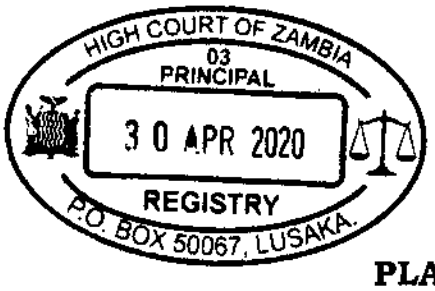
IN THE HIGH COURT FOR ZAMBIA **2019/HP/1839**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)



BETWEEN:

PRIMO ZAMBEZI LIMITED **PLAINTIFF**

(T/A PRIMO ZAMBEZI NATURAL CARBONATED WINE)

AND

PAMUTUNDA ENTERPRISE LIMITED **1ST DEFENDANT**

ZAMBEZI FOOD AND BEVERAGES **2ND DEFENDANT**

CHARLES ILOPU AND OTHERS **3RD DEFENDANT**

Before: ***The Hon. Mr. Justice W.G.K. Muma.***

For the Plaintiff: *Mr. Mr.Zulu from Messrs. Philsong & Partners and Mr. J. Mulonga from Messrs. MSK Advocates*

For the 1st Defendant: *Mr. K. Haongola Messrs. Ilunga & Company*
For the 2nd Defendant: *Mr. Inambao from Messrs. ICN Legal Practitioners*
For the 3rd Defendant: *No Appearance*

RULING

Cases Referred to:

1. ***Stanley Mwambazi v. Morester Farms Limited (1977) ZR 108;***
2. ***Water Wells Limited v. Wilson Samuel Jackson (1984) ZR 121 SC;***
3. ***Fanny Muliango and Samson Muliango v. Namdou Magasa and Maruja Transport & Farming Company Limited (1988 - 1989) Z.R. 209 (S.C.); and***

4. ***Costa Tembo v Hybrid Poultry Farm (Z) Limited (SCZ Judgement No. 13 of 2003)***

Legislation and materials referred to:

1. ***The High Court Act Chapter 27 of the Laws of Zambia; and***
2. ***The Rules of the Supreme Court 1999 Edition (White Book)***

The Plaintiff took out a Writ of Summons accompanied by a Statement of Claim on 18th November, 2019, seeking the following substantive reliefs:

1. ***Damages for loss of business;***
2. ***Damages;***
3. ***An order for an injunction retraining the Defendant either by themselves, their agents, servants and whosoever from counterfeiting or reproducing the Plaintiff's products and illegal use of the Plaintiff's Trademark;***
4. ***An order compelling the Defendants to remove all counterfeit products that have been saturated on the market;***
5. ***Costs; and***
6. ***Any other relief the court may deem fit.***

The 2nd Defendant filed a Memorandum of Appearance and Defence on 5th December, 2019 where the 2nd Defendant made a counter claim. The 2nd Defendant was claiming:

1. ***Damages for criminal defamation and adverse publicity;***

2. ***Special damages of K215, 400.00 for loss of business that was outlined as follows:***

(i)	***The 2nd Defendant produces 300 cases of wine valued at K43 per case per day by 14 making it***	***K180,600.00***
(ii)	***Standing time on machinery at K1200 per day by 14 days***	***K16, 800.00***
(iii)	***Workers' salaries during standing time for 30 workers at K600.00***	***K18, 000.00***
	Total Claim on Special Damages	***K 215, 400.00***

3. ***Interest on the sums found due;***
4. ***Cost; and***
5. ***Any other relief that the court may find due***
6. ***Interest of the sums found due;***
7. ***Costs; and***
8. ***Any other relief the court may find due.***

The 1st Defendant filed Memorandum of Appearance and Defence and Counter Claim on 12th December, 2019 where the 1st Defendant was claiming:

1. ***Damages for infringement of registered trademark and/or for passing off;***

2. ***An order to account for profits made as a result of infringement of registered trademark;***
3. ***Damages caused by loss of sales and damage to 1st Defendant's reputation;***
4. ***An Order for obliteration of the offending mark upon the Plaintiff's goods;***
5. ***Interest;***
6. ***Any other relief as the circumstances warrant as deemed by the court; and***
7. ***Cost of and incidental to these proceedings.***

The Plaintiff thereafter filed a Notice of Discontinuance on 17th December, 2019 wherein the Plaintiff fully discontinued their action against all the Defendants. The Plaintiff filed a Defence to the 1st and 2nd Defendants Counterclaim on 27th December, 2019.

