

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

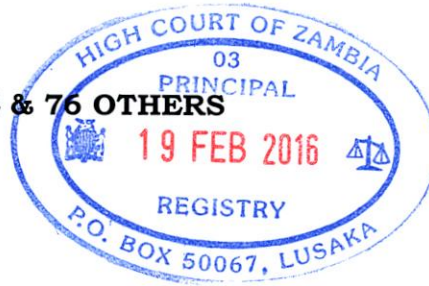
2013/HP/316

(Civil Jurisdiction)

BEATRICE MKANDAWIRE & 76 OTHERS

AND

ZAMBEZI AIRLINES



PLAINTIFF

DEFENDANT

BEFORE : HON. G.C. CHAWATAMA - IN CHAMBERS

For the Plaintiffs : Mr. Ndhlovu- Messrs Batoka Chambers

For the Defendant : Mr. P. Muyatwa- Muyatwa Legal Practitioners

RULING

CASES REFERRED TO:

1. *Covindbhai Baghabhai Patel and Vallabhai Baghabhai Patel v Monile Holding Company Limited (1993) S.J. 19.*
2. *Stanley Mwambazi v Morester Farms Limited (1977) ZR 108*

AUTHORITIES REFERRED TO:

1. *Order 12 rule 2 of the High Court Rules, Cap 27 of the Laws of Zambia.*
2. *Order 35 R 3 HCR Cap 27 of the Laws of Zambia*

This is an application by the Defendant to set aside default judgment delivered on the 19th November, 2015. The Applicant relied on an affidavit in support of their application deposed to by Jomo Matululu filed on 15th December, 2015.

Mr. Muyatwa on behalf of the Defendant submitted that the reason for the Defendant or their Counsel's failure to appear at trial was not due to lack of respect neither was it an act of contempt to the court. Firstly, as deposed to in the affidavit by Mr. Matululu, Zambezi Airlines was going through a period of turmoil as far as administration was concerned. It was thus impossible to obtain full instructions; as such Counsel was unable to attend for want of authority. Counsel prayed that the judgment may be set aside and the matter be heard on its merits.

In the matter whose judgment the Defendant wishes to set aside the Plaintiffs sought the following against the Defendant:

1. *Payment of salaries and allowances from October 2011 to date.*
2. *Interest.*
3. *Costs and any other relief the court may deem fit.*

The Defendants were not present at trial despite having had filed the Memorandum of Appearance and Defence. Infact they were never present at any of the other hearings despite being served with notices of hearing. Particularly on the date of this hearing, Mr. Ndhlovu, the Plaintiff's advocate filed an affidavit of service showing that he had served the Defendant's advocate with the notice of hearing. It was against this background that I proceeded to hear the Plaintiffs.

Mr. Ndhlovu, Counsel for the Plaintiffs opposed this application as well as the application to stay the execution of judgment on the ground that the Defendant did enter appearance and filed a defence and therefore the question of a default judgment does not arise. Moreover, that the Defendant and Counsel were aware of the date of hearing but failed to attend. He added that if Counsel did not have instructions, he could have come to seek an adjournment on the date given for hearing. He prayed that the applications be dismissed with costs to the Plaintiffs as they are misconceived at law and he could only imagine that it was a ploy to buy time and the same were devoid of merit.

Mr. Muyatwa reiterated that it was an application to set aside the judgment in default pursuant to ***Order 12 rule 2 of the High Court Rules, Cap 27 of the Laws of Zambia.***

On arriving at my decision to hear the Plaintiffs in the absence of the Defendants I had given due consideration to the fact that despite the Defendant having had filed a Memorandum of Appearance and Defence, they were never in attendance. I also took into consideration the fact that the Plaintiff had informed the Defendant about the date of hearing as evidenced by the affidavit of service filed by the Plaintiff's Counsel. The judgment will also show that I had arrived at my decision after considering the evidence of the Plaintiffs. It was not a decision made to make the Plaintiffs succeed automatically because the Defendant had failed to appear.

The law does allow for a judgment obtained in default to be set aside, *Order 12 Rule 2 of the High Court Rules, Cap 27 of the Laws of Zambia*, as rightly quoted by Mr. Muyatwa. The Supreme Court has also taken a position that *a default judgment should be set aside if a triable issue is disclosed* as in the case of *Covindbhai Baghabhai Patel and Vallabhai Baghabhai Patel v Monile Holding Company Limited (1993) S.J. 19*.¹

Further in the case of *Stanley Mwambazi v Morester Farms Limited (1977) ZR 108*² the Supreme Court held that:

It is the practice in dealing with bona fide interlocutory application for courts to allow triable issues to come to trial despite the default of the parties; where a party is in default he may be ordered to pay costs, but it is not in the interest of justice to deny him the right to have his case heard.

Further it was held that:

For this favourable treatment to be afforded there must be no unreasonable delay, no mala fides and no improper conduct on the action on the part of the applicant.

Much as I have a desire to allow the Defendant to bring triable issues to trial, I cannot say that the Defendants' conduct is proper and that the delay was reasonable. It is even hard to think that there was no mala fides on the part of the Defendant.

The Defendant's Counsel does not so much as even give a reasonable explanation for his or his client's lack of attendance.

In my opinion the law which applies to the Defendant is **Order 35 R 3 HCR Cap 27 of the Laws of Zambia** which empowers the court upon sufficient proof that the defendant has absented himself from trial without proper excuse to proceed to hear the plaintiff and deliver judgment on the evidence adduced by the plaintiff. The said order provides as follows (quoted in my judgment):

“If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff,”

In the interest of justice, my view is that the Defendant’s conduct is not deserving of depriving the Plaintiffs of enjoying the fruit of their judgment.

This application is dismissed with costs.

Leave to appeal is hereby granted.

DELIVERED AT LUSAKA THIS 19TH DAY OF FEBRUARY, 2016.


G.C. CHAWATAMA
JUDGE