apparently not been served as yet, it is not

clear how the Applicant put in the name “Chrispen Benjamin” for defendant in his application. Further, there is no attempt in the affidavit sworn on behalf of the Applicant to distinguish between the Benjamins Christian and Chrispen (or Crispen), or even Collins, who feature in the case. Of course during presentation of the Summons learned Counsel for the Applicant did his best to distinguish the various Benjamins, but this information being from outside the affidavits on record it amounted to unacceptable evidence from the Bar which I cannot utilize.

The central complaint of Chrispen Benjamin in the application to set aside the attachment order is that it was improperly obtained by the plaintiff and that it is therefore irregular.

Through paragraph 5 of the affidavit in support Chrispen Benjamin has raised a number of points in support of his argument that the attachment order herein is irregular. Among these is a complaint that his trucks were impounded a week before the plaintiff commenced this action. The actual date of impounding and the number of trucks so impounded have not been specified in the affidavit. He also claims that at the time the trucks were so impounded there had been no prior service of any court process on the defendant so that the defendant was then not capable of defeating or delaying the plaintiff’s action.

At this point I must say the affidavit sworn on behalf of the Applicant is rather vague. It is not clear to me whether when the affidavit uses the word “defendant” it refers to Chrispen Benjamin or to Christian Benjamin. This is because the application and its supporting affidavit have Chrispen Benjamin as defendant while the exhibit attached to the affidavit and disclosed as the source of instructions has Christian Benjamin as defendant. Thus even in paragraph 4 of the same affidavit it is not clear which defendant is said to be residing in Canada because the papers served e.g. exhibit “JKD1” have Christian Benjamin as defendant while the Application and affidavit in support, as already said, have Chrispen Benjamin as defendant.

Leaving this aside the further complaint carried by this Summons is that the trucks which suffered attachment herein are not attachable. The trucks in question, it is deponed, are ordinarily resident in Zimbabwe, and thus their return to that country after delivery of goods in Malawi cannot be equated to an attempt to defeat or to delay an action in Malawi of which, on seizure, the defendant is said not to have been aware of.

Yet another complaint raised in the application is that the total value of the attached trucks by far exceeds the total sum

of money the plaintiff is claiming in the action and the plaintiff’s move herein is therefore seen as having been actuated by malice and spite.

Next the Applicant suggests that through the Service of Process and Execution of

Judgments Act (Cap 4:04) of the Laws of Malawi and a reciprocal Act of Parliament in Zimbabwe, judgments obtained in either country can equally be executed in either country as well, and that it was therefore not necessary in this case for the plaintiff to resort to an order of attachment as he did. I must mention that in presenting this application Mr Kainja closely followed the grounds of complaint as depicted in this affidavit.

The Summons to set aside Attachment Order having been filed on 19th April, 2002, on 2nd May, 2002 the plaintiff via his Counsel put in an affidavit in opposition. In brief this affidavit deposes to the effect that the attachment herein is not a result of malice or spite but that it arises from a justifiable claim based on breach of contract. It goes on to depose to the effect that since breach the defendant has for several times been hiding from the plaintiff and that he is not easily traceable even in Zimbabwe and that it was thus sheer opportunity in this case to find him in Malawi.

This affidavit also refers to an exhibit "VN1", which is said to be the bailiff's report, but as was the case earlier, no such exhibit has been attached to the affidavit on the court file. The affidavit however also confirms a finding I have made earlier in this ruling that the order of arrest/attachment was issued on 12th April, 2002. I need also to mention here that the arguments advanced against this application by Mr Nyimba, of

Counsel, also closely followed the contents of the affidavit in opposition.

Turning to the law, for purposes of the present Summons I think rule 1 of Order VIII of the Rules of High Court will suffice. The way I understand that rule it says that after a writ has been issued if the court is satisfied (i) that the plaintiff has a good cause of action and (ii) that the defendant with intent to defeat or to delay this claim of the plaintiff does or attempts or is about to do any of the offending activities as listed, then it may either order the defendant's arrest and require him to furnish security on pain of committal to prison or order attachment against his property. Among the activities that put a defendant at risk of incurring an order under this rule are, inter alia, absconding or leaving Malawi, disposing of, concealing, removing or making away with or handing over property, and wilful evasion or attempt to evade service.

