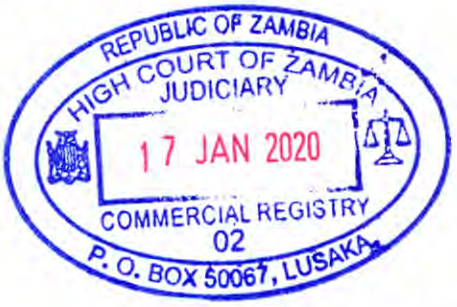
IN THE HIGH COURT FOR ZAMBIA **2019/HPC/0367**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Jurisdiction)



BETWEEN:

AMATHEON AGRIC ZAMBIA LIMITED **PLAINTIFF**

AND

CASSIA CONSULTANT LIMITED **DEFENDANT**

Before Honourable Mr. Justice Bonaventure C. Mbewe in Chambers on the 26th day of November, 2019.

For the Plaintiff : *Mr. R. Mwala of Messrs. A. M. Wood & Company*

For the Defendant : *Mr. H. H. Ndhlovu of Messrs. H. H. Ndhlovu & Company*

R U L I N G

Cases referred to:

1. *Mwambazi v. Morrester Farms Limited (1977) ZR 108*
2. *Amanita Milling Limited v. Nkosi Breweries Limited (2011) ZR 357*

3. *First Merchant Bank Zambia Limited (In Liquidation) v. Al Shams Building Materials Limited, Jayesh Shah SCZ No./8/258/2009*
4. *Water Wells Limited v. Wilson Samuel Jackson (1984) ZR 121*
5. *Premash Bhai Megan Patel v. Rephidim Institute Limited SCZ Judgment No. 3 of 2011,*
6. *First National Bank Zambia Limited and First Rand Limited v. Hussein Abdullatif Saffediene 2019/HPC/0199*
7. *Chazya Silwamba v. Lamba Simpito (2010) ZR vol. 1 at page 475*

Legislation referred to:

1. *Order 53, Rule 6 (2) – (4) of the High Court (Amendment) Rules, 2012*
2. *Order 35, Rule 5 of the High Court Rules, Chapter 27 of the Laws of Zambia*
3. *Practice Direction No. 1 of 2002*
4. *Order 30, Rule 4 of the High Court Rules Chapter 27 of the Laws of Zambia*
5. *Order 35, Rules 1, 3 and 4 of the Rules of the Supreme Court of England*

This is an application by the Defendant to set aside the Judgment in Default herein made pursuant to **Order 35, Rule, 5 of the High Court Rules, Chapter 27 of the Laws of Zambia**. I granted an order staying execution of the Judgment in default of defence on 1st

November, 2019 on an Ex-Parte application to stay Execution filed on 1st November, 2019.

The background to this matter is that, the Plaintiff commenced the action by Writ of Summons on 13th August, 2019. The Defendant entered conditional appearance on 30th August, 2019 and did not take any further step to file any further documents into Court. The Court issued notices for scheduling conferences on 10th and 13th September, 2019 setting the matter down for scheduling conferences on 27th September, 2019 and a re-scheduled scheduling conference on 1st October, 2019 respectively. Plaintiff entered Judgment in Default of Appearance and Defence which I signed on 18th September, 2019. The same was served on the Defendant's Advocates on 20th September, 2019 as attested to in the affidavit of service filed by the Plaintiff's Advocates.

The record shows that on 30th September, 2019, the Plaintiff took out a writ of Fieri Facias to levy execution on the Defendant.

The Affidavit in support of summons to set aside Judgment in default of defence attests that the Defendant's Counsel, Mr. H. H. Ndhlovu S.C. sought further and better particulars, from the Plaintiff's Counsel vide letter dated 9th September, 2019 which the Plaintiff's Counsel has to date not responded to. The Deponent, further attests

that the Defendant has a triable defence on the merits as can be seen from the exhibited defence as such the matter ought to go to trial for the Plaintiff to prove its case.

The Defendant's List of Authorities and Skeleton Arguments filed on 1st November, 2019 relies on the case of **Mwambazi V Morrester Farms Limited (1)** to advance the principle that matters must be settled on their merits. The Defendant also filed Supplementary Skeleton Arguments on 26th November, 2019 citing **Order 35, Rule 5 of the High Court Rules, Chapter 27** as the Order under which the application is brought before this Court. It is further submitted that **Practice Direction No. 1 of 2002** applies to applications brought before the Supreme Court and the Defendant's application is therefore properly before the Court. It is submitted that the Defendant did file skeleton arguments and list of authorities when the application was first filed. The Defendant repeats some of the points put forward in its affidavit in support of the application and contrasts the case of **Amanita Milling Limited V Nkosi Breweries Limited (2)** from the current case submitting that it is only in cases where a defendant is absent t trial that an application setting aside judgment must be made within 7 days.

