IN THE HIGH COURT FOR ZAMBIA 2019/HP/1476
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

16 APR 2024
REGISTRY I

BETWEEN

NATHAN SINKALA AND 119 OTHERS PLAINTIFFS

AND

BROOK CHERITH ESTATES AGENTS 1ST DEFENDANT

CHARLES CHANDA 2ND DEFENDANT

Before the Hon. Lady Justice C. Lombe Phiri in Chambers

For the Plaintiffs: *Mr D. Shachinda – Ferd Jere & Co*

For the 2nd Defendant: *B. B. Mwenya – Nyonod – F. B. Nanguzgambo & Associates*

RULING

Cases referred to:

1. **Water Wells Limited v Jackson (1984)ZR 98**
2. **Patel and another v Monile Holding Company Limited (1993 - 1994) ZR 20 (S.C.)**
3. **Stanley Mwambazi v Morrester Limited (1977) ZR 108 (S.C)**
4. **Nyampala Safaris Zambia Limited and others v Zambia Wildlife Authority and others (SCZ/8/179/2003)**
5. **Barrington v Lee(1971) 3 ALLER 123 (CA)**

6. **Tata (Zambia) Limited v Shilling Zinka(1986) ZR 51 (SC)**
7. **Amanita Milling Limited vs Nkhosi Breweries Limited, (2008/HPC/0241)**
8. **Robert Simeza (Suing in his capacity as Executor of the Estate of Andrew Hadjipetrou) Motel Enterprises Limited (T/A Andrews Motel) Marianthy Noble Yolande Hadjipetrou v Elizabeth Mzyeche (Suing as the Mother and Guardian Ad Litem of Minor Beneficiaries) (SCZ Judgment 23/2011)**

The Plaintiffs in this matter, by way of Writ of Summons and Statement of Claim, brought an action against the defendants for a refund of an amount of K3 873 637.00 being money paid in pursuance of purchase of property that was being sold by the 1st Defendant. The interest of the 2nd Defendant in the matter was that he is a Director in the 1st Defendant company and had been collecting money from the Plaintiffs for the land. The record shows that the action was commenced on 16th September, 2019. The Defendants never entered appearance in the matter although on 6th November, 2019 the 2nd Defendant had responded to an application for an interim injunction that had been successfully mounted by the Plaintiffs. On 21st January, 2020, a judgment in default of appearance and defence was entered in favour of the Plaintiffs. On 8th April, 2021, the Court endorsed a consent order discharging the ex-parte order granted by the Court on 16th September, 2019, which had restricted the 1st Defendant's from transacting on their Stanbic and ZANACO bank accounts. On 22nd November, 2022, two years after the Judgment in Default of Appearance had been granted to the Plaintiffs, the 2nd Defendant filed the applications which are the subject of this Ruling. The said applications are the stay of execution of the judgment in default of appearance

and defence and for setting aside of the judgement in default of appearance and defence.

There was no affidavit in support of the application to stay the execution of the judgment in default of appearance but there was an affidavit in support of the summons to set aside the judgment in default of appearance and defence. The said affidavit was deposed to by the 2nd Defendant himself. He claimed that court process was never personally served on him and he only came to have notice of the proceedings on 16th June, 2022 when advocates for the Plaintiffs served him with the Notice of Bankruptcy. He averred that he had a Defence on the merits, which draft he exhibited. It was averred that the on advice of his lawyers, he had been told that it was the practice of the Court to allow triable matters to come to court and be determined on their merits despite procedural irregularities. It was averred that the Plaintiffs would not suffer any prejudice if the judgment in default of appearance and defence is set aside as it was given ex-parte without both parties being heard. It was averred that it was in the interest of justice that the judgment in default of appearance and defence be set aside so that both parties could be heard and the matter determined on its merits.

In the arguments in support of the application it was submitted that the application before the Court was premised on Order 35 Rule 5 of the High Court Rules Chapter 27 of the Laws of Zambia. It was stated that the order obtained by the Plaintiffs could be set aside upon sufficient grounds shown to the court. It was stated that one of the major grounds was that the defendant has a defence on the merit. Reliance was placed on the cases of **Water Wells**

Limited v Jackson (1984)ZR 98[1], Patel and another v Monile Holding Company Limited (1993 - 1994) ZR 20 (S.C.)[2] and **Stanley Mwambazi v Morrester Limited (1977) ZR 108 (S.C)[3]** to show that cases ought to be considered on their merit. It was stated that the rules of natural justice demand that both parties must be heard. It was further stated that the 2nd Defendant has exhibited a defence on the merits in the Affidavit in support of the application and his defence was to the effect that there was no contract between himself and the Plaintiffs and therefore he cannot be liable. It was prayed that the judgment in default of appearance and defence be set aside.

