IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Civil case number 238 of 2000

Between

THE PREFERENTIAL TRADE AREA BANK ……Plaintiff

And

ELECTRICITY SUPPLY COMMISSION
OF MALAWI …… ……1st Defendant

And

ATTORNEY GENERAL ……2nd Defendant

And
MBENDERA, CHIRAMBO & ASSOCIATES ……. Applicant

CORAM: **D F MWAUNGULU (JUDGE**)
Mbendera and Nkhono, Legal Practitioners, for the applicant solicitors
Msowoya, Legal Practitioner, for the 1st Defendant
Chisanga, Legal Practitioner, for the Plaintiff
Kamanga, Chief Parliamentary Draftsman, for the Attorney General
Katunga, the official interpreter

Mwaungulu, J

ORDER

Introduction

The several applications and counter applications in this matter arise from a loan agreement between the plaintiff bank, Preferential Trade Area Bank, and two defendants, the Electricity Supply Commission and the Malawi Government. The intense legal battle has little to do with the loan. The Preferential Trade Area Bank, the Electricity Supply Commission and the Government of the Republic of Malawi arranged repayments for a loan that, I must confess, was at the time of the action, exceedingly overdue. The contest is because Mbendera, Chibambo & Associates, legal practitioners for the Preferential Treatment Area Bank, claim costs despite that the parties compromised the action. Mbendera Chibambo & Associates want this Court to order the defendants to pay to them, not the Preferential Trade Area Bank, to cover their solicitor to client costs.

The Preferential Trade Area Bank, so it seems, agrees the defendants are liable to pay costs to Mbendera, Chibambo and Associates, its initial legal practitioners. The Preferential Trade Area Bank does not have to pay these costs. The Government of the Republic of Malawi and The Electricity Supply Commission have, according to the Loan Agreement, to pay these costs. Mbendera, Chibambo & Associates do not want the Preferential Trade Area Bank to pay the costs. They want the defendants to pay. The Preferential Trade Area Bank thinks the costs Mbendera, Chibambo & Associates claim are oppressive to them, Government and the Electricity Supply Commission. They, therefore, now have Sidik & Company to contest the costs. Mbendera, Chibambo & Associates claim costs based on recent amendments to the Legal Practitioners (Scale and Minimum Charges) Rules by the Legal Practitioners (Scale and Minimum Charges) (Amendment) Rules.

Background

On 15th October, 1993 the Eastern and Southern African Trade Development Bank agreed to lend money to the Electricity Supply Commission for a project named as Tedzani III Power Scheme, an extension of the present installation of the Tedzani I and

Tedzani II located at Tedzani Falls on the Shire River. Under section 3.01 (3) of the agreement, the Electricity Supply Commission was to ensure that the Government of the Republic of Malawi concluded the IDA agreement with the International Development Association at Washington D.C. in the United States and the AG agreement with the Australian Government. The Government of the Republic of Malawi was to guarantee repayment of the loan. On 19th October, 1993 the Government of the Republic of Malawi entered into a deed of guarantee over the loan between the Electricity Supply Commission of Malawi and the Eastern and Southern African Trade and Development Bank. The Eastern and Southern African Trade and Development Bank released the funds for the project.

By 13th December, 1999 when Mbendera, Chibambo & Associates, on instruction by the Preferential Trade Area Bank, demanded payment, the Electricity Supply Commission of Malawi had arrears of the equivalent in various currencies of the Agreement of US$ 2, 394, 748.10, according to the Preferential Trade Area Bank, and US$ 2, 021, 803.91, according to the Electricity Supply Commission of Malawi. Up to the Preferential Trade Area Bank's instructions to Mbendera, Chibambo & Associates, the Electricity Supply Commission of Malawi defied many reschedules by the Preferential Trade Area Bank.

On 19th December, 1999 Mbendera, Chibambo & Associates wrote the Government of the Republic of Malawi to settle the loan with the Electricity Supply Commission of Malawi under the guarantee. Mbendera, Chibambo & Associates also informed the Government of the Republic of Malawi that the letter was a notice to them under section 4 of the Civil Procedure (Suits by or Against Government or Public Officers) Act indicating that the agreement waived the three months notice under the Act to 14 days. Mbendera, Chibambo & Associates, the Electricity Supply Commission of Malawi and the Government of the Republic of Malawi were negotiating. The negotiations collapsed on about 25th January 2000. The Government of the Republic of Malawi negotiated with the Preferential Trade Area Bank directly

Mbendera, Chibambo & Associates thought the Government of the Republic of Malawi's steps deleterious. On 28th January, 2000 Mbendera, Chibambo & Associates issued a writ at the High Court in Blantyre against the Electricity Supply Commission of Malawi and the Government of the Republic of Malawi. The Preferential Trade Area Bank claimed the loan balance and costs under the Legal Practitioners (Scale and Minimum Charges) (Amendment) Rules. The claim was for United States $ 8, 271, 330.58; German Dem 4, 814, 687.76; and Japanese Y 109, 766, 955.85. Mbendera, Chibambo & Associates' claims under the Legal Practitioners (Scales and Minimum Charges) (Amendment) Rules were: United States $ 9, 512, 030.17; German Dem 5, 536, 890.92; and Japanese Y 16, 465, 043.38. On 31st January, 2000 Mbendera, Chibambo & Associates served the writs. The Government of the Republic of Malawi, much to the chagrin of Mbendera, Chibambo & Associates, persisted with negotiations with the Preferential Trade Area

Bank. Mbendera, Chibambo & Associates accepted the inevitable. They only advised the Preferential Trade Area Bank to advise them of the outcome. Mbendera, Chibambo & Associates warned the Preferential Trade Area Bank of the ticklish question of costs but advised that they and the Government of the Republic of Malawi resolve it.

