IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0231**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ZIMPLOW LIMITED **PLAINTIFF**

AND

KEBBY MULEYA (T/A Just Imagine Centre) **DEFENDANT**

Coram: **Before Hon. Madam Justice Dr. W. S. Mwenda at Lusaka the 12 day of June, 2017.**

For the Plaintiff : Ms. C. Mulomba of Messrs. Theotis Mataka & Sampa Legal Practitioners

For the Defendant : Mr. K. Mwondela of Messrs. Lloyd Jones & Collins

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RULING

Cases referred to:

1. ***Stanley Mwambazi v Forrester Farms Limited (1977) Z.R. 108.***
2. ***In Re Gospel of God Church, Isaac Matongo v. Shadreck Masedza and the Attorney General (1977) Z.R. 292.***

Legislation referred to:

1. ***Order 35 rule 5 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia.***
2. ***Order 3 rule 2 of the High Court Rules.***
3. ***Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia***
4. ***Order 5 rules 15 and 16 of the High Court Rules.***

5. Order 2 rule 1 of the Rules of the Supreme Court, 1999 Edition (White Book).

This is the Defendant's application for an order to set aside order striking out application for non-attendance. The application is made pursuant to Order 35 rule 5 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia which provides as follows:

> *"Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the Court, upon such terms as may seem fit."*

The Summons to Set Aside Order was filed into Court on 15th November, 2016 accompanied by a verifying affidavit of even date sworn by one Abigail Asilijo - Silupumbwe, an advocate for the Defendant seised with the conduct of this matter.

The deponent of the said affidavit averred that on 19th September, 2016, she caused an inquiry into the status of this case at court and was informed that the matter was struck off the cause list for non-attendance. That this matter only came to her attention on Monday 19th September, 2016 when she took over a number of cases formerly handled by her colleague who has since left the law firm.

The deponent further stated that former Counsel for the Defendant was not able to attend the hearing on 10th August, 2016 because she was no longer in the employ of Messrs. Lloyd Jones and Collins and not because of disregard or disdain for this Court.

Further, that the Defendant is not at fault for having missed the hearing of the application for security for costs and stay of proceedings.

It was the deponent's contention that the Defendant has been diligent in prosecuting this matter from commencement and should not suffer the prejudice of the cause being dismissed for want of prosecution and that she believes that it is in the best interests of justice that the Court grants an order to set aside the order dismissing the matter for want of prosecution so that the case is concluded on its merits.

The Plaintiff opposed the application and filed an affidavit in rebuttal sworn by one Patricia Sipatisiwe Tembo, the advocate seised with the conduct of the matter on behalf of the Plaintiff. It was the deponent's averment that contrary to the assertion in the affidavit in support, it is not the former advocate for the Defendant who is on record as the Defendant's advocate but Lloyd Jones and Collins as a firm and that they were at fault for having missed the hearing of their client's application for an order for security for costs and stay of proceedings.

The deponent further averred that the reasons advanced by Counsel for the Defendant to justify the relief sought are not reasonable as the dismissal of the application was due to their negligence in not properly diarising the hearing date of their application. She also stated that it should not be the concern of this Court that a proper handover was not done by the advocate formerly seised with the conduct of this matter. That she believes that there is no reasonable basis upon which this Court should set aside its order to dismiss the Defendant's application for security for costs.

The deponent also brought to the attention of this Court the fact that paragraph 8 of the Defendant's affidavit is a prayer and as such, against the rules of Court relating to affidavits. She averred that it is her belief that this

is a proper case befitting of the exercise of this Court's power and discretion to dismiss the application for want of merit.

To supplement their List of Authorities and Skeleton Arguments, the parties made oral submissions at the hearing of the application. Mr. Mwondela, learned Counsel for the Defendant, submitted that the dismissal of the application for security for costs and stay of proceedings was on account of non-attendance by Counsel, which he admitted, is a procedural default, but nonetheless non-fatal and curable. In support of this submission, Counsel cited the case of ***Stanley Mwambazi v Forrester Farms (1)*** which, he said, is still very good law.

