

**IN THE HIGH COURT FOR ZAMBIA**

**2016/HPC/0535**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)



BETWEEN:

STANDARD CHARTERED BANK ZAMBIA

PLAINTIFF

PLC

**AND**

CHIBUTA HENRY BWALYA MUMBA

DEFENDANT

**Before the Hon. Lady Justice Mrs. Irene Zeko Mbewe**

*For the Plaintiff:*

*Mr. S. Musonda of Messrs A.M. Wood & Company*

*For the Defendant:*

*Mr. S. Kaonga of Messrs Andrew Musukwa & Company*

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## R U L I N G

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### **Cases Referred To:**

1. *Stanley Mwambazi v Morester Farms Ltd (1977) ZR 108.*
2. *Water Wells Ltd v Wilson Samuel Jackson (1984) ZR 98.*
3. *Aristogerasimos Vangelatos & Another v Metro Investments Ltd & 3 Others SCZ/8/122/2012.*

4. *Corindbhai Baghabhai Patel and Vallabhai Baghabhai Patel v Mujile Holdings Co Ltd [1993] SJ 19 (SC)*
5. *Alan Mulemwa Kandala v ZANACO, Edgar Hamuwele & Christopher Mulenga 2012/HPC/0381*
6. *Pakeza Bakery Ltd v Franfarm Ltd and Another [2011] ZR 275*
7. *Winchester Cigarette Machinery Ltd v Payne (No 2) The Times, December 15 CA*
8. *Macfoy v United Africa Company Limited [1963] 2 ALL E R 1169*
9. *Ellis v Allen [1911-1913] ALL E R 12*
10. *Himani Alloys Limited v Tata Steel Limited [2011] 3 Civil Cases 721*
11. *China Henan International Economic Technical Cooperation v Mwange Contractors Limited [2002] ZR 28*

**Legislation Referred To:**

1. *Constitution of Zambia Act No 2 of 2016*
2. *High Court Rules, Cap 27 of the Laws of Zambia*
3. *Rules of the Supreme Court, 1999 Edition*

**Other Works Referred To:**

1. *O Hare and Hill: Civil Litigation, 10<sup>th</sup> Edition, London Sweet & Maxwell*

This is a Ruling on the Defendant's application to set aside the Judgment in default dated 10<sup>th</sup> July, 2017. The application is supported by an affidavit deposed to by Chibuta Henry Bwalya Mumba, the Defendant herein. The salient facts are that the Defendant whilst in the employ of the Plaintiff was availed a loan

facility of US\$39,976.00. According to the Defendant, upon termination of his employment he was unable to service the loan, and that the Plaintiff was sympathetic towards his plight and amenable to the restructuring of the loan. That he was subsequently sued and before he could respond to the originating process, the Plaintiff entered a Judgment in default granted by the Deputy Registrar on 10<sup>th</sup> July 2017. It is deposed that the Defendant if given ample time can liquidate any monies due to the Plaintiff. It is deposed that a Judgment in default can only be endorsed by a Judge of the High Court and not a Deputy Registrar.

The Defendant's application was opposed by way of affidavit deposed to by Mwansa Kapeya the Collections Manager in the Plaintiff Bank. It is deposed that the Plaintiff never engaged in any form of restructuring of the loan nor was the loan amenable to the alleged restructuring (Exhibit "MK 1"). That since the Defendant did not respond to the letter of demand, the Plaintiff commenced a Court action against the Defendant on the 10<sup>th</sup> day of November 2016. That on 5<sup>th</sup> June 2017, the originating process was duly served on the Defendant who failed to enter an appearance or file a

defence resulting in a Judgment in default being entered on 30<sup>th</sup> June 2017. According to the deponent, the Defendant had ample time within which to respond to the originating process. It is deposed that the Judgment in default was correctly endorsed by the Deputy Registrar as per the requirements of the **High Court Act, Cap 27 of the Laws of Zambia**. That the Defendant failed to show any prospects of liquidating the debt, and that the Defendant's application is simply a ploy to prevent the Plaintiff from executing the Judgment of this Honourable Court.

On 31<sup>st</sup> August 2017, the Plaintiff filed a Writ of Fieri Facias and the Defendant was on 14<sup>th</sup> September 2017 granted an ex parte Order staying execution.

