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**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2024/HP/0313

BETWEEN:

**JANE NG'AMBI BANDA
JOHN ZULU
MULENGA NG'ANDU**



**1ST PLAINTIFF
2ND PLAINTIFF
3RD PLAINTIFF**

AND

ROLAND IMPERIAL TOBACCO COMPANY LIMITED

DEFENDANT

**BEFORE: HON. MRS. JUSTICE G. C. CHAWATAMA
IN CHAMBERS ON THE 15TH OCTOBER, 2024**

For the Plaintiff : *Mr. N. Mayembe – Messers. Mayembe Legal Practitioners*
For the Defendant : *Mr. Z.M. Mubiana & Ms. K. Chela – Messers. Nsapato & Company Advocates*

RULING

CASES REFERRED TO:

1. *Philip Mutantika and Sheal Mulyata v Kenneth Chipungu SCZ Judgment No. 13 of 2014*
2. *Access Bank (Zambia) limited V Group five /ZCon Business Park Joint Venture SCZ/8/2014*

AUTHORITIES & OTHER WORKS REFERRED TO:

1. *The High Court Rules Chapter 27 of the Laws of Zambia*

The Plaintiffs took out an action against the Defendant by way of writ of summons and statement of claim. The 1st, 2nd and 3rd Plaintiff's claim.

1. *The sum of ZMW620,493.00 being the total amount due to the 1st, 2nd and 3rd Plaintiff as terminal gratuity, unpaid salary arrears and accrued leave days.*
2. *Compensatory damages for loss of use of funds*
3. *Interest on the amount found due*
4. *Any other relief the court may deem fit and*
5. *Costs.*

Filed on the same day that is the 1st March, 2024 was an affidavit attesting service of Demand letter.

From it, Joshua Muyenga deposed that he did on 7th February, 2024 served on the Defendants letter of demand. The same was produced and was marked JM1a copy of the letter of service which letter was acknowledged as received.

On the 5th March, 2024 an affidavit of service was filed in which was deposed the fact that the Defendant was served the writ and statement of claim.

The Defendant were within fourteen (14) days after service of the writ inclusive of the day of serve cause appearance to be entered that in default of not doing so the Plaintiff may proceed herein and judgment may be given in their absence.

On the 19th March, 2024 the Plaintiff filed to be granted judgment in default of appearance and defence pursuant to Order 12 Rule 1(1) of the High Court Rules of the High Court Act Chapter 27 of the Laws of Zambia.

In an Order granted by the court the court ordered as follows:

That the Plaintiff is not at liberty in the case of the Defendants' non appearance to proceed by default but proceed as if the Defendant had appeared pursuant to Order 12 Rule 18 of the High Court Rules. The Court further ordered that judgment in default be and was granted in respect of the sum of ZMW620,493.00 being the total amount due to the 1st, 2nd and 3rd Plaintiff has terminal gratuity, unpaid salary arrears and accrued leave days. Costs were awarded to the Plaintiff to be agreed in default to be taxed.

On the 28th March, 2024 a writ of fieri facias was filed. On the same date an affidavit of service was filed. Proof that on the 27th March, 2024 the Defendant was served the order dated 25th March, 2024. On the 20th March, 2024 a memorandum of appearance the Defendant's list of documents and a list of witness.

Filed on the 2nd April, 2024 was a composite summons for an order to set aside judgment and default of appearance and defence and for stay of execution pending the hearing of application to set aside

judgment pursuant to Order XXXVI as read with Order III Rule 2 of the High Court Act Chapter 27 of the Laws of Zambia and all enabling law.

Exhibited was the defence marked MM1. According to the court's official stamp the same was filed on the 20th March, 2024. MM2 is a letter to Counsel for the Plaintiff dated March 20th, 2024 in which Counsel was informed to find endorsed by way of service upon themselves-

- 1. Notice of Appointment of Advocates*
- 2. Memorandum of Appearance*
- 3. Defence*
- 4. List of documents and*
- 5. List of witnesses.*

On the 2nd April, 2024 the Court granted an ex parte order that the judgment in default of appearance and defence dated 25th March, 2024 was stayed pending the determination of the Defendant's application to set aside the judgment in default of appearance and defence.

