IN THE COURT OF APPEAL OF ZAMBIA **APPEAL No. 93/2023**
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

RUCON MINING LIMITED **APPELLANT**

AND

BETTERNOW FINANCE COMPANY **RESPONDENT**

CORAM: *SIAVWAPA JP, CHISHIMBA & BANDA-BOBO JJA*

On 20th and 28th February, 2024

For the Appellant: *MR. D. MAZUMBA OF MESSRS. DOUGLAS & PARTNERS*

For the Respondent: *MR. E.C. BANDA WITH MR. T. CHIBELEKA AND MR. N. CHALEKA ALL OF MESSRS. ECB LEGAL PRACTITIONERS*

J U D G M E N T

Cases referred to:

1. ***Rosemary Bwalya v. Zambia National Commercial Bank Appeal No. 133/2005/160/2005.***
2. ***Waterwells Ltd v. Wilson Samuel Jackson (1984) ZR 98.***
3. ***BP Zambia Plc v. Interland Motors Ltd, Development Bank of Zambia.***
4. ***KPMG Peat Marwick v. Sunvest Ltd and Sun Pharmaceuticals Ltd.***
5. ***BP Zambia v. Interland Motors Limited (2007) ZR 37.***
6. ***Bank of Zambia and Another v. Sunvest Limited and Another (1995-1917) ZR 187.***

1.0 INTRODUCTION

1.1. This appeal is against the Ruling by the Honourable Mrs. Justice Abha N. Patel sitting in the High Court, Commercial Division, on 25th January, 2023.

1.2. By the said Ruling, the learned Judge refused to set aside the default judgment she had entered in favour of the Respondent. The learned Judge also refused to dismiss the Respondent's action for abuse of process.

2.0 BACKGROUND

2.1. In 2019, the Respondent and another, filed a Petition in the High Court for the winding up of the Appellant on account that the Appellant had failed to pay the loan facilities it had obtained from the Petitioner.

2.2. By Ruling dated 31st January, 2020, the learned Judge dismissed the Petition on two principal considerations namely; that a prima facie case for winding up had not been established and that the debts were disputed.

2.3. By Writ of Summons dated 31st January, 2022, the Respondent claimed against the Appellant payment of the sum of USD 228, 087.57, damages for breach of contract, interest and costs.

2.4. The Statement of Claim, accompanying the Writ of Summons, states that on 7th February, 2018, the Respondent granted the Appellant an invoice discounting facility in the sum of USD 240, 000.00.

2.5 That the discounting facility was payable in full within sixty (60) days at 7% monthly interest on the unpaid amount. Thereafter, interest would be at 14% if paid after the 45th day.

2.6 That the Appellant made two instalment payments and defaulted on the balance being the sum of USD 228, 087.57

2.7 At page 50 of the Record of Appeal, is exhibited a Notice of Appeal filed into Court on or about 22nd February, 2022. The Appeal was at the instance of the Respondent against the Ruling of 31st January, 2020, dismissing the Petition for winding-up.

3.0 THE SUMMONS TO SET ASIDE DEFAULT JUDGMENT AND TO DISMISS ACTION

3.1. The Appellant filed the summons and the attendant affidavit on 16th November, 2022.

3.2 The basis for the application as set out in the affidavit was that the Respondent did not affectively serve process on the

Appellant and hence, its failure to appear and enter a defence to the summons.

3.3 Further, that the Respondent had appealed against the Ruling dismissing the Petition and the appeal had not yet been determined.

4.0 THE DECISION OF THE HIGH COURT

4.1. In dismissing the two applications contained in the Writ of Summons, the learned Judge considered the law applicable to the two applications starting with the application to set aside default judgment.

4.2. The learned Judge reviewed the cases of *Rosemary Bwalya v. Zambia National Commercial Bank*[1] and *Waterwells Ltd v. Wilson Samuel Jackson*[2].

4.3. In both cases the principle is that even though both the reasons for the default and a defence on the merits should be provided in an application to set aside a default judgment, an arguable defence on the merits is the more important consideration.

4.4. The learned Judge found that the Applicant (Appellant) did not exhibit an arguable defence on the merits. She accordingly dismissed the first limbs of the application to set aside the default Judgment.

4.5. On the second limb to the summons, for an order dismissing the action for being an abuse of Court process,

the learned Judge reviewed case law on multiplicity of actions.

4.6. With particular reference to the cases of *BP Zambia Plc v. Interland Motors Ltd, Development Bank of Zambia*[3] and *KPMG Peat Marwick v. Sunvest Ltd and Sun Pharmaceuticals Ltd*[4], to cite but a couple, the leaned Judge concluded that the parties in the matter appealed against were not exactly the same.

