IN THE SUPREME COURT OF ZAMBIA APPEAL NO.169/2009
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN

LAFARGE CEMENT ZAMBIA LIMITED PLC APPELLANT

AND

PETER SINKAMBA (Suing for and on behalf of CITIZENS FOR A BETTER ENVIRONMENT) **RESPONDENT**

CORAM: CHIRWA, Acting DCJ; MWANAMWAMBWA and MUYOVWE, JJS

On the 20th March, 2012 and 27th November, 2013

For the Appellant: Mr. E.C.Banda, S.C. and Mr. N. Nchito of Messrs MNB

For the Respondent: In person

For the Intervening Party: Ms. C. Mulenga, Assistant Senior State Advocate

---

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Water Wells vs. Wilson Samuel Jackson (1984) ZR. 98**
2. **Stanley Mwambazi vs. Morester Farms Ltd (1977) ZR. 108**

Legislation referred to:

1. **Mines and Minerals Development Act No. 7 of 2008**
2. **Mines and Minerals (Environmental Protection Fund) Regulations Statutory Instrument No. 102 of 1998**
3. **State Proceedings Act Cap. 71 Sections 12(1) and 123(7)**
4. **Practice Direction No. 4 of 1997**

When we heard this appeal, Hon. Mr. Justice Chirwa sat with us. He has since retired and, therefore, this judgment is by the majority.

This is an appeal against two Rulings of the Kitwe High Court dated 3rd and 5th September, 2009 respectively in which the Court refused to set aside the default judgment entered by the respondent. The lower Court also dismissed an application by the appellant to review its decision on the matter.

The background to this case is that the respondent had commenced an action in the Kitwe High Court on 28th January, 2009. Judgment in default was entered on the 13th February, 2009 in favour of the respondent. The Deputy Registrar granted the appellant an order staying execution on the 17th February 2009. Following the appellant's application to set aside the judgment, the Deputy Registrar dismissed the application and discharged the order staying execution although he acknowledged that default judgment was entered before the 21 days required for entering memorandum of appearance and defence. According to the Deputy Registrar, the prime consideration in applications to set aside default judgment is whether the applicant has a defence on the merits. That the appellant had not filed any proposed defence.

On appeal, the learned Judge agreed with the Deputy Registrar that there was need for the appellant to exhibit its defence. This was in spite of the fact that the learned Judge conceded that the period within which the defendant should have entered appearance was 21 days. That the learned Deputy Registrar misdirected himself when he signed the default judgment before 21 days had elapsed.

With regard to the issue of liquidated sums claimed in the writ and statement of claim, the learned Judge noted that Mr. Sinkamba's argument was that the amounts awarded in the default judgment were liquidated amounts pursuant to Section 118 (1) and (2) of the **Mines and Minerals Development Act.** That the appellant was given notice to pay the said amounts in 2008. The learned Judge said in her Ruling at Page R8 (Page 16 of the record of appeal):

"As regards the second ground of appeal, I agree with the plaintiff that the claims were liquidated (the amounts were specified) as shown in paragraphs 1 to 4 of the Statement of Claim and judgment was entered only as regards the liquidated sums."

In dealing with the issue of *locus standi,* the learned Judge stated that the issue was not raised in the affidavit in support of

the application to set aside judgment. She stated that the respondent had shown that he had *locus standi*.

And so the learned Judge dismissed the appeal with costs.

The appellant then applied for review under Order 12 and 39 of the High Court Rules and Order 13 Rule 2 of the Rules of the Supreme Court, this time exhibiting a defence. This was rejected on the ground that the appellant should have done so earlier in their application to set aside the default judgment. That they wanted a second bite at the cherry and the learned Judge, therefore, dismissed the application for review.

Suffice to note that the State applied to join as an Intervening Party and was joined on 8th September, 2009.

The appellant appealed to this Court on the following grounds namely:

1. **The learned trial Judge erred in law and in fact when, having found as a fact that the default judgment entered by the Appellant on 13 February 2009 was irregular, she failed to set the Default Judgment aside.**

2. **The learned trial Judge erred in law and in fact when in her ruling of 3 September 2009, she failed to find that the Appellant had a meritorious defence to the Respondent's suit and insisted that the Appellant should have "exhibited a defence" when there were**

triable issues in the matter before her, the issues of the Respondent's lack of locus standi and the fact that the proceedings were premature having been raised before her, which issues she in fact recognized but wrongly delved into and determined at that stage.

