

SCZ Judgment No. 18 of 2013**IN THE SUPREME COURT OF ZAMBIA****Appeal No. 135/2011****HOLDEN AT LUSAKA**

(Civil Jurisdiction)

BETWEEN:**BENJAMIN YORUM MWILA****APPELLANT****AND****VICTOR JOHN BRADBURY****RESPONDENT****Coram: Chibesakunda, Ag. CJ, Mwanamwambwa and
Muyovwe, JJS****On 5th June, 2012 and 29th October, 2013**

For the Appellant: Mr. L. Kasula of Messrs Lenard Lane Partners
and Mr. Katongo of Messrs Katongo and Company

For the Respondent: Mr. M. Masengu of Messrs Michael Masengu
and Company

J U D G M E N T

Muyovwe, JS, delivered the Judgment of the Court.**Cases referred to:****1. Water-Wells Limited vs. Jackson (1984) Z.R. 98**

This is an appeal by the appellant against the Ruling of the High Court at Kitwe delivered on the 13th May, 2011, in which the

Court refused to set aside its Judgment which was in favour of the respondent.

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The brief facts are that in the Court below, the respondent herein had sued the defendants, namely Chemec Limited and Investment Holdings Limited for, inter alia, an order for specific performance of a contractual term of conditions of employment. Prior to the trial, the respondent applied to the Deputy Registrar to join a 3rd defendant, the appellant herein. The record shows that Mr. Nyirongo appeared for the defendants.

The respondent (plaintiff) then filed an amended Writ of Summons and Statement of Claim and uplifted an Order to Add a Party granted by the Deputy Registrar. According to an affidavit of service filed in the Court below, service of the amended process was effected on the appellant on 21st April, 2007, as the documents were left at his residence and signed for by a Mr. Ngandu. During the trial, the appellant testified as the first defence witness on the 12th November, 2007. The Court below delivered judgment in the matter on 18th April, 2008, in favour of the respondent.

The 1st and 2nd defendants (Chemec Limited and Investments Holdings Limited) being dissatisfied with the entire judgment

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appealed to this Court. This Court delivered its judgment on 26th August, 2010 and dismissed the appeal.

Following the judgment of this Court, a Writ of fieri facias was issued, in which the appellant was cited as 3rd defendant and on being served with the Writ of fieri facias, the appellant then moved the lower Court, by Summons, to set aside the judgment and to set aside the Order of Joinder pursuant to Order III Rule 2 and Order XII Rule 2 of the High Court Rules. In his affidavit in support, the appellant deposed that he had never been a party to the proceedings but was merely a director and employee in the defendant companies. That there had been no Order of the Court joining him as a party to these proceedings and as such it was erroneous and irregular that he was made 3rd defendant.

In his Ruling dated 13th May 2011 the learned Judge, in refusing the application, stated that although the appellant had

testified in the trial, he was not aware that he had been joined as a party. The learned Judge declined to set aside his judgment on the ground that the case had been dealt with by this Court, hence this appeal.

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In his appeal, the appellant advanced four grounds of appeal namely:

- 1. The learned Judge erred in law and in fact by not according the Parties a chance to be heard viva voce.**
- 2. The learned Judge erred in law and in fact when he dismissed the application to set aside the High Court Judgment on the part of the 3rd Defendant after having held that the Appellant was not served the Order for the joinder and the amended Writ of Summons and the statement of Claim.**
- 3. The learned Judge erred in law and in fact when he held that the Supreme Court Judgment had superseded the High Court Judgment on the part of the 3rd Defendant as well, as when the 3rd Defendant did not appeal against the High Court Judgment.**
- 4. The learned Judge erred in law and in fact when he held that the application to set aside the High Court Judgment on the Part of the 3rd defendant was misconceived as it came too late and intended to indirectly challenge the Judgment of the Supreme Court when the 3rd Defendant did not appeal to the Supreme Court and when in fact the 3rd Defendant was not aware he was a party to the suit.**

On behalf of the appellant, Mr. Kasula relied on the filed Heads of argument. In respect of ground one, Counsel submitted that the learned Judge did not accord the parties a chance to be heard viva voce. It was argued that the learned Judge proceeded to render a Ruling on the appellant's application to set aside the High

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Court judgment and to set aside the Order for Joinder on 13th May, 2011 without according the parties an opportunity to appear before him. Counsel contended that the Judge gravely erred in law by not according the parties a chance to be heard on an application made by way of summons. It was submitted that it is mandatory by law for the party making the application by way of summons to move the Court before the Court can render a Judgment or Ruling. In support of this argument, Order XXX Rule 1 and 2 of the High Court Rules was cited.

