



**IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
LILONGWE DISTRICT REGISTRY
COMMERCIAL CASE NO. 160 OF 2015**

BETWEEN:

HENRY YOTAMU MUNTHALI.....JUDGMENT-CREDITOR (CLAIMANT)

-AND-

MZUZU CITY COUNCIL..... JUDGMENT-DEBTOR (DEFENDANT)

CORAM: Justice Dr. Chifundo J. Kachale, *Judge*

Counsel Sitima, for the Judgement-Creditor

Counsel Sikwese, for the Judgement-Debtor

Kataika, Court Clerk

**RULING ON JUDGMENT-DEBTOR'S APPLICATION TO STAY THIRD-PARTY
DEBT ORDER AND DETERMINE WHETHER THE COUNCIL IS ENTITLED TO
EXEMPTION FROM ENFORCEMENT ON THE BASIS OF ORDER 34 RULE 4
CPR 2017**

1. On 24th July 2023, *Henry Yotamu Munthali* (the judgment-creditor) obtained an interim third-party debt order in respect of a judgment he obtained against Mzuzu City Council for the sum of K113,517,067.94. On 1st August 2023 the Council filed an inter partes application to stay the third-party debt order and also to seek a declaration that it is exempt from enforcement on the basis of Order 34 rule 4 of the Courts (High Court) (Civil Procedure Rules) 2017, hereinafter CPR 2017. On 7th August 2023 the judgment-creditor moved the Registrar to refer the matter to a Judge under Order 25 rule 2(1) CPR 2017. The application was heard on 20th February 2024.

2. The summary of the issues for determination are whether the judgment-debtor enjoys the exemption from enforcement extended by Order 34 rule 4 CPR 2017? According to Mzuzu City Council, the terms of Order 34 rule 4 CPR 2017 clearly provide such an exemption to the council since it is a public entity. In response, the judgment-creditor has pointed out that such a position represents a clear misinterpretation and therefore misapplication of the rule in question. The parties have made very elaborate submissions which the court has taken time to consider and will be cited where necessary in this decision.

3. The starting point, in our consideration, is to appreciate the contemplated scope of application of the Order under which the exemption exists. In the mind of this Court, the proper question is not whether an entity performs public ; but rather whether the action can be described as a suit by or against the government or a public officer. In determining that issue, it is very significant to observe that Rule 1 of Order 34 provides very expressly that
 - Subject to the Civil Procedure (Suits by or against the Government or Public Officers) Act, these Rules apply to civil proceedings by or against the State or a public officer.

4. In other words, the Order has to be read subject to what is provided under the cited statute. Section 3 of that statute provides that
 - (1) Save as may otherwise be provided by any Act, suits by or against the Government shall be instituted by or against the Attorney General. Such suits shall be instituted and tried in the same manner as suits to which the Government is not a party.
 - (2) The Attorney General or other person authorized by the Attorney General to act for the Government in respect to any judicial proceedings shall be deemed to be the recognized agent by whom appearances, acts and applications may be made or done on behalf of the Government.

5. Section 2 of the General Interpretation Act, says '*Government means the Government of the Republic established under the Constitution.*' In rule 1 of Order 34 CPR 2017 the terms '*Government*' and '*State*' appear to have been used interchangeably. On the basis of this simple analysis, it would be clear to this Court that the exemption provided under Order 34 is intended to benefit the Government as defined in the law above; to extend it to statutory corporations would be to stretch matters beyond the clear policy considerations which underlie

the proposed exceptional measures under the rules and the legislation in question. By subjecting the application and operation of Order 34 CPR 2017 to the Civil Procedure (Suits by and Against Government or Public Officers) Act, there is a recognition that the rules cannot exceed what the statute contemplated but must be interpreted in conformity with the spirit and terms of the legislation.

6. Thanks to the resourcefulness of Counsel for the judgment-creditor, the Court has had the benefit of a very instructive and insightful article called *Statutory Corporations and 'the Crown'*¹ in which the following pithy remarks were made

.....whatever once may have been the position, statutory corporations should not now be treated as forming part of the executive...this means that a statutory corporation cannot claim the benefit of rights, privileges and immunities of 'the Crown', although it may, depending on the terms of the relevant statute, be able to claim the benefit of rights, privileges and immunities that are equivalent to those to which 'the Crown' is entitled, but which are founded on statute..

....it appears that one reason behind the extensive use by colonial governments of statutory corporations and bodies to conduct what otherwise might be considered 'governmental functions' was a desire to remove areas of administration from direct interference by the executive and to afford third parties dealing with, or damaged by, such bodies full rights in contract and tort (including for breach of statutory duty), which at that stage would not have been available against the executive itself

7. According to this line of thought, which my Court finds credible and in keeping with the spirit under the Civil Procedure (Suits by or against the Government or Public Officers) Act, there must be a clear distinction made between the Government (described as the Crown in the above quote) and its statutory corporations in so far as matters of privileges and immunities are concerned. While there are compelling policy considerations underlying the statutory exemption from enforcement which is accorded to Government (as defined under the General Interpretation Act), there does not exist a similar justification for extending the same to a statutory corporation simply because they undertake public functions.
8. In arriving at its decision the Court has taken time to consider the three decisions around the same issue in the following cases: **Love****more**

¹ UNSW Law Journal, Vol. 28(1), page 186

Kantandiro-v-Malawi Housing Corporation, Personal Injury Cause No. 1254 of 2012 (where the Registrar held that Malawi Housing Corporation is covered by the exemption); **Namaliya-v-Malawi Housing Corporation, Commercial Case No. 506 of 2022** (where a Judge of this Division affirmed the position that Malawi Housing Corporation was so exempt); and **Umali and Another-v-Blantyre City Council, Civil Cause No. 200 of 2017** (where the Registrar concluded that the Blantyre City Council was not exempted from enforcement as a public body).

9. The creation and establishments of such corporations comes with certain legal and functional consequences which were ably discussed in the case of **Umali and another-v- Blantyre City Council** (above) as follows

I have gone through the contention by the judgment creditor with great anxiety in light of the guidance from the Namaliya case...Somehow, this court was persuaded that the enforcement creditor seems to be making a sound argument. First of all, the enforcement creditor invites the court to consider the totality of Order 34. First, they point out that Order 34 rule of the Courts (High Court) (Civil Procedure) Rules provides that subject to the Civil Procedure (Suits by or against the Government or Public Officers) Act, these rules apply to civil proceedings by or against the State or a public officer. In fact, the heading of Order 34 is 'PROCEEDINGS AGAINST THE STATE'. Prima facie, the court is called upon to consider whether the enforcement debtor is a public entity amenable to the exemption under Order 34 rule 4 of the rules. However, rule 1 of Order 34 of CPR 2017, specifically provides that the rules under Order 34 apply to Civil Proceedings by or against the State or Public Officers. It is worth noting that in terms of the rules such proceedings are those which are subject to Civil Procedure (Suits by or against the Government or Public Officers) Act. In the case at hand, the enforcement debtor is incorporated under section 5(2) of the Local Government Act....It goes without saying that the Council has legal personality and can sue and be sued in its own right. It is not surprising that the matter was commenced against them and not through the Attorney General. Somehow, it appears to be quite a stretch of the argument to try to fit this case into Order 34 pigeonhole simply because the enforcement debtor is a creature of statute rendering public service.

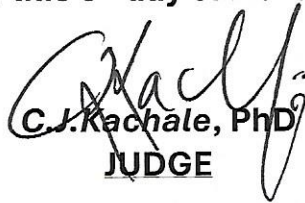
10. This Court shares the legal reasoning espoused above: it is not the functions of the entity that determine whether the exemption under Order 34 of CPR 2017 is applicable: it is rather whether the action can be described as **a suit by or against the Government or a Public Office** as defined in the statute of a similar title. Clearly, that description (in paragraph 4 above) would not cover the present case

which falls on all fours with the **Umali Case (above)**. If the courts in the other two decisions had addressed their minds to this critical issue, we doubt if they would have arrived at the conclusions they did in extending the exemption to a statutory corporation. The only scenario in which such an exemption would operate to benefit such entities would be by express statutory stipulation, which is absent in the current legislative framework.

11. For the aforesaid reasons, therefore, this Court does not find merit in the argument of Mzuzu City Council to stay the third-party debt order of 24th July 2023; accordingly, the application to that effect is dismissed forthwith and that interim order is hereby made absolute. The court has reached the legal conclusion that the exemption under Order 34 rule 4 of CPR 2017 is strictly confined to suits by or against the Government or Public Officers as determined in the preceding paragraph. Costs are for the judgment-creditor.

Order accordingly.

Made in Chambers this 6th day of March 2024 at Lilongwe.


C.J. Kachale, PhD
JUDGE