It seems to me that as coached this rule demands not mere commencement of a good cause of action but also awareness on the defendant's part that such an action has been taken out. Thus where a good cause of action has been commenced but the defendant is not aware of that fact I do not see how, if by sheer coincidence he is seen to leave or to attempt to leave Malawi or he disposes or attempts to dispose of his property, that can be said to be done or to be attempted "with intent to defeat or delay the claim of the plaintiff." The test I apprehend is whether one has been sued and not whether one has been living under fear or expectation of being sued at any given time.

One of my early findings in this case, it will be recalled, was that the issue of the writ in this case and the granting and issue of the order for arrest or attachment were all done simultaneously on 12th April, 2002. In my understanding of Order VIII rule 1, therefore, even if the Christian Benjamin named in those original processes was the one actually served or executed upon, I would have had difficulties in accepting that the order had been properly obtained and executed against him. For a court to conclude that a defendant is absconding or leaving Malawi or is about to do so or that he is disposing or attempting do dispose of his property or that he is evading or attempting to evade service with intent to defeat or delay the claim of the plaintiff, which claim the court has assessed to contain a good cause of action subsequent to issue of writ, I think there is need to show that there has been opportunity for the defendant to plan such escape or to plan such disposal or even to evade or attempt to evade service in relation to an existing rather than merely a contemplated court case.

Now where the order is obtained ex-parte at the very time the action comes into being through issue of writ, at what point, one may ask, between the issue of the writ and the granting of the order can it be said that the defendant has planned a departure from Malawi or a disposal of property, or even attempted an evasion of service with intent to defeat or delay the plaintiff's action when he is not even aware that the action has been commenced. I must emphasise that in my understanding the material provision is concerned with the conduct of the defendant once a writ with a good cause of action has been issued and not with his conduct before commencement of an action. Now in this case since the plaintiff commenced action on 12th April, 2002 and he also obtained the order for arrest or attachment that very day I do not see that there was any opportunity between the issue of the material writ and the obtaining of the material order for the defendant to know that he had been sued so as to be in a position to plan or to engage in any conduct calculated to defeat or delay the action so commenced.

In the circumstances I sincerely think that the plaintiff did not comply with O.VIII rule 1 of the Rules of High Court when he commenced his action and obtained the order of arrest or attachment ex-parte at one and the same time, relying in the process on the defendant's conduct prior to issue of the writ contrary to the requirements of the rule. The plaintiff, in my view, hereafter compounded his faults when he, as it were, in the presence of the police, forced these documents on a person who was clearly not the one named in the processes as issued. Further, although four days later the plaintiff had opportunity to amend his papers and to thus hopefully reflect the name of the person he had earlier wrongly accosted with Christian Benjamin's papers, the record does not show that he followed this up with any legally acceptable service.

I have so far done what I could to step by step study the commencement and progress of this case. I am thus fully conversant with the foundations of the order now under challenge. Arising from my observations as disclosed earlier in this Ruling I will not be overstating the issue if I say that this case has not been on the right footing right from the beginning. The issue of the order of arrest/attachment at one and the same time as the commencement of the case, as I have held, was a violation of Order VIII rule 1 of the Rules of High Court. Service of writ and execution of order of arrest/attachment on a person not named therein and on property not belonging to the man named in the

processes simply made the situation worse rather than better. Obtaining amendments hereafter and not correctly, if at all, serving the said amendments on the rightful defendant equally did not improve matters. Thus should it be true, as deponed in the affidavit in support of the present Summons, that the Applicant was in fact arrested and his trucks impounded well before the writ was issued and before the obtaining of the order of arrest/attachment so that the motions of issuing these processes was merely meant to cover up for and to ratify these illegalities, all I would say would be that the plaintiff has then grossly abused the process of the Court.

As I see it, it would be futile for me to examine each of the remaining grounds of complaint the Applicant has put forward in praying for the setting aside of the order of attachment herein. I am in fact rather surprised why the Applicant so much restricted himself to the setting aside of the order of attachment when the complete order is for arrest or for attachment. Be this as it may the rampant irregularities I have pointed out above leave me little choice in this application except to set aside the entire order of arrest or attachment herein, which I do with costs.

Made in Chambers this 22nd day of July, 2002 at Blantyre.

**A.C. Chipeta**

**JUDGE**