IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 3567 OF 2000

BETWEEN:

ZOMBA MUNICIPAL ASSEMBLY..... PLAINTIFF

-and-

COUNCIL OF THE UNIVERSITY OF MALAWI....DEFENDANT

CORAM: THE HON. MR. JUSTICE F.E. KAPANDA

Mr. Mwala of Counsel for the Plaintiff

Dr. Mtambo of Counsel for the Defendant

Heard on: 9th October 2003

Decided: 12th December 2003

Editorial Note:

In this action the court has been invited to determine the the following issues:-

1. Whether the plaintiff had legal authority to demand payment of municipal rates during the period when the Assemblies were dissolved.

2. Whether the buildings constituting Chancellor College are assessable property.

3. Whether the defendant is the owner of the buildings forming part of Chancellor College and therefore liable to pay municipal rates.

4. Whether the defendant has been in default and in arrears in the payment of the assessed minicipal rates, in terms of the Local Government Act, No. 42 of 1998.

5. Whether interest is claimable on the said municipal rates.

6. Whether the defendant is liable to pay legal practitioner's collection costs.

JUDGMENT

Kapanda, J:

Introduction

The plaintiff is one of these local government authorities established under the Local Government Act,[1] 42 of 1998. It is claiming from the defendant the sum of MK5, 662,388.71 being what it is alleging is arrears of municipal rates. The plaintiff is also claiming interest on the said arrears of municipal rates. There is also a demand for the payment of the sum of MK1,091,229.96. This sum, the claimant says, represents legal practitioner's collection costs.

The defendant, a statutory corporation established under the University of Malawi Act,[2] denies being liable to pay the sums of money mentioned above. In point of fact the defendant argues that the buildings on which one of its constituent colleges stand does not belong to it. For this reason, so the contention goes, it can not be made liable to pay the said municipal rates.

HISTORICAL BACKGROUND

Sometime in 1974 the Government of the Republic of Malawi built and handed over property, situated in Zomba, to the defendant.[3] The property in question comprise Chancellor College Campus, a constituent college of the University of Malawi. The plaintiff had been levying rates on the property and the defendant had been paying municipal rates. It would appear that the levying of rates by the plaintiff and payment of same by the defendant started when the property was allegedly handed over to the defendant. This state of affairs continued until sometime in 1996 when the defendant stopped paying the said municipal rates.

The plaintiff's complaint and the answer by the Defendant

The claim by the plaintiff and the defendant's response thereto are to be discerned from the pleadings that were exchanged between the parties herein. This court does not wish to set out in full the said pleadings. It is sufficient for the purposes of this judgment to give a sketch of what each party is contending. Further, it must be noted that it was wrong on part of the plaintiff to plead that the claim against the defendant is made pursuant to Section 144 to the Local Government (Urban Areas) Act (Cap 22:01) of the Laws of Malawi. The said Local Government (Urban Areas) Act was repealed.[4] In its place there is now the Local Government Act (No. 42 of 1998 which came into force on 8th March 1999.[5] These proceedings were commenced on 17th November 2000. This was after the new Act came into force. For this reason, the pleading should have indicated that the claim is made pursuant to the Local Government Act (No. 42 of 1998). The court is of the view that this error did not occasion any injustice on the part of the defendant. This is demonstrated by the fact that the defendant's arguments are premised on the provisions of the Local Government Act (No. 42 of 1998).

Plaintiff's claim

The claimant has alleged that the defendant is the owner of the rateable property forming part of Chancellor college. As such owner of the property in question the defendant is liable to pay municipal rates that are now in arrears since 1996. The arrears of municipal rates the plaintiff wants to collect from the defendant are in the sum of MK5,662,388.71. The plaintiff claims interest on the said arrears. Furthermore, the claimant wants the defendant to pay it legal practitioner's cost in the sum of MK1,091,229.96.

Defendant's response

The defendant contends that it does not own the buildings the subject matter of the action by the plaintiff. It is further alleged by the defendant that the title in the said

buildings remain with the Government of Malawi.

The defendant goes on to aver that it is not liable to pay the plaintiff either the said sum of MK5,662,388.71 for municipal rates or interest on the said municipal rates or the said legal collection costs. Further, the defendant alleges that the claimant has not legal authority to demand from it the municipal rates in question.

In summary, the defendant has joined issues with the plaintiff on its claim filed with the court on 17th November 2000.

Issues for Determination

From the pleadings summarised above the issues that have arisen and require this court's determination are as follows:-

(a) whether or not the plaintiff has legal authority to demand payment of the municipal rates in question.

(b) whether or not the buildings constituting Chancellor College campus are assessable property.

