

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 1209 OF 1999**

**BETWEEN:**

GRACE P SINALO (Suing on her own behalf  
and on behalf of infant beneficiaries of the  
estate of the late Sinalo) .....PLAINTIFF

AND

THE ADMINISTRATOR GENERAL.....DEFENDANT

**CORAM: HON. JUSTICE CHIZUMILA**

**Nkuna, of Counsel for the Defendant**

Mdala, official court interpreter

**RULING**

**Background**

The Defendant appeals under Order 58 rule 1 of the Rules of the Supreme Court against the Registrar's ruling dated 19th January, 2000 which entered summary judgment to the

Plaintiff for damages to be assessed with costs. I think this ruling was delivered on 19<sup>th</sup> January, 2001 and not 2000 because the Registrar refers to post humus dates and events. The Defendant prays that I reverse the Registrar's ruling and order the matter to proceed to trial. Having satisfied myself that Counsel for the Plaintiff, Mr. Msisha SC who was absent, had consented to the hearing date with the Defence Counsel before Justice Kapanda on 27<sup>th</sup> June, 2003, I heard the Defendant's application.

The Plaintiff is the widow of Felix Sinalo who died on 26<sup>th</sup> December, 1994. Prior to his death the two of them had developed a highly successful venture known as Famba Furnitures with its production factory at Chitawira in Blantyre and show rooms at the trade fair grounds Blantyre, and in Lilongwe. In order to resolve competing claims to the Estate, she initiated a Court action for its proper administration under **High Court Civil Cause Number 544 of 1995**. The High Court appointed the Defendant interim Administrator of the estate for purposes of protecting it until the distribution of assets. Before the Defendant acquired control of the estate, an inventory covering the contents of the factory, including the stock in trade, machinery, office equipment and other conveniences for workers and management was prepared. During the period the Defendant was in control of the estate, the Plaintiff on several occasions informed him through her lawyers that Famba Furniture was being vandalized. Despite the police also confirming the vandalism with him, he disregarded the complaints and did not take any steps to secure the premises.

On 23 December, 1998 the Court gave Famba Furniture to the Plaintiff and her children as their share of the estate. A hand over inventory of the state of things, assets and stock in trade at the factory premises in Chitawira, Blantyre was signed by none other than the Defendant himself and witnessed by his officer Mr. J C Mkusan'gombe. The Plaintiff signed as the taking over officer. That is when the Plaintiff discovered that all the machines had either been stolen or rendered totally unusable through vandalism. The roof had been largely removed. There was no stock in trade, no furniture, no toilet facilities, no doors and no windows. Electrical conduits etc and water pipes including meters had been removed or dug out. All office facilities including telephone receivers, fax machines, fans, hovers, etc. were taken away.

The Plaintiff has been unable to produce anything due to the damage to the factory. She needs to get it back into working condition to enable her to raise funds for upkeep and her children's education. She has traveled to Zimbabwe and South Africa for the replacement costs of the damaged or lost machinery. In addition to these expenses, she will incur transport expenses and duty on the importation of the machinery. The Defendant had the duty to prevent any person from interfering with the assets of the estate as soon as he was invested with the powers of an interim Receiver. In fact he took away a Toyota Pick Up from the Plaintiff which she had been using and kept it at Blantyre Police Station until this Court's decision.

After his appointment, the Defendant advised the general public through the press

that he was the interim Receiver of the estate. He, in that capacity, received and disbursed huge amounts of money to creditors. He also paid the factory guards. He, cannot therefore, now say that he could not protect the factory because of other people's interference. He was appointed precisely to prevent people from doing that. If he felt that he did not have the capacity to act as an effective interim Receiver he was at liberty to seek the Court's direction.

To appreciate the current appeal, it is better to go to its origin. There are two rulings delivered by the Registrar. The first one was made on 21<sup>st</sup> July, 2000 and the Plaintiff claimed for waste, loss and neglect of property to the estate and interest on damages. The appeal was brought under Order 14 of Rules of the Supreme Court for summary judgment. The application was supported by a very lengthy affidavit. The Defendant's Counsel raised two preliminary objections to the application. Firstly, the Defendant contended that this is not a matter, which can fairly and justly be decided by summary procedure because there are so many and complex issues involved as is clearly evident from the nature and size of the Plaintiff's affidavit. Secondly, that the Plaintiff's affidavit is defective as it does not state why she believes the Defendant has no defence to her claim. Paragraph 4 of the defence states that the Defendant was appointed a mere Receiver and not Receiver/Manager of the deceased estate. Thus, the Defendant denies being under a duty to care for and protect the property of the deceased and to enhance its value as alleged. Paragraph 5 of the defence states that although the Defendant was appointed Receiver as alleged the Defendant failed to get hold of the furniture factory as other beneficiaries continued to run and damage it contrary to the Court Order.

