



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NUMBER 365 OF 2010**

**BETWEEN:**

**MRS MUHHAMAD t/a MEJUK COLLECTIONS**

**PLAINTIFF**

**AND**

**PACIFIC LIMITED**

**DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO**

Msuku, Counsel for the Plaintiff  
Masumbu, Counsel for the Defendant  
Kakhobwe, Official Court Interpreter

**JUDGMENT**

This is this court's judgment following a trial of this matter. The plaintiff's claim is for damages for loss of business, conversion of her property, embarrassment, inconvenience and trespass to her rented premises following a distress for rent and eviction effected by the defendant as landlord on the plaintiff who was a tenant herein. The defendant denies the claim.

The plaintiff claims that she was at all material times a tenant of the defendant in a business place in Limbe. She further claims that in January 2010 the defendant, without a warrant of eviction, evicted the plaintiff from the premises. And that in the name of distress and without a warrant of distress, the defendant took away the plaintiff's various items including her personal items such as a passport and

business permit. The plaintiff further claims that the defendant evicted her in broad day light in full view of all other business persons plying their business around the area. Further that, having evicted the plaintiff, the defendant proceeded to put into the shop a new tenant whilst the shop still bore the plaintiff's trading name.

The plaintiff claims that in consequence of the foregoing she has suffered loss and damage and she claims damages for loss of business, conversion of her property, embarrassment and trespass to her premises.

The defendant admits the existence of a tenant and landlord relationship herein. It however claimed that if the plaintiff was evicted at all then she was evicted using a warrant of distress duly issued by the Sheriff of Malawi. The defendant denies having taken part in the eviction of the plaintiff at any point and claimed that the eviction complained of was carried out by the Sheriff of Malawi for whose acts/omissions the defendant is not liable. The defendant denies seizing the personal effects of the plaintiff. The defendant also denies the rest of the plaintiff's claims.

This Court has to determine several issues namely whether the distress was regularly done and whether there was an eviction. And if there was an eviction whether the said eviction of the plaintiff was regularly done. This Court also has to determine if the defendant is responsible for any irregularity in the process of distress and eviction as claimed by the plaintiff. To determine these issues this Court has to consider the evidence adduced at trial and the relevant law as submitted by the parties.

The plaintiff's evidence in-chief at trial was as follows. She stated that she had been a tenant in the defendant's premises located in Limbe for over seven years until January 2010 when she was evicted from the said premises. The premises in issue are business premises and the plaintiff had been using these premises for selling various clothing items. Due to the closeness that developed between the plaintiff and the defendant the plaintiff could sometimes when business was bad, bargain with the defendant to pay rentals late than would otherwise have been usual and the same had been happening throughout the period the plaintiff had been renting from the defendant. Due to the accumulation of rentals at various times, as of January 2010 the rentals due were K709, 500.00.

The plaintiff stated that at the material time in January 2010 she was away and got a call from one of her servants telling her that there were sheriffs at the premises and that they had taken away everything and had sealed the premises. The plaintiff stated that when she visited the premises herein she indeed found that the place had been sealed and when she peeped through the window she found that everything had been removed.

The plaintiff stated that apart from the items that she was selling there were in the premises other things such as her passport, business permit and money all of which had been seized.

She further stated that the sheriffs seized some items and left other items outside in the rains such as working tables and shelves. She produced photographs showing the items left outside.

The plaintiff further stated that she asked her lawyer to claim back her passport and business permit so that she could continue her business but nothing came from the defendant in that regard.

The plaintiff further stated that after her eviction, the defendant put in the premises herein another tenant but to her surprise when she visited the place weeks after her eviction the shop still bore the plaintiff's trading name. She produced photographs she took weeks after her eviction showing her trading name on the shop.

The plaintiff stated that she followed up with the Sheriff of Malawi on the warrant that was used to evict her but was told none was issued but that there was only a notice and a report which she was given and she tendered the same in evidence. In the premises, the plaintiff believes that the defendant's conduct of levying distress without a warrant of distress and evicting the plaintiff without due legal process and subsequently permitting a new tenant to trade under the plaintiff's name are all illegal.

During cross-examination the plaintiff stated that she was complaining that the eviction herein was not done in order. That she was not present at the time of the eviction. She stated that everything was taken from her shop. She also stated that the documents used to effect the eviction were not in order. She stated that she reported the matter to police because she was not sure if the eviction was done by

the sheriffs or thieves. She later learnt that Mr Masumbu had sent Sheriffs to effect the eviction and she wanted to get the documents that Mr Masumbu had given to the sheriffs to effect the eviction. She stated that Mr Masumbu said he had no knowledge of the same. She further said she never saw the instruction of Mr Masumbu to the sheriffs to seal her premises.

