IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL No. 121/2022**
HOLDEN AT KABWE
(Civil Jurisdiction)

BETWEEN:

19 JUN 2024

MONDE MABUKU NYAMBE **1ST APPELLANT**

CHISHIMBA ABIGAIL NYAMBE **2ND APPELLANT**

AND

CARLO PETER TESTI **1ST RESPONDENT**

DEBBIE LUNGU **2ND RESPONDENT**

Coram: ***Chashi, Makungu and Sichinga, JJA***
on 22 May and 19 June 2024

For the Appellants: *Mr. W. Shakalima of Messrs T.K. Ndhlovu & Co.*

For the Respondents: *Messrs S.K. Simwanza and B. Lusungo of Messrs Stephen Osborne*

JUDGMENT

Sichinga JA delivered the Judgment of the Court.

Cases referred to:

1. *Stanley Mwambazi v Morester Farms Limited (1977) ZR 108*
2. *Water Wells Limited v Jackson (1984) ZR 98*
3. *John W.K. Clayton v Hybrid Poultry Farm Limited SCZ No. 15 Of 2006*
4. *Tembo v Sichembe and Others SCZ Appeal No.177 Of 2014*

5. *Habuce Farms Limited v Tabishai Gulam Isap Hola & Aneela Muhamed Islam CAZ Appeal no. 218 of 2020*
6. *Alpine Bulk Transport Co Inc. v Saudi Eagle Shipping Co. Inc. (1986) Z Lloyd Rep 221*
7. *Bishop and Baxter Limited Vs Anglo Eastern Trading and Industrial Co Ltd (1944) KB 12*
8. *Natural Valley Limited v Brick and Tile Manufacturing Limited and Attorney General, Selected Judgment No. 32 of 2018*

Legislation referred to:

1. *The Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by Act No. 2 of 2016*
2. *The High Court Rules, Chapter 27 of the Laws of Zambia*
3. *The Supreme Court Rules (1965) 1999 Edition (White Book)*

Other works referred to:

1. *Halsbury's Laws of England 4th Edition*

1.0 Introduction

1.1 This is an appeal against the Ruling of Lady Justice Mapani-Kawimbe, delivered on 18 February 2022. In the said Ruling, the learned Judge considered the defendants' applications to set aside default judgment and stay of execution. She found *inter alia* that the defendants did not give an excusable explanation for their default. The learned Judge found that it was therefore not in the interest of justice to set aside the

default Judgment. She accordingly dismissed the application to set aside the default Judgment and the application for stay of its execution.

2.0 Background

2.1 The brief background of this matter is that the plaintiffs (respondents now), commenced an action against the defendants (now appellants), by way of writ of summons and statement of claim filed on 28 July 2021, seeking two orders: the first, that the Contract of Sale relating to Subdivision C of Subdivision Z of Farm 297a, Lusaka, stands rescinded due to failure by the defendants to honour their obligations under the Contract of Sale and unwillingness to complete; and that the defendants be refunded the deposits paid in line with clause 15 of the Contract of Sale.

2.2 On 18 August 2021, the plaintiffs' advocates conducted a search on the Registry to ascertain the stage of proceedings. The search revealed that there was no defence filed by the defendants. On the same day, the plaintiffs applied to enter Judgment in default of defence, which application was granted. This propelled the defendants to apply for setting aside the default Judgment and its stay of execution on the ground that the plaintiffs sat on their rights to rescind the contract of sale when they did not rescind the contract soon after the alleged breach of contract.

3.0 Decision of the court below

3.1 After considering the application and the affidavit evidence, the learned Judge formulated the issue for determination to be *whether she should set aside the default judgment entered on 18 August 2021.* From the outset, the learned Judge noted the guidance enshrined in ***Article 118(2) of The Constitution***[1] regarding the focus on substantive justice, rather than procedural technicalities. She further considered ***Orders 12*** and ***20 of The High Court Rules***[2] on the court's power to enter interlocutory judgment where there is default and issues and consequences of non-appearance respectively.

