IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CASE NO. 238 OF 2004

BETWEEN

SCREENVISION ELECTRICAL & SATTELITE…….PLAINTIFF
SPECIALIST

-AND-

HONOURABLE W. KANJIRA……DEFENDANT

CORAM: MANDA**, SENIOR DEPUTY REGISTRAR**

Mwale for the plaintiff

RULING

This is an application for Summary Judgment brought under Order 14 of the Rules of the Supreme Court. The summons is supported by an affidavit sworn by Mtchuka George Mwale, who appeared for the plaintiff.

The plaintiff's claim against the defendant is for the sum of K48 000.00 plus interest thereon; collection costs amounting to K7 200 and costs for this action. The plaintiff averred that the defendant was indebted to him in the sum of K48 000 being the price of 2 Box Speakers and one remote gadget supplied to the defendant at his own request. The plaintiff further averred that upon taking delivery of the items, the defendant paid for them using a cheque number 000128 but that the cheque was referred to drawer. As a consequence, according to the plaintiff, the defendant still remains indebted to him. It was thus on this basis that the plaintiff desired the decision of this court in his favour. To support his application, the plaintiff did attach to his affidavit a copy of an invoice, which according to him bore the defendant's signature, the

amount in question, the items collected and the cheque number. This invoice was marked "MGM1."
From the record, there is no indication that the defendant filed a defence with the court. However, there is on the record an affidavit in opposition which the defendants served on the plaintiff, through Mr. Mwale. In his affidavit in opposition, the defendant did concede to the fact that he was indeed indebted to the plaintiff in the sum of K48 000 and that the invoice marked "MGM1" was indeed raised. However, the defendant averred that the cheque which he issued to the plaintiff in payment for the items he collected did pass through the bank an indication that the plaintiff got his money. The defendant further went on to say that he could not produce the paid cheque because he misplaced the same when he was moving to Tanzania. The defendant also contended that had it been that the cheque had been referred to drawer, the plaintiff would have been able to exhibit it. It was thus on this basis that the defendant did pray to the court that he be allowed to contest these proceedings because he has a defence on the merits. In view of this then the defendant prayed to the court that the plaintiff's application be dismissed with costs to him.

It well settled that to be entitled to summary judgment under Order 14 of the Rules of the Supreme Court, the plaintiff must prove his/her claim clearly and the defendant must be unable to set a bona fide defence or raise an issue which ought to be tried (see ***Roberts v Plant*** [1895] 1 QB 597). Indeed Jessel, M.R did state in ***Anglo-Italian Bank v Wells*** [1878] did state as follows:-

> *"thus where a judge is satisfied that not only is there no defence, but no fairly arguable point on behalf of the defendant, it is his duty to give judgment for the plaintiff."*

Indeed it is a policy under Order 14 of the Rules of the Supreme Court to prevent delay in cases where there is no defence.

While the plaintiff must prove his claim clearly to be entitled to Summary Judgment under Order 14, the onus on the defendant is simply to show cause against the application by affidavit or otherwise to the satisfaction of the court. In this regard a defendant can show cause on a preliminary technicality or by showing that there is a serious issue of fact to be tried or by showing that he has arguable defence or in certain circumstances by raising a ***prima facie*** set-off or counterclaim or by showing the court that for some other reason there ought to be a trial.

In this instance, it seems to me that the defendant's argument is that there is a serious issue of fact which ought to be tried, the same being the issue whether he paid the plaintiff money or not. However, it is trite law that the mere assertion in an affidavit of a given situation does not, *ipso facto,* provide leave to defend. It is a requirement that the defendant must satisfy the court that he has a reasonable probability of showing a real or bona fide defence, that is, his evidence is reasonably capable of belief (as per Bingham L.J. in ***Bhogal v Punjab National Bank*** [1977] 2 All. E. R. 286, 303).

Where there is an issue of fact, the court is required to ask itself the question as to whether what the defendant says in his affidavit is credible. Indeed as a matter of law, the court does not have to treat every affidavit filed in Order 14 proceedings as truthful at face value, especially when every probability and circumstance might point to the contrary (***Famous Ltd v Ge Inn Ex Italia SRL, The Times***, August 3, 1987, C.A., the case is quoted in paragraph 14/3-4/8 of the 1995 White Book).

The question in this instance thus becomes, has the defendant done enough in his affidavit in opposition so as to be given a leave to defend this matter? As earlier pointed out, the ground on which he defendant is denying being indebted to the plaintiff is that he did pay for the items that he took by a cheque, which cheque was honoured by the Bank. The converse to this assertion then will be that the plaintiff is

trying, by bringing this action, (for want of a better word) to "defraud" the defendant. Indeed this would be a logical conclusion if the defendant's cheque had been honoured by the Bank or why else would the plaintiff be bringing this claim. In this regard, I was of the view that the onus was on the defendant to go beyond just mere stating in his affidavit that he did pay the plaintiff using a cheque, which he could not produce because the same had been misplaced when he was moving to Tanzania. Indeed it is the belief of this court that there are ways of showing that a cheque had been honoured by a Bank, one of which is to produce a Bank Statement with the details as to when the cheque was honoured. The production of the Bank Statement was, in my view, something which was not beyond the defendant in as far as these proceedings are concerned. Indeed it is my view that it was much in the defendant's interest to see to it that this case was concluded as speedily as possible and that the defendant could have curtailed any further proceeding by attaching a Bank Statement to his affidavit in opposition, which I am sure should have shown that the cheque he issued to the plaintiff was honoured. The fact that this was not done leads to me to conclude that the cheque was honoured and therefore that defendant does not have a defence to this claim and simply wants to buy some time by filing an affidavit in opposition.

Indeed, in all cases where the defendant intends to challenge an application under Order 14, sufficient facts and particulars must be raised to show that there is a triable issue. In this instance I do not honestly think that the defendant has achieved this. Then there is also the issue of the defendant's non-attendance to these proceedings, which also has to be considered. This is especially in view of the fact that the defendant was aware of the proceedings and elected not to come. It is the view of this court that if the defendant had a defence, he should have been able to attend the proceedings.

Having said all this then, it is the finding of this court that the plaintiff has proved his claim clearly and that there is no bona fide defence to justify a trial. As such I give the plaintiff

summary judgment for the sum of K48 000, plus interest thereon, collection costs amounting to K7 200 and costs of this action.

Made in Chambers this……day of……2004

K.T. MANDA
SENIOR DEPUTY REGISTRAR