IN THE HIGH COURT FOR ZAMBIA **2017/HPC/0393**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

HUBREY MILTON MUSALU **1ST PLAINTIFF**

SHIRLEY DAKA **2ND PLAINTIFF**

MAPEPE BIBLE COLLEGE REGISTERED TRUSTEES **3RD PLAINTIFF**

AND

AB BANK ZAMBIA LIMITED **DEFENDANT**

CORAM: Hon. Lady Justice Dr. W.S. Mwenda in Chambers at Lusaka on the 13th day of March, 2020.

For the Plaintiffs: *Mr. L. Mwanabo of Messrs. L. M. Chambers*

For the Defendant: *Mr. P.K. Chibundi of Messrs. Mosha and Company and Mr. E. Bwalya – In-house Counsel*

RULING

Cases referred to:

1. *Leopold Walford (Z) Limited v. Unifreight (1985) Z.R. 203 (S.C.).*
2. *Republic of Botswana, Ministry of Works Transport and Communication, Rinceau Design Consultants (Sued as a firm previously T/A K.Z. Architects) v. Mitre Limited, S.C.Z. Judgment No. 20 of 1995.*
3. *African Life Financial Services Limited v. Zambia Revenue Authority, Appeal No. 140 of 2014.*

Legislation referred to:

1. *Order 37, rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia (the High Court Rules).*
2. *Practice Note 18/13/3 of the Rules of the Supreme Court, 1999 Edition ("The White Book").*
3. *Order 19, rule 2 of the High Court Rules.*
4. *Article 118 (2) (e) of the Constitution of the Republic of Zambia.*
5. *Order 3, rule 2 of the High Court Rules.*
6. *Order 10, rule 4 (1) of the Court of Appeal Rules, S. I. No. 65 of 2016 (the Court of Appeal Rules).*

Publication referred to:

Bryan A. Garner (Ed), Black's Law Dictionary, 8th Edition [Thomson Reuters, 2004].

This is an application by the Plaintiffs for Stay of Execution of the ruling of this Court, delivered on 2nd December, 2019, pending appeal (hereinafter referred to as "the Application").

The Application was made pursuant to Order 37, rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia (hereinafter referred to as "the High Court Rules") and accompanied by an affidavit (hereinafter referred to as "the Affidavit in Support"), and further accompanied by Skeleton Arguments, all filed on 14th January, 2020.

The background to the Application herein is that on 2nd December, 2019, this Court delivered a ruling in respect of two applications by the Plaintiffs, namely, an application to set aside this Court's ruling dated 5th July, 2018 and an application to strike out the Defendant's Counterclaim for irregularity. In the said ruling, both applications were dismissed, with the effect of discharging the *ex parte* order of

stay of execution of judgment on admission granted by this Court on 10th August, 2018, pending determination of the two applications. Likewise, an *ex parte* order of injunction granted in favour of the Plaintiffs on 17th November, 2017 was dismissed and this Court granted leave to appeal, in the said ruling of 2nd December, 2019.

It is in respect of the said ruling of 2nd December, 2019, that the Application herein has been made. However, before I proceed to adjudicate on the Application herein, Counsel for the Defendant did indicate that there are three applications pending before this Court, namely:

1. The Plaintiffs' application to Set Aside Default Judgment on Defendant's Counterclaim;
2. The Defendant's application for interim payments, filed on 9th January, 2018 and heard on 4th September, 2019; and
3. The Defendant's application to dismiss the Plaintiffs' case for want of compliance with orders for directions, filed on 20th August, 2019 and heard of 16th October, 2019.

I will, therefore, begin by addressing the above applications and then I will move on to deal with the Application herein.

The record shows that following the Defendant's applications to enter judgment on admission and for leave to file judgment in default of appearance, in respect of the Defendant's Counterclaim filed on 9th January, 2018, this Court delivered a ruling on 5th July, 2018 in which the Court found that there was an admission, on the part of the Plaintiffs, that they had obtained loans from the Defendant.

Further, the Court granted leave to the Defendant, to file judgment in default of appearance to the Counterclaim. Pursuant to the said ruling of 5th July, 2018, this Court further endorsed an Order dated 6th December, 2019 in which the Plaintiff were ordered as follows:

(i) To pay to the Defendant the sums owed, of K769,192.91 (under the first loan) and K915,896.72 (under the second loan) in the total sum of K1,695,089.63 as at 26th December, 2017, plus interest accruing thereon at the contractual rate until full repayment;

(ii) In default of payment of the judgment debt within the statutory 90 days redemption period from the date of the order, the Defendant be at liberty to foreclose on the mortgaged properties and exercise its power of possession and sale of the same, to recover the sums owed; and

(iii) That costs of and incidental to this action are awarded to the Defendant to be taxed in default of agreement.

