IN THE COURT OF APPEAL **APPEAL No.205/2020**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

CECILIA HACHIGONTA **APPELLANT**

AND

INVESTRUST BANK PLC **RESPONDENT**

CORAM: CHISANGA JP, MULONGOTI AND SIAVWAPA, JJS

On the 12th November 2020 and 27th August 2021

For the Appellant: *Mr. C. Sichone – National Legal Aid clinic for Women*

For the Respondent: *Mr. M. Kasofu – Messrs Tembo Ngulube & Associates*

JUDGMENT

CHISANGA JP delivered the Judgement of the Court

Cases Referred to:

1. ***McCullough v. BBC 919960 N I 58***
2. ***Tracy v. O'Doud and Others (2002) NIQB 48***
3. ***Photo Bank (Z) Limited v Shengo Holdings Limited (2008) 1 ZR 108***
4. ***Waterwells Limited v Wilson Samuel Jackson (1984) ZR 98***
5. ***Patel and Another v Monile Holdings Company Limited (SCZ Judgment No 6 of 1993)***
6. ***Alpine Bulk Transport co. Inc v Saudi Eagle shipping Co. Inc (1986) 2 Llyods Re 221***
7. ***Mwambazi v Morester Farms Limited (1977) ZR 108***

INTRODUCTION

1. This appeal impugns Salasini J's ruling delivered on 18th April 2019, *in* which she set aside the Ruling of the Deputy Registrar, whereby a default judgement had been set aside.

2. The respondent Bank issued process against the appellant, its former employee, for recovery of K844,232.89 being loan facilities by the respondent availed to the appellant, during her employment. The Writ of Summons was issued on 14th September, 2017 and served on the appellant on 22nd September, 2017. She did not enter an appearance and defence. Thus on 16th October 2017, the court entered default judgement in favour of the respondent Bank. A *Writ of Fieri Facias* was subsequently issued on 20th November 2017.

3. On 24th November, 2017, the appellant applied to stay execution pending the determination of the Court on an application to set aside the default judgment. A stay of execution was granted on 28th November, 2017. In support of the application to set aside the default judgment, the appellant deposed that the delay in filing Memorandum of Appearance and defence was not deliberate. The parties were considering an ex curia settlement and she had been assured by Counsel for the Respondent that no further steps would be taken unless the ex-curia settlement failed. To her surprise, on 8th November, 2017, she was served with a Judgment in default of defence and appearance.

4. In opposition, it was deposed on the respondent's behalf that the appellant had no defence on the merit as she did not deny her indebtedness to the respondent. That no triable issues were disclosed in the defence and counterclaim.

5. The Deputy Registrar allowed the application and set aside the default judgment whereupon the respondent appealed to the judge in chambers. Upon considering the appeal, Salasini J opined that when considering such an application, the court focuses on whether there is a defence on merit. The excuse for the failure to file a defence is given less weight. She formed the view that the appellant had not revealed sufficient evidence that she had a defence on the merit. That the defence and counterclaim did not disclose triable issues that warranted a trial. She thus set aside the Ruling of the Deputy Registrar.

6. Dissatisfied with the outcome, the appellant has appealed on three grounds of appeal which are really one complaint. The gist of the appeal is that the learned judge erred by failing to appreciate the defence as meritorious. The appellant had a counterclaim against the respondent, who had withheld the appellant's gratuity from August, 2015 to October, 2017 and added no interest thereon. The counter claim required to be heard.

7. **THE APPELLANT'S ARGUMENT**

The appellant's argument is that the defence raised issues which cast doubt on the calculation of the sum of K844,232.89 claimed by the respondent. One issue was that the commercial rate applied by the respondent to calculate interest on the loans was contrary to the Debt Settlement Agreement which provided that the loan would be calculated at the Bank staff rate. Secondly, the respondent withheld the Appellant's gratuity amounting to K137 916.62 from August 2015. This was not taken into account when calculating the appellant's indebtedness to it. According to the appellant, the unpaid gratuity accrued interest and would have reduced the appellant's indebtedness to the Respondent.

8. It is pointed out that the respondent claimed K844 232.89, but this amount was later reduced to K726 451.45 in the writ of execution. The appellant contends that faced with such a disparity, the learned judge should have referred the matter to assessment as opposed to setting aside the decision of the Deputy Registrar altogether.

9. The appellant referred to ***McCullough v. BBC***[1] and ***Tracy v. O'Doud and Others.***[2], arguing that it was established in those cases that in order to set aside a judgment, the defendant must firstly have an arguable defence; secondly, it is not necessary that a defendant establishes that the defence has a real prospect of success; thirdly, it is not necessary for the court to form a provisional view of the probable outcome of the case; and lastly that

the court will not set aside judgment if there is no defence to the claim apparent from the material before Court. The merits threshold will require the defendant to establish an arguable defence. This is 'a defence on merits' to which the Court should pay heed.

