IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0400**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MTN (ZAMBIA) LIMITED **PLAINTIFF**

AND

DIAMOND GENERAL INSURANCE LIMITED **1st DEFENDANT**
MEANWOOD GENERAL INSURANCE LIMITED **2nd DEFENDANT**

Before Lady Justice B.G Lungu on 6th March, 2017

For the Plaintiff, Mr. M. Chitambala, Messrs Lukona Chambers

For the 1st Defendant, Mr. M Bwalya, Messrs Mweenye & Mwitwa Advocates

For the 2nd Defendant, Mrs M. Banda Mutuna, Messrs Mweshi Banda & Associates

---

RULING

Cases referred to:

1. ***Mwambazi vs Morester Farms Limited (1977) Z.R 108;***
2. ***Water Wells Limited vs. Wilson Jackson (1984) Z.R 98 (SC);***
3. ***Govindbhai Baghibhai and Vallabhai Baghibhai Patel vs. Monile Holding Company Limited (1993-1994) Z.R 20 (SC);***
4. ***Setrec Steel and Wood and Others vs. Zambia National Commercial Bank, Appeal No. 39/2007 (unreported);***
5. ***Ratnam v. Cumarasany and Another [1964] 3 ALL. E.R 933 at p. 935***
6. ***Access Bank (Zambia) Limited v. Group Five/ ZCON Business Park Joint Venture (SCZ/8/52/2014) [2016];***

7. ***Post Newspapers and others v CBU Council and others (Appeal No. 84 of 1997);***
8. ***Twampane Mining Co-Operative Society Limited vs. E And M Storti Mining Limited, (2011) Z.L.R, vol. 3***

Legislation and Other Materials referred to:

1. ***Order 20, rule 3, High Court Rules, CAP 27 of the Laws of Zambia;***
2. ***Order 41, rule 4, High Court Rules, CAP 27 of the Laws of Zambia;***
3. ***Order 53, rule 10 (8) of the High Court Rules;***
4. ***Judge Thomas A Zonay, Judicial Discretion, Ten Guidelines For Its Use, (2015) National Judicial College, Reno, Nevada, USA***

This is an application brought forth by the 2nd Defendant for an order to set aside Judgment by Default entered against it through the Court's Ruling of on 4th May 2016.

On the one hand, the application enjoyed the support of an Affidavit deposed to by Tobias Haanyimbo Milambo, the Managing Director of the 2nd Defendant and Skeleton Arguments filed together with the Summons on 25th January, 2017.

On the other hand, the application incited opposition from the Plaintiff. The opposition was expressed by way of an Affidavit in Opposition, underpinned by Skeleton Arguments and Combined List of Authorities filed on 1st March, 2017.

Bearing in mind that the issues and arguments before Court necessitate analysis from all points of vantage, I take pause to interpose that the record reflects that in August, 2016 the Court had occasion to consider the 2nd Defendant's application for leave to appeal the Ruling of 4th May, 2016 as well as its application for an order of stay.

By Ruling dated 30th August, 2016, the Court dismissed the 2nd Defendant's application to stay execution of its Ruling of 4th May, 2016 on the ground that the application lacked merit.

In considering that application, the learned Judge Prisca Nyambe *(as she then was)* noted that the 2nd Defendant sought to have the Court set aside its Ruling of 4th May, 2016 on the ground that the 2nd Defendant did in fact file its defence on 12th June, 2014. However, the lettered Judge illumed that that the default Judgment against the 2nd Defendant was entered for violations and disregard of the Court's Orders for Directions in, inter alia, failing to file Witness Statements.

Aside declining the application for stay, the Judge withheld the grant of leave to appeal on the ground that the intended grounds to be raised before the higher Court were not on record.

With that background in mind, I return to the application now before me.

In the Affidavit in Support of this application, the deponent confirmed that Judgment was entered against the 2nd Defendant for non-compliance with the Order for Directions. The deponent attested that the entry of Judgment was preceded by a *viva voce* preliminary application by Counsel for the Plaintiff when the matter came up for trial on 27th April, 2016.

The Affidavit affirms that at the time that the issue of non-compliance was raised on 27th April, 2016, the 2nd Defendant had already filed an amended and consolidated defence into Court. The said defence was filed on 10th June, 2014.

The heart of the argument presented in support of the application before me is that the Court is vested with authority to set aside any judgment by default and that the Court should exercise that authority where a defaulting party has a defence on the merits.

The Applicant took the position that the need for fair justice transcended the need for compliance with procedural rules. According to the Applicant, fair justice could only be attained with a hearing on the merits.

The Applicant's proposition that the Court is vested with power to set aside a default judgment was anchored on ***Order 20, rule 3 and Order 41, rule 4 of the High Court Rules, CAP 27 of the Laws of Zambia***.

