

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2110 OF 2000

BETWEEN:

ACE AGENCIES.....PLAINTIFF

AND

BLANTYRE CITY ASSEMBLY.....DEFENDANT

**CORAM: TEMBO, ASSISTANT REGISTRAR
Tsingano, Counsel for Plaintiff
Nzungu, Counsel for Defendant**



ORDER

This is this court's order on the defendant's application to set aside a default judgment for the sum of K719, 010.77 in respect of goods supplied by the plaintiff to the defendant. The ground for seeking the setting aside of the default judgment is that the statement of claim endorsed on the writ of summons was in the attenuated form as follows"

"The plaintiff's claim against the defendant is for the sum of K719, 010.77 being the amount due from the defendant to the plaintiff in respect of value of goods and costs sold and delivered by the plaintiff to the defendant and agreed interest thereon at the defendant's own request particulars whereof are known to the defendant"

The instant application was made before the late Deputy Registrar Mr Sidira.

At the commencement of the instant application counsel for the defendant stated that the sums claimed by the plaintiff were already paid by the defendant to the plaintiff and that the instant action was of no use except for the issue of sheriff fees. And that in that, connection, since the judgment was irregular sheriff fees ought to be borne by the plaintiff. Counsel for the defendant submitted that the default judgment was entered on an attenuated statement of claim endorsed on the writ of summons herein which statement did not give full particulars of the plaintiffs' claim for example, the dates when the alleged sale of goods took place. And that in terms of order 6 r 2 (1) Rules of Supreme Court such an endorsement required the filing of a full statement of claim before a default judgment was entered. And that in the absence of such a full statement of claim the default judgment was irregular.

The plaintiff's counsel argued in the main that the default judgment entered herein pursuant on the attenuated form of the statement of claim endorsed on the writ of summons was regular since the particulars of the claim were already known to the defendant herein. Counsel for the plaintiff cited the case of *Eximbo (PTY) Ltd v Karim and Sons* Civil cause Number 310 of 1998 in which an attenuated statement of claim similar to the one herein for balance of a sum, being the cost of goods supplied to a defendant, was held to be regular. That case is distinguishable from the instant one, as submitted by defence counsel, as the claim was for a balance and presumably the particulars of the claim were known to the defence in that case.

However, as far as this court is concerned the submission by the plaintiff that the attenuated statement of claim herein was regular holds good in the face of the satisfaction of the plaintiff's claim by the defendant. The defendant cannot be heard to have paid the judgment sum under distress. That is more true now that defence counsel clearly stated that he did not find the action herein to be useful save with regard to sheriff fees and expenses arising out of the execution of the irregular default judgment.

The effect of what the defence is trying to do is to approbate and reprobate the default judgment herein by satisfying it and then seeking to set it aside for alleged irregularity to escape bearing sheriff fees. That is not allowed under procedural law ie approbating and reprobating an act.

Hence, the defendant's application is refused because the judgment complained of was already satisfied and cannot be challenged only for the sake of who bears sheriff fees. By not objecting to the merits not of the default judgment the defence admits the cause of action raised in the plaintiff's attenuated statement of claim, which did not give full particulars of the plaintiffs' claim because the same were known by the defence.

In the premises this court shall not be labour considering the other matters raised in argument by both counsel. Costs on this application are for the plaintiff.

Made in Chambers at Blantyre this^{26th} August 2004.


M. A. Tembo
ASSISTANT REGISTRAR