With regard to the Plaintiff's application to Set Aside Default Judgment on the Defendant's Counterclaim, it is, indeed, true that the same has never been heard following this Court's grant of leave to file judgment in default of appearance, in respect of the Defendant's Counterclaim filed on 9th January, 2018, and therefore, is still pending. I will make an appropriate order, later in this ruling, in respect of the application to set aside default judgment.

With regard to the Defendant's application for interim payments, the record shows that the Defendant's application leading up to the

ruling of 5th July, 2018 was filed on the same date as the said application for interim payments. Further, the application for interim payments was heard on 4th September, 2019.

I have perused the said application for interim payments and the same reveals that the spirit of the application is that even if the Plaintiffs were to succeed in their claims, the net result would be that the Plaintiffs would have to settle their loan obligations to the Defendant because the Plaintiffs have not made any payments towards their indebtedness since 12th June, 2017, in respect of both loan facilities. This argument is premised on the Defendant's contention that the Plaintiffs' claim is that the Plaintiffs ought to have been granted a single loan facility at a uniform interest rate, as opposed to the two loan facilities that were granted with different interest rates. In this light, Counsel for the Defendant stated that the Defendant had created a simulate payment plan in the terms sought by the Plaintiffs, so that the Court would make an order for interim payments until determination of this matter or further order of this Court.

The term 'interim', has been defined by the learned author of Black's Law Dictionary as:

> *"Done, made, or occurring for an intervening time; temporary or provisional."*

As the name 'interim payment' suggests, this is a payment to be made for an intervening time or temporarily; and particularly in this matter, as was clearly put by Counsel for the Defendant, 'until determination of the matter'.

There are two limbs in this matter, namely, the Plaintiffs' claims against the Defendant, and the Defendant's Counterclaim, in respect of which a judgment on admission was entered.

According to Practice Note 18/13/3 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book), the effect of the defendant admitting the facts pleaded in the statement of claim is that there is no issue between the parties on that part of the case which is concerned with those matters of fact, and, therefore, no evidence is admissible in reference to those facts. In other words, the judgment on admission is as good as a judgment on the merits. A judgment on the merits or decision on the merits has been defined, by the learned author of Black's Law Dictionary, as a judgment based on the evidence rather than on technical or procedural grounds. It goes without saying, therefore, that the judgment on admission granted by this Court on 10th August, 2018, effectively determined the issues in the counterclaim as per the order given.

It appears to me that by the Defendant's application for interim payments, the real interest of the Defendant was to recover what it believed the Plaintiffs owed it. As judgment on admission has been entered for the loans, I see no reason in compelling the Plaintiffs to make any interim payments into court as the issue of the Plaintiffs owing the loans has been fully settled by the judgment on admission, which can be enforced by the available means of execution of court orders.

In light of the above, the application for interim payment into court, has thus, been overtaken by events and is at this point, otiose and dismissed accordingly.

The third application said to be pending is the Defendant's application to dismiss the Plaintiffs' case for want of compliance with orders for directions, filed on 20th August, 2019 and heard of 16th October, 2019.

The gist of the said application is that the Plaintiffs failed to comply with orders for directions in that, after filing the Writ of Summons and Statement of Claim, and obtaining an injunction that prevented the Defendant from calling upon the loan, the Plaintiffs have not taken any steps in prosecuting their claim. That, the Defendant had, on 16th October, 2019, received an Affidavit in Opposition which was not accompanied by Skeleton Arguments, in contravention of the rules of court. It was contended, on behalf of the Defendant in this regard, that the said Affidavit in Opposition was improperly before the Court and further, that the failure to timeously serve the Affidavit in Opposition should work against the Plaintiffs.

Counsel for the Defendant, further submitted, that the Plaintiffs failed to state any sufficient reasons for their failure to comply with the orders.

In response, Counsel for the Plaintiffs conceded that the Affidavit in Opposition was, indeed, served late, but that that was due to an oversight on the part of Counsel for the Plaintiffs; and that by proceeding with the matter without first informing the Court that the

Affidavit in Opposition was served late, the Defendant had acquiesced to have this Court consider the said Affidavit.

