IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0461**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

BSI STEEL ZAMBIA LIMITED **PLAINTIFF**

AND

HORIZON PROPERTIES LIMITED **DEFENDANT**

Before Lady Justice B.G Lungu on 11th April, 2017 in chambers at Lusaka.

For the Plaintiff: Mr. C Chonta, Messrs Chonta, Musaila & Pindani

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J U D G M E N T

CASES REFERRED TO:

1. Ellis v. Allen [1914] 1 Ch. 904 at 909;

LEGISLATION AND OTHER MATERIALS REFERRED TO:

1. Order XXI., rule 6 of the High Court Rules, High Court Act, CAP 27 of the Laws of Zambia;

This is an application by the Applicant to enter Judgment on Admission of the claim contained in the Writ of Summons taken out

by the Plaintiff on 21st September, 2016, wherein the Plaintiff claimed:

1. *The sum of USD13, 181.29 in respect of steel and steel products supplied to the Defendant by the Plaintiff at the Defendant's own request;*
2. *Interest on the said sum;*
3. *Costs of and incidental to the claim; and*
4. *Any other relief the Court mat deem fit.*

The application to enter Judgment on Admission was made by way of Summons, supported by an Affidavit in Support, sworn by Victor Nyirenda, the Financial Manager in the Applicant Company. Skeleton Arguments were also filed to augment the Plaintiff's application.

The deponent of the Affidavit in Support deposed that the Defendant, through paragraphs 2 and 4 of its Defence of 11th October, 2016, admitted the debt.

In view of the deposed admission, the Applicant took out a Summons under ***Order XXI., r.6 of the High Court Rules,*** which provides as follows:

> ***"A party may apply, on motion or summons, for judgement on admissions where admissions of facts or part of a case are made by a party to the cause or matter either by his pleadings or otherwise."***

At this stage, the first question to be determined by the Court is whether this application properly sits under Order XXI, r.6. of the High Court Rules. In order to do that, I must be satisfied that the Defendant has made an admission of fact or an admission of part of the Applicant's case, either in their pleadings or otherwise.

In the present case, the admissions referred to are contained in pleadings, namely the Defendant's Defence, thus falling squarely within Order XXI, r. 6.

In the Skeleton Arguments, the Plaintiff's advocates invited the Court to consider the nature of an admission by referring to the English case of ***Ellis v. Allen[1] [1914] 1 Ch. 904 at 909,*** where the Court expounded that ***"the admission may be express or implied but it must be clear..."*** I am persuaded by this authority to the extent that the instrument evidencing the admission must visibly demonstrate that there is affirmation of specific facts or to the claim or part thereof.

I have examined paragraphs 2 and 4 of the Defence. Paragraph 2 reads as follows:

> ***"2. The Defendant admits paragraph 3 of the Statement of Claim save to state that a partial settlement of the Defendant's claim of USD12,538.22 the Plaintiff paid the sum of ZMW33, 000.00 on 17th June, 2016..."***

The Court has noted that the terms Plaintiff and Defendant have been transposed in this paragraph. This notwithstanding, the admission is clear and unequivocal.

Paragraph 4 of the Defence reads as follows:

> ***"4. The Defendant admits paragraph 4 and 5 of the Statement of Claim."***

In that regard, Paragraph 5 of the Statement of Claim reads as follows:

> ***"5. ... the Defendant as at 31st August, 216 was liable to pay the sum of USD643.06 as interest on the overdue amount."***

In view of the foregoing, I am satisfied that the Defendant has expressly admitted being indebted to the Plaintiff to the tune of USD12, 538.22, less the sum of ZMW33,000.00 together with interest in the sum of USD643.06 as at 31st August, 2016.

Additionally, the undisputed Affidavit evidence is that the sum of ZMW33,000.00 is equivalent to USD 2,938.77. Therefore, the admitted principal sum translates to the sum of USD10,242.52.

Furthermore, I take the view that the admission is reinforced by paragraph 6 of the Defence, where the Defendant states that it ***"will seek to pay the admitted sum in lump sometime in March 2017".***

Moreover, the record reflects that there is no opposition to this application. Consequently, Judgment on Admission beckons the Court.

