WATER WELLS LIMITED v WILSON SAMUEL JACKSON (1984) Z.R. 98 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, J.S.S
10TH MAY, AND 15TH JUNE, 1984
(S.C.Z. JUDGMENT NO. 4 OF 1984)

Flynote
Civil Procedure - Appeal - Registrar - Appeal from - When appeal lies to a judge at Chambers - When appeal lies to the Supreme Court.
Civil Procedure - Leave to defend - When granted.
Civil Procedure - Costs - Successful appellant - When liable.
Civil Procedure - Default by one party - Opponent's failings not to provide answer to that party's own default.
Civil Procedure - Default judgment - Application to set aside - Consideration by Court of desirability of full trial.
Civil Procedure - English Rules of Practice and Procedure - When applicable.
Civil Procedure - Jurisdiction - Default judgment - Assessment of damages - Appeal from Registrar to Supreme Court.
Default Judgment - Assessment of damages - Appeals from both - To which court appeals lie.

Headnote
This was an appeal against a refusal by the High Court to set aside a judgment in default of defence. The facts of the appeal are set out in the judgment.

Held:
(i) Order 30 r. 10 of the High Court Rules confers a right of appeal from a Registrar to a Judge at Chambers, but by Practice Direction No. 1 of 1979, appeals against the assessment of damages by a Registrar lie direct to the Supreme Court.
(ii) Applications which may result in a judgment being set aside should be accorded priority over other proceedings stemming out of the judgment called in question.
(iii) No need arises to draw a parallel between the Rules of the Supreme Court of England and those of the High Court Rules of Zambia when the latter Rules make it abundantly clear as to the position in question.
(iii) A High Court judge has jurisdiction to entertain an appeal against a default judgment, notwithstanding that an appeal against assessment which lies to the Supreme Court may already have been lodged .
(v) It is no answer to a party's predicament caused by that party's own default to point at the opponent's alleged failings.

(vi) Although it is usual on an application to set aside a default judgment not only to show a defence on the merits, but also to give an explanation of that default, it is the defence on the merits which is the more important point to consider.

(vii) If no prejudice will be caused to a plaintiff by allowing the defendant to defend the claim,then, the action should be allowed to go to trial.

(viii) Where a respondent has been put to great expense and inconvenience all traceable to the appellant's default, even though an appeal succeeds the costs need not follow the event.

Cases referred to:

(1) Mwambazi v Morester Farms Limited (1977) Z.R. 108.

(2) Ladup Ltd. v Siu (The Times, Thursday November, 24, 1983).

Legislation referred to:

High Court Rules of Zambia, Cap. 50, Ord. 20 r. 15 Ord. 30 r. 10 Rules of the Supreme Court of England, White Book, Ord. 32 r. 15 (3).

For the Appellant: A. M. Hamir, of Solly Patel, Hamir and Lawrence.
For the respondent: E.A. Gani (instructed by Christopher Russell Cook and Co.),

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Judgment

NGULUBE, D.C.J.: delivered the judgment of the court.

This is an appeal against the refusal by the High Court to set aside judgment in default of defence. For convenience, we will refer to the parties by their designation in the court below; thus the respondent will be called the plaintiff and the appellant will be called the defendant.

The relevant history of' the case is as follows: The plaintiff, being dissatisfied with the work done by the defendant under a contract concerned with a borehole, issued a writ on 19th November, 1981, to which an appearance was entered by a firm of advocates known as Lusaka Partners (as agents for another firm calling itself Messrs Chuundu Chambers). The order for directions was taken out on 2nd April ,1982 and, in conformity therewith, the Plaintiff served a statement of claim on 12th April, 1982, on the said Messrs Lusaka Partners. The substance of the statement of claim was to the effect that the defendant had been negligent in the performance of the contract and the plaintiff claimed damages. The time allowed for delivery of the defence and counterclaim, if any, was 21 days, which therefore meant that the defence should have been delivered around the beginning of May, 1982. No defence having been delivered, the plaintiff entered Interlocutory Judgment in default of defence for damages to be assessed. This was on 21st July, 1982. On 10th August, 1982, the plaintiff took out a notice for the assessment of damages returnable initially on 1st September, 1982. (on 24th August,1982, a firm of advocates, rejoicing under the name of Messrs Zambezi Chambers, placed themselves, by a notice to that effect, on record as having taken over

conduct of the defendant's case in place of Messrs Chuundu Chambers. The learned Deputy Registrar eventually heard the plaintiff's evidence on the assessment on 3rd November, 1982, when the defendant's advocates of record applied for, and obtained, an adjournment for the purpose of

taking instructions for the cross-examination of the plaintiff upon his evidence on the assessment. The case was adjourned to 15th November,1982, when Messrs Zambezi Chambers were allowed to withdraw from the case, the defendant having withdrawn instructions from them.

