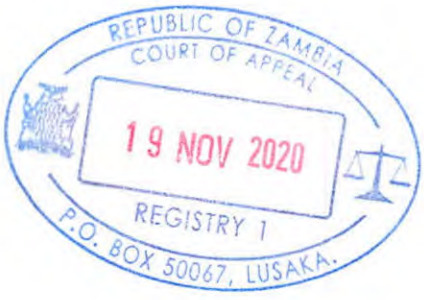
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL 195/2020**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:



DUNCAN MBEMBETA **APPELLANT**

AND

CHARLES LUNDOFU **RESPONDENT**

CORAM: **Chisanga JP, Mulongoti and Siavwapa, JJA**
On 12th and 19th November, 2020

For the Appellant: *Mr. M.M. Mwachilenga of James and Doris Partners*

For the Respondent: *Mr. K. Tembo-Legal Aid Counsel, Legal Aid Board*

J U D G M E N T

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

Cases referred to:

1. ***Amanita Milling Limited v Nkhosi Breweries Limited (2011) Vol. 1 ZR 357***
2. ***Mwambazi v Morrester Farms Limited (1977) ZR 108***
3. ***Covindbhai Baghabhai Patel and Vallabhai Patel v Monile Holdings Company Limited (1993) SJ 19 (SC)***
4. ***Kawambwa Tea Company (1996) Limited v Zygo Bonsai Private Limited- SCZ Appeal No. 11 of 2003***

5. ***Betty Kalunga (suing as administrator of the estate of the late Emmanuel Bwalya) v Konkola Copper Mines Plc (2004) ZR 40 (SC)***
6. ***Access Bank (Z) Limited v Group Five/Zcon Park Joint Venture- SCZ /8/52/2014***
7. ***Ram Auerbach v Alex Kanuata Appeal No. 65 of 2000***
8. ***Jamas Milling Company Limited v Imex International Limited (2002) ZR 79***
9. ***Nevers Sekwila Mumba v Muhabi Lungu-SCZ Appeal No. 200/2014***
10. ***Lafarge v Peter Sinkamba-SCZ Appeal No. 169 of 2009***

Legislation referred to:

1. ***The Rules of the Supreme Court of England, 1999 edition (RSC)***
2. ***The High Court Rules Cap 27 of the Laws of Zambia***
3. ***Halbury's Laws of England (vol 97 5th edition at page 47)***
4. ***The Law Reform (Miscellaneous Provision) Act***
5. ***The Road Traffic Act, 2002***

1.0 **Introduction**

1.1 This is an appeal against the decision of her Ladyship Chembe, J, in which she dismissed the appellant's appeal against the Deputy Registrar's refusal to set aside the Judgment in default of appearance and defence entered in favour of the respondent on 17th March, 2015.

1.2 The appeal deals with the issue whether the default Judgment was properly entered in accordance with the Rules

and whether the appellant has disclosed a defence on the merits which is sufficient to set aside the default Judgment.

2.0 **Background**

2.1 By writ of summons, the respondent commenced an action in the High Court on 24th August, 2014 for damages, for personal injury arising from a road traffic accident allegedly caused by the appellant's negligence.

2.2 On 10th March, 2015, the respondent applied for an order to enter Judgment in Default of Appearance and Defence which was entered on 17th March, 2015. And it was ordered that the quantum of damages be assessed by the Deputy Registrar (DR).

2.3 In October, 2015, the respondent filed an application for Assessment of Damages before the DR. Assessment was conducted in the absence of the appellant and a Judgment was rendered on 2nd November, 2017. The DR awarded the respondent a total of ZMW327,500 as damages, to be paid within 30 days with interest.

2.4 On 4th December, 2017 the appellant applied to the DR to set aside the Judgment in Default, this time he was

represented by Mumba Malila and Partners (previously he appeared in person).

2.5 The grounds for seeking to set aside were that the writ was irregular because it endorsed 14 days within which to enter appearance when the appellant was resident in Solwezi which was beyond 100 kilometers from the Ndola High Court. He was not served with the court process and that he had a defence on the merits.

2.6 On 31st July, 2018, the DR dismissed the application.

2.7 Dissatisfied with the Ruling, the appellant appealed to the Judge at Chambers. The learned Judge dismissed the application, hence the present appeal before us.

