IN THE HIGH COURT FOR ZAMBIA **2015/HP/422**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN

SAMUEL DAVID CHIBUYE PLAINTIFF

AND

STANDARD CHARTERED BANK ZAMBIA DEFENDANT

BEFORE THE HONOURABLE LADY JUSTICE M. CHANDA THIS 6TH DAY OF *MARCH*, 2020

APPEARANCES:

For the plaintiff : Major C.A. Lisita – Central Chambers

For the defendant : Mr. K. Mwondela appearing with Mr. Z. Phiri of Kaumbu Mwondela Legal Practitioners

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RULING

LEGISLATION REFERRED TO

HIGH COURT RULES CHAPTER 27 OF THE LAWS OF ZAMBIA

CASES REFERRED TO

1. ZAMBIA OPEN DOOR MISSION REGISTERED TRUSTEES V KAFUE DISTRICT COUNCIL CAZ APPEAL NO. 26/2017
2. ZAMBIA REVENUE AUTHORITY V SHAH (2001) ZR 60,
3. MWENDA AND OTHERS V THE COMMISSIONER OF LANDS AND OTHERS 2009/HK/569
4. MTONGA ISA JEFF V THE ATTORNEY GENERAL, SCZ/8/106/2009.
5. LEMARE LAKE LOGGING LTD V BRITISH COLUMBIA (MINISTER OF FORESTS & RANGE) 2009 BCSC 902

This is an application by the defendant for the re-opening of trial and discharge of the order fixing the dates of hearing. The application was made pursuant to section 13 of the High Court Act and Order 3 Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia. The brief background of this case is that the plaintiff, **Samuel David Chibuye**, commenced this action against the defendant, **Standard Chartered Bank Zambia PLC**, by way of writ of summons and statement of claim wherein he alleged that his employment was wrongfully terminated by the defendant.

When the matter was re-allocated to this court, a status conference was held during which counsel for the parties were directed to be ready for commencement of trial on 5th June, 2019. When the matter came up however, counsel for the defendant indicated that he had not received instructions from his client on how to proceed and applied for an adjournment. I denied his application for the reason that since the matter was commenced as far back as 2015 there had been sufficient time for counsel to obtain instructions before the date for commencement of trial. I therefore ordered that the trial commences and the plaintiff testified as his own witness while the defendant did not avail any witnesses. At the close of the case, I gave directions on the dates on which submissions were to be filed and indicated the date for delivery of the judgment. Afterwards, the defendant filed an application to re-open trial and discharge the order fixing dates.

The defendant's affidavit in support of the application was deposed to by the defendant's company secretary, Rose Nyendekazi Kavimba. The deponent averred that the defendant's failure to instruct its advocates was caused by the unavailability of material witnesses. Her explanation was that the advocates were ill-equipped to proceed with trial on 5th June, 2019 because she was absent from her work place and was unable to secure alternative witnesses for the trial. She added that it was due to the insufficient instructions that counsel for the defendant could not cross-examine the plaintiff or open the defendant's case. She stated that determining the matter before this court on its merits required a scrutiny of the plaintiff's case through cross-examination and to have the defendant's case heard.

She averred that re-opening of trial would not prejudice the plaintiff in any way because he would only be subjected to cross-examination and would equally have an opportunity to cross-examine the defendant.

She indicated that she verily believed that it was in the interest of justice to adjudge the matter on its merits.

Counsel for the defendant, Mr Z. Phiri, filed skeleton arguments in aid of the defendant's application in which he submitted that the court had the discretionary power to re-open the trial as well as discharge the order fixing dates. He cited the case of **Zambia Open Door Mission Registered Trustees v Kafue District Council CAZ**[1] in which it was stated that the High Court could make any

interlocutory order, for the ends of justice, even when the parties had not requested for it.

Mr Phiri argued that this matter needed to be decided on its merits. He brought to his aid the case of **Zambia Revenue Authority v Shah[2],** in which it was decided that matters before court needed to be determined on their substance and merits where there was only a technical omission or oversight which did not affect the validity of the process.

Counsel emphasised that the defendant's failure to instruct its advocates was due to the unavailability of its material witnesses before court. He added that the defendant had since identified and located witnesses that were material to its case.

Counsel drew the court's attention to the case of **Mwenda and others v The Commissioner of Lands and others[3]** wherein the court in discussing Order 35 Rule 2 of the White Book stated that an application could be made for the discharge of an earlier order fixing the matter for judgment and allow the defendant to defend the matter on the merits. Counsel stated that similarly, section 13 and Order III rule 2 of the High Court Rules gave the court discretion to discharge the dates set for the filing of submissions and delivery of judgment.

On 7th August, 2019, the plaintiff filed his affidavit in opposition and his counsel also filed skeleton arguments. In his affidavit, the plaintiff averred that the matter had taken too long before commencement of

trial and that this was why the court eventually warned the parties about the need for the case to reach its finality. He averred that the defendant had more than four (4) years from the time proceedings commenced and over six (6) weeks from the date of the status conference in which to firmly instruct its advocates in preparation for trial. He expressed doubt with regard to the defendant's failure to locate its witnesses and stated that if that were the case, the defendant could have simply applied to have the cross-examination at a later date. He averred that the defendant's Head of Legal superintended over other advocates whom she could have instructed to prepare for trial if she was as constrained as she claimed. He avowed that even after the court's warning against unnecessary delays, the defendant still showed no desire to defend the suit and opted to lodge an application to re-open the case. He argued that it was not necessary to re-open the case because counsel for the defendant was present during the proceedings but declined to participate so that the case could be heard on its merits.

