IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 680 OF 2000

BETWEEN:

CANDLEX LIMITED ……..... PLAINTIFF

-and-

MARK KATSONGA PHIRI…….....DEFENDANT

CIVIL CAUSE NO. 713 OF 2000

BETWEEN:

CANDLEX LIMITED……..... PLAINTIFF

-and-

MARK KATSONGA PHIRI .....……..... DEFENDANT

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

M/S Savjani S.C. and Ndau, of Counsel for the Plaintiff

M/S Mhone and Mulere, of Counsel for the Defendant

M/S Balakasi, Ngwale, Mankhanamba, Jere and Mzungu 99 Official Interpreters/ Recording Officers

Dates of hearing : 28th January 2002, 1st February 2002, 4th February 99992002, 11th February 2002, 13th February 2002, 2nd 9999April 2002, 5th April 2002, 8th April 2002, 18th April, 99992002, 8th May, 2002, 9th May 2002, 10th May 2002, 999916th May 2002, 25th July 2002, 28th October 2002, 999929th October 2002, 30th October 2002, 31st October 99992002 and 1st November 2002.

Date of judgment: 8th July 2003

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**Kapanda, J**

JUDGMENT

Introduction

The plaintiff company, Candlex Limited, is a private limited liability company incorporated in the Republic of Malawi. It was incorporated in 1983. The plaintiff company operates from its premises on Plot No. CC 936 at Maselema in the City of Blantyre of the said Republic of Malawi. The defendant is one of the three shareholders in the plaintiff company.

The relationship between the defendant and a fellow shareholder has gone sour. This, incidentally, has had an effect on the relationship between him and the plaintiff company. Hence the legal action herein. There were actually two distinct causes of action before this court viz Civil Cause No. 680 of 2000 and Civil Cause No. 713 of 2000. The two legal actions were commenced on 10th March 2000. Both were commenced by the plaintiff company. The two actions were, by the order of this court, consolidated into, and tried as, one action.

The essence of this consolidated action is that the plaintiff wants the defendant out of its premises on the said Plot No. CC 936 at Maselema in the said City of Blantyre. Further, the plaintiff company desires that the defendant should stop calling himself Group Chairman or Managing Director of the plaintiff company. The defendant is challenging the plaintiff's averments in the consolidated action.

**History of the relationship between the Defendant and the Plaintiff company**

In order to fully appreciate what is in issue in this matter a brief history of the plaintiff company need to be stated. Here is the background to this case in so far as it relates to the relationship between the defendant and the plaintiff.

The defendant was a founder of the plaintiff company. He was a majority shareholder at the time the plaintiff company was incorporated. The other shares were held by his wife, brother and mother. Indeed, the defendant's brother, mother and wife were, for all intents and purposes, minority shareholders if not nominal shareholders. Further, during the early days the plaintiff company was a family venture where the board of directors comprised the defendant and his said wife, brother and mother. This has since changed. Neither the defendant nor the said members of his family are Directors of the plaintiff company.

The defendant's shares, in the plaintiff company, have since dwindled. He is no longer a majority shareholder. This has come about because he sold most of his shares to people not within his family. Why his shares were sold will be discussed later. The defendant was also the plaintiff company's Managing Director up until sometime in 1995 when he ceased being the Managing Director of the plaintiff company. Of course the defendant denies that he stopped being the Managing Director of the plaintiff company. We will come back to the position of the Managing Director when the court is considering the issues for determination in this matter.

The defendant did not only found the plaintiff company. He also established other businesses, either as limited liability companies under the Companies Act or as firms under the Business Names Registration Act. There is no evidence to suggest that the plaintiff company had shares or interest in these other businesses of the defendant. All there is to it is that the defendant had an interest in both the plaintiff company and the other businesses of his. More on this will be discussed later in this opinion. It will suffice

though to put it here that, on 6th May 1993, the plaintiff company's then board of directors passed a resolution upgrading the Managing Director's position in the plaintiff company. The incumbent of this position, before it was upgraded to the position Group Chairman/Managing Director, was the defendant.

It was further resolved by the Board of Directors that the defendant was to negotiate for his remuneration, in this newly created post of Group Chairman/Managing Director, from the so called associate companies. The directors were of the view that the defendant's remuneration was not the responsibility of Candlex Limited.

It would appear that members of the board realised that the relationship between the plaintiff company and the defendant's other business ventures was a loose one. This is obvious when one reads the said resolution of the board as regards the defendant's remuneration in his new post. The board was rightly of the view that the defendant's remuneration from the so called associate companies was not its concern or that of the plaintiff company.

As mentioned earlier the number of shares that the defendant holds in the plaintiff company have substantially been reduced. He is no longer a majority shareholder. The natural consequence, but undesirable in the eyes of the defendant, of this has been that the defendant's influence in the plaintiff company has been eroded. He has found himself out of the board of directors of the plaintiff company. Further, the relationship between the defendant, on the one hand, and a fellow shareholder and the plaintiff, on the other hand, is at its lowest ebb. One manifestation of the souring of the relationship between the plaintiff and the defendant is the consolidated action herein where the plaintiff company has lodged a complaint against the defendant.

**The plaintiff's complaint and the answer by the defendant**

Plaintiff's complaint

The full particulars of the plaintiff's complaint against the defendant are in the two statement of claim in the consolidated action herein. We do not intend to set out in full all the allegations of fact in the said statements of claim. The court will only give a sketch of the plaintiff company's complaint.

The plaintiff company's complaint is that the defendant is falsely holding himself out as Group Chairman and Managing Director of the plaintiff company. The plaintiff continues to complain that the defendant is falsely representing that he has controlling or managerial authority over the plaintiff company. It is the further grievance of the plaintiff company that the defendant's conduct is causing confusion to employees of the plaintiff company. Moreover, the plaintiff company complains that it has suffered, and may continue to suffer, serious loss and damage or prejudice by reason of the defendant's said conduct.

Moreover, it is the plaintiff company's contention that the defendant had been occupying its two office rooms as a tenant at will. Further, the plaintiff company states that despite being given notice to delivery up possession of the plaintiff's two office rooms, the defendant has failed to deliver up possession of the said offices.

Consequently, the plaintiff is seeking, over and above costs of these proceedings, the following remedies viz:-

1. An injunction to restrain the Defendant by himself or by his 9employees or agents or any of them or otherwise howsoever from 9holding himself out as the Group or Managing Director or manage 9or employee of the plaintiff company and from interfering 9directly or indirectly in the management and administration of the 9plaintiff company.

2. General damages for (i) unlawful interference in the management 9and administration of the plaintiff company and (ii) procuring 9breach of contract on the part of the employees of the plaintiff 9company.

3. Possession of two office rooms on the plaintiff company's land and 9premises known as Plot No, CC 936 situate in Maselema Road in t 9he City of Blantyre.

4. Mesne profits at such rate as the court deems fit from 8th March 92000 until delivery of possession.

5. An injunction restraining the Defendant by himself or by his 9servants or agents or otherwise howsoever from being or 9remaining in or entering upon the plaintiff's land and premises 9comprising of two office rooms on Plot No. CC in Maselema, in the 9City of Blantyre.

Defendant's response

The defendant denies that he is falsely holding himself out as a Group Chairman and Managing Director. He contends that as a matter of fact he is and was at all material times the Group Chairman/Managing Director of the plaintiff company and all its so called sister companies. Further, the defendant states that his occupation of the two office rooms is by virtue of his being the Managing Director/Group Chairman of the plaintiff company. On that account, it is argued by him, he is not a tenant at will. Moreover, the defendant contends that as a minority shareholder in the plaintiff company he is entitled to possession of the said two offices so that he can effectively protect his interest in the company.

The long and short of it is that the defendant has joined issues with the plaintiff company on the grievances stated above.

**Application For Amendment of Defence**

It must be pointed out that, at the time the pleadings herein were closed, there was no dispute regarding the shareholding in the plaintiff company. The defendant had made an admission in his statements of defence. The essence of this admission was that he admitted that he is a minority shareholder in the plaintiff company. This was the position up to the time when the defendant was about close his defence testimony. Indeed, the defendant changed his mind when this court was about to retire to write its judgment. The defendant purported to apply for an amendment of his statement of defence. He essentially wanted to retract his earlier admission that he was a minority shareholder in the plaintiff company.

The court did not rule on the application. It indicated that it would deal with the application at the time it would be considering the judgment in this matter.

We have decided not to allow the amendment sought by the defendant. There has been an unreasonable and inexcusable delay in the making of this application. Further, there was no evidence to suggest that the admission by the defendant was a mistake which only came to light at the closure of the defendant's defence. As rightly put by Mr Savjan S.C., the defendant and his Counsel had, for a long time, in their possession the letters where the defendant was alleging that he parted with his shares under duress. Notwithstanding the fact that they had the said letter in their possession the defendant decided not to plead it in his defence. We would not be wrong to come to the conclusion that the defendant wanted to amend his defence after realising that his case was a bad one.

The amendment will have to be refused. It is rejected because allowing it would amount to denying the plaintiff company the opportunity of challenging the defendant's case which was being raised for the first time in the proposed amended defence. We are afraid that allowing this amendment would mean re-opening the trial of this action. There must be finality to these proceedings. As a matter of fact, with the admission by the defendant, the plaintiff company and its lawyers were entitled to assume that the action was not being challenged on the question of the defendant being a minority shareholder. The plaintiff company came to court and conducted its case on the premise that it was not going to prove the admitted face that the defendant was a minority shareholder.

Finally, the court would like to observe that even if this amendment were allowed the defendant's allegation would have still have failed. There was no evidence to prove the allegation of duress. The defendant freely sold his shares. Indeed, the company and the defendant wanted an investor who would help keeping the company afloat. The ones who came in were the Hubbes who bought shares from the defendant. There was no hostile take over of the plaintiff company as was being suggested by the defendant. If anything the problem is that the defendant does not want to accept the stark reality that the plaintiff company is no longer his family empire.

By reason of the foregoing the accepted pleadings in this matter are those that were there at the commencement of trial. It is from those pleadings that the facts in dispute between the parties herein arise.

**The Issues**

As we see it, there are not so many issues to be determined albeit that the pleadings exchanged herein appear to be lengthy. We now propose to set out the issues for determination in this matter. The issues arise from the said accepted pleadings in the consolidated action herein.

From the said pleadings the following are, in a nutshell, the issues that require to be adjudicated upon by this court:-

(a) whether or not the plaintiff company is part of a group of companies.

(b) whether or not the defendant is the plaintiff company's

Group Chairman/Managing Director.

(c) whether or not the defendant is entitled to occupy the two office rooms on Plot No. CC 936 Maselema in the City of Blantyre.

(d) whether or not the plaintiff company is entitled to the remedies in the consolidated action herein.

We must observe that, although the issues for determination have been itemized seriatim, the court will not be specifically referring to each one of them when it is making its findings of fact. Further, as we are determining the issues set out above it will become necessary to answer some ancillary questions that have not been specifically mentioned above. Moreover, our decision on these issues will be based on the acceptable evidence on record.

**The Evidence**

The court heard evidence from both parties. The plaintiff called two witness viz. Mrs Rosemary Kanyuka and Mr Michael Hubbe. On the defendant's side there was a total of six witnesses who testified on behalf of the defendant. These witnesses were the defendant (Mr Mark Katsonga Phiri), Messrs Peter Katsonga Phiri, Emmanuel Dustan Chinunda, Levison Weston Ganiza, George Namatumbo and Wellington M'nesa.

All the witnesses underwent some gruelling cross-examination. As a matter of fact some of these witnesses were crossed examined for a period of more than a day.

**Fact of the case**: **A Narrative**

It is from the testimony of these eight witnesses that the relevant facts obtaining in this case can be discerned. We shall attempt, as far as practicable, to set out the said facts in a chronological order as we find them.

Birth of the plaintiff company

The plaintiff company was incorporated into a private limited liability company on 19th May 1983. The defendant and his brother were the only shareholders then. The shareholding structure has since changed. We will come back to this later in this judgment.

Appointment of defendant as Managing Director

At the time of the incorporation of the plaintiff company the defendant was made one of its Directors. The defendant was later appointed Managing Director of the plaintiff company on 1st October 1994. This was after he had been a Director of the company for more than a year. We wish to observe that the defendant was appointed a Managing Director at a meeting of Directors instead of the appointment being made at a shareholder's meeting. This irregularity was never cured by the shareholders of the plaintiff company. Be that it may be, with this appointment there was then created, in the plaintiff company, the position of Managing Director. This position was to change almost nine years later.

The upgrading of the position of Managing Director

On 6th May 1993 the plaintiff's Board of Directors decided to upgrade the position of

Managing Director. It was upgraded to the position of Group Chairman/Managing Director. The relevant parts of the Minutes of the Meeting of the said Board of Directors indicate that the upgrading was being done so that the incumbent could oversee what the Directors called "Group Operations." The defendant was the Managing Director at the time this resolution was made. Indeed, it is in evidence that following this meeting a letter was written to the defendant advising him that he had been appointed Group Chairman/Managing Director. However, it was conceded by Mr Peter Katsonga Phiri that when he wrote this letter of appointment he was not following the minutes of the meeting of the said Board of Directors.

At the time the position of Managing Director was being upgraded the defendant had already established some other businesses and/or limited liability companies. The defendant also set up other businesses after the position of Managing Director was upgraded. It is important to note thought that these other businesses, or limited liability companies, did not and do not have any shares in the plaintiff company.

Reconstitution of the Board of Directors of the plaintiff 99company

The plaintiff company was being managed by the defendant and some members of his family. This state of affairs changed on 29th of April 1994 when a new Board of Directors was put in place. This marked the end of governance of the plaintiff company by the defendant and the members of his family. A professional Board of Directors was then constituted.

The Board of Directors resolves that defendant should 999step down as Managing Director

As a further manifestation of the said end of management of the plaintiff company by the defendant and the members of his family the Board of Directors made a pertinent resolution at its meeting of 23rd February 1995. The Board resolved, inter alia, that the defendant should step down as Managing Director of the plaintiff company. From the evidence on record the defendant was to remain, and remained an ordinary Director of the plaintiff company. The defendant eventually resigned as a Director of the plaintiff company. More on his resignation as a Director will be discussed later.

Financial problems in plaintiff company and sale of shares

The plaintiff company was in financial problems. It was sinking. Actually, it started making huge losses in 1993. Sometime in February 1996 there arose a need to have an investor who would inject money into the plaintiff company so as to keep it floating. The defendant had to sale some of his shares in the plaintiff company. He sold his shares to the Hubbes. Exactly when he sold his shares is not an issue but the evidence on record shows that on 30th July 1996 the Board of Directors of the plaintiff company introduced the Hubbes as shareholders of the plaintiff company. Further, in a written agreement, entered into between the defendant and Michael Hubbe, it shows that Michael Hubbe became a shareholder of the plaintiff company on 1st August 1996. Before the said 1st day of August 1996 a majority of the shares of the plaintiff company were held by the defendant. The position has since changed. In terms of the annual return of the plaintiff company for the period up to 17th November 1999 the defendant was no longer a

majority shareholder. A majority of the shares, in the plaintiff company, are now held by the Hubbes.

Defendant resigns as Director of the plaintiff company

The defendant was part of management of the plaintiff company until sometime in June 1999. As we mentioned earlier, the Board of Directors had resolved that he should step down as Managing Director. Hence he remained in the management of the plaintiff company as a Director up until the said month of June 1999. In point of fact on 8th June 1999 the defendant tendered his letter of resignation as a Director of the plaintiff company. The defendant's resignation was to be with immediate effect. He attempted to withdraw his resignation three (3) months later. As a matter of fact he later on put a condition to his resignation. It would appear that his attempted come back was futile. We say this because on 9th November 1999 the Defendant had proposed himself to the shareholders of the plaintiff company to be appointed a Director. His proposal was rejected.

Upon his resignation, on 8th June 1999, the role of the defendant in the plaintiff company changed. He was no longer part of the management of the plaintiff company. The defendant became a mere shareholder in the plaintiff company. A minority shareholder for that matter.

Defendant's Memoranda to department managers of the 999plaintiff company

The defendant never accepted that he was no longer part of management of the plaintiff company. This manifested itself after the plaintiff's General Manager, Mr Bob Abbey, had had his request for renewal of a temporary Employment Permit refused by Government. On 28th February 2000 the defendant wrote a Memo to all department managers of the plaintiff company instructing them to be reporting to him. In the said Memo of 28th February 2000 the defendant described himself as Group Chairman. This did not go well with the plaintiff company. There was an exchange of Memos between the defendant and the Chairperson of plaintiff's Board of Directors. The plaintiff company's Chairperson of Board of Directors wrote the defendant, on 29th February 2000, advising him to stop writing such kind of Memos. The defendant was further advised that his Memos to department managers were illegal.

Threat of legal action and demand for delivery of two 9999office rooms

The exchange of Memos in February 2000 was followed by yet another Memo from the Chairperson to the defendant. It was dated 6th March 2000. In this Memo the defendant was advised that the plaintiff company would take legal action if the defendant did not desist from the practice of writing Memos to department managers. The threat of legal action was preceded by a Notice to the defendant to vacate two office rooms he had been occupying as Managing Director of the plaintiff company. The Notice was served on the defendant on 2nd March 2000. The plaintiff company demanded of the defendant to deliver up possession of the said office rooms on 8th March 2000. The defendant has not delivered up possession of the said office rooms. We must observe though that the defendant is no longer physically occupying the two office rooms.

The defendant does not deny that the two office rooms belong to the plaintiff company. Further, it is admitted by the defendant that he has other offices opposite the premises of the plaintiff company where he and his other businesses operate from.

The above are the relevant facts that we found from the testimony of the witnesses who testified before this court in the consolidated action herein.

Having set out the facts of this case let us now proceed to consider the issues for determination in this matter. The court will of course bear in mind the submissions of Counsel when it is considering the questions for determination.

**Law and consideration of the issues for Determination**

Is the Defendant entitled to occupy the two offices?

The defendant is no longer in the employ of the plaintiff company. This is the case because he ceased being the Managing Director of the plaintiff company. He must realise that, having resigned as Director of the plaintiff company, he is now a mere shareholder. Further, the position of Group Chairman is irrelevant in so far as the plaintiff company is concerned. The plaintiff company, as we will see shortly, is not part of a group companies. It can not therefore have a position of Group Chairman within its structure. The case of **Mobil Oil (MW) Ltd. vs. Leonard Mutsinze** CC. No. 1510 of 1992 (unreported decision of Chatsika J. of 6th August 1993) is instructive on the question whether the defendant is entitled to occupy the two office rooms.

In the **Mutsinze** case the defendant resigned as an employee of the plaintiff company. It was held by Chatsika, J. as he then was, that the resignation terminated his engagement with the plaintiff company and that this had the result of automatically terminating his right occupy the plaintiff's house. The underlying logic of Justice Chatsika, as he then was, applies with equal force to the case before us. In the instant case the defendant is no longer an employee of the plaintiff company. Consequently, he has no right to occupy the plaintiff company's two office rooms.

It is laughable that the defendant thinks he can occupy the two office rooms as a shareholder. We can imagine what would happen if the plaintiff company had a thousand shareholders and all of them wanted to have an office space at the premises of the plaintiff company. It would be inviting chaos. We know of no law that says that a minority shareholder is entitled to occupy premises of the company in which he owns shares. Indeed, the defendant need not have offices at the premises of the plaintiff company in order for him to protect his said interest as a minority shareholder.

Is the Defendant a tenant at will?

The case of **Mussa Janmahomed vs. Ahmed Mussa Lambat** [1923-60]ALR Mal 181 is instructive as regards how a tenancy at will may be created. It can not be denied that the defendant occupied the two office rooms when he was actively involved with the management of the plaintiff company. He was to occupy the rooms as long as he was employed by the plaintiff company. The defendant continued to occupy the office rooms after he ceased being Managing Director of the plaintiff company. He was not even paying rent for the two office rooms he continued to occupy. A tenancy at will is implied because he had admittedly been permitted to occupy the two office rooms without paying

rent for the use of the said rooms- **Mussa Janmahomed vs. Ahmed Mussa Lambat** - ante.

As a matter of fact, the defendant continued to occupy the office rooms as a tenant at will. The offices are owned by Candlex Limited and the demand for possession of the premises determined the tenancy at will that had been created. The defendant has been in wrongful occupation and use since the date Candlex Limited demanded surrender of the two office rooms. For that the defendant is liable to pay damages to the plaintiff company for the continued wrongful occupation of the said two office rooms. What then are the damages payable?

Mesne Profits

The normal measure of damages for the said wrongful occupation is the market rental value of the property occupied or used for the period of wrongful occupation. The court did not receive in evidence the market rental value of the two office rooms. The ends of justice would be met if this court were to order that the damages should be assessed by the Registrar. It is so ordered.

Could the defendant's resignation be withdrawn?

In **Glossop vs. Glossop** [1907]2Ch. 370 at 374 Neville, J. had this to say which we respectfully endorse:-

"--I have no doubt that a director is entitled to relinquish his office at any 9time he pleases by proper notice to the company, and that resignation 9depends upon his notice and is not dependant upon any acceptance by the 9company, because I do not think they are in a position to refuse acceptance. 9Consequently, it appears to me that a director, once having given in the proper notice of his resignation of his office, is not entitled to withdraw that notice, but, if it is withdrawn it must be by consent of the company properly exercised by their managers, who are the directors of the company. But, of course, that is always dependent upon any contract between the parties, and that has to be ascertained from the articles of association--" (emphasis 9supplied by us)

Further, in **James North (Zimbabwe)(Pvt)Ltd and Others vs. Mattison** [1995]LRC (Comm.)615 at 626 d-f Smith, J. had this to say which is very instructive as well:-

"Mr Gillespie argued that Kelly's letter of resignation contained an offer to 9work out his three months notice, which offer was accepted and therefore 9he remained a director until the end of April - I do not agree with him. 9Article 94 of the articles of association of James North,---, provides .. that the office of a director shall be vacated if, by notice in writing to the company, he resigns his office. Kelly wrote to the Chairman resigning from his office as a director with effect from 31 January. In my view it automatically followed that he vacated his office as director on that date. 9There is no question that his resignation had to be accepted before it could take effect---" (emphasis supplied by us)

In the case under consideration what do the articles of association of Candlex Limited say? Do they say the resignation has to be accepted? Did the other Directors accept the withdrawal of the Defendant's resignation? All indications are that the Articles of Association of the plaintiff company do not say anything about the need for consent of the other Directors before one's resignation can be effective. It therefore does not surprise us that the defendant had to nominate himself to be appointed a Director of the plaintiff

company. The plaintiff company was actually right in treating the defendant as having resigned as Director at the time be gave his notice of resignation. Why? The Articles of Association of the plaintiff company, in article 65, provides that :-

"A Director shall hold office until he resigns his office or is removed from 9office"

And Section 145 of the Companies Act, so far as material, reads as follows:

"--The office of director shall be vacated if, inter alia, the director resigns 9his office by notice in writing to the company."

Both the Companies Act and the articles of association of Candlex Limited do not provide for acceptance of resignation by the Directors of the plaintiff company. It naturally follows that the defendant vacated his office as a director on the day he advised the plaintiff company that he was resigning, as Director, with immediate effect.

Could the defendant, after resigning as a director, continue being Managing Director of the plaintiff company? It would, in our opinion, be pretentious in the extreme to think that the answer to this question would be in the affirmative. In order to appreciate why we are of this view let us consider some statutory provisions that have a hearing on this question. Section 2 of our Companies Act No. 19 of 1984 defines managing director as a director to whom has been delegated any powers of the board of directors to direct and administer the business and affairs of the company. And, a director has the meaning assigned to it by Section 140(1) of Act No. 19 of 1984 which stipulates that:

"For the purposes of this Act [Act No. 19 of 1984] the expression 9"directors" means those persons, by whatever name called, who are appointed 9to direct and administer the business and affairs of the company."

Further, Section 43 of the said Companies Act suggests to us that a Managing Director is part of a group of directors of a company. The defendant, notwithstanding his being eventually made Managing Director, was just delegated to manage the company on behalf of all the other of directors. He could not resign as director and then expect to continue being Managing Director of the plaintiff company. As we understand it, the management of the company is the responsibility of directors only that a Managing Director has delegated authority to do it on behalf of all the directors. He cannot leave this group and then say he will continue to be a Managing Director of a company. In terms of the alleged agreement, with regard to entitlement of shareholders to appoint Directors, may be the defendant qualified to be appointed as director but was not, in point of fact, appointed a director. Actually, this court already found, in its ruling of 2nd April 2002, that the alleged agreement was a non- starter and has no binding effect. The defendant cannot, therefore, claim that he is entitled to run the affairs of the plaintiff company either alone as Group Chairman/Managing Director or in concert with the rightful Directors of the plaintiff company.

Is the Plaintiff company part of a group of companies 9999and/or associated with or related to any other company?

It is the view of this court that whether or not the plaintiff company was part of a group of companies is a question of law. Indeed, we should be concerned with the position at law and not with the defendant's imaginations. We should not involve ourselves with the

defendant's relationship with the plaintiff company and the other companies that he established. We should rather focus our attention on the law as regards the establishment of a group of companies or related and/or associated companies.

The case of **Whitehouse vs. Carlton Hotel (Pty) Ltd** [1988]LRC Comm. 725 was cited by Mr Mhone in support of the argument that the plaintiff company was part of a group of companies. I do not know why this case authority was relied upon by Counsel for the defendant. The case only makes a scanty reference to a group of companies. Indeed, in the **Whitehouse** case there was in existence, in point of fact and law, a group of companies. Further, the principle issue, if not the only issue, being decided though was whether the allotment of shares was properly done or done for improper purposes. The court was also referred to the case **Adams vs. Cape Industries PLC** [1990] Ch. 433. This authority was quoted by the defendant to buttress his argument that the plaintiff company was part of a group of companies that he controlled when he was appointed Group Chairman. This case authority, just like most of the cases cited by Counsel for the defendant, does not assist the defendant. To the contrary it assists the argument of the plaintiff that you can only have a group of companies where one company has shares in another company. I have read the authorities cited by Counsel for the defendant and there is one thing that I have observed. It would appear that Counsel did not fully read these cases. It is observed further that Counsel cited these cases, just for the sake of it.

The authorities quoted by Counsel will not assist us in determining whether the plaintiff company is, at law, part of a group of companies. The law will have to be found somewhere else.

As a starting point in answering the question posed above let us see what the provisions of the Malawi Companies Act say with regard to the term group of companies.

Section 2 of the Companies Act [Act No. 19 of 1984] states that:-

"Group body corporate "or group company" means that, in relation to any 9other body corporate, the body corporate or company so described is:-

(a) a subsidiary of that other

(b) the holding of that other or

(c) a subsidiary of that other's subsidiary."

The facts of this case do not show that the plaintiff company falls into any of the categories described in the above quoted section. Moreover, the plaintiff company has no shareholding in any of the other companies that were being referred to by the Defendant. Furthermore, it is to be observed that most of the so called associated or related companies were not actually body corporate at the time the defendant was erroneously appointed Group Chairman. In our view the defendant's other businesses were associated or related to him as a sole proprietor of same or as a shareholder in those entities that were limited liability companies.

Further, in Section 185(1) of the Companies Act it is provided thus:-

"The provisions of this section (section 185) shall apply where, at the end of 9the

company's financial year, a company has subsidiaries."

The said Section 185, in a summary, obliges limited liability companies that have subsidiaries to prepare group accounts. There are of course exceptions with regard to this requirement. Unfortunately, the plaintiff company never fulfilled those exceptions. It is to be observed that the plaintiff company never prepared group accounts. This, in our view, shows that there was no group of companies to which Candlex Limited belonged.

Moreover, it is a settled principle of law that on incorporation a company becomes a separate legal personality: **Yanu Yanu Company Ltd. vs. Mbewe** 10 MLR 379. Further, it is an established principle of law, and we need not cite a case authority for it, that every limited liability company is a separate legal person that should not be identified with its members. It follows that the other companies that the defendant established as limited liability companies were separate entities from the plaintiff company. They could only become related if the other companies were subsidiaries of plaintiff company or if the plaintiff company had shares in these other companies. The fact that both were founded by the defendant, or that he had shares in all of them, did not make the companies related or associated or a group of companies at law. If the defendant wanted to create a group of companies, in the eyes of the law, then he should have taken the advice of experts. He should have caused the plaintiff company acquire shares in the other limited liability companies that he established. He did not. The plaintiff company never acquired shares in the other companies that the defendant established before he was appointed Group Chairman.

Before leaving this issue we wish to make the following further observations on the question of group of companies. These remarks go a long way to demonstrate why we can not accept the contention that the plaintiff company is part of a group of companies or that it is associated with or related to the other companies that were established by the defendant. Firstly, it is neither being suggested nor is it in evidence that the Defendant held shares in the other companies on behalf of plaintiff company or for the benefit of the plaintiff company. The shares that the defendant held in the other companies were not for the benefit of the plaintiff company but for his own benefit. For this reason it can not be said that Candlex Limited was part of a group of companies or that it was related to, or associated with, the other businesses that the defendant had established. Secondly, there is no evidence of any control exercised by Candlex Limited over the commercial activities that were established by the defendant. The plaintiff company had no corporate control over the other companies to warrant the other companies being referred to as part of a group of companies to which the plaintiff company belonged, or to be associated with, or related to the plaintiff company.

Thirdly, the debtors or creditors of the plaintiff company were its own and not those of the defendant's other businesses. Furthermore, the plaintiff company was not taxed on profits made by these other businesses in which the defendant had an interest. Moreover, the business being conducted by these other companies that were established by the defendant was not being done as part of the business of the plaintiff company.

Fourthly, the fact that the defendant used the plaintiff company's assets to set up his other businesses, or that it loaned money to these other companies, does not of itself make the plaintiff company part of a group of companies. As we see it, the defendant abused his

position in plaintiff company to lend out money, with no interest charged, to the other company or sole proprietorships that he established.

Fifthly, the other companies that were established by the defendant were not wholly or partially owned by Candlex Limited. In our view, they were separate business operations.

Lastly, we did not find any evidence to suggest that the companies were deliberately established with a view to having one composite group designed to deal in one business or economic activity.

Should we lift the veil of incorporation in the circumstances of this case?

The courts have power to lift the veil of incorporation where it is alleged and proven that the veil of incorporation is being used for improper or illegal or unlawful purposes. In the case at hand no one has directly suggested that we should lift the veil of incorporation. Be that as it may be the argument by the defendant, that the plaintiff company has sister or related companies, has the effect of requesting the court to lift the veil of incorporation so that we can see him as a shareholder and founder in both Candlex Limited and the other companies that he established. That is not reason enough for the court to lift the veil of incorporation in Candlex Limited. The plaintiff company is not using its veil for improper or illegal purposes. We will not lift the veil of incorporation for the purpose of allowing the defendant to remain in the management of plaintiff company or for any other purpose.

Is the defendant the plaintiff company's Group Chairman/Managing Director?

The defendant will not be allowed to hold himself out as Group Chairman/Managing Director of the plaintiff company. Yes he might not have been written a letter of termination but that is not good enough reason for him to hold himself out as Group Chairman/Managing Director of plaintiff company. We have already found that the facts of this case show that he does not hold any managerial position in the plaintiff company. If the defendant wants let him take out an action for breach of contract of employment. He will not be allowed to cling on to a position the plaintiff company says the defendant does not hold any more. Further, it has been found as a fact that the plaintiff company does not belong to a group of companies. It therefore follows that the defendant can not use the non existent position of Group Chairman to run the business of the plaintiff company.

At law a company is managed by directors who appoint one amongst themselves to be a Managing Director. If you are not a director you can not manage a company. In terms of the plaintiff company's Articles of Association it is only one of the Directors who can be Managing Director. The defendant resigned as Director and could not, therefore, run the affairs of Candlex Limited under the guise of being Group Chairman.

Indeed, a Managing Director ceases to hold the office of Managing Director if for any reason he vacates the post of the director of the company. The defendant was not appointed in a separate contract to be Managing Director of the plaintiff company. On the facts of this case he was Managing Director because he was a Director of the plaintiff company. Consequently, he must have ceased being Managing Director of the plaintiff company on the day he resigned as Director of the plaintiff company. In any event the Board of Directors of the plaintiff company resolved that he should step down as Managing Director of the plaintiff company. The resolution of the Board of Directors has

not been rescinded or varied.

Was the Defendant an Executive Chairman of Plaintiff company?

The defendant was never appointed an Executive Chairman. There are no board minutes indicating that the defendant was appointed such Executive Chairman. If anything at one point in time he had been appointed Managing Director but he ceased being one when the board decided that he should step down.

Is there Interference, by the Defendant, with operations of Candlex Limited?

From the observations made above we find that the defendant was indeed interfering with the operations of the plaintiff company. Further, it is to be noted that article 72 of the Articles of Association of the plaintiff company provide that:-

"The business of the company (Candlex Limited) shall be managed by the Directors--- and may exercise and do all such acts and things as are necessary to carry into effect all the objects, purposes, authorities, powers, and discretions provided on the Memorandum of Association save such as are by the Act or by the Articles required to be exercised or done by the company in General Meeting---"

And on appointment and removal of Managing Director of the plaintiff company the Articles of Association of Candlex Limited in article 62 state that:-

"The company in General Meeting (shareholders) may at any time appoint a Managing Director to conduct the business of the company--- and may remove any Managing Director so appointed, and may fill up any vacancy in the office of Managing Director---"

As already found above, the defendant is neither a Director nor a Managing Director of the plaintiff company. The defendant is a mere shareholder of the plaintiff company. He is therefore interfering with the operations of the plaintiff company when he writes memos and advises department managers that they should be reporting to him. Further, the defendant is well advised to note that on 7th August 2000 the plaintiff company's shareholders appointed Mr Michael Hubbe to be Managing Director of Candlex Limited. This puts to rest as to who is the plaintiff company's Managing Director.

Is the Defendant being oppressed as a minority shareholder and what is his remedy?

It has been found by this court that the defendant is a minority shareholder. There is no evidence though that he is being oppressed. The defendant should not take the law into his own hands and impose himself as one of the people in management. If he thinks he is being oppressed, as such minority shareholder, then surely Section 203(1)(a) of the Companies Act may be employed by him to get redress in a court of law.

Section 203(1)(a) of the Companies Act states, inter alia, that:-

"Any member of the company may apply to the court for an order under this section on the ground that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or in disregard of his or their proper interests as members of the company---"

We have already found that the defendant offered no evidence to support his assertion that he is being oppressed by reason of his being a minority shareholder. The defendant could feel that he is being oppressed but he is not. The problem is that he wants to

manage the plaintiff company when, under both the Articles of Association of the plaintiff company and the law, he can not be allowed to do so.

For the reasons given above the plaintiff company has made out its case against the defendant in both legal actions.

**Conclusion**

Is the plaintiff company entitled to all the reliefs sought in the consolidated action?

Although we have found that the plaintiff has made out its case against the defendant it does not necessarily follow that it will get all the remedies it sought. We think that the plaintiff has not demonstrated the loss or damage it has actually suffered as a result of the defendant's conduct in interfering with the management and administration of the plaintiff company. For this reason, the court refuses to order that the defendant should pay damages, to the plaintiff, for unlawfully interfering in the management and administration of the plaintiff company or for allegedly procuring breach of contract on the part of the employees of the plaintiff company. The above finding does not, however, mean that the plaintiff company may not in future suffer loss or damage if the defendant's conduct is not stopped. In that event, we find that the plaintiff's prayer for injunction must succeed and an order of injunction is hereby granted restraining the defendant by himself or by his employees or agents or any of them or otherwise howsoever from holding himself out as the Group Chairman or Managing Director or director or manager or employee of the plaintiff company and from interfering directly or indirectly in the management and administration of the plaintiff company.

Further, it is the order of this court that an injunction should issue and is hereby granted restraining the defendant by himself or by his servants or agents or otherwise howsoever from being or remaining in or entering upon the plaintiff's land and premises comprising two office rooms on Plot No CC 936 in Maselema, in the City of Blantyre.

We make the following further orders:-

(a) The defendant shall deliver up possession of the plaintiff's land and premises comprising of the said two office rooms on Plot No. CC 936 situate in Maselema in the City of Blantyre.

(b)The costs of, and occasioned by, this consolidated action are awarded to the plaintiff company.

This disposes of the consolidated action herein.

**Pronounced** in open Court this 8th day of July 2003 at the Principal Registry, Blantyre.

F.E. Kapanda

**JUDGE**

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