Order 20, rule 3 of the High Court Rules gives the Court or a Judge the discretionary power to set aside any judgment by default issued under the High Court Rules. Generally, Order 20 addresses default in the context of pleadings.

Order 41, rule 4 of the of the High Court Rules gives the Court discretionary power to set aside any judgment it enters against a defendant, where such judgment was entered on the ground that the defendant was in default or failed to fulfil any interlocutory order.

Both Order 20, rule 3 and Order 41, rule 4 include the power to attach such terms as to costs or otherwise as the Court may think fit, alongside any order setting aside a default judgment.

The Applicant launched its argument by taking issue with the manner in which the application that resulted in the default judgment was presented. It was contended that the application was not competently before Court as it was not filed in accordance with ***Order 53, rule 10 (8) of the High Court Rules***. That provision of the law requires an interlocutory application in the Commercial Court to be filed together with skeleton arguments of the Applicant's case.

Aside accentuating the existence of the power that the Court has to set aside a default judgment, the 2nd Defendant implored the Court to consider the principle that the existence of a defence on the

merits substantiates hearing a party to proceedings, though the party be a defaulter. The Supreme Court cases of ***Mwambazi vs. Morester Farms Limited (1977) Z.R 108***[1], ***Water Wells Limited vs. Wilson Jackson (1984)Z.R 98 (SC)*** [2] and ***Govindbhai Baghibhai and Vallabhai Baghibhai Patel vs. Monile Holding Company Limited (1993-1994) Z.R 20 (SC)***[3] were relied on for the ratiocination that the existence of triable issues or a defence on the merits is of prime importance when considering setting aside a default judgment.

The applicant also drew the Court's attention to the case of ***Setrec Steel and Wood and Others vs. Zambia National Commercial Bank, Appeal No. 39/2007 (unreported)***[4], where the Supreme Court, having acknowledged the division in civil practice between actions on the general list and those on the commercial list, pronounced that in both types of cases the quest was for fair justice for parties concerned.

The Plaintiff, on the other hand, argued that the power to set aside a default judgment is discretional and thus must be exercised judiciously. On the reliance of the case of ***Ratnam v. Cumarasany and Another [1964] 3 ALL. E.R 933 at p. 935***[5], the Plaintiff's erudition was that in order for the Court to exercise a discretionary

power, there must be some relevant material before it on which to substantiate the exercise of the discretion.

The Plaintiff took the position that, *in casu,* the existence of the defence on the merits was an irrelevant consideration because judgment was not entered in default of defence but on the basis of non-compliance with the Orders for Directions.

The Plaintiff drew the Court's attention to the Supreme Court case of ***Access Bank (Zambia) Limited v. Group Five/ ZCON Business Park Joint Venture (SCZ/8/52/2014) [2016]***[6] where the Court opined that the rules of procedure and timeliness served to make the process of adjudication fair, just, certain and even handed. The Court further opined that laxity in the application of rules under the guise of doing justice through hearing matters on their merits seemed to aid one side whilst unfairly harming the party who endeavoured to abide by the rules.

I take a second hiatus at this juncture, to retrospect on the exercise of discretionary powers. The erudition on judicial discretion by ***Judge Thomas A Zonay, Judicial Discretion, Ten Guidelines For Its Use, (2015) National Judicial College, Reno, Nevada, USA,*** is that judicial discretion is the act of making a choice in the absence of a fixed rule. The choice, it is said, must not be made arbitrarily or capriciously but with regard to what is fair and equitable under the

circumstances and the law. Clearly, discretion involves situational circumstances.

I have perspicaciously examined the affidavit evidence in support which affirms that default Judgment was entered against the 2nd Defendant for want of compliance with the Court's Orders for Directions as it related to the filing of Bundles of Documents, Witness Statements and Skeleton Arguments. No explanation was tendered as to why the Defendant's failed to comply with the Orders. Further, no attempt was made to exhibit Bundles or Witness Statements to demonstrate to the Court that such documents were in existence, which in turn may have prompted the Court to consider that the 2nd Defendant's were ready to proceed to trial without further delay.

The absence of any affidavit evidence explaining or justifying the non-compliance is, in my view, dire when considered in the context of Order LIII, rule 7 which reads:

> *"7. (1) A Judge shall, within fourteen days of the filing of the memorandum of appearance and defence, summon parties to a scheduling conference at which the Judge shall issue directions for trial which shall be* ***adhered to strictly.*** *" (Court emphasis)*

It is my considered opinion that the statutory obligation for the Court and parties to strictly adhere to directions issued by the Judge cannot be overlooked, more so when there are no reasons before Court to justify doing so.

