IN THE HIGH COURT FOR ZAMBIA **2004/HK/331**
AT THE KITWE DISTRCT REGISTRY
(CIVIL JURISDICTION)

B E T W E E N:

PAKEZA BAKERY LIMITED	**1ST PLAINTIFF**
DIVINE FOODS TAKE AWAY & BUTCHERY LIMITED	**2ND PLAINTIFF**
AHMED BADAT	**3RD PLAINTIFF**

AND

AETOS TRANFARM LIMITED	**1ST DEFENDANT**
STILLIANOS GEORGE KOUKOUDIS	**2ND DEFENDANT**

Before the Hon. Justice I.C.T. Chali in chambers on the 17th June 2011

For the Plaintiffs : Mrs. S. Twumasi, Kitwe Chambers

For the Defendants : Mr. L. Kasula, Lenanrd Lane Partners

R U L I N G

Cases referred to:

1. *Robert Lawrence Roy Vs. Chitakata Ranching Company Limited (1980) ZR `98*
2. *Jamas Milling Company Limited Vs. Imex International (PTY) Limited (2003) ZR 79 P.83*
3. *Walusiku Lisulo Vs. Patricia Anne Lisulo (1998) ZR 75*
4. *Saban & Another Vs. Gordc Milan (2008) ZR 233*

Legislation referred to:

1. *High Court Act, Chapter 27 of the Laws of Zambia*
2. *High Court Rules, Chapter 27 of the Laws of Zambia*

On 7th April, 2011, I delivered my judgment in this case in which the dispute was over the use of a service lane and car park which the Plaintiffs claimed they had been wrongfully denied by the Defendants. The Plaintiffs had sought a declaration that they were legally entitled to the use of the lane and car

park and an order to restrain the Defendants from denying them such access as well as damages for the Defendants' wrongful acts.

At the trial of the action on 9th March, 2011, neither the Defendants nor their Advocates were in attendance although they had been present on 29th November, 2010 when the said trial date was set in consultation with Counsel for both sides. Having received no reasons for the absence of the Defendants and their Counsel, I proceeded with the trial in accordance with the provisions of Order 35 Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia.

The result was a judgment in favour of the Plaintiffs as prayed with damages at K20,000,000.00 plus interest and costs.

I must mention also that on the afternoon of 6th April, 2011, that is, the day before I delivered my said judgment, the 2nd Defendant filed an ex-parte summons for the transfer of the case purportedly under section 23 (1) of the High Court Act Chapter 27 of the Laws of Zambia. The reasons given by the 2nd Defendant in his affidavit in support of the said application were, inter alia, as follows:

"4. **That I have known the Justice (Chali) for a considerable period of time dating back to when he was a partner in the law firm of Mwanawasa & Company and (later) Chali, Chama & Company.**

5. That during the course of his practice, the Honourable Justice and myself encountered and underwent serious differences which were very acrimonious.

6. That in the circumstances, the defendants are apprehensive that the (impartiality) of (the Judge) is questionable and that they may not receive a fair hearing of their case".

I refused to grant the ex-parte application because I was of the view that it was coming rather too late in the day to have any merit. The Defendants knew or ought to be taken to have known that the case was allocated to me, after the retirement of the Honourable Mr. Justice Loyd Siame, as far back as 8th June, 2010. Further, by the time of the trial, the case had come up before me on at least six occasions for various applications at which the Defendants and their Advocates attended. The ground of alleged apprehension of partiality could, therefore, not hold any water.

At the same time as the ex-parte application for he transfer of the matter, the 2nd Defendant had filed an ex-parte application for leave to appeal to the Supreme Court against the Rulings I had delivered in Chambers on 29th November 2011 concerning four preliminary applications and issues the Defendants' Advocates had raised. In my various Rulings on that day, I dismissed all the said issues or applications because they were not supported by the record or evidence before me. On the application of 6th April, 2011, for leave to appeal to the Supreme Court out of time against my rulings of 29th November, 2011, the 2nd Defendant swore an affidavit stating, interlia,

> "4. **….The ruling of (29th November, 2010) of this Court was only communicated to the Defendants on 10th December 2010.**
>
> **5. That the Defendants are totally dissatisfied with the said Ruling and on 10th December 2010, instructed their then Advocates ……..to lodge the notice of appeal against the said ruling.**
>
> **6. That it has now transpired that the Defendants' Advocates had omitted to file the notice of appeal within the prescribed period of time and the Defendants are now out of time.**

7. That failure to lodge notice of appeal within the time stipulated time has (not) been by neglect of the Defendants but purely on account of lack of communication with (their) Advocates."

