

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 2344 OF 2005**

**BETWEEN:**

MALAWI HOUSING CORPORATION.....PLAINTIFF

- and -

BLANTYRE WATER BOARD.....1ST DEFENDANT

LILONGWE WATER BOARD.....2ND DEFENDANT

SOUTHERN REGION WATER BOARD.....3RD DEFENDANT

NORTHERN REGION WATER BOARD.....4TH DEFENDANT

CENTRAL REGION WATER BOARD.....5TH DEFENDANT

**CORAM: CHIMASULA PHIRI J.**

Kazembe of Counsel for the plaintiff

Chayekha of Counsel for the 1st defendant

H. Phiri of Counsel for the 2nd - 5th defendant

Mrs Malani – official interpreter.

**RULING**

***Chimasula Phiri J,***

By Originating Summons, the plaintiff seeks several declaratory orders as follows:-

- a. **A declaration that according to Section 36 of the Waterworks Act the defendant Water Boards are supposed to first of all collect the bills (rate and charges levied) from the occupier premises.**
- b. **A declaration that according to the said Section 36 of the Waterworks Act as read with the Water Boards' Bye-laws or Regulations the defendant Water Boards are supposed to use all means possible to collect water bills from the occupier by, among other things disconnecting water supply if the water bill is not paid within 30 days of the water bill becoming payable.**
- c. **A declaration that according to their Bye-laws the 1st, 2nd and 3rd defendants are supposed to disconnect water supply if the water bill of an occupier is not paid within 30 days of the water bill becoming payable.**
- d. **A declaration that according to general practice Water Boards are supposed to disconnect water supply of the water bill of an occupier is not paid within 30 days of such bill becoming payable.**
- e. **A declaration that the right of the Water Boards to disconnect water supply if the water bill is not paid within 30 days of the said bill becoming due was meant to avoid accumulation of water bills for a period beyond 30 days.**
- f. **A declaration that in view of the declaration (e) above the owner of the premises is required to pay the current bill only (a bill of less than 30 days) if the occupier leaves the premises without settling the current bill.**

- g. A declaration that the only obligation on the part of the owner of premises created by Section 36 of the Waterworks Act as read with the Bye laws and the general practice, is payment of the current bill only if the occupier leaves without settling the same.**
  
- h. A declaration that a reading of Section 36 of the Waterworks Act and the Water Boards Bye-laws reveals that the Legislature wanted the Water Boards to be efficient in the collection of bills.**
  
- i. An order that the plaintiff should not be responsible for bills beyond 30 days left by tenants or occupiers of the plaintiff's houses.**
  
- j. An order that the defendant should reconnect water supply where the plaintiff settles the current bill only (bill not beyond 30 days) if any.**
  
- k. An order that each party be responsible for its own costs.**

The Originating Summons is supported by an affidavit of Wellington William Kazembe who is counsel working for the plaintiff at its head office. His affidavit provides as follows:-

- 2. That the facts deponed herein have come to his knowledge in the course of handling this matter and he verily believe the same to be true.**

3. That the plaintiff is a Statutory Corporation established under the Malawi Housing Corporation Act, Cap 32:02 of the Laws of Malawi, and one of its functions is to manage houses and housing estates.
4. That the plaintiff has and manages thousands of houses across the country pursuant to its statutory mandate.
5. That the defendants are statutory bodies established under the Waterworks Act, Cap 72:01 of the Laws of Malawi.
6. That the 1st, 2nd and 3rd defendants have bye-laws which *inter-alia*, empower them to disconnect water if the water bill of the occupier is not paid within 30 days of the water bill becoming payable.
7. That it is general practice for Water Boards to disconnect water supply if the water bill of an occupier is not paid within 30 days of such bill becoming payable and this general practice also applies to the 4th and 5th defendants.
8. That when the plaintiff asked for bye-laws from the 4th and 5th defendants their officials said their organisations do not have the said bye-laws.
9. That contrary to their own bye-laws and the general practice the defendants have not been disconnecting water supply in the plaintiff's tenants' houses when the water bills of the said tenants go beyond 30 days without being settled.
10. That the foregoing has resulted in the plaintiff's tenants accumulating huge water bills.
11. That in most cases these tenants run away after accumulating the said huge water bills.

