Ungolo J.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 18 OF 1993

BETWEEN:

K.J. ZANGAZANGA.....PLAINTIFF

- and -

OLD MUTUAL (M) LTD.....DEFENDANT

Coram: MWAUNGULU, Registrar

Chizeze, Counsel for the plaintiff
Mvula, Counsel for the defendant

ORDER

On the 29th of June, 1993 I ordered that the Judgment in Default of Notice of Intention to Defend be entered on the 16th of February, 1993 be set aside. I further ordered that the Defendant should serve Defence on the Plaintiff in the following 7 days. I reserved ruling.

Mr. Mvula appearing for the Defendant wanted the judgment set aside on two grounds. First, that the judgment in default of notice of intention to defend was irregularly entered. To enter the judgment in default of notice of intention to defend, the Plaintiff filed an affidavit of service by post. He deponed that the Writ must have come to the attention of the Defendant because it had not been returned to the Plaintiff through the dead letter service. This was sufficient to entitle the Plaintiff to enter judgment in default of notice of intention to defend. Mr. Mvula, however, has filed an affidavit where the Defendant swears that in fact he never received the Writ of Summons. He depones that probably the summons was sent through the wrong letter box. On my part, I am content to say that the Plaintiff's judgment of notice of intention to defend is not irregular as long as the Plaintiff, who has sent the Writ by post through the appropriate letter box, has not received the Writ back. In fact the Court places on the Plaintiff a duty to come to the Court for further directions should the Writ return to him through the dead letter box. The law presumes that the Defendant has been served as long as the Writ was sent through the appropriate letter box. It would be defeatistic to allow the Defendant to depone that in fact he never received the Writ if it is shown that it was sent to the correct letter box number. So, on the first point taken by Mr. Mvula, the judgment obtained here was regular.

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This leads us to the second point. Mr. Mvula argues there is a defence on merit. In the proposed defence, the Defendant concedes that certain monies were due to the Plaintiff at the time the Defendant terminated the plaintiff's employment. The Defendant wants to set-off that claim by monies that the Plaintiff owed to the Defendant. The Defendant intends to rely on a procedure laid under Order 18, Rule 17 which provides:-

> "Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a cliam made by the plaintiff, it may be included in the defence and set off against the plaintiff's claim, whether or not, it is also added as a counterclaim."

In the United Kingdom, the defence of set off is governed by Section 49(2) of the Supreme Court of Appeal Act 1981, which replaced Sections 38 and 41 of the Judicature Act 1925. The 1925 Act replaced Section 24 of the Judicature Act 1873. The 1925 and the 1981 Acts in the United Kingdom do not apply to Malawi. The Judicature Act 1873, however, is a statute of general application. In the absence of a statute to the same effect in Malawi, the Judicature Act 1873 is our law. Our Courts Act 1958 does not provide for set-offs and counterclaims in the High Court. Section 40 of the Courts Act provides for set-offs and counterclaims in the Subordinate Courts. The 1873 Judicature Act, therefore, is part of our law.

The defence of set-off principally is governed by rules of equity. The statutory set-off, however, has been widely used at common law. In Mondel vs. Steel (1841) 8 M & W 1858, 871 Baron Parke said:-

> "It must, however, be considered, that in all these cases of goods sold and delivered with a warrant, and work and labour, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply defend himself by showing how much less the subject matter of the action was worth, by reason of the breach of the contract, and to the extent that he obtained or is capable of obtaining, an abetement of price on the account, he must be considered as having received the satisfaction for the breach of the contract, and is precluded from recovering any action to that extent; but no more."

The principles of equity apply in all Courts, Courts of Equity and Common Law. A set-off can be set up as a defence to an action. This right has not been affected by the specified statutes. In Stumore v. Campbell & Co. (1892) 1 Q.B. 314, 316, Lord Esher, M.A. said:-

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> "It was also admitted that they would have no right of set off action before the Judicature Act to recover this money - such a plea would have failed and judgment would have been for the full amount. But it was said that under the Judicature Acts they would have claimed their costs by way of counterclaim and the learned Judge has held that for this reason they were not entitled to the estate of the deceased. The Judicature Act, as has often been said, did not alter the rights of the parties. They only affected procedure, so that no set off could now be maintained in such a case as this."

The point I am trying to establish is that whether a set-off comes as counterclaim or set off, the law is that it is a total defence to the action so much so that in an action to set aside a judgment in default of notice of intention to defend or defence, the defendant raises a triable issue, as was done in this case, when there is a defence of set off.

The only problem I had on this matter is the comment by the learned authors of the Supreme Court Practice 1991 Edition in paragraph 18/17/2 at p.323. There the learned authors say that the rule does not perhaps extend to servants. The case cited for this proposition is Sagar v. Ridehalgh (1930) 2 CH 117, and (1931) 1 CH 310, per Hansworth, M.R.. I have read that judgment and I do not think it is authority for the view expressed by the learned authors. At p.325 the Master of Rolls said:-

> "The cases that I have referred to were once more considered and reviewed in recent years in relation to an action by a builder for the erection and repair of a house in respect of which the owner complained of bad work.... It would seem therefore clear that in such a contract as that under which Sagar was employed, the defendant would have a right to make a deduction from his wages for bag work unless there was some term of the contract which excluded this right, or unless such a deduction is forbidden by statute."

Deductions can be made from wages or salaries unless this is excluded by contract or by legislation. The Master of Rolls continues as follows:

> "Farawell, J. held that this principle is not applicable to the relationship between master and servant. No authority is advanced for this proposition, and it seems contrary to the words of the judgment in the case cited particularly Mondel v. Steel and Sharp v. Hainsworth. The relationship between master and servant is established by a contract between them, a contract which is subject to the rules applicable to other contracts, except in so far as Statute Law has superimposed limitations or rights or duties intersay; open in such a contract and the parties to it."

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The Master of Rolls held in the case that such deductions were permissible. After this statement he tried to see if there were any statutes prohibiting the deductions as mentioned. In the particular case he said none existed. In my most considered view, there is nothing in the case of Sagar v Ridehalgh to form the basis for the proposition that the defence of set off as it exists at equity cannot, in the absence of statutory limitations, be applied to servants.

There is, therefore, a triable issue and the judgment in default of notice of intention to defend was set aside with costs.

D.F. Mwaungulu
REGISTRAR OF THE HIGH COURT