IN HE SUPREME COURT OF SIERRA LEONE
CIV APP 1/2009

BETWEEN:

THE WEST AFRICAN REGIONAL DIRECTOR, - APPELLANTS
LEONARD CHESHIRE INTERNATIONAL
AND
LEONARD CHESHIRE INTERNATIONAL
AND

ABDUL RAHMAN JALLOH - RESPONDENT

AND

CIV APP 2/2009

BETWEEN:

ABDUL RAHMAN JALLOH - APPELLANT

AND

THE WEST AFRICAN REGIONAL DIRECTOR,
LEONARD CHESHIRE FOUNDATION - RESPONDENTS

AND

LEONARD CHESHIRE FOUNDATION

CORAM:

The Hon. Mr. Justice V. V. Thomas, Acting Chief Justice - Presiding

The Hon. Mr. Justice N. C. Browne-Marke, JSC.

The Hon. Ms. Justice V. M. Solomon, JSC.

The Hon. Mr. Justice P.O. Hamilton, JSC.

The Honourable Mrs Justice A Showers – J.A.

COUNSEL:

J B JENKINS-JOHNSTON ESQ for the Appellants in Civ App 1/2009 and for the Respondents in Civ App 2/2009

YADA WILLIAMS ESQ for the Respondent in Civ App 1/2009 and for the Appellant in Civ App 2/2009

THE APPEALS

1. These are twin appeals brought by the Appellants and by the Respondent respectively, against the Judgment of the Court of Appeal dated 18th June,2009. Civ APP 1/2009 was brought by the West African Regional Director of Leonard Cheshire Foundation and Leonard Cheshire International against that Judgment; Civ App 2/2009 was brought by Abdul Rahman Jalloh against the same Judgment.

CIVIL APPEAL 1/2009

2. In Civil Appeal 1/2009 filed on 24th July,2009, the appeal related to a certain portion of the Judgment of the Court below, to wit, the following Order:
"*Order 3 in the Certificate of the Order of the Court: "The amount already taken in execution of the said judgment, including the one-third thereof paid to the Respondent be paid into the interest bearing Account at Standard Chartered Bank currently in the joint names of both Solicitors pending the hearing and determination of the Action.*"
The Appellants contend that this was a misdirection or error in law.
3. The Ground of Appeal is as follows.
"*That the Court of Appeal having set aside the Judgment of the High Court dated 13th February,2007 and all subsequent proceedings, and ordered that the matter go back to the High Court for trial, there was no legal basis for the Order they made that the amount already taken in execution of the said Judgment including the one-third thereof paid to the Respondent should be paid into the interest-bearing account at Standard Chartered Bank, since the execution of the Judgment of the High Court was a subsequent proceeding to the said Judgment and was dependent thereon, and once the Judgment was set aside, nothing dependent thereon could remain in existence thereafter.*"
4. The reliefs sought from this Court are that the Order made by the Court of Appeal set out in paragraph 2, supra, be set aside, and that all monies taken in execution of the Judgment of the High Court dated 13th February,2007 which was set aside by the Court of Appeal be returned forthwith to the Appellants, and that the Costs of the appeal be paid by the Respondent.

CIVIL APPEAL 2/2009

5. In Civ App 2/2009 filed on 16th September,2009, the Grounds of Appeal are as follows:
(i) That the Learned Judges of the Court of Appeal were wrong in law to have held that Edwards, J exceeded his jurisdiction under Order XXB,

High Court (Amendment) Rules, C.I. No 3 of 2006 when striking out the defence filed on behalf of the Defendants/Respondent and entering judgment for the Plaintiff/ Appellant as "*there is no such provision for failure to comply with an Order for Directions given under Order XXB 1(1)*".

