IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 96 OF 2006

BETWEEN:

DEEPS ENTERPRISES.....
.....PLAINTIFF

and

THE REGISTERED TRUSTEES OF THE
ARCHDIOCESE OF
BLANTYRE.....DEFENDANT

CORAM: **THE HON. MR JUSTICE F.E. KAPANDA**
Msungama, of Counsel for the Plaintiff
Gulumba, of Counsel for the Defendant
Matekenya, Court Clerk

Place and Date of Hearing: Blantyre 2nd March 2006

Date of Ruling : 24th May 2006

RULING

Kapanda, J:

Introduction

The case at hand involves the application of some provisions of the Companies Act. As a matter of fact, through an Originating Summons, the Plaintiff is applying for an Order that the Defendant (The Registered Trustees of the Archdiocese of Blantyre) is severally liable, under the provisions of Section 42(1) of the Companies Act (Cap 46:03) of the Laws of Malawi, for the payment of a debt owed by a company in which the said Defendant is a shareholder. The amount of debt involved is in the sum of MK5, 980, 535. The Plaintiff further wants the Defendant adjudged liable to pay collection charges in the sum of MK598, 053 with interest at the current bank lending rate from the time the said sum of MK5, 980, 535 and the collection charges were due to the date of payment.

Background facts

The Plaintiff as a creditor

It is not in dispute that the Plaintiff is owed money for goods sold and supplied. The said good were supplied to a company called Montfort Press and Popular Publications Limited. Further, there is no denying of the fact that the said goods were supplied during the period January 2004 to May 2005. Indeed, on 10th May 2004 Montfort Press and Popular Publications Limited acknowledged owing the Plaintiff sums of money. Furthermore, the Defendant's letter to the Plaintiff, dated 15th July is more revealing of the indebtedness of Montfort Press and Popular Publications Limited. The said letter was in the following terms:-

"15th July 2005.

Mr P.S. Nyadawad
Deeps Enterprises
P.O. Box 31674
Chichiri
BLANTYRE 3.

Fax: 265 1 643 681

Dear Sir,

Montfort Press & Popular Publications Limited

Reference is made to your letter dated 30th May 2005 to Montfort Press & Popular Publications Limited in which you submitted a demand for settlement of a long outstanding debt owed to you in the amount of MK5,688,730.00. We are writing to you in our capacity as shareholders of the company on a strategy we have adopted to address this matter.

In order to resolve this and other financial problems facing the company as well as strategy matters, the Archdiocese has commissioned a task force to address the issues. The task force comprises:

Monsignor Montfort Stima
Father Lawrence Simbota
Father Enoch Kanjira
Mrs Agnes Valera
Mr Ken Mthuzi
Mrs Maria B Msiska
Mr Lucius C K Mandala

These people, who belong to our congregation and are conversant with financial issues, are mandated by the Archdiocese to discuss future payment modalities on the company's indebtedness to yourselves. The members will contact you directly for an appointment to set the ball rolling.

May I record my debt of gratitude on your patience and high degree of understanding so far and hope for a continued mutually beneficial relationship with you.

Yours faithfully

T.G. Ziyaye
Archbishop of Blantyre

Copy to: Members of the task force."

As it were, there was an unequivocal admission that Montfort Press and Popular Publications Limited (hereinafter referred was to as

the Company) owed the Plaintiff sums of money for goods supplied.

The involvement of the Defendant in Montfort Press and Popular Publications Limited

Further, in the said letter of 15th July 2005 the Defendant admitted that it is a shareholder of Montfort Press and Popular Publications Limited. The said Montfort Press and Popular Publications Limited is a limited liability company incorporated on 31st July 1996 with a share capital of 100,000 shares of MK1.00 each. At time of incorporation there were two allotted shares and shareholders (members) of the company viz Bother Johannes Andreas Hermans and Father Joseph Munyapa but the shareholding eventually changed as is reflected in the company's, as well as last, Annual Return filed with the Registrar of companies. In the return of the company made of up to 17th August 1992 the shareholders were the Registered Trustees of the Archdiocese of Blantyre with 99,999 shares and the General Manager with one (1) share. Moreover, according to the annual return made up to 31st March 2002 and filed with the Registrar of companies there were still two shareholders (members) of the company, viz The Registered Trustees of the Archdiocese of Blantyre, of P.O. Box 385 Blantyre with 99,999 shares and the other shareholder is indicated and/or described as The General Manager of P.O. Box 592 Limbe with one share.

