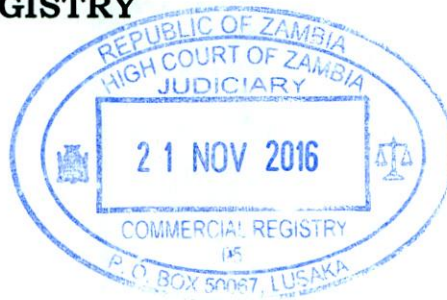


**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**2016/HPC/0339**



BETWEEN:

**ASTRO MOBILE (Z) LIMITED**

**PLAINTIFF**

AND

**KEREN MOTORS LIMITED**

**1<sup>ST</sup> DEFENDANT**

**JOSEPH NGOSA AND OTHERS**  
(AS PER ANNEXTURE)

**2<sup>ND</sup> DEFENDANT**

**Delivered in Chambers before Hon. Mr. Justice Sunday B. Nkonde, SC at Lusaka  
this 21<sup>st</sup> day of November, 2016**

For the Plaintiff : Mr. C. Sianondo of Messrs Malambo and Company  
For the 1<sup>st</sup> Defendant : Major N. Mushemi of Messrs Nhari Mushemi & Associates  
For the 2<sup>nd</sup> Defendant : N/A

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**R U L I N G**

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**CASES REFERRED TO:**

- 1) *Water Wells Limited vs Wilson Samuel Jackson* (1984) ZR 98
- 2) *Stanley Mwambazi vs Morester Farms Limited* (1977) ZR 105
- 3) *Govindbhai Baghibal, Vallabhai Patel vs Monile Holdings Company Limited* (1993-1994) ZR 20
- 4) *National Airport Corporation Limited vs Reggie Ephraim Zimba and Savior Konie* (2000) ZR 184
- 5) *Rosemary Bwalya vs Zambia National Commercial Bank Zulu Appeal No. 1331* 2005 SC2/8/160 2005 (decided 8<sup>th</sup> January, 2016)

**LEGISLATION REFERRED TO:**

- 1) *High Court Rules, Chapter 27 of the Laws of Zambia*

I must first mention that this Ruling has slightly delayed due to this Court's involvement in the 2016 Parliamentary Petitions. I am grateful to Counsel and the parties for the patience shown.

In this action, the 1<sup>st</sup> Defendant applied by Summons and supporting affidavits for two Orders: to set aside judgment in default of appearance with defence of 10<sup>th</sup> August, 2016 and also to stay execution of the judgment in default pending the hearing and determination of the application to set aside the judgment in default.

The genesis of the application is that on 12<sup>th</sup> January, 2016, the Plaintiff commenced this action claiming from the Defendants, inter-alia, damages for breach of a Payroll Agreement dated 5<sup>th</sup> September, 2015, immediate payment of the outstanding amount of K174, 906-42 on the Payroll Agreement with interest as contractually agreed and costs.

On 22<sup>nd</sup> July, 2016, the 1<sup>st</sup> Defendant entered conditional appearance but due to its inaction, the Plaintiff entered judgment in default after the prescribed time for entering appearance with defence had expired. It is this judgment in default that the 1<sup>st</sup> Defendant applied to be set aside as well as to be stayed on 22<sup>nd</sup> August, 2016.

Out of the two applications, I will start with the application to set aside the judgment in default.



The supporting affidavit was sworn by JANET MAKUMBA, the 1<sup>st</sup> Defendant's Deputy Managing Director. It was filed into Court on 22<sup>nd</sup> August, 2016. She deponed that after entering conditional appearance, the 1<sup>st</sup> Defendant had intended to apply for misjoinder of the 1<sup>st</sup> Defendant but delayed to do so because at the time, it was an election period, hence, judgment in default being entered by the Plaintiff.

It was further deponed that notwithstanding the failure to apply for misjoinder, the 1<sup>st</sup> Defendant had a defence to the Plaintiff's claims. The defence was that the Payroll Agreement in issue, which provided for the 1<sup>st</sup> Defendant to facilitate Payroll deductions from the 1<sup>st</sup> Defendant's employees to the Plaintiff for mobile gadgets provided to the employees by the Plaintiff, was signed on behalf of the 1<sup>st</sup> Defendant by a person who was not authorized to sign. The 1<sup>st</sup> Defendant, therefore, denied any breach of the "purported" Payroll Agreement and instead stated that the 1<sup>st</sup> Defendant had no Payroll Agreement with the Plaintiff. The proposed defence was accordingly exhibited to the affidavit in support.

The Plaintiff opposed the application. The opposing affidavit filed into Court on 6<sup>th</sup> September, 2016 was sworn by ONAI JUNIOR SINYABWE, the Plaintiff's Chief Financial Manager. It was deponed that prior to the commencement of the action, the parties had corresponded and at no time did the 1<sup>st</sup> Defendant raise the issue of an unauthorized person signing the Payroll Agreement on its behalf. Letters to the effect were exhibited to the affidavit in opposition together with the Payroll Agreement.

On 23<sup>rd</sup> September, 2016, the 1<sup>st</sup> Defendant filed into Court an affidavit in reply more or less re-stating the facts in the supporting affidavit.

The parties also filed very useful respective Skeleton Arguments and List of Authorities which were relied on.

In the Skeleton Arguments, Learned Counsel for the 1<sup>st</sup> Defendant argued that its defence disclosed in the proposed defence exhibited was adequate for the judgment in default to be set aside by this Court and for the 1<sup>st</sup> Defendant to be allowed to dispute the Plaintiff's claim. Learned Counsel referred to, inter-alia, the cases of **Water Wells Limited v Wilson Samuel Jackson<sup>1</sup>**, **Stanley Mwambazi v Morester Farms Limited<sup>2</sup>**, **Vallabhai Patel v Monile Holdings Company Limited<sup>3</sup>** on the proposition that a Defendant who has an arguable case ought not to be denied the chance to lay the defence before the Court at trial.

On the other hand, Learned Counsel for the Plaintiff contended in the Skeleton Arguments that the signatory to the Payroll Agreement was held out at all material times, including in negotiations leading to the Payroll Agreement, by the 1<sup>st</sup> Defendant as having the authority to sign the Payroll Agreement. Therefore, the 1<sup>st</sup> Defendant was bound by the terms of the Payroll Agreement.

On behalf of the Plaintiff, Learned Counsel advanced a further argument that in any case, the Plaintiff was dealing with senior members of the 1<sup>st</sup> Defendant and any dealing with third parties is internal issues in the 1<sup>st</sup> Defendant, citing the case of **National**



**Airports Corporation Limited v Reggae Ephraim Zimba and Savior Konie<sup>4</sup>** to support this proposition.

Lastly, Learned Counsel for the Plaintiff referred to the futile application earlier made by the 1<sup>st</sup> Defendant to refer the dispute herein to arbitration on the basis of the Arbitration Agreement in the Payroll Agreement. In that application, the 1<sup>st</sup> Defendant had argued that the Plaintiff and the 1<sup>st</sup> Defendant were oneness in mind that any dispute in connection with the Payroll Agreement was determinable by arbitration. Learned Counsel, therefore, urged this Court not to allow the 1<sup>st</sup> Defendant to blow hot and cold in the same breathe.

The question for this Court, therefore, is whether on the basis of the proposed defence and the surrounding circumstances, the judgment in default should be set aside.

To start, with **Order 20 Rule 15 of the High Court Rules**, gives the Court the discretion to set aside a judgment in default; that

***“Any Judgment (or Order) by default under this Order or any other of these Rules, maybe set aside by the Court upon such terms as to costs or otherwise as such Court or Judge may think fit.”***

Further, in the recent past, our Supreme Court in the case of **Rosemary Bwalya v Zambia National Commercial Bank<sup>5</sup>** considered a similar situation as before this Court. In this case, the Respondent who was appearing in person filed a Writ of Summons and Statement of Claim against the Appellant in the High Court claiming

K15,344,000.000 in damages arising from the possession of the Appellant's mortgaged property by the Respondent without a Court Order. After due service, the Respondent did not enter appearance with defence within the prescribed time and, therefore, the Appellant entered judgment in default. The Respondent then appealed to the Deputy Registrar to set aside the judgment in default. The application was supported by an affidavit in which it was deponed that it had a defence on the merits. A copy of the proposed defence was exhibited to that affidavit. Upon hearing the application, the Deputy Registrar refused to set aside the judgment in default on the grounds that the defence contained general denials and further that the reasons for the delay to file a defence were not convincing.

