



(COMMERCIAL DIVISION)  
LILONGWE REGISTRY  
COMMERCIAL CAUSE NO. 011 OF 2020

BETWEEN:

**SAVENDA MANAGEMENT SERVICES LIMITED.....CLAIMANT**

and

**ATTORNEY GENERAL (MINISTRY OF HEALTH AND  
POPULATION..... DEFENDANT**

Coram: **Hon. Justice Annabel Mtalimanja**

Mr. Kita, Counsel for the Claimant.

Mr. Chuma, Counsel for the Defendant.

Mr. Chisiza, Counsel for the Defendant.

Mr. Kachilambe, Court Clerk

**ORDER**

1. It is always prudent and helpful to look at matters in context to gain proper perspective. The record will show that on 29<sup>th</sup> July, 2020 the court, upon the agreement of the parties, waived mediation so that the matter can be disposed off on a point of law. Following this, the court directed that the Defendant should file an application to amend its pleadings and list of documents within

7 days, i.e. 5<sup>th</sup> August, 2020; the Claimant to file submissions within 14 days, i.e. 19<sup>th</sup> August, 2020; the Defendant to file submissions within 14 days thereafter i.e. 2<sup>nd</sup> September, 2020; the Claimant to reply 7 days thereof i.e. 9<sup>th</sup> September, 2020.

2. The Application to amend the Defence was filed and granted on 4<sup>th</sup> August, 2020. The Claimant filed its submissions on 19<sup>th</sup> August, 2020. As at 2<sup>nd</sup> September, 2020 the Defendant had not filed its submissions. This clearly was non-compliance.
3. On 14<sup>th</sup> September, 2020 the Claimant was granted, *ex parte*, an order setting aside the Defence and entering judgment without a hearing, for failing to follow a direction of the court. This application, according to the summons, was made under O.2, r. 3 (c) as read with O.12, r. 4 (1) CPR. On the same 14<sup>th</sup> September, 2020 a perfected order was issued.
4. I observe that the face of the judgment erroneously cited O.2, r.3 (b) and O.12, r.6 (a) CPR as the premise of the order of the court.
5. It is instructive to note that the court granted the order “as prayed for”, i.e. under O.2, r. 3 (c) and O.12, r. 4 (1) and not O.2, r. 3 (b) and O.12 r. 6 (a) CPR as cited. Therefore the judgment had a clerical error, amenable to correction under O.2 CPR.
6. In my considered view, it is O.2, r. 3 (c) and O.12, r. 4 (1) CPR that is the correct law to premise any subsequent applications, orders e.t.c and not the



erroneous one. Therefore the Defendant's application herein is clearly misplaced, in as far as it is anchored on O.2, r. 3 (b) and O.12, r. 6 (a) CPR as the law on which the court exercised its power.

7. I have heard the Defendant's argument that they were misled by the judgment that they were served with since it cited the wrong law. Whilst this may be understandable, it cannot serve Counsel for the Defendant well and far. Counsel had and has the duty to check the court record to understand the basis on which that judgment was granted.
8. If Counsel had been diligent enough they would have seen that the court granted the judgment without a hearing on the basis of O.2, r. 3 (c) and O.12, r. 4 (1) CPR and crafted their application accordingly.
9. Now, having pronounced itself under O.12, r. 4 (1) CPR, I am of the view that this court is *functus officio*. This I say because the CPR have not made provision for setting aside a judgment entered under O.12, r. 4 (1). Unlike the default judgment regime where provision has been made for its setting aside under O.12, r. 21, there is no provision for a court to set aside its own judgment entered under O.12, r.4 (1).
10. It must be that the legislator intended for this not to be set aside so. It must be that the avenue available for setting aside a judgment under O.12, r. 4(1) is by way of appeal to the Supreme Court of Appeal. This is my finding.

11. Being *functus officio*, this court cannot competently review itself on the way the matter was disposed off under O.12, r. 4 (1) CPR. The Defendant is therefore at liberty to invoke the appeal process to have the invocation of O.12, r. 4 (1) and judgment entered thereunder reviewed.

12. The Application is therefore dismissed with costs.

13. In passing, the Sworn Statements of Counsel Chuma are indeed defective for non-compliance with O.18 CPR, but since the matter is not being determined on the merits, I will only encourage Counsel to ensure sworn statements are drafted according to the dictates of the said O.18.

  
Annabel Mtalimanja. J

3<sup>rd</sup> November, 2020

13:45hrs.