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IN THE COURT OF APPEAL OF ZAMBIA **CAZ APPEAL NO. 67/2019**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

SAM **CHISULO** **APPELLANT**

AND

MAZZONITES LIMITED **RESPONDENT**

CORAM: KONDOLO SC, MAKUNGU, SIAVWAPA JJA

On 22nd **May 2020 and on** .2 **June, 2020**

For the Appellant : Mr. W. Muhanga & Mr. C. Mweemba of Messrs. AKM Legal Practitioners

For the Respondent: Mr. S. Zulu S.C. of Messrs. Zulu & Company

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JUDGMENT

KONDOLO SC, JA delivered the Judgment of the Court

CASES REFERRED TO:

1. **New Plast Industries v Commissioner of Lands (2001) ZR 51**
2. **Lafarge Cement Zambia Limited Plc v Peter Sinkamba (Appeal No. 169/2009) [2013] ZMSC 31.**
3. **Clayton v Poultry Farms Ltd (2006) ZR 70**
4. **YB And F Transport Limited v Supersonic Motors Limited SCZ Judgment No. 3 of 2000**

LEGISLATION REFERRED TO:

1. **The Rules of the Supreme Court, 1999 Edition (the Whitebook)**
2. **The High Court (Amendment) Act No. 7 of 2011, Laws of Zambia**

This is an appeal against two Rulings delivered by Justice M. Mapani-Kawimbe dated 21st December, 2018 and 19th February, 2019. The Plaintiff (Respondent herein) issued a Writ of Summons against the Defendant (Appellant herein) who reacted by filing a conditional appearance, indicating that it would be filing an application to set aside the writ for irregularity within 14 days.

The 14-day period elapsed without the Defendant filing an application to set aside the writ and the Plaintiff proceeded to apply for and was granted Judgment in default of appearance. The Defendant made an application before the Deputy Registrar to set aside the default Judgment on the ground that it was entered on the same day that the Deputy Registrar had endorsed the conditional appearance form earlier filed by the Defendant. It was argued by the Defendant that leave to enter the conditional appearance was only allowed when the Deputy Registrar endorsed the form. The Deputy Registrar allowed the application and set aside the Judgment in default.

The Plaintiff decided to refresh the action before a Judge of the High Court and it was heard by Mapani-Kawimbe J. She identified the main *question as being, "whether the time to enter a protest under a conditional memorandum of appearance starts running from the time it is filed or when it is endorsed by the Deputy Registrar?"*

The learned Judge held that when a conditional appearance is entered it is incumbent upon a party to file its protest at the earliest opportunity and it mattered less that the conditional appearance had or has not been endorsed by the Deputy Registrar. She referred to **Order 12 Rule 8 (1) Rules of the Supreme Court ("the Whitebook") 1979** which reads as follows;

> ***"(1) A defendant to an action mazj at anti time before entering an appearance therein, or if he has entered a conditional appearance within fourteen days after entering the appearance, apply to the Court for an order setting aside the writ or service of the writ, or notice of the writ, on him or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the writ or notice on him out of the Jurisdiction."***

She observed that the Order requires that the protest be filed within 14 days of entering conditional appearance and does not state that it should be filed only after it has been endorsed by the Deputy Registrar. That the Plaintiff was well within its rights to file for Judgment in default because the Defendant failed to file its protest within 14 days aforesaid. That the Deputy Registrar should not have endorsed the Defendant's conditional appearance nor permitted the Defendant to take further action in this matter.

She concluded by saying that the Defendant's inaction robbed him of the right to set aside the Plaintiff's process for irregularity and she set aside

the Deputy Registrar's Ruling which had earlier set aside the default Judgment. The Defendant applied to stay execution of the re-instated default Judgment pending appeal but the application was dismissed on the ground that the intended appeal had little prospect of success and that the Defendant had failed to show that it would suffer substantial loss if a stay was not granted.

The Defendant, now the Appellant promptly appealed to this Court on the following grounds;

1. **The learned Judge misapprehended the law and facts and fell in grave error by relying on the provisions of Order Xl rule 2(2) of the High Court Rules as the same provides for appearance by post and is contrary to the facts of this case.**

2. **The learned Judge erred in law and fact when she held that the time within which to ifie a protest starts running from the date that a conditional memorandum of appearance is filed into Court and not from the date it is endorsed by the Deputy Registrar as her holding renders the requirement for the conditional appearance to be endorsed by the Deputy Registrar of no effect, relevance and or use.**

3. The learned Judge erred in law and fact by relying on Order 12 Rule 8(1) of the Rules of the Supreme Court of England when Order Xl Rule (1) (4) of our High Court Rules of Chapter 27 of the Laws of Zambia provides the law for entry of conditional appearance and the procedure for setting aside a writ for irregularity;

4. The learned Judge erred in law and fact by holding that the default judgment endorsed on the same day as the memorandum of appearance was not irregular and by reinstating the said default judgement.

