

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1937 OF 2000

BETWEEN:

GLADYS WHAYO.....PLAINTIFF

AND

PETROLEUM CONTROL COMMISSION.....DEFENDANT

CORAM: POTANI, J.

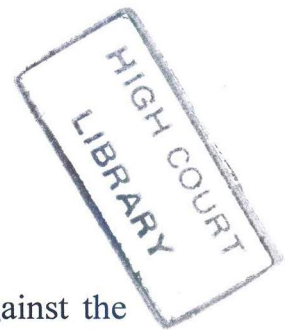
Kasambara, Legal Practitioner for the plaintiff
Tsingano, Legal Practitioner for the defendant

POTANI, J.

RULING

The plaintiff, Gladys Whayo, commenced this action against the defendant, Petroleum Control Commission, claiming damages for wrongful termination of employment. An interlocutory judgment in default of service of defence was entered in favour of the plaintiff. The matter comes before court for the determination of the defendant's application to set aside the default judgment. The application is supported by the affidavit of Moses Francisco Tsingano, counsel for the defendant.

Order 19 rule 9 of Rules of the Supreme Court gives the court powers to set aside or vary a judgment entered in default of service of a defence. Where such a judgment was regularly entered, as is in the instant case, the law is well settled that it can only be set aside if the defendant demonstrates by affidavit evidence that there is a defence on the merits to the plaintiff's claim. See *Farden v Richter* ((1889) 23 QBD 124. Exhibited to the affidavit in support is the defendant's proposed defence which essentially is that the termination of the plaintiff's employment was made in accordance with the express terms and conditions of the plaintiff's appointment as well as conditions of service governing all the defendant's employees and as such cannot be said to be unlawful or wrongful more so since the plaintiff was told the reason for the termination is a letter dated July 27, 1999.



Mr Kasambara for the plaintiff observed that the defendant's proposed defence does not plead that the plaintiff was given an opportunity to be heard and that the letter of termination fell short of telling the plaintiff the reason for the termination in that it simply said her services were no longer required without explaining how that came about which offends section 31 of the Constitution and ILO Convention on Termination of Employment 1982. It was counsel's submission that in the circumstances, the defendant's defence is a mere shame.

A defence on the merits is said to be one which is not just arguable but one with a real prospect of success. See *Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc., The Saudi Eagle* (1986) of Llyod's Rep. 221 CA at p. 223. Counsel for the defendant submitted that as long as the defendant complied with the terms and conditions of the plaintiff's employment in effecting the termination, then *prima facie* there is a defence on the merits. It is imperative to bear in mind that the relationship between the plaintiff and the defendant was contractual. It is trite law that parties to a contract are bound by the terms and conditions of their contract. This is not to say that parties to a contract can come up with conditions and terms that are inconsistent with and offend the constitution, international legal instruments or indeed ordinary municipal legislation. In the instant case, it remains to be seen whether or not the conditions governing the employment of the defendant's employees including the plaintiff are inconsistent with the constitution or the ILO Convention on Termination of Employment 1982 and that is a matter which can only be determined at trial. The point being made is that so long the defendant has shown by affidavit evidence that it complied with terms and conditions of the plaintiff's employment, and then *prima facie* the defendant has demonstrated that he has a defence that has the prospect of success. It is therefore ordered that the default judgment herein be set aside and that service of defence be dispensed with as it was served with the affidavit in support of this application.

Costs of this application are to be borne by the defendant.

Made in Chambers this day of August 27, 2004, at BLANTYRE.



H S B Potani
JUDGE