

**JOHN ASHIKKALIS AND TONY ASHIKKALIS v ATHANASIOS
APOSTOLOPOULOS (1988 - 1989) Z.R. 86 (S.C.)**

SUPREME COURT
NGULUBE, D.C.J., GARDNER, J.S., AND BWEUPE, AG. J.S.
6TH DECEMBER 1988
(S.C.Z. JUDGMENT NO. 26 OF 1988)

Flynote

Civil procedure - Mala fides - As bar to relief - Meaning of.

Headnote

The respondent issued a writ against the appellants in connection with goods which were to be imported from South Africa for ultimate destination in Zaire. Judgment was entered in default of appearance. It was admitted there was no undue delay in entering appearance.

The Registrar set aside the judgment in default of appearance. On appeal to the High Court the Judge held that because of the breach of Exchange Control Regulations the appellants could not rely on the breach. The appellants appealed.

The appellants argued that payment had been made and hence there was no triable issue. The respondent argued that there was evidence of improper conduct in the way the goods bound for Zaire were dealt with in Zambia that amounted to *mala fides* and the claim should not be allowed.

Held:

Mala fides relates to the conduct of the parties in the prosecution of their action in Court and not conduct in connection with the case which is the subject of the writ. *Mwambazi v Morester Farms Limited* explained.

Case referred to:

(1) Mwambazi v Morester Farms Limited (1977) Z.R. 108

For the appellant : J.B. Sakala, Messrs, J. B. Sakala & Company.

For the respondent: W.M. Forrest, Forrest Price & Company.

Judgment

GARDNER, J.S.: delivered the judgment of the Court.

This is an appeal against a decision of a High Court Commissioner allowing an appeal against a District Registrar's order to set aside a judgment in default of appearance.

The facts of the case are that a writ was issued against the appellants in

connection with goods which are to be imported from South Africa, to be transported through Zambia for an ultimate destination in Zaire. Judgment was entered against the appellants in default of appearance. There was affidavit evidence in connection with the application to set aside the default judgment to show that the goods did indeed arrive in Zambia, and, although there were some documents which, as Mr Forrest on behalf of the respondent has indicated, purported to show that the goods left Zambia, it was agreed between the parties by the affidavit evidence that the goods were sold in Zambia, and the claim against the appellant was for the value of the goods. The learned trial Commissioner, having heard the appeal against the order setting aside the default judgment, ruled that, in view of the fact that quite obviously what happened in Zambia was contrary to the Exchange Control Regulations the appellants who were alleged to have been in breach of those regulations could not rely on that breach. The appellants appeal against that decision.

Mr *Sakala* on behalf of the appellants has drawn the Court's attention to affidavits which indicate that the appellant's defence is that they have already paid the respondent. On that ground, and the fact, as accepted by Mr *Forrest* on behalf of the respondent, that delay in entering appearance was a very short delay and therefore, Mr *Sakala* has argued, in order for justice to be done, the case should go for trial. Mr *Forrest*, as we have said, does not argue that the delay in entering the appearance was too long. He does, however, argue that there was *mala fides* on the part of the appellants which debars them from the relief which the Courts could give to them, by allowing them to defend the action by setting aside the default judgment.

In his judgment the learned trial commissioner referred to the case *Mwambazi - Morester Farms Limited* (1). In that case this Court maintained the principle that where there is a procedural default on the part of one of the parties in the case, that default can be remedied by the Court and is better remedied to enable cases to be tried and for justice to be done. We did, however, say, as Mr *Forrest* has argued in his arguments against the appeal, that there must be no unreasonable delay and there must be no *mala fides*. As we have said, Mr *Forrest* does not argue that there was an unreasonable delay in this case. However, he says there was *mala fides* and he has drawn our attention to the evidence which has been put before us in the affidavits sworn by the parties. That evidence indicates that there may well have been improper conduct in the way that these goods bound for Zaire from South Africa were dealt with in Zambia. That, however, is not evidence of *mala fides*. Perhaps we should make it clear now that when we referred to *mala fides* in the *Morester Farms* case we were referring to the conduct of parties in the prosecution of their action in the Court, not in connection with the case which is the subject of the writ of summons. In this case we can find no impropriety in the way in which this action has been defended by the appellant. Therefore, Mr *Forrest's* argument, strongly put forward though it was, cannot succeed. This is an appropriate case to go to trial. There is no doubt that there is a dispute between the parties which can only be dealt with in a proper Court of law.

The appeal is allowed, the judgment in default is set aside, and the case

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will be sent back to the High Court for continued trial. Costs will follow the event and will be awarded to the appellant.

Appeal allowed.
Continued trial ordered.
