Tort – Negligence – claim for special and general damages – Interlocutory judgment in default of defence and notice of intention to defend – Application for assessment of damages – Order to stay proceedings pending an application to set aside judgment.

Civil procedure – Application to set aside default judgment under O. (13) r. (9) R.S.C – case shows a triable issue on contributory negligence by plaintiff – Defendants to defend action – judgment set aside.

TORTS – Law of (Negligence). – procedure.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 1182 OF 1993

BETWEEN:

MRS J M TURQUAND YOUNG.....PLAINTIFF

-AND-

RICHARD KACHULU (MALE).....1ST DEFENDANT
NATIONAL INSURANCE COMPANY LIMITED 2ND DEFENDANT

CORAM: MWAUNGULU, REGISTRAR
Chizumila of counsel for the Plaintiff
Banda of counsel for the Defendant

18/2/94

ORDER

This is an application to set aside a judgement in default of notice of intention to defend and defence entered against the second and first defendant respectively on the 17th of November, 1993. The plaintiff owns a Ford Escort Saloon, registration number BG 2879. The first defendant owns a peugeot 104, registration number BE 9028. The second defendant is an Insurance Company and insurer of the second defendant's car. On the 24th of May, 1990 the plaintiff's son was driving his father's car on the Limbe - Thyolo road towards Thyolo when there was an accident with the first defendant's car, driven at the time by the first defendant.

On 14th September, 1993 the plaintiff took out this action claiming special and general damages for the damage to his car. On 2oth September, 1993 the first defendant lodged a notice of intention to defend. The second defendant did not. The first defendant, served with a statement of claim that accompanied the writ, did not serve defence. On the 17th of November, 1993 the plaintiff obtained an interlocutory judgment in default of defence and notice of intention to defend against the first and second defendant, respectively. The plaintiff obtained an appointment to assess damages for the 22nd of December 1993. On 14th December, 1993 the defendants obtained an order ex parte to stary proceedings pending an application to set aside judgment. The application to set aside was made on the 8th of December, 1993 and heard on the 4th of January 1994.

In the affidavit in support of the application the defendants give reasons for their default and set out their defence. On the first point, the defendants depone that judgment was obtained in default because the defendants had abit of problems in finding out whether their client, the first defendant, was covered by them. They is a plausible and possible explanation given that the first defendant immediately acknowledged service and lodged a notice of intention to defend. Mr Chizumila, appearing for the plaintiff, in argument wanted to raise facts to counter the assertion. On an application to set aside judgment under order 13 rule 9, it is the defendants affidavit which is looked at. It is not permissible to allow counter facts because the court avoids at all costs at this stage to decide the case on affidavits. The practice of the courts has been not to allow an affidavits in opposition. Mr Chizumila further submitted, relying on Blantyre Merecantile Company -v- International Refrigeration Services limited, Civil Cause number 5 of 1982, unreported, that a judgement in default may not be set aside in the absence of an explanation for the default. If that case so decided, it is binding on this court. On the other hand the practice under order 13, rule 9 has been considered in Alpine Bulk Transport Co. Inc -v- Saudi Shipping co. Inc, the saudi Eagle [1986]2 Lloyds Rep. 221, 223, where many cases are reviewed. The paramount consideration is whether there is a defence on the merits and the court will look at several factors, including the defendants explanation for the delay, in exercising the wide discretion under the rule. This to me means, for example, if the court in exercise of its discretion is to set aside a judgement on terms, the defendant's explanation for the delay is a serious consideration. That explanation is of no importance to the question whether the judgement ought to be set aside, except for laches. Otherwise a judgement would be set aside even if there is no merit provided there is a reasonable explanation. Just as it would not be right to refuse to set aside a judgement where clearly there is merit because of a bad or rejected explanation. In Evans -v- Bartlam [1937] AC. Lord Atkin said:

> "The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgement was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court and there is a reasonable explanation why judgement was allowed to go by default, such as mistake, accident, fraud or the like.

> I do not think that any such rule exists, though obviously the reason, if any, for allowing judgement and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgement set aside who knew at the time and intended that there should be a judgement signed, the two rules wuold be deprived of most of their deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced a judgement upon the merits or by conscent,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."

As I have said before, the explanation of defendants is, in my judgement possible and plausible. The question, therefore, is whether the defendants affidavit raises merit.

Much in every way Mr Chizumila raises a factual premise from paragraph 6 of the affidavit in support of the application. In in the defendants depone that the two vehicles collided while exchanging directions. Mr Chizumila submits that this implies that there was a head on collision. He submits that this cannot be supported by the damage to his car. His car had no head lamps broken. In my judgement, Mr Chizumila is reading too much into an otherwise innocuous statement. To say that motor vehicles collided while changing directions is not necessarily to suggest that there was a head-on collision. I think the defendants' defence must be looked at as a whole. Looked at that way it will be seen that the defendants, assert that the plaintiff is partly or wholy to blame. The defence lays down particulars of the plaintiffs negligence, total or contributory. I have decided before, following Burns -v- Kondel [1971]1 Lloyds Rep 554- we do not have the report but the case is cited by the learned authors of the Supreme Court Practice 1991 at paragraph 13/9/5 - that a judgement will be set aside on showing a triable issue on contributory negligence. The affidavit here raises a defence on the merit.

Mr Banda, appearing for the defendant, raised a further ground. He submits the second defendants liability is only on proof of liability of the first defendant to the plaintiff. I had a bit of problems to appreciate the relevance of this ground given that the first defendant's liability was determined by the judgement in default of defence.

There is a triable issue and the defendants ought to defend the action. The judgement of 17th November

1993 is set aside with costs. The defence should be served in the next fourteen days.

Made in Chambers this 4th Day of February 1994.

D F Mwaungulu
REGISTRAR OF THE HIGH COURT