2.8 In dismissing the appeal, the learned Judge found that the defendant (appellant) in his affidavit in support of the application to set aside the default Judgment admitted that he was served with the writ of summons. The Judge reasoned that in considering an application to set aside a default Judgment, what is relevant is not the failure to serve the default Judgment but failure to serve the writ of summons. Thus, the Judge concluded that the appellant, having admitted being served with the writ, was fully aware of the

action against him. The default Judgment was therefore proper, and it is irrelevant that it was not served on him.

2.9 Turning to the grounds that the DR did not consider triable issues raised by the appellant, the learned Judge was of the view that setting aside a default Judgment is a discretionary power of the court. **Order 13 Rule 9 (18) of the Rules of the Supreme Court (White Book)** was cited as providing that in exercising discretion, the court ought to take into account the explanation by the defence as to how the default occurred. And that, it is not sufficient to merely show an arguable defence as the court ought to form a provisional view of the probable outcome of the action. Furthermore that, if proceedings were deliberately ignored such conduct though not amounting to an estoppel at law, must be considered *'in justice'* before the discretion to set aside.

2.10 The learned Judge also referred to the case of **Amanita Milling Limited v Nkhosi Breweries**[1] which holds that:

> ***"The test to be satisfied before the grant of an order setting aside is that: the application must be made within 7 days; a defence on the merit is not of primary consideration, but rather the reason for absence at the trial; if the absence was deliberate and not accidental, the Court would be disinclined to grant the order; the prospects of success of the application at the re-trial; the conduct of the applicant; likely prejudice***

on the successful party by the Judgment being set aside; and the public interest in there being an end to litigation. On application to set aside Judgment, the Court has discretion to extend the period of 7 days where the Court thought it was not necessary to make a substantive application for such enlargement. Once the party is in default, it is for that party to satisfy the Court that discretion should nonetheless be exercised in his favour, and for such purpose he may rely only on relevant circumstances."

2.11 The learned Judge concluded, based on that case, that triable issues are not the only considerations when faced with an application to set aside a default Judgment. The learned Judge found that the appellant did not give any reasons for failure to enter appearance and defence and instead questioned the regularity of the writ. He therefore deliberately ignored Court proceedings and only took the matter seriously when the respondent attempted to enforce the Judgment after assessment of damages.

2.12 Regarding the intended defence, the learned Judge was of the view that evidence of the police report showed that the accident was the defendant's fault despite his averments that the plaintiff was illegally driving an uninsured motor vehicle which had no lights and therefore negligently caused the accident. The Judge opined that the intended

defence had minimal prospect of success. She accordingly dismissed the appeal.

3.0 The Appeal

3.1 Dissatisfied with the ruling, the appellant launched an appeal in this Court, on the following grounds:

1. ***The court below erred both in law and in fact when it refused to set aside the Judgment in default of appearance and defence entered in the matter herein;***
2. ***The court below erred both in law and in fact when it overlooked the triable issues and the appellant's defences of contributory negligence and ex turpicausa non orituractio raised in the draft defence;***
3. ***The court below erred both in law and in fact when it found and held an unsupported police report as a sacrosanct document on which a defence of contributory negligence has a minimal degree of success.***
4. ***The court below erred in law and in fact when it delved into the detailed merits of the case in the absence of a trial.***

4.0 The Arguments

4.1 In support of the grounds of appeal, the appellant's counsel filed appellant's heads of argument on 1st November, 2019. The four grounds of appeal were argued together. Reliance was placed on the Supreme Court decision in **Mwambazi v Morrester Farms Limited**[2] which holds that:

> ***"It is the practise in dealing with bona fide interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties; where a party is in default he may be ordered to pay costs, but it is not in the interest of justice to deny him the right to have his case heard."***

4.2 The cases of **Covindbhai Baghabhai Patel and Vallabhai Patel v Monile Holdings Company Limited**[3] and **Kawambwa Tea Company (1996) Limited v Zygo Bonsai Private Limited**[4] were also cited in support of the argument that a default Judgment should be set aside if a triable issue is disclosed.