Counsel for the Plaintiffs, further, stated that non-compliance with the orders for directions was not deliberate, but was occasioned by the fact that the Court had advised the parties that there was need to consider the propriety of the Defendant's Defence and Counterclaim. That, due to the said advice, the parties had agreed that the Defendant re-amend its Defence and Counterclaim, but to date, this has not been done, although the Defendant still went on to enter Judgment in Default, using the same Defence and Counterclaim.

With regard to the Defendant's contention that the Affidavit in Opposition was improper due to there being no Skeleton Arguments accompanying it, Counsel for the Plaintiffs submitted that it is the party who brings an application before the Court who is required to file Skeleton Arguments in support of their position.

Further, Counsel for the Plaintiffs argued that matters should be determined on the merits and not on technicalities. Counsel, in this regard, beseeched the Court to dismiss the Defendant's application to dismiss the Plaintiff's case for want of compliance with the orders for directions; and to vary or extend the orders for directions pursuant to Order 19, rule 2 of the High Court Rules.

In reply, Counsel for the Defendant argued that oversight is not a sufficient ground to excuse non-compliance as the same is devoid of

particulars that can enable the Court to weigh whether or not the defect is excusable.

As regards the issue of Skeleton Arguments accompanying affidavits, Counsel for the Defendant contended that the legal position is that both the mover of the motion and its opposer must file Skeleton Arguments.

Counsel for the Defendant, further, argued that the reasons advanced by the Plaintiffs for failing to take further action after commencement of this matter, are not sufficient and that nothing stops the Plaintiffs from prosecuting their claim, as they have a duty to prosecute and prove their claims irrespective of the Defence.

As regards the prayer by Counsel for the Plaintiffs to vary the orders for directions or extend time, Counsel for the Defendant contended that no formal application had been made before Court and that the Court cannot extend expired time.

I have carefully considered the arguments advanced by Counsel under the application to dismiss the Plaintiffs' case for want of compliance with the orders for direction. In my view, the issue for determination under the said application is whether or not the Defendant has advanced cogent reasons to warrant a dismissal of the Plaintiffs' claim.

It is not in dispute that the Plaintiff has not complied with the orders for directions, following the Defendant filing its Defence and Counterclaim. However, the Plaintiffs have raised contention around the Defendant's own non-compliance with advice on the part of the

Court, to amend the Defence and Counterclaim. In both the first and second instances, there is an order of court or rule of court, involved and which was not complied with by either party. This, therefore, calls for determination of what the effect of non-compliance with the rules of court is. In establishing this, it is imperative to understand the nature of the rules of court.

In the celebrated case of *Leopold Walford (Z) Limited v. Unifreight*[1], the question that arose was whether a failure to comply with the rules of court was fatal or not and the Court made the following pronouncement regarding the High Court rule in question:

> *"As can be seen from what has been set out above, it is necessary for the plaintiff's address, as well as that of his advocate, to be endorsed on the writ.*
>
> *There has been an alternative argument put forward by Mr. Kawanambulu, namely, that non-compliance with O.VII, r. (1) (a) is not fatal because the rule is merely regulatory or directory. In accepting this argument, we wish to add that, where there has been a breach of a regulatory rule, such breach will not always be fatal as much will depend upon the nature of the breach and the stage of the proceedings reached. This, therefore, means that, as a general rule, breach of a regulatory rule is curable."* (Emphasis mine)

It is clear from the above that the status of the High Court Rules as rules of procedure has been well settled. The High Court Rules are regulatory in nature, and this was further confirmed by the Supreme Court in the case of the *Republic of Botswana, Ministry of Works Transport and Communication, Rinceau Design Consultants (Sued as a firm previously T/A K.Z. Architects) v. Mitre Limited*[2] when it stated the following:

> *"The High Court Rules were rules of procedure and were therefore regulatory and any breach should be treated as a mere irregularity which was curable."*

This is not, in any way, to undermine the need for counsel to comply with rules of procedure. The Supreme Court clearly guided in the case of *African Life Financial Services Limited v. Zambia Revenue Authority*[3], when it stated as follows:

> *"We must make it very clear here that the Courts have an ineradicable inherent power to control the proceedings before them... Failure to comply with court timetables can have serious consequences which include dismissing the matter. The courts expect litigants to comply with directions for trial, and ultimately insist upon compliance, as failure to do so serves to unnecessarily increase the administrative burdens on the administration of justice which affect other litigants seeking to use the court system to resolve disputes, and defend claims brought against them."*

In addition to the settled position above that rules of procedure are merely regulatory and curable if breached, it was the further guidance of the Supreme Court in the *African Life Financial Services Limited* case cited above, that the Courts have an ineradicable inherent power to control the proceedings before them and the rules of court are merely in addition to the Courts' power.