PARTICULARS

1. The Learned Judges failed to make and/or make any proper determination on whether orders 3 and 4 of the Order of Taylor, J of 26th September,2006 were made pursuant to Order XXA as this was necessary to determine the scope of the Judge's powers.
2. That in view of Order XXB (1)(3), the Learned Judges of Appeal were wrong in law to have held that "*Order XXA does not require a party to an action to apply to the Court for an Order of Discovery*".
3. That Order XXB of the amended High Court Rules which deals with summons for directions gives the Judge the discretion to strike out pleadings where a party to proceedings is required to "*give any information or produce any document and that information or document is not given or produced.*"
4. The Learned Judges, having concluded that "*even under this Order (XXA), the power to strike out and enter judgment against a defaulter is discretionary only, and such discretionary powers must be exercised along established principles*", failed to make any proper determination of the reasons why they were holding that Edwards, J had wrongly exercised his discretion.
5. The Learned Judges failed to consider or failed to consider properly that the Defendants had not provided evidence of sufficient cause to require the Court to set aside the judgment of Edwards, J as required under the provisions of Rule 19 of Order XXA.

(ii) That the Learned Judges were wrong in law to set aside the Order made on the Summons for Directions by Taylor, J on 26th September, 2006 as being void as the provisions of Order L of the High Court Rules, 1960 require that an application to set aside proceedings for irregularity should first be made to the High Court within a reasonable time and before a fresh step has been taken.

PARTICULARS

(1) That the issue of the summons for directions being irregular was never raised nor argued by Counsel for the Respondents in the High Court.

(2) That the issue of the irregularity of the summons for directions was not raised within a reasonable time as it was brought up for the first time fourteen months after the summons for directions was filed and

argued and after proceedings in the High Court had long been concluded.

(3) That solicitors for the Respondents had taken several fresh steps in the proceedings in the High Court including applications to extend the time for compliance with the impugned summons for directions before raising the issue of the irregularity in the Court of Appeal.

(iii) That the judgment was given per incuriam.

PARTICULARS

That the Learned Judges of Appeal failed to consider or adequately consider the wide scope provided by Order L (2) of the High Court Rules, 1960 which clearly states that "*no application to set aside any proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity.*"

6.The reliefs sought from this Court are that the Order of the Court of Appeal dated 18th June,2009 be set aside; that the Order and Judgment of 28th February,2007 entered by Hon Justice D B Edwards against the Respondents be restored; and that the costs of this appeal be paid by the Respondents. That *Judgement and Order of the High Court, reads as follows:*

"UPON HEARING Yada Hashim Williams esq of Counsel for the Plaintiff/ Applicant and the Defendants/Respondents having failed to comply with the Court Order dated 13th February,2007; IT IS THIS ORDERED as follows:

1. *That the Defence dated 15th May,2006 and filed herein be struck out and judgment be entered for the Plaintiff as follows:*
   - *(a) Le60,000,000 the cost of Plaintiff's tipper lorry with registration number AAI 384*
   - *(b) Le14,060,000, the value of the goods lost in the accident.*
   - *(c) Le2,960,000 per month for the loss of use of the said vehicle from 19th December,2003 till payment.*
   - *(d) Interest to be assessed.*
   - *(e) Cost to be taxed if not agreed by the parties.*

HIGH COURT PROCEEDINGS

7.Litigation commenced on 21st February,2006 when the Respondent in the 1st Appeal, (hereafter referred to as "the Respondent") issued a writ of summons against the Appellants in the 1st appeal (hereafter referred to as "the Appellants"). It arose out of an accident which occurred on 19th December,2003 involving vehicles owned by both sides. The Respondent alleged that the Appellants' driver was responsible for the accident. He was not a party to the action. It was alleged that at the time of the accident, the

Respondent's vehicle was loaded with goods to the value of Le14,060,000. The Respondent therefore prayed for Judgment in the sum of Le60million being the cost of his own damaged vehicle; the sum of Le14,060,000 being the total value of the goods damaged; and the sum of Le2,960,000 per month for loss of use of his vehicle, beginning 19th December,2003 and continuing. These items of special damage have never been proven at a trial. Appearance was entered by the Appellants on 9th March,2006 and a defence was filed on their behalf on 15th May,2006. It was a complete denial of the veracity of the Respondent's claim. The Respondent in his reply filed on 29th May,2006, joined issue with the Appellants on their defence and entered the action for trial the same day.

