IN THE HIGH COURT FOR ZAMBIA **2018/HPC/0092**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

ACCESS BANK (ZAMBIA) LIMITED **PLAINTIFF**

AND

CHICHOKE INVESTMENTS LIMITED **1ST DEFENDANT**
KENNEDY CHOMBELA **2ND DEFENDANT**

CORAM: Hon. Lady Justice Dr. W. S. Mwenda in Chambers at Lusaka the 14th day of January, 2020

For the Plaintiff: Mrs. S. Nketani-Mwale, In-house Counsel
For the Defendant: Ms. T. Nkhoma of Makebi Zulu Advocates

RULING

Cases referred to:

1) *John Mumba, Danny Museteka, Dr. W. Amisi, Dennis S. Simuyuni v. Zambia Red Cross Society (2006) Z.R. 137 (SC).*
2) *Stanley Mwambazi v. Morester Farms Limited (1997) Z.R. 108 (SC).*
3) *Waterwells Company v. William Jackson (1984) Z.R. 98.*

Legislation referred to:

1) *Order 3, rule 2 of the High Court Act, Chapter 27 of the Laws of Zambia.*
2) *Explanatory Notes in Order 59/13/2 of the rules of the Supreme Court of England, 1999 Edition (the White Book).*
3) *Order 20, rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia.*
4) *Order 3, rule 5 of the High Court Rules, Chapter 27 of the Laws of Zambia.*

Published work cited

1) *Simon Goulding (ed) Odgers on Civil Court Actions: Practice and Precedents, 24th Edition (Sweet & Maxwell, 1996) paragraph 24.47 at p.460.*

There are two applications by the Defendant before this Court. These are, firstly, the application to stay execution of Judgment in Default of Appearance and Defence obtained by the Plaintiff on 24th December, 2018 and secondly, the application to set aside the said Judgment. The applications were filed into court on 22nd January, 2019 and are supported by an Affidavit in Support of Summons for Stay of Execution and Affidavit in Support of Summons for Setting Aside of Default Judgment. The applications are further buttressed by a Combined List of Authorities and Skeleton Arguments in Support of Application for an Order to Stay Execution of Judgment in Default of Appearance and Defence and Order to Set Aside Judgment in Default of Appearance and Defence also dated 22nd January, 2019. Both affidavits were sworn by Kennedy Chombela, the 2nd Defendant herein and Director in the 1st Defendant Company.

In the Affidavit in Support of Summons for Stay of Execution of Default Judgment, Kennedy Chombela swore that it came to his attention that on or about 2nd March, 2018, the Plaintiff commenced legal proceedings against the Defendants by way of Writ of Summons claiming *inter alia,* ZMW94,000.00. That due to his failure to file in a defence or appearance in this matter, the Defendant went ahead and obtained judgment against the Defendant Company on or around 24th December, 2018. The deponent averred that he was advised by his advocates that the application to obtain a default judgment was filed during the Christmas vacation. Further, that his advocates informed him that this is an application for this Court to set aside the

default judgment so that the matter can be determined on the merits. He further averred that he was advised by his advocates and believes the same to be true, that there are triable issues which can only be determined by this Court and that he has a meritorious defence against the Plaintiff. As evidence of this, a copy of the intended defence was produced and exhibited as "KC1". The Affidavit in Support of Summons for Setting Aside of Default Judgment sworn by Kennedy Chombela has similar averments to the Affidavit in Support of Summons to Stay Execution of Default Judgment, with the addition that it is in the interest of justice that the Default Judgment be set aside and that the matter be heard on the merits.

In the Defendants' Combined List of Authorities and Skeleton Arguments in Support, the defendants submitted that the brief facts of the case are that the Plaintiff brought an action by way of Writ of Summons for the following reliefs:

i. *The sum of ZMW 94,000.00 being the total sum paid by the Plaintiff to the 1st and 2nd Defendant's Judgment creditor;*
ii. *Interest on (i) above at commercial bank lending rate;*
iii. *A refund of the total sum of ZMW7,000.00 which the Plaintiff spent on transportation of the legal representative between Lusaka and Kitwe;*
iv. *General damages for loss of opportunity to apply the funds paid out on behalf of the Defendants;*
v. *Any other relief the Court may deem fit;*
vi. *Costs.*