The compromise

The Government of the Republic of Malawi's persistence succeeded: the Preferential Trade Area Bank agreed to the Government of the Republic of Malawi's proposals. The Preferential Trade Area Bank advised Mbendera, Chibambo & Associates of the outcome and the banks acceptance of Mbendera, Chibambo & Associates' advice that the agreement be made an order of the Court. The Preferential Trade Area Bank in the letter of 10th February never commented on the cost question. Despite Mbendera, Chibambo & Associates' efforts to get the Government of the Republic of Malawi to finish the court order and request for further instructions, from Mbendera, Chibambo & Associates' letter of 21st March, 2000, nothing or very little moved. Mbendera, Chibambo & Associates still raised the matter of costs with the bank despite that Mr. Chibambo, a partner in Mbendera, Chibambo & Associates, informed the bank that the cost question be resolved between Mbendera, Chibambo & Associates and the Government of the Republic of Malawi.

The costs dispute

On 27th March 2000 the Preferential Trade Area Bank reminded Mbendera, Chibambo & Associates of this understanding on costs. It is useful to reproduce the bank's comment on this aspect and the claim for costs under the Legal Practitioners (Scale and Minimum Charges) (Amendment) Rules:

"As for your fees, Mr. Chibambo indicated that the firm would negotiate the matter with the Malawi Government. Notwithstanding that you are entitled to charge 15%, we did indicate our concern about the amount to be charged and the undersigned had pointed out to Mr. Chibambo that the issue of fees is what made the bank change the last lawyer who was representing the Bank. We hope that the fees to be negotiated will be reasonable. We wish to point out that there was no agreement made between the parties that the fees should be paid by the Bank. It was made very clear that these were for the account of the Malawi Government."

Negotiations for costs and on the court's order agreed earlier began immediately after this letter. They did not go very far. Mbendera, Chibambo & Associates decided to go to court on the aspects where there was no agreement. On 27th March 2000 the Preferential Trade

Area Bank instructed Mbendera, Chibambo & Associates to withdraw the matter and negotiate costs with the Government of the Republic of Malawi and reiterating their view on the costs. Those negotiations proved unfruitful because of polarity of views on whether the fees under the Legal Practitioners (Scale and Minimum Charges) (Amendment) Rules should be paid. The letter of Mr. Kamanga, the Chief Parliamentary Draftsman dated 17th May 2000 evidences the divergence:

"Gentlemen, while it is conceded that your firm has provided services to Preferential Trade Area Bank in relation to the matter herein, for which you deserve to be remunerated, it is the considered view of these Chambers that, to the extent that your firm has not collected any money on behalf of PTA Bank, no fees are payable to your firm in accordance with the Legal Practitioners (Scale and Minimum Charges) Rules (Cap 5:04 sub. leg. p 29). All moneys which have been or will become payable to PTA Bank are payable in accordance with the arrangements agreed between the Malawi Government and PTA Bank as evidenced in the letter Reference Number LEG/MK/02/MPTC & Electricity Supply Commission of Malawi/00218a dated 18th February issued by the PTA Bank."

The proceedings

On 12th June 2000 Mbendera, Chibambo & Associates applied and obtained leave ex parte by a solicitor to proceed with the client – plaintiff action against the defendants to recover costs. Both defendants want the order set aside because, they contend, the plaintiff should have applied inter partes. They argue the defendant should not have obtained the order ex parte. The Registrar, because the application was ex parte, never considered the propriety of the application. On the law and practice, as I understand them, the plaintiff need not even have applied for leave.

Ex parte application unnecessary for judgment for costs only

The Preferential Trade Area Bank's action was for a liquidated sum. Where a writ is so endorsed, but the plaintiff has by satisfaction, compliance, payment or any reason obtained relief, the plaintiff is entitled under Order 13 of the Rules of the Supreme Court in default of notice of intention to defend to enter judgment for costs without the leave of the court. Under the Rules of the Supreme Court, leave of the court is required if the defendant is in default of notice of intention to defend where leave is necessary for entering judgment in default of notice of intention to defend. The defendant is still liable for costs on a claim for liquidated demand where the defendant pays after issue of a writ but before service: O'Malley v Kilmallock Union (1888) 22 L.R.Ir 326; Wyllie v Phillips (1837) 5 Dowl 644; and Watkins v Nixey April 11 1894. Equally, if the defendant pays after service of the writ and refuses to pay costs, the plaintiff can enter judgment for costs

and indicating that the claim is paid: Hughes v Justin [1894] 1 Q.B. 667. The rule is the same if the defendant refuses to pay the fourteen day costs. Since this was a claim for a liquidated sum, the writ having been issued and served, the plaintiff was entitled to costs. The plaintiff should not have sought leave. The plaintiff's solicitors need not have the either.

Another's assumption of debt does not exempt the debtor

A judgment obtained in default of notice of intention to defend for costs only is a regular judgment. It is not irregular: Charvet v Sneyd, January 24, 1906, unreported, UK. The defendants want the judgment set aside on several grounds. The Electricity Supply Commission of Malawi's argument they are not liable because the Government took over the indebtedness must fail on three grounds. First, the agreement between the Electricity Supply Commission of Malawi and the Preferential Trade Area Bank stipulates such arrangements do not affect the Electricity Supply Commission of Malawi's obligations to the Preferential Trade Area Bank.

Moreover, the Government of the Republic of Malawi guaranteed the loan. The agreement with the Government of the Republic of Malawi is clear that the Government of the Republic of Malawi's obligations to the Preferential Trade Area Bank were coterminous to and independent of the Agreement between the Preferential Trade Area Bank, the lender, and the Electricity Supply Commission of Malawi, the borrower. The Electricity Supply Commission had obligations under the Contract, distinct from the Government of Malawi's obligations, which the Preferential Trade Area Bank could enforce against the Electricity Supply Commission of Malawi.