HIGH COURT AMENDMENT RULES, 2006 - RULES XXB

8. At this point in time, Constitutional Instrument No. 3 dated 30th March,2006, the High Court (Amendment) Rules,2006, had come into force. It amended the High Court Rules, 1960 and introduced the concept of the *'summons for directions'*. Order XXB, Sub- Rule 1(1) of the amended Rules provides that: "*.....the plaintiff shall, within one month after the pleadings in the action are deemed to be closed, take out a summons (in these rules referred to as a summons for directions) returnable in not less than seven days.*" Sub-Rule 1(4) states: *"If the Plaintiff does not take out a summons for directions in accordance with sub-rules (1) to (3), the defendant or any defendant may do so or apply for an order to dismiss the action."*

8. Sub-Rule 5(4) of the amended Order states: "*If the Court on any hearing of the summons for directions requires a party to the action or his legal practitioner to give any information or produce any document and that information or document is not given or produced, then, subject to sub-rule (5) the court may - (a) cause the facts to be recorded in the order with a view to such special order, if any, as to costs as may be just being made at the trial; or, (b) if it appears to it to be just so to do, order the whole or any part of the pleadings of the party concerned to be struck out, or, if the party is plaintiff or the claimant under a counterclaim, order the action or counterclaim to be dismissed on such terms as may be just."*

RULE 28 - HIGH COURT RULES, 2007

9. As a preliminary issue, we are of the view that the Court of Appeal gave the correct interpretation to this rule: The High Court could dismiss a plaintiff's case under this sub-rule; but it could only strike out pleadings filed by a defendant if the defendant were in default; it did not authorise the Court to give judgment in favour of a plaintiff. We have also borne in mind that this sub-rule deals with the situation at the hearing of the summons for directions, not what happens after the directions have been given by the Court, and a party has failed to comply with those directions. That situation was addressed in the subsequent and current High Court Rules, 2007. In Order 28 Rule 2 thereof, it is stated in sub-rule (5) thereof: "*If either party fails to comply with the order as required by sub-rule (4), the Court may make such order as it thinks just including, in particular an order that*

the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly." Sub-rule (4) of Rule 2 of the 2007 Rules sets out the directions which may be given by the Court. It seems, therefore that in 2006, the High Court did not at the time, have power to give judgment for the plaintiff in a situation where the defendant had failed to comply with directions.

10. To return to the narrative of events, the Respondent filed a Summons for Directions on 15th September,2006. Pleadings closed on 26th May,2006. The Summons was therefore filed 4 months late. But the Appellants did not make use of the opportunity conferred by the then amended Order XXB sub-rule 1(4) to have applied to the High Court for the action to be dismissed.

DIRECTIONS GIVEN BY TAYLOR, J

11. On 26th September,2006, Taylor, J gave directions, one of which was that written statements of witnesses and all relevant documents to be used at the trial should be exchanged within 21 days of the date of the Order; and 24th October,2006 was fixed as the date of trial. At the time, Order XXD rule 1(2) stated that: "*At the summons for directions in an action commenced by writ, the court shall direct every party to serve on the other parties, within 14 weeks (or such other period as the court may specify) of the hearing of the summons and on such terms as the court may specify, written statements of the oral evidence which the party intends to adduce on any issues of fact to be decided at the trial."* Taylor, J as we have said fixed, not 14 weeks, but 3 weeks (21) days for the trial to commence. Another Direction the Learned Judge gave was that: "3. *That the parties do discover and exchange all relevant documents to be used at the said trial."* This was a case involving a collision between two vehicles. At the time, Order XXA Rule 2(3) provided that: "*Unless the court otherwise orders, a defendant to an action arising out of an accident on land due to a collision or apprehended collision involving a vehicle shall not make discovery of any documents to the plaintiff under subrule (1).*" An Application for discovery under that amended Order is only necessary where one side has failed to make discovery voluntarily. It should be made in accordance with the provisions of sub-rule (7) of that amended Order. It is when an application has been made to the Court under that Rule, that the Court has power (Order XXA Rule 18(1)) to Order that a "..... *defence be struck out and that judgment be entered accordingly"* for the plaintiff.