It was Counsel's argument that the substratum of fact necessitating the dismissed application still exists, that is to say, the Plaintiff is not ordinarily resident within the jurisdiction of this Court, thus the prejudice that the Defendant would be exposed to if the application for security for costs was not heard on the merits, would far outweigh the nominal prejudice, if any, that the Plaintiff would be exposed to by the setting aside of the order dismissing the application. Additionally, that this Court does have the power to make the order applied for.

It was Counsel's contention that Order 35 rule 5 of the High Court Rules as read together with Order 3 rule 2 and section 13 of the High Court Act, Chapter 27 of the Laws of Zambia, all clothe this Court with the power to set aside an order obtained in the absence of a party or to make any interlocutory order which the Court considers necessary for doing justice.

It should be noted that Order 35 rule 5 of the High Court Rules which Counsel cited has already been quoted earlier in this ruling; therefore, it

won't be repeated here. However, Order 3 rule 2 of the High Court Rules stipulates as follows:-

> *"Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."*

Section 13 of the High Court Act provides as follows:-

> *"In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; ..."*

In response, Mrs. Mulomba, learned Counsel for the Plaintiff admitted that breach of a regulatory rule is curable and not fatal but added that it depends on the nature of the breach and the stage reached in the proceedings. She submitted further that there was no reasonable cause for the Defendant not to appear at the hearing of his own application and in the circumstances, there would be no denial of the right to be heard should the Court deny the Defendant the application.

Counsel submitted in addition, that there is no sufficient cause in this matter for the order of this Court to be set aside but that should the Court deem it fit to set aside its order, then the Defendant must be ordered to pay costs.

That it is the Plaintiff's prayer that the Defendant's application be set aside with costs to the Plaintiff and that the Court proceeds to a Scheduling Conference.

In reply, Mr. Mwondela submitted that in as much as the Plaintiff had argued that there is no sufficient cause for the Court to set aside its order, the Court had not been assisted by the Plaintiff as regards what constitutes 'sufficient cause.' Counsel contended that what would be removed from the realm of 'sufficient cause' would be a scenario where a party demonstrates contumelious disregard for the order of the Court or is guilty of unreasonable delay or multiple infractions. According to Counsel, in this case, the record will show that this was the first infraction by the Defendant and an explanation is offered in the affidavit in support of the application to set aside the order. He urged the Court to dismiss this head of argument.

As regards costs, Counsel submitted that the clear direction of the High Court Act, Chapter 27 of the Laws of Zambia as well as the Rules of the Supreme Court, is that costs are in the discretion of the Court. According to Counsel, in this particular instance, the record will show that the order to dismiss was not the result of an application on the part of the Plaintiff; that in fact, a search they conducted on 19th September, 2016 disclosed that the Plaintiff was not itself in attendance at the hearing. That in the circumstances, it would be unjust to condemn the Defendant in costs at this stage. He urged the Court to exercise its discretion and allow the costs of this application to abide by the outcome of the application for security for costs. It was Counsel's submission, however, that should the Court be disinclined to set aside the order, the Defendant's prayer would be that the Court grants an order that costs of this application be in the cause.

I have considered the Affidavits filed in support of, as well as in opposition to the application. I have also considered the List of Authorities and Skeleton Arguments filed into Court by the Defendant on 15th November, 2016 and the Skeleton Arguments in Opposition to Summons for an Order to Set Aside Court Order filed into Court by the Plaintiff on 20th January, 2017. In addition, I have considered the oral submissions which both Counsel spiritedly advanced. I am indebted to Counsel for the authorities cited therein.

It is not in dispute that this Court has the power under Order 35 rule 5 of the High Court Act to set aside any judgment (which includes any order) obtained in the absence of a party on sufficient cause, upon such terms as the Court may deem fit.

From the outset, it is important to clarify that contrary to the deponent's averment in paragraph 7 of the Affidavit in Support of Summons to Set Aside Order, the application for security of costs and stay of proceedings was not dismissed for want of prosecution but for non-attendance by the Defendant at the hearing of the application.