The Court set 06th June, 2024 as the date to hear the application inter-parte. On the 03rd June, 2024 Counsel for the Plaintiff filed an affidavit in opposition to affidavit in support of summons for an

order to set aside judgment in default of appearance and defence and stay of execution Neumann Muyatwa deposed as follows:

1. *That he has read what purports to be an affidavit in support dated 2nd April, 2024, sworn by one Manfred Mulapiwa and wished to respond as follows:*
 1. *That paragraphs 1 to 4 of the affidavit in support is not disputed save to state that the Defendant was served with the originating process on 4th March, 2024, as evidence by affidavit of service on record dated 5th March, 2024.*
 2. *That the Defendant was required by law to enter appearance and file its defence within 14 days from the 5th March, 2024, being on or before 18th March, 2024.*
 3. *The Defendant failed and/or neglected to enter appearance and file its defence on or before 18th March, 2024 and the Plaintiff proceeded to enter judgment in default.*
 4. *Paragraph 5 of the affidavit in support is not disputed save to state that the Defendant filed its defence after the 14 days required by law.*
 5. *That the record will show that this Honourable Court proceeded to execute an Order entering judgment in*

favour of the Plaintiff in the sum of ZMW620,493.00, on 25th March, 2024.

- 6. That paragraphs 6 of the affidavit in support is not disputed.*
- 7. In response to paragraph 7 of the affidavit in support, delay in engaging an Advocate to act on the Defendants behalf is not a sufficient and excusable reason for the delay by reason that it was well within the Defendants' control to engage Counsel in time.*
- 8. Paragraphs 8 to 15 of the affidavit in support are not disputed save to state that it is irregular for the Defendant to proceed to enter appearance and file defence after the 14 days period when there was a judgment in default on record.*
- 9. That the proper course was for the Defendant to seek to set aside the judgment in default before entering appearance and filing defence.*
- 10. That the Defendant, as a result of od delay, is liable to costs for its default in entering appearance and filing a defence within the time stipulated by law.*

Skeleton arguments and list of authorities were also filed.

The application was granted the court stated that based on all the evidence before it, the Court found that there was an arguable defence which exists.

The matter was then adjourned to the 30th August, 2024 for a status conference it was the Court's intention to issue orders for direction on that date. The Plaintiff did not attend on the 30th August nor did they attend on the 6th September, 2024.

The court proceed to dismiss this matter in accordance with **Order 19 Rule 7 of the High Court Rules**. **Order 19 Rule 7** provides as follows:

"A Judge shall dismiss an action if the parties fail to attend a scheduling conference or status conference on two occasions without justified cause".

The Court has taken note of the list of authorities statutes and other sources namely the Zambia Civil Procedure, Commentary and Cases, Volume 2, Lexis Nexis 2017 filed by Counsel for the Plaintiff. I will zero in to **Rule 7 of Order XIX of Statutory Instrument No. 58 of 2020** which I relied on to dismiss this matter.

It was Counsel's humble submission that this provision confers discretion on the Court to dismiss a matter if the parties involved fail to attend a scheduling or status conference without justifiable cause.

Counsel for the Defendant referring to the same provision stated that the provision is clear and guides that the Court shall dismiss an action when parties do not attend a scheduling or status conference on two occasions without cause.

Counsel referred the Court to the case of *Philip Mutantika and Sheal Mulyata v Kenneth Chipungu SCZ Judgment No. 13 of 2014*¹ where the Supreme Court held that:

“Where a rule is couched in mandatory terms by the use of the word ‘shall’ and is not regulatory, thereby giving the Court discretionary power, any breach of such a rule is fatal to a party’s case”.

I agree with Counsel for the Plaintiff that the use of the word ‘shall’ in the rule makes it clear that the Court must dismiss the action where no justifiable reasons have been preferred to abscond from two scheduling or status conferences. What this means is that the timing of the justifiable cause is critical. In this case the justifiable cause referred to in the rule does not profit the Plaintiff. Not only did the Plaintiff fail to attend Court on both the 30th August, 2024 and 6th September, 2024 the record does not show that Counsel for the Plaintiff informed Counsel for the Defendant to be excused and proceed giving the Court the status of the matter.

In conclusion the Court wishes to remind Counsel the guidance of the Supreme Court in the case of *Access Bank (Zambia) limited V Group five /ZCon Business Park Joint Venture SCZ/8/2014*² that:

“Yet, justice also requires that this Court, indeed all courts must, never provide succor litigants and their Counsel who exhibit scant respect for rules of procedure. Rules of procedure and timeliness serve to make the process of adjudication fair; just, certain and even handed. Under the guise of doing justice through hearing matters on their merit, courts

cannot aid in the bending or circumventing of these rules and shifting goal posts, for while laxity in application of the rules may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules”.

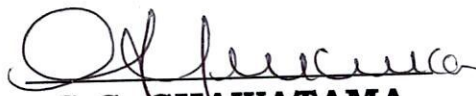
In this case the use of the word ‘shall’ is mandatory imposing a duty, or obligation on the parties, indicating that they must attend court as and when required to do so by the Court and not a recommendation to attend Court.

The Plaintiffs do not have sufficient a reason to set aside the order granted by this Court to dismiss the matter in accordance with Order XIX Rule 7. The matter still stands dismissed.

Costs to the Defendant

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 14TH DAY OF APRIL, 2025.


G.C. CHAWATAMA
HIGH COURT JUDGE