IN THE COURT OF APPEAL OF ZAMBIA **CAZ APPEAL NO. 189/2019**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

COMPREHENSIVE HIV AIDS MANAGEMENT PROGRAMME LIMITED **APPELLANT**

AND

INVESTRUST BANK PLC **RESPONDENT**

CORAM: KONDOLO SC, MULONGOTI AND SICHINGA, JJA
On 11th November, 2020 and 19th November, 2020

For the Appellant : *Mrs S. Kalima-Banda of Messrs J&M Advocates*
For the Respondent : *Ms. T. Sakala of Messrs Fraser Associates*

J U D G M E N T

Kondolo SC, JA delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Holmes Limited v Buidwell Construction Company Limited (1973) Z.R. 97**
2. **African Banking Corporation Zambia V Mubende Country Lodge Limited SCZ Appeal No. 116/2016 (March, 2020)**

3. **Kashikoto Conservancy Limited v Darrel Alexander Watt CAZ Appeal No. 146 Of 2019 (3rd September 2020)**

LEGISLATION REFERRED TO:

1. **The Rules of the Supreme Court 1999 Edition (White Book), Order 14 A and Order 33**
2. **The High Court Rules, High Court Act, Chapter 27, Laws of Zambia, Order 11 rule 1 and 4**

This is an appeal against the Ruling of the learned High Court Judge, K.E. Mwenda-Zimba, in which she denied the Appellant's application to dismiss the matter on a point of law pursuant to **Order 14A as read with Order 33/3 and Order 18/19 of the Rules of the Supreme Court 1999 Edition** (the **"White Book"**).

The brief facts of the case are that the parties entered into a Memorandum of Understanding (**"MOU"**) for the provision of personal loans to the Appellant's employees. Amongst other conditions were the conditions that; the loans would be fully secured against terminal benefits or gratuity of the borrower; repayments would be deducted from the employee's monthly salary and remitted in block amounts to the Respondent and that

outstanding loans would be deducted from the terminal benefits in the event of separation between the employee and the Appellant.

Between 14th November 2009 and 21st June, 2016, the Respondent availed loans to a number of the Appellant's employees with various repayment periods ranging from 12 to 36 months. In default of the MOU, the Appellant did not remit funds and as at 21st June, 2016 stood indebted in the sum of K596,048.36.

The parties executed a Debt Settlement Agreement by which the Appellant agreed to settle K352,051.45. However, on account of erratic payments, the debt was only reduced to K143,874.82 which the Appellant made an undertaking to settle.

There was a further unreconciled debt of K270,508.70 which was to be reconciled by the Appellant providing evidence to the Respondent that the employees captured in this sum had left the employ of the Appellant and no terminal benefits were payable to them.

The Appellant did not settle the sums due causing the Respondent to take out a Writ of Summons claiming payment of K102,316 as at 28th February 2018 arising under the MOU; and

K270,508.70 being the unreconciled debt or in the alternative, an order compelling the Appellant to provide written confirmation of the terminal benefits payable to ex-employees; plus, contractual interest at 24% to be charged on the sums.

In response to the Writ, the Appellant filed a conditional memorandum of appearance followed by a Notice of Motion to raise Preliminary Issues pursuant to **Order 14A as read with Order 33/3 and Order 18/19 of the White Book.** The Appellant raised five (5) grounds challenging the capacity of the Respondent to sue the Appellant when the MOU clearly stated that the Appellant would not be liable. Secondly, whether, in view of the doctrine of privity of contract, the Appellant could be sued for amounts due from its former employees. Thirdly, whether in as far as the Respondent seeks to recover from its employees, the claims disclose a reasonable cause of action against the Appellant. The fourth ground raised the issue of whether the Appellant could be sued for monies that had not been reconciled which in turn meant the Appellant could not settle a defence to a claim based on assumptions and presumptions. Lastly that the action was

incompetently before the Court as far as it related to former employees and ought to be dismissed.

The learned trial Judge heard the preliminary issues raised and found that the question to be determined was whether the Respondent could bring an action against the Appellant for loans incurred by its former or current employees. She found that it was clear from the issues raised in the affidavits and arguments before her that they go to the substance of the main matter and could therefore not be resolved at this stage. The learned trial Judge found that it was common cause that the parties entered into two agreements which placed obligations on both parties. She further held that the claim disclosed real triable issues and justice will be well served if the issues raised in the matter are dealt with after a full hearing.

Disgruntled with the Ruling, the Appellant appealed by assailing it on four (4) grounds, as follows:

1. **The learned puisne judge erred in law and fact when she failed to acknowledge that the Plaintiff (Respondent) was seeking to enforce the full sum owing from the Appellant's**

former and/or current employees on loan agreements to which the Appellant is not a party to and is not a guarantor. Further, the Honourable Judge failed to acknowledge that liability did not transfer to the Appellant by virtue of the Debt Settlement Agreement.

