IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.173 OF 1993

BETWEEN:

BENEDICTO D. CHIWANDA (MALE) ..... PLAINTIFF

AND

THE TRUSTEES OF DIOCESE OF
CHIKWAWA (FIRM) ..... DEFENDANT

CORAM: MWAUNGULU, REGISTRAR
Chisanga, Counsel for the Plaintiff
Kaliwo, Counsel for the Defendant

ORDER

This is an application by the defendant, the Trustees of Diocese of Chikwawa, to set aside a judgment in default of notice of intention to defend that the plaintiff, Mr. Chiwanda, obtained on the 29th of March, 1993. The judgment follows an action taken out by the plaintiff on the 10th of February, 1993 where the plaintiff was claiming general damages for false imprisonment and special damages for loss of salary during the period of imprisonment.

The plaintiff was employed by the defendant. On suspicion of fraud at his place of work, the police arrested him on the 4th of September, 1992. He was at Chikwawa prison up to the 22nd of September, 1992. It does seem that no charges have been preferred against him. He was, however, released on bail. This action is to claim damages for false imprisonment and loss of earnings while the plaintiff was in prison.

The writ of summons was served on the defendant by posting the writ of summons in the letter box on the 11th of March 1993. Surprisingly the Deputy Registrar signed the judgment on the 29th of March, 1993. The judgment was irregular. The defendant had up to 1st of April, 1993 to lodge his notice of intention to defend. If a writ of summons was served by post, it was deemed served on the seventh day, in this case, the 17th of March, 1993. The plaintiff had fourteen days in which to lodge notice of intention to defend inclusive of this date. Judgment should have been obtained at the latest on 31st April 1993. A judgment

entered on 29th April 1993 is premature. The defendant is entitled to have it set aside ex debito justitiae Anlaby v. Praetorius (1888) 20 Q.B.D. 764. Unfortunately, the defendant did not seek to have the judgment set aside on that score. If it is desired to set aside a judgment for irregularity, the irregularity must be specified in the summons (Order 2, rule 2(2).

The defendant proceeded on the basis that the judgment was regular. He sought to show that there was a defence on the merit and that the problems in this case are purely the plaintiff's fault. Although the judgment was regular, it is contended, it ought to be set aside on the two grounds proferred.

On the question of the merit of the defence, there is little that I can add to restate the principles on which the courts have proceeded. The principles are expressed in well-conjured words in the Supreme Court of Appeal (Makaniankhondo Building Contractors v. Hardware and General Dealers) M.S.C.A. Civil No.15 of 1984). A lot of authorities have been reviewed by the Court of Appeal in England in Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle (1986) 2 Lloyds Rep. 221. When considering an application of this nature the courts are doing a balancing act; judgment has been entered albeit only because a party has not complied with the rules of the court as opposed to rules of statute. On the one extreme courts could set aside judgments as a matter of course when the defendant applies. The result would be that the rules of the court would be obeyed in breach. Moreover, defendants would be tempted to set aside judgments of the court for no reason at all save that the court has the power to set aside. Default judgments were permitted because the procedure enables the plaintiff to obtain judgment where the defendant does not have anything to answer to the plaintiff's claim. On the other extreme is a party who has a bona fide and good defence to the plaintiff's action and who has been caught by the rules. Surely such a person ought to be given a chance to state his case. Justice is achieved by a rule and practice which prevent a party who has nothing to answer to the plaintiff's claim not to be allowed to set aside the judgment and enable the party who has a good defence, but for the rules, to defend himself. This is why the scope of Order 13, rule 9 of the Rules of the Supreme Court should not be restricted so as to abridge its beneficiency. The power is a very wide one. It should be left in its pervasiveness. The balance is achieved in an imperfect way by requiring that there must be an affidavit of merits. The affidavit proferred by the defendant in his application raises triable issues.

The defence is formidable. The plaintiff's allegation is that the defendant directed his arrest. Where policemen have been involved in an arrest, liability depends on whether in doing so the police themselves in pursuance of public duty arrested the plaintiff on the information being laid to them.

The defendant would be liable if he actually directed the police to arrest and it turns out that there was no basis for the arrest. It is pleaded by the defendant that the police acted on their initiative. It is further pleaded that an offence was in fact committed and the defendant have a public duty to inform the police, which they did. On the claim for salary, it is pleaded that damages have not been proved because the defendant had alternative employment. These are matters that have to be tried. There is, therefore, a defence on the merit and judgment ought to be set aside.

It is contended against this that it is not enough that the defendant should show merit. Mr. Chisanga argued that the defendant has to show why judgment has been allowed to go by default. Short of that, it is contended, the judgment ought not to be set aside even if there is a defence on the merit. In my opinion, the rule cannot be that the defendant must explain why judgment was allowed to go by default, particularly where there is defence on the merit. The rule is as was put by Lord Justice Atkin in Evans v. Bartlam (1937) A.C. 437, 480. There is no requirement that the defendant must satisfy the court why judgment was allowed to go by default. A good reason will tilt the balance. A bad reason has no effect. Given a defence on the merit, the judgment will be set aside even if there is no explanation or there is a bad explanation.

Obviously if there is an explanation the court will look at it to influence the exercise of the discretion. Looking at the explanation in this case, there are a lot of procedural lapses by the Deputy Registrar and counsel. Mr. Kaliwo finds it strange that the plaintiff resists the application. His surprise is based on the fact that the plaintiff had accepted service of the defence. The defence was actually served on the plaintiff on 14th April, 1993. This was after judgment had been entered. Service of the defence was, therefore, nugatory.

There is an unclear order that was made on the 7th of May, 1993. This was the date when damages were to be assessed. When the case was called before the Deputy Registrar, Mr. Chiligo told the court that the notice of assessment of damages should be adjourned sine die because he was agreeing with the defendant to set aside the judgment. The Deputy Registrar's order only mentioned the adjournment. The order of the Deputy Registrar did not include the plaintiff's legal practitioners request for judgment to be set aside. A court cannot adjourn a case sine die. It has to adjourn to a determinable time.

A lot of problems followed the order. It appears the parties agreed that the judgment in default of notice of intention to defend be set aside. It also appears that they agreed that Mr. Kaliwo should draw a consent order. It is not clear whether they had agreed as to the time when the consent order should be drawn. On 2nd June, 1993 Mr. Kaliwo sent the consent order for signature by the plaintiff. The plaintiff refused to sign charging that the period it had taken to prepare

the order indicated lack of seriousness on the defendant's part to proceed with the matter. The plaintiff intimated that he would issue a notice for appointment to assess damages.

The first appointment was for 2nd July, 1993. The summons was not called that day. There was a notice adjourning the case to 28th July, 1993. On this date the plaintiff appeared and adjourned the case to 12th August, 1993. On 12th August, 1993 the case was not called. The case was reset for 19th October, 1993 when both counsel appeared. On 19th October, Mr. Kaliwo sought adjournment of the summons on grouns that he wanted to apply to set aside the judgment. I allowed him to do that. He did so.

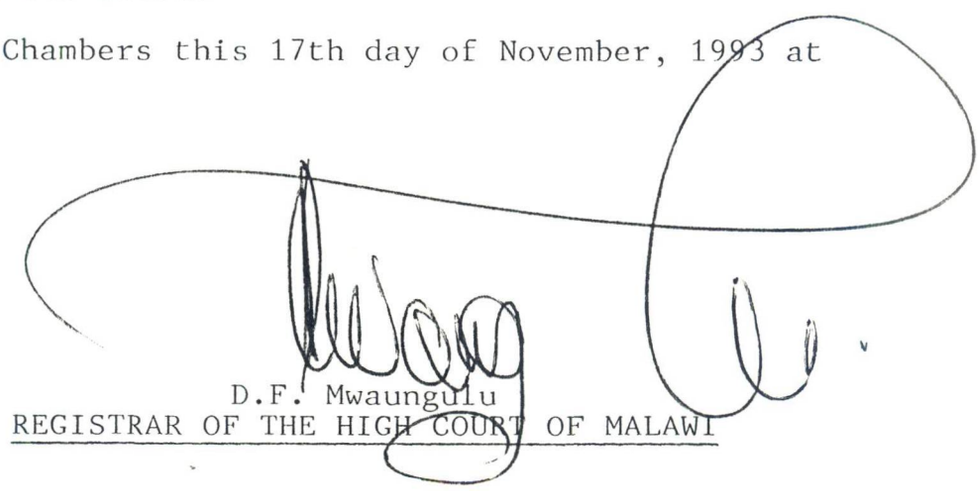
I said all this to show that the defendant's conduct in this case leaves much to be desired. I am surprised that he blames the tardiness in this matter on the plaintiff. Not only did he serve the defence after judgment, I do not understand why he served the defence at all if he did not lodge a notice of intention to defend, the defendant dilly-dallied on drawing the consent order to set aside judgment. Even after judgment had been entered, it is only in November, after much appeasement by the court, that he put in an application to set aside the judgment. The defendant has no explanation for why judgment was allowed to go by default. If anything, the proceedings show that the judgment was allowed to go by default because the defendant cannot just handle matters with despatch.

As I have said before, however, there is defence on the merit. There is no requirement that the defendant should satisfy the court why judgment was allowed to go by default. The paramount consideration is whether there is a defence on the merit. I would, therefore, set aside the judgment because there are triable issues.

I should also mention that even if there was no merit on the affidavit, the fact that the judgment was irregular would be a sufficient reason for setting aside the judgment; Kanchunjulu v. Magareta (1971-72) 6 A.L.R. 403.

Costs in the cause.

MADE in Chambers this 17th day of November, 1993 at Blantyre.



D.F. Mwaungulu
REGISTRAR OF THE HIGH COURT OF MALAWI