10. It has been submitted further that the Court did not address its mind to the counterclaim. The Court should have given directions to the parties on how to proceed with the counterclaim. Reliance is placed on Photo ***Bank (Z) Limited v. Shengo Holdings Limited.***[3], where the Court reportedly stated as follows:-

> ***"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 counterclaim is more of a set-off and this has to be proved."***

11. The Appellant has also made reference to Order 15 Rule 2(4) of the White Book, 1999 Edition. It is prayed that the appeal be upheld.

THE RESPONDENT'S HEADS OF ARGUMENT

12. In opposing the appeal, the respondent relies on the cases of ***Waterwells Limited v. Wilson Samuel Jackson,***[4] ***Patel and Another v. Monile Holding Company Limited.***[5] and the English case of ***Alpine Bulk Transport Co. Inc v. Saudi Eagle Shipping Co. Inc.***[6] It is submitted in the respondent's submission that in dealing with applications to set aside default judgments, a defence on the merit is cardinal.

13. The respondent contends that the Loan Agreement which was executed by the parties addressed the two issues which were raised. In that agreement, the appellant acknowledged that she was indebted to the bank in the sum of K561 328.81 as at 6th June, 2016. She also agreed to the respondent Bank revising the interest at its discretion. It is the respondent's submission that the issue of interest rate applicable on the loans is an afterthought.

14. As for the appellant's gratuity, it is submitted that the same cannot constitute a defence as there was no obligation on the respondent's part to set off the appellant's gratuity against her outstanding loans. Learned counsel contends that the plea of set-off is a further admission of indebtedness. Moreover, the appellant's claim for gratuity is not disputed by the respondent, and was taken into account when the writ of execution was issued.

15. Learned counsel prays Photo ***Bank Limited v. Shengo Holding Limited***[3] in aid, where the Supreme Court held that:

> ***"a party is not entitled to have a judgment in default set aside merely because he or she has a counter-claim."***

16. That based on this authority, the Court is precluded from considering a party's proposed counterclaim in dealing with an application to set aside a judgment in default of appearance and defence.

CONSIDERATION

17. We have considered the arguments of the parties. The issue that arises in this appeal is whether a defence on the merits has been raised by the appellant. In determining this question, we will examine the proposed defence.

18. It is well settled that when a judgement in default of appearance and defence is properly entered, it may be set aside if the defendant raises a defence on the merits. While they are required to explain their failure to enter appearance and defence, the court will accord due weight to the proposed defence. The learned judge was alive to this position. The question is whether or not the proposed defence was properly scrutinised before being discarded.

19. In the defence and counter-claim, the appellant averred that the interest rates applicable to the loan, which she did not dispute obtaining, are the staff lending rates. She also averred that at the time she contracted the loan facilities, it was both an express and implied term of the loan facilities

that the staff lending rates, which ranged between 5% to 15% would continue applying even after the separation from the plaintiff bank.

20. It was additionally averred that sometime in 2015, and long after the defendant had already contracted the loan facilities, the plaintiff bank issued a memo changing the policy on interest rates to one that required revision of interest rates from staff lending rates to commercial rates after an employee left employment. The said memo did not and cannot apply retrospectively so as to affect the defendant who had already contracted the loan facilities prior to 2015.

21. Furthermore, it was averred that the change of policy was a unilateral decision of the plaintiff bank without the consent of the defendant, and therefore, cannot affect the loan agreements made with the defendant before the policy came into effect.

22. Moreover, it was stated in the defence that if at all the plaintiff bank converted the lending rates from staff to commercial as alleged, then it acted in breach of the loan agreement as it did so without the consent of the defendant.

23. These averments were in response to the plaintiff's averment in paragraph 5 of the statement of claim, which was drawn as follows:

> ***"The plaintiff will aver at trial that it was both an express and implied term of the said loan facilities that repayment for the same would be through the defendant's monthly salary and that the interest rates applicable on the loan facilities would be the staff lending rates subject to revision upon the defendant's separation with the bank".***

24. The appellant exhibited a Debt Settlement Agreement in which the parties had reiterated as follows:

> ***"WHEREAS pursuant to several loan facility letters, the Debtor was availed staff loan facilities amounting to K600,000.00 (Six Hundred Thousand Kwacha) under, inter alia, the following condition:***
>
> ***1. That the staff interest rate as per staff lending policy would apply on the loans subject to revision at the bank's discretion, depending on market forces.***

25. The proposed defence asserts that the commercial lending rates were introduced after the contractual terms had already been settled.

26. In addition to this, the clause that purportedly conferred the right on the bank to impose the commercial rates of interest on the loan does not, at this stage without more, lead to the conclusion that the parties had agreed that the interest rates would switch to the commercial lending rates on exit.

27. The clause on which capital is placed by the respondent refers to the staff interest rate. This is the rate that would be revised at the bank's discretion. Prima facie a defence worth looking into has been revealed. Salasini J

should not have upheld the default judgment, in light of the proposed defence.

28. On this ground, we find merit in this appeal, and set aside the default judgment. We consider it unnecessary to delve into the rest of the grounds, as they are rendered otiose. The costs of the appeal are awarded to the appellant, to be agreed and in default taxed.

.....

F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

.....

J. Z. MULONGOTI
COURT OF APPEAL JUDGE

.....

M. J. SIAVWAPA
COURT OF APPEAL JUDGE