JAMAS MILLING COMPANY LIMITED AND IMEX INTERNATIONAL (PTY) LIMITED

SUPREME COURT OF ZAMBIA

NGULUBE CJ, SAKALA, CHITENGI, JJS
4th JUNE, 2002 AND3rd SEPTEMBER, 2002
(SCZ Judgment No. 20/2002)

Flynote:

Court Procedure – commercial list
Court Procedure – Review of judgment – when possible
Court Procedure – Order 53 of High Court rules – purpose of enactment

Headnote:

The respondent commenced an action in the commercial court against the appellant claiming some US$ 720,900.14 damages for breach of contract. The appellant denied this claim and instead counter claimed for US$ 35,709.72 and K 973,737,600.00, a claim which the respondent company in its defence to the counter claim also denied. The matter was set down for scheduling conference on 1st October, 2001. on that date the respondent's advocate attended but the appellant's advocate was absent. The respondent's advocate applied for an adjournment due to the absence of the appellant's advocate. The court adjourned the matter to 8th October 2001 at 09:30 hrs and ordered that the appellant pays K150, 000.00 to Court as hearing fee and costs to the respondent for the adjournment. The High Court entered judgment in default of as the appellant did not pay the K150,000.00 hearing fee. On appeal to the Supreme Court;

Held:

(i) That for review under Order 39 Rule 2 of the High Court Rules to be available, the party seeking it must show that he has discovered fresh material evidence, which would have had material effect upon the decision of the court and has been discovered since the decision but could not with reasonable diligence have been discovered before.

(ii) Further that Rule 5 Order 53 Commercial Action Practice Direction does not make the ordering of payment of a hearing fee mandatory.

(iii) That Rule 5 applies only to interlocutory applications.

(iv) That nothing in the Rules in the Practice Direction which stops a judge in the commercial list from proceeding with the scheduling conference in the absence of one of the parties and give directions which will bind the party who did not attend the scheduling conference.

Authorities Referred to:

1. Order 53 of the High Court Rules, Chapter 27 of the Laws of Zambia, Rules 5 and 6.

2. Order 39 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia.

3. Robert Lawrence Roy Vs Chitakata Ranching Company Limited 1980 ZR 198.

4. Order 35 Rule 5 High Court Rules Chapter 27 of the laws of Zambia.

For the Appellant: Mr. W. Nyirenda of Messrs Ezugha, Musonda & Company
For the Respondent: N/A

Judgment

Chitengi, JS, delivered the Judgment of the Court.

We shall refer to the appellant as the Defendant and the Respondent as the Plaintiff which is what they were in the Court Below.

To put this appeal in clear perspective, it will be necessary to go into the brief history of this matter. The Plaintiff commenced an action in the Commercial Court against the Defendant claiming some US $720,900.14, damages for breach of contract. The Defendant denied this claim and instead counter claimed for US $35,709,72 and K973,737,600.00, a claim which the Plaintiff in its Defence to the Counter Claim also denied.

The Matter was set down for scheduling conference on 1stOctober, 2001. On that date the Plaintiff's advocate attended but the Defendant's advocate was absent. The Plaintiff's advocate applied for an adjournment because of the absence of the Defendant's advocate. The Court adjourned the matter to 8thOctober, 2001 at 09:30 hours and ordered that the Defendant pays K150,000.00 to Court as hearing fee and costs to the Plaintiff for the adjournment.

When the matter come before the court on 8th October, 2001, the Plaintiff's advocate appeared and Mr. Patrick Siampwili, an agent of the Defendant's advocates, appeared for the Defendant. The Court announced that the Defendant had not complied with the court order to pay the hearing fee as required by the Rules. Mr Siampwili made a serious undertaking to pay the fee as ordered by the Court. Mr. Mwiche, advocate for the Plaintiff, raised no objection and said they could proceed and the money could be paid later. The Court would have none of this, saying the Court did not have the powers Counsel were giving it and that if fees were not paid the other party must, as a matter of law, proceed with the claim. The Court then gave the Plaintiff judgment for the sum of US $720,900.14 with costs.

On 11thOctober, 2001 the Defendant took out a summons to review the Judgment aforesaid pursuant to Order 39 Rule 1 of the High Court Rules (2). Mr. William Boli Nyirenda, Counsel for the Defendant, swore an affidavit that he had been informed by his agents Messrs MNB Legal Practitioners that judgment had been entered against the Defendant on "admissions" of the Defence and Counter Claim. Mr. Nyirenda in his affidavit drew the Court's attention to Paragraphs 4, 5, 6, and 7 of the Defence and Counter-Claimwhich show that the claim was not admitted.