The Defendants submitted that their application for stay of execution of the default judgment is made pursuant to Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia which gives this Court authority to make any order that is necessary for purposes of ensuring that justice is done. The Defendants cited Simon Goulding (ed) Odgers on Civil Court Actions: Practice and Precedents, 24th Edition at paragraph 24.47 at page 460, where it is reportedly stated as follows:

> *"Although the court will not without good reasons delay a successful plaintiff in obtaining the fruits of his judgment, it has the power to stay execution if justice requires that the defendant should have this protection."*

The Defendants contend that it would be in the interest of justice and prudent for the Court to exercise its discretion and grant the application by the Defendants for a stay of execution of judgment looking at the circumstances espoused in the Affidavit in Support of this application and more so, that the Defendants be given a chance to redeem themselves and be heard in this matter. In their submission that before an order for stay of execution of judgment is granted, there must be something to stay, the Plaintiffs cited the Supreme Court case of *John Mumba, Danny Museteka, Dr. W. Amisi, Dennis S. Simuyuni v. Zambia Red Cross Society*[1]. They contend that in the present case there is something to stay as the Plaintiff has not yet executed the said judgment against the Defendants. It is the Defendants' further contention that they are alive to the fact that he granting of the stay is discretionary as per the Explanatory Notes found in Order 59/13/2 of the Rules of the Supreme Court of England, 1999 Edition where it is stated thus:

> *"...The question whether or not to grant a stay is entirely in the discretion of the court...and the court will grant it where the special circumstances of the case so require."*

The Defendants thus, prayed that this Court exercises its discretion in favour of the Defendants and grant the stay in the interest of justice.

With regard to the application to set aside the default judgment entered in this matter, the Defendants submitted that the application is made pursuant to Order 20, rule 3 of the Rules of the High Court which stipulates as follows:

> *"Any judgment by default, whether under this Order or under any of these Rules, may be set aside by the Court or Judge, upon such terms as to costs or otherwise as the Court or Judge may think fit."*

In support of the above, the Defendants cited the case of *Stanley Mwambazi v. Morester Farms Limited*[2], where the Supreme Court stated that:

> *"It is the practice in dealing with bona fide interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties; 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 have his case heard."*

The Defendants submitted further, that there are compelling and triable issues in this matter as illustrated in the intended defence, exhibited in the Affidavit in Support, and thus, the matter should be given an opportunity to go to trial and be determined on the merits. Further, that the failure by the Defendants to cause to have an appearance made or file in a defence, is not in any way meant to disrespect the Court. That, the Defendants were in the process of seeking legal representation when the default judgment in question was entered against them.

In further support of their application, the Plaintiffs cited the case of *Waterwells Company v. William Jackson*[3], where the Supreme Court made the following observations:

> *"Although it is usual on an application to set aside a default judgment not only to show a defence on the merits, but also to give an explanation of that default, it is the defence on the merits which is a more important point."*

It was the Defendants' contention that the Court can set aside judgment that is obtained in default of appearance and defence provided a good reason is advanced for the party's failure to enter appearance within the prescribed period and most importantly, where a party proves that they have a defence on the merits. That, in the premises, and in the interest of justice, the Defendants' application be granted.

The applications to stay execution of judgment in default of appearance and defence and to set aside the default judgement is opposed. To this end, the Plaintiff filed into Court on 8th February, 2019 an Affidavit in Opposition to Summons to Stay Execution of Judgment in Default of Appearance and Defence and Affidavit in Opposition to Summons to Set Aside Judgment in Default of Appearance and Defence, which were both sworn by Leonard Sichande, a Recoveries Officer under the Credit Risk Management Department in the Plaintiff Bank. The said affidavits have similar contents; therefore, I will only refer to the contents of the Affidavit in Opposition to Summons to Set Aside Judgment in Default of Appearance and Defence.

