IN THE HIGH COURT FOR ZAMBIA **2018/HPC/0413**
COMMERCIAL DIVISION
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF: ORDER 30, RULE 14 OF THE HIGH COURT RULES, CAP 27 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: APPLICATION FOR A TERM LOAN FACILITY DATED 12TH APRIL, 2012 AND RESCHEDULED TERM LOAN FACILITY DATED 1ST AUGUST, 2014

BETWEEN:

PAN AFRICAN BUILDING SOCIETY **APPLICANT**

AND

ERROL NEAL MOLVER **RESPONDENT**

CORAM: Hon. Lady Justice Dr. W. S. Mwenda in Chambers at Lusaka this 6th day of May, 2020

For the Applicant: *Mr. M. J. Chitupila of Messrs. Gill & Seph Advocates*
For the Respondent: *Mr. S. Kaonga of Theotis Mataka and Sampa Legal Practitioners*

RULING

Cases referred to:

1) *Mwambazi v. Morrester Farms Limited (1977) Z.R. 108.*
2) *Water Wells Limited v. Wilson Samuel Jackson (1984) Z.R. 98.*
3) *Chifuti Maxwell v. Chafingwa Rodney Mwansa and Rodgers Chipili Mwansa, SCZ Appeal No. 9 of 2016.*
4) *Shocked & Another v. Goldschmidt & Another (1998) 1 All E.R. 372.*
5) *Polythene Products (Z) Limited v. Peter Zimba Joshua Banda, SCZ Appeal No. 177 of 2015.*

Legislation cited:

1) *Order 36, rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia (the High Court Rules).*
2) *Order 35, rule 5 of the High Court Rules.*
3) *Order 3, rule 2 of the High Court Rules.*
4) *Editorial Note 35/1/1 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book).*

Authoritative work referred to:

1) *Adrian Zuckerman (ed) Zuckerman on Civil Procedure: Principles of Practice, 3rd Edition (Sweet and Maxwell, 2013).*

There are two applications by the Respondent before this Court; namely, application to stay execution of Judgment Order dated 9th May, 2019, pending application to set aside the said judgment, made pursuant to Order 36, rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia and application to set aside judgment made in the absence of a party made pursuant to Order 35, rule 5 of the High Court Rules. Since an *ex-parte* Order of stay of execution was granted on 14th August, 2019, and the two applications aforementioned were heard and are being determined at the same time, the application for stay has been rendered otiose and therefore, falls off. I will thus, only deal with the application to set aside the judgment herein.

The Summons to set aside Judgment made in the absence of a party was supported by an Affidavit in Support deposed to by one Steven Kaonga, an advocate of the High Court for Zambia practicing in the firm of Theotis Mataka and Sampa Legal Practitioners, who were the advocates then seized with the conduct of the matter on

behalf of the Respondent. The deponent deposed to the contents of his affidavit from facts acquired by him by virtue of being counsel for the Respondent.

It was the deponent's averment that the record will show that the Applicant obtained a Judgment Order against the Respondent in his absence which is dated 7th May, 2019. That, he was advised by the Respondent and verily believed it to be true, that the aforementioned Judgment did not reach the Respondent until June, 2019, as the Respondent had ceased being affiliated with Asset Protection International (Pty) Limited where the Applicant forwarded the Judgment Order. Furthermore, that the Respondent has a valid defence on the merits and that the interest of justice would be served if the Respondent was allowed to present his Affidavit in Opposition before this Court and a Judgement was rendered after both parties were heard. A copy of the intended Affidavit in Opposition was produced as exhibit "SK1".

It was further averred that the Respondent, who is a South African national, is ignorant of Zambian laws and rules of procedure and it would be unfair to penalise him for such ignorance in these circumstances. That, the deponent verily believed that the Respondent's lack of response and absence from Court was not intentional and done to disrespect this Court but was on account of the fact that he is ignorant of the Zambian laws. The deponent further averred that it would serve the administration of justice and will not prejudice the Applicant if the Judgment Order was set aside and the Respondent allowed to file his defence.

The application was opposed and to that end, the Applicant filed an Affidavit in Opposition to Summons to Set Aside Judgment Made in Absence of a Party (hereinafter referred to as "the Affidavit in Opposition") sworn by Maibiba Mulala, the Possession Manager in the Applicant society who deposed that he verily believed that the Respondent has no defence on the merits. That, an examination of exhibit "SK1" shows that it contains numerous allegations but does not attach, as per the standard in any court proceedings, any documentation proving the allegations. Further, that he has been advised by his advocate and verily believes the same to be true, that the courts' position in this jurisdiction is that ignorance of Zambian laws and rules of procedure is no defence; that in any event, the Respondent was made aware of the proceedings before this Court as early as 25th October, 2018 and subsequently on 26th February, 2019. For this averment, reference was made to the Affidavit of Service on the Court record filed on 12th November, 2018 and 13th March, 2019. Therefore, it was the deponent's belief that the Respondent had more than enough notice and time to take adequate steps to respond to the court process.