The Plaintiff has contended that paragraph 8 of the Defendant's affidavit is a prayer and hence against the rules of the Court relating to affidavits.

The said paragraph states and I quote:-

> *"That I believe that it is in the best interests of justice I crave the indulgence of this honourable Court to grant the Order to set aside the Order dismissing the matter for want of prosecution so that the case is concluded on merit."*

The above statement is, in my view, a prayer and as such, contravenes Order 5 rule 15 of the High Court Rules which states that:

"An affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion". (Underlining mine for emphasis only).

Order 5 rule 16 of the Rules provides what an affidavit should contain. It provides as follows:

> *"Every affidavit shall contain only a statement of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true."* (Underlining mine for emphasis only).

It is correct that breach of the requirements of this rule is an irregularity but the irregularity is not of a nature that would lead to the nullification of the affidavit (see Order 2 rule 1 of the Rules of the Supreme Court, 1999 Edition). For this reason, I will not nullify the Affidavit in Support of Summons to Set Aside Order sworn by Abigail Asilijo-Silupumbwe on 15th November, 2016. However, I shall not consider the prayer made in paragraph 8 thereof and expunge it from the affidavit accordingly. This is in accordance with the High Court's holding in the case of ***Re Gospel of God Church, Isaac Matongo v. Shadreck Masedza and the Attorney General (2)*** which I entirely agree with and adopt, where the Court accepted the affidavits which had raised extraneous matters but decided not to consider the matters raised in the respective paragraphs.

Having addressed the above issues, it is opportune to deal with the issue for determination in this application, namely, whether there is sufficient cause to set aside the order dismissing the application for security for costs and stay of proceedings for non-attendance by the Defendant.

In ***Stanley Mwambazi v Forrester Farms Limited (1)*** an authority which both parties cited in their Skeleton Arguments, Gardner J. S. held that:-

"As a general rule, breach of a regulatory rule is curable and not fatal, depending upon the nature of the breach and the stage reached in the proceedings ... 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 be heard".

Judge Gardner went on to hold that:

"For this favourable treatment to be afforded, there must be no unreasonable delay, no malafides and no improper conduct of the action on the part of the Applicant."

It is my considered view that the breach committed by the Defendant in this case was regulatory and, therefore, curable especially that the breach was the first violation by the Defendant and happened early in the action. I find that there was some element of negligence on the part of the Defendant's advocates in not ensuring that another advocate expeditiously took over conduct of this matter after Counsel seised with its conduct left the firm.

However, I also find that even though there was some delay in filing the application to set aside the order after it came to the attention of new Counsel having conduct of the matter, the delay was not inordinate. Further, there is no evidence of malafides or improper conduct on the part of the Defendant. For these reasons, it is my considered view that there is sufficient cause for this Court to set aside the order dismissing the application for security for costs and stay of proceedings.

With regards to the issue of costs, Counsel for the Defendant submitted that the order to dismiss the application was not the result of an application on the part of the Plaintiff and that a search they conducted on 19th September, 2016 disclosed that the Plaintiffs were not themselves present at the hearing.

While concurring with Mr. Mwondela that costs are at the discretion of the Court, it is not, in my view, a requirement for the other party to apply for the dismissal of an application in order for the party to be awarded costs if the said party was in attendance at the hearing at which the order was given. Contrary to the submission by Counsel for the Defendant, the record shows that Ms. P. Tembo from Theotis, Mataka and Sampa Legal Practitioners appeared for the Plaintiff on 10th August, 2016 where the Court struck out the application for security for costs and stay of proceedings with liberty to restore. What led to the present application is the fact that the application for security for costs was not restored within the stipulated time and therefore, stood dismissed.

For the reasons set forth above, I will allow this application and set aside the order dismissing the application for security for costs and stay of proceedings for non-attendance. The application is accordingly restored to the active cause list.

However, I condemn the Defendant in costs for the application.

Delivered in Chambers at Lusaka this 12th day of June, 2017.

W. S. Mwenda (Dr)
HIGH COURT JUDGE