IN THE HIGH COURT OF ZAMBIA **2021/HP/0428**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

FAROOK TICKLAY	**PLAINTIFF**
AND	
BARRINGTON JOSEPH ZULU	**DEFENDANT**
KASANDA KAOMA	**1ST CLAIMANT**
KABUNGO CHIBALE ZULU	**2ND CLAIMANT**

BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN CHAMBERS, ON 17TH DAY OF JUNE, 2024.

For the Plaintiff:	*Mr. S. Bwalya Jnr. – Messrs. Solly Patel, Hamir & Lawrence.*
For the Defendant:	*No Appearance.*
For the Sheriff:	*No Appearance.*
For the Claimants:	*No Appearance.*

COMPOSITE RULING

CASES REFERRED TO:

1. *Sunday Kawayo and Another v First Alliance Bank Zambia Limited – SCZ/8/208/1997;*
2. *Water wells Limited v Jackson (1984) Z.R. 98;*
3. *Mwambazi v Morester Farms Limited (1977) Z.R. 108;*
4. *Sumij Investments Limited and M.M Integrated Steel Mills Limited – Appeal No. 21 of 2016;*

5. *Alpine Bulk Transport Co. v Saudi Eagle Shipping Co. Inc. The Saudi Eagle (1986) 2 Lloyds Rep;*
6. *Metl Zambia Limited v Interfert Agro Commodities Limited, Floyd Malembeka and Wild Tyrkey farm Limited – 2015/HPC/0137;*
7. *Nyampala Safaris and 4 Others v Wildlife Authority and 6 Others – SCZ/8/197/2003;*
8. *Zambia Revenue Authority and Post Newspapers Limited – Appeal No. 36 of 2016;*
9. *Jackson Mambo Sakala, Elias Sakala and Zhyame Mzeze v John William Clayton and Kwathu farms Limited – SCZ/8/273/2015;*
10. *John Kunda (Suing as Country Director of and on behalf of the Adventist Development and Relief Agency (ADRA) v Keren Motors (Z) Limited SCZ Judgment No. 14 of 2012;*
11. *Richard Chizyuka & Betty Chizyuka v Credit Africa Bank Appeal Number 8/113/99;*
12. *Southern Cross Motors limited v Nonc Systems Technology Limited (2012) Vol. 1 Z.R. 524;*
13. *Monk v Bartram (1891) 1 Q.B. 346; and*
14. *Sonny Paul Mulenga & Others v Investrust Merchant Bank Limited (1999) Z.R. 101.*

LEGISLATION REFERRED TO:

1. *The High Court Rules, High Court Act, Chapter 27, Volume 3 of the Laws of Zambia; and*
2. *The Rules of the Supreme Court of England, (White Book)1999 Edition, Vol. 1, London Sweet & Maxwell.*

1. INTRODUCTION

1.1 The Record in this Matter was re-allocated to this Court on 7th March, 2024. A perusal of the Record revealed that there are four Applications that were pending delivery of Rulings. The first Application was filed on 28th June, 2021, and it is for an Order to liquidate Judgment Debt in instalments. The second Application was filed on 18th November, 2021 and it for an Order for Stay of Execution and/or Sell of Goods seized. The third Application was filed on 18th November, 2021 and it is for an Order to set Aside Default Judgment. The fourth Application was made on 9th March, 2022, and it is an Inter-Pleader Summons.

1.2 Upon perusal of the Record, I scheduled the Matter for Status Conference to chart the way forward. Only learned Counsel for the Plaintiff, Mr. S. Bwalya Jr., was in attendance. The rest of the Parties were not in attendance and no reason was advanced for their absence. Counsel for the Plaintiff implored the Court to proceed to render Rulings on the pending Applications based on the documents on Record. Accordingly, this Combined Ruling is in respect of the above mentioned Applications.

2. BACKGROUND

2.1 The background to this Matter, as is relevant to the Applications under consideration, is that the Plaintiff, Farook Ticklay, launched this Suit on 20th April, 2021, against the Defendant, Barrington Joseph Zulu, seeking, *inter alia*, the following reliefs: -

i. *An Order that the Defendant pays the Plaintiff the sum of K227,057.80 owed to the Plaintiff for the services offered by the Plaintiff;*

ii. *An Order of interest on the K227,057.80, at current bank lending rate; and*

iii. *Damages for inconvenience caused by the Defendant's actions.*

2.2 Subsequently, the Defendant having not entered Appearance, the Plaintiff obtained a Judgment in Default of Appearance and Defence, on 10th June, 2021.

Following the entry of the said Judgment in Default, the above mentioned Applications were filed herein.

3. SUMMONS TO LIQUIDATE JUDGMENT DEBT IN INSTALMENTS

3.1 As earlier stated, the Application was filed on 28th June, 2021, by the Defendant. It was filed pursuant to ***Order XXXVI, Rule 9*** of ***The High Court Rules***[1] and is supported by Affidavit, deposed to by the Defendant. A perusal of the Record reveals that the Application is not opposed by the Plaintiff.

3.2 AFFIDAVIT IN SUPPORT

3.2.1 The Deponent averred, *inter alia*, that he is desirous to liquidate the Judgment sum and demonstrated this by making a payment to the Plaintiff, on 18th June, 2021, in the amount of K50,000.00, which was deposited directly in the Plaintiff's Account. A copy of the deposit slip is exhibited as **"BJZ 1"**.

3.2.2 It was further averred that the Defendant has been cooperating with the Plaintiff and has not shown any form of stubbornness in settling the matter amicably, therefore, it is in this regard that he has applied to pay the Judgment sum in instalments.

3.2.3 It was also averred that the Defendant wished to commit himself to liquidate the Judgment sum,

less the K50,000.00, that was paid on 18th June, 2021, by way of instalments of K10,000.00 per month effective end of August, 2021, until full payment. The Defendant asserted that he is not in any formal employment but relied on his own business and that his income would not be determined easily but arrangements would be put in place in raising some amount of money to liquidate the Judgment sum.