3.2 The learned Judge sought the Supreme Court's guidance in the case of ***Stanley Mwambazi v Morester Farms Limited***[1] and observed that when faced with such an application, courts are required to consider the merits of the defence and the explanation for the default. She found that the draft defence exhibited by the defendants did not disclose any triable issue. In addition, she found that the defendants did not give an excusable explanation for their default. She accordingly dismissed the application.

4.0 The appeal

4.1 Dissatisfied with the Ruling, the defendants appealed to this Court advancing the following eight grounds:

1. *The learned Judge in the court below erred in law and fact when she failed to take note of the fact that this is a land dispute and cannot be decided on a technicality;*

2. *The court below erred in law and fact when it dismissed the application to set aside Judgment in default without considering the fact that the appellants exhibited a defence on the merits;*

3. *The learned Judge erred in law and fact when she disregarded the appellants' reason advanced for failure to file a defence within 14 days which is to the effect that they were out of the country and were unable to instruct counsel to defend same as they were unaware of the said proceedings and as such unable to file within the given 14 days. This Court will note that there was no inordinate delay to challenge the said Judgment in default;*

4. *The learned Judge erred in law when it allowed the respondent to rescind the contract of sale on account of delay to pay the balance of K30,000.00 when the appellants have made a substantial payment of K220,000.00 from the total purchase price of K250,000.00;*

5. *The court below erred in law and fact when it disregarded the fact that the respondents had sat on their rights when they defaulted to act immediately upon discovering that the breach of the Agreement as it took them 6 years to rescind;*

6. *The court below erred in law and fact when it did not consider the fact that the demand letter which was issued by the respondent was simply no demand for the balance of the purchase price but rather to inform the appellants of their decision to rescind the contract of sale which is irregular;*

7. ***The court below erred in law and fact when it failed to consider the fact that the respondents' purported enforcement of the Judgment in default is irregular as they did not obtain an order for leave to sale, this cause being a land dispute; and***

8. ***The court below erred by not taking into consideration the fact that the appellant had pleaded in the alternative that should the said rescission be upheld, a refund of the total sum paid to the respondent be paid back with interest.***

5.0 Appellants' arguments in support of the appeal

5.1 At the hearing of the appeal, Mr. Shakalima, learned counsel for the appellants, relied on the appellants' heads of argument filed on 8 June 2022. Grounds one, four, seven and eight were argued separately. Grounds two and three were argued together, whilst grounds five and six are missing.

5.2 In support of the first ground of appeal, we were referred to the following authorities:

5.3 ***Order 12 Rule 8 of the High Court Rules*** *supra* which provides:

> ***"8. In all actions not otherwise specifically provided for by the other sub rules, in case the party served with the writ of summon does not appear within the time limited for appearance, upon the filing by the Plaintiff of a proper affidavit or certificate of service, the matter shall proceed as if such a party had appeared."***

5.4 It was argued that a reading of the ***Order 12 of the High Court Rules*** in its entirety does not in any way provide or cover the matter for rescission of contract. That the effect of the afore stated authority is that a dispute for rescission of contract cannot be decided on a technicality through a judgment in default, as it does not fall within the ambit of the actions that warrant a plaintiff to obtain a judgment in default or be decided on a technicality as same must proceed to trial as if the other party entered a defence.

5.5 ***Order 20 Rule 15 of the High Court Rules*** *supra* which provides that:

> ***"Any Judgment (or Order) by default obtained by default under this order or any other of these rules, may be set aside by the court upon such terms as to the costs or otherwise as such the court may think fit."***

5.6 ***Order 35 Rule 5 of the High Court Rules*** *supra* which provides that:

> ***"Any Judgment or order obtained against any party in the absence of such party may on sufficient grounds be set aside by the court upon such terms as may seem fit."***

5.7 The case of ***Water Wells Limited v Jackson***[2] was referred to for its holding that:

> ***"Where delay was of small magnitude which could be compensated by an order for costs, it was a basis which the court could set aside a default Judgment."***

5.8 The case of ***Stanley Mwambazi v Morester Farms Limited*** *supra* was adverted to for its holding that:

"It is the practice in dealing with bona fide interlocutory applications for the courts to allow triable issues to come to trial despite the default of the parties... for this favorable treatment to be afforded to the applicant, there must be no unreasonable delay, mala fides and no improper conduct on the part of the applicant."