The plaintiff further said that the eviction was not properly effected. She was not present at the premises at the time. Her personal effects such as the business permit and every document she was using in the shop was taken including her cash amounting to K2, 900, 000.00. She stated that she had that day's sales and was planning to leave for China that same week. She stated that the K2, 900, 000.00 is the money that she referred to in her witness statement that was her evidence in-chief in this matter. She stated that although that sum is not specifically mentioned in her witness statement she had mentioned it in her instructions to her lawyer herein.

The plaintiff stated that sheriffs took her passport and business permit. Further that her business has gone down because of this. She said she is now in debt because she does business on credit.

The plaintiff reiterated that at the time of the eviction her rental arrears were K709, 500.00. She further stated that her monthly rentals at the time of her eviction then were K40, 000.00. Previously, these rentals were initially K28, 000.00 and later K35, 000.00.

The plaintiff stated that she had accumulated the arrears of rent at the old rate of rent. She stated that she did not dispute that the defendant landlord herein was entitled to distrain for the rentals. She denied receiving a phone call from the Deputy Sheriff when he visited her shop to distrain for the rentals. She also denied that she refused to come to the shop when called by the Deputy Sheriff. She stated that it is her employees who called her from her shop. And further that it was Mr Jezman who was at the shop. The plaintiff stated that it is the Deputy Sheriff who told her about Mr Jezman. She further stated that at first the Deputy Sheriff denied any knowledge of the matter herein.

The plaintiff further stated that she asked the Deputy Sheriff about her passport and business permit and the Deputy Sheriff denied taking these documents. The Deputy Sheriff also denied taking the money claimed by the plaintiff.

The plaintiff stated that she reported this matter to police but no police report was tendered in evidence though the plaintiff insistent she had given the same to her lawyer for use as evidence in this matter. She stated that she had lost K2, 900, 000.00 and an unspecified sum for two day sales herein.

The plaintiff stated that the rentals in issue herein were arrears dating back to 2006 when she was sick. She stated that she had an agreement with the defendant, and not the defendant's agents, to pay K50, 000.00 every month. She stated that the landlord is their family friend and they agreed with him to pay arrears and rentals at the same time. And that this is how she was paying back the arrears.

The plaintiff then referred to her exhibit MM4 (1), a letter from the Deputy Sheriff reporting to Mr Masumbu on the distress indicating that the sheriffs had distrained for rent and evicted the plaintiff and handed over the premises herein to the landlord. The report is signed by Mr Jezman on behalf of the Deputy Sheriff and is dated 19<sup>th</sup> January 2010. She further stated that the report refers to an inventory of goods taken but the inventory was not attached.

The plaintiff stated that she met the Deputy Sheriff on the 19<sup>th</sup> January 2010 and after 20<sup>th</sup> January 2010. She added that the Deputy Sheriff said he knew nothing of this matter.

The plaintiff then stated that exhibit MM4 (ii), a notice of distress for rent addressed to the plaintiff and dated 20<sup>th</sup> January 2010, which states that on the authority of the legal practitioners of defendant landlord herein the Sheriff of Malawi had seized, distrained for rent and impounded the plaintiff's goods. She stated that this document was not good enough to be used for evicting her. She stated that this notice has a stamp from the office of Sheriff of Malawi. She asserted that this process is illegal.

In re-examination, the plaintiff stated that the report in exhibit MM 4 (i) shows that it is dated 19<sup>th</sup> January 2010 and that the notice of distress exhibit MM 4 (ii) is dated 20<sup>th</sup> January 2010. She reiterated that exhibit MM4 (i) was signed on behalf

of the Deputy Sheriff by Mr Jezman. She further stated that when she queried the Deputy Sheriff about the distress herein he denied knowledge of the same until she found Mr Jezman.

The defendant then called the Deputy Sheriff, Mr Mlauzi, who testified on its behalf. He told this Court that he has served as Deputy Sheriff since 2002. Further, that he only knew the plaintiff through the paperwork but only came to meet her for the first time at the trial. He adopted his witness statement which was ordered to stand as evidence in-chief. He stated that he recalled that it was around 20<sup>th</sup> January 2010 when he received a warrant of distress for his action. Further, that upon receipt of the said warrant he duly signed and issued the warrant of distress in line with standing instructions. The warrant of distress stated that the sum of K1, 261, 000.00 was due as rentals. He further stated that he prepared an inventory of items seized from the plaintiff's shop and it is marked as exhibit PM1.

The Deputy Sheriff further stated that he sent a report on the distress to Mr Masumbu under cover of a letter dated 19<sup>th</sup> January 2012. This report is marked as exhibit PM2. He denied seizing the plaintiff's passport, business permit and any money. He stated that since he has worked as sheriff he has never seized a passport, business permit or money.

