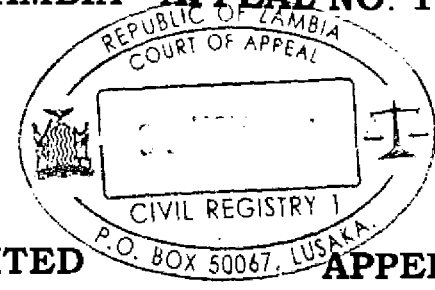
IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 185 OF 2020

HOLDEN AT LUSAKA

(Civil Jurisdiction)



PCP MINING SUPPLIES LIMITED **APPELLANT**

AND

ZAMM IMPORTS LIMITED **RESPONDENT**

Coram: Chashi, Sichinga and Banda - Bobo, JJA

On: 24th August, and 5th November 2021

For the Appellant: Enias Chulu, Messrs Enias Chulu Legal Practitioners

For the Respondent: G. Kunda (Mrs.), Messrs A. D. Gray and Partners

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J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. **Water Wells Limited v Jackson (1984) ZR, 98**

2. **Baghibbhai and Another v Monile Holdings Company (1993 - 94) ZR, 20**

3. **Mwambazi v Morester Farms Limited (1977) ZR, 108**

4. Sam Chisulo v Mazzonites Limited – CAZ Appeal No. 67 of 2019

Rules referred to:

1. **The Supreme Court Practice (1967) London Sweet and Maxwell**
2. **The High Court Act, Chapter 27 of the Laws of Zambia.**

1.0 INTRODUCTION

1.1 This appeal emanates from the Ruling of Honourable Madam Justice Y. Chembe delivered on 21st August 2020. In the said Ruling, the learned Judge found that the default Judgment which was entered by the Appellant who was the plaintiff in the court below was irregular. As a consequence, the default Judgment was set aside.

1.2 This appeal illustrates the lapses in our registries in the accepting of filing of documents and the ramifications which follow, which have an effect on the administration of justice; as they eventually contribute to delays in the dispensation of justice.

2.0 BACKGROUND

2.1 This matter has had an unnecessary lengthy life span. It started with the Appellant commencing an action against the Respondent by way of writ of summons on 14th December 2017. On 2nd January

2018, the Respondent filed into court a conditional memorandum of appearance, which the Registrar only endorsed on 15th January 2018. On 11th January 2018, the Plaintiff filed and was granted a Judgment in default of defence, which was endorsed by the Registrar. This prompted the Appellant to apply for setting aside the default Judgment on the premise that it was irregular as it was entered at the time when the conditional memorandum of appearance was subsisting.

2.2 After considering the application, the Registrar rendered his ruling (refer page 48 of the record of appeal *(the record)*) refusing the application. Unhappy with the ruling, the Respondent appealed to the Judge in chambers. The appeal before the Judge succeeded. In her Judgment delivered on 6th May 2020, the learned Judge set aside the default Judgment.

2.3 What then followed was a repeat of the earlier cycle. On 28th May 2020, the Appellant once again applied for Judgment in default of defence, as the record showed that the Respondent had not filed the application to dismiss the writ of summons for irregularity within the prescribed twenty-one (21) days period. The default Judgment was on the same day granted by the learned Judge. On

2nd June 2020, the Respondent applied to set aside the default Judgment on the ground that, the application to dismiss the writ for irregularity had actually been filed on 21st May 2020, a week before the default Judgment was entered.

3.0 DECISION OF THE COURT BELOW

3.1 After considering the affidavit evidence and the background to the matter, the learned Judge formulated the issue for determination as "*whether the judgment in default of defence ought not to have been granted after the application to dismiss the action had been filed.*" The learned Judge observed that, whilst it was correct that according to the conditional appearance, the Respondent was required to file the application to dismiss the action for irregularity within twenty-one (21) days from 15th January 2018, the running of time was impacted by the events that unfolded. That the Appellant had obtained a Judgment in default of defence on 11th January 2018 which it tried to enforce. Further that on 15th January 2018, the Respondent filed an application to set aside the default Judgment.