5.9 It was argued that there was no inordinate delay to apply to set aside the judgment in default. The said application was filed on 4 October 2021. We were asked to note that the said application to set aside judgment in default gave an account of the delay and also exhibited a defence on the merit bringing out triable issues. Pages 26-33 of the record of appeal referred to.

5.10 We were urged to uphold the first ground of appeal and accord the appellant an opportunity to be heard.

5.11 In support of grounds two and three, we were first referred to the case of ***John W.K. Clayton v Hybrid Poultry Farm Limited***[4] where the Supreme Court held that:

"Although it is the usual on an application to set aside a Judgment in default not only to show a defence on merits, but also to give the explanation of the default."

5.12 The case of ***Tembo v Sichembe and Others***[5] was referred to, where the Supreme Court held:

"A Judgment that is obtained in the absence of a party may be liable to set aside. When dealing with the application to set aside such a judgment, the overriding concern on their substance and merit. Hearing a matter on their merits means that both sides must be heard."

5.13 We were invited to consider the application to set aside the judgment in default together with the proposed defence and explanation availed.

5.14 Counsel urged the Court to uphold grounds two and three of the appeal.

5.15 In ground four, it was advanced that the appellants paid a substantial sum (K220,000.00) of the purchase price of the subject property leaving a balance of only K30,000.00. We were asked to consider that it has taken over six years for the respondent to take steps to rescind the contract of sale. That the respondents sat on their rights to do so when they had not taken any step after the default to pay.

5.16 We were urged to equally uphold ground four.

5.17 The arguments on grounds five and six are not part of the appellants' heads of argument on record and therefore could be considered abandoned.

5.18 In support of ground seven, we were referred to ***Order 45 Rule 3(2) of the Supreme Court Rules***[3] which provides that:

> *"**Enforcement of judgment for possession of land***
>
> ***(2) a writ of possession to enforce a judgment or order for the giving of possession of any land shall not be issued without the leave of the court except where the judgment or order was given or made in a mortgage action to which Order 88 applies.***
>
> ***(3) such leave shall not be granted unless it is shown.***
>
> ***(a) that every person in actual possession of the whole or any part of the land has received such notice of the proceedings***

as appears to the court sufficient to enable him apply to the court for any relief to which he may be entitled."

5.19 It was argued that the respondents did not obtain any leave to enforce the judgment, as this is a land matter and not a mortgage action. It was submitted that the said sale is irregular and must be reversed for non-compliance with the rules of this Court as forestated. That it is a procedural requirement that to repossess land, a litigant has to issue a writ of possession and obtain leave before enforcing same. It was contended that *in casu* the respondents claim to have perfected the judgment in default, without obtaining any writ of possession. It was submitted that the purported sale was irregular and must be reversed.

5.20 In support of the eighth ground of appeal, we were referred to the case of ***Habuce Farms Limited v Tabishai Gulam Isap Hola & Aneela Muhamed Islam***[6] where it was held as follows:

> ***"In the law of contract, rescission is the cancellation of contract so that parties assume position as existed before the contract was entered into. Once rescinded, a contract is treated as though it never existed and neither party can claim on it. A party will be entitled to rescind a contract entered into by misrepresentation, mistake, duress, or under influence.***
>
> ***... In our considered view, based on the facts of the case, the appellant could not have rescinded as none of the vitiating factors had occurred. The Appellant has not alleged any of***

the factors in the variation of contract. It cannot therefore rescind on any of the stated grounds."

5.21 It was submitted that the court below erred in law and fact when it did not consider the fact that when a contract of sale of property is rescinded, the deposit paid has to be paid back. That to date the respondent have not paid back the deposit of K220,000.00.