Attempts to settle debt on behalf of the Company

The Defendant, through its letter of 15th July 2005, appears to have decided to help in the settlement of the debt, the subject-matter of this action. Indeed, in the said letter of 15th July 2005, the Defendant wrote the Plaintiff stating that as shareholders in the Company it had established a task force to address the issues relating to the said indebtedness of the company including the sums of money

owed to the Plaintiff. The said task force actually wrote the Plaintiff indicating that it was putting in place measures for settlement of the debt the company owed the Plaintiff. The Chairman of the task force wrote the Plaintiff thus:-

"5th September 2005

Mr Yadawad
Deeps Enterprises

P.O. Box 31674

Chichiri

BLANTYRE 3

Dear Mr Yadawad

Montfort Press & Popular Publications Limited
Reference is made to our previous meetings and the telephone conversation (Yadawad/Mandala) of last Friday 2nd September 2005. You will recall that we had promised to give you progress reports as one of our major creditors as we go along so that you can appreciate the steps we are taking towards resolving the indebtedness problem that we have with you.

In order to ensure long-term sustainability of the company, the taskforce has gone to an advanced stage in negotiating with a technical partner and financial institutions on the following:

a) Refinancing of existing trade and non-trade creditors;
b) Arrangement of working capital; and
c) Refurbishment and replacement of printing machinery and equipment

At the meantime, one of the major machines has already been repaired and some have been shipped to South Africa for refurbishment. Working capital in the form of material inputs is also continuously being arranged. Financial institutions have indicated willingness to provide the requisite financing that is going to go towards creditors including you and await submission of a business plan, which we are in the process of preparing. In order to improve cash flow, we have engaged a legal firm to assist in debt collection and, right now, reconciliations are being made so that action can start almost immediately.

I would like to reiterate that we are taking these issues very seriously and at the same time getting the goodwill that we were looking for from all quarters.

To this end, the taskforce is aware, at least from your actions, that you would want the problem resolved as soon as possible and that our indebtedness to you has made you lose interest in Montfort Press as trading partner. We will work hard to ensure that we resolve the issue. It would be appropriate to give the task force a chance knowing very well that, although the members are new to Montfort operations, they are trying hard to quickly resolve the matters. You would do us a favour, therefore, if you stopped phoning shareholders such as His Grace The Archbishop, or indeed any of the members of the clergy on the company's indebtedness with you. The task force has got the full mandate to respond to any of your queries. In addition, the assertion you made to the Archbishop that the task force is not helping you is rather unfair. Where we can indeed not help you is to give you post-dated cheques (as requested) because it is against good financial management practice. Business etiquette has it that you work on trust and that's what we would want to develop with you.

I hope the above gives a brief position of where we stand now and hope that the current problem will be over very soon. Should you seek clarifications, please do not hesitate to contact us.

Yours sincerely

Lucius C K Mandala
CHAIRMAN"

The above letter was followed with yet another one dated 16th September 2005 the contents of which were to the effect that the whole debt would be liquidated by the 30th of November 2005. The said letter was as follows:

"16th September 2005

Deeps Enterprises
P O Box 31674
Chichiri
Blantyre

Attention: **Mr Yadawad**

Dear Mr Yadawad

MONTFORT PRESS INDEBTNESS TO DEEPS ENTERPRISES
K5,6000,000

Reference is made to our discussion of last week during which we agreed to liquidate the above amount as follows:

K2 million	-	by 30th September 2005
K1.8 million	-	by 31st October 2005
K1.8 million	-	by 30th November 2005

Please, find enclosed our cheque of K350,000 being part settlement of the first instalment.