(c) whether or not the defendant is the owner of the buildings forming part of Chancellor College and therefore liable to pay the municipal rates assessed for the period in question.

(d) whether or not the defendant has been in default and in arrears in the payment of the municipal rates assessed at MK5,662,388.71.

(e) whether or not interest is payable on the said assessed municipal rates.

(f) whether or not the defendant is liable to pay legal practitioner's collection costs.

The court has set out seriatim the issues for determination in this action. This, however, does not mean that this court will determine these issues in the order as they are appearing above. It is sufficient to mention though that at the end of this judgment this court will deal with the questions that require determination in this matter.

The court will deal with all the issues for determination later in this judgment. For now let me proceed to say something about the evidence that was offered by the litigants herein.

The Evidence

The parties offered written witness statements in support of their respective contentions. There were two written witness statements received from the plaintiff and one such statement from the defendant. There was one witness statement done by Mr Stanley Chilemba an Assistant Director of Finance of the Zomba Municipal Assembly. The other one was from Mr Griffin Rijons Phashani Baloyi of the Ministry of Lands, Physical Planning and Surveys. The defendant's witness statement was from Mr Yaphet Malunga. He is the defendant's Finance Officer.

These two witnesses availed themselves before this court for cross-examination. They also tendered some documents as part of their testimony. Indeed, the evidence offered by these two witnesses was in a form of written witness statements, oral testimony and exhibits.

Facts

I will now set out the facts that emerged from the testimony of these witnesses. The court shall, as far as practicable, set out the said facts in a chorological order. Here are the pertinent facts in this matter.

Payment of rates: 1974-96

As stated earlier on the Government of the Republic of Malawi built and handed over property to the defendant. The property in question are the buildings that comprise the Chancellor College and they are in the Municipality of Zomba. It is observed that there are no documents to show that the said land comprising of Chancellor College belongs to the defendant. This notwithstanding the defendant was paying rates on the said property forming part of Chancellor College as well as other buildings. It has not been disputed that the plaintiff was levying rates and the defendant was paying rates on the property in question. This seems to have been the position from the time the property was allegedly handed over to the defendant. We shall, therefore, assume that the payment started in 1974 when the defendant was given the property in question. It is in evidence that the defendant stopped paying the rates in 1996.

Stoppage and Default of payment of rates: 1996-99

The defendant does not dispute the fact it stopped paying municipal rates in 1996. This state of affairs continued up to the year 2000.

During hearing the defendant purported to show that it defaulted in the payment of rates because during the period 1996-2000 the Municipality Assembly had no councillors that would have authorised collection of municipal rates. The plaintiff maintained that it had legal authority to collect the rates since the secretariat was still in existence notwithstanding the fact that there were no councillors.

The issue of councillors is not the only ground upon which the defendant sought to bas its decision to stop paying rates. This comes out clearly from the defendant's letter of 17th September 1999 which it wrote to the plaintiff.[6] The defendant advised the plaintiff that it had stopped paying municipal rates because it had no title to the property in issue. Thus, so the contention went, the payment of municipal rates were made in error for the buildings in question belong to the Malawi government.

The plaintiff sought the opinion of Government on what the defendant regarding its reasons for non-payment of municipal rates.

Government opinion

The Ministry of Lands, Housing, Physical Planning and Surveys denied that the Government of the Republic of Malawi owns the building and land comprising Chancellor College. Indeed, in its letter of 29th June 2000, the Ministry of Lands, Housing, Physical Planning and Surveys advised both parties herein that the properties occupied by Chancellor College were absolutely handed over to the University of Malawi even though there has not been legal transfer of the land on which Chancellor College was built. It was further said that the delay in the legal conveyance of the land has been due to backlog of work within the Ministry of Lands, Housing, Physical Planning and Surveys. The Ministry went on to advise that as proof of the fact that the land and buildings do not belong to Government the defendant does not pay rent or ground rates.

The arrears

Despite the intervention and opinion of the Ministry the defendant has continued to default in its payment of the rates. The plaintiff on the other hand, continued to issue invoices to the defendant in respect of the rates. As at 31st October 2000 the municipal

rates had accumulated to MK5,662,388.71 and they remain unpaid to this day.

Resumption of payment of rates

The defendant has since partially changed its stance on the issue of payment of municipal rates. It advised the plaintiff of its intention to resume payment of municipal rates but that it would not pay the arrears of rates. Actually, on 7th November 2000 the defendant wrote the plaintiff and advised that it would start paying rates but only those rates as due from November 2000.[7]

This did not go well with the plaintiff. It then, on 17th November 2000, commenced these legal proceedings.

