

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

ALLIANCE MOTORS ZAMBIA LIMITED	PLAINTIFF
AND	
FABIAN MUMBA	1ST DEFENDANT
LEVISON A. MUMBA	2ND DEFENDANT
J. & K. CONSULTANCY ZAMBIA LIMITED	3RD DEFENDANT

Before the Honourable Lady Justice Dr. W. S. Mwenda in Chambers this 25th day of June, 2020.

*For the Plaintiff: Mr. M. Byaruhanga of Messrs. Chalwe & Kabalata
Legal Practitioners.*

For the Defendants: Mr. B. C. Mutale of Messrs. BCM Legal Practitioners.

RULING

Cases referred to:

- 1. John W. K. Clayton v. Hybrid Poultry Farm Limited SCZ Judgment No. 15 of 2006.*
- 2. Waterwells Limited v. Wilson Samuel Jackson (1994) ZR. 98 (SC).*
- 3. Kariba North Bank Company Limited v. Zambia State Insurance Corporation Limited (1980) ZR. 94. (HC).*
- 4. Premesh Bhai Megan Patel v. Rephidim Institute Limited SCZ Judgment No. 3 of 2011.*
- 5. Finance Bank Zambia Limited v. Dimitrios Monokandilos & Filandria Kouri (2012) Vol. 1 ZR. 484. (HC).*

Legislation referred to:

1. *Order 3, rule 2; Order 11, rule 1; & Order 12, rule 2 of the Rules of the High Court, Chapter 27 of the Laws of Zambia.*

Published work referred to:

- 1) *Simon Goulding, Odgers on Civil Court Actions (London: Sweet & Maxwell, 1996).*

The delay in delivering this Ruling is regrettable and attributable to an oversight on the part of the Court.

By summons dated 15th May, 2019, the Defendants applied to have the judgment in default entered on 8th April, 2019, set aside. The summons was supported by an Affidavit in Support sworn by Benjamin Chanda Mutale, Counsel seized with the conduct of this case. The facts as disclosed by the said Affidavit are that on 27th February, 2019, the Plaintiff Company commenced legal proceedings against the Defendants by Writ of Summons and Statement of Claim, claiming, inter alia, USD485,000.00, being monies due and owing for the supply of motor vehicles. The Defendants, through their lawyer, entered a Conditional Memorandum of Appearance alleging an irregularity in the particulars to the claim in the Plaintiff's suit. Further, that a letter was written to the Plaintiff's advocates requesting further and better particulars as evidenced by a copy of the said letter dated 2nd April, 2019 and marked "BCM1". The deponent asserted that due to the process of waiting for further and better particulars from the Plaintiff, they were unable to enter a defence within the

prescribed period and that the further and better particulars requested for have not been furnished to date.

The deponent further stated that the record will show that a judgment in default of appearance and defence was filed on 5th April, 2019 and entered against the Defendants on 9th April, 2019. He deposed further, that the Defendants' failure to file an appearance and defence within the time prescribed by the rules of this Court was not designed or meant to show disrespect to this Court but was as a result of the Plaintiff's failure to furnish the particulars which were requested. That, in view of the fact that the Defendants were not given further and better particulars and the fact that a Conditional Memorandum of Appearance was entered, it will be in the interest of justice that the Judgment in Default of Appearance and Defence entered on the 8th April, 2019 be set aside so as to enable this matter be tried on merit. In addition, that the Defendants ought to be accorded an opportunity to file its defence so as to enable the Court arrive at a just and well-informed decision. Further, that it is in the interest of justice that this Court orders that the execution of the Default Judgment be stayed pending determination of the Defendants' application to have the said Default Judgement set aside.

The Plaintiff filed its Affidavit in Opposition on 28th May, 2019 which was sworn by Namwinga Namusamba, the Collections Executive in the employ of the Plaintiff Company. She deposed that she had been advised by her Advocates that the Defendants requested for further and better particulars outside the period allowed and provided for by the Rules and Procedures of Court.