On 19th November,1982, the defendant, by his present advocates, filed an application returnable in the first instance on 29th November, 1982, to set aside the default judgment and at the same time to say any further proceedings on the assessment. In the interval between the making of this application and the hearing thereof, which finally took place on 14th February, 1983, the learned Deputy Registrar did, on 13th December,1982 , deliver his judgment on the assessment. In terms of Practice Direction No. 1 of 1979, the defendant has appealed to this court against the award of damages and this is a case pending before us as Appeal No. 33 of 1983 which has been adjourned generally pending the decision herein. To continue with the matter in hand, however, the learned Deputy Registrar refused to stay further proceedings on the assessment on the ground that the assessment had already been completed. He farther refused to set aside judgment on the ground that, in his judgment, no sufficient defence had been shown to exist on the merits.

The defendant appealed to a High Court Judge at Chambers against the refusal by the learned Deputy Registrar to set aside the judgment in default of defence. The learned appellate judge considered that, as the learned Deputy Registrar had already assessed the damages, a judge has no jurisdiction to entertain an appeal since it would be anomalous for an appeal against the judgment to lie to him when the appeal against the assessment must lie to the Supreme Court, in terms of Practice Direction No. 1 of 1979. In the premises, the learned appellate judge was of the view that an appeal against the judgment, in these circumstances must lie to the Supreme Court only.

The defendant has appealed to this court against the determination by the learned appellate judge and, in the alternative, against that of the learned Deputy Registrar. On behalf of the defendant, Mr Hamir has submitted that, having regard to the provisions of Order 30, Rule 10, and those of Order 20, Rule 15 of the High Court Rules, the learned appellate judge erred in holding that he had no jurisdiction. The relevant portion of Order 30, Rule 10 reads:

> (1) " Any person affected by any decision, order or direction of the Registrar may appeal therefrom to a judge at Chambers."

It is clear to us that this Rule confers a right of appeal from a Registrar (which includes the Deputy Registrar) to a judge at Chambers; and this is so save for decisions or order to which Practice Direction No. 1 of 1970 applies. The Practice Direction in question is concerned with appeals

against the assessment of damages and was not intended to, nor does it in fact, apply to decisions such as the refusal to set aside a regular judgment in default of a pleading. The alleged anomaly conversed by the learned appellate judge, and repeated by Mr Gani (on behalf of the plaintiff) is said to arise in a situation where, in one and the same case, an appeal against damages lies to the Supreme Court, while an appeal affecting liability and upon which the damages depend, lies to a High Court judge at Chambers. Whether this sort of situation is untidy or unsatisfactory is entirely beside the point. If anything, this may very well be a good reason, not only for an early amendment of the relevant Rules, but also for the parties, and the courts, to consider that applications which

may result in a judgment being set aside should be accorded priority over other proceedings stemming out of the judgment called in question. There is certainly very little point, as happened in this case, in ignoring an application against a judgment and in proceeding to conclude and deliver a decision on the assessment based on that judgment when the application might have succeeded and the court's further labour been in vain. However, as already stated, the alleged anomaly is not the issue. As has been noted, an appeal lies to a judge at Chambers and the jurisdiction to set aside a judgment in default of defence is clearly spelt out in Order 20, Rule 15 which reads:

> "Any judgment by default, whether under this Order or under any other of these Rules, may be set aside by the court or a Judge, upon such terms as to costs or otherwise as such court or Judge may think fit."

The Rule which we have quoted is clear and needs no elaboration. It plainly refers to any judgment by default and does not make any distinction between an Interlocutory Judgment and a final judgment. The parallel which Mr Gani sought to draw from Order 32, Rule 5(3) of the Rules of the Supreme Court of England (which it was said distinguishes a perfected judgment from an Interlocutory one) does not even arise when our own Rules, in Order 20 as a whole, make it abundantly clear that any default judgment whatsoever may be set aside. Indeed a cursory glance through the Rules, under Order 20, reveals that the Order is concerned with both final and Interlocutory Judgment by default.