Further, Article 118 (2) (e) of the Constitution of Zambia provides that justice shall be administered without undue regard to procedural technicalities. In this regard, a court ought to ask itself what injustice curing a breach of procedure will cause; or what prejudice the parties will suffer by the court not observing the strict adherence to rules of procedure.

I am also cognisant of the discretionary powers accorded me under Order 3, rule 2 of the High Court Rules, to judiciously consider matters in issue by taking into account the relevant facts surrounding those issues; these relevant facts are that both parties had their share of non-compliance with the orders.

Based on the foregoing, therefore, I am of the considered view that great injustice will be caused by insisting on the dismissal of the Plaintiffs' claims, for non-compliance with orders for directions; especially since both the Plaintiffs and the Defendant were in breach of the said orders. I do not see any fairness in the Defendant failing to comply with the orders for directions in one instance, and then seeking to chastise the Plaintiffs for a similar failure. Also, I do not see any fairness in the Defendant seeking to benefit from a breach that it has contributed to itself.

The net effect of this Court's order as regards the Defendant's application to dismiss the Plaintiffs' claim for non-compliance with the orders for directions, is that the said application wholly fails. I am not persuaded that the facts in the said application warrant the dismissal of the Plaintiffs' claim

I will now move on to determine the Application herein, namely, the Plaintiffs application for stay of execution of the ruling of this Court, delivered on 2nd December, 2019. However, before I proceed to deliberate on the Application, I wish to address one problematic issue arising from the Summons, namely, the Order pursuant to which the Application has been made. The Order has been cited as Order 37, rule 10 of the High Court Rules, both on the Summonses for this

Application, and in the Skeleton Arguments accompanying the Application. Counsel for the Plaintiffs should know that such Order and/or rule does not exist. Further, Counsel is reminded of his duty to ensure that as he presents his clients' case before this Court, Counsel is careful not to mislead the Court by citing incorrect and non-existing law. This notwithstanding, I will proceed to determine the Application as though it was made based on Order 36, rule 10 of the High Court Rules. The said Order provides as follows:

> *"Except as provided for under rule 9, the Court or Judge may, on sufficient grounds, order stay of execution of judgment."*

As earlier stated, this Court granted leave to appeal, in the said ruling of 2nd December, 2019. This is fortified by Order 10, rule 4 (1) of the Court of Appeal Rules, which states as follows:

> *"The High Court or a quasi-judicial body may grant or refuse leave to appeal to the Court without formal application at the time when judgment is given, and in that event the judgment shall record that leave has been granted or refused accordingly."*

Further, Order 3, rule 2 of the High Court Rules provides 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."*

From the foregoing provisions, it is my considered view that this Court is clothed with the necessary jurisdiction and discretion to make the order as expressed in the ruling of 2nd December, 2019, namely, that leave to appeal was granted.

In my opinion, this in itself is sufficient for this Court to grant the order for stay of execution of the ruling, pending appeal, as refusing to grant the same after expressly granting leave to appeal would simply defy all logic and indeed, render the dissatisfied party's appeal before the Court of Appeal nugatory.

If a court is to move on its own to grant leave to appeal as empowered by Order 10, rule 4 (1) of the Court of Appeal Rules and Order 3, rule 2 of the High Court Rules, it is only rational that the same court should be willing to grant a stay pending appeal otherwise, the very essence of the Court granting leave to appeal, at its discretion as per the law above, would be devoid of any sense if it chooses to refuse a stay pending the appeal whose leave it has granted.

In view of the foregoing, therefore, I am inclined to grant the Plaintiffs' Application for Stay of Execution of the Ruling of 2nd December, 2019. A Stay of Execution of the ruling of this Court, dated 2nd December, 2019, pending appeal, is hereby granted.

I had mentioned earlier in this ruling that I would make the appropriate order as regards the way forward on the pending application to set aside default judgment; this I do now. The Plaintiffs' Application to Set Aside Default Judgment on the Defendant's Counterclaim shall be heard on 1st April, 2020.

Following my decision not to dismiss the Plaintiffs' matter and in pursuance of Order 19, rule 2 of the High Court which allows the Court to vary orders for directions, the parties shall be issued fresh

orders for directions at the same hearing, to determine the course of these proceedings.

Pursuant to Order 10, rule 4 (1) of the Court of Appeal Rules, leave to appeal this ruling is denied.

Costs shall be in the cause.

Dated at Lusaka the 13th day of March, 2020.

W.S. MWENDA (Dr)
HIGH COURT JUDGE