12. We note also that the Directions as appear in the drawn-up Order at page 12 of the Record indicate that the Appellants were not represented at the hearing. We have also looked at the minutes of the hearing at page 62 of the Record. They are quite bare and read as follows: *"This is an application for directions by way of summons for directions dated 15th September,2006 on behalf of the plaintiff for the directions and or orders prayed for on the face of the summons paper. Court: Orders 1,2,3, 5 and 8 as prayed. The time within which the said list of exchange of all relevant documents to be used at the trial as prayed for in order 4, is 21 days from the date of the order. The date to be fixed for the hearing of the action as prayed for in order 4*

is the 24th October,2006." No reason was given by the Learned Judge for the abridgment of time from 14 weeks, as provide for in the amended Order XXD rule 1(2). If one looks at the time-lines set by the Learned Judge, one would easily see that it was most unlikely that the trial would commence on 24th October,2006, just 28 days away. To argue, as Mr Williams has done,, that "*order as prayed*" as stated by the Learned Judge in the case of the 3rd direction sought by the Respondent before Taylor, J brings such an order within the ambit of the amended Order XXA, is insupportable in law. The procedure for applying for, and for ordering discovery by the Court, is amply provided for in the amended Order XXA , and not in the amended Order XXB.

EXTENSION OF TIME FOR COMPLIANCE

12. On 24th November,2006, time for compliance was extended by Taylor, J on the application of the Respondent, to 14th December,2006 - page 13 of the Record. On 14th December,2006, the Respondent's Solicitors filed the Court bundle as directed by Taylor, J. On the same day, Taylor, J granted the Appellants' Solicitors an extension of time for compliance to 9th Janaury,2007.

13. On 5th Janaury,2007, page 63 of the Record, the matter came up before Showers, J. Mr Jenkins-Johnston asked for an extension of time to 6th February,2007. Mr Williams was absent at that hearing.

HEARINGS BEFORE EDWARDS, J

14. On 13th February,2007, the file came up for hearing before Edwards, J – page 63. The Learned Judge made the following Order, on the application of Mr Williams: "*That unless the defendant complies with the order of Court dated 26th September,2006 within 7 days after service of this Order the Defence filed will be struck out and judgment entered for the plaintiff.*" The drawn-up Order at page 19 of the Record does not record the presence of Mr Jenkins-Johnston, but the minutes at page 64 indicate that he may have been present at that hearing. As we have stated above, such an Order was not authorised under the then appropriate Rule of Court. The Learned Judge adjourned the hearing to 28th February,2007.

15. At the hearing on 28th February,2007, it appears both Counsel were present – page 64 of the Record - but this is not quite clear as the Learned Judge noted that there was "*.....an affidavit of service of the court order dated 13th February in the file.*" This could also mean that the Appellants were also unrepresented at the hearing on 13th February,2007. The Learned Judge proceeded to make the Order which we have set out above. Apart from the view we have taken that the said Order could not have been made under the provisions of the amended Order XXB, we are also of the view that the Court of first instance, should always tread cautiously when making an Order ex parte, or, in the absence of the other side to an argument. We think also that the Learned Judge should have taken into consideration the kind of defendants he had to deal with. This he should

have done in the exercise of his judicial discretion. No evidence was led on this point, but we believe that the Cheshire Foundation is known world-wide for its charitable work. To give Judgment for the respective sums prayed for, without hearing any evidence, and without giving any thought to the effect this might have on the Appellants' work in Sierra Leone, does not, in our respectful view, constitute a judicious exercise of the Court's discretion. And to refuse to set aside such a judgment which was palpably wrong, and in any case given in default, when called upon to do so, and to go on to grant a Garnishee Order Absolute, went against the grain of what was said by LIVESEY LUKE, JSC In J T CHANRAI & CO (SL) LTD v PALMER [1970 -71] ALR SL 391, C.A. that even where a case has been heard on its merits, but in the absence of one of the parties, the Courts should be more inclined to hear the party in default, than to uphold a default judgment obtained by the other party.