On 9th January, 2020 the matter came for an application for Order for Costs and Entry of Interlocutory Judgment on Counterclaim. The Plaintiff was inexcusably absent while the Advocate for the 1st Defendant Mr. S. Ilunga was present. I granted the said application as prayed. The Plaintiff thereafter filed an Application for an Order to Stay Execution of Order for Costs and Entry of Interlocutory Judgment on Counterclaim. The Plaintiff subsequently filed an application to set aside

Order for Costs and Entry on Interlocutory Judgment on Counterclaim on 5th February, 2020.

The matter came for hearing on 2nd February, 2020 where the Plaintiff and his advocates Mr. P. Zulu of Messrs. Philsong & Partners and Mr. J. Mulonga of Messrs. MSK Advocates were in attendance. Mr. K. Haongola Messrs. Ilunga & Company and Mr. Inambao from Messrs. ICN Legal Practitioners were in attendance. The 3rd Defendant was inexcusably absent. Advocates for the Plaintiffs submitted that it was an application for Stay of Execution with Affidavit in Support deposed of by Andre Byamungu and Skeleton Arguments that was filed on February 5, 2020. They wished to rely on the said documents. Mr. Byamungu deposed that he had commenced the action against the Defendants on 18th November, 2019 and on 17th December, 2019 filed a Notice of Discontinuance. The same was served on the Defendants. The deponent filed his defence to the 1st and 2nd Defendants counterclaims on 27th December, 2019 and the Defendants were served the said document on 28th January, 2020. The Affidavit of service was produced and marked 'AB2'. The Deponent was advised by his counsel that there were notes by the Honouorable Court indicating that there was a hearing of the matter that counsel was not aware of. Upon conducting a search counsel for the Plaintiff observed that there was an Ex parte Summons for an Order for Costs and Order for Entry of Interlocutory Judgment with affidavit in support

on 9th January, 2020. In the premise the 1st Defendant was heard and on 23rd January, 2020 the court granted the order as prayed. The Order was obtained despite the Plaintiff having filed their Defence to the 1st and 2nd Defendants counterclaim on 27th December, 2019, and having been served on the 1st Defendant's Counsel on 15th January, 2020. The deponent alleged that despite the 1st Defendants Counsel being served with the Defence, they failed to inform the court that they received the Defence to the 1st and 2nd Defendants counterclaim. The Defendants thereafter held the application that was held on 23rd January, 2020.

The Deponent submitted that Counsel for the 1st Defendant on 24th January, 2020 wrote a letter to the Registrar of Trade Marks at Patents and Companies Registration Agency (PACRA) wherein he enclosed the order and sought enforcement of the said order. Produced and marked 'AB5' was the letter from Messrs. Ilunga & Company dated 24th January, 2020. The aforementioned letter was however not served on the Plaintiff or Plaintiff's Counsel and was only discovered when they went to PACRA. The Deponent prayed for the courts indulgence and prayed that court order the stay of execution and set aside the order for costs and entry of interlocutory judgment on counterclaim.

The Plaintiff's Counsel contended that the 1st Defendant's application for order for costs and Interlocutory Judgment on Counter Claim was filed

after the 1st Defendant had already filed the defence to the Counter Claim. In that regard there was a defence before the application was made. The Plaintiff's Counsel referred the court to Order ***XII rule 2 of the High Court Rules Cap 27 of the Laws of Zambia*** as read with ***Order 19 Rule 9 of the Rules of the Supreme Court 1999 edition*** which gives the court the authority to deal with the application. The Plaintiff's Counsel noted that the 1st Defendant had not filed in an Affidavit in Opposition. The Plaintiff's Counsel prayed that the order for costs and interlocutory judgment on the counterclaim be stayed.

