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

2012/HP/32

BETWEEN:

JASON MWANZA	**(Suing in his capacity as General Secretary of the University of Zambia Lecturer and Researchers Union (UNZALARU)**	
AND		**PLAINTIFF**
ROY MWABA	**(Sued in his capacity as Secretary General of the Zambia Congress of Trade Unions (ZCTU)**	**DEFENDANT**

Before the Hon. Mr. Justice E. M. Sikazwe in Chambers.

For the Plaintiff: *Mr. K. J. Katolo -Messrs Milner Katolo and Associates*
For the Defendant: *Mr. K. Wishimanga – Messrs A.M. Wood and Company*

RULING

CASE REFERRED TO:

1. *Stanley Mwambazi v. Morester Farms Limited (1977) Z.R.108 (S.C.)*

LEGISLATION REFERRED TO:

1. *Orders 12 Rule 2, 20 Rule 3 and 35 Rule 5 of the High Court Rules, Cap 27 of the Laws of Zambia*

This is an appeal by the Defendant after being dissatisfied with the Ruling of the Honorable M. Zulu the now Registrar on the 16th June 2014.

The One ground presented was that the Honorable Deputy Registrar as he was then misdirected himself in law and in fact when he dismissed the defendants' application to set aside the Interlocutory Judgment of 27th August 2012.

The brief of the facts is that on 12th January 2012, the Plaintiff took out a Writ of Summons against the defendant for among other reliefs:

i. *a declaration that the General Council meeting of 13th January, 2012 is illegal and all decisions/or actions taken therefrom are a nullity;*

ii. *an Oder restraining the Defendant from holding the General Council meeting scheduled for the 13th of January 2012;*

iii. *damages for inconvenience;*

iv. *costs and;*

v. *any other relief that the court may dim fit.*

An Ex parte Ordering injunction was obtained the same day restraining the Defendant from holding the General Council Meeting scheduled for Friday the 13th January 2012.

This was discharged the following day by the Honorable Madam Justice C. B. Phiri on 13th January 2012 and an interparte hearing was scheduled for 31st day of January 2012 at 14:30 hours.

On the 31st January 2012 the matter was heard and a Ruling reserved by the Judge. The next action on the file on 7th July 2012 was the Default Judgment signed by the Deputy Registrar for not having appeared to the Writ of Summons and not having delivered a Defence.

On 1st May 2012 the same Default Judgment was set aside and inter parties hearing set for 14th day of June 2012 at 10:00hours and that cost be in the cause. On 25th June 2012 a Consent Order was filed and signed by the Deputy Registrar and the parties consenting to;

1. *The Judgment in Default of Appearance and Defence entered be set aside;*

2. *The Defendant will enter Appearance and file the Defence within 14 days from the date hereof and*

3. *Costs of and incidence to this order will be borne by the Defendants to be agreed and in default to be taxed.*

Again on 27th August 2012 the Defendant having failed to comply with the Consent Order it was adjourned that the Plaintiff do recover damages against the Defendant for inconvenience and the same to be assented by the Deputy Registrar with interest on the sums to be found due plus costs to be agreed upon in default to be taxed.

In arguing the case the Defendants Advocate stated that the Lower Court erred in that this matter could be heard by the Court on merit rather than on technical grounds such as precedent irregularities or defects.

Several cases were cited to show that a default Judgment can be set aside in the Courts' discretion and sometimes penalise the defendant in costs. He insisted that the matter ought to be determined on its merits as the "Judgment by default" means anything short of an adjudication on the merits.

On the other hand the Plaintiffs Advocate argued that the Consent Order was entered into on 18th June, 2012 and the Interlocutory Judgment was entered on 24th August, 2012 exactly 67 days later. The Defendant should have filed the Defence on or before 8th July, 2012 going by the date the Deputy Registrar had signed the Consent Order but failed. The Defendant therefore disobeyed the Consent Order and he has himself to blame for his conduct. There was therefore unreasonable delay on his part and the same contributed *mala fides* especially that the Plaintiff was not notified of his difficulties if any in filing the Defence which would have been cured by another Consent Order. The Counsel also cited a number of cases supporting the objection to the application.

I have examined and considered both submissions by the Counsel. It is on record that both parties as far back as July 2015 for the Defendant and August 2015 for Applicant filled in their written submissions. It is also on record that as for back as 29th September, 2014 parties had come to court with a view of resolving the matter Excurio. The Court had also to adjourn several times to let the parties settle the matter outside court as this was the courts desire, that where parties can resolve the matter amicably they are at liberty to do so and only let the court endorse the consent Judgment.

In this case at hand despite all the adjournments and other means of resolving the issue excurio, the matter could not be resolved.

As in other many Supreme Court Judgments as well as going by the provisions of Orders 12, Rule 2, 20 Rule 3 and 35 Rule 5 of the High Court Rules Chapter 27 of the Laws of Zambia, the Court has been given powers if sufficient cause is shown, to set aside or vary any Judgment obtained against any party in the absence of such other party, upon such terms as may seen fit.

Further, as in for the case of ***Stanley Mwambazi V. Morester Farms.*** It was stated that:

> ***"for this favorable 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".***

In this case if we go by history, it will be seen that the Defendant failed to enter appearance and file Defence within 14 days inclusive of the date of service.

On 27th April, 2012 Judgment in Default of Appearance and Defence was filed into court and was signed on 7th May, 2012.

On 18th May, 2012 that Judgment was stayed pending the hearing of the application to set it aside. On the same day a Consent Order was executed by the parties and signed by the Deputy Registrar on 25th June, 2012 where it was agreed *inter alia* that:

> *"2. The Defendant will enter appearance and file his Defence within 14 days from the date hereof."*

After 50 days from the date of filling the Consent Order the Defendant failed again to enter an Appearance and Defence. This was a grave disobedience done by the Defendant to the Consent Order in which it voluntary consented

to. For the Defendant to have a redress to this defect and be heard by this Court it must first challenge the Consent Order which it failed to comply with. I found that the lower court was on firm ground when it dismissed the defendants application to set aside the second interlocutory Judgment of 27th August, 2012.

The Defendant was not serious with resolving the matter, a laissez–faire attitude was taken by him. Also that Orders of the Court must be taken seriously by whoever comes to Court. Matters which come to court must be seen to be concluded within a reasonable time.

This appeal is dismissed with costs to the Plaintiff and in default of agreement to be taxed.

Appeal to the Supreme Court is granted within Fourteen (14) days from this day of the Ruling.

Delivered in Chambers this **23rd** day of **February, 2016**.

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E. M. SIKAZWE

JUDGE