3. **In the alternative to Ground two, the learned trial Judge erred in law and in fact in her ruling of 3 September 2009 when she held that the Respondent had locus standi to institute and prosecute the matter before her, and when, on account of that misdirection, she failed to find that the entire proceedings including the default judgment entered irregularly in the proceedings in the court below, were irregular.**

4. **The learned trial Judge in her ruling of 3 September 2009 erred in law and in fact when she refused to find that the Default Judgment was irregular in that interlocutory and not final Judgment should have been entered by the Respondent as the Respondent's claims, though they consisted of stipulated amounts, were unliquidated in nature, there being no basis for the stipulated amounts.**

5. **The learned trial Judge erred in law and in fact when, in her ruling of 5 September 2009, she refused to consider the defence exhibited in the Appellant's Further Affidavit in Support of an Application for Review.**

6. **The learned trial Judge erred in law when she entertained court process signed and lodged into Court by Mr. Peter Sinkamba in person and permitted Mr. Sinkamba to appear on behalf of the respondent herein in the court below knowing or having reasons to believe that Mr. Sinkamba is not a legal practitioner.**

We have perused the record of appeal, the Ruling of the Court below and the submissions by both parties including the Intervening Party. We do not find it necessary to recount the submissions as we will deal with all the grounds together as they are inter-related. However, we will not deal with ground six as we agree with the Intervening Party that the issue was not raised in the Court below. This ground is, therefore, dismissed.

In our view, this appeal is centered on three issues, that is:

1. The default judgment, should it have been sustained by the learned Judge?
2. The question of *locus standi*.
3. The question of the liquidated sums endorsed by the respondent in the Writ of Summons and the Statement of Claim.

It is common cause that the learned Judge refused to set aside the default judgment on the ground that the appellant did not file a defence on the merits. In this case, as pointed out by both the appellant and the Intervening party the default judgment was entered irregularly. We agree that it should not have been entered in the first place. The learned Judge after reciting **Practice Direction No. 4 of 1977** said at Page R7 (Page15 of the Record of appeal):

“It is clear that the period within which the defendant herein should have entered an appearance is 21 days. There is no provision for reducing the period but extending it. So the learned Deputy Registrar misdirected himself when he signed a default judgment before 21 days had elapsed.

It was irregular for the plaintiff to endorse 14 days as the period for entry of appearance because the distance between Kitwe where the writ was issued and Lusaka where the defendant is based is more than 100 kilometers but less than 500 kilometers”.

We agree with the learned Judge that the respondent erred when he endorsed 14 days as the period within which the appellant was to enter appearance and defence. This, further, confirms that the respondent was not entitled to enter a default judgment at the time that it was entered and that, therefore, the default judgment was irregular as the appellant was not at fault as it had not defaulted since the period for entering appearance had not expired.

It is clear that the learned Judge was of the understanding that the appellant should have exhibited its defence in the affidavit in support of the application to set aside the default judgment. The record shows that after considering the cases of **Water Wells vs. Wilson Samuel Jackson**[1] and **Stanley Mwambazi vs. Morester Farms Ltd,**[2] the learned Judge said at Page R9 (page 17 of the Record of appeal):

“**The legal principles stated in the two cases are applicable to this case notwithstandingthat 21 days for entering an appearance had not elapsed because the defendant has had enough time within which to show the court that it has a defence on the merits. The defendant has failed to disclose a defence on the merits.”**

We must emphasize here that whether the appellant had a defence on the merits was not the only consideration at this stage. It was of utmost importance for the learned Judge to establish whether the default judgment was entered in accordance with laid down procedures. Indeed, the learned Judge having found that the default judgment was entered prematurely, she ought to have proceeded to consider the effect which this had on the entire action. We agree with the appellant that once it was established that the default judgment was irregular then the necessity to show a defence on the merits fell away. This is because, the issue for consideration was the validity of the default judgment or whether the default judgment could stand in view of the fact that it was entered before the 21 days had elapsed. As we have stated above, the default judgment should not have been entered in the first place and the learned Judge should have been alert to this fact, and should not have insisted on seeing the hard copy of the defence. Indeed, as argued by the appellant, the cases of **Water Wells vs. Wilson Jackson**[1]and **Mwambazi vs.**

Morester Farms Ltd[2] were clearly in support of the appellant's case. In **Mwambazi vs. Morester Farms Ltd**[2] we held that:

> **"ii) It is the practice in dealing with bona fide inter-locutory applications for courts to allow triable issues to come to trial despite the default of the parties; where a party is in default he may be ordered to pay costs, but it is not in the interests of justice to deny him the right to have his case heard.**
>
> **(iii) For this favourable treatment to be afforded there must be an unreasonable delay, no mala fides and no improper conduct on the action on the part of the applicant."**

As pointed out by both the Intervening Party and the appellant, the appellant was not a defaulter, nor was it guilty of malafides or indeed improper conduct. And if the Court could deal 'kindly with defaulters' such as it did in the cases of **Water Wells Ltd. vs. Jackson**[1] and **Mwambazi vs. Morester Farms Ltd**[2] the appellant was entitled to be granted the application as a non-defaulter.