5.22 The appellants urged the Court to uphold ground eight and all the other grounds of appeal.

6.0 Respondents' arguments opposing the appeal

6.1 The respondents filed their comprehensive heads of argument on 14 July 2022. We shall not regurgitate the detailed background of the dispute between the parties, as it is sufficiently captured in our preamble to this judgment. Grounds one, two and three are argued together. Grounds four, five and six are equally argued together. Grounds seven and eight are argued separately.

6.2 In opposing grounds one, two and three of the appeal, the respondents submitted that ***Order 12 rule 8 of the High Court Rules,*** cited by the appellants, does not aid them in their appeal, as it is clear from the facts that the appellants did not enter an appearance within the stipulated period. That the court below proceeded to enter Judgment in default as there was proof that the appellant had been served with court process. (Pages 17 - 20 of the supplementary of record of appeal referred to).

6.3 It was advanced that the argument by the appellants that judgment in default cannot be entered in a matter involving rescission of a contract was not supported by law, and thus, it was *per incuriam.*

6.4 With respect to the appellants' submissions on ***Order 20 rule 3*** and ***Order 35 rule 5 of the High Court Rules***, the respondents agreed that a judgment in default may be set aside if an applicant meets the requirements to it being set aside. However, they argued that the appellants did not meet the requirements of the law to allow the Court to set aside the judgment in default. Reliance was placed on ***Order 13/9/12 of the Supreme Court Practice*** which states that "*the application should be made promptly and within a reasonable time.*"

6.5 ***Order 13/9/18 of the Supreme Court Practice*** was cited where it states that:

> "***The primary consideration in exercising discretion is whether the Defendant has merits to which the Court should pay heed to, not as a rule of law but as matter of common sense since there is no point in setting aside a Judgment if the Defendant has no defence, and because, if the Defendant can show merits, the Court will not prima facie desire to let a Judgment pass on which there has been no proper adjudication.***"

6.6 It was submitted that the appellants did not make the application to set aside promptly as required by law. That the judgment in default was entered on 18 August 2021. The

respondents then commenced taxation of costs on 14 September 2021. The appellants then filed the application before court on 4 October 2021 and only served the respondents on 13 December 2021, by which time the appellants had already perfected the judgment.

6.7 It was argued that if the appellants had served the court process on time, the respondents would have been placed on notice of their application and as such the appellants would not have proceeded to effect payment of taxes and change of ownership of the subject property until the matter was disposed of.

6.8 It was the respondents' view that the defence neither had merit nor reasonable prospects of success and therefore, no injustice would be occasioned to the appellants if the judgment in default is upheld. The respondents adverted to the case of ***Alpine Bulk Transport Co Inc. v Saudi Eagle Shipping Co Inc***[8] where the English Court of Appeal made the following propositions:

> ***"a) It is not sufficient to show a merely "arguable" defence that would justify, leave to defend; it must both have "a real prospect of success" and carry some "degree of conviction." Thus, the Court must form a provisional view of the probable outcome of the action.***
>
> ***b) If proceedings are deliberately ignored this conduct although not authority amounting to an estoppel at law, must be considered "in justice" before exercising discretion to set aside."***

6.9 The respondents contended that the appellants ignored the court process by failing to give their advocates instructions, even though they were aware of the action.

6.10 We are also asked to consider that there are no prospects of success if all the matters are taken into consideration, especially the material facts which the appellants suppressed, as brought to fore through the supplementary record of appeal.

6.11 We were urged to dismiss grounds one, two and three.

6.12 In response to grounds four, five and six, it was contended that the appellants' arguments are without legal basis, and that they are applying their minds selectively to the facts and issues at hand. That the letter of demand they refer to was in fact a covering letter enclosing the notice to complete, which is on pages 53 to 54 of the record of appeal.

6.13 It was argued that upon receiving the notice to complete, the appellants did not comply with its terms, but instead responded in the letter at pages 30 to 31 of the record of appeal.