3.3 **SKELETON ARGUMENTS**

3.3.1 The Defendant's Application was accompanied by brief Skeleton Arguments, in which it was submitted, the Affidavit in Support filed by the Defendant provides sufficient details for this Honourable Court to exercise its discretion under ***Order XXXVI***, ***Rule 9*** of ***The High Court Rules***[1]. In further fortifying his Submissions, the Defendant placed reliance on ***Order 47***, ***Rule 1*** of ***The Rules of the Supreme Court***[2] and the case of ***Sunday Kawayo and Another v First Alliance Bank Zambia Limited***[1], in which the Supreme Court stated as follows: -

> ***"There may be cases where the harshness of an execution and its harmful consequences can be avoided without keeping the creditor out of his money and while ensuring that the money is recovered within a reasonable period."***

4. SUMMONS FOR STAY OF EXECUTION AND/OR SELL OF GOODS SEIZED

4.1 The Defendant's Application was filed herein on 18th November, 2021. The Defendant seeks an Order for Stay of Execution and/or sale of goods seized pending the hearing and determination of an Application to set aside Default Judgment. It is supported by an Affidavit deposed to by the Defendant.

4.2 AFFIDAVIT IN SUPPORT

4.2.1 The Defendant averred, *inter alia*, that he caused to be filed herein an Application to set aside the Judgment in Default, which he believes has merit and is likely to succeed. It is further averred that the Plaintiff issued a Writ of *Fieri Facias*, thus the Sheriff of Zambia, having seized the goods shown in a documents exhibited as **"BJZ 3"**, may dispose of them. He also averred that he believes that it is inexpedient to allow the said goods to be disposed of as that would render his Application to set aside Judgment, academic and nugatory; and causing an injustice.

4.3 AFFIDAVIT IN OPPOSITION

4.3.1 The Application is opposed by the Plaintiff, who filed herein an Affidavit in Opposition, on 7th March, 2022, deposed to by the Plaintiff. It is averred, *inter alia*, that on 20th April, 2021, the

Plaintiff caused to be issued a Writ of Summons and Statement of Claim, which were duly served on the Defendant on 25th April, 2021, as evidenced by the Affidavit of Service on the Court Record, dated 17th May, 2021.

4.3.2 It is further averred that the Defendant did not enter appearance, thus on 2nd June, 2021, the Plaintiff applied for entry of Judgment in Default and on 10th June, 2021, this Honourable Court endorsed the Judgment in Default of Appearance and Defence for the sum of K227,057.00, plus interest.

4.3.3 The Plaintiff asserted that on 18th June, 2021, the Defendant deposited the sum of ZMW50,000.00 into his Bank Account in settlement of the Judgment Sum and on 28th June, 2021, he filed into Court an Application to liquidate the Judgment Sum in instalments of ZMW10,000.00, effective from August, 2021, until full payment of the Judgment Sum. He further asserted that the Defendant failed to pay the sum of ZMW10,000.00 in August, 2021, as indicated in his Application to liquidate the Judgment Sum in instalments, and on 28th October, 2021, he caused a Writ of *Fieri Facias* to be issued against the Defendant when he did

not pay any instalments by the month of September, 2021.

4.3.4 The Plaintiff averred that on 18th November, 2021, the Defendant filed into Court an Application to set aside the Judgment in Default of Appearance and Defence, when he has already admitted his indebtedness as demonstrated by his part-payment to the Plaintiff of the sum of ZMW50,000.00, and his Application to settle the said indebtedness in instalments, thus his purported Defence, exhibited in his application to set aside the Judgment in Default of Appearance and Defence, is an afterthought and has no prospects of success.

4.3.5 It is avowed by the Plaintiff that the Defendant has not provided the reasons he did enter Appearance to the Writ of Summons and file a Defence, in response to the allegations contained in the Statement of Claim, thus he verily believes that the Defendant's Application to set aside the Judgment in Default of Appearance and Defence lacks merit and is unlikely to succeed.

4.3.6 The Plaintiff further avowed that the Writ of *Fieri Facia* was executed on 9th November, 2021, and the items seized from the Defendant by the Sheriff of Zambia in the process of the said execution, appear in the seizure form exhibited

by the Defendant in the Affidavit in Support and marked **"BJZ3"**. It is also avowed that the Plaintiff was advised at the Sheriff's office that the goods seized from the Defendant were sold and his Advocates, Messrs. Solly Patel, Hamir & Lawrence wrote letters to the said office on 17th December, 2021, and 20th January, 2021, to request for confirmation of proof of sale of the seized goods, as shown in exhibits marked **"FT 1"** and **"FT 2"**, which are copies of the said letters.

4.3.7 It is affirmed that the Plaintiff subsequently visited the Sheriff's office with his Advocates, where he was advised that the seized goods were sold on 24th November, 2021, except for a stove and motor vehicle, which he personally saw at the Sheriff's premises. He was also availed a Notice of Sheriff's sale by public Auction relating to the said sale, which is exhibited marked **"FT 3"**.

4.3.8 The Plaintiff further affirmed that on 21st February, 2022, the Sheriff's office served his Advocates, Messrs. Solly Patel, Hamir & Lawrence with a Notice of Claim to goods, dated 12th November, 2021. He asserts that he has been advised by his Advocates, Messrs. Solly Patel, Hamir & Lawrence, the veracity of which

advice he verily believes to be true, that an Order for Stay of Execution and/or Sale of Goods cannot be granted with respect to goods that have already been seized and sold.

4.4 **AFFIDAVIT IN REPLY**

4.4.1 The Defendant filed an Affidavit in Reply on 29th March, 2022, deposed to by the Defendant, in which it is averred, *inter alia*, that the Plaintiff and Defendant were in the process of having talks to settle the matter amicably hence his not entering Appearance and filing a Defence, but to his surprise the Plaintiff entered Default Judgment against him.

4.4.2 It is further averred that contrary to the assertions by the Plaintiff, there was no failure on his part to make payment of the sum of K10,000.00, as his Application to pay Judgment Sum in instalments was scheduled for hearing on the 28th September, 2021, but did not take off.

4.4.3 The Defendant also averred that he could not have continued to make payment towards the Judgment Debt due to the fact that the Plaintiff had decided to continue to go ahead with the Court process despite being engaged to settle the matter amicably and making payment in the total sum of K70,000.00 to the Plaintiff, and later

issued a Writ *Fieri Facias*, which was executed on 9th November, 2022.