Further, the default judgment which was entered was an interlocutory judgment and not a final judgment. It must be emphasized that it is not in every case that a plaintiff is entitled to enter a default judgment simply because the defendant has failed to file memorandum of appearance and defence. It is not an

automatic entitlement. At the stage of entering a default judgment, it is the duty of a trial Court or Deputy Registrar, as the case may be, to examine the claims endorsed by the plaintiff in the writ of summons and statement of claim in order to determine whether a default judgment should be entered or not . The respondent's claim as per the endorsement on the writ of summons is as follows:

"The plaintiff's claim is for payment or deposit into the EPF of the Ministry of Mines and Minerals Development of the Republic of Zambia:

(i) The sum of United States Dollars Eight Hundred and Eighty Three Thousand Four Hundred and Nineteen, and Thirty Five Cents (US$883,419.35) being 20% statutory CASH contribution of the total liability payable into (EPF) for Lafarge Lusaka Plant with option to settle in five equal installments over a period of five years (5).

(ii) a bank guarantee of insurance bond in the sum of United States Dollars Three Million Five Hundred and Thirty Three Thousand Six Hundred and Seventy Seven, and Thirty Eight Cents (US$3,533,677.38) being statutory redeemable instrument contribution into (EPF) for Lafarge Lusaka Plant, if the Defendant opts to settle the cash liability all at once, but varying amounts if the five year scheme is opted.

(iii) the sum of United States Dollars One Million and Seven Hundred and Five Thousand, Three Hundred and Seventy Seven, and Forty Two Cents (US$1,705,377.42) contribution of the total liability payable into (EPF) for Lafarge Ndola Plant with option to settle in five equal installments over a period of five years (5).

(iv) a bank guarantee or insurance bond in the sum of United States Dollars Six Million Eight Hundred and Twenty One Thousand, Five Hundred and Nine, and Sixty Seven Cents (US$6,821,509.67) being statutory redeemable instrument contribution into (EPF) for Lafarge Ndola Plant, if the Defendant opts to settle the cash liability all at once, but varying amounts if the five year scheme is opted.

The Plaintiff also claims payment of:

(v) Costs of the environmental audit which was executed to assess the EPF liability of the Defendant for both Lusaka and Ndola Plants.

(vi) Interest on (i), (iii) and (v) above and any other amount found due.

(vii) Legal Costs."

In his statement of claim, the respondent claimed, inter alia, as follows:

"PARTICULARS OF SPECIAL DAMAGES

(viii) The special damages incurred by the Plaintiffs and the Republic are in the sum of United States Dollars Three Hundred and Twenty Three Thousand, Five Hundred and Sixty (US$323,560) being Two Point Five percent (2.5%) of the total value of environmental risk assesses as stated in paragraph (i) above.

7. By reason of the matters aforesaid in paragraphs (i) to (viii) above, the Plaintiffs, public and the Republic have suffered loss and damage.

8. And the Plaintiffs now claim that the Defendant pays:

(a) United States Dollars Two Million Five Hundred and Eighty Eight Thousand Seven Hundred and Ninety Six and Seventy Seven Cents (US$2,588,796.77) into EPF, being summation of cash liability stated in paragraphs (i) and (iii) of the Writ of Summons.

(b) United States Dollars Ten MillionThree Hundred and Fifty Five Thousand One Hundred and Eighty Seven and Five Cents (US$10,355,187.05) into EPF, being summation of redeemable bond liability stated in paragraphs (ii) and (iv) above in the Writ of Summons.

(c) A fine of one million penalty units for failure to comply with lawful directives of the Director of Mines Safety Department stated in paragraphs (ii) and (iv) above in the Statement of Claim.

(d) Special damages in the sum of US$232,560 stated in paragraph (iv) of the writ of summons and (viii) of the Statement of Claim.

(e) Interest on (a) and (d) above and other amount found due.

(f) Legal costs."

A scrutiny of the above claims reveals that prima facie the claims were frivolous and vexatious. We shall return to this aspect later in the judgment.

Further, we note that when the appellant applied for review under Order 39 of the High Court Rules, the application was dismissed by the learned Judge on the ground that there was nothing new to consider. We take the view that this was a misdirection. Since the learned Judge had earlier refused the

application to set aside the default judgment, it was open for the appellant to return to Court to ask for review of the Court's decision. The learned Judge should have considered the exhibited defence in the appellant's further affidavit in support of an application for review.

The respondent's arguments that the appellant sat on its rights and that the lower Court was on firm ground cannot be sustained.

All in all, the learned Judge misdirected herself when she refused to set aside the default judgment.

Coming to the question of *locus standi,* the gist of the appellant's argument is that this issue was raised even before the Deputy Registrar. We note that the learned Judge dealt with this issue when she said at Page 18 of the Record of appeal that:

"Counsel for the defendant only mentioned that the plaintiff has no *locus standi* and the case was commenced prematurely in her submissions. These issues were not mentioned in the application to set aside default judgment…..