FINDINGS

16. We have carefully considered the Court of Appeal's view, and the conclusion reached on the proper interpretation of what was then Order XXB sub-rule 1(1) which we have reproduced above. We agree that it does state in mandatory terms what the plaintiff should do: he should within one month of close of pleadings, take out a summons for directions. But if he fails to do so this is not really an irregularity which is incurable, because sub-rule 1(4) tells us what could be done when there is such a failure on the part of the plaintiff: the defendant may do so, or, apply for an order to dismiss the action. There is no sanction really, where the plaintiff is in default of this sub-rule. That Taylor, J went on to give the directions though the summons was filed 4 months late, did not render a nullity the directions she gave. We are of the view that the Court of Appeal could have founded itself solely on the basis that the amended Order XXB in no wise authorised a Court at that point in time, to enter judgment for a plaintiff where a defendant had failed to comply with directions given on a summons for directions. We have carefully considered the arguments of Mr Williams as recorded in the statement of case filed on behalf of the Respondent, but we are not persuaded by any of them, or, believe that they are relevant to the principal issue we have identified.

17. This case has been long outstanding for various reasons. It had been heard by this Court a few years ago, and judgment was reserved. But before it could be delivered, one of the then presiding Justices, retired from office. Thus, a fresh panel was set up by the Hon the Acting Chief Justice to hear the appeal. The Appellants had filed their statement of case on 18th November,2013; whilst the Respondent had filed his on 28th June,2013. At the hearing before the present panel, Counsel were asked whether they wished to add to their respective written or oral arguments, and each of them said they did not wish to do so. Judgment was then reserved once more.

18. Coming to the relief sought by the Appellants, we are not disposed to grant it in view of the decision we took in similar circumstances in Sup Ct Misc App 1/2015 - INTERNATIONAL CONSTRUCTION COMPANY LTD v ZAKHEM

INTERNATIONAL CONSTRUCTION CO LTD, where, even though the High Court had set aside a default judgment, and we upheld that decision as being right, we also decided that the justice of the case demanded that the monies taken in execution from the Defendant company in that case, ought not to be returned to it. Mr Jenkins-Johnston was Counsel for the applicant in that case, and is well aware of our decision. We are not persuaded, nor do we see any reason why we should depart from the position we took in that case. Much of the delay in seeing that this matter was speedily tried and concluded in the High Court was caused by the Appellants and/or their Solicitors and Counsel. We will not therefore Order that these monies be returned forthwith to the Appellants as the case has not yet been heard on its merits, and the party asking for its return, has been the party in default. As this particular Order constituted the Appellant's sole ground of appeal, we are inclined to dismiss it. Also, for all the reasons we have stated above, the Respondent's appeal dated 16th September, 2009 lacks merit and ought to be dismissed.

19. We therefore make the following Orders:

(1) The Appellants' appeal in Civ App 1/2009 filed on 24th July, 2009 is dismissed.

(2) The Appellant's appeal in Civ App 2/2009 is dismissed.

(3) The Order of the Hon Mr Justice D B Edwards, J dated 13TH February,2007 and the Learned Judge's Judgment and Order dated 28th February,2007 are accordingly set aside.

(4) That part of the Order of the Court of Appeal dated 18th June,2009 wherein it is stated that "*the Respondent is hereby granted an extension of time to file his summons for directions and shall file same within 7 days from the date of this order*", is set aside as it is otiose.

(5) Consequentially, we direct that the Appellants in Civ App 1/2009 do comply with the directions given by Taylor, J on 26th September,2006 within 14 days of the date of the Order herein, and that 21 days after the date of the Order herein, the file be put before a Judge of, or sitting in the High Court, to ensure compliance with those directions in accordance with High Court Rules,2007.

(6) The parties shall bear their own respective Costs in this appeal, and in the Court of Appeal.

HONOURABLE JUSTICE P.O HAMILTON - JUSTICE OF THE SUPREME COURT

This is an Appeal from the judgment of the Court of Appeal dated 18th June, 2009 consisting of two Appeals Civ. App. 1/2009 by West African Regional Director Leonard Cheshire Foundation and Civ. App. 2/2009 by Abdul Rahman Jalloh.

The grounds of appeal raised in Civ. App. 2/2009 will be fully looked into and that of Civ. App. 1/2009 will be considered very briefly at the end of this judgment as it raises only one issue that is the amount already taken in execution of the judgment.