I accept that the dicta in ***Mwambazi vs. Morester Farms Limited (1977) Z.R 108, Water Wells Limited vs. Wilson Jackson (1984) Z.R 98 (SC)*** and ***Govindbhai Baghibhai and Vallabhai Baghibhai Patel vs. Monile Holding Company Limited (1993-1994) Z.R 20 (SC),***is sound law. However, those cases were decided in a system of trial where Witness Statements were not mandatorily required to be filed ahead of the trial. Whilst a defence on the merit was all that one needed to exhibit in order to move a court to allow the matter to proceed to trial, it seems to me that in the context of the Commercial Court, exhibiting of the conspicuously absent Witness Statements would, perhaps, have yielded a more positive outcome for the Applicant. As I have already observed above, however, the Applicant did not see the need to do so.

I move to interpolate my observation that it is both the factual and procedural context of a case which often explains or constrains the rules of law that emerge or apply to it. For instance, the eccentricity of the procedure applicable in conducting trials in the Commercial Division demands that evidence in chief is tendered by way of Witness Statements. The absence of Witness Statements to support or defend a claim at trial therefore exposes that claim or defence to a perilous outcome, whether or not there be a defence on the merits or whether or not the other party takes issue with that state of omission, either formerly or informally.

This brings me to reflect upon on the opinion expressed by the Supreme Court in the case of ***Access Bank (Zambia) Limited v. Group***

Five/ ZCON Business Park Joint Venture (SCZ/8/52/2014) [2016],that rules of procedure and timeliness serve to make the process of adjudication fair, just, certain and even handed.

The opinion rides on the back of a plethora of Supreme Court decisions which weigh the need to be heard on the merits against the need for compliance with procedure. In the case of ***Post Newspapers and others v CBU Council and others (Appeal No. 84 of 1997)***[7]the Supreme Court held as follows:

> *"While parties must generally be heard on merits, litigants who sleep on their rights must expect the wheels of justice to turn in their absence for the sake of expedition and finality."*

Similarly, in the case of ***Twampane Mining Co-Operative Society Limited vs. E And M Storti Mining Limited, (2011) Z.L.R, vol. 3***[8] the Supreme Court held that that those who choose to ignore rules of Court do so at their own peril.

Noting the exposure to peril, I would be failing in my judicial duty if I did not acknowledge that both the aforementioned Supreme Court decisions preceded the 2016 Constitutional Amendments which birthed Article 118 (2) (e) of the Constitution.

Article 118 (2) (e) provides that undue regard should not be placed on procedural technicalities and must be considered from the

vantage point of the principles that underpin the exercise of judicial authority as encapsulated in Article 118 (1).

In particular, the Constitution pronounces that judicial authority must be exercised in a just manner and justice must be administered without undue regard to procedural technicality. It is clear in my mind that Article 118 (2) (e) does not dispense with procedure, but emphasizes the need to strike an appropriate balance between procedure, being what I term the vehicle that drives justice; and substance, being what I term the fuel that fosters justice.

Having carefully considered the Constitution and the jurisprudence set before me, I arrive at the settled view that non-compliance of rules of court constitute a serious breach.Nonetheless, I am also satisfied that not all breaches are fatal and that what is ***"undue"*** is relative to each case.

In casu, the non-compliance related to the absence of Witness Statements. The non-compliance was driven, without a licence, into the date of trial. Given the peculiarities of the procedure relating to trials in the commercial division and on the facts of this case, the 2nd Defendant drove into the materialisation of the peril that befell it.

Before I pronounce myself, I find it necessary to address the length of time in which it took the 2nd Defendant to apply to set aside the default judgment and a critical intervening event.

Judgment was entered on 4th May, 2016 and the application to set aside judgment was filed on 25th January, 2017. I opine that there was an inordinate delay in making the application to set aside the default judgment. My opinion is premised on the definition of inordinate as ascribed by the ***Oxford Advanced Learners Dictionary, A.S Hornby, 7th Edition, at page 77*** , as *"far more than is usual or expected"*.I am without doubt that an application to set aside a judgment in default in excess of 6 months after it was entered is far more than unusual.

The risk of delay is that it exposes application such as the one before Court to intervening circumstances. In this case, the Judge who entered Judgment retired in December, 2016, more than 6 months after she entered the default judgment. Had the Defendant's applied within a reasonable period, that Judge would have considered this application.

As it is, I am faced with the uncanny task of considering whether or not to set aside a judgment of a court of the same jurisdiction after she pronounced herself on the same issue in her Ruling of 30th August, 2016, wherein she declined to grant leave to appeal and

dismissed an application for stay on the basis of lack of merit.As such, I caution myself to guard against trespassing into the jurisdiction of an appellate court.

With the aforementioned caution in mind, and bearing in mind the absence of relevant material and the inordinate delay, I decline the invitation to exercise my discretion to set aside the default judgment.

Costs are awarded to the Plaintiff, to be taxed in default of agreement.

Leave to appeal is granted.

Dated the 29th day of November, 2017

.....

Justice B. G. Lungu

HIGH COURT JUDGE