Mr. Haongola argued that notwithstanding that they did not proceed to file an affidavit in opposition, as a point of entry they noted that the application at hand represents two distinct remedies, which were require to satisfy the affidavit test at law. The Order for cost which was anchored on ***Order XVII rule of the High Court Rules Chapter 27 of the Laws of Zambia*** occurs on an instance where there is notice of withdrawal by the Plaintiff. The intention of the provision is to provide sufficient safeguard for the defendant who will have incurred costs and the time of notice of withdrawal is entered. Mr. Haongola submitted that the record would show that that the time that the Plaintiff was entering a Notice of Withdraw, the 1st Defendant had already appointed a firm of Advocates seized with the conduct of the case. Costs at this point had already been incurred.

In light of the second remedy, the order for interlocutory Judgement, it has been the practice for the court to set aside judgment that has not been rendered on merit, this should not prejudice the validly accrued right for costs.

Counsel for the Plaintiff in rebuttal stated that the issue of costs was in respect of Order XVII that allowed the Plaintiff who filed Notice of Discontinuance where there was a counter claim. Counsel for the Plaintiff averred that the costs that may have been incurred up to the point of notice should be dealt with at the close of the matter. Counsel for the Plaintiff stated that the Plaintiff had been put to great cost by the Defendant's application for an order for costs even when the defence had already been filed. It was therefore the Plaintiff's prayer that the court sustain the application and sets aside the order for costs for entry of interlocutory Judgment on the counter claim. The Plaintiff prayed for costs.

The Plaintiff in their Skeleton Arguments referred the court to the following list of authorities. ***Order III Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia*** that states:

> ***Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such***

order has been expressly asked by the person entitled to the benefit of the order or not.

Order XII Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia provides as follows:

Where judgment is entered pursuant to the provisions of this order, it shall be lawful for the Court or Judge to set aside or vary such judgment upon such terms as may be just.

Order 19 Rule 9 of the Rules of the Supreme Court 1999 edition (White Book) Provides as follows:

The court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this order.

Order 45 Rule 11 of the Rules of the Supreme Court 1999 edition (White Book)

Without prejudice to Order 47, Rule 1, a part against whom a judgment has been given or an order made may apply to the court for a Stay of Execution of the Judgment or order or order relief on the ground of matters which have occurred since the date of the Judgment or order, and the court may by order grant such relief, and on such terms, as it thinks just.

The courts have stated as follows in the succeeding cases. In the case of ***Stanley Mwambazi v. Morester Farms Limited (1977) ZR 108*** the court held *inter alia* that:

> ***At this stage it is the practice dealing with bona fide interlocutory applications for the courts to allow trialable issues to come to trial despite the default parties ... where a party is in default h may be ordered to pay costs, but it was not in the interest to deny him the right to have his case heard. I would emphasize that for this favourable treatment to be afforded to the applicant there must be no unreasonable delay, no mal fides and no improper conduct of the action on the part of the applicant. (Underlined for their emphasis)***

In ***Water Wells Limited v. Wilson Samuel Jackson (1984) ZR 121 SC*** the Supreme Court Held inter alia 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 that default, it is the defence on the merits which is the more important point to consider. (Their emphasis underlined)***

Justice Ngulube DCJ as he was then stated at page 12 in the ***Water wells case*** (supra) as follows:

Indeed the Court of Appeal in England has held to similar effect in Ladup v. Siu (The Times, Thursday 24th November, 1983), 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 agreed with them that, it is wrong to regard the explanation for the default, instead of the arguable defence as the primary considerations. 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.

The Plaintiff submitted that while the above decisions dealt with matters where there was a default on the part of the Applicant to file their defence, the record showed that the Plaintiff on 27th December, 2019 field their defence to the 1st and 2nd Defendant's Counter Claims. The Plaintiff argued that despite the Plaintiff filing a defence, the 1st Defendant filed an application on 9th January, 2020 on the pretext that the Plaintiff did not file a defence to their Counter Claim. The record showed proof of the Plaintiff having served the 1st Defendant with the Defence to the 1st and 2nd Defendant's counterclaim on 15th January, 2020. The Plaintiff argued that when the matter came for application,

counsel for the 1st Defendant did not inform the court of their receipt of the Plaintiff's defence. The Plaintiff alleged that it was Counsels duty as an officer of the court to inform the court of pleadings that the court may not be aware of. The Plaintiff further alleges that had counsel for the 1st Defendant been prudent, they would have conducted a search prior to making an application and the search would have revealed that the Plaintiff had filed a defence on 27th December, 2019. The Plaintiff submitted that for the aforementioned reasons the Order for Costs and Entry of Interlocutory Judgment on Counterclaim is null and *void abinito* as the same was obtained when plaintiff had already filed their defence.