In light of the above, and there being no opposition on record, I hereby enter Judgment on Admission in favour of the Plaintiff in the sum USD10,242.52. together with interest thereon in the sum of USD643.06 as at 31st August, 2016.

The balance of the claim will proceed to trial.

Costs of this application are awarded to the Plaintiff, to be taxed in default of agreement.

Dated this 25th day of April, 2017

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Lady Justice B.G.Lungu

HIGH COURT JUDGE

IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0253**

AT THE COMMERCIAL REGISTRY

AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

METHOD NIMBONA PLAINTIFF

AND

KUMAWA LIMITED DEFENDANT

Before the Honourable Justice Irene Zeko Mbewe in Chambers

For the Plaintiff: *Dr M Mwanawasa of Messrs Mwanawasa and Co*

For the Defendant: *Mr Mosha of Messrs Mosha and Company*

RULING

Cases Referred to:

1. *Water Wells Limited v Jackson [1984] ZR 98*
2. *Chibote Limited and Others v Meridian BIAO Bank Limited (In Liquidation) SCZ No 11 of 2003*

3. *RDS Investments Limited and Joseph Ouseph Moonjelly SCZ No 52 of 1998*

Legislation Referred To:

1. *High Court Rules, Cap 27 of the Laws of Zambia*

2. *Rules of the Supreme Court, 1999 Edition*

This Ruling is on the Defendant's application for an order to set aside judgment delivered on 2016. It is made by way of summons in support whereof an affidavit and skeleton arguments filed on 20th September 2016. The application is made pursuant to **Order 35 Rule 5 of the High Court Rules, Cap 27 of the Laws of Zambia.**
The background to this matter is that it was commenced on 9th June, 2015 by way of Writ of Summons wherein the Plaintiff was claiming for –

(a) the sum of US$32,600 being money paid by the plaintiff to the defendant for transport charges
(b) interest at the current bank rate;
(c) costs;
(d) any other relief the court may deem fit.

The affidavit in support and deposed by Ganizani Tembo the Managing Director in the Defendant Company. The gist of the evidence is that Judgment was entered in favour of the Plaintiff on

the 6th April, 2016 (**Exhibit "GT1"**), and the said Judgment was passed in the absence of both Counsel for the Defendant and the Defendants herein. According to the Defendant, that no information was received from the Defendant's Counsel on the Court dates hence their non appearance before Court. That the Defendant only became aware of the Judgment recently after being informed by the Plaintiff's Advocates of the same. That Messrs Mosha and Company have since been appointed to act on behalf of the Defendant and seek to stay execution of the Judgment and thereafter set aside the Judgment. According to the Defendant, if the judgment is not stayed, the application to set aside judgment will be rendered an academic exercise. The Defendant filed skeleton arguments in support of their application.

The affidavit in opposition was deposed by Method Nimbona the Plaintiff herein whose gist is that the matter was heard and determined, and it would be unjust and unfair to set aside the said Judgment legally obtained by the Plaintiff. The deponent argued that if the Defendant was not properly represented, the recourse should be to sue the lawyers who were representing them for professional negligence. That the Defendant's defence and counterclaim was used by the Court to arrive at the Judgment. It was deposed that while the Court has power to set aside Judgments the same should be on merit and not on the reasons set out by the Defendant which in essence is trying to make the court review its Judgment. It was deposed that in the event that the court decides

to set aside the Judgment, costs already incurred should be settled and there by payment for security for costs.

In the Defendant's affidavit in response, it was deposed that no prejudice will be occasioned on the Plaintiff. That the Defendant has a valid defence and counterclaim which they should be given the opportunity to be heard by the Court.

At the hearing, the parties relied on the respective affidavits and skeleton arguments. Counsel for the Defendant further augmented their arguments with oral submissions.

It was Counsel for the Defendant's view that notwithstanding lapses or failure on the Defendant's former Advocates, the Defendant should be heard so that justice is done as between the litigants. Counsel for the Defendant urged the Court to exercise its discretion in favour of the Defendant as provided under **Order 35 Rule 5 of the High Court Rules, Cap 27 of the Laws of Zambia** by setting aside the Judgment and allowing the case to be properly determined on its merits and not on technicalities.

In response Counsel for the Plaintiff argued that the matter was heard on its merit and that the Defendant's defence and counterclaim had failed and that the commercial procedures on limitation of time was abrogated on several occasions by Counsel for the Defendant. Counsel for the Plaintiff argued that it was

unfair to deny the Plaintiff the fruits of his Judgment especially that professional negligence cannot be overlooked in this matter. She submitted that should the Court be inclined to set aside the Judgment, it should be conditional where costs should stand and security for costs should be considered.

In response, Counsel for the Defendant argued that to impose conditions on security for costs would be to indirectly frustrate the Defendant from bringing his defence especially considering that the matter had progressed. Counsel submitted that the Plaintiff had not suffered any prejudice and that the Court should test the evidence of the Defendant in order to arrive at a just decision.

The Defendant filed in skeleton arguments in which it relied on **Order 35 Rule 5** and **Order 3 Rule 2 of the Rules of the High Court, Cap 27 of the Laws of Zambia.**

I have considered the affidavit evidence, skeleton arguments and list of authorities, including the oral submissions of both Counsel. The Defendant has brought this application pursuant to **Order 35 Rule 5 of the High Court Rules, Cap 27 of the Laws of Zambia** which states as follows:

> **"Any judgment obtained against the 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."**

A corresponding Rule is found in **Order 35 Rule 1** of the **Rules of the Supreme Court, 1999 Edition.** There are factors to be taken into consideration in an application to set aside Judgment obtained in the absence of the other party, and these are listed in **Order 35/1/1 of the Rules of the Supreme Court, 1999 Edition** as follows:

"**(i) Where a party with notice of proceedings has disregarded the opportunity of appearing, and participating in the trial, he will normally be bound by the decision;**

(ii) Where the 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 accident, or mistake, the Court will be unlikely to allow a re-hearing;

(iii) Where the setting aside of judgment would entail a complete re-trial on matters of fact which have already been investigated by the Court, the application will not be granted unless there are very strong reasons for doing so;

(iv) The Court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success;

(v) Delay in applying to set aside is relevant particularly if during the period of delay the successful party has acted

on the judgment, or third parties have acquired rights by reference to it;

(vi) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered; where he has failed to comply with orders of the Court, the Court will be less ready to exercise its discretion in his favour;

(vii) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences; and

(viii) There is a public interest in there being an end to litigation, and not having the time of the Court occupied by the two trials particularly if neither is short.

The background to this matter is that Orders for Directions were issued on the 27th August, 2015 and when the matter came up for a status conference on 17th November, 2015 the Plaintiff had complied with the Orders for Directions whilst the Defendant who was being represented by the firm of Messrs Chibundi and Company had not. On that date, the matter was set down and trial was scheduled for 10th February, 2016. The record shows that no documents were filed in compliance with the Orders for Direction except the defence and counterclaim.

On the 10th February, 2016, Mr Chilambwe of Messrs Mosha standing in for Mr P Chibundi of Messrs Chibundi and Company attended Court and sought an adjournment to enable them file the necessary documents and information. The matter was then adjourned to 27th March 2016. However, on the 29th February, 2016, a notice of withdrawal as Advocates was filed into Court with a supporting affidavit and the reasons for withdrawal being that the Defendant had neglected to provide instructions and it became untenable to continue representing them.

On the 24th March, 2016 trial commenced and there was no appearance from the Defendant. The Plaintiff called their witness who testified, and Judgment was delivered on 6th April, 2016 in favour of the Plaintiff. Subsequently in enforcing the Judgment, a praecipe and writ of *fiera facias* was filed into Court on 4th May, 2016. On the 20th September, 2016, the Defendant through Messrs Mosha and Company Legal Practitioners applied for an *ex parte* order for stay of execution which was not granted but an *inter parte* hearing was set. I have deliberately set out the chronology of events in this matter to show the behaviour of the previous Counsel for the Defendant and the Defendant herein.

Counsel for the Defendant has argued that even though they were lapses, the matter be heard on its merit. There is evidence on record that Counsel for the Defendant was absent from a number of

hearings and failed to comply with the Orders for Directions issued therein.

