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IN THE HIGH COURT FOR ZAMBIA **2013/HP/1799**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

BEM CONSULTANTS LIMITED **PLAINTIFF**

AND

LACKSON AMBULAYA **1ST DEFENDANT**
ARNOLD CHIKOLI **2ND DEFENDANT**
ZAMBIA NATIONAL COMMERCIAL BANK PLC **3RD DEFENDANT**

BEFORE : HON. G.C. CHAWATAMA

For the Plaintiff : *Mr. BC Mutale - Messrs BCM Legal Practitioners*
For the 1st Defendant : *Ms Vanessa Chilukwela & Mr. S Mulengeshi – Messrs Tembo Mulengeshi & Chanda*
For the 2nd Defendant : *N/A*

RULING

CASES REFERRED TO:

1. ***ZRA V Jitent Shah SCZ NO. 10 of 2001***
2. ***Constable V Summerset Country Council 1971 ER at page 952.***
3. ***Waterwells Limited V Wilson Samuel Jackson 1984 ZR98, Stanley Mwambazi V Morrenter Farms Limited 1977 ZLR page 108*** *and the case of* ***John WK Clayton V Hybrid Poultry Farms Limited 2000 ZR Page 70.***
4. ***ZRA V High Tech Trading Company Ltd 2000 ZLR page 67.***
5. ***Water wells Ltd V Wilson Samuel Jackson 1984 ZR 98 (SC)***
6. ***John WK Clayton V Vitybrid Poultry Farm Limited SCZ Judgment No. 15 of 2006***

AUTHORITIES REFERRED TO:

1. ***Order 20 of the High Court Rules Cap 27 of the Laws of Zambia***
2. ***Order Xii Rule 5 of the High Court Rules Cap 87 of the Laws of Zambia***
3. ***Order 47 Rule 3 of Rules of the Supreme Court 1999 Edition***
4. ***Order Xii Rule 2 of the High Court Rules Cap 27 of the Laws of Zambia***

5. ***Order XXX Rule 10 (1) of the High Court Rules Chapter 27 of the Laws of Zambia***

The Plaintiff in this matter, by a writ issued on 3rd December, 2013 claimed –

1) ***The immediate payment of K30,000.00 or reversal of the transaction of 2nd August, 2013.***
2) ***Damages for loss of use of the K30,000.00***
3) ***Punitive damages on account of the Defendants actions***
4) ***Interest on the amount due at the current Bank lending rate***
5) ***Any other relief that the court may deem fit and just***
6) ***Costs of and incidental to the action.***

On the 17th December, 2013 there was a defence filed by Counsel for the third Defendant Zambia National Commercial Bank PLC. On the 30 December, 2013 Counsel for the Defendants filed a reply.

On the 8th January, 2014 summons for direction were sought which orders were given on the 21st January, 2014. On the same day Judgments in default pursuant to ***Order 20 of the High Court Rules Cap 27 of the Laws of Zambia*** was sought.

On the 28th January, 2014 an interlocutory judgment in default of appearance and defence pursuant to ***Order Xii Rule 5 of the High Court Rules Cap 87 of the Laws of Zambia*** was granted against the first and second Defendants. On the 3rd February, 2014 a notice of appointment of Advocates was filed by Messrs Tembo Mulengeshi

and Chanda Legal Practitioners who were appointed as Counsel for the 1st Defendant. A certificate of urgency, an ex-parte summons for an order for stay of execution pending hearing and determination of Application to set aside interlocutory judgment in default of appearance and defence pursuant to ***Order 47 Rule 3 of Rules of the Supreme Court 1999 Edition*** and an affidavit in support of the same was filed.

