

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

(Civil Jurisdiction)
BETWEEN

MARY NALWIMBA

PAUL MUKUPA

AND

MANSA SUGAR LTD

2024/HP/0037



1ST PLAINTIFF

2ND PLAINTIFF

DEFENDANT

BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE

For the 1st Plaintiff:

In-Person

For the 2nd Plaintiff:

In-Person

For the Defendant:

No-appearance

R U L I N G

Cases referred to:

- 1. Shilling Bob Zinka v. The Attorney General (1990-92) Z.R 70.**
- 2. Lafarge Cement Zambia Limited Plc v. Peter Sinkamba (Appeal No.169/2009).**
- 3. Natural Valley Limited v. Brick and Tile Manufacturing and Another (Selected Judgment No.32 of 2018).**
- 4. Tony Mutale v. Crushed Stone Sales Limited (SCZ Judgment No. 17 of 1994).**
- 5. Attorney General v. Sam Amos Mumba (1984) Z.R 14 (S.C).**

Legislation and other material referred to;

1. **High Court Rules, Chapter 27 of the Laws of Zambia.**
2. **Rules of the Supreme Court of England (RSC) White Book, 1999 Edition.**
3. **Bryan A. Garner, The Black's Law Dictionary, Tenth (9th) Edition, 2009.**

1. INTRODUCTION

- 1.1 The Plaintiffs herein commenced an action against the Defendant on 12th January, 2024 for the immediate payment of K201, 300.00 being and in respect of unpaid money for damaged motor vehicle and accommodation.
- 1.2 On 13th May, 2024, the Plaintiffs applied for leave to enter judgment in default of appearance and defence pursuant to Order 88 of the Rules of the Supreme Court of England (RSC) White Book, 1999 Edition.

2. PLAINTIFF'S AFFIDAVIT EVIDENCE

- 2.1 The application is supported by an affidavit deposed to by **PAUL MUKUPA**, the 2nd Plaintiff herein who deposed that they commenced this action against the Defendant and that they served the process through advertising in the Daily Mail.
- 2.2 Further, that the Defendant was given 14 days after the service of the writ of summons and orders for direction on them, to cause appearance and warned that in default of

doing so, they would proceed with the matter and judgment would be given in their absence.

2.3 That the Defendant had failed or neglected to file a defence or admission as required and therefore caused unreasonable delay in concluding the matter.

2.4 He sought the indulgence of the Court to grant him leave to enter judgment in default of defence and appearance against the Defendant.

3. RESPONDENT'S AFFIDAVIT EVIDENCE

3.1 There was no affidavit opposing the application that was filed.

4. HEARING

4.1 When this matter came up for hearing, there was no appearance for the Defendant even though the record indicated that service of the Notice of hearing had been effected. I was therefore satisfied that the Defendant's absence was deliberate and I proceeded to hear the Plaintiffs' case.

4.2 The 2nd Plaintiff told the Court that he had attempted to serve on the Defendant four times but they refused to acknowledge receipt. He was granted an order for substituted service and served the Defendant but the matter had taken time.

4.3 The 1st Plaintiff submitted that it had been long since the Defendant damaged the car which was used for business. That the driver was drunk and he hit in their vehicle which was stationary and ran away. The matter was reported to the police and the police apprehended him from the company. The superiors from the Defendant company wanted to settle the matter but they were not answering phone calls and the time frame in which they promised to pay had lapsed.

4.4 It was for this reason that he wanted leave to enter judgment in default of defence and appearance against the Defendant.

5. DECISION

5.1 By this application, the Plaintiffs seeks leave to enter judgment in default of defence on the basis that the Defendant has neglected to enter its defence and appearance.

5.2 I must hasten to mention that the Plaintiffs have anchored this application on Order 88 of the Rules of the Supreme Court of England, White Book, 1999 Edition which provides for mortgage actions. It goes without saying that as this action is not a mortgage action, the Plaintiffs have relied on a wrong provision of the law.

5.3 Be that as it may, I am considering this application on the basis of the guidance given by the Supreme Court in the case of **Shilling Bob Zinka v. The Attorney General** ⁽¹⁾ that an action is not invalidated by the use of a wrong provision of the law so long as the power to act is traceable to a legitimate source.

5.4 **Order 12 rule 1 (5) of the High Court Rules, Chapter 27 of the Laws of Zambia** provides for entry of default judgment as follows:

“Where the writ is endorsed with a claim for pecuniary damages only, or for detention of goods with or without a claim for pecuniary damages, and is further endorsed for a liquidated demand, whether specially or otherwise, and any defendant fails to appear to the writ, the plaintiff may enter final judgment for the debt or liquidated demand, interest and costs against the defendant or defendants failing to appear, and interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in such of the preceding sub-rules as may be applicable.”