The above are the relevant facts that this court found had emerged from the testimony of the witnesses on record. The court now turns to deal with the issues for consideration in this matter.[8]

Consideration of the issues

Constitutional and statutory framework: Legal authority for demanding payment of municipal rates

The defendant has submitted in argument that the plaintiff had no mandate to levy municipal rates in question. It bases this argument on the fact that the local government authorities were dissolved in 1995 and remained dissolved until they were reinstated in 1999. The defendant further contended that since there were no councillors, during the period when the said municipal rates were assessed, there was no competent authority to decide whether or not, and at what rate, municipal rates should be levied. Dr Mtambo of Counsel for the defendant sought to rely on a decision of the High Court where it was reportedly[9] held that councils, now called assemblies, had no mandate to collect or revise rates in the absence of councillors.

This court does not agree with the submission of the defendant. I will also demonstrate that the purported decision of this court in the so called Malawi Congress Party case[10] leads to an absurdity and must now be corrected.

It is well to note that every local government authority has a constitutional responsibility to deliver essential and local services to people over whom it has

jurisdiction[11]. This responsibility can only be achieved if the said local government authority is able to levy rates. To achieve this the Local Government Act has given Assemblies the authority to levy rates[12]. This authority can not, however, be delegated[13]. Further, it would appear that the statute is silent on what should happen, as regards the levying of rates, where for one reason or another there are no people to constitute an Assembly. Indeed, the same is true with the situation where Assemblies are dissolved. This creates an absurdity. Now the question that comes to mind is should there be no levying of rates where members[14] constituting an assembly are dissolved or where for one reason or another there are no councillors to form part of an Assembly? This court is of the view that this lacuna creates a situation where the obligation of a local authority to deliver services is rendered invalid if it were to be accepted that it can not levy and/or collect rates where members of an Assembly are dissolved. This is the case because local authorities do not cease to provide essential services even where there are no councillors or members[15] to constitute an Assembly. In my judgment, the constitutional and statutory duty, on the part of the Assembly, to provide essential services is a continuous one.[16] In point of fact, it is important to always remember that there is a special relationship between a local authority and a rate payer. This relationship entails that the rate payer is obliged to pay rates and that the local authority has the right to collect them and the obligation to use the proceeds for the delivery of services.

As mentioned earlier, the local authorities are obliged, under both the constitution and the Local Government Act, to provide essential services to the residents of the Assemblies. This they have to do whether the body that constitute an Assembly has been dissolved or not. Indeed, this court doubts if the legislature intended that rate payers should not pay rates when members of an Assembly are unable to constitute themselves as provided for in the Local Government Act.[17] In arriving at this decision the court was alive to the fact that any interpretation of the Local Government Act that results in invalidating the constitutional and statutory duty imposed on an Assembly to levy and collect rates is unreasonable and must be avoided. Such an interpretation would in point of fact lead to an absurdity which must be avoided at all cost. It is, therefore, imperative that in interpreting any statutory provision pertaining to the levying and collection of rates the court ought to favour an interpretation that would lead to constitutional validity. It has reasonably been possible, in my judgment, to interpret the Constitution and the Local Government Act in a way that enables the Assemblies to levy and collect rates. As stated earlier the Assemblies are obliged to continuously provide essential services to the residents of the Assemblies. The court must bear in mind the duties of the Assemblies in this regard and must interpret the provisions of the Local Government Act in a way that is consistent with the obligations of the Assemblies.

For the reasons given above this court finds and concludes that the plaintiff was legally entitled to levy and collect rates on all the immovable property in the designated areas in the Municipality of Zomba. This included the demand for the payment of municipal rates the subject matter of this action. Indeed, it is important to remember that

it is evidence that the Assembly instructed the Secretariat to collect all unpaid rates due to the Assembly including all unpaid municipal rates covering the period that councillors were not in office. This evidence, in my view, was not discredited. In the light of this finding it is not necessary to make any specific decision on the further argument regarding the legality of the rate at which the municipal rates were being levied. I am of this view because the broad principle upon which this court has found the actions of the plaintiff being legal has already been discussed. It is sufficient for the purposes of this judgment to mention only that I do not think that it was fair on the part of the defendant to raise this rate argument during submission. The pleadings did not sufficiently raise the issue of the legality of the rate at which the municipal rates were levied[18]. It is, therefore, no issue that this court should explore and make its finding.[19] Accordingly, it is not necessary for the purposes of this judgment to decide whether the rate at which the municipal rates were levied was within the law. The court will assume in favour of the plaintiff it was, regard being had to the fact that it is not an issue that arose from the pleadings that were exchanged between the parties herein.