Thirdly, the agreement between the Malawi Government and the Preferential Trade Area Bank and the Government of the Republic of Malawi as to mode of payment does not avail the Electricity Supply Commission. Mr. Msowoya relies on a series of authorities starting with a statement of Abbott, C.J., in Welby v Drake (1825) 1 C & P 557, where, a creditor having sued a son after accepting half the sum from the father in satisfaction of the debt, that, "… by suing the son he [the creditor] commits fraud on the father, whom he induced to advance money on the faith of such advance being a discharge of his son from further liability." Similar reasoning appears in Cook v Lister (1863) 13 CB (N.S) 543 followed in Hiramchand Panamchand v Temple [1911] 2 KB 330. Similar considerations prevail in equity: see Hughes v Metropolitan Railway (1877) 2 App.Cas. 439. These cases, all relied on by Mr. Msowoya, including Central London Property Trust Ltd v High Trees House Ltd [1947] 1 KB 130 can be distinguished from the present on two aspects.

In all the cases the third party paid a lesser sum in satisfaction of the whole debt. The Preferential Trade Area Bank insisted for the Electricity Supply Commission of Malawi

to pay the whole debt. In any case the Government of the Republic of Malawi in agreeing to pay by installments was not doing so on behalf of the Electricity Supply Commission of Malawi. The Government of the Republic of Malawi acted under its own obligations under the Contract with the Preferential Trade Area Bank.

Of course, a promise, as opposed to actual payment may be sufficient, Chitty on Contracts, paragraph 235:

"Alternatively, it can be said that the court will not help a creditor to break a contract with a third party by allowing him to obtain a judgment against the debtor. On the contrary, it has been held that where a (the creditor) expressly contracts with B (the third party) not to sue C (the debtor) and A nevertheless sues, B can intervene as to obtain a stay of the action. This possibility would extend to the case where the consideration provided by B was a promise by B to pay A …"

The right to intervene based on a promise, even by this passage, remains the contractor's, not the debtor's. The debtor, The Electricity Supply Commission of Malawi Limited, could not intervene on the promise by staying proceedings. The Government of the Republic of the Republic of Malawi could intervene only, however, if it was a stranger to the agreements. The Electricity Supply Commission of Malawi under its contract with the Preferential Trade Area had to ensure that the Government of the Republic of Malawi guaranteed the loan. The Government of the Republic of Malawi's arrangements for payment were for Government's own sake not the Electricity Supply Commission of Malawi's.

Notice under the Civil Procedure (Suits By and Against the Government and Public Officers Act unnecessary for breaches of contract

The Chief Parliamentary Draftsman's contention that the Preferential Trade Area Bank should have given notice under section 4 of the Civil Procedure (Suits by and Against the Government and Public Officers) Act, on reading the provision, is not right. Section 4 of the Civil Procedure (Suits by and Against the Government and Public Officers) Act is a limitation provision. It should be constructed strictly. Section 4 of the Civil Procedure (Suits by and Against the Government and Public Officers) Act provides:

"No suit shall be instituted against the Government, or against a public officer in respect of any act done in pursuance, or execution or intended execution of any Act or other law, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority, until the expiration of two months next after notice in writing has been, in the case of the Government, delivered to or left at the office of the Attorney General, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims."

The section does not, as it is assumed, apply to all actions against Government. Government or Public Officers are often required by Acts of Parliament or other law or authority or under a public duty to perform certain duties. Where citizens complain that Government or Public Officers have not performed or performed the duties wrongly, section 4 of the Civil Procedure (Suits by or against the Government and Public Officers) Act requires pretenders to notify Government of pending suits. The notice, apart from giving notice to a colossal entity, enables the Government or the Public Officer to remedy the misfeasance or nonfeasance the Act, authority or duty imposes on Government or a Public Officer. The section, in my judgment, does not apply where, like here, the Government is in breach of a contract.

That this is the case is obvious from the section. The act complained of must be "done in pursuance, or execution or intended execution of any Act or other law, or of any public duty or authority." On the face of it breaching contractual obligations cannot be an act done "in pursuance, or execution or intended execution of any Act or any other law, or of any public duty or authority." Government, like anybody else, is obliged to respect contractual obligations. Respecting contractual obligations would be an act done in pursuance, or execution or intended execution of any other law. Breaching contractual obligations cannot be. More importantly, when entering into contractual arrangements, and this can range from buying a needle to complicated international and multinational contracts, Government is not acting under the pretext of an Act or other law or on any public duty or authority. Government acts as any legal entity with rights to enter contractual arrangements. Acts or defaults in those obligations cannot be said to be in pursuance, or execution or intended execution of an Act of Parliament or other law, authority or duty. Section 4 of the Civil Procedure (Suits by and Against Government) Act requires such notice only for acts done in pursuance, or execution of any Act or other law, or of any public duty or authority. It does not apply to contractual obligations. It applies to misfeasance and nonfeasance by Government of statutory, legal or public duties or authority.

Courts will honour arbitration agreements

The Government of the Republic of Malawi finally wants the proceedings stayed because, without first resorting to arbitration, the Preferential Trade Area Bank commenced proceedings in this Court. The Chief Parliamentary Draftsman wants this Court order that the parties resolve this matter by arbitration. The Chief Parliamentary Draftsman projects the modern approach, an approach I held for a long time, that, for commercial and business efficacy, courts must defer to other modes of dispute resolution where the parties, by their agreements, intended them. The Chief Parliamentary Draftsman referred to Cott UK Ltd v Barber Ltd [1997] 3 All E.R. 540, where, after reviewing some authorities, Hegarty, J., said:

"The courts have increasingly recognized that where the parties have agreed that a dispute should go to arbitration, the court should be slow to interfere with that choice, and should normally grant a stay, unless there are strong grounds for permitting the matter to proceed in the ordinary courts. That is part and parcel of the increasing recognition by the courts in this country of the benefits of alternative forms of dispute resolution, of which arbitration is the classic and historic example. Thus there is today a more restricted approach to arbitration applications or appeals from an arbitrator's ward; and, perhaps significantly in the Commercial Court, whose principles are applied in this list also, there is a requirement on the parties to consider the merits of alternative forms of dispute resolution. I take the view therefore that, even when there is no arbitration clause, in the light of the observations of Lord Mustill in the Channel Tunnel Group case, and in the light of changing attitudes of our legal system, the court plainly has a jurisdiction to stay under its inherent jurisdiction, where the parties have chosen some alternative means of dispute resolution."

In Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] 1 All E.R. 664 the House of Lords held that there was indeed a jurisdiction to stay where parties to a contractual arrangement specified some alternative form of dispute resolution other than arbitration. Lord Mustill said:

"I consider that the action can and should be stayed pursuant to the inherent jurisdiction of the court to inhibit proceedings brought in breach of an agreed method of resolving disputes."

Lord Mustill continued:

"Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose, is to my way of thinking, quite beside the point."

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd and Cott UK Ltd v Barber Ltd are persuasive in this Court. The Chief Parliamentary Draftsman referred me only to a decision of this Court in Landell Mills Associates Ltd v Marshall [1991] 14 MLR 175. This was an appeal from my decision as Registrar. The facts are not important. Banda, J., as he then was, in dismissing the appeal supported, although not an arbitration case, this modern view:

"It is important that courts should give effect to the contractual choice of forum made by the parties. Parties must be bound by agreements they have freely made."

There are however decisions of this Court and the Supreme Court of Appeal on the matter, both decisions again emanating from my decision as Registrar. In Chanthunya v Ngwira [1987-89] 12 MLR 133 I refused third party directions because, having agreed to go to arbitration, the defendant and his insurer were bound to do so unless the validity of the policy was challenged. Kalaile, J., as he then was, reversed my decisions. The Supreme Court in National Insurance Co Ltd v Ngwira [1993] 16(1) MLR 381 took the older view. Tambala, J.A., after referring to a passage by Lord Atkin in Bristol Corporation v John Aird and Company [1913] AC 241 said at 387:

"The view expressed by Lord Atkinson seems to be similar to that taken by the District Registrar. It reiterates the idea of the legal sanctity of a contract."

The Supreme Courts view was expressed as follows by Tambala, J.A.:

"We are satisfied that, in the light of the case of Bristol Corporation v John Aird and Company, supra, and the Arbitration Act, (Cap. 6:03), there must be written into Condition 9 of the policy of insurance which the respondent obtained from the appellants a condition that it should be enforced if the court thought it proper to enforce it. The court must have the opportunity to examine the agreement between the parties, including the arbitration clause and all the circumstances surrounding the dispute between the parties, and decide whether special reasons do not exist which would compel a court to refuse its assistance to a person wishing to enforce such bargain. The door to the court must be kept open at all times. No person should be prevented from having access to the courts. It is a well-settled principle of the common law that no man can effectively withdraw himself from the protection of the courts of law any more than he can effectively deprive himself of his personal freedom: Lord Moulton in Bristol Corporation v John Aird and Company, supra, at 256."

The Supreme Court of Appeal's decision is some what unclear on the approach. The High Court decision is certainly not binding on me. I can depart from it at the peril of reasons. The justifications are the courts' change of attitude to alternative dispute resolution, commercial interest, the need to give efficacy to contractual arrangements and section 13 (l) of the 1994 Constitution encouraging alternative dispute resolution. More importantly, there is no doubt that, for international trade and globalization, jurisdictions stressing juristic interventionist approaches against arbitration and other

alternative modes of dispute resolution are pariah.

No arbitration where no dispute

The question is whether I should exercise the discretion to stay proceedings here. The onus is obviously on the one opposed to the agreed mode of dispute resolution. The discretion necessitates answering three questions. Is there a matter for arbitration? Is the matter one that should, based on the agreement between the parties, go to arbitration? Are there matters justifying sending parties to the agreed mode of dispute resolution?

The answer to the first question is important. It is unnecessary to direct parties to alternative modes of dispute resolution where really there is no dispute. Here, as I understand it, there is no dispute that the Electricity Supply Commission of Malawi, the borrower, is in arrears on the loan. Just as there is no dispute that the Government of the Republic of Malawi should on the guarantee pay the Preferential Trade Area bank the sums under the loan. The Preferential Trade Area Bank condescended to numerous unfruitful rescheduling of debts. In my judgment there is no dispute to go for arbitration. Assuming this is a dispute, it is not one which should go to arbitration. The Electricity Supply Commission of Malawi could not pay the loan. Arbitration could neither engender nor enforce payment. Only the court in the circumstances could. I would not, therefore, exercise the discretion in favour of staying the proceedings and requiring the parties to go for arbitration.

A court cannot order a party to pay another party's solicitor to that solicitor where there is a court order or judgment

Mbendera, Chibambo & Associates, having obtained a judgment in default, apply to this Court for orders that the Government of the Republic of Malawi pay directly to Mbendera, Chibambo & Associates money payable to the Preferential Trade Area Bank as shall be sufficient to satisfy the applicant solicitor's costs as against the Preferential Trade Area Bank and that the second defendant pay directly to the applicant solicitors all sums of money payable to the Preferential Trade Area Bank. Mbendera, Chibambo & Associates apply for these orders because, they argue, of the lien they, as solicitors, have at common law after judgment.

Cockburn, C.J in Mercer v Graves (1872) L.R. 7 Q.B. 409 at 503 describes the nature of the lien:

". . . there is no such thing as a lien except upon something for which you have possession . . . Although we talk of an attorney having a lien upon a judgment, it is in fact only a claim or right to ask for the intervention of the Court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client

depriving him of his costs."

Lynskey, J., in James Bibby, Ltd v Wood [1949] 2 All E.R. 1 at 5 said:

"As my Lord has pointed out, a solicitor's lien on money which is not in his own possession but has come into existence owing to his professional exertions is not strictly a lien at all, but is merely a right to go to the court and ask the court to charge the money for the amount of the costs. No such application had been made in his case . . ."

In Mason v Mason and Cottrell Lord Harnworth, M.R., referring to Mercer v Graves said:

"The nature of a solicitor's lien is pointed out in the course of that case. It is merely a right to claim the equitable interference of the court, who may order that the judgment obtained by the solicitor's client do stand as security for her costs and that payment of such an amount as will cover them be made to the solicitor in the first instance. That lien is one which prevails over a fund which is in sight; the right is one which, so to speak, cannot prevail at large."