4.7. She further found that the subject matters of the two actions were not the same. She accordingly dismissed the second limb of the application to dismiss the entire action for irregularity and for constituting a multiplicity of actions.

5.0 THE APPEAL

5.1 The memorandum of Appeal accompanying the Notice of Appeal contains four grounds of Appeal set out as follows:

1. *The Court below erred in law when it held that exhibits marked GAHVA and 5 are mere copies of Notice and Record of Appeal without stating that such copies is a clear indication that there is an active case before the Court of Appeal.*
2. *The Court below also erred in law when it held that "I am satisfied that parties, though similar, are not exactly the same parties as in this case and that there was no proof of the appeal having been heard and or determined", when the actual issue was there was an active matter in the Court of Appeal.*

3. *The Court also erred in law when it held that the earlier action was a petition to winding up while the present action is an action for the recovery of a debt commenced by Writ of Summons without considering that the object of the two actions though commenced in different modes was for the recovery of the debt and therefore, the Court should have held as an abuse of Court process.*
4. *The Court below also erred in law in failing to appreciate that the two cause 2019/HKC/0038 and 2022/HKC/06 were capable of producing two conflicting decisions.*

6.0 ARGUMENTS IN SUPPORT

6.1 In arguing grounds one and two, the Appellant has submitted, in the heads of argument that exhibits GAHV 4 and 5; namely Notice of Appeal and cover of the Record of Appeal are sufficient evidence of an appeal pending at the time the Respondent commenced the action.

6.2 That the pending appeal was at the instance of the Respondent against the Appellant arising from the same facts of the debt as the action in issue.

6.3 As a result of the above, the Appellant submitted that the action in issue amounted to a multiplicity of actions.

6.4 With regard to ground three, the Appellant anchored its argument on the fact that the parties remain the same even though one party to the petition is not a party to the action in issue.

6.5 It is further argued that the subject mater is also the same as both actions seek to recover the debt allegedly owed by the Appellant.

6.6 In ground four, the Appellant has argued that the fact that there was a pending appeal on the subject matter of debt when the Respondent commenced a fresh action over the same debt created a possibility of having two contradictory outcomes.

7.0 ARGUMENTS IN OPPOSITION

7.1 As a preamble to the arguments in opposition to the grounds of appeal, the Respondent drew our attention to the fact that the appeal was against the dismissal of the Appellant's application to set aside the Judgment in default and for multiplicity of actions.

7.2 This preamble simply disclosed the Respondent's agreement with the learned Judge's decision in the Court below.

7.3 In direct response to ground one, the Respondent admits that it had filed a Notice of Appeal and subsequently lodged

the Record of Appeal against the dismissal of the Petition. Further that the Court below acknowledged the same.

7.4 The Respondent however, argued that the said appeal has since been withdrawn by consent. That notwithstanding, the Respondent argued that even if there was an active appeal pending, the two matters would not yield two contradictory outcomes as they are not based on similar facts.

7.5 Arguing grounds two and three together, the Respondent submitted that neither the parties to the two matters nor the subject matters are the same to constitute a multiplicity of actions.

7.6 The Respondent argued that in the Petition to wind-up the Appellant, the parties were C. T. Ayar and the Respondent herein, while in the action for the recovery of the debt, the parties are the Appellant and the Respondent herein.

7.7 The Respondent relied on the cases of *BP Zambia v. Interland Motors Limited* [5] and *Bank of Zambia and Another v. Sunvest Limited and Another* [6].

7.8 In ground four, the Respondent simply repeated its arguments in the first three grounds. The arguments are that the parties are different as well as the nature of the claims.

8.0 OUR ANALYSIS AND DECISION

8.1 The primary question in this appeal is what issues are in dispute before us?

8.2 The Notice of Appeal clearly states that the appeal is against part of the Ruling delivered by the Honourable Mrs. Justice Abha N. Patel

8.3 To refresh memory, in the Ruling, the subject of this appeal, dated 25th January, 2023, the learned Judge considered two applications namely; the application to set aside judgment given in default of appearance and defence and to dismiss the action for being a multiplicity of actions.

8.4 The four grounds of appeal clearly show that the Appellant is only unhappy with the second application and as such we will only consider the second application in our analysis.

8.5 The question then is, should the learned Judge below have dismissed the action on the basis that it amounted to a multiplicity of actions?