S. The learned Judge erred in law and fact when she disregarded the binding decision of the Supreme Court in the case of Lafarge Cement Zambia Limited PLC v Peter Sinkamba (Appeal No. 169/2009)! [2013] ZMSC 31 when she declined to hold that the default Judgment entered was wrongly entered by procedure.

6. The learned Judge misapprehended the law and general principles which govern setting aside of default Judgments, when there was no fault attributed to the Defendant.

7. The learned Judge erred in awarding costs in both rulings appealed against.

Under ground 1, the Appellant argued that the learned trial Judge wrongly cited **Order XI Rule 2 (2) of the High Court Rules ('HCR')** because it relates to conditional appearances entered by post which was not the case herein. The Respondent submitted that the trial Judge had also cited **Order XI Sub Rule 1 HCR** which refers to the conditional appearance being filed by handing it over to the proper officer. He opined that the trial Court was merely emphasising that whatever method is used, the appearance must be entered within the correct time.

It was argued under ground 2 that according to the case of **New Plast Industries v Commissioner of Lands** [(1)] Courts can only recourse to the **Whitebook** where our law is silent or not fully comprehensive. It was argued that there was no lacuna in our law regarding when the time starts to run after filing a conditional memorandum of appearance. It was argued that the memorandum of appearance has a provision for the Registrar's signature and it was the signature which embodies the time frame of 14 days into an Order and that the time therefore starts running from that date. That the trial Judge should not have relied on **Order 12 rule 8 (1) of the Whitebook 1979** in finding that the requirement for the conditional memorandum form to be endorsed by the Deputy Registrar was of no effect.

State Counsel Zulu responded by stating that the Deputy Registrar signed the conditional Memorandum of Appearance after the Appellant failed to apply to set aside the originating process and the Respondent filed Judgment in default of defence on 3rd May, 2018. It was pointed out that the Appellant only obtained leave from the Deputy Registrar to file an application to set aside originating process within 14 days after the Respondent had already obtained Judgment in default, meaning that the Deputy Registrar's endorsement on the conditional memorandum was null and void.

It was further submitted that whilst the **High Court Rules** prescribe a form for entering appearance, they do not provide a form for entering conditional appearance to be endorsed by the Deputy Registrar and the Defendant must make the necessary application to set aside the writ within the time endorsed on the protest, which in this case was 14 days. That the time therefore starts running from the date the conditional memorandum of appearance is filed and not when the Deputy Registrar signs it and *in casu* the Deputy Registrar signed it 30 days after it was filed.

Under Ground 3, the Appellant argued that **Order XI Rule 1(4) High Court Rules** provides for entering of conditional appearance and even though it does not provide a time-frame, the conditional memorandum form itself indicates the time frame and provides for the Deputy Registrar's signature, date and stamp. That the time only starts running once the Deputy Registrar has endorsed the form. That it was therefore erroneous for the trial Judge to rely on the provisions of the Whitebook and the arguments

under ground 2 were adopted. In answer to this ground, the Respondent repeated its argument under ground 2.

The Appellant in ground 4 argued that that the trial Judge should have allowed the matter to proceed and be argued on the merits because it was evident that the Deputy Registrar set aside the default Judgment because she realised that the Appellant had not exercised its right to apply to set aside the Writ of Summons. It was also argued that the Deputy Registrar, having endorsed the conditional memorandum on the same day as the default Judgment, the trial Judge did not give reasons why she gave the default Judgment precedence over the endorsement of the conditional appearance.

The Respondcnt argued that, even though the Deputy Registrar attended to both documents on the same day, the default Judgment was endorsed earlier than the conditional memorandum. That the Deputy Registrar's endorsement was irregular because she ought to have seen on the Record that the Judgment in default had already been endorsed. It was submitted that Counsel for the Appellant should have approached the Deputy Registrar much earlier within the 30 days that had elapsed, to have the conditional memorandum of appearance endorsed in the same way that they did once they realised that Judgment in default, had been granted.