4.3 Learned counsel further referred to **section 10 of the Law Reform (Miscellaneous Provision) Act** and the case of **Betty Kalunga (suing as administrator of the estate of the late Emmanuel Bwalya) v Konkola Copper Mines**[5], arguing that in a case of contributory negligence the damages recoverable by the plaintiff are to be reduced. **Sections 86 and 163(1) of the Road Traffic Act** which prohibit use of an uninsured motor vehicle and a motor vehicle which is in such condition as to cause danger to others on the road, were cited.

4.4 In addition the learned authors of **Halbury's Laws of England (vol 97 5th edition at page 47)** were quoted that ***"a person participating in a criminal enterprise may be barred from***

recovery in respect of harm resulting directly from the illegal activity". Counsel argued that the respondent contravened **The Road Act** and was guilty of an illegal act of driving an uninsured vehicle and he be barred from recovering damages as a result of the accident.

4.5 In response, learned counsel for the respondent filed the respondent's heads of argument. The respondent's counsel argued the first three grounds simultaneously. It is counsel's contention that the appellant failed to appear before court to defend himself at his own peril. He only pointed out irregularities but failed to give reasons for his delay.

4.6 The cases of **Access Bank (Z) Limited v Group Five/Zcon Park Joint Venture**[6] and **Ram Auerbach v Alex Kanuata**[7] were cited in support of the argument that litigants default at their own peril. According to counsel even though the requirement to enter appearance within a stipulated time is one of a procedural nature, the delay to enter defence was inordinate and inexcusable.

The case of **Jamas Milling Company Limited v Imex International Limited**[8] was referred to wherein the Supreme Court observed that:

> ***"While we agree that rules of procedure are meant to facilitate proper administration of justice, we do not accept that in all cases rules cannot be made mandatory, that their breach cannot be visited by unpleasant sanctions against a party who breaches them...it is not in the interest of justice that parties by their shortcomings should delay the quick disposal of cases and cause prejudice and inconvenience to other parties."***

4.7 Thus, the appellant's delay in filing the defence invites a serious sanction being refusal to set aside the default Judgment despite there being triable issues, as alleged. In addition that should the default Judgment be set aside and matter proceeds to trial, the respondent will suffer prejudice considering the length of time the appellant took to apply. This would also be contrary to the principle that litigation must come to an end. Regarding ground four learned counsel submitted that there was nothing wrong with the lower court considering evidence, countering the purported defence, to show its weakness.

4.8 At the hearing of the appeal, Mr. Mwachilenga, who appeared for the appellant raised a point of law and submitted that the default Judgment was erroneously entered pursuant to **Order 12 Rules 6 and 7 as read with Order 20 of the High Court Rules (HCR)**. Learned counsel amplified that **Order 12 Rule 6** refers to matters involving recovery of land and **Rule 7** refers to issues of mesne profits which have nothing to do with personal injury cases as in this case. It was the further submission of counsel that **Order 12 Rule 8** provides that where a defendant neglects to enter a defence as happened in *casu,* and the plaintiff's claim is unliquidated, the matter should proceed as though the defendant had entered appearance (and defence). Thus, the matter herein should have proceeded to trial and the plaintiff should have adduced evidence to prove his claim.

4.9 Mr. Tembo who appeared for the respondent did not address us on this issue. He merely reiterated that the appellant only became serious of defending the action after he was served with the writ of fifa.

5.0 **Considerations and decision of this court**

5.1 The grounds of appeal raise the issue whether the appellant has disclosed an arguable defence or defence on the merits for us to set aside the default Judgment.

Before we delve into consideration of the grounds of appeal, we opine that it is imperative for us to determine first the point of law raised by Mr. Mwachilenga. We are alive to the fact that the issue on the point of law was not raised in the lower court, but it is well settled that a point of law can be raised at any stage even on appeal. See: **Nevers Sekwila Mumba v Muhabi Lungu**[9].

5.2 **Order 12 Rules 6 and 7** pursuant to which the Judgment in default was entered are couched thus:

> "**(6)** ***Recovery of land: In case no appearance shall be entered in an action for the recovery of land within the time limited by the writ for appearance or if an appearance be entered but the defence be limited in part only, the plaintiff shall be at liberty to enter a Judgment that a person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply.***
>
> **(7)** ***Mesne profits: where the plaintiff has endorsed a claim for mesne profits, arrears of rent, double value or damages for breach of contract or wrong or injury to the premises claimed, upon a writ for the recovery of land, he may enter Judgment as in the last preceeding sub-rule mentioned for the land; and may proceed as in the***

proceeding sub-rules mentioned as to such other claim so endorsed".