Yours faithfully

LUCIUS C K MANDALA
CHAIRMAN – TASKFORCE FOR TURNAROUND”

The promise to settle the said debt by the said 30th of November 2005 was never fulfilled. This is borne out by a letter, from the Chairman of the said task force established by the Defendant, and it is dated 13th October 2005. The letter was addressed to the Plaintiff and copied to the Defendant’s Financial Administrator/Vicar General. The purport of the said letter was to inform the Plaintiff that the said taskforce no longer had anything to do with the issue of the company’s indebtedness to the Plaintiff and that instead the said issue had been referred to a third party. The relevant parts of the said letter of 13th October 2005 were as follows:-

“13th October 2005

Mr Yadawad
Deeps Enterprises
P.O. Box 31674
Chichiri
BLANTYRE

Dear Mr Yadawad

Montfort Press & Popular Publications Limited

Further to our previous correspondences and meetings, the shareholders of Montfort Press & Popular Publications Limited have today signed an agreement with Skipco Malawi Limited in which the latter takes over the management of the company with immediate effect. This relationship brings with it technical and financial support to the company and enhances its revenue earning capacity. I am sure that you will be pleased to note this arrangement as our business partner.

In view of the foregoing, all matters and files relating to the indebtedness of the company to Deeps Enterprises have been transferred and handed over to the new managers to deal with them and here you being directed to transact with them accordingly. In addition any future business deals with the company need to be discussed with them too. The contact executive and the address of the new managers in both Malawi and South Africa are as follows:

Mr Skip Scheepers
Skipco Malawi Limited

Mr Skip Scheepers
Skipco International

Trading
P.O. Box 30388
Blantyre 3
Malawi
Tel: 265(0) 1676740
Fax: 265(0) 1677 434
Email: SKIPCO@AFRICA-ONLINENET

70 Tungsten Street
Melville 2109
Republic of South Africa
Tel: 27(0) 11792 0338
Fax: 27(0) 11792 9489
Email: skipco@hixnet.co.za

You will note that with this arrangement, the shareholders and the Board Task force fully delegates management responsibilities which include creditors issues to Skipco Malawi Limited so that we maintain commercial discipline and order in the company as well as observe corporate governance principles.

At this juncture, let me express my gratitude on behalf of the company for the business relationship that has and will continue to exist between Deeps Enterprises and Montfort.

I have taken the liberty to copy this communication to all those who have been involved at/(in) whatever levels and capacities in the matter between Deeps and Montfort for their necessary information. The new managers have also been favoured with a copy for their information and immediate action.

Yours faithfully
ON BEHALF OF THE TASK FORCE

LUCIUS C K MANDALA
CHAIRMAN

Copy to - The Financial Administrator/Vicar General
The Archdiocese of Blantyre
P O Box 385 Blantyre

-Mr Vales Machila
Deputy General Manager
Montfort Press & Popular Publications Limited

-All Members of the Task Force

-Skipco Malawi Limited/Skipco International Trading Malawi/South Africa"

The above is what could be described as a synopsis of the relevant factual background to this matter as was observed from the affidavits on record. It should also be stated here that I had the occasion to read the Defendant's affidavits and I wish to observe that most, if not all, of what is contained in the affidavits is what I would properly describe as matters of opinion or law. The affidavits should not have contained matter of opinion or law.[1] Indeed, the said matters

[1] Order 41 of the Rules of the Supreme Court

of law or opinion should have been left to be included in the submissions.

Arguments

Both the Plaintiff and Defendant have given their points of view in this matter. Naturally, they are not in agreement on the question of liability of the Defendant to settle the debt that was incurred by the company.

It is the Plaintiff's main contention that it commenced the action against the Defendant because at the time the debt was incurred the Defendant was the only member of the company. The Plaintiff argues that since the other shareholder was only referred to as "General Manager" then the Defendant was for all intents and purposes the only member of the company. Counsel for the Plaintiff has forcefully argued that the term "General Manager" refers to an office and not a legal entity. Thus, so the argument goes, the said General Manager is not capable of being a member of the company and/or a shareholder of the company that incurred this debt. The only shareholder is the Defendant. Accordingly, in the view of the Plaintiff, in terms of Section 42(1) of the Companies Act the Defendant has to be adjudged by this court to be severally liable to settle the debt in issue.

