

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CASE NO. 388 OF 2005

BETWEEN

SEAGULL TEXPLAINTIFF

-AND-

KRAZY KOOL BEVERAGES LIMITED.....DEFENDANT

CORAM: MANDA, **SENIOR DEPUTY REGISTRAR**

Mwale for the plaintiff

Gulumba for the defendant

RULING

This is an application for Summary Judgment brought under Order 14 of the Rules of the Supreme Court. The summons is supported by an affidavit sworn by Miss Innocentia Nkhoma but was prosecuted by Mr. Mtchuka George Mwale, who appeared for the plaintiff.

The action arose out of an alleged written contract between the plaintiff and the defendant. It was apparently agreed in the contract that the plaintiff was going to design and sell a soft drink and mineral plant to the defendant at the price of \$98,175.00. It was the plaintiff's claim that following the execution of the written contract, the defendant made subsequent verbal orders for the supply of raw materials, machines and machine spares for the plant. The plaintiff then went on to claim that they did duly ship the raw materials, machines and machine spare parts. The plaintiff also claimed to have forwarded to the defendants invoices, bills of lading and insurance policies.

In paragraph five of the statement of claim the plaintiff informed the court that after they had shipped the raw materials, machines and spare

parts and forwarded the invoices the defendant became liable to pay the sum of \$16, 304. 83. The plaintiff then went on to give a list of invoices with their amounts, totaling to \$16, 304.83. At the same time the plaintiff continued in paragraph six of his statement of claim to assert that the defendant made also made further verbal orders for spare parts and instructed the plaintiff to ship these by air. It would also seem that through the same verbal orders, the plaintiff also supplied the defendant with some raw materials. There is no specification as to what kind of raw materials these were, however it was the plaintiff's claim that the total cost of these spare parts and raw materials that were shipped by air came to \$20, 000, which the defendant has so far failed to pay. In view of this, the plaintiff is claiming from the defendant the sum of \$36, 304.83, collection costs of \$3, 630. 48, VAT of \$635.33 and costs of this action. In the affidavit in support of the summons for summary judgment, the plaintiff went on to repeat what he had said in his statement of claim except in the affidavit, the plaintiff made mention, in paragraph six , of the fact that the defendant had made a payment of \$150 000 through a letter of credit and that the balance for the subsequent order was payable within sixty days from the date if the bill of lading. The plaintiff then went on to point out that they had sent Performa invoices of all materials supplied and that the total cost of the materials supplied was coming up to \$229, 400.16. the plaintiff then went on to state in his affidavit the out of the total amount of the goods supplied, the defendant only made payments amounting to K213, 096.16 (this I believe was supposed to be in US Dollars but was somehow reflected in Kwacha due to the fact that counsel never went through the affidavit after preparing the same), suffice to say however that it was the plaintiff's assertion that out of the quoted total amount of the goods supplied the defendant only paid the sum of \$213, 096.16 and that this left the balance of \$16, 304.83, which is the subject matter of the current proceedings. It is noted that there is no mention in the affidavit of the \$20 000 which the plaintiff was also claiming from the defendant. Of course the explanation that was given by the plaintiff during the prosecution of this case for not mentioning the \$20, 000 was that they had elected to apply for summary judgment for the \$16, 304. 83 only. Nevertheless, it was the view of the court that considering that the plaintiff were saying that the total cost of **all** the materials was \$229, 400.16 and considering further that they were conceding to the fact that the defendant had given them some payments, the plaintiff's should have made mention of the \$20, 000. indeed it was also the view of the court that since the plaintiff had gone to the trouble of mentioning the fact that the defendant had paid them \$150, 000 and had also specifically mentioned when this payment was made, they should have done the same with the other additional payments the defendant made to come to the total of \$213, 096. 16. Further to this is also noted that if we

subtract the figure given by the plaintiff in terms of the worth of the goods supplied and the payments made the figure is coming up to \$16, 304 flat. This means that the 83 cents remains unexplained by just looking at the two figures. At the same time however from the figures supplied by the plaintiff in the table under paragraph 8 of his affidavit in support of this application, the 83 cents is clearly shown. In view of this I thought that perhaps then the discrepancy was due to a typo but then considering that this is matter that involves figures I thought that greater care should have been taken in preparing the documents especially considering the fact that the plaintiff stated in the affidavit that it was one of the defendant's defenses that they had been overcharged. Of course I would like to believe that in accounting terms 83 cents is so insignificant an amount as to be considered an overcharge but in such circumstances it could be argued that the same might point towards a trend.

I have had to go into this analysis at this stage of my ruling because one of the requirements of the summary judgment procedure is that the plaintiff should prove his claim clearly and I thought that I should deal with this question first before determining whether the defendant has an arguable defence. Thus in continuing with this analysis, I did also draw my attention to the statement of claim in view of the affidavit in support of the application for summary judgment. Upon examination of the statement of claim and adding up the figures that are mentioned in there, namely the \$98, 175.00 for the soft drink and mineral plant, the \$16, 304. 83 for the raw materials, machines and spare parts and the \$20, 000 for the raw materials shipped by air, it is noted that the figure comes up to \$134, 479.83. It is quite clear this figure is below the figures that are being mentioned in the affidavit in support of this application. Indeed it is further noted that there is no mention of this figure or the amount of \$98, 175.00 in the affidavit in support of the application for summary judgment even though the same are in the pleadings. The difference between \$229, 400.16, in the affidavit and the \$134, 479. 83 is coming up to \$94, 920.33, which is quite a significant amount for the plaintiffs not to refer to in their statement of claim

Made in Chambers this.....day of.....2004

K.T. MANDA
SENIOR DEPUTY REGISTRAR