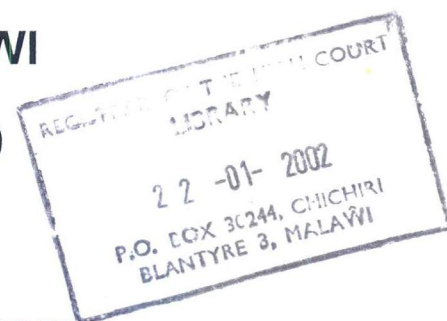


**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CIVIL CAUSE NO. 152 OF 2000**



BETWEEN:

OIL COMPANY OF MALAWI (1978) LTD.....PLAINTIFF

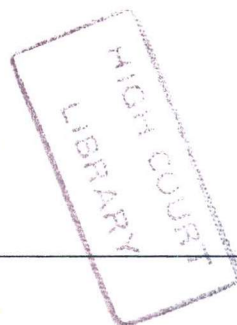
AND

J S CHIBWANA t/a DOWA FILLING STATION .....DEFENDANT

**CORAM: POTANI, REGISTRAR**

Mhango, Counsel for the Plaintiff

Chibwana, Counsel for the defendant



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**RULING**

Pursuant to Order 13 Rule 9 (2) of Rules of the Supreme Court Practice, the defendant took out this application to set aside judgement obtained by the plaintiff in default of giving notice of intention to defend. The judgement was entered on March 2, 2000.

There is the affidavit of the defendant, J S Chibwana, in support of the application. There has also been an attempt by the plaintiff to use the affidavit of Charles Chigondongo Mhango, of counsel for the plaintiff, in opposition to the application.

The default judgement the defendant seeks to be set aside was regularly obtained. It is trite law that such a judgement can only be set aside if the defendant demonstrates, by affidavit evidence, that there is a meritorious defence to the plaintiff's claim and ***Farden vs. Richter (1889)*** 23 QBD 124 is a case in point.

Before I move on to consider whether the defendant in this case has demonstrated that there is a defence on the merits to the claim herein, I wish

to say something on the attempts by the plaintiff to file and use an affidavit in opposition. In the case of **Blantyre Chalk Makers Ltd v. Malawi Book Service Civil Cause Number 1374 of 1994 (unreported)** it was held that on an application to set aside a regular judgement, it is not permissible to file an affidavit in opposition touching on the merits of the defendant's proposed defence. It seems to me that this decision is one based on policy consideration than the law because order 13, under which such an application is made, and the Rules of the Supreme Court in general, do not make any specific provision precluding a plaintiff from filing an affidavit in opposition to such application. The policy consideration behind the decision seems to be that it would not be proper to allow an affidavit in opposition as in the end the court would be dragged into deciding the case on the merits on mere affidavit evidence thereby denying the parties the opportunity to conduct cross-examination in order to verify the truthfulness of the assertions and averments in the affidavits. I would, consequently, entirely ignore the affidavit in opposition to this application in determining whether or not the defendant has put forward a defence on the merits.

The plaintiff's claim as endorsed in the writ is for the sum of K149,220.00 being the price of fuel and oils supplied to the defendant. In his affidavit in support, the defendant does not deny having had fuel and oil supplies from the plaintiff. He, however, contends that he used to make advance payments to the plaintiff by cheque. He further avers that in some instances, the plaintiff would under supply the fuel and oils paid for in advance thereby creating rebates but for a period of close to 2 years, the plaintiff never paid him his rebates. As if that were not enough, the plaintiff failed to repair paraffin pump at the filling station the defendant was operating on arrangement with the plaintiff. The plaintiff also removed diesel and petrol pumps at the filling station such that the defendant was and has been unable to make any sales. The defendant contends that in the circumstances, he wishes to bring up a counterclaim for breach of contract.

In essence, what the defendant is alleging as his defence is that he failed to pay the money being claimed by the plaintiff because firstly the plaintiff owed him money on rebates and secondly because the plaintiff failed to repair the filling station paraffin pump and also removed petrol and diesel pumps. My view is that these assertions by the defendant are such that if proved during



trial, the defendant could successfully defend the claim herein. I would, consequently, order that the default judgement be set aside and defendant must serve defence within 14 days from the date of this order.

The defendant, however, has to bear costs of this application.

Made in Chambers this day of October 4, 2000, at Blantyre.



H S B Potani  
**REGISTRAR**