5.3 It is clear that the default Judgment in this matter was wrongly entered pursuant to **Order 12 Rules 6 and 7**. **Order 20** which was also referred to provides under **Rule 1;** for default of defence to a counterclaim which is not applicable herein. **Rule 2** provides for probate actions and **Rule 3** merely speaks to setting aside default Judgment upon such terms as to costs or otherwise.

Order 12 Rule 8 which Mr. Mwachilenga also relied upon to urge us to set aside the default Judgment provides thus:

> ***"(8). In all actions not otherwise specifically provided for by the other sub-rules, in case the party served with the writ of summons does not appear within the time limited for appearance, upon filing by the plaintiff of a proper affidavit or certificate of service, the action may proceed as if such party had appeared (as amended by Statutory Instrument No. 71 of 1997)"***

5.4 **Rule 8** is clear that the matter should have proceeded to trial as though the defendant (appellant) had entered appearance and defence; for the respondent to prove his claim. In **Lafarge v Peter Sinkamba**[10] the Supreme Court emphasized that:

> ***"It is not in every case that a plaintiff is entitled to enter a default Judgment simply because the defendant has failed to file memorandum of appearance and defence. It is not an automatic entitlement. At the stage of entering a default***

Judgment, it is the duty of a trial court or Deputy Registrar, as the case maybe, to examine the claims endorsed by the plaintiff on the writ of summons and statement of claim in order to determine whether a default Judgment should be entered or not".

5.5 In *casu* the plaintiff's (respondent) claim according to the writ and statement of claim was for the following reliefs:

> ***"(i) Damages for injuries, loss of amenities of life, and pain and suffering occasioned to the plaintiff by reason of the defendant's negligence***
> ***(ii) Compensation for the loss of my vehicle***
> ***(iii) Special damages***
> ***(iv) Interest and costs"***

In the statement of claim, it was averred, inter alia:

> ***"3. On or about the 21st of May, 2014, the plaintiff was driving a Toyota Camry from Solwezi to Chingola along Chingola-Solwezi road in Solwezi when the defendant negligently drove a motor vehicle, Toyota Harrier, registration No. ATB 22 along the said road, that caused the accident..."***

The plaintiff went on to state the particulars of negligence, inter alia,

> *(a) Driving at a speed which was too fast in the circumstances.*
> (b) *Failing to stop, slow down, swerve or in any other way so as to manage or control the said motor vehicle to avoid hitting the plaintiff's vehicle.*

He also provided particulars of injuries and particulars of special damages.

5.6 Had the lower court analysed the plaintiff's claim and scanned the **High Court Rules**, it would have found that the Rules do not provide for entry of default Judgment in such cases and that it was encumbered upon the plaintiff to lead evidence to prove negligence and all damages he suffered as a result. Thus, it was wrong for the respondent to have applied for entry of Judgment in default of defence contrary to the Rules. The Rules required him to proceed as though the appellant had entered appearance and defence.

5.7 Having established that the Judgment in default was irregularly entered, we are inclined to set it aside and allow the appeal. In **Lafarge v Peter Sinkamba**[10] the Supreme Court elucidated that once it is established that the default Judgment was irregular, the necessity to show a defence on the merits falls away. Accordingly, the grounds of appeal herein are rendered otiose as it is unnecessary for us to consider if the appellant disclosed an arguable defence.

5.8 The matter should proceed to trial. The appellant should file and serve appearance and defence within 21 days. Thereafter Orders for Directions be issued which shall apply

to the rest of the proceedings. The matter is sent back to the High Court for trial before another Judge.

6.0 **Conclusion**

6.1 The Judgment in default is set aside for irregularity as elucidated herein. The appeal is allowed. Costs normally follow the event but in the circumstances of this case, costs shall abide the outcome of the trial.

F.M. CHISANGA
JUDGE PRESIDENT

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

M.J. SIAWVAPA
COURT OF APPEAL JUDGE