In regards to the costs, the Plaintiff contends that the matter is still ongoing and yet to be determined by the court. According to the Plaintiff costs must be stayed until matter is fully disposed of by the courts.

I have carefully considered the submissions tendered in by both parties in regards to setting aside Order for Costs and Interlocutory Judgment on Counter Claim. Having evaluated the facts presented it is apparent that the Plaintiff filed a Defence on 27th December, 2019 in response to the 1st and 2nd Defendants counterclaims that were filed on 12th December, 2019 and 5th December, 2019 respectively. The Plaintiff was served with the 1st Defendants Defence on 16th December, 2019. The 1st

Defendant applied for Interlocutory Judgment on 19th January, 2020 and in their Affidavit in Support stated as follows:

> ***That, furthermore, despite having been served with the Memorandum of Appearance, Defence and Counterclaim on 16th December 2019, the Plaintiff has not filed its Defence to the counterclaim.***

The record however shows that the Plaintiff filed in their Defence to the 1st and 2nd Defendants counterclaim on 27th December, 2019. The application made by the 1st Defendant was therefore erroneously made as contrary to what was alleged by the 1st Defendant's Advocates. There was a Defence by the Plaintiff on the record. This should have been brought to the courts attention by the 1st Defendant. The Plaintiff in their submissions correctly referred the court to ***Order XII Rule 2 of the High Court Rules Chapter 87 of the Laws of Zambia*** and ***Order 19 rule 9 of the Rules of the Supreme Court 1999 Edition*** quoted above which gives the court the discretion to set aside or vary judgments entered. Further ***Order 45 Rule 11 of the Rules of the Supreme Court 1999 Edition*** quoted above gives the court the discretion to stay execution of Judgment on terms as it thinks just. There are a number of cases that illustrates why it is desirable for the court to use their discretion in setting aside Interlocutory Judgments. In the case of

Fanny Muliango and Samson Muliango v. Namdou Magasa and Maruja Transport & Farming Company Limited (1988 - 1989) Z.R. 209 (S.C.) it was held that:

> ***Where there is a defence to an action it is preferable that a case should go for trial rather than be prevented from so doing by procedural irregularities.***

Relatedly in the cases of ***Stanley Mwambazi and Waterwells Limited*** *(Supra)* there is emphasis that trialable issues should come to trial despite the fault of the parties. Defence on the merits was said to be a more important point to consider. There should however be no unreasonable delay, malafides or improper conduct of the action on the part of the applicant. In the present case the Plaintiff was not at default as they had filed a Defence within the stipulated time and hence no delay. There was further no malafides or improper conduct on the part of the Plaintiff. The Plaintiff's Defence clearly presented trialable issues. The 1st Defendant's application for Interlocutory Judgment was improper as the Plaintiff Defence was on the record when the 1st Defendant's application was made. The 1st Defendant was duty bound being an officer of the court to bring to the attention to the court of the Plaintiff's Defence on record. The Order for costs and Interlocutory Judgment stand void *ab initio*. In view of the foregoing, I order that the

Interlocutory Judgment on Counterclaim be set aside. The matter shall therefore go to trial and I shall hear the case on its merits.

In regards to the order for costs, the case of ***Costa Tembo v Hybrid Poultry Farm (Z) Limited (SCZ Judgement No. 13 of 2003)*** states as follows:

> ***On costs, although the Court has a discretion in the award of costs, as a general rule, costs follow the event. A successful litigant will get his costs unless the Court orders otherwise for very good reasons.***

On this premise, as the 1st Defendant's application stands set aside, I make no order on costs.

DATED THIS 30th DAY OF APRIL, 2020.

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W.G.K. MUMA
HIGH COURT JUDGE