6.14 It was submitted that the failure to accept the terms in the notice to complete meant that the appellants had failed to accept the terms of the offer contained therein. That despite the time taken to complete the contract, none of the parties waived their rights under the Law Association of Zambia, Conditions of Contract of sale 1997 to which the contract in issue was subject to. The respondents submitted that the

notice to complete was an offer and the appellants needed to accept the terms therein unequivocally and not in the manner they did in the letter at page 30 to 31 of the record of appeal. In support of this submission, reliance was placed on the learned authors of ***Halsbury's Laws of England***[1] Vol. 9 at paragraph 256 on page 133 where it states as follows:

> "***An offer cannot be accepted conditionally; the offeree has power to accept only on the terms stated in the offer.***"

6.15 To buttress the point, the case of ***Bishop and Baxter Limited v Anglo Eastern Trading and Industrial Co Ltd***[9] was referred to, where it was held that:

> "***An acceptance of an offer must not introduce any new terms, nor may it be in a manner other than prescribed in the offer.***"

6.16 It was submitted that the appellants did not accept the offer contained in the notice to complete and as such it was a counter offer, as it introduced new terms other than those contained in the notice to complete. We were urged to dismiss grounds four, five and six of the appeal.

6.17 In response to the seventh ground of appeal, it was submitted that ***Order 45 Rule 3 (2) of the Supreme Court Practice,*** cited by the appellants, applies only to where one party wants to dispossess the other of land. That *in casu*, the appellants have never had possession of the land in issue. That evidence of lack of possession is contained in the contract of sale and specifically at page 73 of the supplementary record of appeal, line 15 wherein it is stated that:

"Vacant possession of the property shall be given to the Purchaser upon full payment of the purchase price."

6.18 It was submitted that the full purchase price was not paid and thus, it follows that the appellants were never in possession of the land in issue. We were urged to equally dismiss ground seven of the appeal.

6.19 In opposing the last ground of appeal, the respondents stated that they were willing to refund the appellants the deposit paid in line with special condition 15 of the contract of sale as outlined above, and shown in the reliefs sought in the writ of summons and statement of claim at pages 9 to 13 of the supplementary record of appeal.

6.20 However, following the award of costs by the court below, the respondents argued that the sum of ZMW220,000.00 paid by the appellants and now in possession of the respondents' advocates is property or funds subjected to the Order for costs. In support of this submission, reliance was placed on the learned authors of *Halsbury's Laws of England supra* where they state at paragraph 244 at page 200 where it is stated that:

> ***"At common law a solicitor has two rights which are liens, the first a right to retain property already in his possession until he is paid costs due to him in his professional capacity and the second is the right to ask the Court to direct that personal property recovered under a Judgment by his exertions be subject to costs."***

6.21 Stemming from the above stated, it was argued that the money paid by the appellants as a deposit cannot be refunded to them until the costs which they were ordered to pay by the court below are settled. We were urged to dismiss ground eight for want of merit.

6.22 Counsel prayed that the appeal in its entirety be dismissed.

7.0 Our decision on appeal

7.1 We have carefully considered the impugned ruling of the court below together with the record of appeal and the arguments by the parties. The issue brought to bear in this appeal is whether the learned Judge in the court below was on firm ground when she declined to set aside the default judgment granted on 18 August 2021. We shall thus address the grounds of appeal in clusters, as some of them are interrelated. Grounds one, two and three will be considered together. Grounds four, five and six will equally be handled as one. Ground seven and eight will be dealt with separately.

7.2 In grounds one, two and three, the appellants have argued that:

a land dispute cannot be decided on a technicality; they exhibited a defence on the merits; and gave an explanation to the effect that they were out of the country and unable to avail instructions to counsel respectively.

7.3 The learned Judge in the court below, following the Supreme Court's guidance in the ***Stanley Mwambazi case*** found that

courts have discretionary power to set aside *ex-parte* judgments in order to ensure that justice prevails. She found that a court faced with an application to set aside a default judgment ought to consider the merits of a defence and the explanation for the default.