Moreover, it will be important to mention that the amount of rates payable has its basis in the value of the property as reflected on the valuation roll.[20] Ratepayers have the right to object to the valuation of the property.[21] However, once the value has been determined and the objection procedure[22] has run its course, the determination of the precise amount of the rate liability is a matter of mechanical calculation based on the proportion of the value of the property payable as rates.[23] The Assembly is entitled to make a surcharge on any arrears of rates and the surcharge shall be calculated at four per centum per month or part thereof[24].

Is the immovable property in question assessable property?

As regards the question whether the buildings in issue are assessable property this court finds that the answer is in the affirmative. It is common cause between the parties that the buildings in issue are within the Zomba Municipal Assembly. Consequently, the buildings are assessable property.[25]

Ownership and liability for payment of rates

On the issue of ownership and liability for the payment of rates on the assessable property herein the court received two opposing submissions.

The plaintiff contended that the properties belong to the defendant although there is no title deed. This ownership, so the submission of Mr Mwala, goes, is confirmed by the letter[26] that the defendant wrote to the Chief Housing Officer dated 8th September

1990 where the defendant confirmed that the Malawi Government ceded some of its houses to the University of Malawi. Further, the plaintiff argued that the defendant became the owner of the property in issue at the time government handed over same to the former and that it is only the conveyancing that has taken time.

Dr Mtambo has contended that to the contrary the assessable property in question is not owned by the defendant but that it is merely in occupation of the premises. It is his argument that there are no title deeds issued in favour of the defendant. This, in the view of the defendant, has meant that the defendants are indisposed to legally and irrevocably dispose of an interest in the buildings forming part of Chancellor College. The defendant further submitted in argument that in light of this the defendant was never assumed ownership of the buildings. For this reason, it is argued on behalf of the defendant, it can not be legally required to pay any rates on the assessable property the subject matter of this action. In support of this contention the defendant sought to rely on the decision of this court in **J.A. Siyani vs. Blantyre City Assembly[27].** The court held that the responsibility to pay rates was that of the Applicant (J.A. Siyani) and not his tenant. Indeed, in that case[28] Justice Kumitsonyo, as he then was, said:

"I would like to make an observation before I proceed further herein that the duty of paying City rates to the respondent to the respondent rested with the applicant at all material times. It was not the responsibility of he applicant's tenant. After all ownership and title in the property was in the applicant and he was the bonafide landlord seized of the property in fee simple in possession. I am saying so because Counsel for the applicant did argue before me that the co-payment of the rates was not wholly the fault of the applicant. Counsel submitted that the applicant's tenant was partially to blame. In my judgment the lease agreement between the applicant and his Tenant was a totally different and separate transaction from the agreement between the applicant and the respondent by virtue of which city rates were to be paid by the applicant to the respondent. These two transactions must be treated separately and must never be confused--"[29]

There are a few observations that need to be made about this case. Firstly, it is important to note that the facts obtaining in the **Siyani** caseare distinguishable from the present case. The court had to determine whether as between a landlord and tenant who was liable to pay city rates. As will be seen shortly, in the matter at hand there is no landlord and tenant relationship. Moreover, it is not known if in the **Siyani** case the court was dealing with the definition of owner as used under the Local Government (Urban Areas) Act.[30] Furthermore, in **Siyani** casethe facts clearly show that the rate payer had not parted with ownership of the assessable property.

Following the observations above the **Siyani** case will not be helpful in determining who is the owner of assessable property herein. The same is true with regard to the issue

of whose responsibility it is to pay rates on the property this court is dealing with in this matter.

Turning to the instant case, it is the further contention of the defendant that the buildings belong to Government. It should, therefore, in terms of Sections 85[31] of the Local Government Act be liable for the rates payable on the buildings.

The above are the submissions that this court received on the issue of ownership. I turn to explore the issue.

As regards the issue whether the defendant owns the assessable property herein, and therefore liable for the rates payable on same, one need not look any further than the provisions of the Local Government Act,1998. Indeed, when determining this question it may be useful to set in full the relevant provisions of Sections 87 and 62 of the said Local Government Act and find out whether they shed light on who is regarded an owner of assessable property.

Section 87 of the Local Government Act provides as follows:

"(1) The person who at the date the rate becomes due is the owner of any assessable property and shall be liable for the payment of the rate---

(2) In the absence of any agreement to the contrary the owner shall be entitled to recover from the former any rate paid by or recovered from him in respect of ownership of the property by such former owner."

It will be observed from this provision that the responsibility to pay rates rests on an owner of assessable property. Further, it is the view of this court that the stipulation recognises the fact that a current owner may recover from a previous owner rates that ought to have been paid by such previous owner.