The Appellant complained that the Respondent had tried to mislead the Court into thinking that the endorsement on the conditional memorandum of appearance and the one on the Default Judgment were done by different

people when in fact it was the same Deputy Registrar. That there was no way of telling which form was endorsed before the other.

Grounds 5 and 6 were argued together. It was submitted that the trial Judge erred when she considered that the Appellant had not filed a defence on the merits because the only issue before the Deputy Registrar was the validity of the default Judgment vis-à-vis the manner in which it was granted. The case of **Lafarge Cement Zambia Limited** Plc v **Peter Sinkamba** [2] was called to aid their argument.

The Respondent submitted that the issue of a defence on the merits did not require consideration because none had been filed. That the Appellant was at fault because it had failed to file an application to set aside originating process within 14 days. It was further argued that **Order** 2/2/4 **of the Whitebook** provides that a party waives its right to pursue an irregularity if it takes a fresh step in the action before addressing the irregularity.

According to the Respondent, the Appellant's application to set aside the default Judgment was a fresh step by which it waived its right to apply for leave to file an application to set aside originating process. The Respondent explained that the consequence of this **was that the appearance** became unconditional and the Appellant should have then applied to set aside the default Judgment by showing that it had a defence on the merits. The case of Clayton v **Poultry Farms Ltd** [3] was cited in which the Supreme Court stated that in an application to set aside a default

judgement, a defence on the merits was a more important consideration than an explanation for the default.

The Appellant replied to grounds 2, 3, 5 and 6 by stating that a conditional appearance is never accompanied by a Defence. The Appellant has issue with the originating process and contrary to the Respondent's submission, the Appellant does not have to apply for leave to set aside a writ after entering a conditional appearance. According to the Appellant, if one must utilise the word "leave", the leave is applied for by firstly entering a conditional appearance and it being endorsed by the Deputy Registrar and thereafter the applicant making a formal application to set aside the originating process. The Appellant submitted that the outlined process was a notorious fact of practice and we were asked to take judicial notice of the practice. It was also submitted that the practice was in tandem with precedent No. 47 of the Form on Conditional appearance from **Chitty and Jacob's Queen's Bench Forms, 20th Edition, p. 46.**

The Appellant further noted that the trial Judge erroneously cited and relied on the **1979 Edition of the Whitebook** which was not applicable in Zambia because **The High Court (Amendment) 2011** provides only for the application of the **1999 Edition of the Whitebook.** The 1999 Edition has however done away with appearance and conditional appearance and it was submitted that the old English form for conditional appearance prescribed in the Whitebook before 1979 which provided for action by the Deputy Registrar was still the practice in Zambia.

State Counsel, submitted that the **1999 Whitebook** does not provide for entering of conditional appearance, we therefore use the **1979 Whitebook** with regard to entering conditional appearance. He further submitted that the High Court Rules do not provide a period within which an application should be made but simply says, "within a reasonable time" whilst the 1979 Whitebook specifies that an application must be made within 14 days.

Ground 7 was on the award of costs and the Appellant stated that even though the award of costs was in the Court's discretion, only a party found to have been at fault should be condemned in costs and in casu the Appellant was not at fault as the default Judgment had been issued irregularly.

We have considered the Record of Appeal and are thankful to Counsel for both Parties for their illuminating arguments on this somewhat grey area of practice and procedure.

The Appellant filed seven (7) grounds of appeal and we shall address them in the order that they were filed. We note that the lower Court and the parties used the terms "District Registrar" and "Deputy Registrar" interchangeably. The High Court Rules define "Registrar" as Registrar of the High Court and includes a Deputy Registrar and a District Registrar. For the purposes of this Judgment we shall refer to "Deputy Registrar" as that was the term provided for endorsement on the conditional Memorandum of Appearance, in contention.

With regard to grounds 1 to 6, we agree with the trial Judge that there is but one question for determination which she quite correctly identified as *follows;* ***Whether the time to enter a protest under a conditional memorandum of appearance starts running from the time it is flied or when it is endorsed by the Deputy Registrar.***

Counsel for the Appellant raised an important issue which goes to the heart of the lower Court's Ruling. It was pointed out that the learned trial Judge's Decision was largely determined by the following paragraph on page R9 of her Ruling at page 16 of the Record of Appeal;

