

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

2014/HP/0858

BETWEEN:

JOSEPH MWAANGA

AND

MUTEMWA SILILO

NAMAKAU SILILO

INUTU SILILO

DAVIE MUSEISEI SILILO



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

4RD DEFENDANT

**Before the Honourable Mrs. Justice S.M. Wanjelani this 17th day
of July, 2020 in Chambers**

For the Plaintiff:

Messrs Kumasonde Chambers

For the 1st and 4th Defendants: Messrs Zulu and Company

**RULING ON APPEAL AGAINST AWARD OF COSTS TO
THE PLAINTIFF**

Cases referred to:

1. *Omar v. Zambia Airways Corporation Limited (1986) ZR 23 (SC).*
2. *Collett v. Van Zyl Brothers Limited (1966) Z.R. 65 (C.A.)*

Legislation referred to:

1. *High Court Rules, Cap 27 of the Laws of Zambia*

This is the 1st and 4th Defendants' Appeal against on an order of costs made by the Deputy Registrar in his Ruling of 13th February, 2020. The grounds of appeal were couched as follows:

- 1. The learned Deputy Registrar was wrong at law by awarding an order for costs to the Plaintiff when on 13th February 2020, he delivered a Ruling by which he granted the Defendants' application to set aside judgement in Default of Defence;*
- 2. The learned Deputy Registrar was wrong at law by finding that the procedural default on the part of the Defendants when in fact it is on record that Mutemwa Sililo, the 1st Defendant filed his Defence and Counter Claim on 20th June 2014, the Writ of Summons having been filed and issued on 4th June 2014.*

In support of the first Ground, Counsel submitted that the Writ of Summons having been filed on 4th June, 2014 and 1st Defendant having filed his Defence and Counter Claim on 20th June, 2014, it was irregular for the Plaintiff to enter Judgement in Default of Defence. He added that when the learned Judge Hon Chitabo issued Orders for Directions on 14th May 2015 where he ordered the Defendants to deliver a Defence and Counter Claim, he was not aware that a Defence and Counterclaim had already been filed.

Under the second Ground of Appeal, it was, submitted that in the Ruling of 13th February, 2020 the learned District Registrar was under the impression that there had been default on the part of the Defendants. He added that the District Registrar therefore awarded costs to the Plaintiff on the wrong principle of law.

The Plaintiff did not respond to this application, presumably because he had launched his own appeal against the same Ruling, challenging the setting aside of the Judgment in Default. However, it is trite that an appeal for the Learned Deputy Registrar is a

hearing de-novo as guided in the case of **Omar V Zambia Airways Corporation Limited**⁽¹⁾ and I will consider all the process presented before the honorable Deputy Registrar.

I have considered the Appeal and the grounds advanced. I note that the Parties were granted Leave to appeal by the Deputy Registrar in his Ruling dated 13th February 2020. **Order 40 of the High Court Rules of the High Court** deals with costs and of relevance to this matter is **rule 6** which provides:

"The cost of every suit or matter and of each particular proceeding therein shall be in the discretion of the Court or a Judge; and the Court or a Judge shall have full power to award and apportion costs, in any manner it or he may deem just, and, in the absence of any express direction by the Court or a Judge, costs shall abide the event of the suit or proceeding..."

While the costs are in the discretion of the Court, further guidance was provided in the case of **Collett v Van Zyl Brothers Limited**⁽²⁾ wherein was stated, *inter alia*, that:

"The award of costs in an action is at the discretion of a trial judge, such discretion to be exercised judicially."

It goes without saying that costs are meant to compensate an innocent Party for any inconvenience suffered as a result of the defaulting Party's actions, while penalizing the latter. **Order 40 of the High Court Rules** and the cited authorities herein implore the Courts to exercise the discretion in granting that costs judiciously.

Thus, this Court is entitled to look at the circumstances of a particular case to assess whether or not the discretion was exercised judiciously for the intended purpose.

A perusal of the record shows that this matter was commenced on 4th June 2014 and a Memorandum of Appearance, a Defence and Counter Claim were filed on 20th June 2014. The Orders for Directions were issued on 14th August 2014 by Mr. Justice Mwila Chitabo SC, but I also note that fresh Orders for Directions were again issued on 14th May 2015.

On 3rd June 2015, there was an application by the Plaintiff to dismiss the action in default of Defence, and in the affidavit in support of the said application sworn by **Killian Ives Mulenga**, it was averred that a search conducted on the 2nd of June 2015, revealed that no Defence and Counter Claim had been filed.

In a Ruling by Hon. Lunda, Deputy Registrar dated 22nd December 2015, Judgment in Default was entered based on failure to abide by the directions of the court and further dismissed the counter claim.

I have also perused the Ruling of Hon L. Ngambi dated 13th February, 2020 wherein he set aside the Judgement in Default of Defence, and awarded costs to the Plaintiff. However, it is not clear whether he took note of the circumstances surrounding this case as the Ruling is devoid of these details.

It is evident from the record, that the 1st Defendant filed his Defence and Counter Claim on 20th June 2014 and at the time the Judgment in Default was granted, the Defence and Counter claim

were on record, albeit they were already filed before the Order for directions was issued. I note that Writ of Summons filed on 4th June, 2014 stated that the Defence should be filed within 14 days.

Given the circumstances of this case, I find that the default was not occasioned by the 1st Defendant but rather inadvertency in not bringing to the attention of the Court the fact that a Defence and Counterclaim that had been filed, hence the issuance of the Order for Directions by the Court did not take into account this fact. Further, based on the fact that the Statement of Claim was not amended, there was no need in my view, for the Defendant to re-file the same Defence and Counterclaim after the issuance of the Order for Directions.

In the premise, I find merit in the appeal and hereby set aside the Order for costs awarded by the District Registrar as there was no procedural default by the Defendant to warrant penalizing him with the payment of costs. I substitute thereof that the costs both before the Deputy Registrar and arising from the Appeal shall be in the cause.

Delivered at Lusaka this 17th day of July, 2020.



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S.M. WANJELANI
JUDGE