The Registrar held that there was no complexity of issues in this case:

“ On the first ground of objection, it is quite true that the exhibits to the affidavit in support is quite lengthy with 31 paragraphs and the exhibits thereto are quite voluminous. However, that, in it self cannot be a ground for finding that the application is outside the scope of Order 14. . . In the present case, the issue is fairly simple as it relates to how the Defendant administered the items forming the deceased's estate which he took over following a court order as listed in 'GS1' as compared to the state of such items at the time they were handed over to the plaintiff as listed in 'GS3' also following a court order.”

As for the alleged defect in the affidavit in support the Registrar held:

“. . . it is clear from practice note 14/2/8 that it is an essential requirement that the affidavit in support of an application like the one before the court should contain an averment by the Plaintiff on the belief that there is no defence to the claim or where a defence has been served, that it is mere sham. Paragraph 30 of the affidavit in support does not come any closer to the recommended wording. It merely analyses the

Defendant's defence. . . Even though. . .one of the grounds for dismissing an application of this nature in terms of Practice note 14/7/2 is where the affidavit in support is defective, the court is empowered . . . to grant leave to the Plaintiff to file further affidavit in order to cure any defects. . .”.

He said this is an appropriate case to grant such leave. The Plaintiff had 7 days from 1<sup>st</sup> August, 2000 within which to file and serve a supplementary affidavit to cure the defect. Costs were reserved until the determination of the application.

The second ruling was made on 19<sup>th</sup> January, 2001. The Registrar entered summary judgment to the Plaintiff for damages to be assessed with costs. The Defendant had two contentions. First, that he was appointed by the Court as a mere Receiver and not Receiver and Manager. Thus, he was not under a duty to care for the estate, protect and enhance the value of the estate as alleged. Secondly, that having been appointed Receiver, he failed to get hold of and exercise control over the factory because other beneficiaries defiantly continued running and managing the concern despite the Court Order.

The Registrar referred to the Order dated 11 January, 1995 to ascertain the duties of the Defendant:

“It is HEREBY ORDERED that a receiver be . . . appointed . . . to take possession and control and protect the assets . . .pending the grant of probate or letters of administration. FURTHER and for the avoidance of doubt the Administrator General shall be the receiver so appointed.”

He found that the order was made pursuant to Sections 25 and 26 of the Wills and Inheritance Act and that it clearly imposed the duty to protect the assets of the estate upon the defendant. He also threw out the Defendant's second contention saying that the Defendant had the power to either seek a Court injunction or institute contempt proceedings against the other beneficiaries.

He also considered whether the Plaintiff's action is barred by Section 27 of the Wills and Inheritance Act which reads:

“No suit shall be brought against a receiver appointed under Section 25 in relation to anything done by him in respect of the property of the deceased in exercise or intended exercise of the powers vested in him: but a person aggrieved by anything done or intended to be done may apply to the Court in the proceedings in which the receiver was

appointed for directions in the matter, and the Court may make such an order as is just.” and found that:

“ . . . the immunity from a suit a receiver enjoys under this Section relates to acts or intended acts by the receiver. This case does not arise from acts or intended acts of the defendant.”

He consequently entered summary judgment to the Plaintiff for damages to be assessed.

### **The Arguments**

The Defendant’s Counsel, Mr. Nkuna, appeared before me on 11<sup>th</sup> July, 2003 for a rehearing of the summons under Order 14 of the Rules of the Supreme Court that brought about the Registrar’s ruling. The facts of this matter were not seriously disputed by Counsel who said they are correctly stated in the ruling of the Registrar. The Defendant only questions the propriety of the procedure by way of summary procedure in a matter which involves questions of negligence. He said it is clear from the Plaintiff’s pleadings that her claim is in negligence because she indicates that the Defendant neglected the estate and hence the alleged waste. The Defendant clearly denies the question of negligence on the following 3 principles:

1. Order 14 enables a Plaintiff to obtain a quick judgment where there is plainly no defence to the claim. **Home and Overseas Insurance Co. Ltd [1990] 1 W LR 158.**
2. Where a Defendant shows that he has a fair case for defence or reasonable grounds for setting probability that he has a bona fide defence he ought to have the leave of the Court to defend the matter. **Yorkshire banking Co. versus Beatson 1879 4 Common Privy Division (CPD) 213.**
3. Actions for damages for negligence are only suitable for procedure under Order 14 if it is clearly established that there is no defence as to liability. This principle has been adopted by authorities which go further to indicate that it is only in very rare circumstances that the procedure under Order 14 of the Rules of the Supreme Court Practice should be adopted in matters of negligence. **Rankie versus Garton Sons and Co. Ltd. [1979] 2 All ER 1185 and Dummer versus Brown and another [1953] 1 All ER 1158**

