IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 230 OF 2001

BETWEEN

CBR TOURS AND TRAVEL LIMITED.....PLAINTIFF

AND

MHINDI BUILDING CONTRACTORS.....DEFENDANT

CORAM: MASOAMPHAMBE, ASSISTANT REGISTRAR
Mwala, of Counsel for the Defendant

RULING

I have before me an application for an order to set aside a default judgment. The application is made under Order 13 Rule 9 of the Rules of the Supreme Court. The application is supported by an affidavit deponed to by Mr Clement Masauko Mwala, of Counsel for the defendant.

The application is not opposed.

The background of the application can be stated in brief.

By writ of summons and a statement of claim issued on 22nd January 2001, which writ was amended and reissued on 26th January 2001 before being re-amended again and re-issued

for the 2nd time on 8th March of 2001, the plaintiff claimed against the defendant the sum of K80,152.20 being the money due to the plaintiff as an outstanding balance for the supply of air tickets to the defendant between August 1999 and April 2000. The plaintiff further claimed interest at the bank lending rate and costs of the action.

On 6th March 2002 the plaintiff obtained a default judgment for the said sum of K80,152.20 plus interest at prevailing bank rate and costs at 15% of the amount due. On 19th June of the same 2002 a warrant of execution was issued on the judgment and costs. On 31st July 2003, the defendant obtained an order staying the execution. The said order was granted on condition that the defendant paid Sheriff fees and expenses forthwith, and that the defendant files and inter-parte application to set aside the judgment within 14 days. Following the Order, the defendant indeed filed summons to set aside judgment on 13th August of 2003.

In paragraph 5 of the affidavit in support of the application deponed by Mr. Clement Mwala of counsel for the defendant it is deponed that the said debt of K80,152.20 was incurred by the brother of the Managing Director, one Mr. Dennis Mzembe personally who was neither an employee nor had a share in the defendant company but only uses the defendant company's address. Mr. Dennis Mzembe therefore incurred the debt on his own and the debt had nothing to do with the company.

Under Order 13, Rule 9 of the Rules of the Supreme Court , the court may, on such terms as it thinks just set aside or vary any judgment entered in default of giving notice of the intention to defend the action. The principle behind this discretionary power was well articulated by Lord Atkin in **Evance v Bantlan** [1937] A.C. 473 at 480 when he said:

> *"The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its*

coercive power where that has only been obtained by a failure to follow any of the rules of procedure"

It is, therefore open to a defendant who desires to defend the action, notwithstanding the entry of a regular judgment to apply for an order setting aside the judgment. It is also open to the court to set aside the default judgment of its own motion as where it comes to its knowledge for example that the judgment is against a man who at the material time was dead. Now, where the judgment is regular then it is an almost inflexible rule that there must be an affidavit of merits i.e. an affidavit stating facts showing a defence on the merits. The case in point is **Fardent v Ritcher** [1889] 23 QBD 124. And on page 129, Huddlestone, B., held that at any rate where such an application is not supported, it ought not to be granted except for some very sufficient reason.

On the application to set aside a regular judgment, the major consideration is whether the defendant has disclosed a defence on the merits and this transcends any reasons given by him for the delay in making the application and even if the explanation given by him is false. This was well propounded in the case of **Vann v Awford** [1986] L.S. Gas 1725 or [1986] The Times, April 23 C.A. Where judgment is irregular, in general the defendant is entitled to have it set aside. The case in point is *ex debito justitiae* (**Anlaby v Practorius)** [1888] 20 Q.B.D. 764. The principle is however subject to two powers of the court. Firstly, as expressly provided in Order 13, Rule 9 the court has power to vary the judgment in an appropriate case so as to correct the irregularity. Secondary, there is a duty on the defendant to apply under Order 2, Rule 2 (1) to set aside for irregularity *"within a reasonable time and before...(h) has taken any fresh step after becoming aware of the irregularity"*

Turning to the case at hand, the defendant avers that he has a defence on merits to the plaintiff's claim. He relies on the argument that the debt in question was incurred by the brother of the Managing Director of the Defendant Company personally. The said brother, Mr Dennis Mzembe was neither

the employee nor had a share in the Defendant Company but only uses the said company's address.

I have carefully examined this proposed defence, and in the opinion of this court, it has a real prospect of success. I therefore grant the defendant's application and hereby set aside the default judgment entered on 6th March of 2002. The defendant must file a defence within 14 days of this Order and must pay the plaintiff's costs thrown to be taxed if not agreed.

Made in Chambers this 24th day of April 2008 at Blantyre.

T.S MASOAMPHAMBE
ASSISTANT REGISTRAR