

# Mphembedzu v Nico General Insurance Company Limited, Civil Cause Number 822 of 2007

<b>Court:</b>	High Court of Malawi
<b>Registry:</b>	Civil Division
<b>Bench:</b>	Honourable Justice M.L. Kamwambe
<b>Cause Number:</b>	Civil Cause Number 822 of 2007
<b>Date of Judgment:</b>	July 23, 2008
<b>Bar:</b>	Mr. Kalua, for the Appellant Ms Kaukonde, for the Respondent

## Head Notes

**Civil Procedure** -Default Judgment – Setting aside a default judgment – The court's discretion to set aside is wide but requires a prompt application

**Civil Procedure** -Default Judgment – Delay in applying to set aside – Inordinate delay is inexcusable and may prejudice the plaintiff

**Civil Procedure** -Default Judgment – Grounds for setting aside – The reason for delay is a factor, but a meritorious defence is not a sole ground if the delay is inordinate

## Summary

The Plaintiff appealed to the High Court, Principal Registry, against a decision of the Assistant Registrar to set aside a default judgment. The original action was commenced by the Plaintiff on 4 April 2007, and a default judgment was entered on 29 May 2007 after the Defendant failed to file a notice of intention to defend. Damages were subsequently assessed on 18 October 2007, and execution was levied on the Defendant in November 2007, with the judgment sum already paid to the Plaintiff.

The Defendant's application to set aside the judgment was made approximately 10 months after the judgment was obtained, 5 months after damages were assessed, and 4 months after execution had been levied. The Court had to determine whether the Assistant Registrar was correct in setting aside the judgment despite the inordinate delay on the part of the Defendant. The Court, sitting as a rehearing, noted that while the underlying principle is to allow a judgment on the merits, an application to set aside must be made promptly and within a reasonable time. The Court found the 10-month delay to be inordinate and inexcusable, particularly given that the Plaintiff had already been paid the judgment sum. The Court also dismissed the Defendant's explanation for the delay, noting that even a meritorious defence would not justify the prejudice caused to the Plaintiff.

The appeal was allowed. The Court held that the delay was inordinate and inexcusable, and that the Plaintiff would be greatly prejudiced if the judgment were set aside. Consequently, the Court dismissed the Defendant's application to set aside the judgment and ordered the Defendant to pay the costs of the appeal.

## **Legislation Construed**

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N/A

## Judgment

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This is Plaintiff's appeal from the decision of the Assistant Registrar in refusing to dismiss application to set aside judgment on the ground of inordinate delay and ordering that the default judgment be set aside and that the Defendants do serve their defence within 14 days of this order. This appeal is by way of rehearing.

This action was commenced on 4th April 2007 and the writ was served on the Defendant on 20th April, 2007. The default judgment was entered on 29th May, 2007 about 39 days after the Defendant had failed to give notice of intention to defend the action. An order of assessment of damages was made on 18th October 2007. Execution was already levied on the Defendant in November, 2007. The judgment sum has already been paid to the Plaintiff.

The Defendant's application to set aside the judgment came after about 10 months from the date judgment was obtained and about 11 months from the date of the writ was served, about 5 months from the date that damages were assessed and 4 months from the date execution was levied on the Defendant.

We are now aware about Lord Atkin's direction in *Evans v Bartlam* [1937] AC 437 at 480 that the underlying principle in an application to set aside the default judgment is that unless and until the court has a judgment on merit or by consent, it is to have the power to revoke the expression of

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

Further Lord Atkin says that there is no rigid rule that the Applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, though obviously the reason, if any for allowing judgment and thereafter applying to set aside is one of the matters to which the court will have regard in exercising its discretion.

It ought to be noted that application to set aside a judgment should be made promptly and within reasonable time. (see note 13/9/12 (1999 Rules of Supreme Court). What is reasonable period will depend on the circumstances of the case. In the case of John G. Kawamba t/a Central Associates Limited v W.T.C Freight Limited Civil Cause No. 541 and 542 of 1986 it was held that six months delay after the default judgment had been entered was inexcusable.

I am aware that this is a personal injury case. Such cases require genuine promptness in setting aside a regular judgment. What ever reason of missing file in the civil registry as cause of delay appears to me as a mere scape goat. Counsel for the Defendant is on record that they were only appointed as late as the 27th September, 2007 prior which time they could not have served a notice of intention to defend. To make things worse they just served the defence on the Appellants on 2 nd July 2008. Delay was inordinate.

Even if there could be a meritorious defence, the Appellant would be greatly prejudiced if the judgment was set aside considering that 10 months in bringing the application to set aside judgment is inordinate and inexcusable in the circumstances, and that execution was already levied on the Respondent, and further that the judgment sums have already been paid to the Appellant who testified in person at the assessment of damages. I allow the appeal and dismiss the Respondents application to set aside judgment with costs.

Made in chambers this 23rd day of July 2008 at Chichiri, Blantyre.