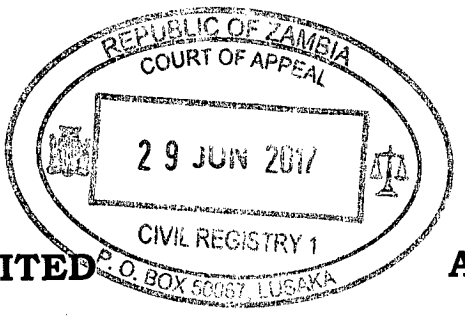
IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO.21/2016**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

SUMIJ INVESTMENTS LIMITED **APPELLANT**

AND

M.M. INTEGRATED STEEL MILLS LIMITED **RESPONDENT**

Coram: Chisanga JP, Mulongoti and Sichinga, JJA

On 7th and 14th March, 2017 and 29th June, 2017

For the Appellant: Mr. M. Katolo of Messrs Milner & Paul Legal Practitioners
For the Respondent: No Appearance

J U D G M E N T

MULONGOTI, JA, *delivered the Judgment of the Court*

Cases referred to:

1. ***Taylor v. Caldwell (1863) QB 1***
2. ***Robinson v. Davison (1871) 1 LR 6 Exch. 269***
3. ***John Mumba, Danny Museteka and Others v. Zambia Red Cross Society (2006) ZR 137 (SC)***
4. ***Cropper v. Smith (1884) 26 QBD***
5. ***Zambia Telecommunications Company Limited v. Mulwanda and Ngandwe SCZ Appeal No. 63 of 2009***

6. ***TATA (Zambia) Limited v. Shilling Zinka (1986) ZR 51***
7. ***Barrington v. Lee (1971) 3 ALL ER 123 (CA)***
8. ***Premesh Bhai Megan Patel v. Rephidim Institute Limited (2011) ZR Vol.1, 134 (SC)***
9. ***Covindbhai Baghabhai Patel and Another v. Monile Holdings Company Limited (SCZ) (1993) S.J No.19***
10. ***Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc. The Saudi Eagle (1986)2 Lloyds Rep. 221***

This is an appeal against the whole ruling of the High Court, commercial division in which that Court refused to set aside the judgment in default of appearance on the basis that the defendant (now appellant) had no defence on the merits.

It is necessary to say a little about the background. On divers dates but between July and September, 2013 the plaintiff (now respondent) supplied the appellant with several consignments of steel products totalling K127,761.16. However, contrary to the terms of the agreement and the usual practice requiring the defendant to settle all tax invoices within 30 days of the delivery of the product, the appellant failed to pay or liquidate the debt. This prompted the respondent to sue for payment of the debt.

The defendant failed to enter appearance and defence. The Court below then entered Judgment in default of appearance and defence, upon application by the plaintiff. The defendant then applied to set aside the default Judgment. In the supporting affidavit deponed by the Director one Jabir Hussein Patel, he deposed *inter alia*, that the defendant had pledged as security a Toyota Hilux vehicle valued in excess of the debt per letter marked as 'JHP2' and the plaintiff was requested to collect the vehicle. That the operations of the defendant

company had halted due to illness of the deponent, the brain behind the running of the company. That the plaintiff served an amended writ and statement of claim on the defendant's advocates but the initial writ and statement of claim was never served on them. As director, he was shocked to receive the amended documents without having received the original ones.

It was further deponed that the delay in filing the memorandum of appearance and defence was in no way disrespectful of the court but purely on the premise that the deponent had travelled out of the country which made it impossible for his advocates to get instructions.

Learned counsel for the defendant also filed skeleton arguments in which it was argued *inter alia*, that the contract between the parties had been frustrated.

The plaintiff opposed the application mainly on the ground that the party in default must not only show a defence on the merit but also explain the default. However, the defence on the merit was most important. That the defence of frustration could not succeed as the defence had not disputed its liability to the plaintiff.

Additionally, that the contract giving rise to the case was between the plaintiff and the defendant, and not of a personal nature between the plaintiff and the deponent (managing director) of the defendant company. Thus, performance of it had not been rendered impossible since the company was still a going concern. It was further argued that the Toyota Hilux was not valued at an amount that was more than the debt and if this was being disputed, it be subjected to a valuation.

In dismissing the application, the Judge found that exhibit 'JHP2' was clear that the defendant did not dispute owing the money in question and had given a Toyota Hilux motor vehicle as a form of security for the debt.