Before going into the Grounds of Appeal raised a brief historical background would be of some assistance in arriving at a reasonable conclusion.

The Respondent in Civ. App. 1/2009 (hereinafter referred to as the Respondent) issued a writ of summons dated 2nd February, 2009 against the Respondent (hereinafter referred to as the Appellants) in Civ. App. 1/2009 for losses incurred as a result of an accident on 19th December, 2003 resulting from an accident of both vehicles in which the Respondent claimed various sums of Le14,060,000/00 being value of the goods, Le60,000,000/00 as cost of his damage, Le2,960,000/00 for loss of use of his vehicle thus resulting in a total loss.

The Appellants entered an appearance and filed a defence. The Respondent filed a reply to the defence on 27th May, 2006 and on this same date entered the matter for trial.

On 15th September, 2006 the Appellants took out a summons for directions returnable on the 26th September, 2006 and on the 26th September, 2006 the Order was granted and the trial was set down for 24th October, 2006. When the trial was to commence on the 24th October, 2006 it failed to proceed as the Respondent failed to co-operate with the Appellants to have a simultaneous exchange of documents in compliance with the directions of the Court and the rules wherein the matter was then adjourned to 9th November, 2006.

On 13th December, 2006 the Respondent complied with the order of 26th September, 2006 and the Appellants were then granted an extension of time to comply.

On 13th February, 2007 counsel for the Appellants had still not complied with the Order dated 26th September, 2006 and as a result of this the Learned Trial Judge made an "Unless Order" which was drawn up and served on the Respondent on 16th February, 2007. On 28th February, 2007 the matter came up before the Learned Trial Judge who noted that the Respondent did fail to comply with the "Unless Order" and so struck out the defence filed by the Appellants and entered judgment for the Respondent as prayed in his statement of claim.

On 6th March, 2007 Counsel for the Appellants filed a Notice of Motion to the Court applying for the following – (a) that the judgment of 28th February, 2007 be set aside, (b) their defence be restored, (c) a further 7 days to comply with the Order of 26th September, 2006 and a stay of execution of the judgment of 28th February, 2007 which application was refused on 3rd April, 2007.

A Notice of Appeal was filed against the judgment and order of 28th February, 2007 and on 18th June, 2007 the Court of Appeal set aside the judgment of the Learned Trial Judge and declared the Summons for Directions void for irregularity and that *Order XXB of the High Court (Amendment) Rules Constitutional Instrument No.3 of 2006* does not make provision for striking out of pleadings and entering judgment.

It is against this background that this appeal has been made especially considering the *High Court (Amendment) Rules 2006 more so Order XXA and Order XXB which never existed in the High Court rules 1960.*

In Civ. App. 1/2009 filed on 24th July, 2009 it was only part of the judgment of the Court of appeal to *wit Order 3:*

> *"The amount already taken in execution of the said judgment including the one-third thereof paid to the Respondent be paid into the interest bearing account at*

Standard Bank currently in the joint-names of both Solicitors pending the hearing and determination of the Action".

The Grounds of Appeal are:

"That the Court of Appeal having set aside the judgment of the High Court dated 13th February, 2007 and all subsequent proceedings, and ordered that the matter go back to the High Court for trial there was no legal basis for the Order they made that the amount already taken in execution of the said judgment including the one third thereof paid to the Respondent should be paid into the interest bearing Account at Standard Bank, since the execution of the judgment of the High Court was a subsequent proceeding to the said judgment and was dependant thereon, and once the judgment was set aside, nothing dependent thereon could remain in existence thereafter".

The relief sought from this Court in this appeal is that the Order of this Court of Appeal be set aside and that all monies taken in execution of the judgment of 13th February, 2007 by the High Court which the Court of Appeal set aside be returned to the Appellants and that the cost of this Appeal be paid by the Respondent.