Dissatisfied, the Respondent appealed to the High Court which allowed the appeal, albeit on different reason. The Appellant then appealed against the High Court's decision to set aside the judgment in default. The Supreme Court considered the appeal and held that:

***“The primary consideration in deciding an application to set aside a default judgment is whether there is an arguable case on the merits, although it is also necessary for the Defendant to give an explanation for the default”***

In doing so, the Supreme Court referred to its earlier decision in **Water Wells v Wilson Samuel Jackson (supra)** where it was held that:

***“Indeed the Court of Appeal in England has held to similar effect in Ladup V Siu (2) 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 agree with that, it is wrong to regard the explanation for the default, instead of the arguable defence as the primary consideration. If the Plaintiff would not be prejudiced by allowing the Defendant to defend the claim then the action should be allowed to go to trial.*

*On the authorities to which we have referred, it is obvious that as at the time when the Defendant first made the application (which is the proper time to take into account) the delay and/or possible prejudice was of small enough a magnitude which could have been compensated by an order for costs. It only remains to consider whether the primary consideration, namely, the arguable defence, exists in this case.”*

Turning to the case before me, I have perused the proposed defence and observe that it disputes most of the allegations made by the Plaintiff. For instance, in paragraph 2, the 1<sup>st</sup> Defendant states that at no time did the 1<sup>st</sup> Defendant agree with the Plaintiff to have its employees get mobile gadgets from the Plaintiff as alleged by the Plaintiff in paragraph 4 of the statement of claim. Further, in paragraph 4 the defence, the 1<sup>st</sup> Defendant denies that in breach of

Agreement, it has failed and or in neglected to pay either the said balance or the minimum monthly installments for the mobile gadgets or any part thereof. The 1<sup>st</sup> Defendant goes further in paragraph 6 to aver instead that the person who signed the Payroll Agreement on behalf of the 1<sup>st</sup> Defendant had no authority to do so and lastly that the 1<sup>st</sup> Defendant did not know of any arrangement or agreement between the 1<sup>st</sup> Defendant and the Plaintiff until upon receiving a demand letter from the Plaintiff's advocates.

In my considered view, and following the holding of the Supreme Court in the case of **Rosemary Bwalya V Zambia National Commercial Bank (Supra)**, I am satisfied that the 1<sup>st</sup> Defendant in its defence disclosed an arguable case on the merits to warrant the setting aside of the judgment in default even in the absence of a satisfactory explanation by the 1<sup>st</sup> Defendant for failing to enter appearance with defence within the prescribed time. This is also in spite of the 1<sup>st</sup> Defendant at one point relying on the Arbitration Agreement in the Payroll Agreement in the futile application to refer the dispute to arbitration which, also in my view, is an issue for argument at trial.

With respect to the second application to stay execution of the judgment in default, it has become academic in view of the Orders I now make as follows:

- 1. An Order setting aside the judgment in default of appearance with defence dated 10<sup>th</sup> August, 2016;**



2. An Order that the 1<sup>st</sup> Defendant file its defence within 14 days from the date of this Order;
3. An Order that the ex-parte Order granted to the 1<sup>st</sup> Defendant herein staying execution of the judgment in default pending the hearing and determination of the application to set aside the judgment in default is forthwith discharged;
4. An Order that there shall be an expedited hearing of the action with the parties to appear at a scheduling conference to be held on 29<sup>th</sup> November, 2016 at 14:15 hours.

Further, since the Plaintiff regularly entered judgment in default, the 1<sup>st</sup> Defendant shall bear the Plaintiff's costs of the two applications.

Dated at Lusaka this 21<sup>st</sup> day of November, 2016.



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Hon. Mr. Justice Sunday B. Nkonde, SC  
**HIGH COURT JUDGE**