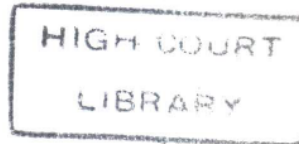


IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 3580 OF 2001



BETWEEN:

MALAWI DEVELOPMENT CORPORATIONPLAINTIFF

AND

CHITIPA INNDEFENDANT

CORAM: TEMBO, ASSISTANT REGISTRAR

Dr Mtamba, Counsel for the Plaintiff, absent.
Ngwira, Counsel for the Defendant

ORDER

This is this court's order on hearing the defendant's application made under 0.13 r 9 Rules of Supreme Court to set aside the default judgment that was entered for the plaintiff herein. The defendant seeks to have the said judgment set aside for irregularity in that the writ of summons that originated this action was not served on the defendant and that the defendant is a wrong party to this action. The application is supported by the affidavit of Mr Simuchimba, Managing Director of Chitipa Inn Limited.

The plaintiff was not present at the hearing although it had filed an affidavit opposing the defendant's application. Mr Ngwira, acting for the plaintiff, adopted the affidavit of Mr Simuchimba. The plaintiff commenced this action against the defendant on 3rd December, 2001 for recovery of the sums of K1,736,196.00 debt, K468,771.84 interest, K440,992.77 surtax and K330,744.58 collection charges.

And default judgment was entered for the plaintiff for those sums after the defendant failed to give its notice of intention to contest the plaintiff's claim.

My Ngwira for the defendant argued that the default judgment was entered for too much in that at the date of the judgment part of the debt owing had already been liquidated by the defendant.

To substantiate that assertion some receipts issued by Dr Mtambo law firm for such payments by the defendant were exhibited. In the affidavit of Mr Simuchinba the receipts were said to be marked exhibit CS3 a, b, c, d, and c.

But on an examination of the said exhibits this court notes that the said exhibits all bear the mark 'CS3' without any further distinction. As such this court finds that it is difficult to proceed in reliance on such exhibits under the category "CS". As a result the defendant's argument that the judgment was entered for too much shall not succeed as there is no proper evidence for this court to proceed on.

Mr Ngwira for the defendant also argued that the defendant was a wrong party sued since Chitipa Inn is a limited liability company as opposed to the Chitipa Inn sued herein. That argument is correct. Chitipa Inn and Chitipa Inn Ltd are two different entities.

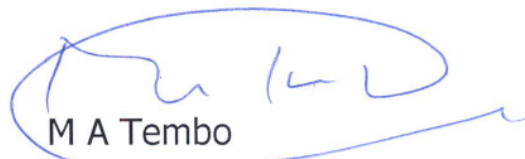
The plaintiff would have been at liberty to apply to amend the defendant's name herein under 0.15 r 6 Rules of Supreme Court but chose not to appear at the hearing.

In the circumstances of the present case it is clear that Chitipa Inn Limited were not the party served with the pleadings herein. Chitipa Inn was the one that had been served. And so, the default judgment against Chitipa Inn Ltd was irregularly entered and is set aside having been entered against a wrong party and without due service of originating process. Such irregular judgment can be set aside *ex debito justicie*. See **Anlaby v. Praetorius (1888) 20 QBD.** The default judgment herein is therefore set aside with costs to the defendant.

The defendant tried to seek this court's order to set aside a consent order entered into between the plaintiff and the managing director of Chitipa Inn Ltd. This court is of the view that the same was

improperly made. That application was not on the summons before this court and this court can not entertain it.

Made in Chambers this 4th December, 2003.



M A Tembo

ASSISTANT REGISTRAR

HIGH COURT
LIBRARY