The contents of paragraph four of the said affidavit is a total lie because the 2nd Defendant was present in my chambers on 29th November, 2010 when the issues and applications were raised and when I was writing my Rulings; he was even shuffling papers to his then counsel, conduct for which I even reprimanded him. The rest of the averments were, therefore, suspect. Hence my refusing to grant that application also.

Accordingly, the third ex-parte application of 6th April, 2011 for the stay of delivery of the judgment I was to deliver on 7th April, 2011, was equally refused for lacking merit. Suffice to say that in support of this third application, the 2nd Defendant had sworn yet another affidavit to the following effect:

"3. That prior to this (third) application, I had instructed Messrs Mukolwe & Company to represent the interests of the Defendants.

4. That when this matter came up for hearing on (09/03/2011) neither myself nor the first Defendant were aware of the proceedings taking place on the said date.

5. That I am advised by the Marshal to the Honourable Court that when the matter was called and although the Defendants' then Counsel was present at court on the material date, Mr. Mukolwe refused to enter the (Court) to deal with the matter on the defendants' behalf.

6. **That I am further advised that the court proceeded to hear the Plaintiffs in the absence of the Defendants and their said Advocates and has reserved (judgment) to 7th April, 2011.**

7. **That the failure by the Defendants to attend court was not intentional or meant to disregard the integrity of this Court.**

8. **That the Defendants desire that this matter be determined on the merits as the Defendants have a credible defence to the Plaintiffs' claim".**

The 2nd Defendant has again lied when he says in paragraph four that he was not aware of 9th March, 2011 as the trial date. That date was agreed upon by both Counsel for the parties on 29th November, 2011 in my chambers where, as already stated, the 2nd Defendant was present. The 2nd Defendant and through him as Director of the 1st Defendant knew of the trial date but did not attend with their lawyers for reasons best known to themselves. The third application could not therefore, be entertained.

I must also add that a fourth application to stay execution of the judgment which was made ex-parte was also refused.

To-date, the Defendants have not attempted to resuscitate those applications for inter partes hearings. In fact, at the hearing of the present application for the review of my judgment of 7th April, 2011, new Counsel for the Defendants, when reminded by the Court of his clients' earlier wish for me to recuse myself from this case, stated that the application had been abandoned.

I have taken the trouble to review these matters for reasons that will emerge as I consider the application now before me for the review of my

judgment of 7th April, 2011. The application is made under Order 39 rule 1 of the High Court Rules which provides thus:

> **"39.1. Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him…..and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision".**

Before I deal with the legal interpretation of the said provision as handed down by our Supreme Court in some cases, let me look at some of the grounds advanced in the 2nd Defendant's affidavit in support thereof. The 2nd Defendant states:

> **"2. That on 7th April 2011, this Honourable Court delivered judgment in default of appearance of the Defendants and (their) Advocates. The said judgment was delivered based on the evidence adduced by the Plaintiffs.**
>
> **3. That (when) the date of trial was given, I had recorded the same as 9th April 2011 and not as it has turned out to be the 9th March, 2011. Such recording was done in error and inadvertently. My Advocate, Mr. Mukolwe was surprisingly in attendance and I received a report that he refused to enter court despite the Marshal advising him of the case. The said lawyer is still on record and has never said to me when he was withdrawing from the case. A very strange behavior indeed.**
>
> **4. That I wish to state that due to our none attendance of Court, the court was deprived of critical evidence which if it had**

been available, the court would not have decided this matter in the manner it did…."

The 2nd Defendant then proceeded to give a catalogue of the evidence leading to his acquisition of the property in question as well as his purported rights to the car par and lane, the subject of the dispute; that he purchased his property together with the lane and car park to the exclusion of other persons.

Firstly, indeed, the trial had proceeded in the absence of the Defendants and their Counsel precisely because they had not reasonably or sufficiently excused their absence. In my considered opinion, before I revisit and review my judgment or decision, I must first consider whether the applicant has good reason for having absented himself at the trial.

