



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 654 OF 2006**

BETWEEN

GREY ISAAC MITAWA PLAINTIFF

-AND-

AGRICULTURE RESEARCH AND EXTENSION TRUST DEFENDANT

CORAM : T.R. Ligowe : Assistant Registrar
Misanjo : Counsel for the Plaintiff
Ottober : Counsel for the Defendant

RULING

This is the defendant's application to set aside a default judgment that was entered in this case on 26th May 2006 the defendant having not served their defence.

The plaintiff claims interest at Commercial Bank lending rate on the principal sum of K162 845 from 1st October 1997 to 6th March 2006 to be assessed which had been unlawfully withheld by the defendant. The default judgment ordered the defendant to pay the interest at the Commercial Bank lending rate to be assessed. The matter came before the Senior Deputy Registrar on 20th December, 2006, for assessment of interest when the Senior Deputy Registrar

heard counsel for the appellant. On 27th December, 2006, the Senior Deputy Registrar made his order which ruled that the appellant could not in law take out a separate action to claim interest only if not claimed with the principal amount and therefore there could be no assessment of interest, in effect ruling that the action for claim of interest was ill conceived in law and was therefore not valid and so was the default judgment.

The plaintiff appealed against the ruling of the Senior Deputy Registrar. The facts of the case as found by the Judge on appeal are that the appellant was an employee of the respondent, the Agricultural Research Extension Trust. He was stationed at the headquarters in Lilongwe. In March, 1997, the appellant was sent on duty to Nkhotakota travelling in a motor vehicle belonging to the respondent. On the way back to Lilongwe, the vehicle was involved in a road accident and the appellant sustained injuries to his right arm. The injuries resulted in the amputation of his right middle finger.

Following the injuries, the appellant lodged a claim under the Workers Compensation Act to the Workers Compensation Commissioner. The Commissioner assessed the appellant's compensation for the injuries at K262, 845.00. The Commissioner then sent a formal "Claim of Compensation" to the respondent on behalf of the appellant requiring the respondent to countersign the form of Claim of Compensation if the respondent agreed with the assessment by the Commissioner and to return the form with payment of the amount of compensation, that is, K262, 845.00. The form sent by the Commissioner was dated 31st July, 1997. The respondent was allowed a period of two months up to 30th September, 1997, to return the form with full payment.

The respondent did return the form within the specified period but with only part payment of the total amount of compensation as assessed by the

Commissioner. That partial amount was K100, 000.00, leaving a balance of K162, 845.00. Sometime in 2002, after some five years of waiting to be paid the balance, the appellant brought an action in the Industrial Relations Court (registered as Matter No IRC 292 of 2002) against the respondent to claim for the balance. The court did not set down the claim for adjudication until three years later on 20th June, 2005, when the court gave directions that it did not have jurisdiction over the matter and that the matter be transferred for adjudication before the appropriate forum since the Workers Compensation Act conferred jurisdiction instead on courts of magistrates.

Before the plaintiff's claim was heard by the appropriate forum, the respondent, on 6th March, 2006, paid the remaining balance of the compensation money to the appellant. Then on 13th April, 2006, the appellant took out a summons before this Court against the respondent claiming interest for the delayed payment of that amount. An affidavit of service on the respondent was filed in Court showing that the respondent was served on 18th April, 2006. The respondent did not file a defence and on 29th May, 2006, the appellant obtained a default judgment which ordered that "the defendant (respondent) do pay the plaintiff (appellant) interest at commercial bank lending rate on the principal sum of K162, 845.00 from 1st October 1997 to 6th March 2006 to be assessed plus reimbursement on collection fees and government surtax on the said collection fees".

The Judge ruled as follows at page 7 of his judgment:

"In my judgment, therefore, there is no rational reason why a claim of interest for delayed payment cannot constitute a separate cause of action in a proper case, and I make no distinction whether it arises from delayed payment of a debt or damages or, as in the present case, compensation or other liquidated sum. I recognise the principle advanced before me by counsel for the respondent and in the order of the Senior Deputy Registrar that interest is awarded at the discretion of the court, but I see no diminution of this principle

just because a claim of interest is made as a separate cause of action in a proper case. Judicial discretion will always be exercised in the interests of justice as the court may determine in the particular case.