During cross-examination, the Deputy Sheriff was referred to exhibit MM4 (i) which he said was his report on the distress herein. He was then referred to exhibit PM2 which he said was the same document on the distress. He stated that there was nothing strange in that the report on the distress was issued by him personally and also by his clerk Mr Jezman. He said this was a report that was sent to Mr Masumbu. He further clarified that reports of distress or execution are unlike cheques. He added that if a report is demanded it can be printed from a computer and be signed by either himself or on his behalf.

The Deputy Sheriff further stated that it was false that he never participated in the distress herein. He stated that he was seized of the distress herein in 2010. Further, that on 19<sup>th</sup> January 2010 he, together with Mr Jezman, went to the plaintiff's shop where he found two shop assistants. He stated that Mr Jezman signed the report. Further, that he was also accompanied by two policemen who provided security and would witness the process.

The Deputy Sheriff said that once he arrived at the plaintiff's shop he introduced himself to the plaintiff's employees and showed them his identity card. He said at that point the plaintiff's employees gave him the plaintiff's phone number. He called the plaintiff to come to the shop to settle the arrears of rentals failing which he would collect her goods by way of distress. He stated further that the plaintiff refused to come to the shop. That he told her of the consequences that he would remove her goods in the presence of her workers. He stated that she was very uncooperative and said the Deputy Sheriff could go ahead with the distress. Further, that at this point the Deputy Sheriff told the plaintiff's employees to remove all their personal effects and money from sales after which the Deputy Sheriff proceeded with distress on all the goods in the shop. He took the goods for safe custody at Trust Auctioneers and Estate Agents pending sale within five days. He said it was only after a while that he was called to mediation.

The Deputy Sheriff said that the applicant never came to his office to see him personally about the matter herein. He could however not tell if the complainant came to the Sheriff's registry.

The Deputy Sheriff further stated that he has a copy of the warrant of distress herein. He said counsel for the plaintiff should be able to tender a warrant of distress which is an authority for levying execution. He further said that he believed the warrant of distress allows him to collect goods and upon collecting goods you lock the premises since there was no security and many people had come to see what was going on and the premises had to be secured.

The Deputy Sheriff said he knew that the plaintiff was the occupant of the premises herein. Further, that the defendant did not accompany him to effect the distress herein. He also said that by the time he finished with the distress the plaintiff's workers were leaving and he took the keys to the shop and locked it and added some of his own locks too. He stated that there was commotion by the time the distress was finalized and he had to secure the premises. He added that he levied distress, secured the place and the defendant came to collect the keys.

The Deputy Sheriff was referred to the notice of distress marked as exhibit MM4 (ii) and he stated that the contents of this document were right. He stated that he did not think that this notice of distress for rent was made before the execution

herein. His view was that there was a typographical error. Further that the seizure note is of 20<sup>th</sup> January 2010.

He further stated that when effecting distress he only collects items that can be sold to recover rentals and that they leave the rest of the items outside the rented premises in question. He then stated that in the present case, the plaintiff's employees were there at the time of the distress and they would take charge over the items left outside the rented premises herein. Further that he would not take items that were not likely to sell at an auction.

The Deputy Sheriff stated further that in his experience it is not for him to see as to where the goods left outside after distress will be secured by the defaulting tenant. Further, that the plaintiff would be the one to know where to keep the goods left outside herein.

The plaintiff submitted that there are several questions that this Court should determine in this matter and she made her submissions on the said questions. These questions and submissions are as follows.

Whether there was a warrant of distress in this matter. On this question the plaintiff submitted that it is a question of fact. Further, that the law is to the effect that it is for a party alleging to prove the truthfulness of the allegation on a balance of probabilities. She referred to the cases of *Kachale v Ashani and another* civil cause number 3306 of 2004 and *Sivaswamy v Agason Motors Ltd* [1995] 1 MLR 274.

The plaintiff then submitted that there is an issue whether the defendant obtained a warrant of distress against the plaintiff. Further, that the plaintiff emphatically testified that she followed up both with the defendant's lawyer and the Sheriff but none of them could give her a copy of the warrant. And that all she was given was a copy of the notice of distress and report by the Sheriff to the defendant's lawyer. The plaintiff further submitted that even the defendant itself despite its witness claiming that there was a warrant of distress could not produce the same.

The plaintiff then submitted that the position at law is that where a party fails to adduce evidence there is a presumption that such evidence is damaging to the party so failing to adduce such evidence. The plaintiff referred to cases where such presumption arose for failure to call certain material witnesses. *Maonga and others*



*v Blantyre Print and Publishing Co. Ltd* [1991] 14 MLR 240 and *Attorney General v Chirambo* civil cause number 444 of 1995.

The plaintiff further submits that what makes the defendant's story even more doubtful is the fact that even the documents that have been adduced by the defendant have no case number to show that a case was registered under which a warrant of distress might have been issued. Finally, that from the totality of the evidence adduced, it is clear that the defendant had no warrant of distress on which it could have acted.

The plaintiff also posed the question whether the defendant could lawfully distress for rent without a warrant of distress. On this question the plaintiff submitted that the law of distress was perfectly summarized by the Supreme Court of Appeal in *Gurmair Garments Manufacturing (EPZ) Limited (In Liquidation) and another v Ishmael Properties Limited* [2007] MLR 127, 133 where the Court stated that

In Malawi a landlord who claims that a tenant owes him arrears of rent must obtain a warrant of distress and a notice of distress for rent from the Sheriff of Malawi who also happens to be the Registrar of the High Court and the Supreme Court of Appeal. The actual distress must be levied by the Sheriff or a person authorized by the Sheriff or a bailiff. The persons levying distress for rent must possess the warrant and notice of distress for rent.

The plaintiff submitted that in the present case the defendant did not possess the warrant of distress to effect the distress and that the distress was therefore illegal.

The plaintiff also posed the question whether the defendant was entitled to seal the premises and evict the plaintiff whether the defendant had the warrant of distress or not. The plaintiff submitted that distress is the landlord's right to seize a tenant's goods for the purpose of realizing rent in arrears. Further, that distress does not entitle the landlord to evict the tenant and seal the premises. Further that the warrant of distress therefore only entitles a landlord to seize the tenant's chattels for the purposes of realizing rentals in arrears. The plaintiff referred to Halsbury's Laws of England, 4<sup>th</sup> edition, volume 13 at par. 206 where the authors state that

The common law right of distress for rent in arrears is a right for the landlord to seize whatever movables he finds on the premises out of which the rent or services issues, and to hold on to them until the rent is paid or the service performed.

She further referred to Black's Law Dictionary which defines distress as a common law right of a landlord to seize a tenant's goods and chattels in a non judicial proceeding to satisfy arrears of rent. She also referred to the case of *Lyons v Elliot* (1876) 1 QBD 210. The plaintiff further submitted that a landlord who wants to repossess his premises must have a writ of possession which is specifically for that purpose. She referred to the case of *Zakulanda v Namukopwe* [1993] 16 (2) MLR 914.

The plaintiff then submitted that the defendant could not lawfully evict her unless it had a writ of possession. And therefore that whether the defendant had a warrant of distress that did not entitle the defendant to evict the plaintiff and seal the premises. Further, that the warrant of distress only entitled the defendant to seize the plaintiff's movable and that the eviction was therefore illegal.

The plaintiff further posed the question whether the defendant could seize items other than movables for the purpose of recovery of rentals. The plaintiff submitted that the defendant landlord could only seize chattels that would satisfy rentals but that it could not seize tools of trade unless it can show that there are no other chattels that could be seized. The plaintiff referred to Halsbury's Laws of England, 4<sup>th</sup> edition, volume 13 at par 249 which is to the following effect

The tools and instruments of a man's trade or profession and instruments of husbandry are distrainable only if there are not other goods on the premises sufficient to countervail the arrears of rent. The axe of a carpenter, the books of a scholar, the kneading-trough of a baker, the stocking-frame or loom of a weaver and even the cab of a cab driver have been held to be within this rule.

The plaintiff also referred to the case of *Lavell v Richings* (1906) 1 KB 480. The plaintiff then submitted that the defendant clearly seized items that are not distrainable. These items are the plaintiff's passport and business permit.

The plaintiff then posed the question whether the defendant is guilty of trespass and conversion. The plaintiff referred to the case of *Chunga v Attorney General* [1996] MLR 162 where Msosa J, as she then was, stated that trespass is defined as wrongful interference with the possession of goods and conversion as an act in relation to the goods of a person which constitutes unjustified denial of his title to them. The same definitions are contained in the case of *Khamisa v Mia* [1992] 15

MLR 187, *Msowoya v Malawi Entrepreneurs Development Institute* [1997] 1 MLR 278 and *Mpungulira Trading Ltd v Marketing Services Division* 16 (1) MLR 346.

The plaintiff further referred to Halsbury's Laws of England, 4<sup>th</sup> edition, volume 13 at par 297 which is to the following effect

If a person not holding a certificate (issued by a Judge or Registrar) levies distress...the person so levying, and any person who has authorized him so to levy, will be deemed to have committed trespass not only as against the tenant, but also as against a third party whose goods are seized. The effect of this is to make a distress by an uncertified bailiff an illegal distress, with all the consequences of a trespass ab initio.

The plaintiff further submitted that it has been held that it is conversion where a party wrongfully seizes another person's property in the case of *Mtawali v New Building Society* [1992] 15 MLR 311.

The plaintiff submitted that in the present case, as the facts show, the defendant did that which it had no authority to do. And that this amounted to unlawful interference with the plaintiff's property and the continued detention of the said property is clearly inconsistent with the rights of the plaintiff and consequently that the defendant is guilty of both trespass and conversion.

The plaintiff then posed the question whether the defendant is liable for the plaintiff's loss of business. She submitted that where there has been either trespass or conversion the claimant is entitled, over and above damages specifically under the heads claimed, to damages that are a consequence of the torts themselves. She submitted further that in *Chiwaya v SEDOM* 14 MLR 47, 55 Unyolo J, as he then was, stated that

This Court has persistently followed the law laid down in *General and Finance Facilities Ltd v Cook's Cars (Romfold) Ltd* (1963) 2 ALLER 314, where it was held that damages in an action for conversion is for a lump sum of which the measure is generally the value of the chattel at the date of the conversion, together with any consequential damage flowing from the conversion and not too remote to be recovered in law.

The plaintiff further referred to the case of *Hassan v Adani t/a Adani's Garage* 16 (1) MLR 109 and *The Heron II* (1967) ALL ER 686 on this point. The plaintiff then submitted that loss of business is a direct consequence of the torts committed

by the defendant herein. that the defendant was aware that the plaintiff was renting the premises herein for business purposes and the defendant went ahead to unlawfully confiscate the plaintiff's chattels and to evict her from the said premises. Further, that such a loss cannot be remote at law and that the defendant is therefore clearly liable for loss of business.

Lastly, the plaintiff posed the question whether the defendant is liable for embarrassment and inconvenience of the plaintiff. The plaintiff then submitted that a party who suffers embarrassment and inconvenience due to another person's wrong has a cause of action against such other person specifically under these heads as separate torts. The plaintiff referred to the following cases on that point. *Pemba v Stagecoach (Mal) Ltd* [1993] 16 (1) MLR 420, *Kalulu v Blantyre Water Board* [1990] 13 MLR 160. This Court notes that in these two cases damages were for trespass which caused embarrassment and inconvenience. Embarrassment and inconvenience were not causes of action per se. The plaintiff further referred to the cases of *Theu v Attorney General* [1994] MLR 348 and *Hara v Malawi Housing Corporation* [1993] 16(2) MLR 527. The plaintiff therefore claims damages for embarrassment and inconvenience.

On its part, the defendant submitted that the issues of determination are two-fold. Namely, whether the defendant lawfully affected a notice of distress and whether the defendant is liable for the damages for loss of business, embarrassment, conversion and trespass. The plaintiff outlined the evidence herein and then submitted on the law.

It submitted that the recent authorities on distress in Malawi are well discussed in *Joubertina Furnishers (Pty) Limited t/a Carnival Furnishers v Lilongwe City Mall* miscellaneous civil cause number 41 of 2013 (High Court) (unreported) where Mwaungulu J., as he then was, stated that

The certificate of appointment as a bailiff for purposes of distress by the landlord's counsel should be understood under those considerations. It is unnecessary when the Sheriff of Malawi distrains for rent that the notification indicates that the Sheriff does so as a bailiff. The Sheriff is not a bailiff. In fact, in law, it is not necessary, though usual, that the landlord should give a sheriff or bailiff a written authority to levy. The certificate could be superfluous. Halsbury's Statutes, 4<sup>th</sup> edition, vol. 13, p. 581.

The defendant further submitted that in *Press Properties Limited v Mulli Brothers and Chombe Tea Limited* miscellaneous civil cause number 180 of 2012 (High Court) (unreported), Mwaungulu J., as he then was, also clarified the law of distress and stated that the landlord was not executing a judgment or order of the court. That the landlord merely exercised the power or right of distress for rent. And further that to exercise that right, the landlord does not want a court order. Further that the landlord need not even issue a written note to the sheriff or bailiff as the case may be.

The defendant then submitted that in the case at hand, a notice of distress was duly issued. Further, that the notice indicated the name of the tenant and amount of rentals due. That the notice of distress was signed by the Deputy Sheriff and stamped by him. Further that the Deputy Sheriff had enough authority to act on and that therefore the process could not have been illegal. Consequently, that the claims for embarrassment and trespass to property must also fail as the process was entirely legal at law.

The defendant then submitted on the plaintiff's failure to call material witnesses. The defendant noted that the plaintiff asserts that the Deputy Sheriff seized her passport, business permits and money. That the plaintiff confirmed that this took place in the presence of her employees who were at her shop at the material time. Further, that the plaintiff even stated that one of her employees called her to advise her that the sheriff was at her shop. The defendant submitted that this employee could easily have been called to confirm the plaintiff's testimony that her passport, business permit and money were seized. Further, that this was particularly important because the inventory tendered in evidence by the Deputy Sheriff did not indicate that a passport, business permit and cash were seized.

The defendant then submitted that this failure to call material witnesses is construed negatively against the one who fails to call such witnesses. The defendant referred to the following cases on that point. *Maonga and others v Blantyre Print and Publishing* and *NBS Bank Limited v BP (Malawi) Limited* [2008] MLR (comm.) 1.

The defendant then submitted on the reliability and credibility of the witnesses in this matter. The defendant submitted that the Deputy Sheriff was consistent in his

testimony that he was involved in the distress process herein. Further, that no evidence was called to prove the plaintiff's assertion that the Deputy Sheriff did not carry out the execution. The defendant submitted that in circumstances this Court should consider giving very little weight to the plaintiff's assertion and it referred to the case of *Dr Lanjesi and others v Mbele* commercial case number 225 of 2009 (High Court) (unreported) on that point.

The defendant further submitted that the plaintiff was not even at the shop when the distress was levied. And further, that none of the witnesses who were employees of the plaintiff, who were at the shop, were called to support the plaintiff's allegations that the passport, business permit and cash were seized. And finally, that the Deputy Sheriff's testimony was credible and should be believed.

The defendant prayed that the plaintiff's claims should be dismissed.

This Court will first have to determine whether the distress herein was regularly carried out. There are two competing views in that regard.

On one hand the plaintiff contends that the defendant ought to have obtained a warrant of distress and notice of distress under a case number registered with this Court whereas the defendant contends that the defendant did not have to register a case and ought even not to have given a written instruction to the Deputy Sheriff herein. The parties contention derive from the cases cited of *Gurmair Garments Manufacturing (EPZ) Limited (In Liquidation) and another v Ishmael Properties Limited* and *Joubertina Furnishers (Pty) Limited t/a Carnival Furnishers v Lilongwe City Mall* respectively.

This Court reflected on the two competing positions and concluded that indeed distress for rent is not a court process such that a landlord need not have a case registered as is envisaged by the plaintiff herein. This Court referred to the Halsbury's Statutes, 4<sup>th</sup> edition, vol. 13, p. 581 cited by my brother Judge, as he then was, in the case of *Joubertina Furnishers (Pty) Limited t/a Carnival Furnishers v Lilongwe City Mall*. This Court then referred to the relevant principle on the distress as also contained in Halsbury's Laws of England, 4<sup>th</sup> edition, vol. 13 at par 291 which provides that

A landlord may distrain either in person or by an authorized bailiff or agent. *Symonds v Kurtz* (1889) 61 LT 559. When a bailiff makes a distress he must have

authority to do so from his employer. *Symonds v Kurtz* (1889) 61 LT 559. As the distrainee is entitled to know by what right the bailiff is acting, this authority is generally and should properly be in writing, and is commonly called a distress warrant or warrant of distress; but it is not essential to his authority that a bailiff should be appointed in writing. Even a corporation aggregate may at common law appoint a person to distrain without deed or warrant.

A distress warrant does not require to be stamped. *Pyle v Partridge* (1846) 15 M & W 20.

A distress is therefore, as we all know, a self help remedy available to the landlord where a tenant defaults on payment of rentals. It would therefore indeed not be correct that the landlord should obtain something akin to a court document to distrain for rent as is envisaged by the plaintiff herein.

Once a distress is levied a notice of distress is to be issued and left at the place of the distress. A Notice of distress cannot precede the distress itself as envisaged in *Gurmair Garments Manufacturing (EPZ) Limited (In Liquidation) and another v Ishmael Properties Limited*. With respect to a notice of distress Halsbury's Laws of England, 4<sup>th</sup> Edition, volume 13 at par. 309 states as follows

No notice of distress was necessary at common law, because at common law all that the distrainor was required to do was seize the goods and impound them, and, if the impounding was in a private pound, to give notice of the place to which they were taken. By statute, whether the distress is levied by a bailiff or by the landlord in person, notice of the distress is necessary before the goods can be sold; and where a bailiff levies the distress, notice is necessary whether or not a sale is intended.

The right of sale to a distress is provided for by the Distress for Rent Act 1689, but before the distrainor can proceed to sale, he must cause notice of the fact of the distress having been made (with the cause of taking) to be left at the chief mansion-house or other most notorious place on the premises charged with the rent distrained for.

Subject to the foregoing observations, this Court agrees with the competing decisions as relied upon by both parties herein on how a distress is to be originated. As explained in *Joubertina Furnishers (Pty) Limited t/a Carnival Furnishers v Lilongwe City Mall* the Deputy Sheriff lawfully carries out instructions to levy distress by virtue of his office.

The evidence in this matter is clear that there is no warrant of distress produced in evidence by the defendant to prove its instructions to the Deputy Sheriff. There is however no doubt that the defendant gave instructions to the Deputy Sheriff to levy distress for rent herein on the plaintiff's rented premises. The plaintiff does not deny being in arrears of rent dating way back. She does not deny the defendant's right to distrain for rent herein. A notice of distress was issued after the levy of the distress herein. The question is whether a distress carried out without a warrant of distress is illegal as contended by the plaintiff.