Leonard Sichande averred in the Affidavit in Opposition to Summons to Set Aside Judgment in Default of Appearance and Defence that it is correct that on or about 2nd March, 2018, the Plaintiff commenced legal proceedings against the Defendant by way of Writ of Summons claiming, *inter alia,* payment of the sum of ZMW94,000.00. Further, that the 2nd Defendant made contact with the Plaintiff before and after the action was commenced, acknowledging his debt to the Plaintiff and promising to make a payment of the garnisheed amount and seeking an extension of time so that he could receive a payment from a contract he was working on. As evidence of this averment, copies of email correspondence between the Plaintiff and the 2nd Defendant was produced as exhibit "LS1". The deponent disputes the Defendants' contention that there are triable issues and asserts that the Plaintiff paid the sum of ZMW94,000.00 which was not its debt but a debt contracted by the Defendants in an arrangement which the Plaintiff was not a party to. That, the 2nd Defendant withdrew almost all the funds from account 0010011070031 leaving a balance of ZMW1,051.89, when he was aware that there was a Garnishee Order served on the Plaintiff's Kitwe Branch and the funds remaining would not be

sufficient to pay the garnisheed amount and his actions were deliberate and extremely dishonest. In support of this averment, a copy of a statement of the account of the 1st Defendant extracted on 31st August, 2017 was produced as exhibit "LS2".

The deponent further averred that the 2nd Defendant was made aware of the strain the payment caused on the Plaintiff as the Plaintiff had not made any profits during the preceding financial years, which the 2nd Defendant said he understood and promised to make good the debt as he valued his relationship with the Plaintiff. Further, that contrary to the averment in the Affidavit in Support, the 2nd Defendant does not have a meritorious defence as it has been demonstrated that the actions he committed which led to the Plaintiff losing its money were deliberate and dishonest and it is clear that the intention is to deny the Plaintiff the fruits of its judgment. Further, that the 2nd Defendant has not adduced any further evidence to show that he indeed has a meritorious defence.

The Plaintiff filed Combined Skeleton Arguments and List of Authorities in Support of Affidavit in Opposition to Summons to Set Aside Judgment in Default and an Order to Stay Execution of Judgment in Default of Appearance and Defence, on 8th February, 2019. It is the Plaintiff's contention that the Defendants were served with the Writ of Summons to which they deliberately did not enter appearance and file a defence and this is evident from the period of time the Plaintiff served process on the 2nd Defendant up to the date Judgment in Default was entered, which was close to 7 months. That, the Defendants had more than sufficient time to seek legal representation and respond to the action appropriately. That, moreover, the Defendants had every opportunity to enter into a consent judgment with the Plaintiff but neglected or refused to respond to the Plaintiff's efforts to settle the matter amicably. Further, that the defence exhibited in the Affidavit in Support lacks merit

and the Defendants do not deny the fact that the Plaintiff paid the sum claimed to their debtors leading to a situation where the Garnishee Order was passed on an account with insufficient funds, which expense was borne by the Plaintiff. It is the Plaintiff's further submission that it has shown this Court correspondence with the 2nd Defendant which shows him negotiating for more time to settle the debt, which the Defendants are now seeking to escape and hoping that the Plaintiff, who is an innocent party in this matter, settles their obligations with the third parties.

The Plaintiff has submitted in addition, that all due process was followed by the Plaintiff as regards entry of the default judgment and the sum entered was exactly that claimed. Further, that a breakdown of costs demanded has been shown in the Affidavits in Opposition to the applications to set aside the default judgment and to stay execution of the same, which evidence is very clear and cannot credibly be contested. Additionally, that Order 3, rule 5 of the High Court Rules, does not forbid filing of an order into the High Court during the Michaelmas vacation but only makes reference to filing of summons and pleadings specifically, and a judgment in default is not a pleading. The Plaintiff has finally submitted that the Defendants' defence exhibited in the Affidavits in Support of the applications before Court lacks merit and does not raise any triable issues and as such, has no prospects of success. It is thus, the Plaintiff's prayer that the Defendant's applications to stay execution of default judgment and to set aside the same be denied.

The matter came up for hearing on 21st March, 2019. Ms. Nkhoma, learned Counsel for the Defendants submitted that her clients would rely on the documents filed on 22nd January, 2019 in support of the applications but augmented the same by stating that both applications were rightly before the Court as they had met the requisite ingredients for the applications to be granted, which are, firstly, that there is

something to stay; secondly, that the Defendants have a defence on the merits and thirdly, that there are triable issues which can only be resolved if the matter is allowed to go to trial. Counsel prayed that the two applications be granted and that costs be in the cause.