8.6 The Appellant has strongly argued that cause No. 2019/HKC/0038, representing the Petition to wind-up the Appellant, and Cause No. 2022/HKC/06, representing the writ of Summons claiming payment of USD 228, 087.57, are both founded on debt recovery and involve the same parties.

8.7 That if the above is the case, then Cause No. 2022/HKC/06, ought to be dismissed because at the time it was filed the Respondent had already filed an appeal against the dismissal of the Petition in Cause No. 2019/HKC/0038.

8.8 The Appellant has anchored its argument on the doctrine of multiplicity of actions, a practice frowned upon by Courts through various decisions earlier cited in this Judgment.

8.9 One such case we shall consider is that of *BP Zambia Plc v. Interland Motors* in which the Supreme Court of Zambia stated as follows;

> *"A party in dispute with another over a particular subject matter should not be allowed to deploy his grievances piecemeal in scattered litigation, and keep on hauling the same opponent over the same subject matter before various Courts. The administration of justice would be brought into disrepute if a party managed to get conflicting decisions which undermined each other from two or more different judges over the same subject matter."*

8.10. This part of the Supreme Court Judgment epitomizes the undesirability of parties deploying grievances capable of resolution in one cause before different Courts.

9.0 PRINCIPLES GOVERNING MULTIPLICITY OF ACTIONS

9.1 There are two main principles governing multiplicity of actions namely; that the parties to the two actions should be the same and that the two actions should arise from the same facts.

9.2 The mischief to be cured by the doctrine of multiplicity of actions is the likelihood of the two Courts rendering conflicting decisions.

9.3 In this appeal, it is common cause that both the Petition for winding-up the Appellant and the summons by which the Respondent claims the sum of USD 228, 087.57 against the Appellant stem from a loan facility that the Respondent advanced to the Respondent.

9.4 Secondly, in both matters, the ultimate objective is for the Respondent to recover from the Appellant the outstanding balance on the facility advanced.

9.5 There are however, some aspects that make this appeal unique. Firstly, at the time of filing Cause No. 2022/HKC/06, Cause No. 2019/HKC/0038, had already been dismissed by the High Court but it had been appealed against.

9.6 Secondly, not-withstanding that the two actions were based on the facility, the objectives and outcomes are different. This is so because, whereas a winding up petition has as its objective, the realisation of the debtor's assets and the application of the proceeds to the settlement of the debts, a claim by Writ of Summons seeks to compel the debtor to pay the debt.

9.7 The third factor is that the Respondent has since withdrawn the appeal against the dismissal of the Petition to wind-up the Appellant.

9.8 The learned Judge refused to dismiss the action because she was of the view that the two matters did not share a commonality of parties and cause of action.

9.9 The learned Judge opined that the dropping out of one party to the Petition in the appeal and the mode of commencement of the two actions set them apart thereby taking them outside the realm of the doctrine of multiplicity of actions.

9.10 Our view is that the learned Judge anchored her decision on thin ice because as demonstrated earlier, the Respondent is a party in both actions and so is the Appellant. We do not think that the dropping out of the 1st Petitioner in Cause No. 2019/HKC/0038, from the appeal makes any difference to

the principle that the parties in both causes should be the same in a multiplicity of actions.

9.11 Secondly, we have also demonstrated that even though the two actions were commenced differently, they both emanate from a default on payment of a loan facility. So, the cause of action is the same in both cases.

9.12 We would have therefore, found that the learned Judge erred to have held that the two causes were not caught up by the doctrine of multiplicity of actions with a likelihood of giving rise to conflicting decisions.

9.13 However, in view of the fact that it is not in dispute that the appeal has since been withdrawn, coming to such a conclusion would be futile and prejudicial to the Respondent who has a judgment in default which was not set aside by the Court below.

10.0 CONCLUSION

10.1 The Appellant has attempted to escape the payment of the debt it acquired from the Respondent by seeking to have the default judgment set aside on account of multiplicity of actions when it is very much aware that there is no other matter pending in any Court of law on the debt it owes the Respondent.

10.2 According to the Respondent, the appeal was withdrawn by Consent of the parties. The Appellant, being a party to the withdrawal order, cannot be heard to pursue the argument for multiplicity of actions.

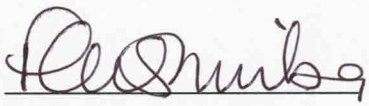
10.3 Consequently, we dismiss the appeal for lack of merit with costs to be taxed in default of agreement.

M.J. SIAVWAPA

JUDGE PRESIDENT

A. M. BANDA-BOBO

COURT OF APPEAL JUDGE



F. M. CHISHIMBA

COURT OF APPEAL JUDGE