

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

2014/HPC/0412

BETWEEN:

MSANIDE PHIRI

PLAINTIFF

AND

BHB CONTRACTORS LIMITED

1ST DEFENDANT

STANSLOUS MUBANGA

2ND DEFENDANT

BRIAN CHILUMBA

3RD DEFENDANT

Before the Hon. Mr. Justice Justin Chashi in Chambers on the 29th day of May, 2015.

For the Plaintiff:

C. Hamwela, Messrs Nchito & Nchito

For the 1st, 2nd and 3rd Defendants:

V.K. Chitupila, (Mrs) Messrs Tembo Mulengashi and Chanda Legal Practitioners.

RULING

Cases referred to:

- 1. Zambia Revenue Authority v Jayesh Shah-SCZ Judgment No. 10 of 2011 (Unreported)*
- 2. Water Wells Limited v Wilson Samuel Jackson (1984) Z.R. 98*

Legislation referred to:

- 3. The High Court Act, Chapter 27 of the Laws of Zambia*
- 4. The Supreme Court Practice (White Book), 1999*

MsanidePhiri, the Plaintiff herein commenced this action on the 6th day of October, 2014 by way of Writ of Summons accompanied by a Statement of Claim. In turn, on the 21st day of October, 2014, **BHB Contractors Limited**, the 1st Defendant, entered conditional appearance to the Writ of Summons.

Subsequently, on the 29th day of October, 2014, the 2nd and 3rd Defendants, namely **Stanslous Mubanga** and **Brian Chilumba**, respectively also entered conditional appearance.

On the 9th day of January, 2015, the Plaintiff filed an amended Statement of Claim and an application to enter Judgment on admission. However, before this application could be heard, the Plaintiff proceeded to file a Judgment in default of appearance and defence pursuant to **Order 12, Rules 1 and 3 (sic) of the High Court Rules**³ which Judgment was endorsed by the Deputy Registrar on the 20th day of March, 2015.

It is this Judgment which has necessitated the application currently before me. Same was filed on the 27th day of March, 2015 and is for an Order to set aside the said default Judgment for irregularity pursuant to **Order 12, Rule 2 of the High Court Rules**³ as read together with **Order 19, Rule 9 of the Rules of the Supreme Court**⁴. In support of the application are skeleton arguments and an affidavit jointly sworn by the 2nd and 3rd Defendants, both of even date.

Attendant to this application, the Defendants took out ex parte summons for an Order to stay execution of the default judgement.

Accordingly, an ex parte Order was granted on the same day as prayed pending the determination of the instant application. The sustainability or otherwise of this Order now hangs in the balance. It all depends upon the determination of the current application which application I hereunder proceed to consider.

Without delving into the superfluous niceties of the depositions made by the 2nd and 3rd Defendants in their affidavit in support of the application, let me begin by briefly discussing the affidavit evidence before this Court.

The 2nd and 3rd Defendants asserted in their affidavit that on the 10th day of November, 2014 after they had entered conditional appearance, their lawyers wrote a letter to the Plaintiff to request for further and better particulars of the contents of the Plaintiff's Statement of Claim. According to the deponents, this was done to enable the Defendants to make a proper defence to the Plaintiff's claim. A Copy of the said letter was exhibited as **SMBC1** to further this assertion.

It was the Defendants' evidence that the particulars which they requested for from the Plaintiff have not been furnished to date. According to them, the parties are nonetheless pursuing an amicable settlement of the dispute herein. The deponents thus expressed surprise as to why the Plaintiff decided to file a default Judgment. It was their assertion that their failure to file a defence was not deliberate but was as a result of the Plaintiff's failure to

furnish the particulars which they requested for and the parties' pursuit of an amicable settlement.

Interestingly, the Plaintiff did not file any document to oppose the Defendants' application. Instead, when the application came up for hearing on the 21st day of May, 2015, Counsel for the Plaintiff explained that he would only raise points of law in opposing the application. He accordingly proceeded to do so after Counsel for the Defendants had made her viva voce submissions in furtherance of the application.