It is the Defendant's prayer that the application to set aside judgment in default of defence be allowed and the Defendant be allowed to file its defence and the matter be sent to trial.

At the Hearing Counsel for the Defendant argued and submitted along the lines set out above.

The Plaintiff filed an Affidavit in Opposition deposing that the Defendant's application is improperly and incompetently before the Court as the summons and affidavit moving the Court have not cited the law this Court is being moved pursuant to. The Affidavit further deposes that the application is not accompanied by skeleton arguments and list of authorities as required by law. The affidavit goes on to depose that the though a conditional appearance was filed, and served, no application was filed in the 14 day period for doing so and the Plaintiff after the expiration of this period entered judgment in Default.

The affidavit deposes that the reasons given for the Defendant's omission fall short of reasons to persuade the Court to set aside the default Judgment and the application has failed to demonstrate sufficient grounds for this Court to set aside the default judgment.

The Plaintiff argued in its Skeleton Arguments that **Practice Direction No. 1 of 2002** provides that *"All applications brought to Court should indicate the Act and the Section and Rule under which the application is brought, failure to which the application shall not be accepted for filing or entertained."*

The case of **First Merchant Bank Zambia Limited (In Liquidation) v. Al Shams Building Materials Limited, Jayesh Shah (3)** unreported, was cited as a case in which the Practice Direction was given effect to by the Supreme Court.

It was argued that the application is incompetently before the Court owing to the Defendant not filing its skeleton arguments & list of authorities with the application and the Court should therefore dismiss it.

The Plaintiff cited the law that sets down the requirement for entering appearance and filing a defence pointing out that the Defendant entered conditional appearance and did not file a defence after expiration of the period of the stipulated 14 days and that the law thereby allows a plaintiff to enter judgment in default which it did in this case.

The Plaintiff cites the celebrated **Water Wells Limited v. Wilson Samuel Jackson (4)** case as well as **Premash Bhai Megan Patel v. Rephidim Institute Limited (5)**, **Amanita Milling Limited v. Nkosi Breweries Limited (2)** and **First National Bank Zambia Limited and First Rand Limited v. Hussein Abdullatif Saffediene (6)** is support of the principle that to set aside a default judgment the Defendant ought to show that it has a defence on the merits as well as the requirement that to grant an order setting aside, the Defendant's application must be made within 7 days. The Plaintiff submits that the Defendant has failed to demonstrate any reasonable ground for the Court to set aside its judgment and is out of time.

At the hearing Counsel for the Plaintiff augmented his arguments and submissions verbally along the lines set out above.

I have read through all documents, arguments and submissions in this matter and hold that this application is correctly before me on the ground that **Practice Direction No. 1 of 2002** does not apply to matters in the High Court as it was issued specifically for matters being brought to the Supreme Court on Appeal to guide adherence to the Supreme Court Rules on preparation and filing of records and supplementary records of appeal and heads of argument.

The said Practice Direction reads;

SUPREME COURT OF ZAMBIA
P O BOX 50067
RIDGEWAY
LUSAKA

16th July, 2002

SUPREME COURT PRACTICE DIRECTION NO. 1 OF 2002

Applications Brought to Court under Rules 10, 58 and 59 of the Supreme Court Rules, Cap, 25.

All applications brought to court should indicate the Act and Section or Order and rule under which the application is brought failure, which the application shall not be accepted for filing or entertained.

(a) ***Rule 10, 58 and 59 of the Supreme Court Rules Cap 25*** *regarding preparation of records and supplementary records of appeal. You are all enjoined to strictly observe these rules failure, which may render dismissal of an appeal in terms of* ***Rule 68*** *of the same rules.*

(b) ***Rule 70*** *regarding filing of heads of argument. Lately this rule has been flouted by many lawyers. In future no head of argument shall be accepted which brought for filing outside the*

2002 correctly as the matter they were commenting on was before the Supreme Court to which the **Practice Direction** applied. That authority cannot be used in the case *in casu,* even if it is good practice for counsel to always cite the law under which an application is brought.

