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IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NUMBER 99 OF 1990

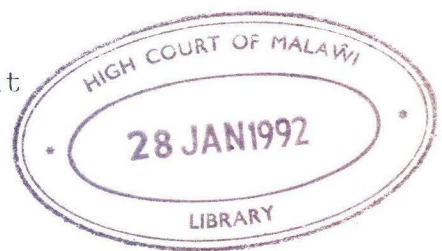
BETWEEN:

SUGAR CORPORATION OF  
MALAWI LTD. .... PLAINTIFF

and

J. HARDING t/a KIRTLAND COMPANY (S.A.) .. DEFENDANT

Coram: D F Mwaungulu, Acting Registrar  
Mandala, Counsel for the Plaintiff  
Chirwa, of Counsel for the Defendant



RULING

The plaintiff's application for summary judgment must be dismissed with costs. Going by the pleadings and the affidavit in support of the application, there are some serious disputations of fact and, I would think, law. It also appears to me that the plaintiff is hunting for a defendant and if he has shot one the defendant is not dead maybe until after trial.

The plaintiff is a company registered in Malawi that produces sugar for export and domestic consumption. There is a measure of uncertainty, I will consider this later, about the defendant. Whoever is the defendant though, the plaintiff's action is based on a contract, or a series of them, where the defendant was to carry cement and sugar to and from Mozambique. The plaintiff paid the agreed costs. The defendant did not pay the railage charges which he should have paid, according to the agreement. These were being debited to the account of AMI (Mozambique) SARL, the plaintiff's agent. The plaintiff's claim is for these charges which were paid for by AMI (Mozambique) SARL.

The defendant in this action is put as James Harding t/a Kirtland Company (S.A.). The defendant denies that he has ever been a carrier of goods or ever traded as Kirtland Company (S.A.). He denies that he had entered into any agreement with the plaintiff. He has put a spirited and heavy defence which in esse puts at askance his being a party to the action.

In spite of the magnanimity in Order 14 to an entitled plaintiff, judgment under the order is justified only in cases where the plaintiff's claim is clear and obvious and where the defendant has no defence or issue against the action. So that where the defendant shows a defence or a reasonable chance of defence or a bona fide case for the defence the defendant should be given unconditional leave to defend. Order 14 is intended only to apply to cases where there is no reasonable doubt that the plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay (Jones vs. Stone(1894) A.C.122. Leave to defend must be given unless it is clear that there is no real substantial question to be tried (Lodd vs. Delap (1905)12 L.T.510); that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment (Thompson vs. Marshall (1880)41 L.T. 720; Jacobs vs. Booths Distillery Co. (1901)85 L.T. 262.

The case at hand is clearly a case where judgment cannot be given summarily. Exhibits A and B in the plaintiff's affidavit in support of the application show that the contract was between the plaintiff and Kirtland Company (S.A.). Kirtland Company (S.A.) is in Switzerland. The designation of the concern is not J Harding t/a Kirtland Company (S.A.). J. Harding can be joined, this is under Malawian law, if J. Harding is a sole trader owning the business. The plaintiff has a grotesque premise, which I will consider later, for supposing that J. Harding was running the business. The bottom line is that there is nothing in the affidavit to show that the contract was between J. Harding who was trading as Kirtland Company (S.A.). J. Harding denies trading as Kirtland Company (S.A.). He is neither a shareholder, director officer nor agent of Kirtland Company (S.A.). This is a substantial issue that should go to trial.

Of course in exhibit 'C' there is reference to Mr. Harding. The defendant says that if his name was referred to in the telex it must have been in relation to Kirtland. In my opinion the telex in question is so nebulous to suggest that the contract was with Mr. Harding let alone that Mr. Harding was trading as Kirtland Company (S.A.) or an officer, member, agent of Kirtland Company (S.A.).

The basis for pinning J. Harding is found in a letter (exhibit D) written to the solicitors for J. Harding:

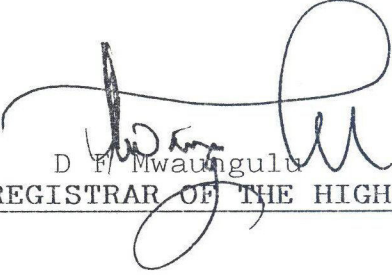
"We have conducted a search of Kirtland Company (S.A.) in Switzerland and our search indicates that there is no company with the name Kirtland Company S.A. registered in Baste in Switzerland. It would therefore, follow that it was your client who was personally involved and not Kirtland since the company does not appear to exist."



The request for the search or the reply to the request have not been exhibited. Nobody has deposed to the search. There is no evidence of the nature or extent of the search. It must be proved that Kirtland Company (S.A.) is not registered in Switzerland. This is not proved by the letter from the plaintiff's legal practitioners. There is doubt about whether Kirtland Company (S.A.) exists in Switzerland and the plaintiff has to prove that at the trial. Giving judgment under Order 14 is tantamount to endorsing the uncertainty in the plaintiff's mind about who they contracted with. It is quite obvious that the plaintiffs are fishing for the defendant. There is some doubt about whether J. Harding t/a Kirtland Company (S.A.) is the proper party and that issue must go for trial.

I give unconditional leave to the defendant to defend the action. The case will be tried by a Judge sitting without the Jury at the Principal Registry on a date to be fixed by the Court. There should be discovery in the next fourteen days and inspection within fourteen days after the time set for discovery. The case should be set down by 1st March 1991. I rate the case at C. The possible length of trial is 3 days.

Made in Chambers this 18th day of January 1991.

  
D. F. Mwaungulu  
ACTING REGISTRAR OF THE HIGH COURT

