SCZ NO. 10 OF 2008
APPEAL NO. 126/2006

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE

(CIVIL JURISDICTION)

BETWEEN:

PHOTO BANK (Z) LIMITED	**Appellant**
AND	
SHENGO HOLDINGS LIMITED	**Respondent**

Coram: Chirwa,Ag. DCJ, Mushabati JS and Kabalata Ag. JS on 8th November, 2006 and 26th February, 2008.

For the Appellant: Me H Kabwe of Hobday Kabwe & Co.
For the Respondent: Mr W Mweemba of Mweemba & Co.

JUDGMENT

Chirwa, Ag. DCJ, delivered judgment of the Court:-

Cases referred to:-

1. **Development Bank Of Zamba & Another V Sunvest LIMITED And Sun Pharmaceuticals Limited** [**SCZ Judgment No. 3 Of 1997)**

The appellant, **PHOTO BANK (Z) LIMITED**, are appealing against judgment of the High Court entered, in default of appearance and defence, in favour of the respondent, **SHENGO HOLDINGS LIMITED**. The judgment was in the sum of K40,467,000.00.

To have a clear understanding of the matter, it is necessary to look at the relationship of the parties. The appellant is renting some space in a

building known as Chester House, Cairo Road, Lusaka, belonging to the respondent. The monthly rent, according to the Statement of Claim, was K13,489,000. At the time the writ of Summons was issued, there was an outstanding bill of K40,467,000. The Writ of Summons was duly served on the appellant on 26th January, 2006. There was no appearance or defence filed even when judgment in default of appearance was filed on 10th February, 2006. It is worthwhile to mention at this stage, that this action was instituted in the Commercial Registry of the High Court and therefore Rules pertaining to commercial causes applied.

After obtaining judgment in default of appearance, the respondent went ahead to enforce it and issue Warrant of Distress and the same was executed by the Bailiff and only then did the appellant react to the action. They applied, ex-parte to the Court below for stay of execution of the Warrant and the same was granted on 22nd February, 2006. This stay of execution was granted after the Warrant of distress had been executed on 16th February, 2006.

The appellant then applied to the High Court to set aside the judgment in default and in support of this application, the affidavit in support of the application did not dispute the fact that rent was owing and due but put up a counter-claim to the tune estimated at "over US$ 55,460 and at least K20,650,000 in other costs". The counter-claim by the appellant arose from the alleged damage to their property through seepage of water into

the rented premises and which seepage was alleged due to non-maintenance of the property by the respondent. The learned trial judge heard this application and in his short ruling dismissing the application, the learned trial judge said that the appellants admitted the claim of respondent but in their defence, raised a counter-claim. The learned trial judge stated that a counter-claim was a claim in its own right which had still to be proved and that the appropriate thing to have been done was for the appellant to stay the judgment until the end of trial of the counter claim. It is against this refusal to set aside the judgment that the appellants have appealed.

There are two grounds of appeal and these are that the leaned trial judge of the High Court erred in law and fact when he decided that the defence and counter-claim should be determined in a separate action outside the action under which judgment in default of appearance and defence had been entered, and the second ground was that the Court below misdirected itself at law and on facts when it maintained a judgment in default of appearance and defence without considering the merits of the appellants' defence and counter-claim disclosed.

These two grounds of appeal were supported in the appeal by detailed written heads of arguments and authorities which were relied upon at the hearing of the appeal.

The gist of the argument in the first ground of appeal is that the learned trial judge should not have stated that the Counter-Claim be determined in a separate action outside the already existing action as in doing so would be encouraging multiplicity of actions which was deplored by the Court in the case of **DEVELOPMENT BANK OF ZAMBA** & **ANOTHER** v **SUNVEST LIMITED and SUN PHARMACEUTICALS LIMITED (1)** and that it was desirable for the lower court to resolve all issues between the parties. It was further pointed out that the spirit adopted by the lower Court was against Order 15, rule 2 of the Supreme Court Rules of England (1995 Ed).

In reaction to this head of argument, the respondent who also filed detailed heads of arguments and relied on at the hearing, submitted that the learned trial judge never decided that the defence and Counter-Claim should be decided in a separate action. What the learned trial judge advised was that the appellant should not have applied for the setting aside of the default judgment but to stay the same pending the determination of the Counter-claim. This, it was argued, was because there was no defence to the respondents claim for the due rentals but the appellant set up a set-off which had yet to prove. In supporting the learned trial judge, Order 15, rule 2 sub rule 3 was quoted which states that "A Counterclaim may be preceded with notwithstanding that judgment is given for the plaintiff in the action or the action is stayed, discontinued or dismissed".

We have considered the first ground of appeal and the submissions made. We have looked at the proposed defence to the action as exhibited at page 36 of the record of appeal. We have also looked at the affidavit in support of summons to set aside default judgment at Page 31 of the record of appeal. Both the defence and affidavit referred to do not dispute that K40,467,000 was due and owing to the respondent but they withheld it as an off-set for alleged damages caused to their equipment due to leakages. The alleged damage had yet to be proved.

This alleged loss was never before the court and by conduct, the appellants never submitted themselves to the Court's jurisdiction. They totally disregarded by failing to enter an appearance and defence. They unilaterally awarded themselves the damages due to the alleged respondent's failure to honour its obligation under the lease. The learned trial judge in his ruling put the matter in this way:

> **"It is my considered view that the defendant admits the plaintiff's claim. The defence raised a counter claim. A counter claim is claim in its own right which has still to be proved. The appropriate thing to do in those circumstances would have been to stay the default judgment until the end of trial** of the Counter Claim".

We cannot fault the learned judge's opinion as expressed. By counter claiming, you are not denying the claim which was a liquidated claim.

The counter claim is more of a set-off and this has to be proved. As the judgment was properly entered, a Counter-claim cannot be the basis for setting it aside. The learned trial judge correctly stated that the only reasonable option available to the appellant was to stay the execution of the properly entered judgment pending the proof of the Counter Claim. He never said that the appellant should commence another action but to pursue their counter-claim. This, in our view would not amount to multiplicity of actions. The case of **DEVELOPMENT BANK OF ZAMBIA V SUNVEST LIMITED (1)** referred to by the appellant was on totally different facts. In that case, the action by the Bank was in relation to matters affecting the respondents in which the Bank had appointed a Receiver to manage the affairs of the respondents in order to recover its money and the respondents took out an action affecting the appointment of the Receiver. The Bank commenced another action against the respondent for recovery of the money for which had appointed a Receiver. Here the parties were the same and the subject, namely, recovery of the money was the same. This was obviously a multiplicity of proceedings which we deplored. We are of a further view that the learned trial judge's remarks cannot be said to have considered the appellants counter-claim. He clearly stated that the appellants could have pursued their counter-claim in an action they admitted on being sued by the respondent for rental arrears. The Counter-claim has yet to be proved and it is still open to the appellants to pursue their claim. The judgment was for the sum claimed and not on the counter-claim because the counter-claim never existed

on the Court's record. This part of our consideration of ground 1 equally covers ground 2 of the appeal. We see no merits in the two grounds of appeal and they are dismissed. Costs to the respondents to be agreed, in default to be taxed.

D K Chirwa
AG. DEPUTY CHIEF JUSTICE

C S Mushabati
JUDGE OF THE SUPREME COURT

T A Kabalata
AG. JUDGE OF THE SUPREME COURT

For Your Signature Please

Chirwa, Ag. DCJ:……

Mushabati, JS:……

Kabalata, Ag.JS:……