IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 750 OF 1993

BETWEEN:

LEOPARD DEVELOPMENT LTD ..... PLAINTIFF

AND

S. C. GONDWE ..... DEFENDANT

CORAM: D F MWAUNGULU, REGISTRAR
Chiligo, Counsel for the Plaintiff
Mwafulirwa, Counsel for the Defendant
Mkandawire (Miss), Interpreter

ORDER

On the 30th of December, 1993 I dismissed the defendant's application to set aside a judgment in default of defence. The judgment was obtained on the 18th of September, 1993. The plaintiff took out the writ on the 8th of June, 1993. The defendant lodged his notice of intention to defend on 18th June, 1993. The statement of claim was served with the writ. The defendant was in default of defence. The plaintiff obtained judgment in default of defence which the defendant, by an application of 6th December, 1993, wants set aside.

The facts, gathered from the statement of claim and the affidavit in support of the application to set aside judgment, are as follows. The defendant was operating a filling station at Kanjedza. He was dealing in the plaintiff's petroleum products. In between October, 1992 and March, 1993, the plaintiff supplied to the defendant petroleum products amounting to K369,538.29. In between November 1992 and March, 1993, the defendant paid K243,156.66. There was a rebate of K11,767.60. The defendant is therefore, indebted to the plaintiff to the sum of K114,728.34. The action is in respect of this sum. As we have seen, the plaintiff obtained judgment in respect of this sum.

The defendant wants the judgment set aside on the basis of an affidavit sworn by his legal practitioner, Mr Mwafulirwa. The graveman of the affidavit is a purported agreement between the plaintiff and the defendant suspending the payment of the sum due on condition that the defendant pay the debt by instalments while the plaintiff continues to supply petroleum products to the defendant on cash basis. It is deponed that the defendant had made this offer verbally. It was confirmed by correspondence which is deponed to in the affidavit. The correspondence is not exhibited. I do not think this is consequential because the source of the deponents belief, as required by order 41, rule 5 (2), has been disclosed. In any event it is unnecessary to belabour the point on the view I have taken of the evidence before me.

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This is an application to set aside a regular judgment. Such judgment, except on very good cause, may be set aside if there is an affidavit of merit - an affidavit disclosing a defence - or at any rate, a matter fit for trial. In this case the indebtalness is conceded. The defence put forward is the agreement mentioned earlier. The question for determination is if this agreement absolves the defendant's liability to the plaintiff. On the conceded facts, if it does the matter should go to trial. If it does not, and I am afraid, it does not, there is no issue to go for trial.

The case here raises an old principle of the law of contract. The way I understand Mr Mwafulirwa's argument, Mr Mwafulirwa appears for the defendant, the purported agreement binds the plaintiff on the earlier debt. The general principle, countenanced by nobilities before him, was better expressed by Lord Justice Hanworth, M.R. in Vanbergers vs. St Edmunds Properties Ltd (1933) 2 K.B. 223, 231:

> "It is a well established principle that a promise to pay a sum which the debtor is already bound by law to pay to the promisee does not afford any consideration to support the contract."

The statement of law is based on the earlier case of Foakes vs. Beer (1894) 9 App. Cas. 605, a decision of the House of Lords. The principle, however, is older. It has its trace to 1602 and Lord Coke in Pinnel's case (1602) 5 Co. Rep. 1170. The matter seems to have been settled at Common Law. Equity, however, intervened to mortify the rigours of the common law. Following the broad principle of Lord Cairns in Hughes vs. Metropolitan Railway Company (1877) 2 App. Cas. 439, 448, Lord Denning provided the answer in D and C Builders vs. Rees (1966) 2 Q. B. 617. In Hughes vs. Metropolitan Railway Company Lord Cairns said:

> "It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiations which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspence, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have taken place between the parties."

Lord Denning observed in D and C Builders Ltd vs.Rees that the effect of the principle was to suspend the strict legal rights and preclude enforcement of the rights. The application of the principle was subject to what Lord Denning said later in the judgment which has also a significant bearing on the result of this case. At page 625 Lord Denning said:

> "In applying the principle, however, we must note the qualification. The creditor is only barred from his legal rights when it would be inequitable for him to insist upon them. Where there has been a true accord, under which the creditor voluntarily agrees to accept a lesser sum in

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> satisfaction, and the debtor acts upon the accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance. But he is not bound unless there has been truly an accord between them."

In this case I have been at great pains to discover if there was any agreement at all between the plaintiff and the defendant. In paragraphs 5 (c) of the affidavit it is deponed that there was a request by the defendant for payment by instalments if the plaintiff continued to supply his petroleum products on cash terms. There is no suggestion that in the discussions there was an agreement. The paragraph continues with an assertion that the request was confirmed by a written request of 5th April, 1993. To my mind this means that the plaintiff had not agreed to the request. In paragraph 3 (d) it is deponed that the plaintiff refused the request. There was, therefore, no accord between the plaintiff and the defendant to suspend the payment of the money. Even if there was, on the facts as come out in the affidavit in support, the agreement would not be enforced for lack of consideration.

In my view there is no defence to the plaintiff's action. There is no triable issue. I dismiss the application to set aside the judgment with costs. The plaintiff has agreed to stay of execution for twenty-eight days for negotiations. I so order.

Made in Chambers this 4th day of January, 1994 at Blantyre.

D F Mwaungulu
REGISTRAR OF THE HIGH COURT