The Defendant filed skeleton arguments on 14<sup>th</sup> September 2017 and relied on **Order 36 Rule 9 Rules of the High Court, Cap 27 of the Laws of Zambia** wherein a stay of execution may be granted if there are special circumstances.

In its skeleton arguments in opposition to the Defendant's application to set aside the Judgment in default, Counsel for the Defendant relies on **Order 20 Rule 3** and **Order 12 Rule 2 High**

**Court Rules, Cap 27 of the Laws of Zambia, and Order 19 Rule 9 Rules of the Supreme Court, 1999 Edition** where the Court may on such terms as it thinks just set aside or vary any judgment entered therein and in support of this proposition cited the case of **Stanley Mwambazi v Morester Farms Ltd (1977) ZR 108<sup>1</sup>** and **Water Wells Ltd v Wilson Samuel Jackson (1984) ZR 98<sup>2</sup>**.

Counsel for the Defendant argues that under **Order 53 Rule 10 (1) High Court Rules, Cap 27 of the Laws of Zambia** an interlocutory application shall be made to a Judge in chambers of the commercial list, and failure to do so renders such an Order null and void as it is granted without jurisdiction. The case of **Aristogerasimos Vangelatos and Another v Metro Investments Limited and 3 Others SCZ/8/122/2012<sup>3</sup>** was cited. Counsel for the Defendant argues that the Judgment in default be set aside so that the matter is heard on its merits as the Defendant was not given ample time to respond to the Court documents as they were not served on him within a reasonable time. It is the Defendant's prayer that the Judgment in default be set aside and the matter restored to the active Cause List.

The Plaintiff filed its skeleton arguments and list of authorities on 14<sup>th</sup> November, 2017 and relied on **Order 12 Rule 1 (1)** and **Order 20 Rule 3 High Court Rules, Cap 27 of the Laws of Zambia**. The case of **Water Wells Ltd v Wilson Samuel Jackson (1984) ZR 98<sup>2</sup>** was cited in support of the proposition that in setting aside a Judgment in default, there must be a defence on the merits and triable issues. In the course of arguments, Counsel for the Plaintiff cited the case of **Corindbhai Baghabhai Patel and Vallabhai Baghabhai Patel v Monile Holding Company Ltd [1993] SJ 19 (SC)<sup>4</sup>** where it was espoused that in a case where a Defendant acts mala fides or in bad faith, the Court should not entertain the application to set aside a Judgment in default.

Counsel for the Plaintiff argues that there is a difference between an interlocutory application and a final Judgment and cites the case of **Alan Mulemwa Kandala and Zambia National Commercial Bank and Edgar Hamuwele and Christopher Mulenga 2012/HPC/0381<sup>5</sup>**. Counsel for the Plaintiff contends that sufficient cause has not been shown to set aside a Judgment in default as elucidated in the case of **Pakeza Bakery Limited and**

**Another v Tranfarm Ltd and Another [2011] ZR 275<sup>6</sup>.** That in any case, the Defendant has not disputed his default and indebtedness to the Plaintiff. The Court's attention was drawn to the case of **Winchester Cigarette Machinery Ltd v Payne No. 2 (1993) The Times December 15 C.A<sup>7</sup>** where it was held that there has to be a good reason to deny the Judgment Creditor the fruits of his Judgment, and that no sufficient grounds have been advanced by the Defendant to be afforded the treatment they seek.

Counsel for the Plaintiff argues that the Judgment in default entered herein is not irregular as **Order 12 Rule 1 (1) High Court Rules, Cap 27 of the Laws of Zambia** allows a Deputy Registrar to sign a Judgment in default. Counsel for the Plaintiff contends that the Defendant has not disclosed any defence and prays that the application to set aside the Judgment in default be dismissed with costs.

At the hearing, both parties relied on their respective affidavits, skeleton arguments, list of authorities and made rival oral submissions similar to their skeleton arguments.

There are two applications before me, namely an inter parte stay of execution pending an application to set aside a Judgment in default, and summons to set aside the Judgment in default. I shall first deal with the latter as it will determine the status of the stay of execution. From the evidence on record, I discern that the issue for my determination is whether the Deputy Registrar has the mandate or jurisdiction to sign a Judgment in default.