In my view, what the Defendants are requesting is to set aside my judgment and to her the case de novo. This may be done in terms of order 25 Rule 5 which provides:

"Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court upon such terms as may seem fit"

The phrases "**upon such grounds as he shall consider sufficient**" and "**on sufficient cause shown**" in my view are synonymous and require an inquiry by the Judge or Court into the reasons behind the default. In the case of default judgment simplicita a defaulting party ought to explain why, for instance, he did not file his memorandum of appearance and defence in the stipulated time. Once the court is satisfied as to those reasons for the default, it then proceeds to assess if on the face of the record the party in default has a defence on the merit and, if so, to grant the application to set aside the default judgment. In the

instance case, I am not at all satisfied as to the reason for the absence f both the Defendants as well as their Counsel at the trial.

In the case of **ROBERT LAWRENCE ROY VS. CHITAKATA RANCHING COMPANY LIMITED (1980) ZR 198 (HC),** Commissioner Jack Dare held that:

> **"1. Events which occur for the first time after delivery of judgment could not be taken into account as grounds for review of a judgment.**
>
> **2. Setting aside a judgment on fresh evidence will lie on the ground of the discovery of material evidence which would have had material effect upon the decision of the court and has been discovered since the decision but could not with reasonable diligence have been discovered before".**

In the case of an application for review, the Supreme Court has said, in the case of **JAMAS MILLING COMPAMY LIMITED VS. IMEX INTERNATIONAL (PTY) LIMITED (2003)ZR 79** at p. 83 and approving the holding in the ROBERTY LAWRENCE ROY case:

> **"for review under Order 39 Rule 2 of the High Court Rules to be available, the party seeking it must show that he has discovered fresh material evidence which would have had material effect upon the decision of the court and has been discovered since the decision but could not with reasonable diligence have been discovered before….the fresh evidence must have existed at the time of the decision but had not been discovered before".**

In the instance case, it is evident that the Defendants had all the material evidence prior to the trial. For example, they were in possession of the contract of sale and survey diagrams showing the extent of their holdings and their rights vis-a-vis those of the Plaintiffs; they even pleaded that position in their Defence. They simply failed to present that evidence for no reason at all. I refuse to accept that they only discovered that evidence after the judgment had been rendered.

The Supreme Court case of **WALUSIKU LISULO VS. PATRICIA ANNE LISULO (1998) ZR 75** was an appeal against the refusal by a High Court Judge to review his judgment on appeal from the Deputy Registrar on assessment of maintenance for the Respondent and three children of the family. The Supreme Court held:

"1. The power to review under Order 39 Rule 1 is discretionary for the Judge and there must be sufficient grounds to exercise that discretion.

2. Evidence relating to the Appellant's financial statements was available throughout the hearing. Therefore it cannot be said to be fresh evidence for the purposes of review under Order 39 Rule 1 of the High Court Rules.

3. Order 39 Rule 1 of the High Court Rules is not designed for parties to have a second bite. Litigation must come to an end and successful parties must enjoy the fruits of their judgments"

The Court further said at p.78 of that report:

> **"Looking at the reasons for asking for review, it is obvious that the new evidence is not new that came to light later which**

no proper and reasonable diligence could earlier have secured”

That is precisely the position in the instance case.

The Supreme Court also reiterated its holdings in the JAMAS MILLING and LISULO cases in the case of **SABAN AND ANOTHER VS. GORDIC MILAN (2008) ZR 233** by restating that the power to review under Order 39 Rule 1 is discretionary and that “**there must be sufficient grounds to exercise that discretion”** (p.250 of the Report).

At the conclusion of the hearing of the preliminary issues and applications on 29th November, 2010, I had observed that this was a typical case of unwarranted interlocutory applications only intended, in my view, to delay the conclusion of the case. I have re-affirmed that view by the applications I have reviewed in this Ruling.

In the circumstances, I do not find any grounds at all, let alone sufficient grounds for either setting aside or reviewing my judgment of 7th April, 2011. The application is accordingly dismissed. The Plaintiffs shall have their costs, said costs to be taxed if not agreed.

Delivered in chambers the 17th day of June 2011

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I.C.T. CHALI
JUDGE