12. That the water bills accumulate due to the defendants' inefficiencies because they do not exercise their right to disconnect water supply on time if the water bill remains unpaid after 30 days when the said bill becomes payable.
13. That if the defendants were efficient the water bills would not have been accumulating beyond one month.
14. That the defendants have been requiring the plaintiff to clear the whole bill left by previous tenants in order for the defendants to supply water to a new tenant.
15. That the plaintiff in order to ensure that a new tenant has water supply has been compelled to pay the huge accumulated water bills left by previous tenants.
16. That the plaintiff has lost millions of Kwacha in paying the bills left by previous tenants due to the defendants' inefficiencies.
17. That a scrutiny of Section 36 of the Waterworks Act as read with bye-laws and the general practice in this field reveals that the only fair interpretation of the laws is that the owner of the premises, the plaintiff herein, is only supposed to pay the current bill (bill of less than 30 days which has not been communicated to the occupier) if any, if the said occupier leaves without settling the said current bill
18. That all this unfairness can come to an end by interpreting Section 36 of the Waterworks Act fairly in particular by interpreting that the owner of the premises is supposed to pay the current bill only because the law requires the

**Water Boards to disconnect water supply if the water bill is not paid within 30 days of becoming payable.**

- 19. That according to Section 36 of the Waterworks Act the defendant Water Boards are supposed to first of all collect from the occupier and only approach the owner of the premises for payment after the occupier has failed to pay and this failure can only be ascertained after the water has been disconnected immediately after a bill for 30 days has not been paid.**

He filed a supplementary affidavit in support of the Originating Summons whose effect has been to demonstrate that the plaintiff has been compelled to clear bills left by previous tenants in view of the defendants' refusal to reconnect water supply where there is an outstanding bill by a previous tenant. This year alone a sum of over K656,087.65 has been paid to the 1st defendant alone. Exhibits are there to support this contention by the plaintiff.

The 1st defendant filed and served Affidavit in Opposition sworn by Paul Lupiya who is the Administrative Officer. His affidavit states as follows –

- 2. He deposes to matters of fact that lay within his knowledge by virtue of employment with the 1st defendant and as advised by the company's legal practitioners and he verily believes the same to be true.**
- 3. The 1st defendant is a statutory body and is indeed governed by the Water Works Act and bye-laws.**
- 4. According to Section 36 of the Water Works Act all rates and charges are to be deemed as a charge upon the premises to which they relate as from the date they fall due and are recoverable from the occupier and if he fails to pay from the owner of the premises or any subsequent owner or occupier or agent of any such owner or occupier.**

5. **As far as he knows there is no cut point at which the owners' liability to pay the rates or charges ends; so long as there is an outstanding amount and the occupier is unable to pay the owner becomes liable.**
6. **It is true that the 1st defendant is empowered to disconnect water whenever there is an outstanding bill for 30 days but the law or the bye-law that so empowers the 1st defendant does not make it mandatory to disconnect the supply, the 1st defendant is given discretion.**
7. **Further, reference to paragraph 6 above disconnection of water does not always yield repayment of the outstanding bills so much so that even if disconnection be carried out, in some instances, the occupier still is unable to pay thereby thrashing the liability on the owner of the premises or a subsequent occupier.**
8. **As he is made to understand, the said Section 36 of the Water Works Act and the relevant bye-laws were aimed at providing the defendants an effective way of ensuring that water charges are paid and if a contrary order is made the same will result in the defendants losing out contrary to what was envisaged by Parliament.**
9. **He is informed and verily believes that as regards the plaintiff having to pay for its tenants when they fail to settle their water bills and vacate the houses, the same is what the law provides and it is only fair because the plaintiff stands a better chance of tracing them since they give their full particulars to the plaintiff and that their lease agreements also provide for an opportunity to the plaintiff to commence legal proceedings against the tenants where they fail to perform any one of their obligations such as payment for water charges.**

