

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NUMBER 1201 OF 1993**

**BETWEEN**

**HARDWARE AND GENERAL DEALERS LTD.**

**PLAINTIFF**

**AND**

**G.R. NAURA t/a K. & G. GENERAL CONTRACTOR**

**DEFENDANT**

**CORAM: MWAUNGULU, J**

Zimba, for the plaintiff

Nampota, for the defendant

Selemani, Official Interpreter

**Mwaungulu, J**

**ORDER**

This is an application under Order 14 of the Rules of the Supreme Court. The plaintiff is applying for summary judgment. The application is based on the action which the plaintiff took out on 14th September, 1993. In that action the plaintiff is suing the defendant for K24, 107.06 being money due and payable to the plaintiff in respect of the defendant's cheques issued to the plaintiff which cheques were duly presented for payment but were returned "refer to drawer." The writ of summons was endorsed with a statement of claim.

The defendant issued two cheques: one for K 7,109.93 and the other for K 21,997.13.

Both cheques were dishonoured by the bank. In the statement of claim the plaintiff pleads that on the 31 st. of August 1993 he wrote to the defendant demanding payment of the sum. In the affidavit in support of the application the plaintiff deposes that the defendant was served with a notice of dishonour. In an action on a bill of exchange the plaintiff must endorse in the statement of claim that the drawer was given notice of dishonour (**May -v- Chidley** [1894] 1 Q.B. 451). The statement in the statement of claim that the plaintiff demanded payment is I think sufficient endorsement for purposes of the requirement. The indorsement in the statement of claim need not take any specific wording. These cheques are the basis of this action.

The defendant served defence on the plaintiff. In the defence the defendant denies that he owes the plaintiff the sum claimed. He admits to owing the plaintiff K10, 000. In relation to the rest of the claim, the defendant pleads that that amount should be paid by someone else. He already has obtained a third party notice for indemnity. According to the defendant, when he went to the plaintiff to buy goods, the other person owed money to the plaintiff. The defendant agreed with this other person, not the plaintiff, that the defendant would issue his cheque to cover the other person's indebtedness. Under the agreement the other person would pay the debt to the plaintiff before the cheques became due. The plaintiff pleads that the other person did not honour the obligation that is why the cheque was dishonoured

There is an amended defence. In it the defendant contends that the plaintiff knew of the arrangement between the defendant and the third party. The defendant further contends that there was no contract between the plaintiff and the defendant in relation to the money that the other person. The defendant therefore contends that there was no valuable consideration for the said cheque. The defendant concedes that he was an accommodation party in so far as the money the other party owed to the plaintiff.

On the strength of these two concessions by the defendant I am prepared, and I do so, to give judgment for the plaintiff and refuse leave to the defendant to defend the action. Order 14 of the Rules of the Supreme Court was intended to help the Court and the parties. It would really be a diminution of the authority of the Court not to have a power under which, in an appropriate case, it can say we will not go to trial, however and for whatever reason the defendant wants one, because the plaintiff has clearly made a case where it would be a waste of time and resource to have a trial. The plaintiff is entitled to speedy and quick justice at the least of cost. The rule is an encouragement to the defendant to let go where clearly he has nothing to say to the plaintiff's action. The practice of the Courts in exercising the discretion provided by the rule has been to give judgment to the plaintiff where he has proved his case so clearly and the defendant cannot raise any triable issue against the plaintiff's action. "When the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff." (Per Jessel, M.R., in **Anglo-Italian Bank -v- Wells** (1878) 38 L.T. 197, 201 cited in **Lucky Haulage -v- Nobrega** (1993) Civ. Cas. No. 1268).

Mr. Nampota concedes that the defendant was an accommodation party. Section 28 of the Bills of Exchange Act provides as follows:

“(1) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value for therefor, and for the purpose of lending his name to some other person.

(2) An accommodation party is liable on the bill to a holder for value; it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party.”

The defendant signed the bill. It is true, as the defendant accepts, that the defendant received no value for it as drawer of the bill. The law does not require him to receive any value as drawer of the bill. It suffices if the drawer intended to lend his name to some other person. The law requires the holder to hold it for value. To that there is no dispute. The plaintiff was holding the cheque for money which the third party owed it. The law goes further to make the accommodation party liable to the holder for value. It is irrelevant to liability that the holder knew that the accommodation party was one or not.

On the 10<sup>th</sup> of December, 1993 the plaintiff took out this summons for summary judgment contending that the defendant has no defence to the plaintiff’s action. The defendant pleads in his defence that the plaintiff knew that the defendant was an accommodation party. That cannot be a defence to the holder of the bill for value. An accommodation party is liable on the bill to the holder for value irrespective of whether the holder knew that the defendant was an accommodation party.

“The intention of the parties in immediate relationship where one of them has signed for the accommodation of the other, is that the other should be at liberty to raise money by the negotiation of the bill, but should provide funds to meet the bill if called on at maturity. The relationship is one of principal and surety.” (Halsbury’s Laws of England, Fourth Edition, 1973, Butterworth)

Where the instrument is an accommodation bill, it is the duty of the person for whom the accommodation was made to provide funds to satisfy the bill on maturity (**Sleigh -v- Sleigh** (1850) 5 Exch. 514) or, if he fails to raise the funds, to indemnify the acceptor or any party who has been compelled to pay the holder (**Bechervaise -v- Lewis** (1872) L.R. 7 C.P. 372,377). The fact that the party accommodated has not fulfilled his duty to furnish the funds on maturity of the bill is no defence to the accommodating party to the holder

for value. The payment of funds to the accommodating party by the party accommodated is not a condition precedent for the meeting of the bill on maturity. In an accommodation bill the relationship is one between principal and surety.

The surety's liability occurs when the principal debtor fails to pay back (**Belford Union Guardians -v- Pattison** (1856) 11 Ex Ch. 623). The creditor need not request the principal debtor to pay before proceeding against the surety( **Belfast Banking Co. -v- Stanley** (1865) 15 W.R. 989; **Re Brown, Brown -v- Brown** [1893] 2 Ch 300). It is not moreover necessary, without agreement, to proceed against the surety that the creditor sues the principal debtor, even if the latter be solvent. In **Wright -v- Simpson** (1802) 6 Ves 734, Lord Eldon, Lord Chancellor, said that it is the surety's business to see whether the principal debtor pays, not the creditor. The defendant here was a surety of the other. The plaintiff is entitled to proceed against him on the accommodation bill without calling on the principal debtor to pay.

Judgment will therefore be entered against the defendant. The defendant can proceed against the other accommodated by the bill.

Made in Chambers this 16th Day of September, 1997.

D.F. Mwaungulu

**JUDGE**