IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 625 OF 2004

BETWEEN

F. CHIRWA t/a TIKHALE BUILDING CONTRACTORS ..... PLAINTIFF

-AND-

M.D. INITIATIVE .....1ST DEFENDANT

CORAM : **T.R. Ligowe : Assistant Registrar**

Chinoko : Counsel for the Plaintiff

Nankhuni : Counsel for the Defendant

RULING

The plaintiff entered a default judgment against the defendant on 26th November 2004, for the sum of K314 000 being retention money payable by August 2002 by the defendant as agent of DFID on a contract to rehabilitate Ndunda CCAP school, interest thereon to be assessed, K47 000 collection costs and costs of the action.

The defendant now applies to set aside the judgment and stay proceedings pending arbitration proceedings. The application is supported by an affidavit sworn by counsel. He deposes among other things that, the defendant has a defence to the plaintiff's claim which is that it is a wrong party to the action. The proper defendant should have been the Attorney General. The plaintiff contracted with the Malawi

Government to construct the school in question and the defendant was not party to that contract. That all payments on the contract were duly authorized by the defendant as supervisor of the project but the Malawi Government refused to pay the plaintiff because Messrs Chiume Consultants, the quantity surveyors on the project, stated that they had at one time overpaid the plaintiff by the sum claimed herein. Counsel further deposes that the articles of agreement and conditions signed by the plaintiff and the Malawi Government require that in case of disputes the matter has to be referred to arbitration.

The plaintiff filed and served an affidavit in opposition which the defendant has objected. He argues that to allow the affidavit in opposition would be tantamount to trying the matter on affidavit evidence. He cites ***Mussa v. Chawawa and another*** 15 MLR 329. Mwaungulu Registrar as he was then held that:

> "It is a practice of considerable antiquity not to allow an affidavit in answer to an application to set aside judgments. The practice is that the defendant's affidavit should raise a defence on the merits. If the affidavit is deficient, the defendant can put in a supplementary affidavit (***Kamchunjulu v Magaleta*** (1971–72) 6 ALR (Mal) 403). To allow affidavits in answer would be tantamount to trying the case on affidavits without the opportunity of witnesses or evidence before the court without cross-examination. Only the defendant's affidavit, therefore, will be considered."

Counsel for the plaintiff contends that his affidavit in opposition has to be accepted as the present practice is that affidavits in opposition are admitted. He cites ***Leasing and Finance Co. of Malawi v. S.A. Jumbe*** Civil Cause No. 2791 of 1997 (Principal Registry) (unreported) and states that late Qoto Registrar relied on the plaintiff's affidavit in opposition in deciding whether the defendant's affidavit in support raised a defence on

merits. I have read the Registrar's ruling in that case but, with due respect, he did not rely on any affidavit in opposition. He actually states at page 2 that there was no affidavit in opposition in that case. But if the mentioning of the affidavit in opposition meant that if there was one he would have used it, then I have to consider this issue further.

There is another case actually, ***Pereira v Ndaule t/a Cenda Building Contractors*** [1993] 16(2) MLR 712 (HC), where Chipeta Deputy Registrar, as he then was, accepted an affidavit in opposition. In the course of his ruling he said at page 714:

> "The aim of the affidavit in support and the proposed exhibited defence was to persuade this Court about the existence of such arguable or triable issues. On the other hand the aim of the affidavit in opposition and its exhibits was to show that such defence as is being proposed is a sham and that it should therefore not influence me into finding grounds for the setting aside of judgment."

He further said:

> "It is important I think at this stage to warn myself that the hearing of an application to set aside judgment is essentially different from the hearing of an application for summary judgment, such as under Order 14 of the Rules of Supreme Court. Whereas in applications for summary judgment I am allowed by the rules to delve into questions of merit in order to decide whether any proposed defence is valid or only a sham where I am dealing with the upholding or removal of a default judgment it is not part of my jurisdiction to at this juncture actually determine which defence is likely to succeed or fail. In other words when I am dealing with the question of setting aside a judgment earned through procedural default I am not supposed to carry out a trial on affidavits and convert or appear to convert what is merely a technical judgment into one of merit."

And then he said:

> "It becomes my duty at this stage to weigh and consider the affidavits and exhibits presented in this application as well as the arguments.