3.2 The learned Judge was of the view that, the time endorsed on the appearance to defend did not and could not start running until the

Respondent's application was heard. She noted that the Registrar endorsed the conditional appearance four (4) days after granting the Judgment in default. The Registrar proceeded to hear the Respondent's application to set aside the default Judgment and dismissed it. On appeal the learned Judge set aside the Registrar's decision. That given the scenario, it was unclear as at which point the Respondent could have filed a defence. The learned Judge was of the view that the Respondent would only have been required to file a defence either at the expiry of twenty-one (21) days following the date of Judgment or after dismissal of the application to dismiss the action for irregularity.

3.3 According to the learned Judge, her understanding of the conditional appearance to defend was that the Respondent was excused from filing a defence until the application to dismiss the action was disposed of. That if the Respondent succeeds, the matter ends there, but if he does not, then he is at liberty to file the defence as directed by the court.

3.4 As regards the argument by the Appellant that to set aside a default Judgment, it is necessary to demonstrate that the Respondent has a defence on the merits in order to succeed, the learned Judge

referred to **Water Wells Limited v Jackson**[1]. **Baghibbai and Another v Monile Holdings Company**[2] and **Mwambazi v Morester Farms Limited**[3] which cases speak to the holdings that a defence on the merits is critical to this type of application.

3.5 However, the learned Judge distinguished the case before her from the authorities referred to, in that, in the case before her the Respondent did not wish to file a defence as they wanted the action to be dismissed for irregularity on the ground of failure to comply with the rules and more importantly that it was not the correct party that had been sued. The learned Judge opined that, in the given situation, the Respondent cannot be called upon or expected to file a defence, until the issues subject of the Respondent's application were resolved. The learned Judge was of the view that although the Respondent had not demonstrated a defence on the merits, an arguable case had been raised which may impact the trial and that, that is equivalent to a defence on the merits.

3.6 The learned Judge observed that in any event, the main issue raised by the Respondent was that the default Judgment should not have been granted as there was no default. That having accepted the application to dismiss the action for irregularity filed

on 21st May 2020, fifteen (15) days after the Judgment of the court, it cannot be said to have been filed out of time. In view of the fact that at the time Judgment in default was being entered on 28th May 2020, the application to dismiss had already been filed, the default Judgment was irregular and amenable to be set aside.

4.0 THE APPEAL

4.1 Dissatisfied with the Ruling, the Appellant has appealed to this Court advancing the following two grounds:

(1) *The court below erred in law and fact when it held that a conditional appearance to defend excuses the defendant from filing a defence, until the application to dismiss the action is disposed of.*

(2) *The court below erred in law and fact when it set aside the Judgment in default of defence granted on 28th May 2020.*

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 In arguing the first ground of appeal, Mr. Chulu Counsel for the Appellant, referred to Order 12/7/4 of **The Rules of the Supreme Court (RSC)**[1] and submitted that it was clear that the court below, fell into error in holding that, conditional appearance excuses the defendant from filing a defence until the application is disposed of.

According to Counsel, the correct position at law is that, the defendant is given a time limit within which to file an application to set aside process or service of the same. That at the expiration of that time, if no application is filed, the conditional appearance becomes unconditional and the plaintiff is at liberty to proceed accordingly.

5.2 Counsel submitted that *in casu*, the Respondent filed a conditional appearance. The order by the Registrar was that "This appearance shall remain unconditional unless the applicant makes an application to set aside within 21 days." The Appellant contended that the Respondent was thus required to file the application on or before 4th February 2018, but did not do so. That therefore the conditional appearance became unconditional on 5th February 2018.

5.3 It was further submitted that, pursuant to Order 12/7/14 **RSC**, a presumption was raised against the Respondent for waiver of their objection and in view of the fact that the conditional appearance became unconditional, it was required of the Respondent to file a defence, in the absence of which the Appellant was entitled to enter Judgment in default of defence. It was Counsel's submission that,

it did not cure the failure by the Respondent that they filed their application after a period of two (2) years from the expiration of twenty-one (21) days granted by the Registrar. That not only is the period inordinate, but that the application became defunct when the period expired. According to Counsel, the presumption ought to be held against the Respondent that it waived the objection. That for the same reason, the court below fell in error, when it held that time for filing the Appellant's application to set aside or dismiss the action was impacted by events that unfolded.