5.5 Order 12 rule 1(5) allows the plaintiff to enter final judgment for a debt or liquidated demand and interlocutory judgment

for the value of goods and damages or damages only as the case may be.

5.6 As to the meaning of pecuniary damages, I have had recourse to the Black's Law Dictionary, 10th edition which defines pecuniary damages at page 473 as:

“Damages that can be estimated and monetarily compensated.”

5.7 In short, pecuniary damages are economic losses that can be easily quantifiable, for example, money lost, future lost earnings or medical bills.

5.8 From the endorsement on the writ, the Plaintiffs seek immediate payment of K201,300.00 being and in respect of unpaid money for the damaged motor vehicle and accommodation, plus interest on the amount found due.

5.9 The Plaintiffs have also averred that the Defendant's vehicle which was being driven by James Mulaisho who was extremely drunk and over speeding went off the road and hit into the Plaintiff's vehicle and caused damage to the vehicle.

5.10 What is clear from the endorsement on the writ is that what the Plaintiffs herein seek are special damages which are awarded to compensate for actual out of pocket

expenses/financial costs that a claimant has incurred as a result of the defendant's actions or behaviour.

5.11 While the Defendant in the present case has not entered a memorandum of appearance and defence, it is important to consider the guidance given by the Supreme Court in the case of Lafarge Cement Zambia Limited Plc v. Peter Sinkamba ⁽²⁾ where it stated that:

“It must be emphasized that it is not in every case that a plaintiff is entitled to enter a default judgment simply because the defendant has failed to file memorandum of appearance and defence. It is not an automatic entitlement. At the stage of entering a default judgment, it is the duty of a trial Court or Deputy Registrar, as the case may be, to examine the claims endorsed by the plaintiff in the writ of summon and statement of claim in order to determine whether a default judgment should be entered or not.”

5.12 The guidance given by the Supreme Court in the above case is apt as it stressed the principle that it is not in all cases where a party is entitled to entry of default judgment where the opposite party omits or neglects to file a defence when construing the meaning of Order 12 of the High Court Rules.

This position was re-echoed in the case of **Natural Valley Limited v. Brick and Tile Manufacturing and Another** (3).

5.13 I am ably guided by these authorities. It is therefore my considered view that having regard to the endorsement on the writ of summons and statement of claim, this is not an appropriate action in which to proceed by way of default because the Defendant has neglected to file a defence. I hold this view because before the claim for special damages can be ascertained, liability must be established. Thus, there must be evidence first to show negligence or wrong doing on the part of the defendant at the trial of the matter.

5.14 Once that has been done the claim for special damages must be strictly proved as the amount claimed cannot just be plucked from the air. This was guidance given by the Supreme Court in the ***Lafarge Cement Zambia Limited*** case.

5.15 In this regard, the Supreme Court in the case of **Tony Mutale v. Crushed Stone Sales Limited** (4) held that:

“There is need for satisfactory proof to be provided before special damages can be awarded by the court.”

5.16 In addition, in the case of **Attorney General v. Sam Amos Mumba** (5) the Supreme Court held that:

“Where loss of business forms part of the claim, it must be pleaded as special damages and strictly proved.”

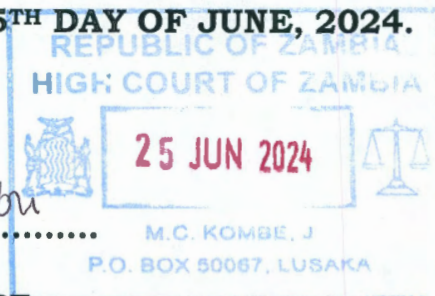
5.17 Given the foregoing, I cannot accept the amount of K201,300.00 which the Plaintiffs have endorsed on the writ of summons without proof of how it was arrived at.

5.18 For these reasons, I find that this is not an appropriate case to grant the order for leave to enter judgment in default. Consequently, the application is dismissed and I order that the Plaintiffs shall proceed as though the Defendant had entered appearance and filed a defence. The parties shall appear before this Court on 22nd July, 2024 at 08:30 hours for a status conference.

5.19 I make no order as to costs.

DELIVERED AT LUSAKA THIS 25TH DAY OF JUNE, 2024.





**M.C. KOMBE
JUDGE**