REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 125 OF 2014

BETWEEN:
DBR INTERNATIONAL WAP LIMITED **PLAINTIFF**

-AND-

JING ZHI JIANG, ZHEN ZHEN JIANG& HANG QING JIANG
T/A
DA CHINA RESTAURANT **DEFENDANT**

CORAM:	**ANNELINE KANTHAMBI**	**ASSISTANT REGISTRAR**
	Mr. E. Mbw'ana	Counsel for the Plaintiff
	Defendants	Not Present (Unrepresented)
	Mrs. J. Chilimampunga	Court Clerk

ORDER ON SUMMARY JUDGMENT

This is an application by the plaintiff herein seeking summary judgment under Order 14 of the Rules of the Supreme Court. The Applicant filed an affidavit and skeletal arguments in support of the Application, in which the issues are raised.

The plaintiff by amended writ of summons dated 25th March 2014 which was later amended on28th May 2015 commenced an action against the defendants herein Jing Zhi Jiang, Zhen Zhen Jiang and Hang Qing Jiang t/a Da China Restaurant, claiming the sum of MK15, 727, 572.61 being its share of the revenue realized from the gambling machines which it installed following a written agreement between the plaintiff and the respondent. I will reproduce

the relevant paragraphs of the statement of claim. According to the plaintiff's statement of claim,

6. the parties herein had entered into a written agreements (Site Agreement") by which the plaintiff installed gaming machines to be operated by the defendants at Mzuzu Hotel, Da China Restaurant in Blantyre and at Shire Highlands Hotel in Limbe. By the said Site Agreements, it was agreed that the defendant would retain 33.33% of the net gambling revenue. That the said net would be calculated by deducting from the total gross revenue 66.666% thereof which would be paid to the plaintiff twice every month on the 7th and the 22nd day of every month together with all the gaming taxes payable by the defendant.

7.That a further term of the agreement stipulated that in case of any dispute regarding the amount payable to the plaintiff by the defendant, the defendant would nevertheless continue to pay an amount equivalent to such sum as calculated by the plaintiff on due dates pending the resolution of the dispute and that the plaintiff would be entitled to charge the defendant interest on the outstanding amounts at the rate of 2% above the prevailing prime lending rate as quoted by the plaintiff's bankers from time to time.

8. That in breach of the said agreement and in total disregard to repeated demands by the plaintiff for payment the defendant has failed to pay the plaintiff the sum of MK15, 727, 572.61 being its share of the revenue in respect of the months of July 2013 to September 2013. Consequentially the plaintiff proceeded to terminate the site agreements.

9. The plaintiff therefore claims:

(i) The said sum of MK15, 727, 572.61

(ii) Interest on the said sum at the rate of 2% above the prevailing prime lending rate as quoted by the plaintiff's bankers from time to time from the due dates to the date of payment.

(iii) Costs of this action.

Counsel for the Plaintiff alleges that the defendants have no defence to the action and that their defence is a sham.

The Defence on the other hand did not file any affidavit in opposition neither did the defence file any skeleton arguments. In short, the defence chose not to say anything on this particular application. The record does however show that the defendants were duly served with the summons which they duly acknowledged on the 12th of May 2016 as well as on the 13th of December 2016. However the defendants' defence states as follows:

1. The defendants admit the contents of paragraph 1 of the statement of claim
2. The defendants admit being business persons but deny trading as Da China Restaurant as alleged in the statement of claim and will at trial demand proof of the allegation.
3. The defendants admit the contents of paragraph 4 of the statement of claim.
4. The defendants deny the contents of paragraph 5 of the statement of claim and will at trial demand proof.
5. The defendants deny the contents of paragraphs 6, 7 and 8 of the statement of claim.
6. The defendnts plead that by a written agreement dated 8th October 2010 the plaintiff and Jiang Qing Xi, Jiang Jing Zhi and Jiang Zhen Zhen t/a China Da Restaurant agreed to have WAP gambling machines installed at their premises at Ginnery Corner.
7. The machines were duly installed and operated in accordance with the said written agreement.
8. The defendants have no business interests at Mzuzu Hotel and Shire Highlands Hotel and are not aware of any agreements with the plaintiff regarding these sites as alleged by the plaintiff.
9. The defendants state that sometime in August and September thieves broke into their premises on 2 separate occasions and went away with a total sum of K1, 551, 681.37 which was kept in an office in the gambling area and the incidents were reported to the Malawi Police.

Save as hereinbefore expressly admitted the defendant denies each and every allegation contained in the statement of claim as if the same were herein specifically set out and traversed seriatim.

I will now proceed to consider the application for summary judgment on the basis of the application made herein and the affidavit in support viz the law under which the application is made. In considering the application, I will consider the defence as it stands against the claims in the plaintiff'sstatement of claim and as it stands against the other evidence the plaintiff has furnished in support of the application herein.

The Law

Order 14 rule 2 of the Rules of the Supreme Court states as follows:

(1) An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or part of a claim,

to which the application relates is based and ***stating that in the deponent's belief*** that there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.

(2) Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.

It was stated by Ndovi, J as he then was, in the case of *Oasis International and another v Mahomed t/a CNC Medical Supplies [1996] MLR @ 62* that "*in every summons under Order 14 the first two considerations are (a) whether the case comes within the order; and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under Order 14.*"

Under Order 14 it is important that the affidavit in support of the application should verify the claim as disclosed in the statement of claim and also specifically state that in the defendant's opinion there is no defence to the action. *Hassam and Co v Hassam Sacranie t/a Plastichem Industries [1993] 16(2) MLR 899@ 901*

Explaining further on the requirement under order 14, Mwaungulu R, as he then was stated that erifying facts relied on, as required by Order 14 rule 2, was normally done by reference to the statement of claim. *Rasul v Tutla [1992] 15 MLR @422; Reliance Insurance Agencies v Rustam, [1992] 15 MLR@ 426.*

Whether or Not to Order the Summary Judgment:

The preliminary requirements for granting an order of summary judgment under order 14 are the following;-

a) The defendants should be served with a statement of claim;
b) The defendant should give a notice of intention to defend;
c) The affidavit in support of the application should comply with the requirement of rule 2.

***The basis of an order under Order 14 is that the plaintiff verily believes that there* is no defence**. Obviously there must be good grounds for such belief. The machinery of Order 14 works on the basis that if the plaintiff's application is properly constituted, he is prima facie entitled to judgment unless the defendant shows cause to the contrary or the application is dismissed. The cases lay down that the purposes of Order 14 is to enable the plaintiff summary judgment without trial, if he can prove his claim clearly, and

if the defendant is unable to raise a *bona fide* defence, or raise an issue against the claim which ought to be tried. See *Manica (Malawi) Ltd v Interocean Freight Services (PTY) Ltd [1995] 2 MLR@ 611.*

Regard being had to case before me, I find the following requirements were duly satisfied;

a) That the defendant herein were duly served with a statement of claim. Let me also mention on the outset that most of the documents in the record herein are not original. The record of the proceedings of this action are contained in a "temporary file" opened as a result of the main file gone missing. As such there is no original writ and statement of claim and the attendant amendments, as well as defence that was filed with the court, but only copies of the same. There is however evidence that although there is no return of service and no intention to defend the matter filed by the defendant herein, the defence was well aware of all the proceeding herein and was duly served with the statement of claim as evidencedby a defence served on the plaintiff's lawyers Beal, Dalken & Associates on the 2^{9th} of April 2014. There cannot be such a defence if there was no statement of claim served on them in the first place.

b) The other pertinent question to be determined is whether the affidavit in support of the application complied with the requirement of rule 2, stated above. The answer is in the positive. This is so because by paragraph 2 of the affidavit, clearly shows that deponent verily believes the facts deponed by him to be true. And one of the facts deponed as shown in paragraph."

The remaining issue to be decided is whether the Plaintiff can obtain, in the circumstances, judgment without trial. Have the plaintiffs proven their claim clearly, and is the defendant unable to raise a *bona fide* defence, or raise an issue against the claim which ought to be tried? See *Manica (Malawi) Ltd v Interocean Freight Services (PTY) Ltd [1995] 2 MLR@ 611.*

From the reading of the parties' statement of claim, defence and affidavits in support of and in opposition to the application for summary judgment herein, I do find that the plaintiffs have made out a partially clear case to warrant judgment to be entered. Here is why:

1. What is very clear is that the parties herein entered into a business agreement.In the first place, there is a 'site agreement between the plaintiffs and one Jiang Jing Zhi representing himself and Da China Restaurant. This particular agreement is specifically referring to the site

of installation as Da China Restaurant. The defendants therefore cannot deny trading as Da China Restaurant, as traversed in paragraph 2 of the defence, as there is ample evidence to support the claim that they entered into an agreement with DBR international WAP Limited. In the first place there is a Standard Site Agreement between Warwick N. Ofsowitz, DBR International WAP Limited (the "route operator") and Jiang Jing Zhi representing Da China Restaurant and Himself. This document was purportedly signed by Jiang Jing Zhi on the 20th of August 2010. Whereas the page on which the words "STANDARD SITE AGREEMENT Between Warwick N. Ofsowitz, DBR International WAP LIMITED (the route operator) and JIANG JING ZHI Representing; DA CHINA RESTAURANT & HIMSELF" appear the name of the restaurant is stated as DA CHINA restaurant, elsewhere in the agreement, the prospective site licence holder, namely Jiang Jing Zhi endorsed as his street address "CHINA DA RESTAURANT" (see paragraph 12.1.2). So whether the business is called China Da Restaurant or Da China Restaurant, it would appear both parties understood it to mean one and same thing. It is therefore too late for the defendants to deny liability based on this inconsistency when they had condoned the same.

However, the communication purportedly between the plaintiff and one of the defendants, one Mr. Carey Jiang as found on exhibit EM3, there is evidence showing that the defendants were jointly and severally operating the said business at Shire Highlands, China Da and Mzuzu. There is acknowledgement that machines were installed at the aforesaid sites and that the one who signed for the agreement, which the author did not object to, was JJ, a family member. In this part of his communication to wofsowitz@comcast.net, Mr Carey Jiang states and I quote,

"Warwick,

Thank you for the message, my explanation are following:

1. *Mzuzu rental has been paid up to June 2013, Mr Sagawa was the one who made the payment to the hotel, and if necessary he can send you the receipt to be evidence.*
2. *We request your lenience and cooperation, we are very sure that the deposit will be made as soon as we organize funds for Shire Highlands site.*
3. *On the signing of the agreement is that during the time JJ was signing I was in China and being one of our family member I had no doubt in him signing the agreement and since the machinery were installed, both sites were being*

managed by me and my dad, we only therefore asked him to manage Shire Highlands site.

I hope this would be meet your utmost significance.

Best Regards,

Carey Jiang.

In yet another communication Mr Carey Jiang purpotedly wrote as follows:

Dear Mr Warwick,

I am very sorry to inform you that JJ has failed to make the deposite for Shire Hotel up to now because he has been gambling again and all the money on his site has been gone since his wife left. We did not know until today. When I got Jill's mail, I asked JJ why he did not make the deposit to DBR. I was told at the beginning the customers on his site got credits from him and would pay him back in this week, buit today he has just admitted that he failed to deposit the money because of gambling. I want to report this to you because I need to apologise that I break my promise which I have made to you that we will pay on time. My parents and I are so disappointed about JJ. We have never though JJ would break his promise once again after last time what he has done. Mr Warwick, please accept my sincere apology once again and please switch off the machines for Shire Hotel since JJ has not made the payment for his site. But would you please keep China da and Mzuzu sites running since these two sites are operated by my dad and me so that we are able to pay DBR the amount owed by JJ. Thank you very much for your understanding.

Very sincerely yours,

Carey Jiang.

These communications purportedly between the plaintiff and one Mr. Carey Jiang, supposedly a brother to Jiang Jing, the signatory to the site agreement, ought to have established the fact that in spite of all the defendants' denials of the plaintiff's involvement with them in business at Shire Highlands Hotel and Mzuzu, there indeed existed such businesses which also involved the plaintiffs herein. However I have found a small inconsistency that has been gnawing at the line of thought I had taken toward granting the summary judgment, which inconsistency demands a proper explanation at trial.

I find that the email address given in the site agreement exhibited as is carey802020@hotmail.com, whereas the one in the correspondence just mentioned above is carey808020@hotmail.com. I believe this is one of the

details that would have to be dealt with at trial as they pertain to the origin of the correspondence and the persons behind the same. In addition, the form of

the emails leaves more questions than answers in me, there seems to have been a lot of editing done before printing them out such that they are rendered suspicious as they do not appear to be email correspondence. One can easily generate the same by just typing on Microsoft word.

Secondly, while there is evidence that as per the agreement the plaintiff was entitled to 66.666% of the net gambling revenue, the amount specifically claimed herein have not been sufficiently explained and proven. The document purporting to be the summary note released by the data logger could easily have been generated by anyone with a computer and printed out. That document contains the figures claimed does not in any way show where or how those figures came about so as to tie the same to the gambling sites in question.

In short this is not a case amenable to summary judgment, certainly not on the basis of what has been submitted in court so far, as it has failed to clearly prove the plaintiff's case. It is on that basis that I refuse to grant an order for summary judgment in the present action. The matter will proceed to trial before a judge sitting alone.

The application is hereby dismissed.

I make no order as to costs, since the defendant did not appear.

Made in Chamber this 11th day of May in the year 2017.

A. Kanthambi
Assistant Registrar