

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2015/HP/0862



BETWEEN:

PERFECT INVESTMENT LIMITED

PLAINTIFF

AND

LINKSOFT COMMUNICATIONS SYSTEMS

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 20th
DAY OF AUGUST, 2020**

For the Plaintiff : Mr J. Katati, Dove Chambers

For the Defendant : no appearance

R U L I N G

LEGISLATION REFERRED TO:

1. The High Court Rules, Chapter 27 of the Laws of Zambia

This matter was commenced by the plaintiff on 10th June, 2015 by way of writ of summons and statement of claim against the defendant and Airtel Zambia as the defendants, in which the claims were for;

- i. K63, 725.00 being the balance due from the defendants to the plaintiff under contracts for the construction of two communication towers constructed by the plaintiff at the instruction of the defendants at Chikonkomene Railway Station and Chikonkomene village in the Kabwe district of the Central Province of Zambia*

under purchase orders No LPO 006/LCSZM/P1/2011 and LPO 005/LCSZM/P1/ 2011 dated 16th May, 2011, at the instance of the defendants.

- ii. Damages for breach of contract;*
- iii. Interest;*
- iv. Costs and;*
- v. Any other relief that the court may deem fit.*

On 4th September, 2015, the plaintiff filed an affidavit of service which reflected that the now defendant, who was the 1st defendant, was served process on 10th June, 2015, through their advocates Musa Dudhia and Company. Exhibited to that affidavit, was a copy of the writ of summons on which the advocates acknowledged service by endorsing a received date stamp. The Deputy Registrar on 7th September, 2015 entered default judgment against the now defendant.

The 2nd defendant filed a defence on 26th July, 2016, and following trial, on 18th August, 2017, I delivered a judgment in which I dismissed the claim against the 2nd defendant. In the meantime, the matter proceeded before the Deputy Registrar for assessment of damages, in respect of the now defendant, which assessment was done in their absence, as there was proof of service.

The Deputy Registrar in a judgment dated 18th June, 2018 awarded the plaintiff damages in the amount of K22, 000.00 with interest at the average bank deposit rate per annum from the date of the writ to

the date of payment. The plaintiff was further awarded costs to be taxed in default of agreement.

Dissatisfied with the judgment, the defendant herein launched an appeal to the Court of Appeal, which in a judgment dated 20th February, 2020, in setting aside the default judgment held that before a judgment in default of appearance and defence can be entered, the plaintiff should prove to the court that the writ of summons and statement of claim were served, by filing an affidavit of service, and producing the writ duly endorsed with the date when the writ and statement of claim were served, within three (3) days of such service.

That a court handling an application for such default judgment has a duty to look out for such evidence, in line with Order X Rule 22 of the High Court Rules, Chapter 27 of the Laws of Zambia, and in the absence thereof, decline to entertain the application for want of jurisdiction. The Court of Appeal held that as the plaintiff did not comply with the statutory requirement, the proceedings were a nullity. The default judgment as well as the assessment proceedings were consequently set aside.

On 17th April, 2020, the plaintiff filed summons for leave to amend the writ of summons and statement of claim, with an accompanying affidavit. The affidavit in support of the application is deposed by Jonathan Nguleka, a managing director of the plaintiff company. The gist of that affidavit is that as Airtel Zambia was found not to be liable for the plaintiff's claims in the judgment that I delivered, it is desirable that the writ of summons and statement of claim is amended to reflect the present circumstances. It is further contended that the

amendment will enable the plaintiff to plead special damages which were not initially pleaded.

No affidavit in opposition has been filed to the application. On 10th August, 2020, the plaintiff filed an affidavit of service which shows that the application for leave to amend the writ of summons and statement of claim was served on Musa Dudhia on 23rd June, 2020. It will be noted that when the matter came up on 24th July, 2020 for a status conference, Counsel from Musa Dudhia and Company, Mr M Ndalameta told the court that he represented the intended 2nd and 3rd defendants.

I noted that the intended 2nd and 3rd defendants had not been joined to the proceedings, and in any event they were supposed to have been joined in line with an application that the plaintiff had made to pierce the defendant's corporate veil, following the judgment on assessment that was delivered by the Deputy Registrar. However, as the default judgment and the judgment on assessment had been set aside by the Court of Appeal, there are no intended 2nd and 3rd defendants in this matter.

Therefore, according to the record, Musa Dudhia and Company do not represent the defendant herein. As such, service of the application on them was irregular.

I accordingly direct the plaintiff to effect personal service on the defendant before I can consider the application. This shall be done within thirty (30) days from today, and an affidavit of service shall be

filed to that effect. Failure to do so will result in the application being dismissed for want of prosecution. Costs shall be in the cause.

DATED AT LUSAKA THIS 20th DAY OF AUGUST, 2020

 S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE