IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CASE NO. 127 OF 2004

BETWEEN

MAKOLEGO & COMPANY……PLAINTIFF

-AND-

L.M. PHIRI……DEFENDANT
(t/a Lloyds Electrical & Building Contractors)

CORAM: MANDA**, SENIOR DEPUTY REGISTRAR**

Makono for the plaintiff

L.M. PHIRI (in person)

RULING

This is a summons for Summary Judgment taken out under Order 14 of the Rules of the Supreme Court. The application is supported by an affidavit sworn by Mr. Roderick Chikadzakuwani Makono, who adopted the same when he appeared on behalf of the plaintiff.

This action arose out of legal work which the plaintiff company states it performed on behalf of the defendant after the latter had given them instructions to undertake the same. According to Mr. Makono, the defendant had instructed them to collect from the Malawi Government the sum of K4, 027, 584. 00. This sum was apparently due to the defendant from a number of building contracts which the defendant had taken out with the government. Upon getting the instructions, Mr. Makono said he did write a letter of demand Ministry of Education with a copy to the Attorney General claiming the amount as instructed by the defendant. The letter of demand

was duly exhibited as "*RCM1.*" This being debt collection, the plaintiffs also included the statutory 15% collection fees, which amounted to K604 132.20 in the demand. It is this amount of K604 132.20 that the plaintiff seeks to recover from the defendant.

Ordinarily one would not expect suits like these to come before the courts, indeed this much was acknowledged by Mr. Makono. This is for the simple reason that collection fees are paid directly to the counsel. However, in the present instance there seem to have been an arrangement made by the plaintiff and the defendant to the effect that the plaintiff should write the Attorney General, withdrawing the letter of demand so as to allow an out of court settlement. As part of this arrangement, the defendant was to be paid directly by Ministry of Education and this was per exhibit "*RCM4.*"

Following this arrangement the defendant was paid money by Ministry of Education but it was not clear how much he was paid. It was Mr. Makono's submission that after getting the money the defendant disappeared without going back to the plaintiffs or indeed disclosing how much money he was paid. Not only did the defendant not disclose the amount of money that he was paid, he also never gave the plaintiffs the collection costs.

On his part the defendant, who did not file an affidavit in opposition, admitted to have given the plaintiffs instructions to write the letter of demand. However, the defendant went on to inform the court that he did withdraw his instructions from the plaintiffs and that this was the reason why the plaintiff wrote "*RCM4.*" The defendant also informed the court that Ministry of Education never paid him what was claimed by the plaintiff in the demand letter and that this is the reason why the plaintiff never exhibited any documentation regarding the amount that was paid to the defendant. The defendant then went on to aver that much as he agreed to the fact that the plaintiffs were entitled to 15% collection fees, he was of the view that the same should not have been claimed from him

but rather from the Attorney General because they were the defendants.

The defendant then went on to state that he was ready to pay the plaintiff a deposit even though in his view the plaintiffs failed to collect his money. In this regard the defendant informed the court that he felt that getting his money from the Ministry of Education was a combined effort between him and the plaintiffs. The defendant further contended that he was prepared to pay the plaintiffs any other consideration but not the collection charges. It was thus the defendant prayer that the plaintiffs claim should be thrown out for the plaintiff to sue the Attorney General for the collection charges.

From the above facts, it is quite clear that the defendant does not deny the fact that he owes the plaintiff money for the work that the latter did for him. The only contention the defendant is making is as regards the amount, which he believes should less than K604, 132. 20.

Order 62/15/1 of the Rules of the Supreme Court preserves the freedom of the client and the solicitor to make whatever agreement they may desire for the supply of the solicitors services. In England and Wales this rule is subject to the provisions of the Solicitors Act of 1974. In Malawi however this will be subject to the Legal Education and Legal Practitioners Act, in particular the Legal Practitioners (Scale and Minimum Charges) Rules.

In this instant there was an agreement between the plaintiff and the defendant that the former's remuneration would be 15% of the amount claimed. Of course collection costs are fixed by Statute so it cannot be really said that the parties did agree in that respect. Rather the agreement was in the sense that the collection fees would be sufficient remuneration for the plaintiff's services. The question thus becomes when does collection fees become payable? Under Table 6 of the Scales and Minimum Charges, it does say that solicitor and own client charge on collecting moneys is to be charged on receipt

of the moneys. There is also a proviso which states that where proceedings are commenced, there shall be additional charge for party and party costs. The proviso also states that the 15% costs shall be recoverable from the debtor whether proceedings are commenced or not and that where proceedings are commenced, it shall be recoverable as part of the judgment debt.

In this instance, as earlier observed, it is not clear how much money was collected by the defendant from Ministry of Education. Indeed the defendant himself was not forthcoming as to how much money he got. The defendant simply told the court that he got less money that what he had asked the plaintiff to demand from the Attorney General and that because of this he could not pay what he had agreed with the plaintiff. In any case he considered the collection of the money a joint effort because at the time that he was collecting the money he had withdrawn the instructions he had given to the plaintiffs and that the plaintiff were no longer acting for him. This then raises the question as to whether the defendant would have been entitled to collection fees in terms of Order 62 rule 18 of the Rules of the Supreme Court, as a litigant in person. In such an instance then it would pertinent for the defendant to show to the court the amount of work that he did so that the same can be apportioned in terms of percentage. These in my view are matters of evidence and cannot be summarily tried.

To be entitled to summary judgment under Order 14 of the Rules of the Supreme Court, the plaintiff must prove his/her claim clearly and the defendant must be unable to set a bona fide defence or raise an issue which ought to be tried (see ***Roberts v Plant*** [1895] 1 QB 597). Indeed Jessel, M.R did state in ***Anglo-Italian Bank v Wells*** [1878] did state as follows:-

> *"thus where a judge is satisfied that not only is there no defence, but no fairy arguable point on behalf of the defendant, it his duty to give judgment for the plaintiff."*

It is the view of this court that this matter does raise some fairly arguable points. In particular there is the issue as to how much the plaintiff's will be entitled to for the services that they provided to the accused person. In relation to this there would also be a question as to whether the plaintiff can claim collection costs or whether this is a case where they will have to come up with a Bill of Costs for the amount of work that they did for the defendant. Indeed there would be questions as to what extent did the plaintiff's letter of demand influence the decision of the Attorney General to settle the defendants claim. Indeed it could also be worthwhile for the court to consider why a decision was made by the plaintiff that the money should be paid directly to the defendant when the plaintiffs say they were still acting for the defendant.

Having considered all these then, it is the view of this court that the plaintiffs' application for summary judgment cannot succeed and is accordingly dismissed. Costs will be in the cause.

Made in Chambers this……day of……2004

K.T. MANDA
SENIOR DEPUTY REGISTRAR