The Defendant argues that the Judgment in default is null and void as the Deputy Registrar has no jurisdiction to enter such Judgment as all interlocutory applications shall be made to a Judge in chambers. On the other hand, the Plaintiff argues that a Judgment in default is not an interlocutory application as it serves the purpose of bringing a matter to its finality whereas an interlocutory application deals with an interim relief. That it is within the mandate of the Deputy Registrar to sign a final Judgment by virtue of **Order 12 Rule 1 (1) High Court Rules, Cap 27 of the Laws of Zambia.**

**Order 12 Rule 1 (1) High Court Rules, Cap 27 of the Laws of Zambia** states as follows:



*“(1) Where the Writ of Summons is endorsed for a liquidated demand and the Defendant fails or all the Defendants if more than one fail to appear, the Plaintiff may enter final Judgment signed by the Deputy or District Registrar for any sum not exceeding the sum of endorsed on the writ together with interest and costs, upon which an affidavit or certificate as the case may be, of due service being filed”.*

Under this Order, it is apparent that the Deputy or District Registrar clearly has the jurisdiction to sign a final Judgment where a Defendant fails to enter an appearance and file a defence.

Similarly, **Order 20 Rule 3 High Court Rules, Cap 27 of the Laws of Zambia** reads as follows:

*“3. Any Judgment by default, whether under this Order or under any of these Rules, may be set aside by the court or a Judge, upon such terms as to costs or otherwise as they court or Judge may think fit.”*

An interpretation of **Order 20 Rule 3 High Court Rules, Cap 27 of the Laws of Zambia** entails that a Judgment in default may be set aside upon such terms as the Court or Judge may think fit. This

means that it is not cast in stone as the Court or Judge has discretionary powers to set it aside or vary such a Judgment in default as the justice of the case requires. Counsels herein have correctly cited the relevant test in setting aside a Judgment in default as settled by the Supreme Court in the case of **Water Wells v Wilson Samuel Jackson (1984) ZR 98<sup>2</sup>** and **Stanley Mwambazi v Morester Farms Ltd (1977) ZR 108<sup>1</sup>**.

The gist of the issue before me is whether **Order 53 Rule 10 (1) High Court Rules, Cap 27 of the Laws of Zambia** is applicable herein as argued by Counsel for the Defendant. I will begin by putting matters into perspective. It goes without debate that the action herein is a commercial action having been commenced in the Commercial Registry. All commercial actions are governed by **Order 53 High Court Rules, Cap 27 of the Laws of Zambia**. Specifically and of relevance herein is **Order 53 Rule 2 High Court Rules** which provides as follows:

*"(1) There shall be a Commercial List in which commercial actions in the Court shall be entered in accordance with these Rules.*

*(2) Every commercial action shall be prosecuted in accordance with these Rules."*

*(3) If there is any inconsistency between these Rules and the rules applicable to the general list in relation to commercial actions, these Rules shall, to the extent of the inconsistency, prevail in commercial actions."*

**Order 53 Rule 10 (1) High Court Rules, Cap 27 of the Laws of Zambia** provides as follows:

*"(1) An interlocutory application shall be made to a Judge in Chambers."*

From the aforesaid, where a cause relates to a commercial action, it is my considered view that an interlocutory application shall be made to a Judge in chambers pursuant to **Order 53 10 (1) High Court Rules, Cap 27 of the Laws of Zambia**. Applying the facts to the law, it is apparent in the present case that a Judge did not sign the Judgment in default. What then are the consequences befalling the ill fated Judgment in default dated 10<sup>th</sup> July 2017? It is trite that a Court can only exercise the jurisdiction conferred by it under a written law or attendant Rules. I find that the Judgment in

default signed by the Deputy Registrar falls outside their jurisdictional limits and is therefore null and void as it is contrary to **Order 53 Rule 10(1) Rules of the High Court, Cap 27 of the Laws of Zambia**. I associate myself with the case of **Macfoy v United Africa Company Limited [1963] 2 ALL E R 1169<sup>8</sup>** where it was held:

*"If an act is void, then it is a nullity. It is not only bad but incurably bad. There is no need for the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so and every proceeding which is founded on it is also bad and incurable bad. You cannot put something on nothing and expect it to stay there. It collapses."*

Further, I do not see any inconsistency between **Order 53 Rule 10 (1)** and **Order 12 Rule 1 (1) High Court Rules, Cap 27 of the Laws of Zambia** as the former refers to matters on the commercial list whilst the latter refers to matters on the general list. In any case, **Order 53 Rule 2 (3) High Court Rules, Cap 27 of the Laws of Zambia** is clear in that where there is any inconsistency between

the rules on the commercial list and the rules applicable to the general list in relation to commercial actions, **Order 53** shall prevail to the extent of the inconsistency.