The plaintiff has shown that he has *locus standi* and to say the case was brought up prematurely is not in my view a defence on the merits."

Counsel for the appellant also argued that *locus standi* should have been considered as a defence by the learned Judge. Both the appellant and the Intervening Party are agreeable that Section 123 **of the Mines and Minerals Development Act** has nothing to do with the Environmental Protection Fund (EPF). It was pointed out that Section 123(6) provides that:

"Any person, group of persons or any private state or organization may bring a claim and seek redress in respect of a breach or threatened breach of any provision relating to damage to the environment biological diversity, human and animal health or to socio-economic conditions."

It was submitted that this Section does not authorize the respondent to litigate on account of the EPF, a government fund and any litigation should be through the Attorney General as provided under Section 12 (1) of the **State Proceedings Act.**

On the other hand, the respondent argued that he has *locus standi* to protect the environment in areas which have been disturbed by the Appellant "through its historical and on-going mining activities." He relied on Section 123(7) of the **Mines and Minerals Development Act** which reads:

"(7) Any person, group of persons or any private or state organization may bring a claim and seek redress in respect of the breach or threatened breach of any

provision relating to damage to the environment, biological diversity, human and animal health or to socio-economic conditions-

(a) in that person's or group of persons' interest;

(b) in the interest of or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;

(c) in the interest of, or on behalf of, a group or class of persons whose interests are affected;

(d) in the public interest; and

(e) in the interest of protecting the environment or biological diversity."

Further, that this matter is of public interest because public funds are at risk should the appellant fail to undertake the rehabilitation of the land it has, and continues to degrade, over the years. We were referred to Regulation 3 (b) of the **Mines and Minerals (Environmental Protection Fund) Regulations of 1998** which reads as follows:

"to provide protection to the government against the risk of having the obligation to undertake the rehabilitation of the mining area where the holder of a mining licence fails to do so."

According to the respondent, Parliament has given him the right to sue. The respondent claimed that his organization was authorized to recover moneys from the appellant.

We have considered the arguments on both sides as regards the issue of *locus standi.* We tend to agree with the appellant and the Intervening Party from the outset that the respondent has behaved like a meddlesome private "Attorney-General" and has taken out a suit which is the preserve of the government. As submitted by the State, any action relating to the EPF must be under the direction of the Ministry of Mines in conjunction with the Attorney General. Indeed, a perusal of the respondent's claims leaves one to wonder how the respondent arrived at the figures claimed and why the figures are in United States Dollars. Clearly, these figures were plucked from the air. We take the view that had the learned Deputy Registrar and the learned Judge properly scrutinized the claims and the figures endorsed, they would have both arrived at the inescapable conclusion that the respondent had no *locus standi* in this matter and that if anything the action was frivolous and vexatious.

Certainly, the respondent misapprehended Section 123 of the **Mines and Minerals Act** and since his claim relates to the EPF, it is manifestly clear that he had no *locus standi* to commence this action. Section 123 (7) has not clothed the respondent with authority to 'recover money or demand from the

appellant payment or deposit into the EPF'. The best the respondent could have done was to co-operate with the Ministry of Mines to register his grievances with regard to the operations of the appellant and to establish whether the appellant was paying into the EPF or not. It is up to the government to use its powers under the Act as far as the EPF is concerned.

We find that the learned Judge erred when she concluded that the respondent had *locus standi* to commence this matter. We agree that this was a defence on the merits which the learned Judge failed to consider and this was a misdirection.

In conclusion, we take the view that had the learned Judge properly perused the writ of summons and statement of claim; had she considered the fact that the respondent's claim had no legal basis since amounts were plucked from the air; had she properly considered the fact that the default judgment was entered before the period for entering memorandum of appearance and defence had elapsed (reason being that the respondent had endorsed 14 days instead of 21 days), she would have come to the inescapable conclusion that the respondent had no cause of action; that the default judgment was irregular and that the respondent had no *locus standi* and she would have

dismissed the action as it is clearly frivolous and vexatious. It has no legal leg to stand on.

Therefore, for reasons stated herein, we dismiss the respondent's case in the Court below in its entirety.

Coming to the question of costs, it is trite that costs follow the event. We note the provisions of Section 123 of the **Mines and Minerals Development Act** which protects a plaintiff from costs if a matter is properly commenced under that Section. As we have observed, the respondent had no legal authority to bring this action and, therefore, cannot benefit from his wrongs.

We allow this appeal with costs to the appellant to be taxed in default of agreement.

RTD

.....

D.K. CHIRWA
ACTING DEPUTY CHIEF JUSTICE

.....

M. S. MWANAMWAMBWA
SUPREME COURT JUDGE

.....

E.N.C. MUYOVWE
SUPREME COURT JUDGE