It is clear from the judgment of Lord Goddard, C.J., in James Bibby, Ltd v Wood at 4 that the right is no more than a right to go to court to charge the property in favour of the solicitor, and, until that is done, the solicitor has no right to the money.

The solicitor can in Malawi at common law apply for a charging order over property recovered: see Campbell v Campbell and Lewis [1941] 1 All E.R. 274. In England a charging order can in addition be obtained under the Solicitors Act. Mbendera, Chibambo & Associates have not applied for a charging order. Equally, the solicitor can apply for an injunction restraining his client from receiving payment without notice to himself: see Hobson v Shearwood (1845) 8 Beav 486; and Lloyd v Jones (1879) 40 L.T. 514. Mbendera, Chibambo & Associates have not applied for such an injunction. Mbendera Chibambo & Associates could face practical problems with a client beyond our borders as the Preferential Trade Area Bank is. Instead Mbendera, Chibambo and Associates have obtained a judgment for costs against the defendants for their costs. The question is whether Mbendera, Chibambo & Associates can obtain a similar order or one like it against the defendants or the defendant's solicitors.

Mbendera, Chibambo & Associates think they can and apply to this court for such an order. This, however, is contrary to the practice as I understand it. In Lloyd v Mansell (1853) LJQB 110 the court held that as against an opposite party ordered to pay a sum to the solicitor's client, the solicitor is not entitled to an order to pay the money to the solicitor to satisfy his lien. In Lloyd v Mansell, on the reference of an action, the costs to

abide by the event, the arbitrator ordered the defendant to pay the plaintiff a certain sum. Afterwards the plaintiff became insolvent. His attorney, whose bill of costs exceeded the amount awarded, and the costs taxed under the award, claimed a lien in respect of his bill on such amount and taxed costs, and called upon the defendant to pay them to him for his own use and in satisfaction of his lien. The Court held that the attorney was not entitled to an order calling upon the defendant to pay him the money. The court refused a direct payment to the defendant.

As I understand it, the practice is not to obtain such an order against the defendant. Rather the solicitor should, where the money is payable to a client either under an order to pay costs, as was the case in Read v Dupper (1795) 6 Term Rep 361: and Ex parte Bryant (1815) 1 Madd 49, or a judgment, as was the case in Ormerod v Tate (1801) 1 East 464, or compromise, as was the case in White v Pearce (1849) 7 Hare 276: and Ross v Buxton (1889) 42 Ch D 190 at 202, give notice of the solicitor's lien to a party liable to pay or her solicitors who will be liable to pay again to the solicitors if payment is made initially without regard to the solicitor's claim: see Welsh v Hole (1779) 1 Doug KB 238: and Read v Dupper (1795) 6 Term Rep 361.

As I understand it, Mbendera, Chibambo & Associates gave such notice to the Attorney General and the Preferential Trade Area Bank. Such notice is, without any order from this Court, sufficient to make the Electricity Supply Commission of Malawi (ESCOM) and the Government of the Republic of Malawi liable to pay the costs to Mbendera, Chibambo & Associates. What cannot happen is, on the authorities mentioned, for this Court to order, where, like here, there is an order or judgment for costs, that the defendants or their solicitors pay the other solicitor to protect that others lien for costs. This has been the practice since 1853 when Lloyd v Mansell was decided. I am the most reluctant to affect a rule of such pedigree, particularly if I have no reason for departure.

The rule in Lloyds v Mansell has not occasioned injustice. The practice rests on the unassailable principle that once a judgment or order is in place, the other party can enforce it, as happened here, by execution. I cannot therefore order the Government of the Republic of Malawi or the Electricity Supply Commission of Malawi to pay the money to Mbendera, Chibambo & Associates. The rule also rests, subject to the exception appearing shortly, on the principle that the solicitor's lien is really against her client. The exception is the one Blackburn, J., epitomizes in Re Sullivan v Pearson ex parte Morrison (1868) Vol. IV 153:

"There is no doubt at all that where an attorney has by his labour or his money obtained a judgment for his client, he has a lien upon the proceeds of such judgment, and is entitled to have its proceeds pass through his hands. The lien does not amount to an equitable assignment of the proceeds of the judgment, but it is yet protected by the Court. Whether there has been an actual judgment, or whether the fruits of the litigation have been

obtained without a judgment, if an arrangement is made to prevent the attorney from reaping the benefit of his lien, the Court may set aside such an arrangement, or may force the parties who have so deprived the attorney, to pay the costs for which the attorney had the lien. It is not necessary to define what would be a proper case for the interference of the Court. These are cases where the fruits of the litigation have been substantially obtained."

Blackburn, J., continued

"I do not think that the fact that judgment has or has not been signed is conclusive on the point. In Ex parte Games (1) the plaintiff, after declaration, gave the defendant a release of the cause of action. The release was pleaded. The replication confessed the plea and prayed judgment for costs. Judgment for costs was afterwards signed, and a writ of execution issues, but the plaintiff, in collusion with the defendant, refused to allow the execution to be enforced. The question was whether the Court would compel the defendant to pay the costs of the plaintiff's attorney. It was held that there was a proper case made out for the interference of the Court, and that an order calling on the plaintiff "or the defendant" to pay the costs was properly made.

Compromise was a result of Mbendera, Chibambo & Associates' exertions

From all there is in the affidavits, the compromise was because of the effort and exertion of Mbendera, Chibambo & Associates for which, on all the authorities cited to me, some referred to in the order, Mbendera, Chibambo & Associates must be compensated. The Chief Parliamentary Draftsman contends that Mbendera, Chibambo & Associates should not claim the collection fees under the First Schedule of the Legal Practitioners (Scale and Minimum Charges) (Amendment) Rules 1999, essentially because Mbendera, Chibambo & Associates never collected the money. I have taken the view that the successful arrangements between the Preferential Trade Area Bank and the Government of the Republic of Malawi was a compromise as a result of Mbendera, Chibambo & Associates exertion and effort for which there must be remuneration. The Preferential Trade Area Bank's recoveries albeit piecemeal are as a result of that exertion.