The Defendant's argument is that it is not true that membership in the company went below the requisite two since the first two subscribers of the shares never transferred their allotted shares to any person. Indeed, the Defendant purported to show that it is only recently that the company entered into an agreement with a third party Skipco Malawi Limited to become shareholder. The said agreement is dated 13th October 2005. Further, the Defendant is of the view that in the circumstances the Plaintiff is obliged to claim against the company directly and not against it. The short of it is that the Defendant denies that it is severally liable to liquidate the debt herein.

The above are the arguments that were advanced by the parties through their respective Counsel. There were also authorities that were cited in support of these submissions. This is now an opportune time to enumerate the issues for determination in the matter.

Issues For Determination

The issues that must be adjudicated upon by this court have arisen from the Summons and, to some extent, the submissions by

Counsel. The said questions, in my judgment, may be put thus:-

(a) Whether or not membership in the company had been reduced to less than two at the time the debt, the subject matter of this action, was incurred by the company.
(b) Whether or not the Defendant is severally liable to settle the debt on behalf of the company.
(c) How much, if any, is owed by the company to the Defendant.

As mentioned earlier, the questions that have been isolated herein arise from the Summons and the arguments of Counsel. There are other ancillary questions that will also be alluded to later in this ruling. I will not however give the court's view on the issues in dispute until after the law is set out in this ruling.

The law

As I see it, the applicable law in this matter is the one obtaining under the Companies Act of the Laws of Malawi. Indeed, Counsel addressed me at length on the provisions of the said Companies Act as they relate to the instant case. I will, therefore, proceed to cite the stipulations in the said Act which I found to be relevant to the matter before me.

Membership of a company

As regards membership of a Company, the provisions of Section 31 and 32(1) of Companies Act are apt. Section 31 of the said Act provides:-

> "(1) The subscribers of the memorandum of a company shall be members of the company, and shall be entered as members in its register of members.
>
> "(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.
>
> (3) In the case of a company limited by shares and an unlimited company, each member shall be shareholder of the company and shall hold at least one share, and every holder of a share shall be a member of the company." (emphasis supplied by me)

It would appear that the above cited section envisages that members of a company will ordinarily be legal persons or legal entities. Indeed, as rightly submitted by Counsel for the plaintiff, only a legal entity is capable of owning shares in a company and therefore being a

member of a particular company. This view is fortified by a reading of the provisions of Section 32 of the Companies Act, the relevant parts of which state that:-

> "(1) Every company shall keep a Register of its members and enter therein the following particulars-
>
> (a) full name, address and occupation of each member, and in the case of a company limited by shares or an unlimited company a statement of the shares held by each member----
> (b) the date at which each person was entered in the Register as a member
> (c) the date at which any person ceased to be a member" [underlining and emphasis supplied by me]

As it were, in my view, the words underlined show that the Companies Act is talking about a legal entity and not an office. Indeed, General Manager is an office and not a legal entity or person. My understanding is that being a General Manager is an occupation. Thus, it would not be in keeping with the provisions of the relevant Act that an office or an occupation should own shares in a company. Indeed, it does not sound to be logical for an occupation or office to acquire or own shares in a limited liability company.

Further, Section 37 of the Companies Act stipulates that the register of members (referred to in Section 32(1)) shall be prima facie evidence of any matter directed by the Companies Act to be inserted or authorized to be inserted therein by the said Act.

Prohibition on a company owning shares

A reading of Section 73(1) of the Companies Act suggests to me that a company is not allowed to, either directly or indirectly, acquire or have an interest in its own shares. The said Section 73(1) of the Companies Act states that:-

> "Subject to the provisions of this Act (the Companies Act), no company having a share capital shall acquire or hold any interest in its own shares, either directly or indirectly through nominees or otherwise.
> Provided that where such an interest arises as a result of acquisition of a controlling interest in the shares of another company or as a result of the enforcement of any security the shares or interest in shares shall be disposed of at the earliest practicable date, not being later than twelve months from the date the company acquired or held such interest---"

The company herein had a share capital. Accordingly, it was bound by the provisions of this section. It could not therefore, either directly or indirectly, acquire an interest in its own share capital.

