

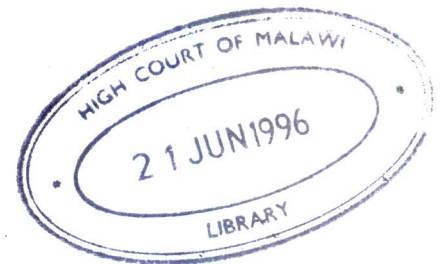
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO 1910 OF 1994

BETWEEN:

OPTICHEM MALAWI LTD PLAINTIFF
AND
TINYADE ESTATE DEFENDANT

CORAM:

W.W. QOTO DEPUTY REGISTRAR
MWAFULIRWA FOR THE PLAINTIFF
M. CHIRWA FOR THE DEFENDANT



RULING

I have to determine an application to set aside a default judgement herein entered by the plaintiff against the defendant on 28th December, 1994.

The factual background to the application lies within a very narrow campus. By a writ of summons issued on 5th October, 1994, the plaintiff claimed against the defendant the sum of K44,341.51, "being the price of goods sold and delivered by the plaintiff to the defendant at the defendant's own request, particulars whereof are well known to the defendant and for costs of this action."

The defendant, through Ronald Tsamwa, filed an acknowledgement of service form on 31st October, 1994. He indicated therein an intention not to contest the proceedings. It is on that basis that the plaintiff entered a default judgement.

The application to set aside the judgement is supported by an affidavit deposed to by Ronald Tsamwa.


The basis of the application is irregularity Ronald Tsamwa depones that the fertilizer allegedly sold and delivered to the defendant was infact sold and delivered to him personally. He incurred the debt in his personal name. He is one of the directors of the defendant Tinyade Estate which is a limited liability company. The debt to the plaintiff was incurred by him in his personal capacity.

Mr. Chirwa for the defendant contented that the judgement obtained herein was irregular in that the proceedings are against a wrong party. It must therefore be set aside ex-debito justitiae. Alternatively Mr Chirwa argued that the judgement be set aside on the ground that the defendant has a meritorious defence to the plaintiff's claim Under Ord. 13 r. 9 of RSC, the court has a discretionary power to set aside or vary any judgement entered in default of giving notice of intention to defend the action upon such terms as it thinks just. The purpose of this discretionary power is to avoid the injustice which might be caused if judgement followed automatically on default, Evans v Barttam (1937) A.C. 473. Where a judgement is sought to be set aside for irregularity, the irregularity has to be specified in the summons Ord. 2. r. 2 (2) and the affidavit in support should state the nature of the irregularity and the circumstances under which the default had arisen. The defendant need not disclose the nature of his defence in his affidavit although as here, it has been thought prudent to do so lest the defendant is unable to persuade the court that the judgement is irregular and wishes, in the alternative, that though regular, the judgement be set aside on the ground that he has a meritorious defence.

Turning to the instant, there is no affidavit in opposition to the defendant's affidavit. It has not been disputed that the defendant is a limited liability company and as such it can sue and be sued in its own name. It is again not in dispute that Ronald Tsamwa incurred the debt personally albeit he is one of the directors of the defendant's company. I thought it is elementary that a limited liability company, being a legal person on its own, cannot be liable for the personal debts of its directors unless an agency relationship can be shown to be established. The doctrine of privity of contract prevents vicarious responsibility on the part of directors for the limited company's liabilities under copntract Montgomerie v U.K Steamship Association (1891) 1 Q.B. 370. It follows therefore that the defendant cannot be liable under a contract between the plaintiff and Ronald Tsamwa.

The judgement against the defendant was therefore irregular as it was against a wrong party. Further the proceedings as a whole are against a wrong party. The judgement is accordingly set aside ex-debito justitiae; (Anlaby v Praetorious (1888) 20 QBD 764). The application is therefore allowed with costs.

MADE IN CHAMBERS THIS 25TH JANUARY, 1996 AT BLANTYRE.


W.W. QOTO
DEPUTY REGISTRAR