In reply to Mr. Nyirenda's affidavit Mr. Kafula Mwiche, the Plaintiff's advocate, swore an affidavit in opposition to the effect that the Judgment was entered not on admission but in default because the Defendant had not paid the K150,000.00 hearing fee and Plaintiff's costs and that even at the time Mr. Mwiche swore the affidavit the Defendant had not paid the hearing fee and the Plaintiff's costs. Further, Mr. Mwiche deposed that he had in fact faxed the Court Order to the Defendants advocates on 2nd October, 2001.

The application to review was heard on 11thNovember, 2001 and on 16thNovember, 2001 the Court delivered a Reserved Ruling dismissing the application to review. The Court was of the opinion that the Rules in the Commercial Court must be complied with as they were made for a special purpose; that in any case there was no explanation as to why the K150,000.00 hearing fee was not paid and that on the affidavit of Mr. Mwiche the Court's Order of the 1stOctober, 2001 was communicated to the Defendants by fax on 2nd October, 2001.

The Defendant now appeals to this Court against the refusal by the Court below to review the Judgment.

The Defendant filed heads of arguments with two grounds of appeal. In the heads of arguments we have been referred to numerous authorities on setting aside of judgment obtained in default and on service of Court orders on parties. These are the usual authorities we have dealt with before and we do not intend to recite them as we find nothing new in them which will make us depart from what we have previously said.

The gist of the heads of argument is that a judgment in default is liable to be set aside where there is an explanation of the default and where there is a defence on the merits. That a Court Order is a formal document whose form and content are a matter of law; that the letter exhibited by Counsel for the Plaintiff was not a Court Order.

In arguing the heads of argument Mr. Nyirenda submitted that a practice direction can not impeach the Court's discretion, particularly in a case like this one involving a lot of money. The sanction imposed by Order 53 Rule 5 of the High Court Rules (1) remains a sanction and cannot be used to determine matters before court summarily. Mr. Nyirenda then said that he was misled by their agent that judgment was on admission. He said when he appeared before the Court, he asked the Court to re-look at the Defence and Counter-Claim. It was then that the Court said the Defendant had not paid K150,000.00 hearing fee for failing to appear at the scheduling conference. He was not aware of the fax at the time they were before the Court. He did not receive the fax. This was giving evidence from the Bar. The failure by Mr. Nyirenda to swear an affidavit explaining what happened must incur our disapproval . It was Mr. Nyirenda's submission that a fax does not constitute a Court order. Different sanctions should be imposed instead of inflicting injustice on the Defendant.

The Plaintiff's advocates did not appear to argue the appeal, nor did they file heads of argument. We were assured by Mr. Nyirenda that the Plaintiff's advocates were aware of the date of hearing of the appeal, and there being no explanation from the Plaintiff's advocates.

We have considered the submissions of counsel and we have looked at the record and the Ruling of the Court below.

While we agree that rules of procedure are meant to facilitate proper administration of justice, we do not accept that in all cases rules of procedure cannot be made mandatory and that their breach cannot be visited by unpleasant sanctions against the party who breaches them.

The Commercial list, where the action was commenced, and Order 53 of High Court Rules (1) which was introduced to regulate procedure in the Commercial List are not without history. The introduction of the Commercial List was a reaction to the business community's complaints that cases of commercial nature were taking too long to dispose of so that by the time judgment was rendered the parties had suffered economic ruin. The Judiciary's response was to introduce the Commercial List as a fast track. Of course, the Commercial List would have

meant nothing if the dilatory procedures in the General List were made applicable to the Commercial List also. Hence, the introduction of Order 53(1) to specifically deal with Commercial cases. The sanctions in Order 53(1) are meant to make parties move with all the speed required to dispose of the case as quickly as possible.

The Rules in Order 53(1) are not peculiar to Zambia. In other jurisdictions, particularly in England and Wales where we adopted these Rules, the Rules are enforced with full vigour and breach of these Rules can have serious consequences. We will hate to have a situation where lax application of the Rules in the Commercial List will result in the commercial List itself being just another General List with a different name.

In the circumstances, the arguments that the Rules will work injustice do not find favour with us. In fact, it is not in the interest of justice that parties by their short comings should delay the quick disposal of cases and cause prejudice and inconvenience to the other parties. Those who come to the Commercial List must strictly abide by the Rules in that List. Everything has a price. Those who want their cases quickly disposed of must strictly abide by the Rules of the Commercial List. Parties and advocates litigating in the Commercial List must take heed of this warning.

Having made these comments we now deal with the defendants' application for review. The application for review was made pursuant to Order 39 Rule 1 of the High Court Rules (2). The affidavit in support of this application did not state that fresh material evidence had been found after the delivery of the judgment but stated that since this Judgment was entered on admissions,.p the Court should re-look at paragraphs 4, 5, 6 and 7 of the Defence and Counter-Claim.