Further, in the scheme of this provision that would not even be achieved under the guise that its General Manager has a share in the company.

Obligation to file an annual return

Section 181 of the Companies Act obliges companies to file annual returns with the Registrar of Companies. Actually, there is a penalty for failing to file an annual return. The annual return must be in a prescribed format and it is supposed to be signed by a Director and the Secretary of the Company. Further, indeed if the company has shares, the said annual return should contain, *inter alia*, the names and addresses of members of the company, the number of shares held by each existing member at the date of return.

As I understand it, and this is from a reading of the second schedule to the Companies Act, the law requires that these returns should be made truthfully and honestly. Indeed, other legal commentators have said that the objective of an annual return is to provide an annual consolidation of periodic information so that a searcher does not have to go beyond the last annual return.[2]

Legal implications of having less than the required number of members in a company

As mentioned earlier, the application by the Plaintiff is premised on the provisions of Section 42(1) of the Companies Act. The said subsection 1 of Section 42 stipulates that:-

> "(1) If at any time the number of members of a company is reduced below two and it carries on business for more than six months without at least two members, every person who is a member or director of the company during the time that it so carries on business after those six months and is cognizant of the fact that it is carrying on business with fewer that two members shall be severally liable for the payment of all debts and liabilities of the company during that period.

(2) The court, in any proceeding against such a member or on application being to it by any person interested, if it is just and reasonable to do so, may relieve any such member either wholly or partly from liability under Subsection (1) on such terms as it deems fit."

As understand it, this provision comes into play where membership of a company gets reduced to one. Indeed, the remaining member becomes severally liable to settle debts incurred by the company unless the sole remaining member can demonstrate that

[2] Gower L.C.B., The Principles of Modern Company Law, (3rd ed.) London, Stevens and Sons, 1969,p449

the said remaining shareholder was not aware that membership in the company had been so reduced to a single shareholder.

Discussion

It is now necessary that I should apply the law to the instant case. I propose that the application of the law should be through the raising of questions for determination in this matter.

> **Did membership in the company get reduced to less than two at the time the debt was incurred by the company**?

There is undisputed evidence that the debt herein was incurred by the company during the period between January 2004 and May 2005. Further, the court has found as a fact that on a perusal of the only public and official records with the Registrar of Companies, the company all along had a share capital of 100,000 shares of MK1.00 each. Moreover, according to the annual return made by the company on 15th August 2002 there are two members of the company viz. the Defendant with 99,999 shares and the other member is shown as "The General Manager" with one(1) share. As rightly put by Counsel for the Plaintiff, the "General Manager" being referred to is the occupant of the office of General Manager of the company. Put simply, the other shareholder is any person who happens to be a General Manager of the company at any particular time. In point of fact, and as forcefully submitted by the Plaintiff, the term "General Manager" in the said annual return refers to the occupant an office and not a legal entity as envisaged by the Companies Act.[3] Additionally, this court agrees with the Plaintiff and finds it as a fact, that for all intents and purposes whoever is the General Manager holds the one (1) share on behalf of the company and at the pleasure of the employer (the company). The General Manager is a shareholder in name only. In making this finding the court is alive to the fact that the position of a General Manager is liable and/or susceptible to being occupied by different people at different times. Indeed, in my view, what is happening is that the company is attempting to circumvent the provisions of the Companies Act that stipulate that a company cannot acquire shares in itself or hold shares in itself.[4] As a matter of fact, the company was purporting to avoid the law that states that a company with a share capital should at least have two members if it is to legally operate and carry on business in Malawi.[5] Further, it is well to observe that the law does, in

[3] Section 32 of the Companies Act of the Laws of Malawi

[4] Section 73(1) of the Companies Act of the Laws of Malawi

[5] Section 42 of the Companies Act of the Laws of Malawi

my judgment, suggest that it is only a person or a legal entity and not an office that is capable of holding a share.[6] It must be noted that the defendant had always wanted the company to be in the hands of its faithful if the totality of the evidence is to be considered. Thus, it will be observed that the initial subscribers of the shares in the company were members of the clergy of the defendant.