4.4.4 The Defendant asserts that contrary to the averments by the Plaintiff, his proposed Defence is of merit as it brings up contentious issues and that he has the right to defend himself in this matter, which he has chosen to do due to the actions of the Plaintiff of not being desirous of settling the matter amicably and saving the business relationship.

4.4.5 The Defendant further asserted that the Writ of *Fieri Facias* was executed on the 9th November, 2021, however, it was discovered at the hearing before this Honourable Court that the goods were erroneously sold by the Sheriff's Office without being advertised and despite the Sheriff being served with a Notice of Claim on 12th November, 2021, and the Plaintiff's Advocates being served with the Order for Stay of Execution on the 13th December, 2021.

4.4.6 The Defendant also asserts that he caused a letter to be sent to the Sheriff's Office through his Advocates Messrs. Haimbe Legal Practitioners, confirming the discoveries mentioned above despite there being a Notice of Claim and an *Ex Parte* Order for Stay of Execution on record, however, there was no response from the Sheriff.

4.4.7 The Defendant avowed that on 11th February, 2022, he caused to be effected another letter to the Sheriff following up on the said goods that were sold erroneously but to no avail.

4.4.8 The Defendant states that the matter herein is of a different nature as the goods in question were not sold in accordance with the laid down procedure by first advertising the goods in the newspaper and subsequent auction of the said goods. Further, that there is on record an Order for Stay of Execution and/or Sale of 18th November, 2021, which has not been discharged.

4.4.9 Finally, the Defendant affirmed that he is advised by his Counsel that despite the goods erroneously sold by the Sheriff, his Application is still of merit due to the fact that not all the goods seized have been sold, the Defendant has been prejudiced by the goods being sold despite being granted an Order for Stay of Execution and/or Sale and that the matter is still being heard before this Honourable Court on the Application to set aside the Writ of *Fieri Facias*.

5. SUMMONS TO SET ASIDE DEFAULT JUDGMENT

5.1 On 18th November, 2021, the Defendant filed herein an Application to set aside Default Judgment, pursuant to ***Order XII***, ***Rule 2*** and ***Order XX***, ***Rule 3*** of ***The High***

Court Rules[1]. The said Application is supported by Affidavit deposed to by the Defendant.

5.2 **AFFIDAVIT IN SUPPORT**

5.2.1 The Defendant averred, *inter alia*, that on 10th June, 2021, Judgment in Default in the sum of K227,957.80 was entered against him and at the time, he was desirous to settle the said Judgment sum, pursuant to which on the 18th June, 2021, he caused to be deposited directly in the Plaintiff's account the sum of K50,000.00.

5.2.2 The Defendant further averred that thereafter, he engaged the Plaintiff with a view to settling the said debt in instalments but to no avail, thus prompting him to file an Application to liquidate Judgment Debt in instalments on the 28th June, 2021.

5.2.3 It is also averred that the Record will show that the said Application was scheduled to be heard on the 28th September, 2021, at 09:00 hours, but did not take off and was rescheduled for hearing to a later date. That while awaiting the new hearing date, the Plaintiff proceeded to issue a Writ of *Fieri Facias*, which was executed on the 9th November, 2021.

5.2.4 The Defendant asserted that he was surprised by the above stated as he truly and verily believed

that there was an understanding between the Plaintiff and him that no execution would be undertaken pending this Honourable Court's decision on the Application to pay Judgment Debt in instalments. That in light of the Plaintiff's decision, he has decided to exercise his right to enter an Appearance and settle a Defence herein as he has a valid and genuine Defence herein, which is exhibited marked **"BJZ 2"**.

5.3 **AFFIDAVIT IN OPPOSITION**

5.3.1 The Plaintiff opposed the Application and filed herein an Affidavit in Opposition, deposed to by the Plaintiff, in which he reiterates the contents of his Affidavit in Opposition, as captured above in paragraph 4.3, save to state that he never agreed and/or reached an understanding with the Defendant, relating to the issuance and execution of the Writ of *Fieri Facias*, as averred by the Defendant.

5.3.2 The Plaintiff averred that the Defendant has already admitted his indebtedness as demonstrated by his payment to the Plaintiff of the sum of K50,000.00 and the Application to settle the said indebtedness in instalments by virtue of which the Plaintiff verily believes that the Defendant's purported Defence is an afterthought and has no prospects of success.

5.3.3 It is also averred that the Defendant has not provided the reasons he did not enter Appearance to the Writ of Summons and file a Defence in response to the allegations contained in the Statement of Claim.

5.4 **AFFIDAVIT IN REPLY**

5.4.1 In his Affidavit in Reply, filed on 29th March, 2022, the Defendant reiterates his averments in the Affidavit in Support, which need no repetition as they are on Record, save to state that he averred that contrary to the Plaintiff's assertions in the Affidavit in Opposition, the reason for his depositing K50,000.00 into the Plaintiff's Account was due to the fact that the purported Judgment Sum comprised two transactions between the Plaintiff and Defendant, which the Plaintiff decided to combine. He asserts that he was desirous of settling the said sum so as to save the business relationship that he had with the Plaintiff and not as an admission of the claims.

5.4.2 The Defendant further asserts that contrary to the assertions to the Plaintiff's Affidavit in Opposition, there was no failure on his part to make payment of the sum of K10,000.00, as it was already stated in the Affidavit in Support that the Application to pay the Judgment Sum in

instalments was scheduled for hearing on the 28th September, 2021, but did not take off.

5.4.3 The Defendant also asserts that he could not have continued to make payment towards the Judgment Debt due to the fact that the Plaintiff had decided to continue to go ahead with the Court Process despite being engaged to settle the matter amicably and his making payment in the total sum of K70,000.00 to the Plaintiff, and that as stated in the Affidavit in Support, the Plaintiff issued a Writ of *Fieri Facias*, which was executed on 9th November, 2022.

