Received by J. Lebwe on behalf of Wilkinson & Associates
09/11/2021
07:42 PM

REPUBLIC OF MALAWI

IN THE NDUSTRIAL RELATIONS COURT

SITTING IN LILONGWE REGISTRY

MATTER NUMBER IRC 460 OF 2021

BETWEEN

PAUL MPHWIYO .....APPLICANT

And

THE ATTORNEY GENERAL.....RESPONDENT

CORAM	:	**Howard Pemba**	:	**Deputy Chairperson**
		Chikwakwa	:	Counsel for the Applicant
		Thabo Chakaka Nyirenda	:	The Attorney General
		Kataika,	:	Court ClerK

RULING

This is the ruling of the Court upon an application by the Attorney General on whether the default judgment that was entered in favour of the Applicant on 1st September 2021 should be set aside or not. The application was made by way of IRC Form 3 under Rules 16(1) and 25(1)(h) of the Industrial Relations Court (Procedure) Rules. It is supported by skeletal arguments and an affidavit filed and sworn by Thabo Chakaka Nyirenda, the Attorney General of the Republic of Malawi.

The grounds, as laid down in this affidavit, are that the default judgment is irregular as the Applicant failed to give the Respondent the mandatory three-month notice before commencing this action; and that if anything the Respondent has a defence on merits and a valid counter-claim which ought to set off or extinguish the Applicant's claim. A copy of this purported defence is attached to this affidavit and is marked as **TCN1**. There is another exhibit marked as **TCN 2** which is a charge sheet against the Applicant and other people in criminal case No. 35 of 2014 and this forms the Respondent's basis of their counter-claim.

The Applicant opposes to this application and has filed an affidavit in opposition to the Respondent's motion sworn by the Applicant himself. There are also skeletal arguments in opposition to the motion herein. In both of these documents, the Applicant's argument is that the statutory mandatory three-month notice was actually served on the Respondent in March 2021 and there is a copy of it exhibited as **PM1**. Having seen that there was no response to this notice from the Respondent, the Applicant states that he had no option but to commence this present action in August 2021. It is further stated that the IRC Form 1 was also served on the Respondent but there was still no response. After seeing that the required 14-day period had elapsed after serving the Respondent with the IRC Form 1, and there still be no response from their side, the Applicant then proceeded to enter the said default judgment against the Respondent. Hence, it is the Applicant's submission that the default judgment is regularly obtained and need not be set aside on that ground.

The Applicant further states that the Respondent have no any defence on merits to claim as they do not dispute that he was interdicted without pay and that he has never been given an opportunity to explain himself in relation to the alleged theft of as mentioned in the purported defence. He avers that even though he is indeed answering to criminal charges in criminal case number 35 of 2014, no court of law has found him guilty of these charges. It is further asserted by the Applicant that the Respondent is actually playing double standards as other civil servants who were also interdicted without pay together with himself were paid their withheld salaries and

yet he is still on interdiction without pay. There are exhibits marked as **PM4, PM5** and **PM6** intended to substantiate his assertions. Thus, he prays that this honourable court should dismiss the Respondent's application to set aside the default judgment.

I have heard counsels for both parties and I have read the law applicable in the application to set aside the default judgement. The brief facts of this action are that the Applicant, a former budget Director, was interdicted from the civil service pending conclusion of the criminal trial involving theft and money laundering of the sum of K2.4 billion. Having been appraised that interdiction without pay is unlawful, unfair and without any legal backing under the Constitution and any written laws of the Republic of Malawi, he commenced the action herein claiming, among others, reinstatement on the payroll and payment of the withheld wages. The Respondent having failed to file their response to these claims, the Applicant applied for and was granted leave to enter default judgment which the Respondent now applies to set aside.

The two main grounds upon which a default judgement may be set aside are irregularity and a defence on merits. If the default judgment was entered irregularly, it would be set aside as of right. If the default judgment was regularly entered, the court proceeds to look at whether the Respondent has a defence on merits or not regardless of whatever reason is given as to why the default judgment was entered. Generally, my task is to determine on whether the default judgment herein should be set aside or not. In determining this issue, I am inclined to assess whether the said default judgment was obtained irregularly or not and/or whether the Respondent has a defence on merits to the Applicant's claims.

The cardinal rule is that unless and until the court has pronounced a judgment on merits or by consent, it is to have the powers to revoke the expression of its coercive power where that has only been obtained by a failure to comply with any of the rules of procedure (See **Evans vs Bartlam [1937] 2 ALL ER 646, Grimshaw vs Dunbar [1953] IQB 408 and Hayman vs Rowlands [1957] I ALLER 321.**

In a similar fashion, and related to the above cited fundamental rule, **Rule 25(1)(h)** of the Industrial Relations Court (Procedure) rules provides that '*without prejudice to the decision-making power of the Court under Section 67, the Court may, on application or of its own motion at any time, rescind on good cause being shown, any order made by it in the absence of a party*'.

A default judgment being an order that is not pronounced on merits and made in the absence of another party, it is trite that this court has discretionary powers to cancel it on justified grounds some of which are irregularity and a defence on merits. In that respect, I will now proceed to look at whether the default judgment herein was entered irregularly.

The record informs this court that the Applicant filed a claim form (IRC Form 1) on 3rd August, 2021 claiming withheld salary from the date of interdiction to the date when the payment is actually made, reinstatement on the government payroll, and compensation for withheld benefits, among others. This IRC Form 1 was served on the Respondent on 4th August, 2021 at 11:30am and the service of it is seen to have been accepted and acknowledged by F. Kamlopa, on behalf of the Attorney General. The default judgment was entered on 1st September 2021. This undoubtedly shows that the default judgment was indeed entered after expiry of the prescribed 14-day period from the date on which the statement of claim was delivered as per **Rule 12** of the IRC (Procedure) Rules. The Respondent also does not seem to dispute this fact.

Nevertheless, their basis for their claim that the default judgment was entered irregularly is that the Applicant failed to give the Respondent the mandatory three-month notice before commencing this action, a fact which the Applicant has denied. I have looked at the exhibit marked **PM1**, and though not titled 'notice of intention to sue', it is clear as per the last paragraph that a notice of intention to sue Government was duly given as per the requirement of the law. This was received by the Ministry of Justice on 19th March 2021 and if the Respondent did not see it, then it should be an

issue internal lapses within his office. From that date of giving notice to the date of commencement of this action, about five months had elapsed. It is therefore not correct that the Applicant failed to give the Respondent the mandatory three-month notice before commencing this action on 3rd August, 2021. In view of this finding, I hold that the default judgment that was entered on 1st September, 2021 was regularly entered as there is clear evidence that the action was commenced after due notice of intention to sue Government was given as required by **Section 4** of the Civil Procedure (Suits by or Against the Government and Public Officers) Act, and the default judgment was entered after the Respondent failed to file their response to the Applicant's claim within the prescribed 14 day period. Thus, it cannot be set aside based on the ground that it was irregular.

Be that as it may, even if it would be true that the Applicant failed to give the Respondent the mandatory three-month notice before commencing this action on 3rd August, 2021, that, in my view, does not preclude the Respondent from filing their response to the Applicant's claim if service of it has been duly effected on them. What matters, under **Rule 26** of the IRC (Procedure) rules, for the Registrar to enter judgment by default against a party is not failure to give notice of intention to sue but rather failure to respond to a statement of claim or any application within the prescribed time limit or any extension granted by the Court within which to deliver a response. Therefore, though it is mandatory and therefore required of any claimant to give a three-month notice before commencing action against the Respondent, failure to do so cannot be an excuse by the Respondent for failing to respond. This is more or less the same with limitation period. The fact that an action has been commenced outside the limitation period does not prevent the defendant from defending it. Actually, both of them are something that can even be pleaded in the defence and, at some point in the proceedings, be good grounds to apply that the matter be disposed of on a point of law.

Having found that the default judgment is regular, I will proceed to look at whether the Respondent have a defence on merits. It is trite that for a regular default

judgment to be set aside, the defendant must, in his affidavit, states facts which show a defence on merits (see **Farden vs Richter (188923Q.B.D 142)** and **Kamchunjulu vs Magaleta** (1971-72)6ALR 403). It is further a trite principle of law that the discretionary power to set aside a regular judgment is unconditional and the purpose is to avoid injustice which may be caused if judgment follows automatically on default. If the defendant can show a defence on merits, the court should not prima facie desire to let a judgment pass on which there has been no proper adjudication (See **Alpine Bulk Transport Co Inc vs Saudi Eagle Shipping Co Inc (1986)2Lyods Rep.221**).

In his affidavit, the Attorney General avers that they have a defence on merits. This purported defence is exhibited as **TCN1** and its main plea hovers around the fact that the Applicant's employment was regulated by the Malawi Public Service Commission Regulations (MPSCR) and that **Regulation 40(1)(a)** of it empowers the Respondent to interdict without pay a civil servant who has been charged with a criminal offence before a competent court of law. Thus, considering that the Applicant is still charged with several offences relating to the theft and money laundering of Government money amounting to MK2.4billion before the High Court of Malawi in criminal case Number 35 of 2014 **(TCN2)**, and that he, together with his co-accused, was already found with a case to answer, his interdiction without pay is lawful, fair and justified. The Respondent further states that they have a good counter-claim against the Applicant which should set off or extinguish the Applicant's claim. Hence, they shall seek an order for stay of the present proceedings pending conclusion of the said criminal proceedings.

A defence on merits was proficiently tackled in the case of **Thindwa vs Attorney General [1997] 2MLR 45** in which the court held that for a defence to suffice as defence on merits for purposes of setting aside a regular judgment, it should be that which a reasonable tribunal would consider carrying with it real prospects of success when only the allegations in it is considered.

In the present case, the Applicant's claims are based on his understanding that interdiction without pay is unlawful, illegal and tantamount to unfair labour practice. This understanding emanates from the letter dated 12th August 2020 in which the Office of the former Attorney General advised the Government that interdiction of public officers without pay is illegal and there are some decided cases that have been cited in support of his understanding. The Respondent pleads that the same is lawful, fair and justified as it has been expressly provided in the MPSCRs which constitute the Conditions of Service of the Applicant's employment with the Malawi Government. Let me remind myself, and perhaps the parties as well, that at this point, my task is not to determine on whether interdiction without pay is illegal and/or unfair labour practice. It is to determine whether or not the Respondent have a defence on merits to the Applicant's claim. Thus, I will not delve myself into the analysis of these cited cases.

Suffice to say that looking at this Respondent's purported defence, and the Respondent having stated that they have a counter-claim for the sum of K2.4 billion which is related to the criminal charges that the Applicant is answering in the High Court, this court has all reasonable belief that this is a defence that carries with it prospects of success when only the allegations in it is considered. It is, in my view, a defence on merits and has to be tested at trial. It is therefore the ruling of this court that the default judgment that was entered in favour of the Applicant dated 1st September 2021 be and is hereby set aside on the ground that the Respondent has a defence on merits. The Respondent should be allowed to formally file their defence and serve it on the Applicant within 14 days from the date of this order and thereafter the matter shall be set down for prehearing conference before the Registrar.

Made in chambers, this 8th November, 2021 at Industrial Relations Court, Lilongwe Registry.

Howard Pemba

Deputy Chairperson