By reason of the foregoing discussion of the law, this court finds and concludes that at the time the debt herein was incurred membership of the company was as indicated in the last annual return of 15th August 2002. For the avoidance of doubt this court finds that the debt was incurred during a period when membership in the company had been reduced to just one member. Actually, the only member was the Defendant and the nominal member, to wit, the General Manager. Accordingly, the General Manager held the shares as a nominee of the company that employed him. Further, since the General Manager is not a legal person recognized at law as such, but just an office, and therefore incapable of holding shares, what we have is that effectively the company has and had only one member, to wit, the Defendant. Indeed, at the time the debt was incurred the company had, for all intents and purposes, only one shareholder viz the Registered Trustees of the Archdiocese of Blantyre- the Defendant. Put simply membership in the company has been below the required two as demonstrated by the return of August 2002 and accordingly a contravention of the Companies Act of the Laws of Malawi.[7]

It is idle talk on the part of the defendant to say that the shares in the company were never transferred. The only available annual return filed with the Registrar of Companies is so clear as regards membership in the company. Membership changed from the original two viz. Brother Hermans and Father Munyapa to the defendant and the General Manager of the company. The argument being advanced that no shares were transferred from Brother Hermans and Father Munyapa does not add up in the light of clear evidence of membership as shown in the said annual return and indeed such proposition is only intended to deflect this court's attention from the justice of this matter.

The company was attempting to hold its own shares through an employer which is proscribed by the Companies Act of the Laws of Malawi. The long and short of it is that the company wanted to be operating illegally. This court will not condone such actions on the part of the company.

Is the Defendant severally liable for the debt?

The court has just found, and concluded, that membership in the

[6] Section 32 of the Companies Act of the Laws of Malawi

[7] Section 42(1) of the Companies Act of the Laws of Malawi

company had been reduced to below two shareholders. The question that comes to mind is whether or not the Defendant is severally liable to make good the debt that was incurred by the company. As I understand it, the position at law is that every person who is a member, or director, during a period a company has less than two members will be severally liable for the payment of the debt incurred during the said period the company carries on business and such member is aware that there are less than two members.[8] The member, or director, may only be exonerated from liability if the court is satisfied that it is just and reasonable to excuse such member or director.[9] It would be unjust and unreasonable to excuse the defendant in the circumstances of this case. The defendant created a legitimate expectation on the part of the plaintiff that the former was going to settle the debt when it write the plaintiff advising the latter that a task force had been established to look into the question op the indebtedness of the company. The court can not allow that it should escape from this liability bringing up the issue of a third party.

The other issue that arises is whether the Defendant was aware that it was the only member of the company and the company continued to operate its business during this period with the full knowledge of the Defendant that membership was reduced to less than two. This court finds that the Defendant was aware that it was the only member of the company. In my judgment, it is aware that it was the only member of the company because all along it was the majority shareholder and surely it should have been aware that the General Manager was only a nominal shareholder. Further, I have come to this conclusion because the evidence of the Plaintiff to the effect that the Defendant was for all intents and purposes the only member of the company has not been sufficiently disputed by the Defendant. The consequence of operating its business with only itself as the sole member is that the Defendant will have to settle the debts that were incurred by the company during all this time when the Defendant was the only member. Actually, this court is alive to the fact that there is an abundance of correspondence to show that the Defendant, as a shareholder, instituted a task force that set out to look at modalities of settling the debt on behalf of the company. The Defendant will therefore only be fulfilling what it had set out to do viz. to settle the debt on behalf of the company. Further, it must be put here that the Defendant has not demonstrated that it is just or reasonable for it to be excused from paying what the company owes the Plaintiff. Indeed, it would be unjust and unreasonable to allow the Defendant to escape liability when it is considered that the Defendant created a legitimate

[8] Section 42(1) of the Companies Act of the Laws of Malawi

[9] Section 42(2) of the Companies Act of the Laws of Malawi

expectation in the Plaintiff that it was assisting in the settlement of the debt. The defendant should not change the tune now and be allowed to avoid squaring the debt under the pretext that there is a third party who acquired an equity in the company.

This court therefore finds that Section 42(1) of the Companies Act should be applied to this case. Accordingly, it is hereby ordered that the Defendant, as the only shareholder of the company, should settle the debt owed to the Plaintiff.

What is the amount of debt owed?

The court has observed that Counsel appears to be saying that the exact amount of what the company owes the Plaintiff is not clear. However, the Originating Summons is clear as regards what the Plaintiff is claiming from the Defendant. The Plaintiff is claiming the sum of MK5,980,535.00 and the Defendant does not dispute that this is the amount of debt owed by the company. If anything the Defendant only purported to deny liability to settle the debt on behalf of the company. I therefore find that there is no dispute that the amount of MK5,980,532.00 is the sum owed. It is the sum that the Defendant will have to be severally liable to pay in this matter.

Is the Plaintiff entitled to collection charges in the sum of MK598,053.00?

The court has observed that the Plaintiff is claiming the sum of MK598,053.00 as collection charges. A simple observation will reveal that this sum represents 10% of the amount of claim.

The proceedings herein were commenced on 27th February 2006. In terms of Legal Practitioners (Scale and Minimum Charges) (Amendment) Rules, which came into effect on 13th March 2002, legal collection charges are payable by the collecting party and not the paying party.[10] I know of no other amendment that has been passed to alter the position of the law as stipulated in the amendment of 13th March 2002. Consequently, the Defendant is not liable, either severally or otherwise, to pay sum of MK598,053.00 being the collection charges claimed in the matter. The party liable to pay these collection charges, if Counsel insists on their payment should be the Plaintiff.

The claim for interest

[10] *Zomba Municipal Assembly vs Council of the University of Malawi*, Civil Cause No. 3567 of 2000, (unreported), (H.C.); *Liquidator, Import and Export (MW) Limited vs J.L. Kankhwanga and Others*, Civil Appeal No. 52 of 2003 (unreported), (H.C.)

There is a claim for interest by the Plaintiff. The Originating Summons indicates that the Plaintiff wants this interest on both the debt and collection charges at the current bank lending rate calculated from the time the sums were due for payment to the date of payment in full on the basis that the said debts were incurred at a time when membership in the company got reduced to below two(2). However, I wish to observe that the Plaintiff does not say anything on the issue of interest in the affidavit in support of the application. Further, it is well to point out that in this court's view the Plaintiff is not seeking this court's exercise of an equitable jurisdiction. Indeed, the application herein is made under a particular provision of the Companies Act of the Laws of Malawi.

It is my understanding of the law that an award of interest at a rate over and above the normal rate of interest is awardable only when court is exercising an equitable jurisdiction.[11] Moreover, as I understand it, the position at law is that where a Plaintiff is seeking interest at bank lending rate, like in the instant case, then there is need for evidence to be adduced so that the court may decide what amount of interest to allow.[12]

As discussed above, the Plaintiff did not offer any evidence to justify the award of interest at more than the normal interest rate payable on a judgment debt. Furthermore, this court is not exercising equitable jurisdiction. Accordingly, the Plaintiff will be entitled to only the usual interest on a judgment debt.[13] It is so ordered.

Conclusion

The Plaintiff has succeeded in its claim for an order that the Defendant be severally liable to pay the debt incurred by the company in the sum of Mk5,980,535.00 but not the collection charges. However, since the Plaintiff resorted to litigation to get what is due to it in terms of the law it will be awarded party and party costs. Since the plaintiff has not succeeded on all its points of claim it shall be entitled to only two-thirds (2/3) of the costs occasioned by this application. Further, this court has found that the said debt will be paid with interest at the rate of five per centum, and not at the claimed bank lending rate, as provided for in Section 65 of the Courts Act.

[11] Liquidator, Import and Export (MW) Ltd vs J.L. Kankhwangwa supra

[12] *Pro-Finance Trust SA vs Gladstone* [2002]1 BCK 141 cited with approval in *Liquidator, Import and Export (MW) Ltd vs J.L. Kankhwangwa and Others*, Civil Appeal No. 52 of 2003, (unreported), (H.C.)

[13] Section 65 of the Courts Act

Pronounced in Chambers this 24th day of May 2006 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE