**IN THE HIGH COURT FOR ZAMBIA** **2017/HPC/0462**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)




BETWEEN:

AUPIE AGRO FOAM LIMITED PLAINTIFF

AND

EASTCHL TRANSPORT AND LOGISTICS LIMITED DEFENDANT

Before: The Hon. Lady Justice Dr. W. S. Mwenda in Chambers at Lusaka the 30th day of January, 2018.

For the Plaintiff: Mrs. N. Simachela of Messrs Nchito and Nchito Advocates

For the Defendant: Mrs. E. Chanda of Messrs. Chanda Chizu and Associates.

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# RULING

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***Legislation referred to:***

*Order 20, rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia.*

This is the Defendant's application to set aside judgment in default of appearance and defence pursuant to Order 20, rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia. The default judgment was entered on 27th November, 2017.

The application is buttressed by an Affidavit in Support dated 4th December, 2017 sworn by one Francis Jilowa, the Defendant's

Human Resource officer who testifies to the effect that on 7th November, 2017 the Plaintiff served on them originating process and on 23rd November, 2017, entered a default judgment. That the Defendant's advocates gave a copy of the process to the then Human Resource Officer who indicated to them that they would provide further information and correspondence to help in preparing a defence.

It is the deponent's averment that the Defendant has a defence on the merits as evidenced by the copy of the intended Defence exhibited to the affidavit as "FJ3". The deponent avers further, that the Company (Defendant) underwent restructuring in the Human Resource Office for some time and the Human Resource Officer left employment.

That when the deponent took office he was not aware of the said process and that even upon verbal reminders by their advocates, he needed to consult as he had just taken over office and therefore delayed in giving the said information. Further, that the Defendant is desirous and ready to file the Defence as soon as the default judgment is set aside and they are allowed to file the Defence.

The Plaintiff opposed the application and to that end filed, on 19th January, 2018, a Composite Affidavit in Opposition to Summons to Stay Execution of Default Judgment and Summons to Set Aside Judgment in Default, sworn by Colonel Charles Chisanga (Rtd), the Head of Human Resources in the Plaintiff Company wherein he avers that the court process was duly and timeously served on the Defendant on 7th November, 2017 and to that effect, exhibited

a copy of the letter of acknowledgment of receipt as "CC1". He further avers that the Defendant has been aware of the dispute and that the reason given for the delay does not excuse their failure to enter appearance and defence.

At the hearing of the application Mrs. Chanda, Counsel for the Defendant, submitted orally that for an application such as the one before court the Defendant must reveal that there are triable issues and the Defence which is exhibited before this Court reveals that there are triable issues and that the Defendant craves this Court to set aside the default judgment in the interest of justice.

In response, Mrs. Simachela, Counsel for the Plaintiff, submitted that the Plaintiff opposes the application for two reasons, firstly, that the reason advanced by the Defendant for the delay in filing its Defence has no merit and that the court rules as to time within which to file documents must be taken seriously and should be strictly observed.

According to Counsel, the Defendant's affidavit reveals that the Defendant took a very lax approach to the court process served on them. Secondly, the proposed Defence reveals no triable issues and in fact consists of a lot of admissions as far as the Plaintiff's claim is concerned. It was thus Counsel's submission that this is not a proper case for the Court to exercise its discretion to set aside the default judgment and it is the Plaintiff's prayer that the application be dismissed with costs to the Plaintiff.

In reply Mrs. Chanda submitted that the reason the Plaintiff came to court in the first place was because there was a disagreement between the parties. Further, that much as the Plaintiff might say that the Defence contains admissions, there are certain aspects that the parties do not agree upon and hence the reason the parties are before this Court. That it is those issues that the parties do not agree on that raise the issues that the Defendant is relying on.

Counsel submitted further that while the Defendant agrees that rules of court as to time must be observed, it is the Defendant's submission that the delay in filing its Defence was not deliberate but due to unexpected and unforeseen human error as revealed in the Affidavit in Support. Thus, the Defendant still craves this Court to set aside the default judgment in the interest of justice.

I have carefully perused the documents filed by both parties in support of and indeed in opposition to the application before me. I concur with the submission by Counsel for the Plaintiff, which submission Counsel for the Defendant also alluded to, that the times set by the court rules in which to file court process must be respected by parties to suits. Indeed, parties who do not show such respect do so at their own peril. However, this Court is vested with the discretion to set aside a judgment in default by virtue of Order 20, rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia, which stipulates as follows: -

> *"Any judgment by default, whether under this Order or under any of these Rules, may be set aside by the Court or a*

*Judge, upon such terms as to costs as the Court or a Judge may think fit.*"

I have perused the intended Defence and I am satisfied that it raises triable issues and a defence on the merits. For these reasons I am inclined to set aside the default judgment entered on 27th November, 2017.

The Judgment in Default of Appearance and Defence is accordingly set aside. However, the Defendant is condemned in costs, to be agreed or taxed in default thereof.

Dated at Lusaka this 30th day of January, 2018.

W. S. Mwenda (Dr)
**HIGH COURT JUDGE**