5.4.4 The Defendant avowed that he had a business relationship and several transactions that he was keen to protect and hence, when the Plaintiff came up with allegations that building materials were misused, the Defendant decided to attempt to settle the matter amicably, which resulted in the discussions and subsequent payment of the sums on record and not that it was an admission.

5.4.5 The Defendant further avowed that contrary to the assertions by the Plaintiff in his Affidavit in Opposition, his reason for not entering appearance was due to the fact that he had made efforts to settle the matter amicably in order to save their business relationship, but to his

surprise, the Plaintiff would always go against what they agreed by taking a fresh step in the Court Process despite his showing seriousness in having this matter settled by beginning to make payments.

5.4.6 The Defendant also avowed that the Plaintiff's actions prompted him to exercise his right to defend himself as it was later discovered that the Plaintiff was paid by the government for the works that he claims to have building materials misused and he will aver at trial that at the time the Plaintiff was paid by the government, 26 out of 30 units were completed and the rest of the 4 were signed for to be completed and that the claims by the Plaintiff with regards to missing building materials is subject to assessment.

6. SKELETON ARGUMENTS

6.1 DEFENDANT'S SKELETON ARGUMENTS

6.1.1 In augmenting his Applications to Stay Execution and Set Aside the Default Judgment, the Defendant filed brief Skeleton Arguments, in which Counsel for the Defendant submits that the Parties herein were in the process of settling the matter amicably, hence the Plaintiff not settling his Defence. Counsel contends that the Defendant has a Defence on merit, exhibited in the Affidavit in Support filed herein and which

he intends to file before this Honourable Court. Counsel further contends that this Honourable Court has the discretion to Stay the Execution and Set Aside the Default Judgment.

6.1.2 In fortifying the above submissions, Counsel called in aid ***Order 47***, ***Rule 1*** of ***The Rules of the Supreme Court***[2], ***Order III***, ***Rule 2*** and ***Order XX***, ***Rule 3*** of ***The High Court Rules***[1]. Counsel further placed reliance on the case of ***Water Wells Limited v Jackson***[2], wherein the Court stated as follows: -

> ***"...although it is usual on an Application to set aside 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 part to consider..."***

6.1.3 Counsel also cited the case of ***Mwambazi v Morester Farms Limited***[3], in which the Court guided as follows: -

> ***"...it is the practice in dealing with bonafide interlocutory Applications for Courts to allow triable issues to come to trial despite the default of the parties...but it is not in the interest of justice to deny the right to have his case heard..."***

6.1.4 Finally, Counsel submitted that the Plaintiff herein will not be prejudiced in any way should

this Honourable Court grant the Applications sought herein and prayed that this Honourable Court grant the Applications sought so that the matter can be heard on the merits.

6.2 PLAINTIFF'S SKELETON ARGUMENTS

6.2.1 The Plaintiff filed herein combined Skeleton Arguments in Opposition to the Defendant's two Applications for Setting Aside Default Judgment and Stay of Execution and/or sale of seized goods, in which Counsel for the Plaintiff submitted, *inter alia*, that the Application to set aside Default Judgment is provided for under ***Order XX***, ***Rule 3*** of ***The High Court Rules***[1], which gives the Court discretion to set aside a Judgment in Default in the following fashion: -

> ***"Any Judgment made 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 or Judge may think fit."***
> *(Counsel's emphasis)*

6.2.2 Counsel submitted that the conditions precedent for the setting aside of the Default Judgment have been subject of judicial pronouncement in our jurisdiction in a plethora of cases. Counsel went on to state that in upholding the High Court's decision to decline to set aside a Default Judgment, the Court of Appeal stated the

following, with respect to the conditions thereof, in the case of ***Sumij Investments Limited and M.M Integrated Steel Mills Limited***[4] at Page J8: -

> ***"It is settled law that a Judgment in Default of defence and appearance can be set aside. It is settled law that in setting aside a Default Judgment, the Defendant should give an explanation of his default and show that the proposed defence has merit. See Barrington v Lee. The Supreme Court has also held in a plethora of cases, some of which have been cited by Counsel, that when dealing with an application to set aside a Default Judgment, the question is whether the defence on the merits has been raised and whether the Applicant has given a reasonable explanation for his failure to file a defence within the stipulated time. That Court has stressed that it is the disclosure of a defence on the merits which is the more important point to consider. See Premesh Bhai Megan Patel v Rephdim Institute Limited. In that case the Supreme Court found that no defence on the merits was disclosed to warrant the matter going to trial.***
>
> ***In casu, it was not disputed that the Appellant is owing the Respondent for the goods supplied. On this point alone we are inclined to uphold the trial Judge's finding that the Appellant has no defence on the merits."*** *(Counsel's emphasis)*

6.2.3 Counsel further cited the English case of ***Alpine Bulk Transport Co. v Saudi Eagle Shipping Co. Inc. The Saudi Eagle***[5], where the Court emphasised the following: -

> ***"It is not sufficient to show a merely arguable defence, but the defence must have a real prospect of success and carry some degree of conviction."*** *(Counsel's emphasis)*

6.2.4 Counsel contends that from the foregoing authorities, it can be discerned that the following are the conditions which must influence the exercise of the Court's discretion in granting an Applicant an Order to Set Aside Judgment entered in Default of Appearance and Defence: -

i. The Applicant must provide a reasonable explanation for the failure to enter Appearance and file a Defence within the prescribed time; and

ii. The most important condition being that the Applicant must demonstrate or raise an arguable defence on the merits, which must have real prospect of success and carry some degree of conviction.

6.2.5 Counsel argued that the Defendant has failed to meet the two conditions for setting aside the subject Judgment in Default of Appearance and Defence, because firstly, as shown in paragraph

18 of the Plaintiff's Affidavit in Opposition, a perusal of the Defendant's Affidavit in Support of the Application to Set Aside the Judgment in Default of Appearance and Defence glaringly reveals that the Defendant has not attempted to provide an explanation as to why he did not enter Appearance and file a Defence within the prescribed time.

6.2.6 Secondly, Counsel argued that the Defendant has not demonstrated that he has a Defence on the merits as a perusal of the contents of the Draft Defence marked **"BJZ 2"**, exhibited in the Affidavit in Support, reveals in paragraph 4 and 6 that the Defendant appears to have admitted the Plaintiff's claim.