The issue for determination is whether or not the Defendant has in its application satisfied the requirements to justify the granting of an order to set aside Judgment obtained in the absence of a party. Where Judgment has been given after a trial, it is the explanation of the absence of the absent party that is most important, unless the absence was not deliberate but was due to accident, or mistake, the Court will be unlikely to allow a re-hearing.

A perusal of the averments in the Defendant's affidavit in support of this application, shows the reasons adduced for failure to appear at the trial of the case was that the Defendant was not aware of the date of hearing as there was no notification of court dates from the previous Counsel.

The previous Counsel in their notice of withdrawal from acting on behalf of the Defendant dated 29 February 2016, despite filing a defence and counterclaim, gave reasons for withdrawal from record as the failure of the Defendant to provide instructions. Counsel for the Plaintiff on the other hand argued that the Defendant was aware of the date of hearing. I find that there is no evidence to show that the hearing date was communicated to the Defendant by the previous Counsel for the Defendant. I opine that the Defendant should not therefore be punished for the default of their Counsel. I

am satisfied that there is sufficient reason for the Defendant's absence or failure to appear at the trial and defend the action.

In considering justice between the parties, the conduct of the person applying to set aside the Judgment has to be considered, and whether the Defendant has failed to comply with orders of the Court, the Court will be less ready to exercise its discretion in the Defendant's favour. Counsel for the Plaintiff argued that the improper conduct of the Defendant's previous Counsel should not be ignored and the Defendant will do well to address any issue of loss sustained as a result of the previous Counsel's failure to carry out its instructions. In this respect, I concur that Counsel should at all times carry out their professional duty with care and skill, and with a view to protect their client. According to the previous Counsel, their withdrawal from representing the Defendant was as a result of failure to obtain instructions. The correct inference to draw is that there was a breakdown in communication between the previous Counsel and client.

The Court will not consider setting aside judgment regularly obtained unless the Defendant enjoys real prospects of success. I have perused the record, and find that there is a counterclaim on record.

As to whether or not there has been undue delay in making the application to set aside the Judgment, Judgment was delivered on

6th April, 2016 and the application to set aside the Judgment was filed into Court on 20th September, 2016 representing a period of 6 months. I opine that there was a delay on the part of the Defendant. The Defendant has attributed this to non notification of the court proceedings until Counsel for the Plaintiff's sent them a copy of the Judgment.

Another material consideration is whether the successful party would be prejudiced by the Judgment being set aside, especially if the Plaintiff cannot be protected against the financial consequences. Counsel for the Plaintiff argued that prejudice would arise if the application was allowed. It must be noted that from the time of the delivery of the Judgment, the Plaintiff took further action in enforcing the Judgment by issuing a writ of *fieri facias* and garnishee proceedings. I am ably guided by the Supreme Court which has on a number of occasions pronounced that if no prejudice shall be caused to a party if the matter is allowed to proceed to trial then the defaulting party may only be condemned in costs and the matter must then proceed to trial and be determined on merit. This was the position elucidated in the case of **Water Wells Limited v Jackson** and **Chibote Limited and Others v Meridian BIAO Bank Limited (In Liquidation).** In **RDS Investments Limited and Joseph Ouseph Moonjelly** the Supreme Court held that:

"We have said in a number of cases and we wish to reiterate here that any judgment not on merit is liable to be set aside and on merit means both sides being heard. For this reason we would urge lawyers and Courts below not to be hasty in seeking for and delivering judgments before both sides are heard unless there are some compelling reasons."

I associate myself with the position taken in the cited cases.
Further, much as it is in the public interest that litigation must come to an end, it is my considered view that in the interest of justice matters be heard on their merit as pronounced by the Supreme Court in a plethora of cases.

By way of conclusion, I am satisfied that this is a proper case for the setting aside of the Judgment made in the absence of a party. For avoidance of doubt, the Judgment entered on 6th April 2016 is hereby set aside.

Costs are awarded to the Plaintiff to be taxed in default of agreement.

The matter is set down for trial on the 15th May, 2017 at 14.30 hours.

Leave to appeal granted.

Delivered this 25th day of April 2017

HON IRENE ZEKO MBEWE

HIGH COURT JUDGE.