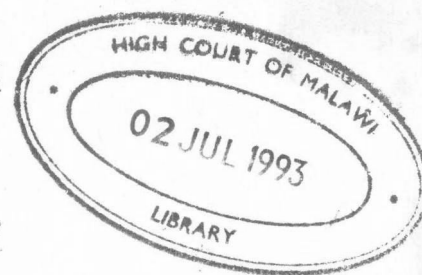


IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 252 OF 1987



BETWEEN:

INTERNATIONAL MARKETING SERVICES (PVT) LTD.....PLAINTIFF

- and -

NATIONAL BANK OF MALAWI.....DEFENDANT

CORAM: MBALAME, J.

Chikopa/Chizeze, of Counsel, for the Plaintiff
Chiligo, of Counsel for the Defendant
Selemani/Nkhoma, Official Interpreters
Gausi (Mrs)/Longwe, Court Reporters



J U D G E M E N T

By its amended Writ of Summons, the plaintiff International Marketing Services (Pvt) Limited, a company of limited liability and incorporated under the Companies Act (Cap 6:03) of the Laws of Malawi, claims damages from the defendant, the National Bank of Malawi, a commercial bank registered and operating in the country under the provisions of the Banking Act (Cap 44:01) of the Laws of Malawi, for conversion by the defendant of the sum of K13,964.22, the property of the plaintiff, or alternatively, the said sum of money as money had and received by the defendant to the plaintiff's use. It is the plaintiff's case that the plaintiff maintained a Current Account at one of the defendant's branches, namely, Victoria Avenue Branch in Blantyre. On or about the 4th June 1986, the defendant, without any lawful excuse, it is alleged, closed the plaintiffs' account and transferred a sum of K13,964.22 therefrom to a Suspense Account. Around the 23rd October 1986, the plaintiff demanded payment of the said amount, but to no avail, and the said defendant has since refused to effect such payment.

The defendants' defence is two-fold. They do not deny maintaining the plaintiff's account at Victoria Avenue Branch and receiving therein from the plaintiff a sum of K58,632.22, which was supposed to be in payment for salt delivered by a company in the Republic of South Africa. The defendant remitted the amount less a sum of K13,964.22 and contends that since the money had been deposited with the defendant to the account of the South African suppliers, the plaintiff has no claim over it. In the alternative, the defendant contends that it was agreed between the plaintiff

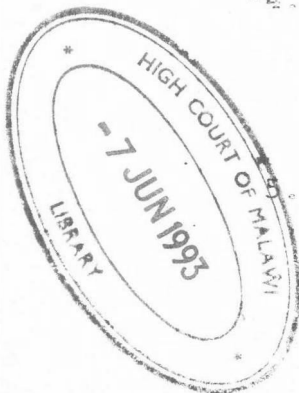
and the defendant that, out of the proceeds of the sale of the salt, the defendant should deduct all the money owed to them by Mr George Liunde, Managing Director of the plaintiff and which debt he incurred while trading as a firm called General Marketing International. These then are the pleadings before the Court. Each party called one witness. And I consider this to be the right juncture to surface the oral testimony.

Mr George D Liunde, the Managing Director of the plaintiff, gave evidence. In his testimony, he told the Court the background of the claim and how the plaintiff finally deposited the sum of K58,632.22, which was payment to a South African company, Van De Ghinste cc, for salt sold and delivered to the plaintiff. He said the defendant never paid the whole amount to Van De Ghinste cc. They paid less K13,964.22, which amount he believed was put in a Suspense Account. It was further his evidence that prior to the birth of the plaintiff company, he was in partnership with his two sons and a Mr Matabwa and trading under the style of General Marketing International. This company had its account with the defendants at Chichiri Branch and was indebted to the defendant at the time it stopped trading. He emphatically denied to have offered, as Managing Director of the plaintiff, to pay for the debts of the now defunct partnership from the sum of K58,632.22. For the defendant, Mr Wyson Ng'oma, who described himself as a Bank Investigator and Recoveries Officer, told the Court that he knew Mr Liunde as the owner of the two companies, namely, General Marketing International and International Marketing Services (Pvt) Ltd. He confirmed that the plaintiff was to transfer money to a South African company through Victoria Avenue Branch and that out of this, the defendant deducted the sum aforesaid, which money was owing and long overdue on the account of General Marketing International maintained at Chichiri Branch.

I will deal with the first limb of the defendant's defence first. The defendant contends that having received the sum of K58,632.22 from the plaintiff to the use of Messrs Van De Ghinste cc, the plaintiff had no claim over it thereafter. Paragraphs 4 and 5 of the defence read as follows:

"4. However, for reasons that were made known to Van De Ghinste cc, South Africa, the defendant paid to the said Van De Ghinste cc, South Africa, the sum of K44,668.0 keeping for itself the sum of K13,964.22.

In the premises with regard to paragraphs 4 and 5 of the Statement of Claim the Defendant avers that the sum of K13,964.22 (being a portion of K58,632.22 received by it for payment to Van De Ghinste cc, South Africa) does not belong to the Plaintiff and the Plaintiff was not entitled to a refund of the same."



With respect, I do not for once think the defendant had the right to deduct the sum of K13,964.22, which sum was intended for the plaintiff's creditors. The plaintiff paid that amount in the bank with specific instructions to the defendant to pay the amount to a third-party. If the amount was in excess of what the plaintiff owed them, it should have been held to the credit of the plaintiff and payable to the plaintiff on demand. This limb of the defence cannot, in my judgement, hold.

This is, however, not the end of the story; there is the alternative defence, which is in the following terms:

- "9. Further or in the alternative, the Defendant states that the Plaintiff by its letter dated 16th September 1985 guaranteed the payment of moneys owed by General Marketing International to the Defendant.
10. The Defendant repeats paragraph 9 hereof and states that pursuant to matters stated therein the Defendant was entitled to exercise its right of set off on the Plaintiff's funds towards settlement of General Marketing International indebtedness to the Defendant and the Defendant lawfully exercised that right.
11. The Defendant states that the Plaintiff has failed to pay to the Defendant the sum of money that is due and payable by the Plaintiff to the Defendant as per the guarantee referred to herein and the Defendant seeks to set off the Plaintiff's claim herein in satisfaction of the debt owed to the Defendant by General Marketing International."

It is clear from the evidence before me that International Marketing Services (Pvt) Ltd, the plaintiff herein, is distinctly a separate entity from General Marketing International, which was a partnership between the plaintiff's Managing Director and three others. In other words, in the absence of some special arrangement the plaintiff cannot be responsible for the debts of General Marketing International just because its Managing Director was a partner in that firm. The letter mentioned in paragraph 9 of the defence is of utmost importance and crucial to the case, and reads as follows:

16th September 1985

The Manager,
National Bank of Malawi,
Victoria Avenue Branch,
Blantyre.

Dear Sir

WE have paid in the sum of K80,000 and K30,000 to our account and we expect to pay in a further K41,000 in the next few days.

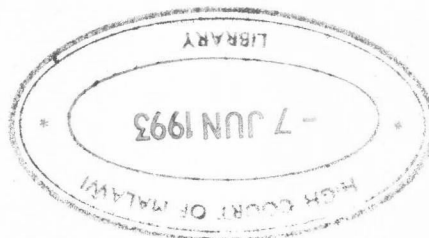
The sum of approximately K120,000 is in respect of bills to be paid in respect of salt imports from South Africa and should be debited to our account and held by you on behalf of the exporters. We undertake to provide all necessary documentation to enable an application to be made to the Exchange Control department for remittance of the funds to South Africa.

We shall be issuing a cheque in favour of Leopold Walford in respect of clearing charges and customs duty amounting to approximately K6,000; and another cheque of K6,000 will be issued in favour of National Bank of Malawi, in respect of the old debt which was owed by General Marketing International Ltd to National Bank and Barclays Bank, Zimbabwe in respect of rice export. Please debit our account accordingly.

We shall endeavour to clear the outstanding amount remaining in respect of the old debt as soon as possible.

Yours faithfully,

G.D. Liunde
Managing Director"



The letter is dated 16th September 1985. In the Statement of Claim, the Plaintiff contends that the amount claimed was transferred into a Suspense Account on 4th June 1986, which was after the letter was written. What then was the effect of this letter? Counsel for the defendant has submitted that this constituted a guarantee whereby the plaintiff undertook to pay the money owed by General Marketing International and that on receipt of the money payable to Van De Ghinste cc, the defendant was entitled to exercise its right of set-off. According to **Bullen and Leak and Jacob's Precedents on Pleadings**, a guarantee is defined as a collateral promise to answer for the debt, default or miscarriage of another who is, or is about, to become liable for the same to the person guaranteed." A contract of this nature must be evidenced by a note or memorandum, in

writing, signed by the party to be charged, or by his agent, otherwise it will be caught by section 4 of the Statute of Frauds. In the case of *Osman -v- Mahomed* (1978-80) MLR 9, p.195, *Skinner, CJ*, as he then was, quoted with approval the case of *Berkmyr -v- Darnell*, 91 ER 27, when he distinguished an original contract from a collateral contract guaranteed by a guarantee. It is clear from Exhibit P4 - the letter of 16th September 1985 - that the plaintiff did guarantee to pay the debts of the defunct General Marketing International **post facto**. That formed a collateral contract by which the plaintiff is bound. I, therefore, find that at the time the plaintiff was depositing the amount of K58,632.22 with the defendant, it being clear that General Marketing International would never be able to honour its debts to the defendant, the plaintiff was indebted to the defendant in the sum of K13,964.22 through General Marketing International. Having found that the plaintiff was indebted to the defendant in the sum aforesaid as at 16th September 1985, I now turn to the question of set-off as pleaded by the defendant. Unlike a counter-claim, a set-off is in the form of a defence. It entitles the defendant to refuse to pay an amount demanded from him. This is what the defendant has done in the instant case. There is a demand by the plaintiff of the sum of K13,964.22 and the defendant refuses to pay that amount because it is owed by the plaintiff through a guarantee in that amount. In my judgement, the defendant is entitled to the set-off. The plaintiff's claim must, therefore, fail in its entirety and I award the costs of this action to the defendant.

PRONOUNCED in open court this 5th day of March 1993,
at Blantyre.


R P Mbalame
JUDGE