That the Defendants filed their Conditional Memorandum of Appearance on 18th March, 2019 and only requested for further and better particulars in a letter dated 2nd April, 2019, which was 16 days after the filing of the Conditional Memorandum of Appearance. She produced copies of the Conditional Memorandum of Appearance and letter requesting for further and better particulars which were exhibited as "KM1" and "KM2", respectively. The Default Judgment was first filed on 3rd April, 2019 before the Defendants' request for further and better particulars as exhibited by "KM3", being a copy of the said Default Judgment and further, that the Defendants were served with the Default Judgment by cover letter dated 16th April, 2019 in which it was indicated that their request for further and better particulars had been overtaken by events. The cover letter was produced and marked exhibit "KM4".

The deponent further stated that the Defendants did not take any further steps to challenge the Default Judgement when they were served on 16th April, 2019 and only did so when the Plaintiff started executing. That, therefore, the Defendants' Advocates cannot now allege that their default was based on the non-response to its request for further and better particulars. She deposed that on advice from her Advocate, which she verily believed, paragraph 11 of the Defendants' Affidavit, which is to the effect that the Defendants' failure to file an appearance and defence was as a result of the Plaintiff's failure to furnish further and better particulars, contains *mala fides* calculated to deceive and mislead this Court into granting the application.

It was her further deposition that the Defendants had not

exhibited any defence to satisfy this Court that not only are there triable issues in this matter but that they also have a defence on the merits. That she had been advised by her Advocates that the application before Court is meant to delay execution of the Default Judgment and to deny the Plaintiff the justice it deserves. Further, that three (3) years had passed since the Defendants received delivery and possession of the motor vehicles from the Plaintiff and no effort has been made to liquidate the debt for the depreciating assets which continue to depreciate in their possession, and yet the motor vehicles should have been paid for by June of 2016. The deponent further stated that on advice by her Advocate which advice she believed, the Plaintiff will be prejudiced and more harm will befall the Plaintiff if the application is granted as the Defendants have not exhibited a defence or shown cause why they made their request for further and better particulars outside the prescribed period of 14 days from the date endorsed by the Deputy Registrar on their Conditional Memorandum of Appearance.

The application came up for hearing on 21st November, 2019 and Counsel on both sides indicated that they would rely on the affidavits and skeleton arguments filed in support of their respective cases. In their skeleton arguments filed on 15th May, 2019, the Defendants relied on Order 12 rule 2 and Order 3 rule 2 of the Rules of the High Court, Chapter 27 of the Laws of Zambia to submit that this Court is conferred with the power to set aside judgment in default of appearance and defence. It was argued, placing reliance on the holdings in the cases of *John W.K. Clayton v. Hybrid Poultry Farm Limited*¹ and *Waterwells Limited v. Wilson Samuel Jackson*², that in the instant case, it would be in the

interest of justice to set aside the judgment in default of appearance and defence. The Defendants reiterated the assertions contained in their Affidavit in Support to the Application that the delay in filing a defence was as a result of the request made to the Plaintiff for further and better particulars. That the request for further and better particulars was in conformity with the holding in the case of John W. K. Clayton (*supra*).

Making reference to Simon Goulding's Odgers on Civil Court Actions and the case of *Kariba North Bank Company Limited v. Zambia State Insurance Corporation Limited*³, the Defendants submitted on the importance and functions of further and better particulars.

In its skeleton arguments filed on 28th May, 2018, the Plaintiff submitted that the Defendants' application was premised on their explanation that the failure to file an appearance and defence within the prescribed time was as a result of the Plaintiff's failure to furnish them with further and better particulars. It was argued, on authority of Order 11 rule 1 of the Rules of the High Court, Chapter 27 of the Laws of Zambia, that the explanation given by the Defendants for their default should be dismissed as the said explanation is *mala fides* and calculated only to deceive this Court.