In respect of ground two, it was submitted that the Court below should not have dismissed the application to set aside the judgment after having held that the appellant was not served with

the Order for Joinder and the amended Writ of Summons and Statement of Claim. That the manner in which the appellant was joined to the proceedings left much to be desired. It was submitted that as can be noted in the Ruling of the Court below which is the subject of this appeal, the appellant herein was never served with the application for Joinder nor the Order for Joinder nor the Amended Writ of Summons and Statement of Claim. That there

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was in fact no defence filed on record for the appellant herein in the Court below. It was submitted that this notwithstanding, the Court below proceeded to determine the appellant's case and rendered Judgment, therefore, the said Judgment is in fact a Judgment in Default of Appearance and Defence. In this regard, Counsel cited Order XXXV Rule 5 and Order XX Rule 3 of the High Court Rules. Further, Counsel inter alia, cited the case of **Water-Wells Limited vs. Jackson**¹.

With regard to grounds three and four, it was submitted that the Court below should not have held that the Judgment of this Court had superseded the High Court Judgment when the

appellant did not appeal against the High Court Judgment and was not aware that he was a party to the suit. Counsel contended that appellant, not having been party to the appeal against the lower Court's judgment, cannot be affected by the subsequent Supreme Court Judgment. That the learned Judge erred when he found that the Supreme Court Judgment superseded the High Court Judgment when the appellant did not appeal against the said judgment.

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Mr. Masengu, Counsel for the respondent also filed Heads of Argument which he relied on.

In response to ground one, it was submitted that the only way the lower Court could have heard the matter was by way of review under Order XXXIX of the High Court Rules. That there was no application for special leave and that the application which was filed almost three years later was too late as alluded to by the lower Court. Further, the matter having been determined by the Supreme Court, there was no way the learned Judge could have heard the said application.

With regard to ground two, Counsel's response was that Mr. Nyirongo represented all the defendants, who included the appellant, who even testified in the matter. Counsel submitted that even during the application for joinder of the appellant, Mr. Nyirongo was in attendance and he never opposed the application. Counsel added that the High Court Judgment also mentions the appellant as one of the defendants. That the argument that the

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appellant was not aware of the proceedings should not be entertained.

In response to grounds three and four, it was submitted, inter alia, that the appellant could not have had the lower Court's judgment reversed as it was upheld by this Court. Counsel contended that ordinarily, the only way a litigant can return to this Court is under the slip rule. It was submitted that if this Court upheld this appeal, a bad precedent would be set where after losing a case, parties would resort to making applications in the High Court to have their Judgment set aside. That the Court

below should not have entertained the application to set aside Judgment and urged us to dismiss the appeal for lack of merit.

We have perused the Record of Appeal and considered the Ruling of the Court below and the submissions by learned Counsel for the parties. We will deal with the arguments under the four grounds of appeal together.

First of all, we take note of the fact that the lower Court proceeded to deliver the Ruling in issue without hearing the parties.

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We agree with Counsel for the appellant that having filed summons, the learned Judge should have accorded the parties an opportunity to be heard. However, having considered the affidavit evidence and perused the Record of Appeal, we are of the view that had the learned Judge heard the parties he would still have arrived at the same decision. Therefore, we find no merit in the argument by Counsel for the appellant on this issue.

Our perusal of the Record of Appeal reveals that the defendants including the appellant were represented by Mr.

Nyirongo in the Court below and that Mr. Nyirongo was present during the proceedings for joinder. That the appellant was joined to the proceedings in the lower Court, as there is an Order signed by the learned Deputy Registrar to that effect dated 13th March, 2007. It is not in dispute that the appellant appeared in the matter and testified as the first defence witness on 12th November, 2007. The Judgment of the lower Court though not reflecting the appellant as a party in the caption states in paragraph 1:

“The plaintiff here-in Mr. Victor John Bradbury took out summons against the defendants here-in Chemec Limited, Investment Holdings Limited and Mr. Benjamin Yoram Mwila.”