As to the argument whether a Judgment in default is an interlocutory or final Judgment, in view of my finding that the said Judgment in default is null and void, the argument by Counsel for the Plaintiff becomes redundant. Suffice to say, in the case of **Order 12 Rule 1 (1) High Court Rules Cap 27 of the Laws of Zambia**, according to the wording of the said Rule, it expressly refers to a final Judgment.

The upshot is that the Judgment in default signed on 10<sup>th</sup> July 2017 by the Deputy Registrar is a null and void. Consequently, the ex parte stay of execution granted to the Defendant on 20<sup>th</sup> September 2017 is birthed from a nullity and is forthwith discharged.

In respect to the application to set aside the Judgment in default, costs are awarded to the Defendant to be taxed in default of agreement.

Counsel for the Plaintiff argues that the Defendant has admitted his indebtedness to the Plaintiff. The law on admissions is well settled that an admission should be expressly stated and clear. This principle has been espoused in a number of authorities such as **Ellis v Allen (1911-13) All ER 906<sup>9</sup>**. In the case of **Himani Alloys Ltd v Tata Steel Limited (2011) 3 Civil Cases 721<sup>10</sup>** in respect to an admission, the Court put it in this way:

*“It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it. The court, on examination of the facts and circumstances, has to exercise its judicial discretion, keeping in mind that a Judgment on admission is a Judgment without trial which permanently denies any remedy to the Defendant, by way of an appeal on merits. Therefore, unless the admission is clear, unambiguous and unconditional, the discretion of the court should not be exercised to deny the valuable right of a Defendant to contest the claim. In short the discretion should be used only when there is a clear admission which can be acted upon”.*

In **O Hare and Hill: Civil Litigation, 10<sup>th</sup> Edition, London Sweet & Maxwell** at page 311 it states that:

*"the admission must be sufficiently clear that the answer in question can be closed."*

I am guided by the Supreme Court in the case of **China Henan International Economic Technical Co-operation v Mwangi Constructors Limited [2002] ZR 28<sup>11</sup>** where it states that:

*"It would be absurd to expect a Court which is in control, to pause and wait for an application for Judgment on admission, where clearly the defence is deemed to have admitted the claim".*

I have perused the pleadings and affidavit evidence and do find that the Defendant admits being indebted to the Plaintiff. This can be discerned from paragraph 12 of the affidavit in support of ex parte summons for stay of execution dated 14<sup>th</sup> September 2017 and repeated in the Defendant's affidavit in support of summons to set aside a Judgment in default, stating as follows:

*“12. That in any event I firmly believe that I can liquidate any monies due to the Plaintiff Bank if given ample time.”*

I am satisfied in the circumstances of this case that the Defendant has clearly admitted his indebtedness to the Plaintiff, and I enter Judgment on admission in favour of the Plaintiff in the sum of US\$39,976.00 plus interest at the short term dollar deposit rate from date of the Writ to date of Judgment and thereafter at the current commercial dollar lending rate until full payment.

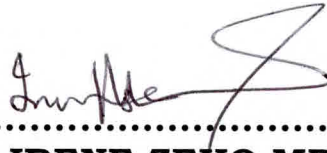
Counsel for the Defendant rather wittingly tried to sneak in a viva voce application pursuant to **Order 36 Rule 9 High Court Rules, Cap 27 of the Laws of Zambia** to pay the Judgment debt in instalments. This application is not supported by an affidavit stating the facts, and skeleton arguments as envisaged under **Order 53 Rule 10 (8) High Court Rules, Cap 27 of the Laws of Zambia**, and is therefore incompetently before me. Suffice to say, the Defendant is at liberty to make the necessary application.

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

Leave to appeal granted.



Dated this 15<sup>th</sup> day of January 2018.



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**HON. JUSTICE IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**