



IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

Blantyre Registry

Commercial Case No. 343 of 2018

(Before Honourable Justice Katsala)

BETWEEN

GLOBE ELECTRONICS LIMITED.....CLAIMANT

AND

SUNBIRD TOURISM PLC.....DEFENDANT

CORAM: D.H. SANKHULANI, ESQ., ASSISTANT REGISTRAR

Mr. G. Kambale, of Counsel for the Claimant

Mr. C. Khondiwa, of Counsel for the Defendant

Mr. E. Makombe, Court Clerk

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Sankhulani, AR

RULING

Introduction

This ruling follows hearing that was held on an application by the Defendant for an order setting aside the default judgment herein on the ground of existence of a meritorious defence.

Background Information

The Plaintiff commenced the present action by way of writ of summons, claiming, inter alias, the sum of K3,150,000.00 being money owed to it for three laptop computers sold and supplied to the Defendant.

The default judgment herein was entered on account of there being no defence filed on the Defendant's behalf. Following the default judgment, this Court, on the Claimant's application, made an enforcement (seizure and sale) order.

Subsequently, the Defendant obtained a stay order pending an application to set aside default judgment. Accordingly, the Defendant filed the present application, which is supported by a sworn statement and skeleton arguments. The Claimant, on its part, filed a sworn statement in opposition to the present application.

The present application was heard in the presence of both parties hereto, after which the matter was adjourned to today's date for ruling. Hence this ruling.

Issues for Determination

- Whether the Defendant has shown reasonable cause for not defending.
- Whether the Defendant has shown a meritorious defence.
- Whether the default judgment herein ought to be set aside.

Whether the Defendant Has Shown Reasonable Cause For Not Defending

Under **Order 12, rule 21(3)(a)** of the **Courts (High Court) (Civil Procedure) Rules 2017**, the court may set aside a default judgment where a Defendant has shown, in addition to a meritorious defence, reasonable cause for not defending.

In the sworn statement in support of the present application, it is deposed to that the delay in filing defence arose from the fact that Counsel was waiting for instructions from the Defendant whether to file defence. Another reason for the delay that has been given is persistent power outages at the Claimant's legal practitioners' chambers. However, in my most-considered

opinion, these two are not good reasons for not defending. The Claimant is legally represented. It properly filed a response. It is, therefore, difficult to understand why the Defendant did not just file a holding defence pending the giving of further instructions to its legal practitioners, in order to comply with time prescriptions. I, therefore, find the Defendant to have failed to show reasonable cause for not defending the action.

Whether Defendant Has Shown a Meritorious Defence

Under **Order 12, rule 21(3)(b)** of the **Courts (High Court) (Civil Procedure) Rules 2017**, the court will set aside a default judgment where the defendant has shown a defence on the merits. The major consideration to be had at the back of the court's mind when considering this ground for setting aside a default judgment is whether the defendant has disclosed a defence on the merits. Where the judgment sought to be set aside is regular, as is the case here, then it is an (almost) inflexible rule that there must be an affidavit stating facts showing a defence on the merits (**Farden vs. Ritchter (1889) 23. O.B.D. 124**). In order to show a defence on the merits, the affidavit only needs to disclose an arguable or triable issue, and once the defence is thus shown, its strength or weakness is immaterial at that stage (**Chilenje vs The Attorney General [2004] MLR 34**).

Coming to the matter at hand, I have carefully analyzed the affidavit in support of the present application vis-à-vis the Claimant's Statement of Claim herein. The cause of action herein arises from the selling and delivery of three laptop computers to the Defendant by the Claimant. On the Defendant's part, of more importance is his proposed defence, marked as 'CK 1', exhibited to the aforesaid sworn statement in support of the present application. In Paragraph 2 of 'CK 1', the Defendant denies ever entering into a contract with the Claimant for the purchase of any computers. In Paragraph 3 of 'CK 1', the Defendant denies ever authorizing or ratifying issuance of a local purchase order exhibited to the Claimant's sworn statement in opposition to the present application and marked as 'GK 1'. In Paragraph of 'CK 1', the Defendant denies ever receiving into its custody any laptop computers. Therefore, by making the said denials, the Defendant is denying liability for the reliefs sought herein. That raises a serious question as to whether the Defendant is liable for any of the reliefs sought herein. In my most-considered opinion, that issue as raised by the Defendant is an arguable or triable one that ought to go for trial. In other words, I find that, in raising a triable or arguable issue as highlighted above, the Defendant has, in that sense, shown a defence on the merits.

Whether the Default Judgment Herein Ought to be Set Aside

In view of the immediately foregoing finding, the default judgment herein ought to be set aside on the ground of existence of a meritorious defence. I so opine and find. The rationale behind applications of this nature was well articulated by Lord Atkin in **Evans vs. Bartlam (1937) AC 473** at **Page 480**, as follows:

“The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.”

So, bearing this rationale in mind, the fact that the Defendant has failed to show reasonable cause for not defending the action is, in my opinion, not a sufficient ground for deciding otherwise, in the circumstances of this matter.

Final Order

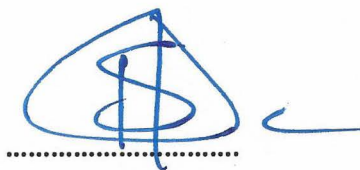
In view of the foregoing findings and reasoning, I hereby set aside the default judgment herein, and grant the Defendant leave to defend the action.

The defendant is, in this regard, ordered to file and serve on the Claimant its defence within fourteen (14) days from the date hereof.

Costs

These usually follow the event but are always, however, in the court’s discretion. The Claimant shall have costs of the present application.

Delivered in Chambers at Blantyre Registry of the Commercial Division of the High Court this 7th day of December 2018.



D.H. SANKHULANI

ASSISTANT REGISTRAR