6.2.7 Furthermore, Counsel argued that the Defendant's reaction of immediately paying the Plaintiff the sum of K50,000.00, after the entry of the Default Judgment, and subsequently making an Application to liquidate the Judgment Sum in instalments, as revealed in paragraph 6 and 7 of the Defendant's Affidavit in Support, further lends credence to the fact that the Defendant does not dispute the Plaintiff's Claim.

6.2.8 Counsel went on to argue that as indicated in paragraph 17 of the Plaintiff's Affidavit in Opposition, the Defendant's purported Defence

is an afterthought, quite apart from the fact that it lacks merit.

6.2.9 Counsel prayed that this Honourable Court dismisses the Defendant's Application to Set Aside the subject Judgment in Default of Appearance and Defence, with costs to be paid by the Defendant to the Plaintiff and to be taxed in Default of Agreement.

6.2.10 In submitting on the Application to Stay Execution and/or Sale of Seized Goods, Counsel invited the Court to ***Order 47***, ***Rule 1 (a)*** of ***The Rules of the Supreme Court***[2], which gives the Court the discretion to Stay Execution of a Judgment and is couched as follows: -

> ***"Where a Judgment is given or an Order made for the payment by any person of money and the Court is satisfied, on an Application made at the time of the Judgment or Order, or at any time thereafter, by the Judgment debtor or other party liable to execution that there are special circumstances which render it inexpedient to enforce the Judgment...then, ... the Court may by Order stay the execution of the Judgment or Order by Writ of Fieri Facias either absolutely or for such period and subject to such conditions as the Court thinks fit."***
> *(Counsel's emphasis)*

6.2.11 Counsel submitted that this Court had occasion to pronounce itself on the effect and application of ***Order 47***, ***Rule 1*** of ***The Rules of the Supreme Court***[2], and for persuasive reasons, he cited the case of ***Metl Zambia Limited v Interfert Agro Commodities Limited, Floyd Malembeka and Wild Tyrkey Farm Limited***[6], where Honourable Lady Justice B. G. Lungu stated the following at page R8: -

> ***"The effect of Order 47 Rule 1 RSC, as stated in the explanatory notes to the Rule is to confer express power on the Court to stay execution by Writ of Fifa either absolutely or for such period and subject to such conditions as the Court thinks fit. The notes further guide that "in considering whether to grant a stay of execution of money Judgment, ...the Court in exercise of its unfettered discretion must start with the assumption that there had to be good reason to deny the Judgment creditor of the fruits of his Judgment. The Zambian Courts have also had occasion to apply and expound on Order 47 of the White Book. In the case of Kapiri Glass Product Limited v Maruti Oil Industry Limited, the Court observed that it was clear that under Order 47 Rule 1 (a) of the SCR, the Application for Stay of Execution can be made under special circumstances and further that the special circumstances are of various nature."***
>
> *(Counsel's emphasis)*

6.2.12 Counsel further cited the case of ***Nyampala Safaris and 4 Others v Wildlife Authority and 6 Others***[7], where the Supreme Court restated the position of law that a Stay should only be granted where good and convincing reasons have been advanced by a party. The Supreme Court also stated that the rationale for the position was that a successfully litigant should not be deprived of the fruit of litigation as a matter of course.

6.2.13 Counsel also contended that an Order of Stay of Execution and/or Sale of Seized Goods cannot be granted where the seized goods have already been sold despite the impropriety of the said sale, where there is nothing to Stay. In fortifying this contention, Counsel placed reliance on the Supreme Court's decision in the cases of ***Zambia Revenue Authority and Post Newspapers Limited***[8] and ***Jackson Mambo Sakala, Elias Sakala and Zhyame Mzeze v John William Clayton and Kwathu Farms Limited***[9].

6.2.14 In addressing the issue of whether the Defendant has provided sufficient reasons to warrant the grant of a Stay of Execution and/or Sale of Seized Goods, enough to deprive the Plaintiff the fruit of the subject Default Judgment, Counsel

submitted that the Defendant has not done so as firstly, as can be gleaned from the letters and the Notices of the Sheriff's sale marked **"FT1"**, **"FT2"**, **FT3"** and **"FT5"**, respectively, exhibited in the Plaintiff's Affidavit in Opposition to the Defendant's Stay Application, most of the goods seized by the Sheriffs from the Defendant have been sold. He placed reliance on the cases of ***Zambia Revenue Authority and Post Newspapers Limited***[8] and ***Jackson Mambo Sakala, Elias Sakala and Zhyame Mzeze v John William Clayton and Kwathu Farms Limited***[9], cited above.

6.2.15 Secondly, Counsel submitted that the reasons proffered by the Defendant in persuading this Honourable Court to grant the Order for Stay of Execution and/or Sale of Goods Seized, are to the effect that his Application to set aside the Default Judgment is likely to succeed and if the Stay is not granted, the said Application will be rendered academic. Counsel argued that as established in his arguments above, the Defendant's Application for an Order to Set Aside the Default Judgment is unlikely to succeed. Consequently, Counsel submits that the Defendant's reasons for seeking an Order for Stay anchored on the Application to Set Aside the Default Judgment is rendered insufficient.

6.2.16 Counsel prayed that this Honourable Court dismisses the Defendant's Application to Stay Execution and/or Sale of Seized Goods with costs to be paid by the Defendant to the Plaintiff and be taxed in Default of Agreement.

7. INTER-PLEADER SUMMONS

7.1 The fourth and last Application filed herein relates to Inter-Pleader Summons taken out by the Sheriff of Zambia, on 9th March, 2022, for determination to be made as to who is entitled to the goods seized in execution of the Writ issued by the Plaintiff. This followed the Notice of Claim to Goods taken and/or intended to be taken in Execution, which was filed herein by the Defendant on 12th November, 2021. In the said Notice, Kasanda Kaoma and Kabungo Chibale Zulu, the Claimants herein, claimed interest in the goods, equipment, properties and chattels of whatever description, whatsoever, situate at Plot No. 375/19897/M, 9th Street, Chalala, Lusaka, of which the Writ of *Fieri Facias* was entered herein and executed on the 9th November, 2021.

