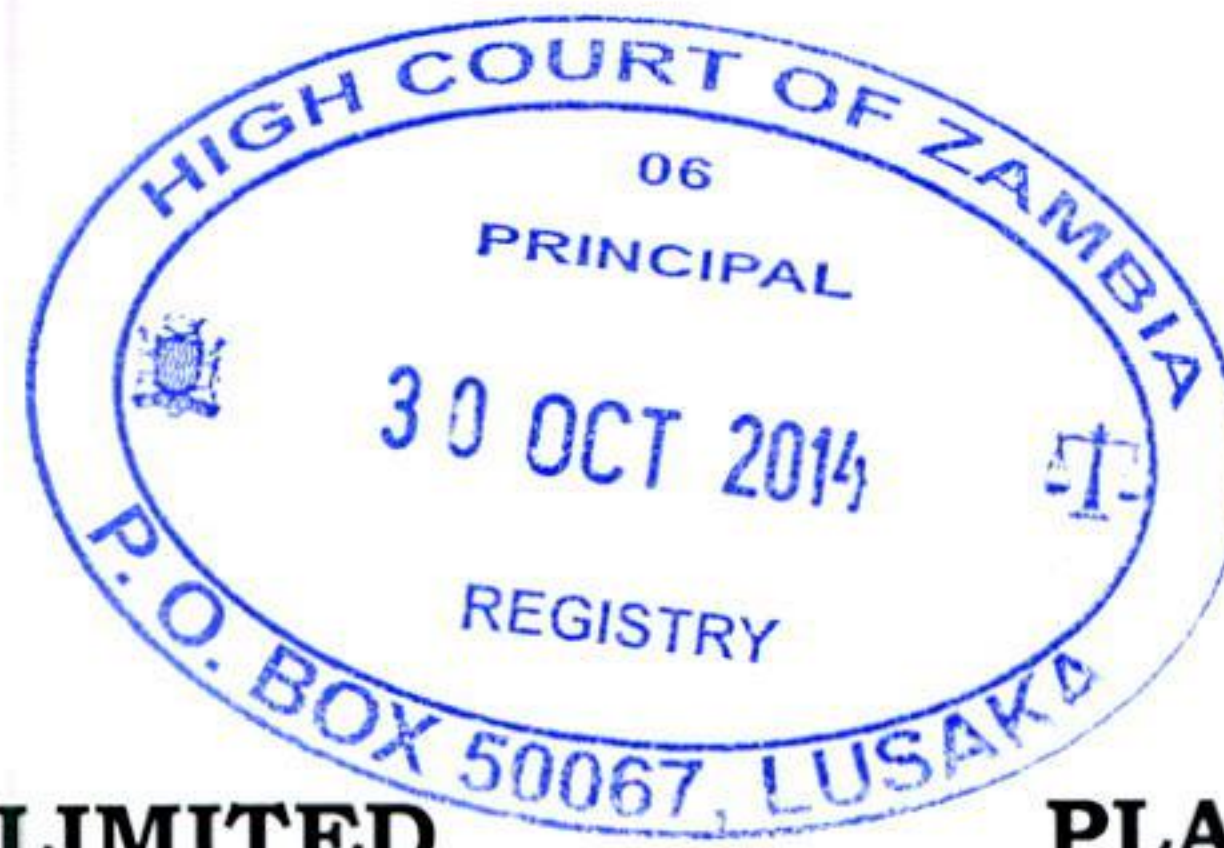


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2013/HP/1348



BETWEEN:

GOLD SACKS INVESTMENTS LIMITED

PLAINTIFF

AND

GODFREY CHINGALA

DEFENDANT

Before Hon. Mrs. Justice J. Z. Mulongoti
in Chambers on 30th October, 2014

For the Plaintiff:

**Mrs. P. Yangailo of P.H. Yangailo &
Co.**

For the Defendants:

**Mr. N. Bah of Messrs Ferd Jere &
Company**

R U L I N G

Cases referred to:

1. *John W.K. Clayton v Hybrid Poultry Farm Limited* (2006) ZR 70 (S.C)
2. *Water Wells Limited v Wilson Samuel Jackson* (1984) ZR 98 (S.C)

Legislation referred to:

1. *Order XX Rule 3 of the High Court Rules Chapter 27 of the Laws of Zambia*

This is an application by the defendant for an order to set aside the interlocutory judgment in default of appearance and defence dated 13th November 2013 pursuant to Order XX Rule 3 of the High Court Rules Chapter 27 of the Laws of Zambia. The application was by summons supported by an affidavit dated 29th November, 2014 sworn by the defendant Godfrey Chingala. He deposed, *inter alia*, that the plaintiff sued him for payment of the sums of K500,000.00 and \$14,000.00 respectively after which the parties engaged in a series of negotiations with a view to settling the matter *ex curia* and that a draft consent order was prepared in that regard. That unbeknown to him, the plaintiff obtained an interlocutory judgment in default of appearance and defence while negotiations were ongoing, which he believes was obtained in bad faith and amounted to an abuse of court process. He further deposed that he had a defence to the matter on merit as he was improperly joined as a party to the proceedings.

The plaintiff filed an affidavit in opposition dated 20th August, 2014 sworn by its director one Zhu Mei. He deposed, *inter alia*, that the defendant did not disclose any meritorious defence and that the consent orders referred to relate to another matter under cause no. 2013/HP/1083. That to the contrary, the defendant admits his indebtedness to the plaintiff as shown on exhibit 'ZM2' which is a note of acknowledgement of the debt signed by the defendant himself.