In response, Mrs. Nketani-Mwale, learned Counsel for the Plaintiff submitted that the Plaintiff opposed the two applications and would rely on the Affidavit in Opposition filed on 8th February, 2019 and Skeleton Arguments and List of Authorities in support of the same. That, by way of emphasis, as far as the record showed, the defence exhibited does not show that there are any triable issues as the Defendants have not expressly disputed the claims made by the Plaintiff. She stressed that as shown in the Affidavit in Opposition, the 2nd Defendant has on more than one occasion admitted the debt which was created by his default and has requested the Plaintiff to give him time to pay it off before the two applications before Court. Counsel submitted that the Defendants' applications are yet another way to stall the payments which they know are to be made to the Plaintiff. She prayed that the two applications should not be granted.

In reply, Ms. Nkhoma submitted that the defence exhibited reveals that the Defendants deny owing the Plaintiff the money that has been claimed and this denial stems from the fact that the Defendants did not authorise the Plaintiff to pay out the money that was sitting on the account in question. That, these are the triable issues that the defendants are talking about and that the same can only be resolved at trial. Counsel maintained her prayer that the applications be granted in the interest of justice.

I have perused the documents filed in support of and in opposition to the two applications. I have further, considered the oral submissions by both Counsel in

support of their respective cases. Since the two applications were heard at the same time, the approach I will take with respect to the same is to start by determining the application to set aside the default judgment as the outcome of the application will in one way or the other, have a bearing on the outcome of the application for stay of execution.

As the Defendants have correctly submitted in their Skeleton Arguments, this Court has the discretion under Order 20, rule 3 of the High Court Rules, to set aside a default judgment. However, there are conditions that must be satisfied before a default judgment can be set aside, as the authorities cited have guided. These conditions are firstly, an explanation for the default; secondly, a defence on the merits and thirdly, the existence of triable issues. In the case of *Waterwells Company v. William Jackson*[3], the Supreme Court made an observation to the effect that in an application to set aside a default judgment, it is usual to give an explanation for the default and a defence on the merits, with the latter being the more important consideration. In the case of *Stanley Mwambazi v. Morester Farms Limited*[2], the Supreme Court stated that it is the practice of courts to allow triable issues to come to trial despite the default of the parties as it is not in the interest of justice to deny the party in default the right to have his case heard. In *casu,* the Defendants have explained the reason for the delay in entering appearance and filing their defence as having been in the process of looking for lawyers when the Plaintiff entered the default judgment. They have also submitted that they have a defence on the merits as outlined in the intended defence exhibited as "KC1" to the Affidavit in Support of Summons for Setting Aside Default Judgment, namely, that the Plaintiff acted in the absence of any authority and/instructions from either the 1st or 2nd Defendant to overdraw the 1st Defendant's account in the sum of ZMW 94,000.00. It is the

Defendant's contention that consequently, there are triable issues that can only be determined at trial.

On the other hand, the Plaintiff has submitted that the defence exhibited does not show that there are any triable issues as the Defendant have not expressly disputed the claims made by the Plaintiff. I am inclined to agree with the submission by learned Counsel for the Plaintiff that the exhibited defence does not show any triable issues as the Defendants have not expressly disputed the claims made by the Plaintiff. Indeed, the Defendants do not deny the fact that the Plaintiff paid the sum claimed to their debtors leading to a situation where the Garnishee Order was enforced on an account with insufficient funds, which expense was borne by the Plaintiff. Therefore, the defence exhibited in the Affidavit in Support lacks merit. Further, when you consider the fact that the Writ of Summons herein was filed on 2nd March, 2018 and the Judgment in Default of Appearance and Defence was entered on 24th December, 2018, a period of nine (9) months had passed between the two events. Therefore, the Defendants' explanation that they were in the process of looking for lawyers when the Plaintiff entered the default judgment sounds like an afterthought. It defies logic to think that it can take a period of nine months to find a lawyer.

For the above reasons, I am of the view that the Defendants have not fulfilled the requirements for the grant of the application to set aside default judgment. Consequently, the application is dismissed. With the dismissal of the application to set aside default judgment, the application to stay execution of the default judgment has no leg to stand on and is accordingly dismissed. As a result, the *Ex-Parte* Order for stay of execution of the default judgment granted on 22nd January, 2019 pending application for setting aside of the default judgment is discharged forthwith.

Costs of and incidental to the applications herein are awarded to the Plaintiff, to be agreed or taxed in default thereof.

Leave to appeal is denied.

Delivered at Lusaka the 14th day of January, 2020.

Dr. W. S. Mwenda
High Court Judge