The compromise was not to avoid solicitor's remuneration

The compromise between the Preferential Trade Area Bank and the Government of the Republic of Malawi was not intended to deprive Mbendera, Chibambo & Associates of remuneration. Mbendera, Chibambo & Associates knew the negotiations were in progress. The Government of the Republic of Malawi and the Preferential Trade Area Bank genuinely sought to resolve the embarrassing situation for the debtor. The Preferential Trade Area Bank informed the Government of the Republic of Malawi and

Mbendera, Chibambo & Associates to discuss the costs issue. All along the Preferential Trade Area Bank maintained that the Government of the Republic of Malawi would under the agreement pay Mbendera, Chibambo & Associates costs. On all the authorities cited I do not think I should order the Government of Malawi and the Electricity Supply Commission to pay the money to Mbendera, Chibambo & Associates. The order, in my judgment would not be to protect the lien, that having been done by the notice on the Government of the Republic of Malawi. There was no collusion in the compromise to deprive a solicitor of costs. This was a genuine compromise between the parties after action commenced.

The indemnity principle

This Court must address the Preferential Trade Area Bank's concerns about the incidence of costs after the Legal Practitioner (Scale and Minimum Charges) (Amendment) Rules, 1999. The amendments come for judicial scrutiny for the first time. Apart from their effect on the cost of litigation, the amendments radically transform the indemnity rule, the basis of costs in Malawi.

Under the indemnity principle, on an action for collection of money, different cost implications for the collecting and paying party emerge. The paying party pays costs, party to party costs, the collecting party incurs to prosecute the action and her own solicitor's costs, the solicitor client costs. The paying party does not pay the costs of the collecting party's solicitor. Generally the paying party can have the Court tax the party to party and her solicitor client costs. The paying party has not to pay the full cost of the collecting party. The collecting party does not pay the paying party's costs. The collecting party pays her solicitor's costs. The paying party indemnifies the collecting party the costs of litigation only to the extent of the party to party costs. The paying party does not indemnify the collecting party the full cost of her solicitor. Consequently, the collecting party pays her legal practitioner excess costs beyond party to party costs the paying party pays the collecting party. The collecting party can have the court tax her solicitor client costs.

The Legal Practitioner (Scales and Minimum Charges) Rules

The solicitor to client costs are more generous than the party to party costs. In Malawi and in England for some time statutes regulate costs solicitors charge their clients. Section 44 (1) of the Legal Education and Legal Practitioners Act provides:

"The Minister, in consultation with the Chief Justice may make rules for the better carrying out of this Act."

Section 44 (2) of the Legal Education and Legal Practitioners Act provides:

"Without derogating from the generality of subsection (1) such rules may – (a) prescribe both scale charges and minimum charges that may be levied by legal practitioners; (b) provide for the taxation of costs and the remuneration of legal practitioners."

Until the Legal Practitioners (Scale and Minimum Charges)(Amendment) Rules 1999 the rules applicable were the Legal Practitioners (Scale and Minimum Charges) Rules made under article 22 of the British Central Africa Order in Council, 1902. Rule 3 underscores that the charges are between solicitor and client:

"Where a legal practitioner performs the services specified in the First Column if the Second Schedule acting for and on behalf of a client specified in the Second Column of that Schedule in relation to, or for the purposes of, a project or scheme of national interest specified in the Third Column of that Schedule, the charges payable to the legal practitioner shall be the corresponding charges specified in the Fourth Column of that Schedule."

The part that concerns us is Table 6 of the First Schedule to the Rules. The First Column to Table 6 reads:

"Collection of Moneys, Solicitor and own client charge on collecting moneys to be charged on receipt of moneys: Provided that where proceedings are commenced the percentage may only be charged on the amount up to the date of commencement of such proceedings. Where proceedings are commenced Solicitor may charge Solicitor and own client charged in addition to party and party but, subject to any special agreement between Solicitor and client not on a percentage basis."

The charges part to Table 6 reads:

If the amount collected –

(a) does not exceed K2. K1

(b) exceeds K2 but does not exceed K10 .. .. K2

(c) exceeds K10 but does not exceed K20.. .. K3

(d) exceeds K20 but does not exceed K200 .. 15% on such amount

(e) exceeds K200 .. .. .. 15% on the first K200 and 10% on the next K800 and 5% on the balance collected.

A few things can be said about the rule. First, at that time, the charges were clearly solicitor to client, not party to party. Secondly, they were charges where the client requested a legal practitioner to collect money. The paying party is not collecting money. Her lawyer cannot therefore collect the fees under this rule from her. This is underscored by the third aspect, the requirement under the rule that the money is payable on receipt of the money not disbursement of the money.

Thirdly, between solicitor and client, the solicitor could charge party to party costs against the client. This in practice never means the collecting party is paid twice. There are many scenarios. There is where the collecting client already paid her solicitor costs to cover party to party costs. Where the defendant pays the party to party costs, the solicitor would be obligated to pay back the client the recovered costs. Where the defendant fails to pay the costs, a prepayment is an insurance against such prospect. In both scenarios the solicitor is entitled to the charges under this section independent of the party to party costs. Consequently, the only time the collecting client actually pays the party to party costs to her solicitor is where the defendant fails to pay the amount in the judgment and costs. In this instance the risk of failure cannot be the solicitor's; the risk is the clients and she must pay the costs under this rule and the party to party costs.

The Legal Practitioner (Scales and Minimum Charges) (Amendment) Rules

The Legal Practitioner (Scales and Minimum Charges) Rules, unlike the amended rules, recognizes the indemnity rule. The only costs the paying party pays to the collecting party are party to party. The paying party is not responsible for the solicitor to client costs of the collecting party. The amendment introduces a fundamental change to the indemnity rule, a change, I must say, that was not thought through when introducing such a fundamental change to the cost of litigation. The amendment reads as follows in the First Column:

"Collection of Monies. Solicitor and own client charge on instruction to collect any sums of money. Where proceedings are commenced, there shall be additional charge for party and party costs. Provided that the 15 percent costs shall also be recoverable from the debtor where proceedings are commenced or not and where proceedings are commenced, it shall be recoverable as part of the Judgment debt."