7.4 In the ***Stanley Mwambazi case***, in addition to what the appellants' referred to, it was held *inter alia* 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 that default, it is the defence on the merits which is the more important to consider."***

7.5 From a reading of the pleadings, the alleged facts of this case are not convoluted and are hardly in dispute. On or about 5 May 2015, the respondents entered into a contract with the appellants for the sale of the respondents' land, a proposed subdivision of Subdivision Z of Farm 297a, Lusaka for a consideration of K250,000.00. The appellants paid a sum of K220,000.00 towards the purchase price, leaving a balance of K30,000.00. The contract was made subject to the Law Association of Zambia Conditions of Sale 1997, as far as the same were not inconsistent with or varied by the special conditions of the contract. Pages 41 to 46 of the record of appeal refers.

7.6 On 12 May 2021, the respondents gave the appellants notice to complete the agreement within fourteen days following an

alleged breach of the contract, by the appellants, to pay Property Transfer Tax in February 2017. A letter of even date was sent by the respondents' advocates addressed to the appellants rescinding the Contract of Sale in line with clause 15 of the said contract.

7.7 On 31 May 2021, the appellants' advocates responded to the letter of 12 May 2021, in the main, stating that the respondents were precluded from rescinding the contract because of a substantial part of it having been performed. They conveyed that the appellants proposed to settle the outstanding sum of K30,000.00 by 7 June 2021 and settlement of the Property Transfer Tax by 30 June 2021. Pages 32 to 33 of the record of appeal refer.

7.8 The respondents replied to the appellants' letter on 3 June 2021, stating that the contract had been rescinded as the appellants had failed to comply with the terms of the Notice to Complete. Pages 85 to 86 of the supplementary record of appeal refer.

7.9 Following these events, the respondents commenced the action on 28 July 2021 seeking the reliefs contained in the writ of summons at pages 9 and 10 of the supplementary record of appeal. The record reveals at page 16 of the supplementary record of appeal that the respondents' advocates conducted a search on 18 August 2021 and found that the appellants had not filed their defence. They proceeded

to enter judgment in default of defence on the same day, which was served on the appellants' advocates on 19 August 2021. Page 17 of the supplementary record of appeal refers.

7.10 On 4 October 2021, the appellants filed the application to set aside the judgment in default and stay the same, the ruling of which is the subject of this appeal.

7.11 In the proposed defence, the appellants contended that the respondents sat on their rights to rescind the contract as the default complained of occurred six years before. Further, that the rescission was premature and irregular because the respondents ought first to have demanded immediate settlement of the balance and availed the appellants a period to pay. Ultimately, that the contract could not be rescinded as there was substantial performance of it by the settlement of 90% of the purchase price.

7.12 The learned Judge found that the appellants stated in their defence that the respondents did not demand the full payment of their money, yet they received a notice to complete on 12 May 2021, according to exhibit "CPT4" in the affidavit in opposition to summons to set aside default judgment. That the appellants stated that they were ready to receive a refund but insisted that it was to be done at the current market value of the property.

7.13 Further, the learned Judge found the appellant's explanation that they were frequently out of the jurisdiction to be

inexcusable. She consequently held that it was in the interest of justice not to set aside the default judgment.

7.14 Before we proceed to examine whether the learned Judge was on firm ground in refusing to set aside the judgment in default, we wish to address an issue that was raised by the appellants in their arguments in support of ground one, namely, that this is a land dispute and thus, could not be determined on a technicality. The determination of this issue is imperative because it will largely influence how we proceed to deal with the rest of the grounds of appeal.

7.15 The appellants, in contending that this matter could not be determined on a technicality, have placed reliance on ***Order 12 of the High Court Rules*** *supra*. The appellants have, thus argued that *Order 12 of the High Court Rules*, in its entirety does not in any way provide or cover the matter for rescission of contract. That the effect of the Order is that a dispute for rescission of contract cannot be decided on a technicality through a judgment in default, as it does not fall within the ambit of the actions that warrant a plaintiff to obtain a judgment in default or be decided on a technicality. That the same must proceed to trial as if the other party had entered a defence.