7.2 AFFIDAVIT IN SUPPORT OF INTER-PLEADER SUMMONS

7.2.1 The Affidavit in Support of Inter-Pleader Summons is deposed to by William Kashimbi, the Undersheriff, in which it is averred, *inter alia*, that he executed a *Fifa* issued by the Plaintiff

against the Defendant, for recovery of the claimed sum of money, plus Sheriff's commission and other costs for levying execution and interest, as shown by exhibit marked **"WK1"**, which is a copy of the Writ of *Fifa*.

7.2.2 The Deponent further averred that on 9th November, 2021, he seized some goods, as shown by exhibit marked **"WK2"**, which is the Seizure Form, but was later served with a Notice of Claim by Kasanda Kaoma and Kabungo Chibale Zulu. The Deponent claims to have exhibited a letter marked **"WK4"**, which was written to the Plaintiff, asking them to admit or dispute the Claim and exhibit marked **"WK5"**, which is a copy of the Notice of Dispute to Claim, but these are not attached to the Affidavit on Record.

7.2.3 The Deponent also averred that the Sheriff of Zambia claims no interest in the disputed goods other than commission and other costs of execution.

8. CONSIDERATION AND DECISION OF THE COURT

8.1 I have carefully considered all the four Applications that are under consideration, the Affidavit evidence and Submissions. I have further considered the Authorities cited, for which I am grateful to Counsel.

8.2 I will address the Applications in the order that they were filed herein, starting with the Summons to Liquidate Judgment Debt in Instalments, that was filed by the Defendant on 28th June, 2021.

8.3 **APPLICATION TO LIQUIDATE JUDGMENT DEBT IN INSTALMENTS**

8.3.1 The Application was made pursuant to ***Order XXXVI, Rule 9*** of ***The High Court Rules***[1]. In the Defendant's Skeleton Arguments, Counsel invited the Court to ***Order 47, Rule 1*** of ***The Rules of the Supreme Court***[2]. In referring to ***Order 47, Rule 1*** of ***The Rules of the Supreme Court***[2] cited by Counsel, the Supreme Court, in the case of ***Zambia Export and Import Bank v Mkuyu Farms Limited and Others***[10] stated that: -

> ***"It is quite clear from this order that a Court may order a judgment debt to be satisfied by instalments upon sufficient cause being shown by the judgment debtor."***

8.3.2 In the case, on which Counsel placed reliance on, of ***Sandy Kawayo & Another v First Alliance Bank (Z) Limited***[1], the Supreme Court held as follows: -

> ***"The jurisdiction to permit payment of money judgment by instalment is undoubtedly a discretionary one... Order 47/1 requires the***

***Court to be satisfied that there are special circumstances which render it expedient... the debtor should make out a good case for instalments which can be considered to be sufficient reason or special circumstances.*"**
(Court's emphasis)

8.3.3 In the Affidavit of the Defendant, filed on 28th June, 2021, in support of his Application to pay Judgment Debt in instalment, the Defendant deposed in the relevant paragraphs that he is more than desirous to liquidate the Judgment Sum as demonstrated by his payment of K50,000.00, which he deposited directly into the Plaintiff's account. He further deposed that he has been cooperating with the Plaintiff and has not shown any stubbornness in settling the matter amicably. He also proposed to liquidate the Judgment Sum by payment of monthly instalments of K10,000.00, effective from the month end of August, 2021. Additionally, the Defendant averred that he is not in any formal employment but relied on his own business and that his income would not be determined easily but arrangements will be put in place in raising some amount of money to liquidate the Judgment sum.

8.3.4 In terms of ***Order XXXVI***, ***Rule 9*** of ***The High Court Rules***[1], pursuant to which this

Application was made, the Defendant ought to demonstrate some *"sufficient reason"* in applying to pay Judgment debt by instalments. Under ***The Rules of the Supreme Court***[2], there must be shown to be *"special circumstances"* or *"cause"*, which render it desirable to order a Stay. Applying the above in this matter, the Defendant was required to adduce cogent evidence, such as proof of status of his business that he professed to have, bank account details and statements, his income, nature and value of his said business and properties, if any, as well as details of indebtedness to other persons apart from the Judgment Creditor. For only then can a Court make an informed decision as to the *"proper balance between the needs of the judgment debtor to be granted a stay of execution and the needs of the judgment creditor to obtain due and prompt satisfaction of his judgment debt"* as provided under ***Order 47***, ***Rule 1 (2)*** of ***The Rules of the Supreme Court***[2].

8.3.5 It is my considered view that the Defendant has not satisfied the parameters prescribed under the foregoing legal provisions and as such, his Application is devoid of merit and is dismissed.

8.4 **APPLICATION FOR STAY OF EXECUTION AND/OR SALE OF GOODS SEIZED**

8.4.1 I will now deal with the Application to Stay Execution and Sale of Goods Seized. It is a well settled principle of law that a successful litigant is entitled to the immediate enjoyment of the fruits of its Judgment, as per holding of the Supreme Court in the case of ***John Kunda (Suing as Country Director of and on behalf of the Adventist Development and Relief Agency (ADRA) vs. Keren Motors (Z) Limited***[10]. It is also trite that the Court has the discretion to Order a Stay of Execution provided there are sufficient grounds warranting such an Order.

8.4.2 In the case of ***Richard M. Chizyuka and Betty Chizyuka vs. Credit Bank***[11], the Court held that there is need for the Defendant to clearly demonstrate the basis or grounds upon which a Stay should be granted. Accordingly, in order for the Court to grant a Stay, the Defendant is required to satisfy this Court that there are prospects of his succeeding in his Application to Set Aside Default Judgment. In other words, the Defendant should show that he has sufficient grounds to warrant an Order of Stay of Execution of Judgment. This is in line with ***Order XXXVI, Rule 10*** of ***The High Court Rules***[1], which provides as follows: -

> ***"Except as provided for under rule 9, the Court or Judge may, on sufficient grounds, order***

stay of execution of judgment." *(Court's emphasis)*

8.4.3 Further, in the case of ***Southern Cross Motors Limited v Nonc Systems Technology Limited***[12], it was observed that: -

> ***"...the applicant ought to demonstrate some 'sufficient reason' in applying for a stay. Under Order 47 Rule 1 of the Rules of the Supreme Courts, there must be shown to be 'special circumstances' or 'cause' which render it desirable to order a stay. This requires evidence to be adduced..."*** *(Court's emphasis)*

8.4.4 I have addressed my mind to the case of ***Monk v Bartram***[13], where the Court of Appeal of England and Wales, expressed sentiments on what might not be considered to constitute *"special circumstances"*. In delivering the Judgment of the Court of Appeal, Lord Esher, M.R., observed as follows at ***page 346***: -

> ***"It has never been the practice in either case to stay execution after the judge at the trial has refused to grant it, unless special circumstances are shown to exist. It is impossible to enumerate all the matters that might be considered to constitute special circumstances; but it may certainly be said that the allegations that there has been a misdirection, that the verdict was against the***

weight of evidence, or that there was no evidence to support it, are not special circumstances on which the Court will grant a stay of execution. *(Court's emphasis)*

8.4.5 The rationale for these stringent conditions or criteria, in exercising the discretion to grant a Stay, is that a successful party should not be denied immediate enjoyment of the fruits of the Judgment, unless good, and sufficient grounds are advanced, or shown.

8.4.6 In the case of ***Sonny Paul Mulenga & Others v Investrust Bank Limited***[14], the Supreme Court of Zambia held as follows: -

> ***"In terms of our rules of Court an appeal does not automatically operate as a stay of execution and it is pointless to request for a stay solely because an appeal has been entered. In exercising its discretion whether to grant a stay or not, the Court is entitled to preview the prospects of the proposed appeal. The successful party should not be denied immediate enjoyment of a Judgment unless there are good and sufficient grounds."*** *(Court's emphasis)*

8.4.7 Although some of the authorities cited above speak to Orders for Stay of Execution pending Appeal, the same principles are applicable to any Applications for Stay Orders.

8.4.8 The Defendant averred in his Affidavit in Support that he has filed herein an Application to Set Aside the Judgment in Default and thus it would be inexpedient to allow the seized goods to be disposed of as that would render his Application to Set Aside Judgment academic and nugatory. He further averred that an injustice will be occasioned should the goods be sold before the hearing and determination of the Application to Set Aside the Default Judgment.

8.4.9 For the above stated reasons, the Defendant believes that he has demonstrated exceptional circumstances to persuade this Court to grant the Order of Stay pending determination of his Application to Set Aside Default Judgment.

8.4.10 As seen from the above cited authorities, it is clear that a Court is entitled to preview the prospect of success of the Application that has accompanied the Application for Stay. In this case, it is the Application to Set Aside Default Judgment.

8.4.11 In the case cited by Counsel for the Plaintiff of ***Sumij Investments Limited and M. M. Integrated Steel Mills Limited***[4], the Court of Appeal guided that in dealing with an Application to Set Aside a Default Judgment, a Court must ask itself whether the Applicant has

raised a defence on the merits and given a reasonable explanation for his failure to file a defence within the stipulated time. In the said case, the Court of Appeal upheld the trial Judge's findings that the Appellant had no defence on the merits as it had not been disputed that he was owing the Respondent for the goods supplied.

8.4.12 Being guided by the above cited authorities, I have perused the Defendant's Affidavit in Support of the Application to Set Aside the Judgment in Default. The said Affidavit reveals that the Defendant, who had not entered Appearance and neglected to file his Defence, had engaged the Plaintiff with a view to liquidating the Judgment sum in instalments. It was only after the Plaintiff exercised his right of enforcement of the Judgment in Default that the Defendant woke up from his slumber and suddenly saw the need to exercised his right to enter an Appearance and settle a Defence.

8.4.13 I have further perused the Defendant's proposed Defence, exhibited as **"BJZ 2"** in his said Affidavit and in my view, it has no prospect of success. Additionally, I find that the Defendant has not given a reasonable explanation for his failure to enter Appearance and settle his Defence within the stipulated time, as it is trite

that out of Court discussions do not stall the proceedings in Court.

8.4.14 Accordingly, I find that there are no special circumstances shown by the Defendant, on which this Court can grant a stay of execution. The Application lacks merit and is dismissed with costs to the Plaintiff to be taxed in default of agreement.

8.5 APPLICATION TO SET ASIDE DEFAULT JUDGMENT

8.5.1 I will now move on to determine the third Application, wherein the Defendant seeks to Set Aside the Default Judgment obtained by the Plaintiff on 10th June, 2021. The Defendant's Application was made on 18th November, 2021, which is over five months after the Plaintiff obtained the Judgment in Default of Appearance and Defence,

8.5.2 The Application was made pursuant to ***Order XX***, ***Rule 3*** of ***The High Court Rules***[1], which is couched as follows: -

> ***"Any judgment by default, whether under this Order of under any of these Rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as the Court or Judge may think fit."*** *(Court's emphasis)*

8.5.3 The above provision of the law authorises the Court, in its discretion, to set aside any Judgment by Default. Guidance has been given on conditions for setting aside Default Judgment in a plethora of decided cases by the Superior Courts and indeed, in ***The Rules of the Supreme Court***[2]. The relevant part of ***Order 13, Rule 9 (3)*** of ***The Rules of the Supreme Court***[2] provides as follows: -

> ***"...The application should be made as promptly as possible (see paras 13/9/12 and 13/9/13). For criteria employed see "Discretionary powers of the Court" at para. 13/9/18. The application must be supported by an affidavit; unless otherwise ordered it is to be served with the summons (O.32, r.3 and must set out the merits of the proposed defence and any excuse to be relied on for allowing judgment to be entered..."*** *(Court's emphasis)*

8.5.4 As can be seen from the above, the Application to Set Aside Default Judgment should be made promptly and within a reasonable time. In exercising its discretion, the Court must consider whether the Defendant's proposed Defence has merits, as there is no point in setting aside a Judgment if the Defendant has no Defence. If the Defendant can show a Defence on the merits, the Court will not *prima facie*

desire to let a Judgment pass on which there has been no proper adjudication.