The Plaintiffs filed into Court a combined affidavit in opposition to the applications. The affidavit was deposed to by Nathan Sinkala. It was averred that the Defendants were served with the Court process on 16th September 2019 at the Defendant premises where the 2nd Defendant is and was at all material times a Director and Shareholder. The Affidavit of Service was exhibited. It was further averred that upon receipt of the court process the defendants proceeded to retain Messrs Mwack Associated on 23rd September, 2019. The Notice of Appointment which was filed into Court was exhibited. It was stated that subsequent court process was served on the Defendant's Advocates. That regardless, the Defendants continued to exhibit laxity in defending the matter despite being duly served with the court process as both defendants were represented by counsel on the record. It was also averred that there being no Appearance and Defence for a period of over four months from the date of filing of the Notice of Appointment by his lawyers, the Court entered Judgment in Default of Appearance and Defence on 31st January, 2020. That not withstanding the Defendants neglected to pay the Judgment

sum within 7 days. It was averred that the Plaintiffs subsequently took steps to execute the said Judgment but the Sheriffs entered a nulla bona. The same was exhibited. That, consequently, on 9th July, 2020, the Plaintiffs commenced winding up proceedings against the 1st Defendant under cause 2020/HPC/0555. That in furtherance of this the 1st Defendant was placed on provisional liquidation on 20th July, 2020. It was averred that the winding up proceedings are still on going and had reached an advanced stage as trial had been set. In the like manner bankruptcy proceedings had commenced against the 2nd Defendant. It was averred that contrary to the assertions of the 2nd Defendant, he was in fact liable as he was collection money in his personal capacity and using the 1st Defendant to collect money, therefore they were both liable. It was further averred that the application by the 2nd Defendant was late in the day, being brought almost three years from the date of the Judgment in Default of Appearance and Defence.

In the arguments in opposition it was stated that the Court has the jurisdiction to stay the execution of the judgment in default pursuant to Order 36 rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia. It was further submitted that the case of **Nyampala Safaris Zambia Limited and others v Zambia Wildlife Authority and others (SCZ/8/179/2003)**[4] provides the criteria for the grant of a stay of execution which is good and convincing reasons. Also that a successful litigant ought not to be deprived of the fruits of their litigation as a matter of course. In relation to the application to set aside the judgment in default of appearance it was posited that the same was made pursuant to Order 35 Rule 5 of the High Court Rules. It was submitted that the remedy sought by the defendant is a discretionary one, however, guidance

has been given in decided cases, regarding the elements to be satisfied in order for the court to set aside a Default Judgment. It was further submitted that the case of **Mwambazi v Morester Farms Limited (1977) ZR 108**[3] sets out the relevant principle applicable to cases where it is sought to set aside a regular judgment by default. Emphasis was placed on the guidance given that the defence of the Defendant ought to be considered on the merits as long as there was no prejudice caused to the Plaintiff by allowing the defendant to defend its claim. It was stated that it was settled law that a judgment in default could be set aside. It was also stated that in setting aside the judgment in default the defendant should explain his default and show that his defence has merit. Reliance was placed on the cases of **Barrington v Lee(1971) 3 ALLER 123 (CA)**[5] and **Tata (Zambia) Limited v Shilling Zinka(1986) ZR 51 (SC)**[6]. It was submitted that the main issue for consideration should be that there is a defence on the merits. It was further submitted that the import of the cited legal provisions and case law that an application for stay of execution is only granted on good and reasonable grounds so that a litigant should not be deprived from enjoying the fruits of a judgment. Further, that the remedy of setting aside a judgment in default is not a matter of right. It was stated that it is a remedy in the preserve of the discretionary powers of the Court. It was submitted that the court if inclined to grant the remedy must be satisfied that that the Defendant has disclosed the Defence on merit that has prospects of success and that the Defendant has given a reasonable explanation to justify the granting of his application. It was argued that in the case in casu the 2nd Defendant has failed to demonstrate good and convincing reasons for the court to stay execution of the said judgment in default of appearance and defence. The 2nd Defendant has further sought to invoke a discretionary remedy by

absence was not deliberate, but was due to accident or mistake, the Court will be unlikely to allow the hearing.

(3) Where the setting aside of judgment would entail a complete re-trial on matters of fact which have already been investigated by the Court the application will not be granted unless there are strong reasons for doing so.

(4) The Court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospect of success.

It is clear that the first appellant had notice, as the matter was adjourned at his counsel's request. He took no steps to file an affidavit in opposition. Even in the Supreme Court he never filed the appeal within time. The first appellant's attitude in this litigation has been similar to that in the lower Court and this Court. He appears to be seized with the notion that he must drive the litigation and not the judges. The High Court and Supreme Court judgments decided on the facts.

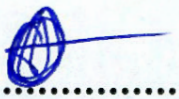
Careful consideration has been made of the circumstances of this case. It is pretty clear from the record and the depositions that the 2nd Defendant attempted to mislead the court that he never had notice of the proceedings. However, this is unconceivable that the 2nd Defendant who received process on behalf of the 1st Defendant and instructed counsel in the matter was unaware of the proceedings. The record even has an affidavit in opposition deposed to by the 2nd Defendant, dated 6th November, 2019. Clearly, from the record and facts as deposed to by the Plaintiff, there is no shred of truth in support of the applications that have been set out by the 2nd Defendant. The applications if

granted will only delay the Plaintiffs enjoyment of the fruits of their judgment. The evidence on the record clearly shows that the 2nd Defendant was always aware of the matter in court.

In view of the foregoing the applications are dismissed with costs for the Plaintiffs.

Leave to appeal is granted.

Dated at Lusaka this ....16th....day of ....APRIL....2024



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C. LOMBE PHIRI

JUDGE