The plaintiff contends that since there is no warrant of distress then the distress was illegally levied. The defendant contends that the warrant of distress is not necessary. It must be noted that, on one hand, the distrainee is entitled to know by what right a sheriff is acting. Further that the authority to the sheriff to distrain for rent is generally and should properly be in writing, and is commonly called a distress warrant or warrant of distress. However, on the other hand, it is not essential to his authority that a sheriff should be appointed in writing.

This Court finds a lot of wisdom in the view that the authority to a sheriff to distrain for rent is generally and should properly be in writing, commonly called a distress warrant or warrant of distress. In this era of constitutional rights it would be perilous to let a distress to be carried out by a sheriff without a written instruction as that would make it very hard for the tenant to know by what right a sheriff levies distress and also to safeguard his or her rights in relation to the said distress. This Court says this whilst noting that in England and Wales the remedy of distress for rent was heavily criticized for involving serious interference with the tenant's human rights, namely respect for privacy and the right to peaceful enjoyment of possessions. *Fuller v Happy Shopper Markets Ltd* [2001] 1 W.L.R. 1681.

Having said the foregoing, this Court's conclusion is however that a warrant of distress is at law not necessary or essential to the authority of a bailiff or sheriff levying distress. See Halsbury's Statutes, 4<sup>th</sup> edition, vol. 13 p. 581. What matters is the fact that a bailiff or sheriff has authority from a landlord. Of course, a landlord who instructs a sheriff or bailiff to levy a distress without a warrant may open himself up to potential legal action if the tenant refuses the bailiff or sheriff



access to the premises. It is therefore proper and advisable that a landlord give a warrant of distress to a sheriff to levy distress.

In the foregoing premises, this Court finds that the fact that the Deputy Sheriff herein did not have a warrant of distress does not make the distress illegal given that the landlord herein clearly gave the Deputy Sheriff authority to levy the distress and upon levying the distress the Deputy Sheriff produced a notice of distress as legally required. This Court therefore agrees with the defendant that the distress was therefore properly carried out. The distress was not illegal. The plaintiff's claim to damages for trespass, conversion, loss of business, inconvenience and embarrassment on the basis of the alleged illegal distress herein therefore fails.

There is an issue that this Court must dispose of before proceeding to deal with the issue of the legality of the eviction herein. It is the claim that the defendant levied distress on the plaintiff's cash and tools of trade namely a business permit and passport.

As rightly submitted by the plaintiff, tools of trade are exempt from distress and any distress of such tools will make the distress illegal. The plaintiff who was not at the shop herein asserted that the Deputy Sheriff seized the items claimed. This Court however agrees with the defendant that the plaintiff did not prove that these items were indeed seized by the Deputy Sheriff. The plaintiff was not at the shop at the material time and she did not call as witnesses any of her employees who were present at the time of the distress to testify that indeed the items in issue were seized. That makes her evidence suspect. The tools of trade and cash alleged to have been illegally seized do not appear on the inventory to the notice of distress. In these circumstances, this Court agrees with the defendant that there is no proof that the Deputy Sheriff seized the items and cash as claimed by the plaintiff. The plaintiff's claim for damages for trespass, conversion, loss of business, inconvenience and embarrassment in that regard therefore also fails.

This Court then has to consider whether the defendant did evict the plaintiff from the shop and if that is the case whether the eviction was legally done. The plaintiff has proved that the eviction was indeed done as it is clear from the evidence of the plaintiff as well as that of the Deputy Sheriff that after levying distress the Deputy

Sheriff proceeded to lock the shop herein and he took the keys to the landlord who accepted the keys and then put a new tenant in the shop. The Deputy Sheriff tried to justify the sealing of the premises as a security precaution after distress. The fact however is clear that after locking the premises the Deputy Sheriff took the keys to the landlord who accepted the keys. This Court therefore finds that there was an eviction after the distress.

The defendant pleaded in its defence that the plaintiff was evicted using a warrant of distress duly issued by the Deputy Sheriff. However, as rightly submitted by the plaintiff, the eviction herein cannot be justified on the basis of the distress since the distress is about taking of chattels to satisfy rental arrears. The eviction cannot be based on a warrant of distress.

The defendant alternatively pleaded that it did not take part in the eviction and that if there was an eviction then the same was carried out by the Deputy Sheriff for whose acts the defendant is not liable. Despite this alternative pleading, the defendant did not pursue any argument along these lines in its skeleton arguments. That means the alternative argument was abandoned. Even if the argument were not to be abandoned one would take it that the defendant ratified the actions of its agent the Deputy Sheriff by accepting the keys to the shop herein after the eviction. The alternative argument can therefore not stand. The acts of the Deputy Sheriff were accepted by the defendant who proceeded not only to accept the keys but also to put a new tenant in the shop herein. The eviction of the plaintiff therefore falls squarely in the hands of the defendant as principal of the agent, the Deputy Sheriff, herein. If the defendant did not ratify the eviction it would have given the shop keys back to the plaintiff to continue as a tenant. The defendant is therefore responsible for the eviction herein.