8.5.5 Accordingly, the Court is required to take into account the explanation of the Defendant as to how the default occurred. As aptly submitted by the Plaintiff, the Court of Appeal in the case cited by the Plaintiff of ***Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle***[5], summarised the conditions that must influence the exercise of the Court's discretion in granting such an Application, one of these proposition being that:

> ***"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."***

8.5.6 Having analysed the Defendant's Affidavit in Support of his Application to Set Aside Default Judgment, it is my considered view that the Defendant has not met the requirements for setting aside the Judgment in Default of Appearance and Defence. I say so because, firstly, the Defendant did not promptly file his Application. He waited for over five months after the Judgment in Default had been entered and

only made the Application when the Plaintiff decided to enforce the Judgment in Default.

8.5.7 Secondly, the Defendant has not proffered a reasonable explanation for his failure to enter Appearance and settle his Defence.

8.5.8 Thirdly, a perusal of the Defendant's proposed Defence reveals that the Defendant has no Defence on the merits. In fact, the Affidavit evidence clearly shows that the Defendant admits the Plaintiff's claim. In any case, the Defendant had applied to pay the Judgment Debt in proposed instalments and even paid K50,000.00 to the Plaintiff towards the Judgment Debt.

8.5.9 For the foregoing reasons, I find that the Application to Set Aside Judgment in Default of Appearance and Defence lacks merit and is dismissed, with costs to the Plaintiff to be taxed in default of agreement.

8.6 **INTER-PLEADER SUMMONS**

8.6.1 This now brings me to the final Application, which was made by the Sheriff of Zambia, on 9th March, 2022.

8.6.2 I have considered the Interpleader Application together with Notice of Claim filed herein by Counsel for the Defendant, on 12th November,

2021. I have also carefully weighed the averments in the Affidavit in Support of the Interpleader Summons.

8.6.3 The points for determination are whether the goods and assets in dispute, seized by the Sheriff of Zambia, belong to the Claimants, Kasanda Kaoma and Kabungo Chibale Zulu; and who bears the commission and costs of execution to the Sheriff.

8.6.4 The procedure for Interpleader Proceedings is provided for by ***Order XLIII*** of ***The High Court Rules***[1]. ***Order XLIII Rule 1 (b)*** of ***The High Court Rules***[1], is couched as follows: -

> ***"Relief by way of interpleader may be granted...***
>
> ***(b) where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the court, and claim is made to any money, goods or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels by any person other than the person against whom the process is issued."***

8.6.5 ***Order XLIII Rule 1 (b)*** of ***The High Court Rules***[1] cited above, is very clear. It provides for situations where money, goods or movable

property (chattels) have been taken or are intended to be taken in execution. I am, therefore, of the view that the Inter Pleader in this case is properly made before this Court.

8.6.6 Counsel for the Defendant filed herein the Claimant's Notice of Claim, alleging that Kasanda Kaoma and Kabungo Chibale Zulu, have an interest in the goods, equipment, properties and chattels of whatever description, whatsoever, situate at Plot No. 375/19897/M, 9th Street, Chalala, Lusaka, which were taken in execution by the Sheriff of Zambia, under the Writ of *Fieri Facias*, entered herein and executed on 9th November, 2021. The question now is whether the Claimants have been able to establish their ownership of the goods and assets in dispute and therefore, entitled to have the same released to them.

8.6.7 In applications of this nature, the burden of proof is on the Claimants to prove their title to the goods at the time of seizure (see ***Order 17, Rule 5 (12)*** of ***The Rules of the Supreme Court***[2]). A party who relies on ownership in an object, must allege and prove the right of ownership. The Claimants must set out such facts and allegations, which constitute proof of ownership. Accordingly, for the Claimants to

succeed in this Application, they must show by cogent evidence that the goods, that they now claim (the seized goods), which were found on the premises where execution was enforced, actually are owned by them.

8.6.8 The Claimants herein did not file any response to the Sheriff's Affidavit in Support of Inter Pleader Summons. Accordingly, the Claimants who state that the goods and assets in dispute are owned by them did not proffer proof of such ownership. Consequently, the Court is unable to ascertain their claims of ownership of these goods and assets.

8.6.9 *In casu,* the goods and assets were seized from an address that was indicated on the *Praecipe* of *Fieri Facias* as Shantumbu Road, New Chalala, Opposite 8th Avenue, Woodlands, Lusaka. I am not satisfied that the Claimants got anywhere close to discharging the onus on them to prove their claim to ownership of the attached goods and assets, especially bearing in mind the presumption of ownership raised by the fact that the goods and assets were attached while in the control and custody of the Defendant. In this case, the goods and assets attached by the Sheriff were found at an address which was given as the Defendant's address. The Claimants have

not discharged the onus on a balance of probabilities, that the goods and assets in question belong to them. I therefore hold that the Claimants are not the rightful owners of the claimed goods that were seized at the said address.

8.6.10 ***Order 17***, ***Rule 8 (1)*** of ***The Rules of the Supreme Court***[2], provides that: -

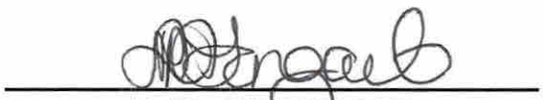
> ***"Order as to costs***
> ***In a sheriff's interpleader, <u>where the interpleader claimant fails the sheriff is entitled to his costs</u> (including possession money) from the time of notice of the claim or from sale, whichever is earlier. Where the interpleader claimant succeeds, the sheriff is entitled to his costs as against the execution creditor from the time when the creditor made it necessary for the sheriff to interplead. However, in either case, as a general rule, the sheriff recovers his costs from the execution creditor who, if successful, has a remedy over against the interpleader claimant. A successful interpleader claimant will generally be awarded costs against the execution creditor."***

8.6.11 For the foregoing reasons, the Claimants' claims lack merit and are hereby dismissed.

8.6.12 The attached goods and assets be and are hereby declared executable.

8.6.13 The Claimants shall pay the costs.

DELIVERED AT LUSAKA THIS 17TH DAY OF JUNE, 2024.



P. K. YANGAILO
HIGH COURT JUDGE