

12-3-92

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IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO.895 OF 1990

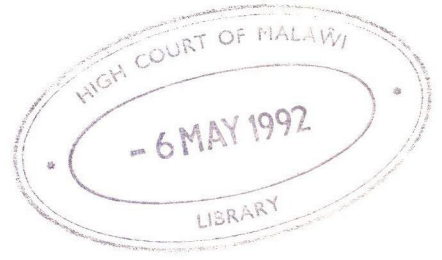
BETWEEN:

BOWSPRIT TRADING (PTY) LIMITED PLAINTIFF

AND

NAMALUNGA ENTERPRISES LTD. DEFENDANT

CORAM: Mwaungulu, Registrar
Kadwa, Counsel for the Plaintiff
Chatsika, Counsel for the Defendant



ORDER

On this summons, where the plaintiff seeks summary judgment under Order 14 of the Rules of the Supreme Court, I give unconditional leave to defend the action. The case will be tried at the Principal Registry by a Judge sitting without a jury. The case will appear on the short cause list. There should be discovery by exchange of lists of documents within 14 days followed by inspection within fourteen days thereafter. The case should be set down by 1st May, 1992.

The plaintiff took out this action on the 26th of September, 1990. He claims price of goods sold to the defendants. The plaintiff is a company registered in South Africa. The defendant is a company registered in Malawi. Around the 25th of April, 1990 the plaintiff agreed to sell and the defendants agreed to buy gumboots. These goods were delivered to the defendants on the 7th of June, 1990. Invoices were sent to the defendant and he received them. The invoice is exhibited in the plaintiff's affidavit. A portion of the invoice reads:

"Payment: By means of a bill of exchange"

All these facts are contained in the statement of claim and verified by the affidavit sworn in support of the application. This far there is agreement with the defendant because, in paragraph 1 of defence, paragraphs 1 and 2 of the statement of claim are admitted. The price has not been paid.

The gravamen of the defence is that payment of the price was subject to the defendant receiving a bill of exchange from the plaintiff. It is contended that the price could not be paid on this account. The defendant has not sworn an affidavit in opposition. He can establish his ground of defence without it.

Order 14 of the Rules of the Supreme Court is not a new order. Its benefits, which have resulted in expansion of its scope and practice, have been eulogised and explained by many a jurist. The proper way to settle disputes in our accusatorial system is by trial where there is discovery and direct testimony tested by cross-examination. Normally a defendant is entitled to have his matter tried. Where, however, the plaintiff's claim is clearly established by the pleadings and the affidavit in support of the application, surely the courts should spare the plaintiff the vicissitudes of a trial where there is no defence or matter to be tried in the action. It must therefore be in those circumstances where there is no defence or matter to be tried where summary judgment should be given. To my mind the case here is not such a one.

The defendant, while conceding that the goods were accepted and the price not paid by him, charges that the price could only be paid when the plaintiff had sent him a bill of exchange. The plaintiff states that payment of price was not conditional on production of a bill of exchange.

In my opinion, Mr. Chatsika is right when he says that the price could not be paid unless the plaintiff prepared a bill of exchange. Admittedly, the agreement did not state in black and white, as Mr. Kadwa states, that a bill of exchange was a condition precedent. This, however, was an international transaction and certain principles apply.

Payments of the price of goods supplied under an international sale are effected either by direct payment made by a banker at the buyer's instruction to the seller or by the use of a bill of exchange drawn by a seller on the buyer. There is nothing in the affidavit in support of the summons or the pleadings to indicate that the defendant's bank was to transfer funds or that there was a bank overdraft in respect of the defendant. If there was such stipulation, no doubt, on receipt of invoices, the defendant should have paid the price by transfer of funds or banker's draft. On the contrary, the invoice clearly says that payment was to be by a bill of exchange. The bill of exchange should have been drawn by the seller on the buyer. It has not been drawn, at least the affidavit and the pleadings do not say it was. If this was not done, and it is not now to decide whether that was done, the buyer would have paid the price. There is, therefore, a triable issue in the action on the price. The summons is dismissed with costs.

MADE in Chambers this 12th day of March, 1992 at Blantyre.


D.F. Mwangulu
REGISTRAR OF HIGH COURT