5.4 In support of the second ground of appeal, Counsel drew our attention to the three Supreme Court authorities which were referred to by the learned Judge in the Ruling and submitted that it is settled law that in order to set aside a Judgment in default of defence, the defendant should demonstrate that he has a defence on the merit. That the court below made a finding of fact that the Respondent had demonstrated a defence on the merits and that indeed the record of proceedings clearly showed the absence of the demonstration. That therefore, the court fell in error when it set aside the Judgment in default of defence as there was absence of a defence on merit.

6.0 ARGUMENTS IN OPPOSING THE APPEAL

6.1 In opposing the appeal, Mrs Kunda, Counsel for the Respondent seemed to be responding to four grounds of appeal. We note from the Appellant's heads of arguments that, only two grounds of appeal were argued. We will therefore take it that the other two grounds *(if any)* were abandoned.

6.2 In response to the first ground, Counsel for the Respondent submitted that the Appellant in its arguments relied on order 12/7/4 **RSC, 1967**[1]. Counsel argued that the Appellant's arguments lacks legal basis as the **RSC 1967** are not applicable for use in the High Court for Zambia. We note that at the hearing of the appeal, Mr. Chulu abandoned the arguments under paragraphs 2.3, 2.6 and 2.7 of the Appellant's head of arguments as he was in agreement with the Respondent's contention. We therefore see no point in pursuing the issue any further.

6.3 Counsel submitted that the Judgment entered by the Registrar in default of defence on 11th January 2018 was irregular on the basis that there was no prior Order of the court vacating the Respondent's conditional memorandum of appearance filed into court on 2nd January 2018 as explained in the case of ***Sam Chisulo v***

Mazzonites Limited[4] . That from the explanation in the said case, the Respondent put the Appellant on notice of its intention to file its application to challenge the irregularity of the writ of summons within 21 days effective from 15th January, 2018 when the Registrar endorsed the conditional memorandum of appearance.

6.4 According to Counsel there being a Judgment in default of defence on the court record, though obtained irregularly, an application aimed at challenging the irregularity of the writ of summons when the Appellant had obtained a default Judgment, could only be made after an Order from the court setting aside the default Judgment.

6.5 Counsel further submitted that there was no inordinate delay to file the application to set aside the writ of summons for irregularity. Counsel contended that the court below was in order when it held that time for filing the application to set aside or dismiss was impacted by the events that unfolded. Further that the court below was on firm ground when it held that a conditional appearance excuses the defendant from filing a defence until the application to dismiss action is disposed of.

6.6 In response to the second ground, Counsel submitted that the Appellant's heads of argument under paragraphs 3.2 and 3.5 are

centred on the law applicable to setting aside Judgments obtained in default of defence. According to Counsel, the arguments are misplaced, as the application at the centre of the appeal relates to an application obtained, notwithstanding that a conditional appearance was properly before the court as opposed to one entered in default of defence. That therefore the ***Baghibbhai***[1], ***Water Wells***[2] and ***Mwambazi***[3] cases are inapplicable.

6.7 As regards the issue as to when time started running, reliance was placed on the ***Sam Chisulo***[4] case and reiterated that it started running from 15th January 2018 and that therefore the Respondent was not out of time to apply to set aside the writ of summons for irregularity.

6.8 Counsel submitted that the Judgment in default of defence was entered against the Respondent before the expiration of the time given in the conditional memorandum of appearance for the Respondent to make its application to set aside the writ of summons. That the default Judgment was therefore irregularly obtained. According to Counsel, the Appellant's argument therefore that the Respondent ought to have filed into court a defence when there was a conditional appearance is not supported by law.

6.9 According to Counsel, the court below was on firm ground when it set aside the Judgment in default of defence dated 28th May 2020 as the Respondent was well within time and had in fact made the application to set aside the writ of summons for irregularity.

