IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2012/HPC/0510

BETWEEN:

NATIONAL HERITAGE CONSERVATION COMMISSION **PLAINTIFF**

AND

POZZOLONA ENGINEERING AND BUILDERS LIMITED **DEFENDANT**

CORAM: Hon. Lady Justice Dr. W.S. Mwenda in Chambers at Lusaka on the 18th day of April, 2018.

For the Plaintiff: Mr. K. Mwondela of Messrs. Loyd Jones & Collins

For the Defendant: Mr. T. S. Chilembo of Messrs. T. S. Chilembo Chambers

RULING

Cases referred to:

1. *Ruth Kumbi v. Robinson Kaleb Zulu, S.C.Z Judgment No. 9 of 2009.*
2. *Gaedonic Automotives Limited and Another v. Citizen Economic Empowerment Commission, S.C.Z Judgment No. 39 of 2014.*

Legislation referred to:

1. *Order 10, Rule 4(5) of the Court of Appeal Rules of Zambia.*
2. *Order 47, Rule 1 of the Rules of the Supreme Court, 1999 Edition.*
3. *Order 3, Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.*

This matter came up on 6th June, 2017, for hearing of an application by the Defendant (the "Application"), for an Order to Stay Execution of Judgment in Default. The Application is made pursuant to Order 3, Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia (hereinafter referred to as the "High Court Rules"), as read together with Order 47, Rule 1 of the Rules of the Supreme Court, 1999 Edition (hereinafter called the "White Book").

At the hearing, Counsel for the Plaintiff raised concerns that, in my view, touch not only on the usual opposition to an application of this nature, but also on whether the same is properly before this Court. In light of this, therefore, I find it imperative to give a detailed account of the events leading to this Application.

The Plaintiff commenced proceedings against the Defendant, by way of Writ of Summons and accompanying Statement of Claim, on 27th August, 2012, claiming the following:

(i) damages for breach of contract;

(ii) special damages in the sum of K116,085,000.00, in accordance with clause GCC 49.1 of the contract;

(iii) any other relief the Court may deem fit;

(iv) interest at Bank of Zambia Policy rate from date of breach to date of judgment; and

(v) costs.

The Plaintiff proceeded to serve process by substituted service through advertisement in a widely circulating newspaper, pursuant to an order of Court dated 2nd October, 2012.

On 28th November, 2012, Judgment in Default of Appearance and Defence was entered against the Defendant, and in respect of which the Defendant filed an application to stay execution pending an application to set aside the said judgment, on 31st December, 2012. Alongside the said application, the Defendant also filed an application to set aside default judgment.

The said applications were supported by an affidavit of even date, sworn by one Sunday Mulenga Kwangala, wherein the Defendant's intended defence and counter claim were exhibited. The said Affidavit was further accompanied by Skeleton Arguments.

An *ex parte* order staying execution of the judgment in default was granted on 14th January, 2013, and hearing of the application to set aside the judgment in default was reserved for 7th February, 2013. At the said hearing, the Defendant did not turn up and Counsel for the Plaintiff prayed for an order striking off the application. The Court, accordingly, struck off the application and discharged the *ex parte* order for stay of execution.

The Defendant then filed an application to restore the application to active cause list, on 13th March, 2013. Both parties having failed to attend the hearing of the said application, on 6th September, 2013, the matter was consequently struck off the active cause list with

liberty to restore within 30 days, in default of which the matter would stand dismissed.

After the said order of 6th September, 2013, the next entry on the record is a search conducted by the advocates for the Plaintiff on 6th November, 2014, over a year later.

Following a subsequent search dated 30th March, 2016, the Plaintiff issued a Writ of Fieri Facias and accompanying Praecipe of Fieri Facias on 12th October, 2016. However, execution of judgment failed as the Defendant no longer conducted business at the address visited.

The Plaintiff also made an application for assessment of damages for breach of contract on 19th December, 2016.

Having changed its advocates, the Defendant filed an application to set aside the order striking out and dismissing this matter and an application for an order to stay execution of judgment, on 22nd February, 2017. The latter is the Application, now before Court, necessitating this ruling.

Subsequent to the said applications, the parties executed a Consent Order setting aside this Court's order striking out and dismissing this matter and thus restoring it to active cause list, on 6th April, 2017.