The deponent further asserted that he verily believed that it is immaterial when the Judgment reached the Respondent because the Respondent was at all times aware of the court proceedings and voluntarily elected not to take any definitive steps of response. Consequently, the Respondent's lack of response and absence from Court was deliberate and therefore, inexcusable. Further, that contrary to the averment in the Affidavit in Support, the deponent

verily believed that the Applicant will suffer prejudice and injustice as it will not be able to enjoy the fruits of the Judgment.

The application came up for hearing on 10th October, 2019. The parties agreed that the Court renders its ruling based on the documents already filed in Court.

In the Skeleton Arguments filed in support of the application to set aside Judgment, Counsel for the Respondent submitted that they had moved the Court pursuant to the provisions of Order 35, rule 5 of the High Court Rules which states that any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the Court, upon such terms as may seem fit. Counsel also relied on the provisions of Order 3, rule 2 of the High Court Rules, which gives the Court the power to make any interlocutory order which it considers necessary for doing justice. It was argued that this Court has the jurisdiction to set aside a Judgment obtained in the absence of a party if sufficient cause is shown and if the act of setting aside is necessary for advancing the cause of justice. Counsel also relied on the case of *Mwambazi v. Morrester Farms Limited*[1], where the court stated as follows:

> *"Where a party is in default, he may be ordered to pay costs, but it is not in the interest of justice to deny him the right to have his case heard. I would emphasise that for this favourable treatment to be afforded to the applicant, there must be no unreasonable delay, and no improper conduct of the action on the part of the applicant."*
> (Underlining by the Respondent for emphasis)

The case of *Water Wells Limited v. Wilson Samuel Jackson*[2], was also cited for the Respondent's argument that although it is usual in 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.

It was argued that on the strength of the above authorities, a judgment obtained in the absence of a party is amenable to be set aside if there is a reasonable explanation for the failure to enter appearance and file a defence and if there are triable issues or a defence on the merits. It was contended that as demonstrated by the Affidavit in Support, the Respondent did not make an appearance to any of the proceedings on account of his ignorance of Zambian laws, but after receipt of the Judgment and being advised accordingly, the Respondent did not hesitate to take out this application and defend this suit. Further, that the Respondent has a proper defence on the merits as exhibited in the Affidavit in Support. Therefore, it would be unjust to allow the Judgment Order to stand and to have the Applicant enforce it when the Respondent does not have any liabilities to Applicant. That, in light of the above, it is the Respondent's prayer that the Judgment Order obtained in the Respondent's absence be set aside and costs be in the cause.

The Applicant filed its Skeleton Arguments in Opposition on 24th September, 2019 wherein it was argued that according to the Applicant's interpretation of Order 35, rule 5 of the High Court Rules, the Court is empowered to set aside a judgment obtained against a party in their absence upon sufficient cause being shown, that is to say, the party seeking to set aside the judgment must demonstrate to the Court that there is sufficient cause or reason to warrant the

setting aside of the judgment obtained in their absence. Further, that in order to satisfy the requirement of 'sufficient cause', the party seeking to set aside the judgment must show to the Court the reasons for the absence, which reasons must not have been deliberate and should have arisen by accident or mistake. The Applicant cited the case of *Chifuti Maxwell v. Chafingwa Rodney Mwansa and Rodgers Chipili Mwansa*[3], where the Supreme Court of Zambia stated that the primary consideration for the judge at the hearing of an application to set aside a judgment are the reasons for the absence of the party applying and not the defence on the merits. It was submitted that similar sentiments were expressed by the court in the English case of *Shocked & Another v. Goldschmidt & Another*[4], and in the works of the learned authors of Zuckerman on Civil Procedure: Principles and Practice, 3rd Edition, where they state:

> *"...it remains the case that a party who has failed to attend is entitled to an opportunity to explain his absence so that he may show good reason for his absence."* (emphasis supplied by the Applicant).

It was contended that the reasons given by the Respondent for his absence from the Court, namely, that he was ignorant of the Zambian laws and procedures, do not reveal sufficient cause that would warrant this Court to set aside the Judgment herein, as ignorance of the law is no defence as guided by the Supreme Court in the case of *Polythene Products (Z) Limited v. Peter Zimba Joshua Banda*[5]. Further, that in any event the Respondent was made aware of the court proceedings before this Court as early as 25th October, 2018 and subsequently, on 26th February, 2019 as evidenced by the

Affidavits of Service on the Court record filed on 12th November, 2018 and 13th March, 2019, respectively.

It was argued that having been served with the court process, the Respondent had more than enough notice and time to take adequate steps to respond to the court process. Hence, it is immaterial when the Judgment reached the Respondent. Further, that the Respondent's lack of response and absence from Court was deliberate and therefore, inexcusable. It was submitted that no good and compelling reasons having been revealed, it was the Applicant's prayer that the application to set aside the Judgment be disregarded for complete lack of merit and consequently dismissed.