At the hearing, learned counsel for the defendant Mr. Bah, relied on the affidavit in support aforesaid. He submitted that the judgment was obtained without the defendant's knowledge while

the parties were involved in negotiations to settle the matter *ex curia*. He contended that the defendant has a defence on merit as he was improperly joined to the proceedings because the proper party to be sued should have been Son Degualle Agencies Limited, a private limited company with capacity to sue and be sued. He went on to submit that the plaintiff has sued the said company in another action under cause no. 2013/HP/1083 based on the same facts. He urged this Court to grant the application in order to allow the defendant to defend the action on its merits and prayed that the default judgment be set aside with costs.

In response, learned counsel for the plaintiff Mrs. Yangailo, relied on the affidavit in opposition dated 20th August, 2014 sworn by the said Zhu Mei. She submitted that the defendant has neither entered appearance nor disclosed a meritorious defence in his affidavit which clearly shows that he has no defence. She submitted that the *ex curia* negotiations were in relation to another matter where a company in which the defendant is a director has been sued under cause no. 2013/HP/1083. It was submitted that the defendant has been sued in this matter for payment of the sums of K500,000.00 and US\$14,000.00 respectively which he borrowed in his personal capacity as evidenced by the note of acknowledgement of debt signed by the defendant appearing as exhibit 'ZM2' in the affidavit in opposition. It was also submitted that the fact that the defendant acknowledged the debt meant that he had no defence on merit. Further, the defendant has not taken any steps to discharge the debt which he acknowledged.

It was further submitted that if the defendant believed that he was improperly joined to the proceedings, he should have made the appropriate application to that effect. Learned counsel for the plaintiff prayed that the court upholds the interlocutory judgment in default of appearance and defence and that the ex parte order for stay of execution be discharged.

In reply, Mr. Bah submitted that the consent order shown as exhibit 'CG5' in the affidavit in support was an attempt to consolidate the two causes of action. Particularly, paragraph 2 allowed the plaintiff to enter judgment in both cases. He contended that it would be unfair to allow the plaintiff to execute a judgment which was obtained in bad faith since the judgment was entered without his knowledge while awaiting a response on the consolidation of the two causes of action.

I have considered the affidavit evidence and the submission by learned counsel for both parties. The gist of the defendant's argument is that he was improperly joined to these proceedings and that the judgment was obtained in the course of settlement negotiations without his knowledge. Although the defendant is denying personal liability, he has not rebutted the plaintiff's evidence that he acknowledged the debt by the note of acknowledgement shown on exhibit 'CG5' wherein the defendant categorically declared being indebted to the plaintiff in his personal capacity.

The defendant contends that he failed to enter appearance and file a defence because of the settlement negotiations. The Supreme Court in the case of **John W.K. Clayton v Hybrid**

Poultry Farm Limited (1) held, *inter alia*, that it is the duty of a defendant to provide a swift response by way of a memorandum of appearance and an elaborate defence within the stipulated period, which the Defendant in this case neglected to do. He could have filed his defence and appearance in time, while negotiations were ongoing. The Supreme Court further held that an applicant does not have to concentrate on why he failed to enter appearance. An applicant has to show that he has an arguable defence on the merits by providing prima facie evidence, such as documentary proof.

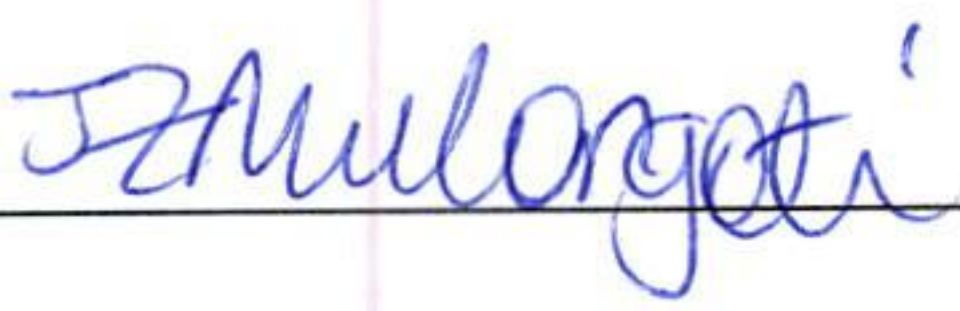
It is significant to note that the defendant in casu, has not exhibited his intended defence, if at all. To the contrary, the draft consent order prepared by his counsel and marked 'GC5' contains admissions on his part. In paragraph 2 it was stated that judgment in the sums claimed, be entered in favour of the plaintiff in both cases. As already noted the defendant has not rebutted the plaintiff's evidence that he acknowledged the debt as shown in exhibit 'ZM2' of the Plaintiffs affidavit in opposition. The defendant went on to deposit his title deed in respect of his property known as stand no. 376, Matero as security for repayment of the money he owed. He acknowledged the debt in his personal capacity. In light of all these admissions, I find that the defendant has lamentably failed to show that he has an arguable defence on the merits so as to entitle this court to set aside the interlocutory judgment in default of appearance and defence, as ably argued by Mrs. Yangailo.

I am further fortified by the Supreme Court holding in **Water Wells Limited v Wilson Samuel Jackson (2)** that:

“although it is usual on an application to set aside a default judgment not only to show a defence on the merits, but also to give an explanation of that default, it is the defence on the merits which is the more important point to consider...it is wrong to regard the explanation for the default, instead of the arguable defence as the primary consideration.”

In view of the foregoing, the defendant's application to set aside the interlocutory judgment in default of appearance and defence is denied, with costs to the plaintiff, to be taxed in default of agreement. The ex parte order for stay of execution dated 5th December, 2013 is hereby discharged. Leave to appeal is granted.

Delivered at Lusaka this ^{30th} day of ^{OCT} 2014.



J. Z. MULONGOTI
HIGH COURT JUDGE