

72mm

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

2020/HPC/0341

BETWEEN:

K.E.E REAL ESTATES LIMITED

PLAINTIFF



AND

BRENDA CHISHA NAKAZWE

DEFENDANT

Before Hon. Mr. Justice Bonaventure C. Mbewe in Chambers on 15th July, 2020.

Researcher : Mwiche Ntinda

Marshal : Esther Ng'uni

For the Plaintiff : N/A

For the Respondent : N/A

RULING EX TEMPORE

Cases and Authorities Referred to:

- 1. *Bimzi Limited v. B & C Commodities and Shipping Limited*
SCZ/8/177/98;

2. *Sonny Paul Mulenga and Others v. Investrust Bank Limited (1999) ZLR page 101;*
3. *Chazyia Silwamba v. Lamba Simpito (2010) ZR Vol. 1 at page 475;*
4. *The High Court Rules, Chapter 27 of the Laws of Zambia.*

INTRODUCTION

I have delivered this Ruling without hearing the parties for the reasons that I will set out hereunder.

The Plaintiff herein issued a Writ of Summons accompanied by a Statement of Claim on 6th May, 2020 against the Defendant one Brenda Chisha Nakazwe in an action for recovery of a debt.

The Plaintiff, filed an Affidavit of Service on 13th May, 2020 sworn by one Harmony Sakanjole attesting that service of the Writ of Summons and Statement of Claim was effected on the firm of Messrs. Willa Mutofwe and Associates as Advocates for the Defendant, on 7th May, 2020, and that the said Advocates signed and date stamped the return copy of the letter of service which is exhibited to the affidavit as “HS1”.

The Plaintiff, filed for Judgment in Default of Appearance against the Defendant on 25th June, 2020, which Order I signed on 26th June, 2020.

The Defendant has now applied to this Court *ex-parte* for an Order staying execution of the Judgment in Default of Appearance of 26th June pending hearing and determination of an application to set aside default judgment.

ARGUMENTS AND EVIDENCE

The Defendant's *ex parte* application for an order to stay execution is made pursuant to **Order 3, Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia** and is supported, by an affidavit sworn by one Brenda Nakazwe the Defendant in this action and Skeleton Arguments and List of Authorities.

The Affidavit of Brenda Nakazwe deposes that she was never served process personally and the Plaintiff served process on her Advocates before she had engaged them and instructed them on how to proceed in this matter. The deponent deposes that she has a valid defence to the claim against her and she exhibits a draft Defence as "BN1". She asks the Court to stay execution of the Judgment as she risks execution if the same is not stayed. The draft Defence exhibited by the Defendant reads as follows;

DEFENCE

- 1. That paragraphs 1 and 2 of the Plaintiff's Statement of Claim are not in dispute*
- 2. That paragraph 3 of the Plaintiff's Statement of Claim is disputed and the Defendant shall aver at trial that she did not borrow the*

sum of ZMW293,544.76 and shall further put the Plaintiff to the strict proof thereof.

- 3. That paragraph 4 of the Statement of Claim is not in dispute*
- 4. That paragraph 5 of the Plaintiff's Statement of Claim is in dispute and the Defendant shall aver at trial that she never borrowed a further sum of ZMW101,266.67 and shall further put the Plaintiff to the strict proof thereof at trial*
- 5. Paragraph 6 of the Plaintiff's Statement of Claim is in dispute and within the peculiar knowledge of the Plaintiff and the Defendant shall put the Plaintiff to the strict proof thereof at trial.*
- 6. Paragraph 7 of the Plaintiff's Statement of Claim is in dispute and within the peculiar knowledge of the Plaintiff and the Defendant shall put the Plaintiff to the strict proof thereof at trial.*
- 7. Paragraph 8 of the Plaintiff's Statement of Claim is in dispute and within the peculiar knowledge of the Plaintiff and the Defendant shall put the Plaintiff to the strict proof thereof at trial.*
- 8. Paragraph 9 of the Plaintiff's Statement of Claim is in dispute and within the peculiar knowledge of the Plaintiff and the Defendant shall put the Plaintiff to the strict proof thereof at trial.*
- 9. SAVE as hereinafter expressly admitted, the Defendant denies each and every allegation set out in the Plaintiff's Statement of Claim as if the same were set out forth herein and traversed seriatim*

The Skeleton Arguments and List of Authorities relies on **Order 3, Rule 2 of the High Court Rules** as the law under which the application is brought.

Order 3, Rule 2 of the High Court Rules reads;

“Subject to any particular rules, the Court or a Judge may, in all cases 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.”

The Defendant goes on to cite the following case in support of the application namely; **Bimzi Limited V B & C Commodities and Shipping Limited SCZ/8/177/98**, wherein the Supreme Court held that;

“a stay of execution is a discretionary remedy and that it is exercisable on well settled principles, these being;

- (i) That the court is satisfied that there are good reasons for doing so and/or;**
- (ii) There are special circumstances warranting it.”**

The Defendant also relies on the holding in the case of **Sonny Paul Mulenga and Others v. Investrust Bank Limited (1999) ZLR page 101** that held that;

“(a) In exercising its discretion whether to grant a stay of not, the Court is entitled to preview the prospects or chances of success at the trial.

(b) The successful party should not be denied immediate enjoyment of the judgment unless there are good and sufficient grounds.”

The Defendant submits that this Court should grant the stay prayed for to maintain the *status quo* and prevent any injustice that may be occasioned by execution pending the hearing of the application to set aside the default judgment.

The Defendant has not filed into Court the application to set aside the default judgment referred to in her Summons and Skeleton Arguments.