It is the Defendant’s arguments that applying these 3 principles the Plaintiff was

not entitled to summary judgment in this matter. That it is also clear from the Registrar's ruling that he did not consider the question of whether it was proper in the case of negligence to proceed by way of summary judgment. Consequently, there is no doubt that once the Registrar came to the conclusion that there was waste in the estate, he held that the Defendant was liable. He treated the matter as one calling for strict liability without requiring the Plaintiff to prove the negligence which was alleged in the statement of claim. That was wrong. If the defence filed by the Defendant merely denies negligence and should the Court find such a defence a sham, then the court should also find that the Plaintiff's pleadings do not give out particulars of the alleged negligence. On that ground the Defendant was entitled to just put in a denial of the alleged neglect. Order 18 rule 12 of the Rules of the Supreme Court clearly gives a duty to the Plaintiff to give particulars in her pleadings showing in what respects the Defendant was negligent. Thus, the Registrar erred in law by giving an Order for summary judgment because the Plaintiff failed in that duty. She cannot turn around now and take advantage of the Defendant's denial to apply for summary judgment. The question of negligence can only be fully and justly determined at a full hearing after hearing witnesses.

According to the Plaintiff's skeleton arguments she says that:

1. A Receiver appointed under section 25 of the Wills and Inheritance Act Cap 10:02 of the Laws of Malawi is appointed in order to protect the property against waste pending grant.
2. Section 27 prohibits suits against the Receiver and is carefully worded to cover the following: "anything done . . . by the Receiver in respect of the deceased in exercise . . . of the power vested in the Receiver". The power vested in the Receiver was to protect the property pending grant. The Receiver did not do anything and failed to protect the property which is the subject of the Court action.
3. A Receiver is liable for the consequences of his failure to act. The section does not grant immunity against liability. It merely forbids separate actions from being commenced. If the Receiver had taken certain steps which led to loss or waste then he would be entitled to rely on the provisions of Section 27. At common law the Receiver is and remains a trustee of the parties entitled to the property which was under the Receiver's protection. **Seagram V Truck (1881) 18 Ch. D. 296**. A Receiver is prima facie answerable for all moneys that come or that might have come into his hands but for his own negligence or default. A Receiver is said to be liable for loss occasioned by his parting with the control of the property. **32 Halsbury's Laws of England 3rd ed.435 Para.726** or by his willful default to carry out the order of the Court. **Halbury's op cit.** which in the instant case was to protect the property against waste.
4. A Receiver has a right to be indemnified but only in respect of liabilities properly

incurred.

5. The Court would be entitled to order that costs of this case be personally borne by the Receiver because this is a bad example of the total neglect of the obligations imposed by statute. Receivers are often made personally liable for costs particularly so where the proceedings giving rise to the costs were made necessary by the misconduct or default of the Receiver. **Re Lloyd, Allen v Lloyd(1879) 12 Ch.D. 447; Halbury's op cit 437, Para 731.** The beneficiaries or estate should not be ordered to indemnify the Receiver for damages and costs as such an order would be tantamount to condoning the Receiver's neglect of duty.

## **The Law**

Order 58 rule 1 of the Rules of the Supreme Court deals with appeals from the Registrar to a Judge in chambers which are by way of actual rehearing of the appeal which led to the order under appearance. The Judge treats the matter as if coming for the first time and will give the weight it deserves to the previous decision of the Master but is not bound by it.

Order 14 rule 1 deals with an application by the Plaintiff for summary judgment where the Defendant has no defence to a claim included in the writ. Under rule 3-4(3) the Defendant may show cause against the Plaintiff's application:

- (1) by a preliminary or technical objection, e.g. that the case is not within this Order or that the statement of claim or affidavit in support is defective . . . ; or
- (2) on merits, e.g. that he has a good defence to the claim on the merits, or . . . that a difficult point of law is involved, or a dispute as to the facts which ought to be tried, or . . . any other circumstances showing reasonable grounds of a bona fide defence.

Under Practice notes 14/3-4/ the Defendant's affidavit must "condescend upon particulars," and should , as far as possible, deal specifically with the Plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied on to support it. Sufficient facts and particulars must be given to show that there is a triable issue.

Order 18 rule 12(I)of the Supreme Court Practice deals with particulars of pleading : "every pleading must contain the necessary particulars of any claim, defence or other matter pleaded . . . ."