On the whole, the submissions by Counsel for the Defendants were a rehash of her skeleton arguments, the gist of both being that the default Judgment is irregular because the Defendants did enter conditional appearance. According to Counsel, the default judgment must be set aside so that the case is determined on its merits. The case of **Zambia Revenue Authority v Jayesh Shah**¹ was cited to further the argument.

On the other hand, in his submissions in opposition to the Defendants' application, Counsel for the Plaintiff argued that when the Plaintiff filed an amended Statement of Claim, the Defendants' conditional appearance **"fell off"**. By so saying, Counsel appears to have been of the view that the effect of amending the Statement of Claim was to render the conditional appearance legally non-existent as he suggested that the Defendants ought to have entered another appearance. No

authority was, however, cited to buttress this conspicuously extreme view.

Counsel further submitted that the Defendants' application is unsustainable because no defence was exhibited or disclosed in the affidavit in support of the application. The case of **Water Wells Limited v Wilson Samuel Jackson**² was cited in this regard.

Having perused all the documents filed herein and having considered the arguments advanced by Counsel for the parties, I am in no doubt as to the gist of the Defendants' application. It is palpable that the Defendants want the default Judgment in issue set aside for irregularity. The supposed irregularity, according to the Defendants stems from the fact that they did enter appearance to the Writ of Summons. As such, the Defendants make an issue of the fact the default Judgment was entered after appearance had been entered on their behalf.

Therefore, contrary to the suggestion by Counsel for the Plaintiff, the issue is not whether the Defendants have a defence on the merits of the case. The issue for now is whether, in the light of the foregoing, the default Judgment in question is regular so as to be enforceable. Although Counsel for the Defendants suggested in her submissions that the Defendants have a defence on the merits of the case, in my view, this argument was also misconceived as no evidence of a prima facie defence has been adduced. In fact this argument is somewhat at variance with the

Defendants' own evidence to the effect that they did not file a defence because they needed further and better particulars of the Plaintiff's claim in order to do so.

This notwithstanding, I am, without the slightest of doubts, satisfied that the Defendants entered conditional appearance as evidenced from the case record. Also, I am satisfied that Counsel for the Defendants did write a letter to Counsel for the Plaintiff on the 10th day of November, 2014 to request for further and better particulars in respect of the averments made in the Plaintiff's Statement of Claim and that to date no such particulars have been furnished. I am so satisfied because the letter exhibited as **SMBC1** and the Defendants' evidence that Plaintiff's lawyers did not reply to this letter have not been challenged.

While it may well be correct to say that this letter was rendered otiose when the Plaintiff filed an amended Statement of Claim as the particulars which the Defendants had requested for appear to have been included therein, the fact that the Defendants appeared to the Writ of Summons cannot be ignored. As earlier intimated, I do not agree with the suggestion by Counsel for the Plaintiff that the Defendants needed to re-enter appearance following the amendment to the Statement of Claim. Suffice to say that such procedure is alien to our jurisdiction. If all the particulars they needed have been covered in the amended Statement of Claim, all the Defendants had to do was to file a defence. Thus, in so far as it purports to have been entered in

default of appearance, the default Judgment in question is irregular.

Further, I note that in addition to entering appearance, the Defendants have been active participants in these proceedings hitherto. Perhaps their only culpability is born of their failure to file a defence after the amended Writ of Summons was served upon them. Nonetheless, their explanation that there are ongoing negotiations between the parties for a possible ex curia settlement of the dispute suggests that the Plaintiff filed the default Judgment surreptitiously much to the 'ambush' of the Defendants who believed in good faith that the dispute would be resolved ex curia hence obviating the need to file a defence. I am thus inclined to give the Defendants the benefit of the doubt in this regard.

All the foregoing taken it account, I am left with no further latitude in the exercise of my discretion but to grant the Defendants' application as prayed. Indeed, justice demands nothing less than doing so.

Accordingly, the Judgment in default of appearance and defence dated the 20th day of March, 2015 which was entered for the Plaintiff herein is hereby set aside. The Defendants are to file their defence within fourteen (14) days from the date hereof failing which the Plaintiff shall be entitled to enter judgement in default of defence.

Costs of this application shall be in the cause.

Leave to appeal to is hereby granted.

Delivered at Lusaka this 29th day of May, 2015

Justin Chashi
HIGH COURT JUDGE