We are of the firm opinion that under the Rules, the learned appellate judge had jurisdiction to entertain the appeal to himself against the default judgment, notwithstanding that an assessment had been concluded by the learned Deputy Registrar. We are, therefore, satisfied that the learned appellate judge had erred in holding otherwise. We do not wish to add to the delay in the disposal of this case by remitting it below and, for that reason, we propose to consider the case on the merits, as we are, in any event, entitled to do.

Mr Hamir, sought to argue that the plaintiff had contributed to the delay. The submissions in this respect were, of course, wholly untenable. As Mr Gani pointed out, it was the defendant and his various former advocates who were in default and it is, in any case, no answer to a party's predicament caused by that party's own default to point

at the opponent's alleged failings which have nothing to do with the issue at hand. The relevant principles applicable to cases where it is sought to set aside a regular judgment by default were considered by this court in *Mwambazi v Morester Farms Limited* (1), where it was held (reading from headnotes) that:

> (a) "It is the practice in dealing with bona fide interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties; where a party is in default he may be ordered to pay costs, but it is not in the interests of justice to deny him the right to have his case heard."
> (b) "For this favourable treatment to be afforded there must be no unreasonable delay, no mala fides, and no improper conduct of the action on the part of the applicant."

Indeed the Court of Appeal in England has held to similar effect in *Ladup v Siu* (2), when they said that, although it is usual on an application to set aside a default judgment, not only to show a defence on the merits but also to give an explanation of the default, it is the defence on the merits which is the more important point to consider. We agree with them that, it is wrong to regard the explanation for the default, instead of the arguable defence as the primary consideration. If the plaintiff would not be prejudiced by allowing the defendant to defend the claim then the action should be allowed to go on trial.

On the authorities to which we have referred, it is obvious that as at the time when the defendant first made application (which is the proper time to take into account) the delay and/or possible prejudice was of small enough a magnitude which could have been compensated by an order for costs. It only remains to consider whether the primary consideration, namely, the arguable defence, exists in this case.

Mr Gani has submitted that the defendant had not put forward any meaningful defence. The defence was put forward by the defendant's Managing Director in an affidavit in the following terms:

> "19. That I have a valid defence in this action in that the damage caused to the Plaintiffs borehole was due to the Plaintiff having dropped some piping and machine tools into the borehole before the Defendant had undertaken the work, notice of which was given to the Plaintiff at the time the Defendant undertook the work and further the Defendant was aware of this by his own knowledge."
> "20. That the Defendant has a valid defence in this action in that the danced cause herein was not caused by any act or omission of the Defendant its servants or agents but was caused by an act by the Plaintiff himself "

While we agree that paragraph 19 of the affidavit by the defendant's Managing Director was not couched in the happiest of terms, yet there was in the next paragraph a denial of negligence in the performance

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of the contract and an assertion that the plaintiff had himself brought about the misfortune which befell him. We are further fortified in this view by a perusal of the record and the documents, all of which were available to the learned Deputy Registrar when he dealt with the application to set aside the default judgment. Indeed the learned Deputy Registrar would have been entitled to have had regard to all the material which was then actually before him, whether specifically advanced m the specific application or not, in order for justice to be done in this case where, on the plaintiff's own evidence, third parties were involved in one way or another in the process of the plaintiff attempting to commission the borehole, the subject of this litigation. In our view, an arguable defence was disclosed and the court below should have exercised its discretion in favour of defendant on the principles enunciated in the *Mwambazi* case (supra). We propose to rectify the errors below. The appeal is allowed and the default judgment set aside. It also follows that a hearing will not now be necessary on the related appeal No. 33 of 1983 concerned with the damages assessed on the judgment which we have set aside and which damages must necessarily fall with the reversal of the judgment.

The plaintiff has obviously been put to great expense and inconvenience all traceable to the defendant's default. Though, therefore, the appeal has succeeded, it was brought about through the default of the defendant and the costs cannot follow the event nor can they be in the case to follow. They will be borne by the defendant and they are payable immediately. Our order is that the plaintiff will have his costs of his appeal as well as the cost and expenses in the court below; excluding only the costs of the action prior to the defendant's default which will be in the cause. The costs are to be taxed in default of agreement. To prevent any delay in the main action, it is ordered that the defendant deliver his defence to the plaintiff's statement of claim within 14 days of the date hereof; thereafter the Order for directions already made shall apply to the rest of the proceedings.

Appeal allowed, default judgment set aside