In the present case, I hold that the claim for interest on the delayed payment of the balance of compensation money due by the respondent to the appellant was a proper cause of action on its own and that the default judgment obtained by the appellant was also proper. I accordingly allow the appeal by the appellant, with costs against the respondent, and I set aside the order of the Senior Deputy Registrar and I order that the interest claimed by the appellant be assessed in accordance with the default judgment obtained by the appellant.”

Instead of proceeding with the assessment of the interest the defendant now applies to set aside the default judgment. As is required, the application is supported by an affidavit sworn by counsel for the defendant. She deposes that the plaintiff obtained a default judgment on 29th May 2002 (sic) for interest at the Commercial Bank lending rate on the damages awarded to the plaintiff under the Workers Compensation Act. That the claim for interest is not based on contract and no facts have been pleaded in support of the claim for interest. That the defendant intends to contest the claim for interest on the ground that it has an arguable defence on the merits as follows:

1. The plaintiff's claim for interest is not based on contract and no facts have been pleaded in support of his claim for interest.
2. The plaintiff's claim for interest lacks merit in that there was no categorical refusal by the defendant to pay the compensation to the plaintiff and there is no evidence that the defendant unjustly enriched itself.

Counsel further deposes that the plaintiff was not driven to legal proceedings in order to recover the compensation awarded to him under the Workers Compensation Act. That the court has the discretion to award interest on a judgment debt but the discretion does not extend to damages. And in the instant case the plaintiff is not claiming interest on a debt or judgment debt

but compensation awarded to him under the Workers Compensation Act. In any event the commercial interest rate claimed is only applicable in commercial cases including claims on bills of exchange.

In opposing the application counsel for the plaintiff argues that the defendant has inordinately delayed in making it. Over two years have passed since the default judgment was entered. And so on the authority of ***Malizani v. Pride Malawi Ltd.*** Civil Cause No. 691 of 2006 (Principal Registry) (Unreported) the application has to be dismissed. Counsel further argues that the decision of Justice Singini on the appeal is final and conclusive as it ruled that interest is payable and it has to be assessed. The Judge ruled on merits. The issue for which the defendant wants the default judgment set aside is the same as the one the Honourable Judge tackled on the appeal, whether or not the interest is payable. Re-opening the same issue would be a matter of *res judicata* and an abuse of the process of the court. The rate of interest is a matter that can be dealt with on assessment.

I entirely agree with counsel for the plaintiff. I will however, not belabour myself with the issue of delay in making the application, but the fact that the Judge decided on the purported defence being raised in the present application on the appeal.

The primary consideration in exercising the court's discretion in an application to set aside a default judgment is whether the defendant has merits to which the court should pay heed, 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. It was held in ***Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle*** [1986] 2 Lloyd's Rep. 221 at 223, CA, that:

- (a) It is not sufficient to show a merely "arguable" defence that would justify leave to defend under O.14; it must both have "a real prospect of success" and "carry some degree of conviction". Thus the court must form a provisional view of the probable outcome of the action.
- (b) If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside.

The Judge had three grounds to deal with on the appeal, but he opted to deal with the last ground only. He said at page 4 of his judgment:

“However, I will not seek to rule on those two grounds. I consider that the appeal really turns on the last ground which raises the point of law of whether interest can or cannot be claimed if not claimed with the principal amount; and this, to my mind, is the crux of the matter in this appeal, that is, if a claim of interest can be an independent cause of action before the courts.”

The defendant's defence in the affidavit in support of the present application centers on the very point of law that the Judge dealt with on the appeal. The facts are not in dispute at all. In view of the judgment on appeal, I see no merit in the defence raised and so the application is dismissed with costs.

Made in Chambers this 24th day of September 2008.

T.R. Ligowe
ASSISTANT REGISTRAR