2. **The learned lower Court further erred in law and fact by failing to address her mind to the doctrine of privity of contract and how it affected the efficacy of the claim as filed by the Respondent.**
3. **The learned Puisne Judge erred in law and fact when she failed to address her mind to the mandatory provisions of Order XXX Rule 14 of the High Court Rules of the High Court Act, Chapter 27 of the laws of Zambia which provide a mandatory mode of commencement for mortgage actions; and**
4. **The learned puisne Judge erred in law and fact when she failed to interrogate whether a cause of action had been established in the claim as filed by the Respondent as per the provisions of Order 18 rule 19 of the Rules of the Supreme Court RSC, 1999 Edition Vol.1 (White Book).**

We are indebted to both Counsel for their spirited arguments and have considered the Record of appeal and taken a keen interest in the provision of the law that conferred the necessary jurisdiction on the trial Judge to hear and determine this matter.

We shall begin by addressing the provisions under **Order 14A** of the **White Book** and depending on the view we take, we may proceed to determine the filed grounds of appeal.

The Appellant moved the lower Court by notice of motion to raise preliminary issues pursuant to **Order 14A** as read with **Order 33** an**d Order 18 rule 9 of the White Book**.

We shall reproduce **Order 14A** for easy reference.

> ***"(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that—***
>
> ***(a) such question is suitable for determination without a full***
>
> ***trial of the action, and***

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under

this Order unless the parties have either -

(a) had an opportunity of being heard on the question, or

(b) consented to an order or judgment on such determination.

(4) The jurisdiction of the Court under this Order may be exercised by a master.

(5) Nothing in this Order shall limit the powers of The Court under Order 18, rule 19 or any other provision of these rules."

Further Order 14A/2 dictates the procedure to be employed when invoking Order 14A as follows:

(a) <u>the defendant must have given notice of intention to defend;</u>

(b) the question of law or construction is suitable for determination without a full trial of the action (para. 1(i)(a));

(c) such determination will be final as to the entire cause or matter or any claim or issue therein (para. 1(i)(h)); and

(c) the parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination (para. 1(3)). (emphasis ours)

The cited provisions are mandatory and **Order 14A** can only be invoked after the laid down procedure has been complied with. The implication is that the Court cannot be moved to determine a matter on a point of law under **Order 14A** without a party having satisfied the requirements of **Order 14A/2/3.**

In the case of **African Banking Corporation Zambia V Mubende Country Lodge Limited** [2] the Supreme court had occasion to discuss at length the import of the requirements that

must be satisfied before invoking **Order 14A** and in particular the requirement for a notice of intention to defend. In that appeal the appellant, in response to a writ of summons, filed a Conditional memorandum of appearance together with a Notice of Motion to determine the matter on a point of law and dismiss the action pursuant to Orders **14A** and **33** of the **White Book**. The Supreme Court held that: certain requirements must be fulfilled before a matter can be disposed of on a point of law and one such requirement is the giving of a notice of intention to defend.

The Supreme Court held that where a defendant is served with a writ of summons, what constitutes a notice of intention to defend is the defendant filing a memorandum of appearance and defence as provided by **Order 11 Rule 1 High Court Rules**. The Court stated that compliance with Order 11 aforesaid is a pre-requisite to launching an application under **Order 14A of the Whitebook.** That filing a conditional memorandum of appearance only challenges the validity of proceedings with a view to setting aside a writ and does not qualify as an intention to defend and can never be extended to constitute a notice of intention to defend.

In **Kashikoto Conservancy Limited v Darrel Alexander Watt**[3] the appellant appealed to this Court against a Ruling of the High Court in which the Court refused to determine a preliminary issue raised under **Order 14A and Order 33 of the White Book** to dismiss the matter on a point of law. According to the trial Judge, the issues in contention in that case, required a trial to enable logical resolution after hearing both parties. She opined that the case was not fit for dismissal on a preliminary point of law.

When that matter came before us on appeal, we noted that at the time the trial Court was determining the preliminary issue, there was also before it, an application to set aside a default Judgment on the counter-claim filed in the same case and the Respondent had not yet settled his defence. We held the view that the pre-requisites under Order 14A, having not been met the learned Judge should not have entertained the determination of a point of law.

Reverting to the case before us, page 37 of the record of appeal shows that the Appellant filed a conditional memorandum of appearance on 12th April, 2019 and soon thereafter on 26th April,

2019, filed the notice of motion which culminated into the Ruling subject of this appeal. No Defence was filed.

Following the **African Banking Corporation case** (supra), the first requirement under **Order 14A/2/3** of the **Whitebook** was not met. As stated in the cited authorities, the conditional memorandum of appearance does not qualify as a notice of intention to defend. It is not a pleading and is devoid of sufficient information which the Court can scrutinise and utilise in determining whether or not to dispose of a matter with finality without a full trial.

In *casu*, even though the trial Court ultimately dismissed the motion, we adopt the stance we assumed in **Kashikoto Conservancy Limited v Darrel Alexander Watt** and hold that the trial judge should not have entertained the application because the Appellant had not filed a defence which was a condition precedent in an application to dismiss a matter on a point of law under **Order 14A of the White Book**.

In the view that we take, determining the merits of the appeal shall be a mere academic exercise, an endeavour from which Courts

have been encouraged to refrain. We accordingly set aside the Ruling of the Court and order the Appellant to file a Defence to allow the matter to proceed in accordance with the law. The matter is referred back to the High Court before the same Judge.

Costs in the cause.

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M.M. KONDOLO SC
COURT OF APPEAL JUDGE

.....
J.Z. MULONGOTI
COURT OF APPEAL JUDGE

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D.L.Y. SICHINGA
COURT OF APPEAL JUDGE