The deponent concluded by stating that he was presently unemployed and that his numerous trips to court without the matter taking-off had negatively impacted his income-generating opportunities and social well-being. He stated that re-opening the matter would further prejudice him financially unlike the defendant who could easily afford it.

Counsel for the plaintiff, Major C.A. Lisita, argued that the gist of the application was whether an order made at a trial during which a

party was absent could be set aside. He submitted that the court was not bound to make an order under section 13 and order 3 Rule 2 where a particular situation was adequately dealt with under a specific rule. He stated that the matter was heard pursuant to Order 35 Rule 3 of the High Court Rules, which allows it to hear a cause and give judgment in the absence of a defendant who was served with a notice. He stated that pursuant to the said Order, where a plaintiff appeared before court but a defendant did not, the plaintiff had every right to proceed with proving his claim. He argued that this was what transpired in the present case.

He cited the court's decision in the case of **Nkhuwa v Lusaka Services Limited** in which it was stated that in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. Counsel argued that the reasons advanced for the failure to prepare were untenable as demonstrated in the plaintiff's affidavit in opposition.

Counsel contended that the defendant's failure to table its case was self-inflicted because it was the defendant's counsel who declined to participate in the proceedings due to lack of instructions. He stated that this meant that the case was in fact heard on its merits and was not equivalent to a default judgment. He added that the defendant had disregarded the opportunity of appearing at and participating in the trial and should be bound by the decision in line with Order 35 Rule 1(2).

It was counsel's contention that the defendant's application was premised on the notion that although the court had discretion to decide whether to proceed to trial, it ought to have chosen the route which was favourable to the defendant. He stated that a party who deliberately ignore a court order did so at his own peril.

He referred to section 2 of the High Court Act which defines a judgment to include a decree and that since a decree included an order, the defendant was imploring the court to set aside the order on sufficient cause as required in Order 35 Rule 5 of the High Court Rules. He stated that the operative phrase was "sufficient cause shown".

Counsel's final submission placed emphasis on the fact that the defendant had not disclosed any material upon which the court could exercise its discretion to set aside its order and exercising its discretion in a manner which was not favourable to the defendant was not enough reason to set it aside.

I have carefully considered the affidavits and the arguments raised by both parties and I wish to begin by stating that the court has authority to proceed with hearing a matter in the absence of a defendant and to deliver judgment based on the plaintiff's evidence. This position was affirmed by the Supreme Court in the case of **Mtonga Isa Jeff v The Attorney General[4].**

In the present case, it must be observed that the defendant's application was premised on section 13 of the High Court Act. The said section states as follows:

> **In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.**

It is my affirmation that a reading into the foregoing provision shows that the court is vested with discretion to decide whether the grounds advanced by an applicant are sufficient to warrant the opening and rehearing of a case.

It is worthy of note that an application similar to the one before me (although it had been made pursuant to Order 35 Rule 2) was considered in the case of **Mwenda and others v The Commissioner of Lands and others 2009/HK/56.** In that case, the High Court's

view was that an application to discharge an earlier order fixing a date for judgment could be granted if it was shown that there was a material error which could influence the court's decision. I agree with the view expressed by the court and I also find helpful the decision of the British Columbia Supreme Court in the case of **Lemare Lake Logging Ltd v British Columbia (Minister of Forests & Range)**[5]. In that case, Grauer J. discussed the discretion to re-open a matter and emphasised on, inter alia, the following two issues:

1. That the onus is on the applicant to establish that a miscarriage of justice would probably occur if the matter is not reopened; and

2. That the credibility and weight of the proposed evidence is a relevant consideration in deciding whether its admission would probably change the result.

In casu, the issue for determination is therefore whether the evidence advanced by the defendant discloses that there may be a miscarriage of justice if the matter is not re-opened.

After considering the circumstances of this case, I find the reasons advanced by the defendant of the none availability of material witnesses on the day of trial to be satisfactory. The explanation given by the defendant for its counsel's lack of instructions to proceed was purely to do with its internal challenges in communicating with its external lawyers, and I am of the view that any resulting prejudice to the plaintiff can be compensated by costs.

In Light of the foregoing, it is my considered view that the applicant has demonstrated sufficient reason for me to re-open the trial as failure to do so may lead to a miscarriage of justice. I accordingly discharge my earlier order setting the dates for filing of submissions and delivery of judgment and order the re-opening of the matter for continuation of trial on a date to be communicated to the parties. I admonish the defendant for its failure to inform counsel about the unavailability of witnesses. For this reason, I condemn the defendant in costs for the proceedings of 5th June, 2019 and for this application to be paid before the date of hearing.

Dated at Lusaka the 6th day of *March*, 2020.

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M.CHANDA
JUDGE