

LEGAL ALERT

THE COURT OF APPEAL OF ZAMBIA SETTLES THE LAW ON WHETHER JUDGES ARE AT LIBERTY TO ATTACH CONDITIONS TO ORDERS SETTING ASIDE DEFAULT JUDGMENTS AND ORDERS FOR LEAVE TO APPEAL TO THE COURT OF APPEAL



Are Judges at liberty to attach any conditions to orders to set aside default judgments and orders for leave to appeal? If so, are such powers absolute and unfettered. The Court of Appeal had occasion to consider these elementary principles that guide Courts on attaching conditions to orders to set aside default judgments and orders for leave to appeal.

In *Kapsch TrafficCom AG vs. Intelligent Mobility Solutions Limited*, Kapsch had applied to set aside an Interlocutory Judgment in Default of Appearance and Defences. Whilst granting an order to set aside the Default Judgment and leave to appeal, the Learned Judge, nonetheless, granted the foregoing orders on the condition that 30% of the Plaintiff's claims be assessed by the Deputy Registrar and paid to the other party. In effect, the setting aside of the Judgment In Default would only take effect after the 30% of the Plaintiff's claims had been assessed and paid. Similarly, leave to appeal against the Judge's ruling regarding the setting aside of the Judgment in

Default could only be made upon payment of 30% of the Plaintiff's claims into Court. Therefore, Kapsch was constrained from appealing or filing a defence. Kapsch, appealed to the Court of Appeal despite the assessment proceedings not concluding on the premise of Section 23 (1) and Section 23 (2) of the Court of Appeal Act, 2016. On appeal, the Court disagreed with the High Court's decision and allowed the Appeal by Kapsch.

Briefly, the Court of Appeal has emphasised the following guidelines for attaching conditions to orders to set aside default judgments and orders for leave to appeal:

Leave to Appeal

(a) Firstly, while it is every litigant's right to appeal, the Court of Appeal found that leave to appeal is required in certain instances where an appeal is against an interlocutory decision. The Court of Appeal relied on Section 23 (1) (e) of the Court of Appeal Act, 2016.

While the Court of Appeal was also directed to Section 23 (2) of the Court of Appeal Act, unfortunately, the Court did not pronounce itself on it. *Food for Thought: Considering Section 23 (2) of the Court of Appeal Act, 2016, an order refusing unconditional leave to defend an action is not an interlocutory order or interlocutory judgment in the meaning of paragraph (e) of subsection (1). Therefore, the appeal herein did not require leave in the first place.*

(b) Secondly, the Court re-emphasised that the superseding consideration in applications for leave to appeal is prospects of success. Once a judge considers the prospects of success and decides to grant leave, conditions may be imposed for the purpose of expediting the filing of the appeal.

(c) Thirdly, conditions on orders for leave to appeal should be reasonable and within the law. In this case, the Court of Appeal was of the view that ordering payment of the disputed claim

is bad for procedure and an impediment to an appeal, which should be avoided at every opportunity. Such conditions have the effect of subjecting a defendant to the consequence of the same ruling or judgment it disagrees with. Moreover, such order would pose serious cost recovery problems if the appeal is eventually successful.

(d) What would be reasonable is an order for security for costs.

Setting aside default judgments

(a) To begin with, the primary consideration for setting aside a default judgment is whether the applicant has an arguable defence on the merits.

(b) The second consideration is whether the applicant had a reasonable excuse for failing to enter appearance and defence within the stipulated time.

(c) Although the Court has discretion to attach conditions to orders for setting aside default

judgments, the extent of the discretion is limited by the law. The sort of conditions allowed by the law include security for costs and other costs deemed necessary. The Judge is not at large on what conditions to attach to such orders.

(d) Where the Court attaches a condition to an order in excess of its jurisdiction, such order and condition is null, void and unenforceable.

(e) Lastly, an unsatisfactory reason for failure to enter appearance and defence within time is only a secondary consideration to the need for an applicant to provide an arguable defence on the merits. Put differently, once the applicant is found with an arguable defence on the merits, any other considerations are irrelevant.

We hope you found this alert useful. Please contact our Dispute Resolution and Public Policy Partner and Senior Associate, Sydney Chisenga at SChisenga@corpus.co.zm and Martha Siwale Namwila- Mwala at MNamwila@corpus.co.zm respectively, if you have any questions relating to this legal alert.



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