For review under Order 39 Rule (2) of the High Court Rules to be available the party seeking it must show that he has discovered fresh material evidence which would have had material effect upon the decisions of the Court and has been discovered since the decision but could not with reasonable diligence have been discovered before: ROBERT LAWRENCE ROY VS CHITAKATA RANCHING COMPANY LIMITED(3). It is clear on this authority that the fresh evidence must have existed at the time of the decision but had not been discovered before. That is not the position here. The Defence and Counter Claim were before the court below when it entered the judgment. In any case, the Court below did not adjudicate on any evidence. The Court below merely entered Judgment for the Plaintiff because the Defendant did not pay the hearing fee of K150,000.00 it ordered to be paid. In the event, the application for review was misconceived. The proper application would have been one of setting aside judgment in default under Order 35 Rule 5(4).

As the Court below in entering Judgment for the Plaintiff relied on Rule 5 Order 53 Commercial Actions Practice Direction (1) it will be necessary to reproduce Rule 5 in full:-

"5. Where a party requests an adjournment and the Judge whilst granting an adjournment is of the view that the reasons for adjournment are not very firm, the Judge may, apart form awarding costs to the opponent, condemn the party requesting the adjournment to a hearing fee to be paid to the Court. Such fee shall be paid before the matter proceeds. Provided that where the party condemned to such hearing fee is not the applicant and that party fails or neglects to pay the fee by the next hearing day, the applicant shall be granted his application. Where the condemned party is the applicant and he fails or neglects to pay the hearing fee by the next hearing day, the application shall be dismissed;"

As there appears to be some problem with the application of Rule 5 we wish to put the correct interpretation on it for the guidance of trial courts in the Commercial List.

We have carefully read the provisions of this Rule and the other Rules in the Practice Direction. Properly read, we hold that Rule 5 does not make the ordering of payment of a hearing fee mandatory. An order to pay hearing fee can only be made where the reasons for an adjournment are not very firm. Furthermore, we hold that Rule 5 applies only to interlocutory applications. The use of the word "Applicant" and not "Plaintiff" or "Defendant" is not without significance. As Rule 5 only applies to interlocutory applications and not to the substantive action, a judgment in default cannot be entered on the substantive matter under this Rule.

Rule 5 is not in derogation of the other Orders in the High Court Rules. For example, before Rule 5 can be invoked the High Court Rules regarding service and proof of service of court process must have been complied with. The other Rules in Order 53 must also have been complied with. For example, with regard to scheduling conference, the non attendance of which by the Defendant led to the entry of judgment, Rule 6 must be complied with before Rule 5 comes into play.

Since the determination of this appeal to a great extent also turns on the provisions of Rule 6 it will be necessary to reproduce it in full. Rule 6 reads:-

"6(1) A Judge shall within 14 days after the filing of the Memorandum and Defence, Summon the parties to "scheduling conference."

What this means is that before a Judge can invoke Rule 5 he must be satisfied that in fact all the parties have been summoned and are aware of the scheduling conference date. In this case, we have searched the record for the notification of the scheduling conference from the court but in vain. Neither have we found any evidence of proof of service on the Defendant. In the circumstances, the court below was not entitled to order the Defendant to pay a hearing fee when there was no proof that the Defendant was aware of the scheduling conference date.

In any case, the court below could not order the Defendant to pay a hearing fee because in the circumstance of this case the order flew into the teeth of Rule 5 it self. Rule 5 which we have reproduced above clearly states that the party to be ordered to pay a hearing fee is the party who requests an adjournment on grounds -which are not very firm. In this case the Defendant did not apply for an adjournment. The adjournment was applied for by the Plaintiff who stated that he did not know why the Defendant was not present. So the Defendant was condemned to pay the hearing fee not because it applied for an adjournment without very firm grounds but because it was absent and its absence made the Plaintiff to apply for an adjournment . But that is not what Rule 5 says. In the circumstances, we are firm in our minds that the court below misdirected itself in law when it ordered the Defendant to pay hearing fee because the Defendant was absent at the scheduling conference. We are also firm in our minds that the court below misdirected itself in law when it entered judgment in default in favour of the Plaintiff on the ground that the Defendant had not paid the hearing fee it was ordered to pay.

In conclusion, we wish to state that we find nothing in the Rules in the Practice Direction which stops a Judge in the Commercial List from proceeding with the scheduling conference in the absence of one of the parties and give directions which will bind the party who did not attend the scheduling conference.

For the reasons we have given, we allow the appeal. The judgment of the court below is set aside and we remit the matter to the court below for scheduling conference and thereafter to be dealt with according to law. We order that the costs be in the cause.