With regard to the Respondent's submission of a defence on the merits, the Applicant submitted that the Respondent has totally misunderstood and misapplied the provisions of Order 35, rule 5 of the Rules of the High Court as the said provision is restricted to setting aside a judgment based only on sufficient cause or reasons being demonstrated to the Court. That, the setting aside of a judgment under the said Order is not based on the demonstration of a defence on the merits. Further, that even assuming that this Court was to accept that the Judgment could be set aside on the grounds of a defence on the merits being shown, the Respondent has failed to disclose such a defence on the merits. Furthermore, that the Respondent has made wild allegations in the Affidavit in Support which have not been substantiated. That, since there is no basis or support for the said allegations, no defence on the merits has been

disclosed. Consequently, the Applicant prays that the Respondent's application be dismissed with costs.

I have considered the application by the Respondent to this Court to set aside the Judgment which was made in the absence of the Respondent. For this application the Respondent has relied on the provisions of Order 35, rule 5 of the High Court Rules which provides as follows:

> *"Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the Court, upon such terms as may seem fit."*

It is clear from the provisions of Order 35, rule 5 quoted above, that this Court does have the power to set aside a judgment obtained against a party in their absence on sufficient cause being shown. In *casu,* the fact that judgment was entered in favour of the Applicant after the Respondent failed to appear in Court for the hearing of the Originating Summons is not in dispute. It is on record that the said Judgment was entered after the Court was satisfied by the evidence before it that notice of hearing was served on the Respondent who had not filed an Affidavit in Opposition and had not communicated to the Court the reasons for his failure to appear in Court for the hearing.

The question to be determined is whether the Respondent has shown sufficient cause in order for this Court to exercise its discretion in favour of granting the application and setting aside the Judgment. The Respondent has alleged that he did not receive the Judgment herein until sometime in June, 2019 and further that he has a defence on the merits and further still, that being a South

African national, he was ignorant of Zambian laws and procedure, hence the lack of response to the court process and absence from Court. On the other hand, the Applicant has argued that it is evident that the Respondent has no defence on the merits as he has not supported the allegations he has made in his Affidavit in Support with documentation to prove the veracity of the said allegations. Further, that it is immaterial when the judgment reached the Respondent as he was aware of the Court proceedings and had sufficient time to take adequate steps to respond to the Court process but voluntarily elected not to take any definitive steps of response. The Applicant further argued that the position of courts in this jurisdiction is that ignorance of law is no defence, therefore, the Respondent cannot use that as a ground for asking this Court to set aside the judgment herein.

Both parties have cited authorities in support of their cases, which I have considered. I concur with the submission by the Applicant that while this Court is empowered to set aside a judgment obtained against a party in their absence, the party seeking to have the judgment set aside must demonstrate to the Court that there is sufficient cause to warrant the setting aside of the judgment. I also agree that in order to satisfy the requirement of sufficient cause, the Respondent must give reasons for his absence at the hearing. Further, according to Editorial Note 35/1/1 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book):

> *"The following "general indications" should be taken into account when the court is considering to set aside a judgment obtained when a party failed to appear:*

> *"(1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision.*
> *(2) Where judgment has been given after a trial, it is the explanation for the absence of the absent party that is most important; unless the absence was not deliberate but was due to an accident or mistake, the court will be unlikely to allow a re-hearing.*
> *(3) ..."* (Emphasis supplied by the Court)

The cases of Chifuti Maxwell v. Chafingwa Rodney Mwansa and Rodgers Chipili Mwansa (supra); Shocked and Another v. Goldschmidt and Others (supra), Editorial Note 35/1/1 of the White Book and Zuckerman on Civil Procedure: Principles and Practice, all point to the fact that the most important consideration for the judge hearing an application to set aside a judgment obtained in the absence of a party, is the reasons for the absence of the party at the proceedings. Triable issues and defence on the merits, are therefore, not considerations that the Court should take into account in an application under Order 35, rule 5 of the High Court Rules.

There is evidence on the record that the Respondent was made aware of the proceedings before this Court on 25th October, 2018 and 26th February, 2019 but did not file any documents in his defence. He has advanced ignorance of Zambian laws and procedures as the reason for his failure to file an affidavit in opposition to the originating summons and not appearing in court. However, as correctly submitted by Counsel for the Applicant, ignorance of law is no defence in this jurisdiction (refer to the case of Polythene Products (Z) Limited (supra). Therefore, the explanation by the Respondent for

his failure to file court process and attend the proceedings does not amount to sufficient cause. In fact, the alleged ignorance of the Zambian law and procedure should have prompted the Respondent to engage the services of counsel to represent him as soon as he received court process and not wait until judgment had been entered, as he did. The fact that after being aware of the proceedings, the respondent waited until after judgment had been entered against him before engaging counsel lends credence to the Applicant's contention that he voluntarily elected not to take any definitive steps of response.

For the aforesaid reasons, I am of the view that the Respondent has not shown sufficient cause for this Court to set aside the judgment obtained against him in his absence. Therefore, the application lacks merit and is dismissed. The *ex parte* Order for Stay of Execution of Judgment Order granted on 28th June, 2019 is discharged forthwith.

Costs of and incidental to this application are awarded to the Applicant. The said costs are to be agreed by the parties or taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 6th day of May, 2020.

DR. W. S. MWENDA
HIGH COURT JUDGE