The Section discussed above does not define who is to be regarded as an owner of assessable property. You get that definition in Section 62 of the said Local Government Act,1998. The pertinent parts of the said Section 62 are in the following terms:

"For the purposes of this part (I.e. Part VII-Valuation and Rating) - 'owner' means the person, other than a mortgagor not in possessing, entitled with or without the consent of any other person to dispose of an interest in the property." (emphasis

supplied)

I must make two observations about this Section. Firstly, it should be noted that the Section does not mention title deeds. Further, it neither says that the owner must be one who has title deeds nor does it provide that the owner means a person whose name or interest is registered in the Deeds Registry. Secondly, the Section does not describe what sort of interest in the property is capable of being disposed by the person who is supposed to be liable for rates. In light of this observation we must resort to extrinsic aids to interpret the meaning of this Section. In this regard the court will have to look at the meanings of some words that have been used in the section. The words being referred to are "dispose of an interest."

The word "dispose", where not limited by context, is sufficient to extend to all acts by which a new interest (legal or equitable) in the property is effectually created.[32] As I understand it, the context in which the word "dispose" has been used has not been limited. Thus, the interest being referred in the section includes both a legal or an equitable interest.[33] Further, the word "dispose" means to sell, give in exchange, pledge or otherwise hand over.[34]

In view of the meanings discussed above, it is the understanding of this court that to dispose of an interest in the property means no more than to transfer an interest. This could be a legal or an equitable interest. In the instant case the defendant has an equitable interest which is capable of being disposed. The defendant acquired this equitable interest at the time the buildings were handed over, and ceded, to it. Indeed, the defendant will be legally entitled to acquire a formal title. It is not, therefore, surprising that the defendant has demanded and or requested that it be given title deeds.

Is the land herein Government land?

As regards the contention that the immovable property herein belongs to Government, the court finds that that argument does not have support at law. Put simply, this court finds and concludes that this land can not be government land. The position at law is that Government land means all land which is occupied, used or acquired by the Government and any other land that reverts to Government.[35] As I see it, there is no evidence to suggest that the land in question is either occupied or used by Government. If anything it is a fact that the land is occupied and used by a constituent college of the defendant. Further, there is no material presented before this court to demonstrate that the land has since reverted to Government. Indeed, there is no evidence pointing to the fact that having disposed of this land in issue to the defendant the Government made another disposition in connection with this land. In point of fact, this court doubts that Government would do that unless if it is to create a legal interest. In my view it is most likely than not that that legal interest would be in favour of the defendant which has an equitable title to the lands in question. In any event, from the letter written by the

defendant to the Chief Housing Officer, Government had ceded some land to the defendant.

The letter and its implications

As has already been mentioned, in its letter[36] to the Chief Housing Officer the defendant alluded to the fact that some of the land belonging to Government were ceded to it. The defendant was complaining that the Malawi Housing Corporation had converted or attempted to convert part of its property. In order to secure its equitable interest in the property it then requested that it be given some documentation with a view to having some title deeds.

Surprisingly, when the issue of payment of rates is raised the defendant wants to pretend that it does not own the property ceded to it by the Government. It then wants to hide under the provisions of the Local Government Act and thereby avoid paying rates. It wants to attempt to avoid paying the rates by resorting to the literal meaning of owner as set out in Section 62 of the said Local Government Act. This amounts to abuse of statutory provisions. The court must not allow this to happen.

The defendant is well advised to pursue the issue of title deeds and get them. If it wants the assistance of the court it may pursue that avenue. It must not pursue the issue of title deeds but at the same time want to evade payment of rates. The defendant will not be allowed to blow hot and cold at the same time. Further, I wish to observe that if the ownership argument, advanced by the defendant, is accepted then the end result will be an absurdity. Beneficiaries of essential services in Assemblies will avoid, indeed evade, payment of rates on the pretext that they have no title deeds. As discussed above, this court is enjoined to avoid an interpretation of a statutory provision that leads to an absurdity or an interpretation that renders duties or obligations nugatory.

Further, it must be remembered that the defendant acknowledges in its letter to the Chief Housing Officer that the Malawi Government ceded some of its houses to the University of Malawi. The essence of this letter is that the defendant is accepting that Government gave up possession of some houses and transferred same to the defendant. Indeed, the letter clearly demonstrates that the defendant is the owner of the houses that were ceded to it but that it has no title deeds for the said houses.

Now is possession of a title deed the only way one can prove that he/she is an owner of property or an interest in a property. In my judgment ownership may well be established by proof of possession. Title deeds are only prima facie proof of ownership. Indeed, a title deed is merely a document that evidences apparent ownership but does not necessarily signify full and complete title or beneficial interest.

