



THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE
PIBAG 221 BLANTYRE

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

Blantyre Registry

Commercial Case No. 375 of 2018

(Before Honourable Justice Sikwese)

BETWEEN

LARKCON INTERNATIONAL LIMITED t/a SIS INSPECTIONS.....CLAIMANT

AND

TRANSGLOBE PRODUCE EXPORT LIMITED.....DEFENDANT

CORAM: D.H. SANKHULANI, ESQ., ASSISTANT REGISTRAR

Mr. B. Mhango, of Counsel for the Claimant

Mr. Z. Chipembere and Ms. D. Manjandimo, of Counsel for the Defendant

Mr. A. Nyirongo, Court Clerk

.....
Sankhulani, AR

RULING

Introduction

This ruling follows hearing that was held on an application, brought under **Order 10, rules 1 and 5** and under **Order 2 of the Courts (High Court) (Civil Procedure) Rules 2017**, by the Defendant to restore its application to set aside default judgment.

Background Information

The Plaintiff commenced the present action by way of a specially-endorsed summons, claiming the sum of K79,351,682.68, interest thereon, the sum of K11,902,752.40 being collection charges and costs of the action. The cause of action herein arose from four transactions whereby the Defendant procured stock monitoring and collateral management services from the Claimant.

Subsequently, a default judgment was entered herein on account of there being no response filed on the Defendant's behalf.

Later on, the Defendant obtained a stay order pending an application to set aside default judgment. Accordingly, the Defendant filed an application to set aside default judgment, which was supported by a sworn statement and skeleton arguments. The Claimant, on its part, filed a sworn statement and skeleton arguments in opposition to the said application. On the scheduled date for hearing of the said application, the Defendant did not appear to prosecute the application. Accordingly, this Court, on the Claimant's application, dismissed with costs the said Defendant's application to set aside default judgment.

Subsequently, the Defendant filed the present application, which was later heard in the presence of both parties hereto who appeared through their respective Counsel. The matter was then adjourned to today's date for ruling. Hence this ruling.

Issues for Determination

- Whether the Defendant has got sufficient excuse for non-attendance.
- Whether the Defendant has made out a case for restoration.
- Whether the Defendant's application to set aside default judgment ought to be restored.

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Whether the Defendant has Got Sufficient Excuse for Non-attendance

In the sworn statement in support of the present application, counsel Zwelithini Chipembere deposes that on the material date, he had three matters, one before the magistrate's court scheduled for 10 a.m. and two before the High court, with one coming at 10 a.m. and the other one at 10:30 a.m. According to counsel, he had, on the material date, gone to the magistrate's court to seek an adjournment and then got caught up in a traffic jam on his way to this Court.

However, I find counsel's explanation to be far from convincing. During oral representations, counsel conceded that there are about six or seven lawyers at their firm. He said the number dwindles when one takes into account that some of the lawyers at their firm are admitted to the Malawi bar with conditions. He went on to say that at the material time, Mr. Gondwe was in Egypt, and that Mr. Theu was in Zomba. According to him, it was only him and Madalo Banda who were available. In the sworn statement in support, he says that Counsel Madalo Banda, who was seized with the application, had two matters at the magistrate's court. It is a well-known rule of procedure, which I hope will one day be recognized as sacrosanct, that High Court's business takes precedence over magistrate's, where there is a clash of scheduled times. It is, therefore, inconceivable why either of the counsels did not simply give brief to some other counsel to appear at the courts below concerned in order to seek adjournments. Nothing has been placed before this Court as to why this simple course of action was not taken. It is difficult to understand how counsel thought he would appear at 10 a.m. at the magistrate's court, seek an adjournment and then attend, at 10 a.m. again, the matter before this Court. All in all, I find that the Defendant does not have an excuse for its non-attendance at the scheduled date for hearing of its application to set aside default judgment.

Whether the Defendant has Made Out a Case for Restoration

By the sworn statement in support of the present application, the Defendant puts forward existence of a meritorious defence as the basis for its application to set aside default judgment, which application was dismissed and is now sought to be restored.

However, exhibited to the sworn statement in opposition to the present application is a letter from the Defendant's lawyers to the Claimant's lawyers, marked as 'BM 1'. The said 'BM 1' clearly shows that it was a cover letter for a cheque worth K5,000,000.00 that the Defendant paid to the Claimant regarding this matter. 'BM 1' is not marked 'without prejudice', and does not contain any qualification to the Defendant's indebtedness as implied by the payment. Now, the fact that

'BM 1' is not marked 'without prejudice', and also that it does not contain any qualification to the Defendant's indebtedness as implied by the payment clearly means that there are no triable or arguable issues that may properly be said to be raised by the Defendant's application to set aside default judgment sought to be restored hereby. I so opine and find. Accordingly, I find the Defendant not to have succeeded in making out a case for restoration.

Whether the Defendant's Application to set aside Default Judgment Ought to be Restored

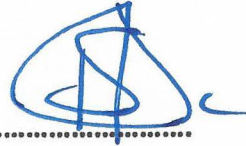
In view of the foregoing findings and reasoning, I find that the Defendant's application to set aside default judgment ought not to be restored.

Final Order

In view of the foregoing findings and reasoning, the Defendant's present application is hereby dismissed with costs.

Further, the stay order that was granted earlier on is hereby discharged.

Delivered in Chambers at Blantyre Registry of the Commercial Division of the High Court this 28th day of January 2019.



D.H. SANKHULANI

ASSISTANT REGISTRAR