7.16 The Supreme Court guided on this issue, in the case of ***Natural Valley Limited v Brick and Tile Manufacturing***

Limited and The Attorney General[8], as follows, beginning at page J22:

> ***"The distinction we have made is important because it is not in all cases where a party is entitled to entry of default judgment where the opposite party omits or neglects to file a defence... Order 12 rule 1 of the High Court Act allows entry of judgment in default where a writ of summons is endorsed with a liquidated demand. Rule 2 of the same Order provides for entry of interlocutory judgment and issuance of a notice of assessment where a writ is endorsed with a claim for pecuniary damages and the defendant fails to enter a defence. Similarly, Rule 4 provides that in a matter where a writ is endorsed with a claim for damages in respect of detention of goods, a plaintiff may enter interlocutory judgment.***
>
> ***In a matter where the writ is endorsed with a claim for recovery of land or mesne profits, a plaintiff may enter judgment pursuant to rule 6 and 7 where the defendant defaults to file a defence.***
>
> ***The examples we have given in the two preceding paragraphs are the only ones specifically provided for under the rules for entry of default and interlocutory judgments. The question, therefore, is what happens in respect of claims not specifically provided for, such as the one, which had confronted the learned High Court Judge, for a declaratory judgment? Order 12 rule 8 provides as follows:***
>
>> ***"In all actions not otherwise specifically provided for by the other sub-rules, in case the party served with the writ of summons does not appear within the time***

limited for appearance upon the filing by the plaintiff of a proper affidavit or certificate of service, the action may proceed as if such party has appeared."

The effect of the rule we have set out in the preceding paragraph in relation to this appeal is that the learned High Court Judge should not have granted the order for default judgment against the appellant because the remedy sought in the writ of summons was for declaratory orders. She, instead, should have issued an order for directions to chart the course for a trial in the matter as if the appellant had filed a defence.

It was thus, a misdirection on the part of the learned High Court Judge to enter judgment in default and hold that there was no need for trial in the matter in relation to the 1st respondent's claim as against the appellant."

7.17 The guidance of the Supreme Court is that, if the claim endorsed in the writ of summons is not one that is captured under ***Order 12 of the High Court Rules*** *supra*, and the defendant does not file a defence to that writ, the Judge cannot enter judgment in default of defence. What the Judge should do is to proceed to hear the matter as if the defendant had appeared.

7.18 What the above entails, therefore, is that in circumstances when a plaintiff applies for entry of judgment in default of defence against a defaulting defendant, the court should examine the claim endorsed on the writ to ensure that it is one

in respect of which such judgment can be granted under *Order 12 of the High Court Rules.*

7.19 Turning to the case before us, the plaintiffs' (respondents') claims as endorsed on the writ before the lower Court were thus:

(i) that the Contract of Sale relating to Subdivision C of Subdivision Z of Farm 297a, Lusaka stands rescinded due to failure by the defendants to honour their obligations under the Contract of Sale and unwillingness to complete; and

(ii) that the defendants be refunded the deposits paid in line with clause 15 of the Contract of Sale.

7.20 We have carefully considered the claims above and find that they are not the type of claims that were envisaged under *Order 12 of the High Court Rules*, for purposes of entry of judgment in default of defence. Therefore, it was a misdirection on the part of the learned Judge below to have granted the default judgment in the first place and indeed, to have even proceeded to consider the application to set it aside. The learned Judge below had no jurisdiction to grant the default judgment sought. What the learned Judge below had power to do was to proceed to hear the matter as though the defendant had filed a defence.