> advanced. Falling short of going into merits of the case it appears to me that among other things the parties herein disagree on whether there was a specific date for completion of construction, whether there was unreasonable delay, whether all fault for delay fell on the defendant, whether on determination of the contract it was fair to limit the valuation of the work done and work outstanding using a quantity surveyor alleged not to be wholly neutral in the exercise. I am aware that the exhibits to the affidavit in opposition go quite some way in trying to answer some of the points on which the parties are not at ad idem with each other. I have however wondered whether my jurisdiction now actually extends to the final determination of those issues.
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> It suffices, I finally think, that the parties have a number of contentious issues deserving sorting out between them which if determined may land or subtract weight to the current Judgment and that since this Judgment is only procedural it will only be fair if the parties are accorded opportunity to argue their sides in open court, I accordingly find that arguable or triable issues exist in this case and so I do hereby set aside the default judgment of 11 February 1993."

I am not bound myself by any of the decisions cited above as all of them were made by Registrars, and a Registrar's decision is not binding precedent. I am aware though, that decisions of a court of equal jurisdiction need to be followed as far as possible. (***Chirwa v. Rep***. (H.C.) 4 ALR (Mal) 350). It is the view of this court that an affidavit in opposition in answer to the defendant's affidavit of merits need not be considered. If considered it is tantamount to trying the matter on affidavit evidence. One can notice that in ***Pereira v Ndaule t/a Cenda Building Contractors*** (supra) the Registrar did not weigh and consider the affidavits. He only observed that the parties were disagreeing without going into the merits. His Honour actually acknowledged it when he said:

> "I am not supposed to carry out a trial on affidavits and convert or appear to convert what is merely a technical judgment into one of merit."

and when he said:

> "I have however wondered whether my jurisdiction now actually extends to the final determination of those issues."

It is trite that on an application to set aside a default judgment the major consideration is whether the defendant has disclosed a defence on the merits. Paragraph 13/9/14 of the Rules of the Supreme Court states that this (the major consideration) is not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence, and because if the defendant can show merits the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication.

So, it is clear, what is important is the defendant's affidavit disclosing a defence on merits vis a vis the plaintiff's statement of claim, to see if it has both a real prospect of success and carries some degree of conviction. A real likelihood that the defendant will succeed on fact.

An exception would be where the defendant delayed in making the application and the plaintiff in his affidavit in opposition would like to show prejudice occasioned to him by the delay. Apparently if delay is coupled with prejudice occasioned to the plaintiff the court may refuse to set aside the judgment. (***Harley v. Samson*** (1914) 30 T.L.R. 450)

In the present case the plaintiff's affidavit in opposition is in answer to the defendant's affidavit on the merits. Therefore I will not consider it.

In his submission counsel for the plaintiff has argued that this application has been delayed to the prejudice of the plaintiff. It has not been show however how the plaintiff has been prejudiced.

On considering the defendant's affidavit in support as against the plaintiff's statement of claim I find that it discloses a meritorious defence and so I exercise the court's discretion by setting aside the default judgment on conditions that the defendant serves his defence and pays into court the money ordered in the default judgment within 14 days from the date hereof. Costs will be in the cause.

The defendant applied to set aside the default judgment and stay proceedings pending arbitration proceedings. Neither party argued so much on the second limb of the application. The defendant on one hand only states in his affidavit in support and skeleton arguments that the articles of agreement and conditions signed by the plaintiff and the Malawi Government required that in case of disputes the matter has to be referred to arbitration. And in all fairness this matter ought to proceed by way of arbitration. The plaintiff on the other hand only argues that the need for arbitration does not oust the jurisdiction of the court as the High Court has unlimited original jurisdiction.

It is true, an arbitration clause does not in any way oust the jurisdiction of the courts, nor does it prevent the parties from putting in a claim in court in spite of its existence; it merely enables the other party to apply for a stay of legal proceedings pending such arbitration. (***DO Oghene and Sons Ltd v Royal Exch Assur*** 1968 (1) ALR Comm 119 MW 5 Nig.) It was held in the case just cited that the application has to be made by way of motion on notice and even then the grant or refusal of the stay is within the court's discretion. It was however held in ***National Insurance***

Co Ltd v Ngwira [1993] 16(1) MLR 381 (SCA) at 388 that the court must have the opportunity to examine the agreement between the parties, including the arbitration clause and all the circumstances surrounding the dispute between the parties, and decide whether special reasons do not exist which would compel a court to refuse its assistance to a person wishing to enforce such bargain.

This court has not been accorded enough material on which to exercise its discretion whether to stay the present proceedings pending arbitration. I leave it like that.

Made in chambers this ……day of February 2007.

T.R. Ligowe

ASSISTANT REGISTRAR