IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 790/92

BETWEEN:

LEYLAND DAF (MW) LTD.....PLAINTIFF

VERSUS

F.A. LAMBAT.....DEFENDANT

CORAM: D F MWAUNGULU
Nampota for the Plaintiff
Chizumila for the Defendant

ORDER

On the 4th of March, 1993 I heard the plaintiff's application for summary judgement under Order 14 of the Rules Of The Supreme Court. I reserved ruling. Upon reading the pleadings, the affidavits in support, opposition and reply and listening to argument, judgement will be entered for K44,490.12. The case will go to trial for the sum of K4,604.66 subject to this sum being paid into court in the next sixty days.

The plantiff took out this action on the 23rd of June, 1992 claiming K94,851.78 for goods and services supplied to the defendant. The invoices for the work and goods are particularised in the statement of claim issued together with the writ. On 8th July 1992 the defendant lodged a notice of intention to defend. On 15th July, 1992 the plainntiff served an amendment to the statement claim to account for a credit note for the sum of K40,500.00. This reduced the claim to K54,351.78.

On the 26th of August, 1992 the plaintiff took out this summons. In the affidavit in support of the application it is deponed that on 19th March, 1992, after a demand letter for the sum of K54,351.78 was sent to the defendant, the defendant issued postdated cheques for the sum. (exhibits JMC 2-6). Two cheques were dishonoured. The affidavit in support of the application allows for the set-off contained in the amended defence. The plaintiff therefore, prayed for judgment to be entered in the sum of K50,094.78, after taking away the set-off.

On the 22nd October 1992 the defendant served an affidavit in opposition This affidavit is more revealing of the transaction.

In the affidavit is exhibited a quotation from the plaintiff for various works. This comprises two parts: a letter and an enclosure. The letter and enclosure show a quotation of K11,792.74. (exhibit FAL). There is a further exhibit FAL invoice 12086 fovarious works done in Zambia. This invoice is for the sum of K4,604.66

The amended defence is in exhibit FAL 2. in the second paragraph it is conceded the credit note reduced the claim to K54,351.78. The defendant contends that the quotation dated 12th September 1991 was for K11,792.74 was unilateral . The defendant does not therefore want to pay the sum of K9,113.75. The defendant also disputes the claim for K4,604.66 for various works done in Zambia because they were repeat jobs for poor workmanship. It was for this poor workmanship that there was a breakdown in Zambia. The defendant therefore admits the sum of K40,633.37. There is a repeat of the set-off which, as we have seen, the plaintiff is not claiming summary judgement for.

In the affidavit in opposition the defendant contends that the cheques were issued on the firm understanding that he would forego his action on, I think, the set-off. It is, therefore, open to him to raise the defences he has the plaintiff having taken this action.

I have subjected the facts that come out from the affidavits to a serious scrutiny. In all fairness to both parties the issues could easily have been narrowed and resolved if considerable care had been taken on the facts. The only matter to go to trial is for the sum of K4,604.66 on invoice number 12086 dated 14th January, 1992. The plaintiffs contention is that there is no triable issue and the defendant has no defence to the action.

The main pretext for the plaintiff's contention is that the indebtedness is not disputed because the defendant issued cheques to cover the debts. Against the plaintiff is the fact that this is not an action on bill of exhange. Mr Chizumila contends, correctly in my view , that the fact that the defendant offered to pay the debt by instalments does not preclude him if he has a defence. The case cited for this in the Supreme Court of Appeal decision in Makaniankhondo Building Contractor versus Hardware General Dealers (1982, Court Appeal Case Number 12, unrepaid. That decision follows the practice established by the House Of Lords in 1937 in Evans versus Bartlam (1937) A.C 473, 479 where Atkin L J said:

3/.....

> "My Lords, I do not find myself convinced by these judgements. I find nothing in the facts analogous to cases where party having obtained and enjoyed material benefit from a judgement has been held precluded from attacking it while he still is in enjoyment of the benefit. I cannot bring myself to think that a judgement debtor who asks for and receives a stay of execution approbate the judgement, so as to preclude him thereafter from seeking to set aside whether by appeal or otherwise. No do I find it possible to apply the doctrine of election. It is a simple answer to say that to infer election it must be shown that the person concerned had full knowledge of the various rights amongst which he elects. There is here no evidence that the defendant at the time he asked for and received time had any knowledge of his right to apply to set the judgement aside. I cannot think that there is any presumption that he knew of this remedy either sufficiently for the purpose of the doctrine as to election or at all ..."

The only catch is that both these cases were on an application to set aside a judgement. I have come across no authority directly on an application under Order 14. One thing, however, is common to both instances: the defendant must raise a triable issue or a defence on the merits. I find no reason why where there is an application under Order 14, and there is a defence to the action, the defendant should be denied the right to put foreward his defence simply because mistakenly he had offered to pay by instalment. The law should show more condescendence where, like here, the decision was made without legal advice. The fact that the defendant agreed to pay by instalments does not in itself prevent the defendant raising such defences as he has to an application for summary judgement.

The defendant takes issue with three aspects of the transaction, the quotation, the repairs conducted in Zambia and the set-off. The set-off is not subject of the application. There are two issues which the defendant contends are triable and should be left for trial.

There is no merit in the argument that the quotation should stand at K11,792.64. Of course the letter mentions this figure. This is the figure that is tallied on the quotation sheets accompaning the letter. It is quite clear from these documments that there was an error in the extrapolation of the cost of twelve bigend bearings. The cost of each, is K468.54. When extrapolating for twelve such bearings the price of one is put. The correct price is K5682.48. There is a shortfall of K5,153.94. The error was explained to the defendant in the plaintiff's letter of 24th February, 1992. This explanation is plausible and acceptable. Mr Chizumila submitted that the fact that the defendant never replied does not mean the explanation

4/.....

was believed. The matter is triable and the plaintiff should be cross-examined on it. There is, in my view, sufficient premise on the affidavits to find that there was an error. The defendant cannot benefit from it. He must pay the actual price for the goods supplied.

Then there is the invoice for work done in Zambia. The defendant contends that the repairs in Zambia emanate from the plaintiff's poor workmanship on his motor vehicle. The defendant cannot pay for this. The plaintiff contends that the breakdown in Zambia was due to a fault patent at the time of repair and explained to the defendants. This is a sort of allegation on which the defendant is entitled to interrogate the plantiff (Harrison -v- Bottenheim (1878) 26 WR, CA).. The defendants defence on the issue is however, to borrow a phrase, "Shadowy", (Per Lord Denning M.R. in Van Lynn Developments Limited -v- Pelias Construction Company. (1968) 3 All E.R 824). Leave is granted to defend the action on condition that the sum of K4,604.66 is paid into court in the next sixty days.

There will be summary judgement for the sum of K44,490.12. As to the residue, the case will be tried, unless the parties cousent to it being tried by the Registrar, by a Judge sitting without a jury at the principal Registry on a date to be fixed by the court. In the next fourteen days there will be discovery by exchange of lists of documets verified by affidavit. This will be followed by inspection fourteen days thereafter. The case should be set down by 30th June 1993. The trial will take a day. Costs to the plaintiff for the amount obtained under summary judgement.

The parties can appeal to a Judge in Chambers

Dated this 13th day of April, 1993.

D F Mwaungulu
REGISTRAR OF HIGH COURT