## Conclusion

I must admit I am perplexed as to what the Defendant wants as he agrees and admits that:

The Plaintiff obtained a Court Order issued by the High Court under **Civil Cause Number 544 of 1995** appointing the Defendant interim Administrator of the estate of the Plaintiff's deceased husband. The Order specifically directed the Defendant to take control of the estate and protect it pending the granting of the Letters of Administration. The Letters of Administration were duly obtained by the Plaintiff but that there was waste to the estate due to vandalism at the time the Defendant was handing it over to her. The waste was done whilst the estate was under the protection of the Defendant.

The Defendant's Counsel tried to convince me that he has a bona fide defence by citing several authorities. However, these cases do not convince me either. In the case of **Oliunga Farms Ltd v Administrator General [1990] 13 MLR**. Banda, J. as he then was says:

“ It seems to me that the duty of the Administrator General, as a personal representative of a deceased person, is to protect the interest of the deceased estate . . .The complaint against the Administrator General is not as a personal representative but rather against the way in which he has purported to exercise his duties in relation to the interest of the deceased director of the plaintiff company . . .His interest is and would only be the protection of the estate of the deceased director . . .”

Coming to the case at hand, I am afraid I do not see any defence nor is there any difficult point of law involved. There is also no triable issue. The Registrar dealt with Order 14 at length in both his rulings. I do not intend to delve into it in this application. Suffice it to mention that this argument fails.

As for the question of negligence, I am afraid this argument also fails. Having admitted that the Defendant was responsible for the estate and further that waste did occur whilst the estate was in his hands, I fail to see how the same Defendant can come to Court, accept the facts as representing a true picture but in the same breath turn around and expect the Court to give him remedy. In addition, the argument that the Applicant's claim should not be entertained because even though the writ does not specifically say so, the claim is for negligence also does not hold water. What the Plaintiff says in her claim is that she is suing for waste because the Defendant did not protect the estate as per Court Order which so clearly stated that his duty was to "protect the estate until Letters of Administration are granted". I am convinced that the word negligent was used by the Plaintiff as a way of expressing the devastating state of the estate at the time the Defendant handed it over to her and further how the total inattention, ignorance and



disregard of the knowledge on vandalism by the defendant led to the waste of the estate which is the origin of this application.

It is apparent that the main bone of contention in this application is that of interpretation. I have therefore resorted to The Thesaurus for its simple and clear meanings. The meanings when put together leave me without any doubt that the Defendant failed in his duty to protect the estate pending the grant of Letters of Administration. I agree with Counsel for the Plaintiff that the Defendant was indeed under duty to take care of and to protect the estate against waste. The Registrar was correct in holding that the Defendant was under a duty to protect the estate and entering summary judgment to the Plaintiff. I therefore dismiss the Defendant's appeal in its entirety. I further direct that the Registrar set the matter down for assessment of damages before her as per ruling of 19<sup>th</sup> January, 2001.

### **Costs**

In the matter of **Phyllis Ntaba and another and The Trustees of the Commercial Bank of Malawi Pension Fund and another Civil Cause No.52 of 1992**. Banda, CJ. said:

“ The Executors were made aware of this fact . . . but in spite of that knowledge the Administrator General, who is a co-executor, continued to hold on to the funds . . . and in my view these proceedings have been necessitated by his refusal to handover the money to the trustees . . . The Administrator General, because of his delay in refunding the money in spite of his knowledge of the true nature and status of it, will personally bear the costs occasioned by this application.”

The principle in the above case applies to this case. The Defendant, who was the Receiver, was made aware of the fact that Famba Furnitures was being vandalized but in spite of that knowledge he continued to ignore the complaints for almost 4 years from 11<sup>th</sup> January, 1995 the day he was appointed Receiver. In

addition, he files one application after another depriving the beneficiaries of the opportunity to earn a living from the factory for almost 9 years now. His inaction amounted to a double blow on the Plaintiff and her children. Firstly, they lost a husband and a father who was the main bread earner, traumatic enough in itself. Secondly, they have been let down by the very person appointed by the law to take care of and protect their interest. Thirdly, he has clearly flouted their constitutional rights. It behoves me how the Defendant could sit back, willfully ignore a Court order and expect equity to cover him. This cannot be condoned. He should have been charged for contempt of Court.

These proceedings have been necessitated by the Defendant's inaction to protect the estate from vandalism. I therefore, order that the Defendant, because of his inaction, indifference and delay as Receiver of the estate, in spite of his knowledge of the true nature and status of the property, will personally bear the costs occasioned by this application.

**MADE** in Chambers this 8th day of December, 2003 at Blantyre.

T. R. M. Chizumila  
JUDGE