IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.1418 OF 1992

BETWEEN:

H.W. JONGA (MALE) ..... PLAINTIFF

- and -

NAPOLO UKANA BREWERIES LIMITED ..... DEFENDANT

CORAM: MWAUNGULU, REGISTRAR

Mandala, Counsel for the Plaintiff
Kasambala, Counsel for the Defendant

O R D E R

This is a summons by the plaintiff for summary judgment under Order 14 of the Rules of the Supreme Court. For reasons which will be apparent later, it may be important to reproduce Order 14 rule 3(1):

> "Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect of the claim or part of the claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed."

This provision altered the practice on summary judgments which had existed for over a century. Prior to this rule the plaintiff had to show that the defendant had no defence or the defendant had to show that there was an issue or question in dispute. Under Order 14 rule 3(1), however, the Court may deny the plaintiff his entitlement to judgment even where the defendant has raised no substantial issue provided "that there ought for some other reason to be a trial of that claim or part". There are affidavits in support and in opposition to the application.

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The plaintiff was appointed Managing Director of the defendant Company in January, 1989. He was one of the principal shareholders. He sold his shares in the Company. On the 26th of November, 1992 he took out this action to claim remuneration amounting to K53,693.92, being sums due to him when he was a Director of the defendant Company. His claim is based on a management meeting that took place on the 31st of March, 1989 where it was resolved that Directors would be entitled to house rent of K1,000.00 per month and telephone expenses of up to K750.00 per month. When he retired from the Directorship in 1990 he wrote to the Company on 25th of March, 1992 demanding the monies. All these issues are raised in the plaintiff's statement of claim.

The defendants put in an amended defence in which they conceded that the plaintiff was their Managing Director at some time. They deny that there was a meeting on 31st March resolving that the sums claimed by the plaintiff be paid to Directors of the Company. They also claim that the sum of K29,397.00 appearing in the Directors Account was a ploy to avoid or evade tax. They also allege that the plaintiff who master-minded it and promulgated, this was aware that no monies would be paid out to Directors. There is a counter-claim in which the defendants are claiming the sum of K5,000.00 for a motor vehicle which the plaintiff took away when leaving the defendant Company. There is also a claim for K5,075.14, being the amount the defendant paid on the plaintiff's behalf when the Sheriff executed against the plaintiff.

The affidavits in support of the application and in opposition to the application verify the facts as postulated in the pleadings. In my view, unconditional leave to defend should be given to the defendant. I think I state the principle correctly when I say that where there is serious dispute as to the facts in a particular case the rightful course is not to give the plaintiff the judgment but rather to give the defendant the right to defend himself so that the plaintiff can clearly establish his case and the Court be given the opportunity to decide the fact after hearing the defendant and the plaintiff. I would have thought that this is well known, but if any authority is needed then Saw v. Hackin (1889) 5 TLR at 72 is such authority.

In this case the claim is based on a management meeting of the 31st of March, 1989. On the face of it Directors of a Company cannot claim remuneration. Dunston v. Imperial Gas Light and Coke Company (1831) 3 B and Ald. 125; Harton v. West Cock Railways (1883) 23 Ch.D 654, 672. But the Articles of Association usually provide remuneration to Directors. In this case the Articles of Association did so provide. It appears to

me that this is what the plaintiff wanted to say in the unclear pleading in paragraph 2. This seems to be confirmed by paragraph 2(b) of the affidavit in support of the application. The defendant, however, took real issue that lack of clarity in paragraph 2 of the statement of claim, he thought, and I don't understand why, is a serious legal issue which the Court should resolve. I must confess that it must have been obvious to the defendant that the plaintiff would not have intended that the Articles of Association would get remuneration. Assuming that it was in fact a legal issue that Articles of Association would receive remuneration, I would have thought this is a very simple legal question and wholy unarguable that I would not have given leave to defend. (Cow v. Casey (1949) 1 KB 474, 481, followed and applied in European Asian Bank AG v. Punjab and Sind Bank No.2 (1983) 2 All E.R. 508, 516.) The Articles of Association, according to the pleadings and the affidavits, provided for remuneration. Articles of Association commonly provide that Directors shall be entitled to such remuneration as shall be voted to them at a general meeting. If that is the case then there must be a resolution duly passed by the Company to that effect. If, however, the remuneration is approved by all shareholders entitled to attend and vote at a general meeting, this has the same effect as a resolution duly passed by the Company at a general meeting. Re:Duomatic Ltd. (1969) 2 Ch. 365 and Cane v. Jones and Others (1981) 1 All E.R. at page 533. In some cases, however, the resolution of the members approving the accounts may be sufficient authorization, so long as the members are aware that they are being asked to apporve the acounts, they are also being asked to approve the remuneration. (Felix Hadley and Co. Ltd. v. Hadley (1897) A.C. 97, 141). It is not clear to me in this case, either from the pleadings or the affidavits, whether remuneration was to be voted at a general meeting. I may concede for purposes of this case that probably this was not the case. The case might very well be, as is always the case, that the amount of remuneration to be paid to Dictors is a matter of internal management. That was the case in (Burland v. Earl (1902) A.C. page 83, Normandy v. Ind Coope and Co. Ltd. (1908) 1 Ch. page 84). This is where the dispute arises.