The charges section to the amended Table 6 reads, "15% of the amount collected."

There are two difficulties from the amendment.

The amendment's problems

First, there is the flat rate for all sorts of amounts collected. At low levels of collection, there may be no criticism. At a high level of collection, the flat rate would, for many reasons, border on the side of, excess, unreasonableness and oppression. First, as in this case, a collecting solicitor can recover huge costs. Secondly, such sums, apart from the risk factor, would be greatly unrelated to the quantity and quality of the solicitor's work. The risk factor allows examination of the complexity of the matter, the importance of the matter to the plaintiff and many such considerations. There are instances, like the present, where these considerations, particularly where the flat rate results into unreasonable remuneration for solicitors, pale into insignificance. Thirdly, such sums are unwelcome whether paid by the collecting or paying party.

The third aspect becomes paramount in two instances. A collecting party will pay her own solicitor if the paying party fails to pay party to party costs. Before and after the amendment, the collecting client's solicitor could claim the fees under this rule where the paying party pays the amount claimed and cannot pay both aspects of costs. It is unreasonable and oppressive, subject to the risk factor, to require the collecting client to pay such huge costs. In this instance, the matter becomes more pronounced where the solicitor demands the client to proffer such sums before commencing proceedings. The second instance is where the paying party can afford to pay. The astronomical figures surprise any sense of justice or fairness.

The second aspect of unfairness is the amendment requiring the collecting party to claim the sums under the schedules from the paying party. The rationale for the amendment is that it was unreasonable that the rules, up to this point, required the collecting party to suffer client to solicitor costs when the paying party caused the collecting party's recourse to litigation in the first place. We can look at the justification for the indemnity rule as to costs later. For now, I stress the unfairness of this lopsided amendment by balancing the effects of the two rules.

Considering the effects of the amendment, the previous rule, the single criticism notwithstanding, consonants reasonableness and fairness. The single criticism against the rule is requiring the collecting party bear such costs. There are several justifications for the approach. First, there is the contractual relationship between solicitor and client that requires consideration for the services rendered. On the face of it, this contractual relationship cannot base on the precarious result of a trial for remuneration. The remuneration can only base on the contract itself. The rules discussed are, as part of public policy and control, to regulate costs in this relationship. It is significant that under English law this control shifted from legislative control to consultation and consensus

with the bar. Our rules, as seen, base on rules under a received law of considerable antiquity until, of course, this amendment.

Secondly, the rule bases on risk considerations. The risk of a debt being bad is part of contracts involving money. When such risk occurs, the solicitor cannot be a victim of a client's decision gone sour. Both client and solicitor know that the money is, but for litigation, lost. Once the asset is redeemed, the joy and the loss averted by litigation are reasons justifying requiring the solicitor benefit from the asset realized. Others, for good reasons too, think the paying party should bear such a risk.

Comparison between the indemnity and contingency rules

There could be good reasons indeed for such a course. The indemnity rule, the rule applicable to us and the United Kingdom and other Commonwealth jurisdictions, and the contingency rule about costs, one obtaining in the United States, point to obvious difficulty in such a rule. The suggestion that the paying party bear the risk has undesirable results on the indemnity rule regime: the paying party has to pay three regimes of costs, party to party costs as between her and the collecting party, solicitor and client costs as between the collecting party and her client and solicitor to client costs as between her and her solicitor. The indemnity rule is that the only costs the paying party should pay to the other party are the party to party costs. Party to party costs are based on what is reasonable and necessary to recover the money from the other side. Rules may fix what is reasonable in case the paying party pays without trial and leave it to taxation where the matter proceeds to trial.

The indemnity rule leaves the solicitor and client costs subject to contract and/or regulation. The contingency rule, as we all know, does not allow the collecting party to collect costs from the paying party. On the risk principle, the client and solicitor look to the award for damages and costs. Consequently, a solicitor recovers no costs from her client if the paying party is of straw.

That a solicitor may not recover anything from a client even if the client can afford where the paying party cannot pay and the level of costs cause reluctance in the United Kingdom to abandon the indemnity rule for the contingency rule. In the United Kingdom conditional fee agreements adjust the indemnity rule. A client and solicitor can agree to pay up to 100 percent over the costs, not a percentage of the money collected. This leaves the award free from the excesses latent in the amendment. On the whole the indemnity rule remains the distinct feature of the cost regime in the United Kingdom.

The indemnity rule is the rule of costs in this jurisdiction. The difficulty is that this

amendment seems to affect indirectly and grossly the indemnity rule. There is no reason in practice, principle or theory why the paying party should pay three regimes of costs. The extension of the rule to require the paying party to pay the solicitor client costs of the collecting party in addition to her client and solicitor costs and party to party costs is curious indeed. This is, of course, in addition to the other 15% sheriff fees if the matter goes to execution. This is an oppressive cost structure requiring immediate legislative intervention.

Legislative intervention

The legislative intervention should not only address the anomaly of overburdening the paying party with three regimes of costs. It should address injustices that may occur, even if the intervention removes the novel burden on the paying party, where the percentage may be burdensome even on the collecting client who has to pay in advance the sums claimed by the client under the rule or has to bear the cost once the paying party can only afford to pay the amount claimed and not the costs. Surely, the collecting client needs such protection where the percentage, apart from the risk factor, results to awards unrelated to the quality and quality of the solicitor's work.

One way was the one under the previous rule where low percentages were prescribed for larger sums. Those percentages may also be unrelated to quality or quantity of work where large sums of money were involved. Definitely, those percentages made a lot of sense in 1902 when loans were of very low amounts. They are inappropriate today when, like here, loans involve larger amounts and transnational institutions lending or borrowing billions of dollars.