The ex-parte order of stay was granted on the 3rd February, 2014. On the 31st January, 2014 summons to set aside interlocutory judgment in default of appearance and defence for irregularity pursuant to ***Order Xii Rule 2 of the High Court Rules Cap 27 of the Laws of Zambia*** and affidavit in support of the same were filed. The application was heard on the 17th February, 2014 and a ruling was delivered on the 25th February, 2014. The learned Deputy Registrar in her ruling stated that the first Defendant in his affidavit in support of the application to set aside interlocutory judgment in Default of Appearance and defence for irregularity concentrated on the reasons for the default in entering appearance and filing a defence and did not demonstrate that he has any defence on the merits. The learned Deputy Registrar concluded that there was nothing before her to enable her to consider that there is a defence on the merits that could have persuaded her to set aside the default Judgment. She stated that since the first Defendants' application lacked merit, it is

dismissed with costs to the Plaintiff to be taxed in default of agreement.

On the 28th February 2014 Counsel for the first Defendant under a certificate of urgency filed an Ex-parte summons for an order for stay of execution pending hearing and determination of the appeal pursuant *to* ***Order XXX Rule 10 (1) of the High Court Rules Chapter 27 of the Laws of Zambia*** which application was denied by the learned Deputy Registrar. On the same day Counsel for the first Defendant filed a notice of Appeal to a Judge in chambers. Counsel filed an application to stay execution of interlocutory judgment in default pending determination of appeal to Judge in chambers pursuant to ***Order XXX Rule 10 of the High Court Rules.***

The Ex-parte order of stay of execution was granted by this court on the 11th March, 2014 after hearing Counsel on the 24th April, 2014.

Miss Chilukwela of Messrs BCM Legal Practitioners stated that the basis of their appeal is that the Registrar erred in law and fact when she ruled that the first Defendant had no defence on the merits without considering the submissions that were made on behalf of the first Defendant dated the 17th February, 2014. Counsel stated that the basis on which the application to set aside was made was on the ground that service was not effected personally on the first Defendant despite the fact that there is an

affidavit of service which indicates that the first Defendant refused to receive process. On the lack of a defence as stated by the learned Deputy Registrar, Counsel argued that the first Defendant was not given an opportunity to bring the defence before the court on account of there being no service on him personally.

Counsel pointed out that the learned Deputy Registrar should have taken into consideration the fact that the first Defendant stated that he had a defence and that the omission to exhibit the same is a technical omission and a defect which is curable and does not affect the validity of the proceedings. The court was referred to the case of ***ZRA V Jitent Shah SCZ NO. 10 of 2001*** and the case of ***Constable V Summerset Country Council 1971 ER at page 952.*** It was their contention that although there is a rule that requires that the defence be exhibited the omission to attach such is a technical oversight which can be cured without prejudice to the Plaintiff.

In response Mr. Mutale Counsel for the Plaintiff stated that the Deputy Registrar was on firm ground when she held that the first Defendant had no defence on the merits upon which she could exercise her discretion to set aside judgment in default entered against the first Defendant.

Counsel referred the court to the case of ***Waterwells Limited V Wilson Samuel Jackson 1984 ZR98***, ***Stanley Mwambazi V Morrenter Farms Limited 1977 ZLR page 108*** and the case of **John WK Clayton V Hybrid Poultry Farms Limited 2000 ZR Page 70.** Counsel pointed out that the basis of setting aside Judgment in default is that triable issues should come to trial despite the fault of the parties.

Counsel pointed out that no defence was exhibited. All the first Defendant did was to rely on why he did not file a defence in his affidavit.

The court was referred to the case of ***ZRA V High Tech Trading Company Ltd 2000 ZLR page 67***.

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. If the Defendant desires to defend the action notwithstanding the entry of a regular judgment he may apply this rule to set aside the judgment.

The application must be supported by an affidavit and must set out the merits of the proposed defence and any excuse to be relied on. Where the judgment is regular, then it is an almost inflexible rule that there must be an affidavit stating facts

showing a defence on the merits. At any rate where such an application is not thus supported it ought not to be granted except for some very sufficient reason. For the purpose of setting aside a default judgment, the Defendant must show that he has a meritorious defence on the application to set aside a default 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 even if the explanation given by him is false. The fact that he has told lies in seeking to explain the delay, however may affect his credibility, and may therefore be relevant to the credibility of his defence and the way in which the court should exercise its discretion.