10. In reference to paragraphs 12 to 17 of the plaintiff's affidavit in support of the application, it is not true that the bills accumulate due to the 1st defendant's deliberate inefficiency because the defendant has been conducting water disconnections but it is not always that it succeeds in recovering the money and in some cases the tenants end up vacating the houses.
11. Further a reading of paragraph 14 to 16 of the plaintiff's affidavit in support clearly shows that the 1st defendant disconnects or disconnected water supply and when it is demanding the plaintiff to make payment before reconnection when there is no supply of water to the houses.
12. As far as he knows there is no bar for the 1st defendant to disconnect water supply after 30 days and after giving the tenants or consumers reasonable period to settle the bills.
13. He is informed and verily believes that an interpretation of Section 36 of the Water Works Act as read with the bye-laws and the alleged general practice, would not lead to a finding that the plaintiff is only supposed to pay for current bills as there is no cut off point given by law.

The 2nd, 3rd, 4th and 5th defendants are represented by Messrs Racane Associates. There is an affidavit for each one of them sworn by Mr Raphael Joseph Mhone, a legal practitioner in the said firm. The matter before the court is not an interlocutory application. Order 41 Rule 5 of the Rules of the Supreme Court provide as follows:-

**An affidavit may contain only such facts as the deponent is able of his own knowledge to prove.**



**An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.**

**For the purpose of this rule, those applications only are considered interlocutory which do not decide the rights of the parties – *Rossage vs Rossage* (1960) 1 W.L.R. 249.**

In **Norse International Limited –vs- Group Five International Limited** – Civil Cause Number 2309 of 1995 (unreported) I emphasized that in so far as the law provides, counsel should not swear an affidavit for matters that are not interlocutory. Even in interlocutory proceedings, as a matter of good practice, counsel should refrain from this common habit of swearing affidavits on behalf of client. I have imagined the sort of embarrassment counsel would face if there was going to be a cross-examination on inaccurate facts supplied to counsel by client. Even if I were to accept Mr Mhone’s affidavits, which is not the case here, I have difficulties with his inaccurate and incomplete source of information. It is not sufficient just to indicate that the information was from the defendant. He should have indicated whether it was from the Board Chair or the Chief Executive Officer etc. The position of this court is that it will not accept the affidavits in opposition sworn on behalf of the 2nd, 3rd, 4th and 5th defendants because these affidavits are inadmissible in legal proceedings which are not interlocutory.

Under Section 31 of Waterworks Act – Cap.72:01 it is provided as follows:-

**31. All rates shall as from the date on which they fall due be deemed to be a charge upon the property on which they are assessed and shall be recoverable from the occupier, or if he fails to pay, the owner of the property or any subsequent owner or occupier, or the agent of any such owner or occupier.**

This same wording exists for Blantyre Waterworks Act – Cap 72:02 in Section 28. The provision was transplanted in Section 28 of the Lilongwe Waterworks Act – Cap 72:04.

The wording of these provisions is very clear. It provides that all water rates from the date that they become due are deemed to be a charge upon the property. Thus there is a *nexus* between the incurred rates and the property. The provision clearly provides the steps for recovery of the rates. Firstly, it shall be the occupier and normally the consumer who is obliged to pay. Secondly, only where the occupiers fail to pay, liability to pay attaches to the owner of the property in the likes of the plaintiff or any subsequent owner or occupier or their agent.

The 1st defendant admits that a bye-law exists which gives authority to the defendants to disconnect water supply for non-payment or outstanding bill for 30 days. However, the 1st defendant argues that this provision is not mandatory but one of the options the defendant has got to enforce payment. The 1st defendant has argued that this method is not fool-proof because there are times when water supply is disconnected to premises yet the occupier finds alternative supply from neighbours or the occupier moves to other premises with water supply. The 1st defendant also argues that due to staff limitations, disconnections are not effected immediately. Lastly, the 1st defendant argues that the plaintiff is better placed to trace the occupier who defaults payment because the plaintiff would have details in the tenancy agreement.

