

IN THE SUPREME COURT OF ZAMBIA

SCZ APPEAL NO. 106/2000

HOLDEN AT LUSAKA

(Civil Jurisdiction)

DR. ARNOLD MAAMBO CHOOKA

APPELLANT

AND

**REV. WELLINS M. MUNTHALI T/A
LUSAKA POLYTECHNIC**

RESPONDENT

Coram: Lewanika, DCJ., Sakala and Chibesakunda JJS

19th March and 19th July, 2002.

For the Appellant: Mr. M.J.M. Pikiti of Pikiti & Company.

For the Respondent: Mr. F. Kongwa of Kongwa & Company.

J U D G M E N T

Sakala, JS., delivered the Judgment of the Court.

This is an appeal against a judgment of the High Court entered in favour of the Respondent for a sum of money owed by the Appellant pursuant to a loan agreement dated 9th May, 1995 with simple interest at 5% per day from the date of the agreement to the date of payment, which was 31st January, 2000. In default, the court ordered that the Appellant should surrender the mortgaged property, stand No. 9621 Chudleigh, Lusaka.

By the time we heard this appeal, both parties had since died. Consequently, before the hearing of the appeal, necessary applications were made to substitute the deceased parties with their respective Administrators of their Estates. In case of the Appellant, the Administrator, in the name of Mildred Chooka, the daughter, was substituted as the Appellant. In the case of the Respondent, Ms. Josephine Munthali and Ms. Florence Munthali, joint Administrators, were substituted as the Respondents.

For convenience, we shall refer to the Appellant as the Defendant and the Respondents as the Plaintiff, which they were at trial. On account of the issues raised in this appeal, we propose to set out the common facts in some detail. The action was commenced by an originating summons. The Plaintiff claimed for payment of K6.8 million as money due under a loan agreement entered into between the parties on 9th May, 1995. This loan was secured by a property known as stand No. 9621, Lusaka. The Plaintiff also sought for an order for the sale of the secured property. The affidavit supporting the summons exhibited the loan agreement. According to the facts not in dispute, the Defendant surrendered the Title Deeds to the said property to the Plaintiff. It was also

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common cause that the Defendant had agreed to commence servicing the principal sum advanced by making monthly payments of interest from 9th July, 1995. To this effect, the Defendant prepared a repayment schedule which the Plaintiff accepted. It was also not in dispute that the Defendant defaulted in the repayments after having made only three instalments of K15,000 each, the last one having been paid on 7th September, 1995. It was part of the loan agreement that in the event of a default by the Defendant, the Plaintiff was to be at liberty to sell the mortgaged property.

The affidavit in opposition contained some very strong language but did not dispute the existence of the loan agreement. The Defendant's defence according to the affidavit in opposition was that the loan agreement of 9th May, 1995 had been replaced and over taken by two concurrent business contracts, one on Projects Procurement and Management and another being Employment Contract as Manager Special Consultancy Duties. These two contracts were exhibited. The Defendant also deposed that over a period of 20 months from September 1995 to April, 1997 professional services had been rendered to the Plaintiff amounting to a sum of K27,225,000. There was also affidavit evidence in opposition not disputed that on 25th November, 1996, the Defendant took out a

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writ of summons against the Plaintiff under cause No. 1996/HP/4740 in respect of the two concurrent business contracts. The writ was exhibited. It was also not in dispute that the Plaintiff's present action, commenced by originating summons on 15th April, 1997, over five months after the Defendant had issued the writ, was consolidated with the Defendant's action. According to the record of proceedings, the learned trial judge ordered that the two actions, earlier consolidated, be separated so that the Defendant's action earlier commenced by a writ should proceed with pleadings. From the record of appeal, the Defendant had at one time obtained an interlocutory judgment against the Plaintiff in default of appearance. He also had obtained a second judgment against the Plaintiff in default of appearance. Both these judgments were set aside.

The learned trial judge considered, at great length, the affidavit evidence. From the record of appeal, we have not been able to find an affidavit in reply to the affidavit in opposition. Before the trial court, counsel appearing for the Plaintiff urged the court to make the orders sought relying on the affidavit and notice of motion that had shown that the money owing had now shot up to K17,803,000.00. The position of the Defendant at the hearing was that he had a defence and a counter-claim. The learned trial judge considered the submissions

by both parties. She found that there was no dispute on the loan agreement and its contents. We agree with the trial judge. On the affidavit evidence, the court found that it was not in dispute that the Defendant owed the Plaintiff the sum of K2.3million with interest up to March 1997, and that he was in default. This was correct. The court found also that the loan agreement did not provide for a period beyond March 1997. The court noted that the Defendant and the Plaintiff had other business transactions on which the Defendant had sued the Plaintiff. The trial court, however, held that the question of the loan agreement was a distinct transaction which created clear obligations to the parties. The court concluded that on the evidence, the Plaintiff had proved his claim that the Defendant owed him money pursuant to a loan agreement of 5th May, 1995. Accordingly, judgment was entered in favour of the Plaintiff.