This Court then shall consider whether the landlord illegally evicted the plaintiff herein. The plaintiff claims that for the landlord to evict a tenant the landlord must have a writ of possession for that purpose. Further that since the defendant landlord herein had no writ of possession then the sealing of the shop and eviction of the plaintiff was illegal. As already stated earlier, the defendant did not put up an argument in this regard in its skeleton arguments after trial except that in evidence the Deputy Sheriff explained that they had to seal the shop to safeguard the same

after a commotion following the distress. This Court has to determine if the plaintiff has proved that the eviction was illegally done.

This Court notes that the plaintiff has relied on the case of *Zakulanda v Namukopwe* which she states is to the effect that a landlord must have a writ of possession in order to repossess his premises. This Court has read that case and notes that it actually stands for the proposition that a lessor does not effect a forfeiture of a lease by issuing a writ of possession. Rather that serving of a writ of possession is equivalent to re-entry and effects a forfeiture. So that it cannot be, as is being said by the plaintiff, that for a landlord to repossess his premises he must have a writ of possession. Rather a landlord will effect a forfeiture of a lease by re-entry and service of a writ of possession is equivalent to re-entry. Service of a writ of possession is an instance of re-entry. The plaintiff's contention, is therefore not tenable, that the defendant should have had a writ of possession in order to repossess its business premises that it had let out to the plaintiff who had defaulted on rentals in the sum of K709, 500.00 when monthly rentals were in the range of K28, 000.00 and K35, 000.00.

The plaintiff does not state whether there was a lease or a periodic tenancy. She does not state the terms with regard to termination of the lease or periodic tenancy on breach of payment of rentals. And whether the defendant breached the lease or periodic tenancy provisions on termination. The plaintiff did not indicate if the lease or periodic tenancy was subject to the Registered Land Act or otherwise. All the plaintiff claims is that the defendant must have had a writ of possession before evicting her which it did not have. This Court has found that such is not the case on the authority cited by the plaintiff.

If the letting of the shop herein was by way of a periodic tenancy under the Registered Land Act then it may be subject to section 39 of the Registered Land Act which provides that

(1) Where in any lease the term is not specified and no provision is made for the giving of notice to terminate the tenancy, the lease shall be deemed to have created a periodic tenancy.

(2) Where the proprietor of land permits the exclusive occupation of the land or any part thereof by any other person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.

(3) The period of a periodic tenancy deemed to be created by this section shall be the period by reference to which the rent is payable, and the tenancy may be determined by either party giving to the other notice, the length of which shall, subject to any other written law, be not less than the period of the tenancy.

The plaintiff has not indicated if such is the case.

The letting of the shop may have been under a lease under the Registered Land Act. Such a lease would be determined under section 57 of the Registered Land Act

(1) Where—

- (a) the period of a lease has expired;
- (b) an event upon which a lease is expressed to terminate has happened;
- (c) a lessor has lawfully re-entered; or
- (d) a notice duly given to terminate the lease has expired,

and the lessor has recovered possession of the land leased, the lease and every other interest appearing on the register relating to the lease shall thereupon terminate, and the lessor may apply in writing to the Registrar to cancel its registration.

(2) An application under this section shall be supported by such evidence of the matters giving rise to the termination and the recovery of possession by the lessor as the Registrar may require, and the Registrar on being satisfied of the matters set forth in the application shall cancel the registration of the lease.

The plaintiff has not indicated if the foregoing is applicable.

In short, the plaintiff has not indicated and proved the basis to show that the eviction herein was illegally effected by the landlord. The plaintiff has not proved on a balance of probabilities that the eviction herein as effected by the defendant was illegal in circumstances where she owed rentals for a long period of time. Forfeiture of a lease by service of a writ of possession as is required by the plaintiff herein is just one of the modes of terminating a lease. The plaintiff has not proved if that was relevant prior to the eviction herein.

Since the plaintiff asserted the affirmative, she should have properly set up her case as to why she submits that a writ of possession is required. The plaintiff did not do that. This Court cannot speculate as to the plaintiff's case. The plaintiff has not therefore not discharged her burden to prove that the eviction was illegal. The plaintiff's claim of an illegal eviction therefore fails.

The plaintiff's case therefore fails in its entirety.

Costs normally follow the event and shall be for the defendant.

Made in open court at Blantyre this 18<sup>th</sup> December 2015.

M.A. Tembo  
**JUDGE**