The plaintiff has argued that if the defendants promptly disconnected water supply on overdue bills, the plaintiff's liability as owner of premises would not go beyond the current bill. The plaintiff has demonstrated through exhibits that these bills are huge and drain financial resources of the plaintiff. Further, the plaintiff has shown the inconvenience that results from the defendants refusal to reconnect water supply.

There is no case precedent to provide proper guidance on the decision. However, the arguments from both parties are cogent enough to assist the court in its findings and decision. At law, the plaintiff's liability is statutory and not contractual. The liability of the occupier is both contractual and statutory. It would be inappropriate for the defendant to supply water to an occupier without a contract. The defendants do not seem keen on enforcing that contractual obligation. The statutory liability first places the obligation on the occupier before extending liability to the owner of the premises or subsequent occupier. The statutory liability of the plaintiff is only triggered after the occupier has failed to pay. How is payment from the occupier

enforced? It is common knowledge that there are several methods. The most obvious would be by sending bills to occupier and demanding payment and where payment is not forthcoming, the defendant has statutory authority to disconnect supply. Furthermore, even after disconnection, the defendants are at liberty to recover overdue bills through legal proceedings. It is obvious from the affidavits in this court that the defendants have not been vigilant in disconnections on bills which are 30 days overdue. This has led to unnecessary accumulation of bills resulting in heavy burden on the plaintiff. I would wish to agree with the plaintiff's submission that the bye-law and the general practice of disconnection on outstanding bills of 30 days was aimed at avoiding unnecessary accumulation of bills by an occupier. The failure by the defendants to strictly enforce their own bye-laws or general practice of disconnection is a symptom of inefficiency on their part. It is rather unfortunate that the defendants would wish to rely on the tenancy clause between the plaintiff and occupier on payment of services including water supply. With respect, the defendants would be strangers to that tenancy agreement and no benefit would enure to them.

Although the statute did not put a cut-off point on the liability of the plaintiff, the bye-laws and the general practice of disconnection by these defendants on 30 days overdue accounts clearly is a pointer to the plaintiff's liability. The plaintiff is by statute liable to pay for the current bill only in the event where the occupier has for one reason or another failed to pay. Beyond that period the defendant is supposed to disconnect the water supply as an option. If the defendant does not disconnect water supply, it does so at its own risk or mercy and why should the plaintiff continue to carry liability for the defendant's decision? It is an absurd and unfair interpretation of Section 31 of the Waterworks Act to suggest that Parliament intended that the owner of the premises must pay a water bill of over 12 months (for example) when the defendants had the law, opportunity and expertise all on their side to prevent the water bill accumulating to over one month.

This court holds the view that the owner of the premises in the likes of the plaintiff is supposed to pay for the current bill only (a bill of less than 30 days which has not been communicated to the occupier due to time factor). It is therefore wrong for the defendants not to

reconnect water supply when the plaintiff has cleared the current bill left by the previous occupier.

Further, the statutory provision which extends liability to the owner of premises appears to be unreasonable. There is no law or practice that obliges the defendants to send bills of an occupier of premises to the landlord. Therefore how would the landlord know that the tenant is not settling water bills? Unless where the landlord acts as a guarantor, can the defendants press the plaintiff to pay the long outstanding bills.

I wish to comment that in this millennium with computers awash, it is unacceptable for the defendants to plead lack of capacity to enforce bye-laws or practice of disconnection on 30 days after becoming due.

## **CONCLUSION**

The declarations and orders as prayed for by the plaintiff are hereby granted.

**MADE** in chambers this 2nd day of December 2005 at Blantyre.

Chimasula Phiri

**JUDGE**