IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.552 OF 1993

BETWEEN:

NAZCO CREATIONS ..... PLAINTIFF

- and -

HASSAM HAJI MAHOMED
t/a HASCO CASH "N" CARRY ..... DEFENDANT

CORAM: MWAUNGULU, REGISTRAR

Chiligo, Counsel for the Plaintiff
Gonakulimji, Counsel for the Defendant

O R D E R

On the 28th of October, 1993 I heard an application by the plaintiff to set aside an order that I made on the 24th of August, 1993 setting aside the judgment entered by the plaintiff, Nazco Creations, against the defendant, Hassam Haji Mahomed t/a Hasco Cash "N" Carry. On the 28th of May, 1993 the defendant took out the summons to set aside the judgment. The summons was returnable on the 24th of August, 1993. The plaintiff was served on the 12th of August, 1993. The plaintiff did not appear on the 24th of August, 1993. I heard the defendant and set aside the judgment with costs to the plaintiff. The plaintiff then took out the summons that I heard on the 28th of October, 1993 to set aside the order I made in his absence. I set aside the order that I made ex-parte on the 24th of August, 1993. I ordered that I hear the defendant's application to set aside the judgment.

The defendant sought to set aside the judgment on two grounds. First, that the judgment was irregular in that the judgment in default of notice of intention to defend was obtained prematurely and without the plaintiff serving a statement of claim on the defendant. The second ground was that the defendant has a good defence to the plaintiff's action. I set aside the judgment in default of notice of intention to defend not on grounds that the judgment was irregular but that

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the defendant had grounds on the merits. I did not think that the judgment was irregular. I proceed to give reasons for the conclusion.

The judgment here was not irregular. The plaintiff issued a writ of summons on the 5th of May, 1993. The writ was served by posting it on the 6th of May, 1993. Mr. Gonakulinji, appearing for the defendant, rightly pointed out that the writ was indeed served on the seventh day notwithstanding Order 3 rule 2 of the Rules of the Supreme Court. Consequently, the writ of summons was deemed served on the 14th of May, 1993. Mr. Gonakulinji contends that the defendant had up to 28th May within which to file notice of his intention to defend the action. This cannot be correct. The defendant had up to 27th May within which to serve his notice of intention to defend. The writ requires that the acknowledgment of service stating therein whether you intend to contest the actionto be lodged at the appropriate Registry within 14 days inclusive of the day of service. If the writ of summons was served on the defendant on the 14th of May, 1993, therefore, the defendant had up to the 27th on which to lodge his notice of intention to defend. The judgment in default of notice of intention to defend was obtained on the 28th of May. 1993. The judgment was not, therefore, irregular. The notice of intention to defend curiously was also received on the 28th of May, 1993. A Court will accept tardy notice of intention to defend but only where a judgment in default of notice of intention to defend has not been entered. On the record, as it is, it must be that the notice of intention to defend was actually received after judgment in default of notice of intention to defend had been entered by the defence. The judgment was, therefore, regular.

It was also contended that the judgment was irregular because the plaintiff did not serve the defendant with a statement of claim. The plaintiff has no duty in an action for a liquidated claim only to serve a statement of claim where the defendant has not lodged a notice of intention to defend. There is no obligation to include a statement of claim in a writ. It will suffice if the plaintiff includes a concise statement of the nature of the claim made or the relief or remedy required in the action. Practically, there are three options available to the plaintiff. He can endorse his statement of claim on the writ. In which case it will be served together with the writ. He can issue a writ without the endorsement of a statement of claim provided there is a concise statement of the nature of the claim or relief or remedy required and let the statement accompany the writ when the writ is being served. Alternatively, and that is what happened in this case, the plaintiff can issue a writ endorse it with a concise statement of the nature of the claim made or the relief or remedy sought and serve it without a statement of claim. If this happens the plaintiff can serve a statement of claim shortly after service

of the writ or wait until there is a notice of intention to defend in which case he must serve his statement of claim 14 days after the lodging of the notice of intention to defend. Where the plaintiff has endorsed his writ such a concise statement of the nature of the claim, relief or remedy sought and he has not endorsed a statement of claim he can still obtain a judgment in default of notice of intention to defend if the defendant does not acknowledge service intimating he intends to defend. In this case, in so far as the defendant had not lodged a notice of intention to defend, the plaintiff could obtain judgment in default of notice of intention to defend notwithstanding that statement of claim had not been served on him. The judgment would, therefore, not be irregular on that score.

The judgment here is regular. It cannot be set aside unless there is a defence on the merit. The defence exhibited in the affidavit in support of the application raises triable issues and, prima facie, a defence to the plaintiff's action. The plaintiff's action was for the price of goods supplied and delivered. The defendant, while accepting the contract of sale, says that he rejected the goods, notified the plaintiff of it, and, although there was no obligation so to do, caused the goods to be sent to the plaintiff. Unfortunately, the affidavit does not give reasons why the goods were rejected. This is important. If the goods were rejected because the defendant was entitled to, the plaintiff has no remedy against the defendant. It is the defendant who has a remedy against the plaintiff. On the other hand, if the defendant rejected the goods on no grounds, the plaintiff has a cause of action against the defendant. One would have needed the affidavit to be more revealing on this matter. This deficiency, however, is not fatal, or at least it is not as fatal. The fact that the defendant's affidavit does not show merit does not imply that his application to set aside should be rejected outright. The judgment could still be set aside if there are exceptional circumstances or, at least, the Court could order a supplementary affidavit to clarify the issue (Kanchunjulu v. Magareta (1971-72)) 6 ALR (Mal.) 403). I would have ordered a supplementary affidavit on this aspect. I shouldn't because of what I am going to say.

The affidavit in support of the application to set aside the judgment discloses that when the goods were rejected they were redelivered to the plaintiff. In this case the plaintiff cannot sue for the contract price. He is entitled to the loss that has been occasioned to him by rejection of the goods. Short of that, he should have mitigated his loss by the resale of the goods. He would then be entitled to the difference between the contract price of the goods and the price at which he sold the goods. Most certainly he would not be entitled to

the full contract price. Where the amount that the defendant is liable to pay can only be proved by evidence at trial, it would be improper not to allow the defendant to have an oppotunity to dispute the claims against him. On that score, even for the deficiency in the affidavit that I referred to earlier, I would set aside the judgment.

MADE in Chambers this 15th day of November, 1993 at Blantyre.

D.F. Mwaungulu
REGISTRAR OF THE HIGH COURT OF MALAWI