The Plaintiff submitted that the Affidavit in Opposition provided evidence that the Defendants made their request for further and better particulars 16 days after they entered a conditional memorandum of appearance and defence. That, no reasonable explanation has been given as to why the request was made outside the time period prescribed by Order 11 rule 1 of the

Rules of the High Court. It was the Plaintiff's further contention that the proper procedure would have been for the Defendants to issue a notice to request for further and better particulars in accordance with the Rules immediately after the Writ of Summons and Statement of Claim was served upon them. Thus, the Plaintiff submitted that the Defendants cannot hide behind the failure of the Plaintiff to respond to their letter. In support of this argument, reliance was placed on the case of *Water wells Limited v. Wilson Samuel Jackson* (supra) in which the Supreme Court stated that:

"It is no answer to a party's predicament caused by that party's own default to point at the opponent's alleged failings."

It was the Plaintiff's further argument that the Defendants have not exhibited a defence on the merits on which to base their application to set aside the default judgment as espoused in a plethora of cases. To augment this argument, my attention was drawn to the case of *Water wells* (supra) and that of *Premesh Bhai Megan Patel v. Rephidim Institute Limited*⁴ in which the Supreme Court stated that over and above any reasonable explanation that the applicant may give, the deciding factor is a defence on the merits. The Plaintiff reiterated that the Defendants' explanation for their failure was not sufficient for this Court to set aside the default judgment. On this basis, it was submitted that more harm and prejudice will befall the Plaintiff if the Defendants' application is granted as the Plaintiff remains at sea as to what defences the Defendants wish to raise. In support of this argument, reference was made to the case of *Finance Bank Zambia Limited v. Dimitrios Monokandilos & Filandria Kouri*⁵ in which the High Court, deciding whether or not to dismiss an action stated that

“the defence relied on must not only be arguable, but must carry some degree of conviction. Thus, the defence should not be fanciful; it must have some substance.”

On this basis, the Plaintiff contended that the debt owed by the Defendants is long overdue, since 2016 and wondered what defences the Defendants may raise to legitimately challenge the Plaintiff's claims.

The Plaintiff concluded with a prayer that this Court dismisses both the Defendants' application to set aside the default judgment and to stay execution, with costs.

I have considered the parties' arguments and affidavit evidence for and against the application. The issue for my consideration is whether or not the Defendants have advanced sufficient reasons to warrant my setting aside the Judgment in Default entered against them. The gist of the Defendants' argument is that their delay in filing a defence was due to non-response by the Plaintiff to their request for further and better particulars. I tend to disagree with this argument. On the contrary, I agree with the Plaintiff's submission that the Defendants cannot use the Plaintiff's apparent failure to justify their delay in filing the defence. Nothing stopped the Defendants from filing a defence in line with what the Plaintiff had already filed. Filing a conditional memorandum of appearance did not amount to filing a defence. The law on filing a conditional memorandum of appearance is settled. A conditional memorandum is entered where the defendant intends to make an application within 14 days of the writ. Where 14 days elapse and there is no application and no formal appearance and defence

entered, the plaintiff is at liberty to enter judgment in default of appearance and defence.

In the instant case, the writ was taken out on 27th February, 2019. It was served on the Defendants on 1st March, 2019. The Defendants entered a Conditional Memorandum of Appearance on 18th March, 2019. No application was filed by the Defendants and on 3rd April, 2019, the Plaintiff filed for judgment in default of appearance and defence. This was more than 35 days of the writ being taken out and 16 days of the Defendants having filed the conditional Memorandum of Appearance. Therefore, the Defendant's argument that their delay in filing a defence is as a result of the Plaintiff not having responded to their request for further and better particulars is not convincing and lacks merit.

In addition to the above, I have perused through the court record. No defence was filed by the Defendants. The case of Water Wells Limited v. Wilson Samuel Jackson (*supra*), called in aid by the Plaintiff, is instructive. The Supreme Court held in that case *inter alia* that:

"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 the more important point to consider."

In the absence of a defence on the merit and on authority of the Water Wells case, I find no merit in the Defendants' application to set aside Judgment in Default and I dismiss it accordingly. Costs of and incidental to this application are awarded to the Plaintiff. The said costs are to be agreed upon by the parties or taxed in default of agreement.

Leave to appeal is denied.

Delivered at Lusaka the 25th day of June, 2020.



**DR. W. S. MWENDA
JUDGE**