7.0 DECISION OF THIS COURT

7.1 We have considered the arguments by the parties and the Ruling being impugned. In addressing the first ground of appeal, we note that the parties brought into contention, issues relating to matters which occurred prior to the Judgment of the court below which was delivered on 6th May 2020 by Chembe J. The issue of when the time started running in respect to the conditional memorandum of appearance was settled in that Judgment, which has never been challenged or appealed against. The learned Judge in the said Judgment also found that the conditional memorandum of appearance which was filed by the Respondent was valid and that the Registrar erred in granting Judgment in default in the circumstances. It was on that basis that the appeal was upheld and the default Judgment endorsed by the Registrar was set aside. In view of the subsistence of the said Judgment, we see no basis to

dwell on issues which were settled by the said Judgment and has never been challenged.

7.2 The issue before us on this ground is whether, given the circumstances of this case, the learned Judge in the court below was on firm ground in setting aside the default Judgment which was granted on 28th May 2020.

7.3 We note that on setting aside the default Judgment in her Judgment of 6th May 2020, the learned Judge did not state the period within which the Respondent should enter appearance or file the application for setting aside writ of summons. In our view, the Judge should have done so. Having not done so, our view is that after setting aside the default Judgment, the 21 days period for entering of appearance or applying as aforestated started running from 6th May, 2020 when the default Judgment was set aside.

7.4 Therefore, the application by the Appellant for Judgment in default of defence filed on 28th May 2020, should not have been accepted as the Respondent had prior to that, on 21st May, 2020, pursuant to the conditional memorandum of appearance, filed an application to dismiss the writ of summons for irregularity. We note that the

application by the Respondent was filed before the expiration of 21 days. We are therefore of the view that, had it been brought to the attention of the learned Judge, that the Respondent had filed the aforestated application, she would not have endorsed the default Judgment.

7.5 In the view that we have taken, the default judgment was irregularly obtained and as such we find no basis on which to fault the learned Judge for setting it aside.

7.6 In order to put the matter into its proper perspective on the effect of a conditional memorandum of appearance, reference is made to Order 11/1 (4) of **The High Court Rules (HCR)**[2] which provides as follows:-

> ***"Any person served with a writ under Order 6 of these rules may enter conditional appearance and apply by summons to the court to set aside the writ on ground that the writ is irregular or that the court has no jurisdiction."***

7.7 The rule allows a party within the time required to file an appearance to make an application to the court by summons to set aside the writ on grounds that the writ is irregular or that the court has no

jurisdiction. Therefore, a party who has entered a conditional appearance may either enter a defence during the time required or make the application to set aside the writ by summons. However, a plaintiff cannot enter Judgment in default of defence within the time required for appearance.

7.8 In the view that we have taken, the first ground of appeal fails.

7.9 The second ground attacks the learned Judge for setting aside the default Judgment granted on 28th May 2020, on the ground that the Respondent had not demonstrated a defence on the merit. Firstly, we agree with Counsel for the Respondent that the three cases of ***Water Wells[1], Baghibbhai[2] and Mwambazi[3]*** are not appliable as they relate to default Judgments regularly obtained where a party fails to file a defence within the required time. They therefore do not apply to a default Judgment obtained irregularly as was the case in this matter.

7.10 As earlier alluded to, the Respondent could have filed a defence or applied to set aside the writ. Having settled to apply to set aside the writ, the issue of demonstrating a defence on the merit did not arise. Therefore, the second ground of appeal equally fails.

8.0 CONCLUSION

8.1 The appeal having failed, it is accordingly dismissed for lack of merit. The matter is sent back to Honourable Madam Justice Y. Chembe to determine the Respondent's application to set aside the writ of summons.

8.2 Costs of this appeal are for the Respondent, to be paid forthwith. Same are to be taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE

D. Y. L. SICHINGA, SC
COURT OF APPEAL JUDGE

A. M. BANDA - BOBO
COURT OF APPEAL JUDGE