7.21 Since the learned Judge below did not have authority to enter judgment in default, *'what then should have been the correct*

remedy for the defendants?' The Supreme Court further guided as follows, in the case of ***Natural Valley Limited v Brick and Tile Manufacturing Limited and The Attorney General,*** *supra*, at page J28:

> ***"We... hold that the nature of this case is such that the correct remedy is an appeal and not setting aside before the learned High Court Judge. This arises from the fact that our holding is that the learned High Court Judge ought not, in the first place, to have entered default judgment because the Order does not provide for default judgment in the light of the relief sought in the Court below. Consequently, the default judgment was not "entered pursuant to the provisions of ... Order [12]" and cannot, therefore, be remedied in accordance with Order 12 rule 10 sub-rule 2 of the High Court Act."***

7.22 According to the guidance of the Supreme Court in the ***Natural Valley case***, once the Judge in the court below entered judgment in default, the defendant ought to have appealed and not applied to set aside the said judgment.

7.23 In view of the foregoing, the appeal succeeds because the claims endorsed on the writ in the court below were not in a class that allows for entry of judgment in default of defence. To an extent, therefore, ground one only succeeds as far as it states that the matter is one that could not be decided on a technicality.

7.24 Ground two fails only because it reflects a misconception of the procedure that ought to have been followed after the Judge in the lower court erroneously entered judgment in default (as espoused in the ***Natural Valley case***). For the same reason grounds three and seven also fail. The arguments that were advanced by the appellants, in support of grounds two, three and seven, would have been an appropriate fit, had the erroneous default judgment and its refusal to be set aside, been valid. After the guidance in the ***Natural Valley case***, we simply cannot proceed to entertain the said arguments, as we would be jumping the gun on issues that have prematurely been brought before us.

7.25 Grounds four, five, six and eight all fail because they all touch on the substance of what the lower court ought to have subjected to trial, had she followed the procedure prescribed in *Order 12 of the High Court Rules.* Our rationale for holding in this manner will be clarified by our orders in our conclusion below.

8.0 Conclusion

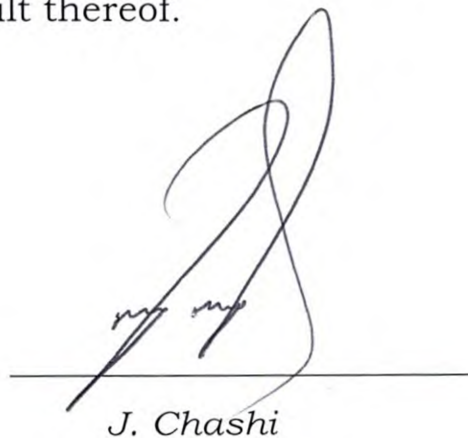
8.1 We allow the appeal, not based on the grounds of appeal raised by the appellants, but as guided by the Supreme Court in the case of ***Natural Valley Limited v Brick and Tile Manufacturing Limited and The Attorney General*** *supra.*

8.2 We accordingly set aside the default judgment entered against the appellants. We remit the case back to the High Court to be

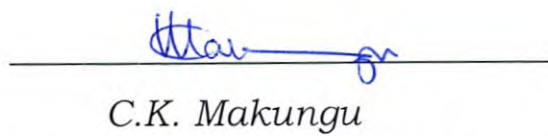
dealt with by a different Judge, who shall proceed in accordance with the provisions of *Order 12 rule 8 of the High Court Rules*, namely, to issue orders for direction for trial as if the appellants had filed a defence.

8.3 The learned Judge in the lower court will, thus proceed to hold a trial at the close of pleadings in the usual way.

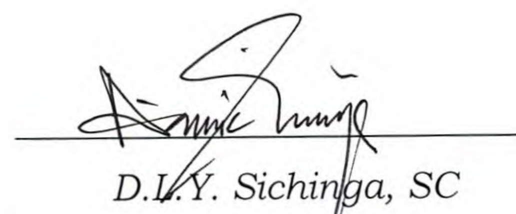
8.4 Costs of the appeal are awarded to the appellants to be agreed or taxed in default thereof.



J. Chashi
COURT OF APPEAL JUDGE



C.K. Makungu
COURT OF APPEAL JUDGE



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