The court was asked to consider three issues by Counsel for the first Defendant, firstly that the Deputy Registrar should have considered the submissions when arriving at her decision. Secondly that the first Defendant was not given an opportunity to bring the defence before the court on account of there being no service on him personally. Thirdly that the Deputy Registrar should have taken into consideration what the first Defendant stated to the effect that he had a defence and that the omission to exhibit the same is a technical omission and a defect which is curable and should not affect the airable of the proceedings.

Counsel for the Plaintiff in the Plaintiff's extract of authorities referred the court to three cases. In the first case ***Waterwells Ltd V Wilson Samuel Jackson 1984 ZR 98 (SC)*** where the Supreme Court held in part that:

(vi) *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.*

(Vii) If no prejudice will be caused to a Plaintiff by allowing the Defendant to defend the claim, then the action should be allowed to go to trial.

(Viii) Where a Respondent has been put to great expense and inconvenience all traceable to the Appellant's default, even though an appeal succeeds the cost need not follows the event.

The second case which the court was referred to was ***John WK Clayton V Vitybrid Poultry Farm Limited SCZ Judgment No. 15 of 2006*** where the Supreme Court held in part:

2. *It is a duty of a Defendant to provide a shift response by way of a memorandum of appearance and an elaborate defence within the stipulated period*
3. *The reasons advanced in the affidavit of the Appellant for the lapse in the filling of a memorandum of appearance and defence must be plausible*

The third case was ***Robert Simeza and 3 Others v Elizabeth Mzyeche*** in which the Supreme Court highlighted general indication to be

taken into account when considering to set aside judgment. These are:-

1) *Where a party with notice of proceedings has disregarded the opportunity of appearing and participating in the trial; he will normally be based by be decision*
2) *Where judgment has been given a trial it is the explanation for the absence of the assert party that is most important unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow the hearing*
3) *Where the setting aside of judgment would entail a complete re-trial on matters of fact which have already been investigated by the court the application will not be granted unless there are strong reasons for doing so.*
4) *The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospect of success.*

I agree with the learned Deputy Registrar that the first Defendant in his affidavit in support of the application to set aside the interlocutory judgment in default of appearance and defence for irregularity concentrated on the reasons for the default in entering appearance and filing a defence and did not demonstrate that he has a defence on the merits. The Deputy Registrar was on firm ground when she concluded that there was nothing before her that could have enabled her to consider that at the stage at which she was making a decision that there is a defence on the merits that would have convinced or persuaded her to set aside the default judgment.

The effect of a judgment in default is that by making a default in giving notice of intention to defend the Defendant admits all the allegations in the statement of claim endorsed on the writ.

I am satisfied that there was proof of service in that there is an affidavit of service in which Masanya Zulu a Legal Clerk of the firm Messrs BCM Legal Practitioners states that on the 6th December, 2013 he served the first Defendant a writ of summons and statement of claim and exhibited a letter of service to this effect. The letter states that the same was received by Lackson Ambulaya the first Defendant who refused to sign it.

On the contrary the Deputy Registrar did consider all the submissions of the parties when arriving at her decision. The first Defendant was given an opportunity to bring his defence as was stated proper service was effected. To state that one has a defence is not enough. To say that the omission to exhibit the same and say it was a technical omission is unacceptable.

Order 13/9/3 Rules of the Supreme Court of England 1999 Edition is clear the application such as the one before me must be supported by an affidavit which affidavit must set out the merits of the proposed defence and any excuse to be relied on. The judgment before me is regular there should have been an affidavit on merits i.e. an affidavit stating facts showing a defence on the merits. In the absence of a meritorious defence the Deputy

Registrar could reach no other decision. Failure to disclose a defence on the merits is fatal as it transcends any reasons given by the first Defendant for the delay.

This appeal has totally failed. I award costs to the Plaintiffs.

DELIVERED AT THIS 23RD **DAY OF** OCTOBER **2014.**

HIGH COURT OF ZAMBIA
09
PRINCIPLE
23 OCT 2014
REGISTRY
P.O. BOX 50067, LUSAKA

G.C.M CHAWATAMA
JUDGE