There is material before this court to demonstrate that Government ceded some of its houses, and built houses which it handed over, to the defendant. Ownership in the houses is with the defendant who has possession of same and not Government. The property can not, therefore, be disposed by any other person but the defendant. For this reason, it is the defendant who must be responsible for the payment of the municipal rates on those properties. It is so found and concluded.

The Exemption Argument

The defendant has submitted that even if it were to be assumed that it owns the buildings in question some of them are exempted from municipal rates in terms of Section 83(1) as read with Section 83(2) of the Local Government Act,1998. The buildings, it says, exempted are those staff houses that have been converted into off-campus student's lodgings due to ever increasing student population.

However, the defendant never pleaded this exemption in respect of some buildings that had allegedly been converted from staff houses into the said off-campus lodgings or offices. This court was not invited to decide on an issue concerning exemption. The pleadings bear testimony to this observation. In light of this fact, that the issue of exemption does not arise from the pleadings, nothing turns on the exemption argument. I consider the issue of exemption no further. Put simply it is not necessary for this court to make a specific finding of fact on whether the exemption provided for in subsections (1)(e)[37] and (2)[38] of Section 83 of the said Local Government Act. It is concluded thus since the pleadings do not raise the issue of exemption. The court can not, therefore, be allowed to give its judgment on facts not pleaded.[39]

It will suffice though to put it here that, although some evidence was offered to the effect that some staff houses have been converted, no cogent evidence was adduced regarding how many such houses have been so converted. The defendant could only say about three staff houses that have been converted into off-campus student's lodgings at Chirunga. There is no evidence of conversion into offices. Further, and in any event, the defendant ought to have raised the issue of exemption before the expiry of twenty-eight(28) days from the first day on which the rates became payable.[40] The defendant neither complied with the said Section 76 of the Local Government Act (No. 42 of 1998 nor the now repealed Local Government (Urban Areas) Act. Moreover, even if the exemption argument was considered and accepted by the Assembly that would not entail that the defendant should not pay the rates levied on the buildings that were allegedly converted. The municipal rates levied on these buildings would still have been paid. The rates would have been based on the valuation appearing in the valuation roll or supplementary valuation roll.[41] This would of course have been subject to the outcome of an appeal or objection raised in respect of the property the subject matter of the appeal or objection.[42] In the event of prevailing in the appeal, or objection, the defendant

would have gotten a refund of the rates paid on the exempted property.

For the reasons given above, the exemption argument is dismissed.

The claim for interest

The court has noted that there is a claim for interest on the arrears of municipal rates that are due from the defendant. In the writ of summons the rate of interest claimed is at current bank lending rate. The claim for interest at the said bank lending rate is not repeated in the statement of claim. In the statement of claim the plaintiff is merely claiming interest on the said arrears of municipal rates. It is trite law that a claim is considered abandoned when it is indorsed in the writ of summons but not repealed in the statement of claim.[43] The court, therefore, finds that the claim for interest at the said bank lending rate has been abandoned. It will be assumed, for the purposes of this judgment, that the plaintiff wants interest at no particular rate.

Further, the plaintiff has argued that it is entitled to be awarded interest on the arrears of municipal rates because same has been withheld by the defendant and the plaintiff has resorted to litigation to recover the said rates.

The defendant's argument on the question of interest is simple. It is to the effect that since the defendant is not liable to for municipal rates then the issue of interest does not arise.

This court finds that the interest claimed must not be awarded to the plaintiff. The reason for this finding is not based on the argument of the defendant but rather because the claim for interest was not properly pleaded.

It is the finding of this court that the claim for interest is not properly pleaded because it only appears in the prayer in the statement of claim. Further, the defendant has not pleaded, in the main body of its statement of claim, the ground or basis or the rate at which it is claimed. This is not in keeping with the rule as records pleading interest.[44]

The plaintiff has not complied with the said Order 18/8/9 (-21) of the rules of the Supreme Court. It can not, therefore, succeed on its claim for interest on the outstanding municipal rates.

Legal collection costs

As stated earlier the plaintiff is demanding that the defendant should be adjudged to

pay the sum of MK1,091,229.96 being legal practitioner's collection costs.

The defendant has submitted in argument that it is not liable to pay any legal practitioner's costs. It is the view of the defendant that in terms of the recent amendments[45] the legal practitioner's collection costs are payable by the plaintiff to its lawyers. I do not agree with this contention by the defendant.

However, this court accepts the argument by the plaintiff to the effect that the amendment contained in Government Notice No. 6 of 2002 does not apply to the instant case. The amendment came into effect on 13th March 2002. The present proceedings were commenced on 17th November 2000.