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We take cognizance of the arguments by Counsel for the appellant to the effect that the appellant was never made a party to the proceedings in the Court below and even in this Court when the matter came up on appeal. We have also taken cognizance of the learned Judge’s observations in the Ruling appealed against in which he said:

“The record will show that although the plaintiff (respondent herein) had applied to join the 3rd defendant (appellant herein) and he was joined, he was not served and he did not become aware of the fact that he was a

party to the case. The then advocate for the defendants in all the process he filed in this case before and after the judgment it is applied to set aside, did not show that the 3rd defendant was a party to this case.

Although there is an affidavit on record showing that the 3rd defendant was served with the amended writ of summons, amended statement of claim and an order of joinder on 19th March, 2007 the 3rd defendant has never defacto been served with the alleged process.”

We find no basis for this conclusion by the learned Judge and our firm view is that he misdirected himself when he came to the said conclusion. The record in the Court below shows that, according to the affidavit of service filed into Court, the appellant was served with the Amended Statement of Claim and the Amended

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Writ of Summons and the Order to add Party at his residence in Kitwe as the documents were signed and received by a Mr. Ngandu on 21st April, 2007. The affidavit of service on the caption clearly depicts the appellant as the 3rd defendant in the matter. We are satisfied that the appellant was properly served with the Court process.

In his affidavit in support, the appellant claimed that he never instructed Mr. Nyirongo who was appearing on behalf of the defendants in the Court below to act for him. This submission should not have been accepted by the Court below as Mr. Nyirongo clearly represented all the defendants and he did not object to the application for joinder. As Mr. Nyirongo led the appellant as he gave evidence in the Court below he was aware that the appellant was a party to the proceedings.

We are satisfied that the appellant was joined to these proceedings on 13th March 2007, as per the Order by the learned Deputy Registrar. As stated earlier, in the trial, the appellant was the only witness for the defendants. And in the body of the Judgment delivered by the lower Court, the appellant is mentioned

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as a party despite not appearing on the caption. This is a clear indication that the Court dealt with the appellant as a party in the proceedings. The learned Judge, therefore, contradicted himself when he stated in his Ruling that:

“The record will show that although the plaintiff had applied to join the 3rd defendant and he was joined, he

was not served and he did not become aware of the fact that he was a party to the case.”

Indeed, we do not agree with the above observations made by the learned Judge. As we have alluded to herein, the learned Judge in his judgment at Page J1 acknowledged that the appellant was one of the defendants in the matter. Therefore, the argument by the appellant that the Judgment of the Court below was a default judgment cannot be sustained as the appellant clearly opted not to file a defence but to appear as a witness in the proceedings.

Further, it is common practice that once a judgment is delivered, copies are availed to the parties concerned. As we have already stated, it is not in dispute that the appellant was represented and quite obviously his Counsel received a copy of the judgment dated 18th April, 2008 and which judgment was appealed

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against and was dealt with by this Court in finality. It follows, therefore, that the appellant could not claim that he was not aware that the judgment affected him, more so that he was

director and majority shareholder of the two defendant companies. It was only after this Court's Judgment which upheld the decision of the lower Court that the appellant sought to have the Judgment of the lower Court set aside.

We must state that we do, however, agree with the learned Judge that the case having been dealt with by the Supreme Court could not be set aside. And the appellant, although not having appealed against the decision of the High Court was certainly affected by outcome of the Supreme Court Judgment as he was not only a defendant in the matter but a majority shareholder in the defendant companies. In fact, the fact that he did not appeal is an indication that he accepted the decision of the lower Court. We have said time and again that there must be finality to litigation and we agree with Mr. Masengu that if we allowed this appeal, we would be setting a bad precedent where litigants, after losing their

appeals in this Court would resort to making applications in the Court below to have their judgments set aside.

We, therefore, find no merit in this appeal. We dismiss it with costs to the respondent, to be taxed in default of agreement.

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L. P. CHIBESAKUNDA
ACTING CHIEF JUSTICE

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M. S. MWANAMWAMBWA
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE