

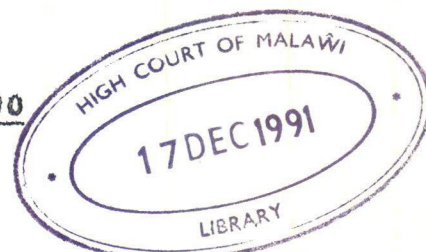
01-03-1991

XAA

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 329 OF 1990



BETWEEN:

NIKAWANE ENTERPRISES LTD. .... PLAINTIFF

and

R F PHONI ..... DEFENDANT

Coram: D F Mwaungulu, Acting Registrar  
Nyirenda, of Counsel for the Defendant/Applicant  
Ng'ombe, of Counsel for the Plaintiff/Respondent

RULING

On the 27th of August 1990 I set aside a judgment in default of notice of intention to defend entered on the 28th of May 1990. I reserved ruling.

The plaintiff took out the writ on this action on the 23rd of April 1990. The endorsement on the writ is:

"The plaintiff's claim is for R34,638.01, profits, interest and damages as particularised in the statement of claim annexed hereto and costs of the action."

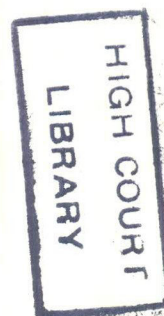
There are problems with punctuation here. It is not clear whether the R34,638.01 refers to profits, interest and damages or whether it is a distinct claim from profits, interest and damages. As a matter of course such defects can be cured in the statement of claim. The statement of claim here shades more clouds than light. Paragraph 2 which covers the amount reads:

"The plaintiff secured through the defendant an indent numbered NE//R1018/87 from Peoples Trading Centre. Limited Agency Division for doom worth R34,668 from a supplier in South Africa known as Robertson (Pty) Limited."

There is variance with the amount claimed in the writ. In paragraph 5, where the relief is claimed, we have the following:

"The plaintiff therefore claims from the defendant and prays for an order that:

2/.....



- (a) the defendant do declare to the plaintiff the total landed costs of the goods;
- (b) the customer to whom the defendant had sold the goods;
- (c) the profit so determined to attract interest at the rate of 18% from the date of sale;
- (d) the price at which the defendant sold the goods; and
- (e) damages for breach of contract."

Again there are punctuation and syntactical problems. The body of the paragraph does not match with the itemisation of the reliefs sought.

The first point taken by Mr. Nyirenda is that the judgment is irregular in that it is based on a claim for R34,638.01 indorsed on the writ which claim is abandoned because it is not repeated in the statement of claim. There is merit in the argument in every way. I have referred to the uncertainty caused by wrong punctuation but, even giving the interpretation most favourable to the plaintiff, the claim for the sum is neither explained or repeated in the statement of claim. A claim in the writ not repeated in the statement of claim is treated as abandoned (Cargil vs. Bower (1878) 10 Ch.D.302; Lewis vs. Durnford (1907) 24 T.L.R. 64, 65.

The second point taken by Mr. Nyirenda is that leave of the court was to be had under Order 13, Rule 6 of the Rules of the Supreme Court. This argument is only tenable if the claim for a declaration, which in my opinion is what is claimed in paragraph 5 of the statement of claim, was claimed in the writ. Apart from that a judgment in default of notice of intention to defend cannot be had where the action is for mixed claims (Order 13, Rule 6). It is not correct that on the facts of this case leave should have been obtained under Order 13, Rule 6 of the Rules of the Supreme Court. If there are other claims as is here and there is no notice of intention to defend the plaintiff is supposed to proceed as if there was such notice in which case he must serve a statement of claim if he has not already done so. If defence is not served the plaintiff must take out a motion or summons for judgment under Order 19, Rule 7. So the judgment here would have been irregular because there was no motion or summons for judgment not because leave to enter judgment was not obtained. The judgment entered here was not for a declaration but on a mistaken view of a liquidated claim. The claim for a declaration was not in the writ and no judgment could be obtained on it. It is superfluous to decide on the point



because, if there was a notice of intention to defend, the defendant would have applied to have that aspect struck off the pleadings.

In view of the conclusion I have drawn on the matter I do not think I should labour on the third point. Suffice to say that there is merit in the affidavit.

Costs to the defendant.

Made in Chambers this 20 day of March 1991.

  
D F Mwaungulu  
ACTING REGISTRAR OF THE HIGH COURT