In considering whether the contract had been frustrated, the Court below quoted from Monahan's book 'Essential Contract of Law', thus:

> ***"the doctrine of frustration is based on the view that a frustrating event changes the nature of performance to such an extent that there is no longer a real contract between the parties"***.

And the case of **Taylor v. Caldwell**[1] that:

> ***"the destruction of the actual subject matter of the contract excused both parties from any obligation to perform the contract. The court noted that neither party was responsible for starting the fire. In other words, the contract contained an implied term that both parties would be discharged from their contractual obligations if performance under the terms of the contract became impossible because of some subsequent event, without either party being at fault"***.

Consequently, the court below found that the facts in *casu* do not fall under frustration. He amplified that he saw no event that occurred and affected the performance of the contract to such an extent that the parties were discharged from their contractual obligations. Additionally, that the party to the contract was not the actual managing director but the defendant company. Furthermore, that as contended by the plaintiff's advocates, the plaintiff's managing director even though he was ill and out of the country, could have used modern technology to instruct his lawyers.

The learned Judge also took judicial notice of the fact that the law in Zambia required a company to have more than one director. He also found that the issue of improper service did not arise since Order 20 Rule 1 paragraph 7 of the Rules of the Supreme Court, 1999 edition, provides that where the writ is amended it must be served as if it were the original one. And that the difference in time between the original writ and the amended one was one day such that no prejudice was occasioned to the defendant. The application was thus dismissed with costs to the plaintiff. It is this ruling which is the source of this appeal.

The appellant (defendant) has raised four grounds of appeal as follows:

1. The learned trial Judge erred and misdirected himself in law and fact when he held that there was no event that occurred and affected the performance of the contract to such an extent that the parties were discharged from their contractual obligations.

2. The learned trial Judge erred in law and fact when he held that even if the managing director of the appellant company was ill he should have used modern technology to instruct his advocates.

3. The learned trial Judge erred in law and fact when he analysed evidence as if it was a main trial when the application before him was to set aside the judgement in default of defence and appearance.

4. The learned trial Judge erred in law and fact when he held that there is no ground for the Judgment in default of appearance

and defence to be set aside despite the appellant exhibiting a defence and counter claim on the merits.

Learned counsel for the appellant also filed the appellant's heads of argument. In arguing ground one, counsel submits that the appellant had shown that it had one managing director, which is not prohibited by law. Due to terminal illness, the managing director was unable to run the company to its capacity which resulted in its under performance and failure to perform its obligations under the contract with the respondent. Accordingly, this should qualify as falling under the doctrine of frustration. The case of **Robinson v. Davison**[2] is cited as authority.

It is the further submission of learned counsel that the issue of frustration of the contract was not before the trial court for determination and it was improper for him to have considered it as guided by the Supreme Court in **John Mumba, Danny Museteka and Others v. Zambia Red Cross Society**[3].

Regarding ground two, counsel contends that by holding that even if the managing director was ill, he should have used modern technology to instruct his advocates, the Court was punishing the appellant. That the object of the Court is not to punish the mistakes of the parties but to correct them.

The case of **Cropper v. Smith**[4] is relied upon where it was held that:

> ***"Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties and not to punish them for the mistakes which they make in the conduct of their case...I think of it no kind of error or mistake which, if not fraudulent....the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the***

sake of deciding matters in controversy and I don't regard such amendments as a matter of favour of grace... it seems to me that as soon as it appears that they lead to a decision of the real matter in controversy, it is as such a matter of right on its part to have it corrected, if it can be done without injustice".

According to counsel the reason for delaying in filing an appearance and defence should not be the basis for refusing to set aside a default judgment. The issue the Court should really consider is whether there is a triable issue disclosed.

Thus, the trial Court erred to have held that a modern form of technology should have been used to instruct the advocates.

It is counsel's argument in ground three that the trial Judge erred in law and fact when he analysed evidence as if it was a main trial when the application before him was to set aside the judgment in default of appearance and defence. Several cases were cited in support of this argument including **Zambia Telecommunications Company Limited v. Mulwanda and Ngandwe**[5].

Counsel amplified that in considering whether the appellant had a defence on the merit, the trial Judge went further and made a determination on that defence without giving the appellant an opportunity to be heard as the Court was merely dealing with a preliminary issue. That this is a great injustice on the part of the appellant. The ruling is thus null and void.