It is trite law that in the absence of a provision to the contrary proceedings began under an enactment which is later repealed and replaced will not be affected by the repeal.[46] it is obvious that the amendment the defendant is talking about came into effect after the plaintiff had commenced the proceedings against it. Further, it is to be observed that the costs pleaded were clearly made pursuant to an earlier amendment[47] that came into effect on 24th December 1999. The recent amendment of 2002 is, therefore, not applicable to the case before this court.[48]

The plaintiff will, therefore, be entitled to the legal practitioner's collection costs claimed. The amount of legal practitioner's collection charges, at the rate of 15% provided for in the rules, should be MK 849,358.30 and not the sum of MK 1,091,229.96 claimed by the plaintiff.

Conclusion

The plaintiff has succeeded on all its claims except the one in relation to the claim for interest. It is so adjudged. As regards costs it is ordered that as regards the cost of, and occasioned in, these proceedings the plaintiff will be awarded two-thirds of the costs. It will not get full costs because, as seen above, it did not wholly succeed on its claims against the defendant.

Pronounced in open Court this 12th day of December 2003 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE

[1] Section 4 as read with first schedule of Act No. 42 of 1998.

[2] Section 3 as read with Section 8 of Cap. 30:02 of the Laws of Malawi.

[3] It is to be noted that there are no documents to show that the property was handed over to the defendant and when exactly the handover was done. The defendant does not deny though that government ceded land to it. More on this will be discussed later in this judgment.

[4] Section 114(1) of Local Government Act (No. 42 of 1998.

[5] See Government Notice No. 8 of 1999.

[6] The letter was in the following terms: Dear SirI have been instructed by the University of Malawi (hereinafter referred to as my as my client) advised you that you have for more than twenty years since the University moved to Zomba you collected the City Rates from my client amounting to over MK6,8 million.The buildings housing the University of Malawi belonged to the Government who hold the title deeds and not my clients.Accordingly, my clients not being the owners of the buildings had no obligation to pay City Rates.The purpose of this letter is to demand from you a refund of the City Rates paid to you under mistake of fact and to advise you that from now onwards my client will not pay any more City Rates to yourselves.THEREFORE TAKE NOTICE that if I do not receive an admission that you refund monies wrongly paid to you legal action will be taken against you without further recourse to you.Your faithfully(Signed)Dr Michael Mtambo…….”

[7] The relevant parts of the said letter of 7th November from the defendant’s Counsel are as follows: “7th November 2000Wilson and MorganP.O. Box 9BlantyreDear SirRE:

CITY RATES, UNIVERSITY OF MALAWIReference is made to your letter dated 31st October 2000 addressed to the University of Malawi (hereinafter referred to as our clients) in respect of the claim for MK5,662,388.71, collection costs of MK1,091,229.96 e.t.c.My clients' position is that your clients have no legal basis to claim rates from our clients. Should you be minded to commence legal action against our clients, please forward any court process to the undersigned for appropriate action.However, as gesture of goodwill to enable your clients to meet their budgetary requirements, we are by copy of this letter advising our clients to start paying city rates accruing from the date of this letter.Yours faithfully(Signed)DR M.C. MTAMBO, LAW FIRMCC: Clients."

[8] The issues have already been set out in the Editorial to this judgment.

[9] No copy of the decision was made available to this Court.

[10] Ibid.

[11] Section 146(2)(d) of the Republic of Malawi Constitution.

[12] Section 79(1) and Section 44(1) read with the Third Schedule of the Local Government Act, No. 42 of 1998.

[13] Section 15(1)(c) of the Local Government Act.

[14] Section 5(1) of the Local Government Act, No. 42 of 1998 sets out the people who will constitute an Assembly.

[15] See Note 11 above.

[16] Section 6(c)(d) read with Second Schedule of the Local Government Act, No. 42 of 1998. Actually, the local authorities must ensure that money is raised as speedily as possible because the local authorities uses it to fulfil its constitutional and statutory obligations in relation to delivery of services.

[17] Section 5(1) of Act No. 42 of 1998.

[18] In paragraph 5 of its statement of defence the defendant pleaded that: "The defendant will at the trial contend that the plaintiff had no legal authority to demand the city rates in question from the defendant." Thus, the issue arising from this allegation of fact can not in all fairness be about the rate at which the rates were levied but rather the legality of the demand.

[19] Fred Nseula vs. The Attorney-General and Malawi Congress Party MSCA Civil Appeal No. 32 of 1997 [Supreme Court decision of 15th March 1999] unreported

[20] Section 66(3) and is particular 79(2) of the Local Government Act, No. 42 of 1998.

[21] Section 76 of the Local Government Act.

[22] Ibid, See Note above.

[23] Section 64 and 79 of the Local Government Act, No. 42 of 1998. There is no

provision that says the member of the Assembly are the ones to fix the rate at which rates should be levied.