The plaintiff has exhibited the minutes of, I think, a management meeting held on 31st March, 1989. The minutes are signed by the plaintiff as Chairman and a Mrs A.A. Bowler as secretary. It does appear as this was not a Board meeting because the Board was to be informed of this meeting. The minutes of this meeting show that the rental and the telephone bills were to be paid by the Company as the plaintiff claims. If this was all, I would have given judgment for the plaintiff. The defendants, however, dispute the authenticity of these

minutes. They state that the signature of the secretary is not genuine. They have proffered another set of signatures to disprove this. The defendants further allege that this meeting never took place at all. They contend that the actual meeting where the amount of remuneration was decided took place on the 10th of January, 1990. There, there was no suggestion that telephone bills would be paid. Of course, they do not seem to dispute that the rentals of K1,000.00 were payable. They contend, however, that those rents were paid to the plaintiff according to their journal/ledger entries. They have produced the minutes of the same meeting. In my view, this dispute cannot be resolved by looking at the affidavits. The matter must go to full trial so that the plaintiff can be cross-examined on these matters. These are facts which by their nature entitle the defendant to interrogate the plaintiff.

There is more than that. The plaintiffs are claiming a further sum of K29,397.00 as money standing to their account which the defendants must pay. This money indeed seems to be standing to the plaintiff's account according to the final accounts prepared by the defendants' Accountants, Graham Carr & Company. The defendants argued that this money was in fact not payable to the plaintiff. They argue that the money was put into the Directors Account just to inflate the liability of the Company in order to evade tax. They contend that it was very clear to all Directors including the plaintiff that these monies would not be payable. I think that these are matters on which the plaintiff should be interrogated. See Harrison v. Botten Heim (1878) 26 WR 362.

As I pointed out at the beginning, there are some magical words that have been introduced in rule 3(1) of Order 14: "that there ought for some other reason to be a trial". In Miles v. Bull (1968) 3 All E.R. 632, 637 Megarry, J. considered the effect of these new words. He said at page 637:

> "If the defendant cannot point to a specific issue which ought to be tried, but nevertheless satisfies the Court that there are circumstances that ought to be investigated, then I think those concluding words are involved. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff."

I think in this case if the minutes of the meeting in which the plaintiff relies are questionable then this is a matter that

requires full investigation at the trial. In this case there is more than that. If, as the defendants allege that certain monies were put into the Directors Accounts to inflate liability in order to evade or avoid tax and it was not intended that these monies would be paid out to the Directors and that the plaintiff himself master-minded that decision, it is difficult to see how he should claim that money on summary judgment without fully inquiring whether this was so. This, in my view, would be covered by the final words in Order 14 rule 3(1).

Finally, there is a counter-claim to the plaintiff's action. The claim is in fact connected to the plaintiff's action. He wants to get dues payable to him when he was a Director of the Company. The Company is alleging that he took away with him Company property and at one stage the Company had to bail him out when the Sheriff came. I think these claims properly relate to the plaintiff's action. In Zoedan Co. v. Barrett (1882) 26 SJ 657 Lord Justice Cotton observed that although a counter-claim is for many purposes a cross-claim it ought to be treated as a defence for purposes of Order 14.

I would, therefore, dismiss the application in this case and give unconditional leave to the defendant to defend the action.

Within 14 days there will be discovery by exchange of lists of documents verified by affidavits. This will be followed by inspection 14 days thereafter. The case should be set down by 30th June, 1993. The case will be tried by a Judge without a jury at the Principal Registry.

The parties can appeal to the Judge in Chambers.

MADE in Chambers on this 18th day of May, 1993, at Blantyre.

D.F. Mwaungulu
REGISTRAR