> ***"My understanding of that order is that a Defendant is required within 14 days of entering conditional appearance to apply to Court to set aside a writ, a service of writ or notice of the writ. The order does not state that the protest should be filed only after it has been endorsed by the Deputy Registrar. In my view the prescriptive nature of the order is meant to ensure that cases are timely prosecuted in Court. Thus, a Defendant who fails to raise a protest within the 14 days window gives rise to an impression that he is no longer opposed to the manner in which the suit had been brought against him."***

The reproduced paragraph was the Judges understanding of **Order 12 Rule 8 (1) of the Whitebook.** Counsel for the Appellant observed that the cited Order is from the 1979 Edition of Whitebook which is not applicable to Zambia. As correctly submitted, according to **section 10 (1) of the High**

Court Act only the 1999 Edition of the Whitebook is applicable to Zambia. This, in our view was a cardinal error by the learned trial Judge because her analysis of the issue before her was influenced by inapplicable law.

The argument by State Counsel that we can resort to citing the 1979 Edition was not supported by any authority and is unsustainable because **section 10 (1) of the High Court Act** is crystal clear as to which edition of the Whitebook is applicable in Zambia.

Currently, our laws provide for conditional appearance under **Order 11 rule 1(4)** of the **High Court Rules** which states as follows:

> ***(4) Any person served with a writ under Order VI of these rules may enter conditional appearance and apply by Summons to the Court to set aside the writ on grounds that the writ is irregular or that the Court has no jurisdiction.***

We also note that the amendment to the High Court Rules did not prescribe a new form to be used for entering conditional appearance but **Order 11 Rule 8** prescribes a form *"Form 18"* for a memorandum of appearance and at the end of the said Order are the words ***"...with such variation as the circumstances may require".***

A perusal of the conditional appearance on page 44 of the Record of Appeal shows that it is in substantial conformity with *"Form 18"* save for the addition of the word "Conditional" before the word "Appearance" both on the title and in the body of the form as well as the addition of the following sentence on the left margin of the document:

"This appearance is total and unconditional unless the Defendant applies to dismiss or set aside the originating process within 14 days for irregularities

Deputy Registrar"

It is our view that "form 18" is used for both types of appearances save for the changes indicated above.

Legal Practitioners have developed a practice of inscribing on the left margin of the Memorandum of Appearance that they are entering a conditional appearance and that they will make the intended application within 14 days and they include a provision for the conditional memorandum of appearance to be endorsed by the Deputy Registrar and we take judicial notice of the usual practice.

In our view, the provision for the Deputy Registrars to endorse **conditional memoranda of** appearance is not for decorative purposes. The filing of the conditional appearance is therefore the initial part of the process which is only given effect after being considered and endorsed by the Deputy Registrars. In our view, the requirement for the endorsement is that it puts the Court and the Plaintiff on notice that an application will be made to challenge either the irregularity of the Writ of Summons or the jurisdiction of the Court, the outcome of which may affect the action from the onset. Therefore, the endorsement by the Deputy Registrar is what gives effect to the conditional memorandum of appearance.

The 14-day period which was endorsed on the conditional memorandum of appearance, in *casu,* therefore only started running after it was endorsed by the Deputy Registrar. The effect of this is that the Judgment in default was correctly set aside by the Deputy Registrar because it was irregular on account of the fact that the Appellant was not out of time within which to apply to set aside the Writ for irregularity. In view of our finding, we see no need to address the Respondent's submissions that the Appellant was estopped from taking any fresh step in this matter such as applying to set aside the default Judgment.

The net effect of our Ruling is that the appeal succeeds and the lower Court's Ruling is set aside. The Appellant having filed conditional appearance shall file its application to set aside the Writ of Summons for irregularity within 14 days of the date of this Ruling failure to which the Plaintiff will be at liberty to take the necessary action against the Defendant.

On Ground 7 and the question of costs we refer to the case of **YB And F Transport Limited v Supersonic Motors Limited** [4] in which the Supreme Court stated as follows;

"The general principle is that costs should follow the event; In other words, a successful party should normally not be deprived of his costs. Such an unusual turn of events should have an explanation, for example, if the successful party did something wrong in the action or in the conduct of it."

As indicated in the cited case, costs normally follow the event but *in* casu we have considered the fact that the issue's for determination arose from an error by the Court endorsing the default Judgment filed herein on the same day that it endorsed the conditional memorandum of appearance. We therefore order that each party shall bear its own costs both in this court and the court below.

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M.M. KONDOLO Sc

COURT OF APPEAL JUDGE

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C.K. MAKUNd

COURT OF APPEAL JUDGE

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M.J. SIAVWAPA

COURT OF APPEAL JUDGE