Taxation

The rules, before and after the amendment, provided for a limited check on excesses. Part III, in the General Guidelines on Legal Costs, of both the original and amended rules, provide:

"(1) Wherever scale charges are not applicable, the legal practitioner can charge such sum as may be fair and reasonable having regard to all the circumstances of the case and in particular to –

(a) the complexity of the matter or the difficulty or novelty of the questions raised;

(b) where money or property is involved, its amount or value;

(c) the importance of the matter to the client;

(d) the skill, labour, specialized knowledge and responsibility involved therein on the part of the legal practitioner;

(e) the number and importance of the documents prepared or perused, without regard to length;

(f) the place where the circumstances in which the business or any part thereof is transacted and

(g) the tone expended by the legal practitioner

(2) The client may apply to the Taxing Master for taxation of costs."

The rules, therefore, in a sense address concerns, legitimate ones, in my judgment, expressed by the Preferential Trade Area Bank that the costs Mbendera, Chibambo & Associates claim against the defendants and them are very high. Rule 2 just quoted provides for taxation of legal costs. Of course, the Preferential Trade Area Bank, under the contracts, does not have to pay the costs. The contractual arrangements could not stop Mbendera, Chibambo & Associates demanding these costs from them before commencing action. In that case the Preferential Trade Area Bank would, as costs between client and solicitor, question the claim for costs. The Preferential Trade Area Bank would question the cost under this rule. What exercised my mind is whether rule 2 refers only to instances in rule 1, namely, where the fees are not fixed by some rule. Rule 2 is an independent rule and requires taxation of 'legal costs,' including those under the schedule. Surely the requirement for taxation in rule (2) must relate to the costs claimed under and in the schedule. If there is any justification for the rule, it is what I have repeated many times in the course of this judgment that, depending on the size of the claim, awards under the rule can, subject to the risk factor, be disproportionate to the quality and quantity of the solicitors work. As I understand it, in the United Kingdom, in practice, both under the regulations and on the contractual arrangements, such costs are generally taxable. There is however an analogous situation which indicates that though the fees seem to be fixed as minima, they are taxable.

The order dealing with sheriff fees in England and Wales is the schedule to an Order dated July 8 1920, under the Sheriffs Act 1887, s.20(2), fixing the fees to be taken by sheriffs or sheriffs' officers concerned in the execution of writs of fieri facias. In its body it provides:

"The following fees, numbers 1, 2 and 3, shall be paid by the execution creditor, and shall not be recoverable by him although the execution proves abortive."

Another provision states:

"Except where the judgment or order sought to be enforced is for less than £600 and does not entitle the plaintiff to costs against the persons against whom the execution is issued,

the foregoing fees numbered 1, 2, 3, 4, 5, 6, 7, 8(1), 9 and 10, shall be levied in every case in which an execution is completed by sale, as fees payable to sheriffs were levied before the making of this Order."

There is a paragraph worded just like part 2 of the schedule:

"The amount of any fees and charges payable under this table shall be taxed by Master of the Supreme Court or a district Judge of the High Court, as the case may be, in the case the sheriff and the party liable to pay such fees and charges differ as to the amount thereof."

This order is not ultra vires: Union Bank of Manchester Ltd v Grundy [1924] 1 KB 833. In Union Bank of Manchester v Grundy the Court of Appeal rejected the suggestion that the power to have such costs fixed was ultra vires a ministerial power to fix costs. Bankes, L.J., said:

"This method of fixing within limits the fees and charges, providing for a taxation if the parties differ, must of necessity confer on the taxing Master or District Registrar a certain discretion in fixing the actual fee to be paid provided it does not exceed the maximum. It was contended, as it was in Townend v Sheriff of Yorkshire (1), that an order so framed is ultra vires, because it provides for something beyond the mere fixing of the amount of the fees and poundage. There is something to be said for that argument, but I think it would be reading the language of the section too strictly, in view of the subject matter, to say that it was not competent for the Lord Chancellor to fix the amount of the fees and poundage by leaving it, to a certain extent, in the discretion of a designated official to say what the amount shall be in a particular case, provided it does not exceed a certain maximum. My first conclusion therefore is that the order in itself is not ultra vires."

Costs under this schedule can be taxed by the Court.

Conclusion

In this matter, Mbendera Chibambo & Associates are entitled to costs. Having obtained a judgment in default for costs, this Court cannot order the Government of the Republic of Malawi or the Electricity Supply Commission of Malawi, the defendants in this matter, to pay Mbendera Chibambo & Associates costs as lien for solicitor's costs. Mbendera, Chibambo & Associates gave notice to the defendants to pay them. This suffices, without a further order of the court, to compel the defendants to pay Mbendera, Chibambo & Associates so long, of course, as there is no court's order for costs. Mbendera, Chibambo & Associates have not, to protect their lien, applied for a charging

order or an injunction against the Preferential Trade Area Bank not to receive money without prior notice to Mbendera, Chibambo & Associates. Having obtained a judgment

As I see this is a judgment for costs only. The Preferential Trade Area Bank, the Attorney General and the Electricity Supply Commission dispute the quantum. The judgment can only be for costs to be taxed. The costs should, if not agreed, be taxed.

The defendants suggest that they are not liable under the Legal Practitioners (Scales and Minimum Charges) (Amendment) rules because the law governing the contract is English law. The suggestion, coming clearly in the argument, is that the costs should be paid under English law. I should reproduce the actual provision:

"This Loan Agreement shall be construed and governed in accordance with the Laws of England."

The provision relates to the construction and law governing the contract. The contract does not prescribe on forum. Neither is the choice of English law indicative of the English forum. This Court, because of the close connection with the place of performance of the contract and the two defendants, is the forum conveniens. The costs of litigation are not part of the contract; they are subject to the rule of the court. They are governed by the rule of the court seized with the matter. Without express provision and in the absence of any authority, I find no reason in principle why lawyers litigating in our forums should be remunerated on scales and principles other than ours.

Subject to what I have said about the costs being taxable, I dismiss all the applications with costs.

Made in open court this 23rd Day of October 2003.

D F Mwaungulu

JUDGE