DECISION OF THE COURT

The application before me is brought pursuant to **Order 3, Rule 2 of the High Court Rules** which clearly gives this Court wide discretionary powers. According to the holding in **Bimzi Limited VB & C Commodities and Shipping Limited SCZ/8/177/98**, the Defendant needs to satisfy this Court;

“(i) That the court is satisfied that there are good reasons for doing so and/or;

(ii) There are special circumstances warranting it.”

In exercising my discretion in determining this application, I am mindful of the guidance by the Supreme Court in the case of **Sonny Paul Mulemga and Others v. Investrust Bank Limited (1999) ZLR page 101** when it held that;

“(a) In exercising its discretion whether to grant a stay of not, the Court is entitled to preview the prospects or chances of success at the trial.

(b) The successful party should not be denied immediate enjoyment of the judgment unless there are good and sufficient grounds.”

I warn myself to guard against pre-judging the main case, but I find that the Defence filed by the Defendant in the response to the Statement of Claim is a classic case of the Defendant making bare denials without putting forward what the actual case for the Defendant is.

The Defendant’s draft Defence does not meet the requirements of a defence as set down by law in **Order 53, Rule 6 (2) – (5) of High Court Rules, Chapter 27 of the Laws of Zambia**, which reads;

(2)The defence shall specifically traverse every allegation of fact made in the statement of claim or counter-claim, as the case may be.

(3) A general or bare denial of allegations of fact or a general statement of non admission of the allegations of fact shall not be a traverse thereof.

(4) A defence that fails to meet the requirements of this rule shall be deemed to have admitted the allegations not specifically traversed.

(5) Where a defence fails under sub-rule (4), the plaintiff or defendant, or the court on its own motion, may in an appropriate case, enter judgment on admission.”

The Defendants purported traverse of the averments in the Statement of Claim are largely not a traverse at all. The following underlined parts of the draft Defence are examples of what I have found not to meet the standard required in **Order 53, Rule 6(2) – (5)**;

2. That paragraph 3 of the Plaintiff’s Statement of Claim is disputed and the Defendant shall aver at trial that she did not borrow the sum of ZMW293,544.76 and shall further put the Plaintiff to the strict proof thereof.

4. That paragraph 5 of the Plaintiff’s Statement of Claim is in dispute and the Defendant shall aver at trial that she never borrowed a further sum of ZMW101,266.67 and shall further put the Plaintiff to the strict proof thereof at trial

5. Paragraph 6 of the Plaintiff’s Statement of Claim is in dispute and within the peculiar knowledge of the Plaintiff and the Defendant shall put the Plaintiff to the strict proof thereof at trial.

The Defendant has not provided any underlying detail of why she denies borrowing from the Plaintiff. The holding in the case of **Chazyia Silwamba v. Lamba Simpito (2010) ZR Vol. 1 at page 475** is instructive in guiding litigants on how to put forward their defences, which I posit should clearly guide the Court as to what a defendant's case is as well as narrow the issues on which the defence is pivots. The Court had the following to say in the **Chazyia Silwamba** case;

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.*
3. *An admission may be made expressly in a defence or in a defence to counterclaim.*
4. *An admission may also arise by virtue of the rules. For instance, where a defendant fails to traverse an allegation of fact in a statement of claim or where there is a default of defence.*
5. *If a defendant fails to address an allegation he is deemed to admit it.*
6. *The function of an admission is to ensure that the Court's time at trial is not wasted and delay is avoided. Admissions also narrow the issues to be decided.*
7. **A defence must not be evasive. A defence must answer all allegations at the level of detail of the underlying allegation.**

8. Every allegation must be admitted frankly or denied boldly; any half admission or half denial is deemed to be evasive.”

Upon a review of all circumstance surrounding this application and the law and authorities on the matter, I am not satisfied that there are good reasons or that there are special circumstances warranting me to exercise my discretion and grant a stay of execution. I am further not convinced that the Defendant has a good and arguable defence on the merits as I find that the draft Defence does not meet the required standard of a defence under **Order 53, Rule 6(2) – (5) of the High Court Rules.**

The Defendant deposes in her Affidavit that she was not personally served with process. I consider the service on her Advocates to be proper service as it has not been shown that the said Advocates at any time, refused to accept service, if they did not have the Defendant's instructions. They equally did not return the originating process to the Plaintiff's Advocates or inform them at any time that they did not hold instructions from the Defendant and therefore could not accept service of process.

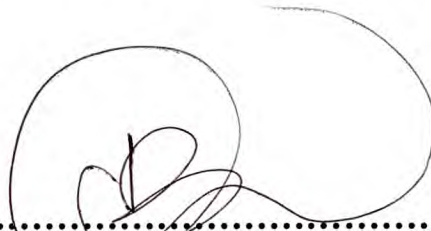
Further, the absence of any application by the Defendant's to set aside the default judgment accompanying this application does not give me comfort that granting the stay will be followed by the timely hearing of the application to set aside the default judgment, if I cannot give that application a return date. This application is said to seek an Order for

stay, pending the determination of an application which is not before this Court and is not known when it will come before the Court.

I am, also guided by the principle in the case of **Sonny Paul Mulenga and Others v. Investrust Bank Limited (1999) ZLR page 101** relied on by the applicant that a successful party should not be denied immediate enjoyment of the judgment unless there are good and sufficient grounds.

I therefore hereby dismiss the Defendant's application for stay of execution. I order no costs and leave to appeal is granted.

Delivered at Lusaka this 15th day of July, 2020.

A handwritten signature in black ink, consisting of a large, stylized 'B' followed by a series of loops and a long horizontal stroke extending to the right.

.....
Bonaventure C. Mbewe
HIGH COURT JUDGE