In arguing the appeal before us, Mr. Pikiti, on behalf of the Defendant, filed detailed written heads of argument based on three grounds of appeal. He abandoned the second ground of appeal that requested for a trial to resolve the issues raised in the affidavit in opposition because both parties had since died. The first ground argued was that the court erred in law and fact by disregarding the recognition or by not accepting the Defendant's Writ of Summons under

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cause No. 1996/HP/4740 dated 22nd November, 1996 amended on 13th May, 1998 that the trial court also erred by not accepting the Defendant's statement of claim, interlocutory application, order of consolidation with the Plaintiff's recent originating summons in cause No. 1996/HP/951 dated 15th April, 1997 and that the trial court further erred by not accepting the Defendant's affidavit opposing the originating summons. The second ground argued related to the issue of interest that the Plaintiff, not being a registered or licenced financial institution, advanced the money under employer/employee relationship and therefore interest at 0.5 % per day was on the higher side.

On account of the view we take of this appeal, we do not propose to delve into the arguments based on these grounds in great detail. The summary of the arguments on the first ground of appeal is that the learned trial judge, in dealing with the Plaintiff's originating summons and affidavit in support, although acknowledged and referred to the affidavit in opposition and the exhibited writ, and the consolidation order, disregarded and never considered the defence to the originating summons. It was argued, on the first ground, that the defendant had filed his writ under cause No. 1996/HP/4740 on 22nd November, 1996, amended on 13th May, 1998. On the other hand, the Plaintiff had filed his originating

summons only later, on 15th April, 1997 under cause No. 1997/HP/951. It was submitted that in these circumstances the trial Judge, not only opted to give privileges and superior rights to the Plaintiff's Originating Summons, but also ignored the existence of the Defendant's Writ of Summons right up to Judgment and completely deprived the Defendant of an opportunity to a fair hearing but only alluded to the counter-claim.

The response to the submissions on ground one by Mr. Kongwa, on behalf of the Plaintiff, was that the Plaintiff's claim was for a repayment on a loan advance under a written agreement secured by the deposit of title deeds. Mr. Kongwa contended that the Plaintiffs action was commenced by an Originating Summons filed on 15th April, 1997 while the Defendant's action, filed earlier in 1996 under cause 1996/HP/4740 commenced by a writ of summons, was based on facts that were unconnected to the transaction the subject of the Plaintiff's originating summons.

We have anxiously considered the originating summons, the affidavits in support and in opposition, including the exhibits to the affidavits; as well as the judgment of the learned trial judge. The issue of the Defendant owing the

Plaintiff money under the loan agreement was not in dispute. Mr. Kongwa's submissions in support of the trial court's judgment, in our view, simplified the issues and overlooked the facts not in dispute. First and foremost, in both actions namely, the earlier one commenced by the Defendant by a Writ of summons in 1996 and that commenced by the Plaintiff later by an originating summons in 1997, the parties were the same. For this reason the matter had at one stage been consolidated but at the instance of Mr. Kongwa, as per record, the two actions were severed. But be that as it may, the Defendant's affidavit in opposition with the exhibited Writ were before the learned trial judge. The Plaintiff was, by an originating summons claiming money from the Defendant. Equally, the Defendant was by a Writ of Summons claiming money from the Plaintiff. The Defendant's action was much earlier than that of the Plaintiff. Why the Plaintiff commenced his own action, it is not very clear from the record.

Before entering judgment in favour of the Plaintiff, the learned trial judge had this to say:-

"The Defendant and the Plaintiff seem to have had other transactions on which they have resorted to court. The question of the loan agreement appears to have been a distinct transaction which created clear obligations on the parties. On the evidence before me, the Plaintiff has proved his claim that the Defendant owes him money pursuant to the loan agreement of 5th May, 1995. I enter judgment in his favour as claimed."

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This approach by the learned trial judge totally ignored the Defendant's defence as contained in the affidavit in opposition in which he was pleading that the Plaintiff owed him a larger sum of money than claimed. Above all, the learned trial judge also totally ignored the Defendant's Writ. We agree that the question of the loan agreement was distinct and created clear obligations on the parties. But in both actions, the claims were for money owing. On our part, we do not see the prudence on the part of the Plaintiff to have commenced a different action when he could easily have raised his claim as a counter claim to the Defendant's action which was commenced earlier.

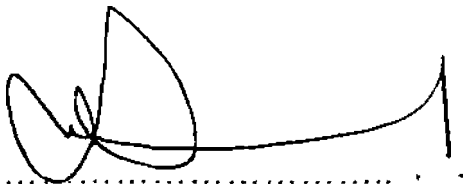
In any event, there was no satisfactory reason for severing the actions which had been properly consolidated. The Defendant was perfectly entitled to raise, as a defence to the originating summons, matters contained in his Writ of Summons.

We are satisfied that had the learned trial judge considered the defence to the originating summons raised by the Defendant, she would not have entered judgment in favour of the Plaintiff.

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On this ground alone, this appeal ought to succeed. It, therefore, becomes unnecessary for us to consider the second ground relating to interest. The appeal is allowed with costs to be taxed in default of agreement.

This was a proper case in which a retrial should have been ordered but for the fact that both parties are now deceased, an order for retrial may not be practical. However, since in each case the facts appear not to be in dispute, the respective Administrators of the deceased parties' estates may wish to reach an amicable out of court settlement.



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D. M. Lewanika,
DEPUTY CHIEF JUSTICE



.....
E. L. Sakala,
SUPREME COURT JUDGE.



.....
L.P. Chibesakunda,
SUPREME COURT JUDGE.