In ground four, it is argued that the trial court erred in law and fact when it held that there is no ground for setting aside the judgment in default of appearance and defence.

Relying on the Supreme Court decision in **TATA (Zambia) Limited v. Shilling Zinka**[6] it is argued that the condition to set aside a default

judgment is to perfect the court process. That the appellant sought to have the proceedings perfected by exhibiting a proposed defence thus demonstrating that it has a defence on the merit. Furthermore, that the defendant must explain why it did not file an appearance and defence which was done in *casu*.

The respondent did not file its heads of argument. As the record would reveal, at the hearing on 7th March, 2017, confusion arose as to whether Mwenye Mwitwa advocates who represented them in the court below continued to do so before this court. This was after the appellant's counsel, Mr. Katolo, informed the Court that he served the record of appeal on Mwenye Mwitwa Advocates. Mr. Mwitwa, (who was present in court for another matter) when questioned, informed the Court that though his firm was served, they were no longer acting for the respondent. We adjourned to 14th March, 2017 but there was still no appearance by the respondent. We proceeded to hear the appellant's counsel who opted to rely entirely on the heads of argument.

The central issue in this appeal is whether the trial Court erred in law and fact when he refused to set aside the Judgment in default on the grounds afore mentioned. We will consider all the grounds together as they are related.

It is settled law that a judgment in default of defence and appearance can be set aside. It is also settled law that in setting aside a default Judgment, the defendant should give an explanation of his default and show that the proposed defence has merit. See **Barrington v. Lee**[7]. The Supreme Court has also held in a plethora of cases, some of which have been cited by counsel, that when dealing with an application to set aside a default Judgment, the question is whether

a defence on the merits has been raised and whether the applicant has given a reasonable explanation for his failure to file a defence within the stipulated time. That Court has stressed that it is the disclosure of a defence on the merits which is the more important point to consider. See **Premesh Bhai Megan Patel v. Rephidim Institute Limited**[8]. In that case the Supreme Court found that no defence on the merits was disclosed to warrant the matter going to trial.

In **Covindbhai Baghabhai Patel and Another v. Monile Holdings Company Limited**[9], the Supreme Court held that:

> ***"a default judgment should be set aside if a triable issue is disclosed".***

In **Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle**[10]. It was held that:

> ***"it is not sufficient to show a merely arguable defence, but the defence must have a real prospect of success and carry some degree of conviction".***

It was further held that:

> ***"the Court must form a provisional view of the outcome of the action".***

In *casu,* it was not disputed that the appellant is owing the respondent for the goods supplied. On this point alone we are inclined to uphold the trial Judge's finding that the appellant has no defence on the merits.

We also note that the appellant's explanation as to its failure to enter appearance and defence is that the managing director was out of jurisdiction and unable to instruct counsel. The Judge reasoned

that the appellant should have employed modern technology to instruct his counsel. Learned counsel has argued that by so holding the Court was punishing the appellant.

We wish to state that the most important consideration when setting aside a default Judgment is a defence on the merits and disclosure of triable issues and not so much the explanation for failing to file the defence. Having found that the appellant does not have a defence on the merits the explanation for failing to file is secondary.

We also find no merit in the arguments that the Court erred in when he analysed evidence as if it was a main trial, when the application before him was to set aside the judgment in default of defence and appearance. The Judge considered all the issues raised by the appellant. Thus, the issue of the contract being frustrated was raised by the appellant and the Judge had to consider it. And in determining whether there was a defence on the merit or triable issues, the Court had to analyse the facts disclosed by the affidavit evidence. As held in **The Saudi Eagle**[10] the Court must form a provisional view of the outcome of the action.

We hasten to state that we agree with the trial court that the doctrine of frustration does not apply, on the facts of this case as he reasoned. The appeal is accordingly dismissed. Each party to bear own costs.

Before we leave this appeal, we wish to state that since the appellant provided the Toyota Hilux vehicle as security for the debt and it contends that the vehicle covered the debt in full whilst the respondent insists that the appellant's debt is still outstanding, we order that the Toyota Hilux be valued by a registered dealer like Toyota Zambia to determine its value then and if it is found that the

appellant is still owing it should then pay the balance. For completeness of the process of assessment of value, we refer the matter to the Deputy Registrar.

F.M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

D.L.Y. SICHINGA
COURT OF APPEAL JUDGE