

**IN THE HIGH COURT OF MALAWI**  
*PRINCIPAL REGISTRY*  
**CIVIL CAUSE NO. 3081 OF 2000**

**BETWEEN:**

F M 101 RADIO LTD.....PLAINTIFF

AND

MARKET POINT ADVERTISEMENT ..... DEFENDANT

Coram: M.A.Tembo, Assistant Registrar  
Kauka, Counsel for the plaintiff  
Dr Mtambo, Counsel for the defendant



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ORDER

This is this court's order on the plaintiff's application for summary judgment. The application was made under Order 14 Rules of the Supreme Court.

Both the plaintiff and the defendant filed an affidavit each. The plaintiff's claim is for the sum of K86, 636.00 being the balance of money due and owing to the plaintiff from the defendant for the services rendered by the plaintiff to the defendant.

The oral arguments herein were made before the then Deputy Registrar.

The plaintiff rendered advertising services to the defendant on divers occasions. The plaintiff now claims the price for such services. The defendant denies liability contending that it was only acting as an agent for some disclosed principals and that such principals ought to bear responsibility for the sums claimed. The plaintiff retorted that the defendant although having disclosed principals was itself not an agent in the legal sense but only an agent in the commercial sense. And that as a result the defendant is still liable for the sums claimed despite disclosure of the principals herein. Against this the defence argued that there is a triable factual/legal issue as to whether the defendant herein was an agent in the commercial as opposed to the legal sense.

The plaintiff further submitted that from previous dealings between it and the defendant it would be seen that the defendant actually paid for services rendered in similar circumstances to the ones giving rise to the present claim. And the defence replied that such a practice is not conclusive of the fact that the defendant is liable herein. And that may be the defendant effected payment for services using money from the disclosed principals. The defence invited the court to determine at trial the significance of such payments. And the defence opposed summary judgment.

This court notes the law applicable in Order 14 applications. Leave to defend must be given unless it is clear there is no real or substantial question to be tried, see *Cold v Delap* [1905] 92 LT 510, or that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment. See *Jones v Stone* [1894] A.C. 122.

In the present case this court is convinced that there are real questions requiring trial.

Firstly the issue of whether the defendant is an agent in the commercial sense as opposed to the legal sense. The resolution of this question is both factual and legal and it shall have a bearing on the liability of the defendant in the presence of disclosed principals. As the law is clear that where the principal is disclosed an agent is not liable.

Secondly, there is the issue of the previous practice of the defendant in paying for services rendered to it by the plaintiff in similar circumstances to the ones herein. Does that practice make the defendant liable on behalf of the disclosed principals? This is also a factual and legal question only capable of resolution at trial.

In the premises this court finds substantial disputes of both fact and law that require resolution by trial and therefore declines to grant summary judgment to the plaintiff.

And this court grants costs to the defence on the instant application the plaintiff having wholly failed.

Made in Chambers at Blandyre this 1<sup>st</sup> March 2005

  
M.A. Tembo  
Assistant Registrar