[24] Section 86(2) and (3) of the Local Government Act, No. 42 of 1998.

[25] Section 63 as read with First Schedule of the Local Government Act, No. 42 of 1998.

[26] The relevant parts of the said letter of 8th September 1990 were in the following terms: "Dear Sir**HOUSES CEDED TO UNIVERSITY OF MALAWI BY GOVERNMENT**As you may probably be aware Sir, that at the time Government was moving its seat from Zomba to Lilongwe, Government ceded some of its houses to University of Malawi, to facilitate the move of the University of Malawi from Chichiri Blantyre, to Zomba. By misfortune, a confusion has arisen whereby Malawi Housing Corporation have started to mark some of the house belonging to the University of Malawi with Malawi Housing Corporation numbers, for example CHEJUSU 1, 2, and 3. Plot Nos 5231/5232 and 5301. We are therefore seeking to be given a copy of the official hand-over document which we do not have. Also in the same vein we would like to use the document for "Conveyance" purposes, so that we can be able to secure "Title Deeds" for University of Malawi properties in Zomba.In the circumstances, the undersigned proposes to call at your offices in Lilongwe for a discussion at 9.00 hours on Thursday 16th September, 1999. If you have no objection to this proposal, Sir, kindly confirm.I am Sir,Yours faithfully, (Signed)W.J. Chilunga**For: UNIVERSITY REGISTRAR**WJC/dc."

[27] Civil Cause No. 58 of 1996 [High Court decision of 23rd July 1996] unreported.

[28] Ibid.

[29] Ibid, at page 2 of the Order of the court.

[30] Chapter 22:01 of the Laws of Malawi. This Act is now repealed.

[31] Section 85 provides: "The Government shall pay to the Assembly fifty per centum of the amount of rates on its assessable property."

[32] Roland Burrows, Words and Phrases Judicially Defined. Vol. 2 (Butterworth, London 1943) p. 107.

[33] John B. Saunders, Words and Phrases Legally Defined 2nd ed. (Butterworth, London (1969) p. 87.

[34] Bryan A. Garner, Black's Law Dictionary 7th ed. (West Group, 1999) p. 816 states that "an equitable interest means an interest held by virtual of an equitable title and at page 1493 has defined an equitable title as a title that indicates a beneficial interest in property and that gives the holder the right to acquire a formal legal title.

[35] Section 2 of Land Act (Cap 57:01) of the Laws of Malawi.

[36]The author of this letter did not testify before this court. We will never know what came out of the meeting with the Chief Housing Officer

[37] Section (1)(e) stipulates that: “The Assembly shall remit in full the payment of rates on land and improvements owned by an educational institution.

[38] Section 83(2) provides that: This section shall not apply to any separate buildings used as residence for staff or use of any premises or art thereof for profit or as such other premises as the Minister may, by notice in the Gazette, specify.

[39]**Kharaj vs. Khani** (H-C) ACR Mal Vol. 1 381; Super/Rade House vs. Macomb (MSCA) 10 MLR 89.

[40] Section 76 of the Local Government Act No. 42 of 1998 which states that: Quote the section” or Section 129 of the repealed Local Government (Urban Areas) Act which provided that “Quote section.”

[41] Section 78 of the Local Government Act which states that: “The rates levied upon a property in respect of which an objection or appeal has been lodged shall be payable according to the valuation appearing in the valuation roll or supplementary valuation roll pending the determination of the objection or appeal.”

[42] Ibid.

[43] Nikawane Enterprise Ltd vs. Mhoni [1991]14 MLR 395 (HC).

[44] Note 21 of Order 18/8/9 of the Rules of the Supreme Court 1995 ed. States that: “A claim for interest must be specifically pleaded-- If the claim for interest is not pleaded, the court will not award the plaintiff any interest-- The claim for interest must be pleaded in the body of the pleading, and not only in the prayer, though it should be repeated in the prayer it must identify precisely the ground or basis
on which it is claimed, and whenever possible the date from which and the rate at which interest is being claimed--- if the interest is claimed under another statute--- the pleading should specifically identify the statute or statutory provisions with the rate at which and the period for which interest is being claimed. The claim for interest in a pleading--- is a condition precedent for its award---”

[45] Legal Practitioners (Scale and Minimum Charges)(Amendment) Rules, 2002.

[46] R vs. Patel [1964-66]ALR 178.

[47] Legal Practitioners (Scale and Minimum Charges) (Amendment) Rules, 1999 G.N. 49 of 1999.

[48] Section 14(1)(a) of the General Interpretation Act (Cap 1:01) of the Laws of Malawi.