I agree with the Defendant's Counsel's submission and therefore dismiss the submission put forward by Counsel for the Plaintiff to dismiss the application for not complying with the Practice Direction as the quoted Practice Direction does not apply to the High Court. I equally dismiss the submission that the defendant did not file its skeleton arguments and list of authorities when filing its application as the Court has on record the said document which was filed on 1st November, 2019 with the rest of the documents for this application. Even though the Defendant's document is only one page, it meets the requirements of a skeleton argument and list of authorities.

I have read the **Amanita** authority quoted to support the argument that the Defendant should have brought its application within 7 days which has been countered by the Defendant's Counsel who argues that the authority applies to applications to set aside judgment obtained after trail in the absence of a party. The matter deals with **Order 30, Rule 4 of the High Court Rules** and **Order 35, Rule1, 3 and 4 of the Rules of the Supreme Court of England, 1999**

Edition which provide for a Court to reconsider or set aside its own judgment where trail was held in the absence of a party on sufficient cause. The cited authority does not deal with simple application to set aside a default Judgment under **Order 35, Rule 5 of the Rules of the Supreme Court of England.**

Coming to the main issue in contention which is whether this Court should set aside the default judgment if the Defendant has shown a good and arguable defence on the merits and has given a reasonable explanation for the default.

I have read the Defendant's reasons for the default which is that, Counsel for the Defendant's Counsel wrote the Counsel for the Plaintiff on 9th September, 2019 seeking further and better particulars. The letter in questions seeks to elicit details of the person or persons that the Plaintiff dealt with or involved in the oral agreement. The letter also advises the Plaintiff to amend the Defendant's name in the proceedings.

The Defendant argues that it has raised triable issues and has a defence on the merits which defence, I have read the draft defence which is exhibited in the affidavit in support of ex- parte summons to stay execution pending hearing of summons to set aside judgment in default of defence

I find that the Defence filed by the Defendant herein does not raise triable issues as I do not believe that the Plaintiff could have picked out the Defendant randomly to bring this action against and in the absence of the Defendant stating what role it played or did not play in the transaction, it is not sufficient for the Defendant to simply say it did not contract with the Plaintiff and did not collect or take possession of the goods in question. If the officers or representatives of the Defendant contracted with the Plaintiff in their own capacity and not on behalf of the Company, that fact ought to have been pleaded. The Defendant, if it is to be believed, should have made an application for misjoinder or joinder of the correct party, which it has not. **Order 53, Rule 6 (5)** would have obliged me to enter judgment on admission for the Plaintiff in view of my above finding that the Defendant's proposed defence has not adequately to reversed the Plaintiffs assertions of fact.

In the case of **Chazya Silwamba V. Lamba Simpito (3)** the Court had the following to say on the matter of judgment on admission;

1. *"A party may admit the truth of the whole or any part of another's case. When a fact is admitted, it is unnecessary for a party to advance evidence in relation to the admitted fact(s) at trial.*
2. *When a fact is admitted, it ceases to be an issue and neither is required or permitted to advance evidence about it at trial.*

lack of courtesy which could have helped narrow down the issues early in the matter. The Plaintiff has not responded to this in their affidavit in opposition. However, as the Plaintiff never responded, it was still open for the Defendant to apply to Court for the said further and better particulars or to apply to strike out the writ and statement of claim as threatened in the said letter or make an application for misjoinder. I note that the Plaintiff served the default judgment on the Defendant's Counsel on 20th September, 2019 before taking out the Writ of Fieri Facias on 30th September, 2019.

I find that the Defendant's Counsel did not pursue the matter with the vigour one would have expected especially that they did not get a response from the Plaintiff's Counsel and neither did they follow through on the filed Conditional Memorandum of Appearance to apply to strike out the writ and statement of claim within the allotted 14 days for doing so. They equally appear not to have acted on the default judgment served on them.

On a totality of the evidence before me, I do not find that this is an appropriate case for me to exercise my discretion to set aside the judgment in default as the Defendant has not shown sufficient cause. I therefore dismiss the Defendant's application to set aside the Judgment in Default of Appearance and Defence and accordingly

vacate the stay of execution I granted to the Defendant on 1st November, 2019.

I award costs of and incidental to these proceedings to the Plaintiff, to be taxed, in default of agreement.

Delivered under my hand at Lusaka this 17st day of January 2020

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Bonaventure C. Mbewe
HIGH COURT JUDGE