I have carefully examined the record and on the strength of Order 3, Rule 2 of the High Court Rules that endows this Court with inherent discretionary powers to determine issues in the interest of justice, I make the following findings.

I am of the view that the effect of the said Consent Order is that it revives this matter only as at the period before 6th September, 2013 when the matter was struck off the active cause list and consequently dismissed by operation of the law thirty (30) days later.

The implication of the same, therefore, is that any act done by either party between 6th October, 2013 (being thirty days after the order striking this matter off the cause list) and 6th April, 2017 (being the date of the Consent Order restoring this matter to active cause list), is of no effect as the matter stood dismissed.

Further, I opine that the Consent Order does not operate to restore the Defendant's application to restore its application to set aside the judgment in default entered by the Plaintiff. The same stands dismissed by an 'unless order' and should be made afresh.

The Supreme Court clearly pronounced itself on the subject of 'unless orders' in the case of *Ruth Kumbi v. Robinson Kaleb Zulu*[1] as follows:

> *"...it is common ground that the position at law in Zambia as well as in England up to 1981, was that failure to comply with the conditions stipulated to an "Unless" Order resulted in the appeal being dismissed, and as such not capable of restoration to active cause list."*

On the strength of the Ruth Kumbi authority, I disagree with Counsel for Defendant on his assertion that the Defendant's application to set aside judgment in default was revived upon the parties signing the Consent Order.

In yet another Supreme Court case of *Gaedonic Automotives Limited and Another v. Citizen Economic Empowerment Commission*[2] the Court stated the following, regarding the effect of a dismissal of court process and subsequent actions:

> *"Our understanding of dismissal under the 60 days Rule is that it means nothing else could be done under that cause. And hence, the reason why the Respondent had to commence a fresh action."*

Although the authority above is not dealing with an application to set aside judgment in default of appearance, the principle espoused therein can be extended to the case *in casu*.

It follows, therefore, that since the Defendant's application to restore the application to set aside judgment in default of appearance was dismissed, nothing more could be done under that application and indeed, the record does not show any action taken by the Defendant to challenge the said dismissal or any endeavours to revive the application to set aside judgment in default. That being the case, the only avenue left for the Defendant as regards the application to set aside the Plaintiff's judgment in default is to make a fresh application.

Based on the foregoing, I opine that the Application now before this Court by the Defendant has no place on the record as it could only have had effect after the matter was successfully restored to active cause list. This restoration only took effect upon the parties executing the Consent Order and the Court endorsing the same.

Needless to say, and despite the Plaintiff having filed in its opposition to the Defendant's Application after execution of the Consent Order, the said opposition, in my view, also has no leg to stand on as the Application it purports to oppose is not on the record.

For avoidance of doubt, the status to which this matter was restored by the Consent Order of 6th April, 2017 is as follows:

(i) Judgment in Default of Appearance and Defence is entered against the Defendant on 28th November, 2012;

(ii) *Ex parte* order of 14th January, 2013, stands vacated as per order of 7th April, 2013; and

(iii) Defendant's application to set aside judgment in default is dismissed after the parties' failure to attend at a hearing intended to restore the same.

Therefore, any act by the parties purported to have been done in respect of this matter between 6th October, 2013 and 6th April, 2017, is of no legal effect.

Consequently, I find that procedurally, this Application is not properly before this Court as it is hinged on documents purportedly filed into court while the matter stood dismissed. Equally, the Plaintiff's documents in opposition, which are responding to the purported Defendant's documents are irregularly before Court.

As things stand, there is no application for stay of execution on the record for this Court to consider and determine.

The parties shall, thus, be guided by the clarity of status of this matter provided above and proceed to make and file the necessary applications and documents as follows:

(i) the Defendant shall file a fresh Summons for an order to stay execution of default judgment and supporting documents within seven (7) days of this order;

(ii) the Plaintiff shall file its affidavit in opposition and supporting documents within seven (7) days of receipt of documents from the Defendant; and

(iii) the Defendant shall file its reply, if any, within seven (7) days of receipt of documents from the Plaintiff.

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

Dated at Lusaka the 18th day of April, 2018.

W.S. MWENDA (Dr)
HIGH COURT JUDGE