In relation to Civ. App. 2/2009 filed on 16th September, 2009 the Ground of Appeal are as follows:

i. That the Learned Judges of the Court of Appeal were wrong in law to have held that Edwards J. exceeded his jurisdiction under Order XXB, High Court (Amendment) Rules C.I. No.3 of 2006 when striking out the defence filed on behalf of the Defendant/Respondents and entering judgment for the Plaintiff/Appellant as *"there is no such provision for failure to comply with an order for Directions given under Order XXB 1(1)".*

PARTICULARS

1. The Learned Judges failed to make and/or make any proper determination on whether *Order 3 and 4* of the Order of Taylor J. of 26th September, 2006 were

made pursuant to *Order XXA*, as this was necessary to determine the scope of the judge's powers.

2. That in view of *Order XXB (1)(3)* the Learned Judges of Appeal were wrong in law to have held that *"Order XXA does not require a party to an action to apply to the Court for an Order for Discovery".*

3. That *Order XXB of the amended High Court Rules* which deals with summons for directions gives the Judge the discretion to strike out pleadings where a party to proceedings is required to *"give any information or produce any document and that information or document is not given or produced".*

4. The Learned Judges having concluded that *"even under this Order [XXA], the power to strike out and enter judgment against a defaulter is discretionary only, and such discretionary powers must be exercised along established principles"* failed to make any proper determination of the reasons why they were holding that Edwards J. had wrongly exercised his discretion.

5. The Learned Judges failed to consider or failed to consider properly that the Defendant had not provided evidence of sufficient cause to require the Court to set aside the judgment of Edwards J. as required under the provisions of *Rule 19 of Order XXA.*

ii. That the Learned Judges were wrong in law to set aside the Order made on the Summons for Directions by Taylor J. on 26th September, 2006 as being void as the provisions of Order L. of the High Court Rules 1960 requires that an application to set aside proceedings for irregularity should first be made to the High Court within a reasonable time and BEFORE a fresh step has been taken.

PARTICULARS

1. That the issue of the summons for directions being irregular was never raised nor argued by Counsel for the Respondents in the High Court.

2. That the issue of the irregularity of the summons for directions was not raised within a reasonable time as it was brought for the first time fourteen months after the summons for directions was filed and argued and after proceedings in High Court had long concluded.

3. That solicitors for the Respondents had taken several fresh steps in the proceedings in the High Court including applications to extend the time for compliance with the impugned summons for directions before raising the issue of the irregularity in the Court of Appeal.

iii. That the judgment was given *per incuriam.*

PARTICULARS

a. That the Learned Judges of appeal failed to consider or adequately consider the wide scope provided by *Order L(2) of the High Court Rules 1960* which clearly stated that *"no application to set aside any proceedings for irregularity shall be allowed unless made within a reasonable time, not if the party applying has taken a fresh step after knowledge of the irregularity".*

The reliefs sought in this appeal are that the Order dated 18th June, 2008 of the Court of Appeal be set aside and that the judgment and Order of Hon. Mr. Justice D.B. Edwards be restored which was granted against the Respondents dated 28th February, 2007 be restored and the cost of this appeal be paid by the Respondents.

The *High Court (Amendment) Rules Constitutional Instrument No.3 of 2006* which amended the *High Court Rules 1960 introduced Order XXB "Summons for Directions"* which provides:

"1. (1) With the view to providing, in every action to which this rule applies, an occasion for the consideration by the Court for the preparations for the trial of the action so that –

(a) all matters which shall or can be dealt with in interlocutory application and have not already been dealt with may, so far as possible be dealt with; and

(b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof, the plaintiff shall, within one month after the pleadings in the action are deemed to be closed, take out a summons (in these rules referred to as a summons for directions) returnable in not less than seven days".

Order XXB Rules 1(4), (5), (7) and (8) provides:

"(4) If the Plaintiff does not take out a summons for directions in accordance with sub-rules (1) to (3), the defendant or any defendant may do so or apply for an order to dismiss the action,

(5) On an application by a defendant to dismiss the action under sub-rule (4), the Court may either dismiss the action on such terms as may be just or deal with the application as if it were a summons for directions.

(7) Notwithstanding anything in sub rule (1) any party to an action to which this rule applies may take out a summons for directions at any time after the defendant has entered an appearance or, if there are two or more defendants at least one of them has entered an appearance.

(8) A Plaintiff whose action has been dismissed under sub rule (5) may apply not later than one month after the date of the Order by notice on motion that the order be set aside and the action be restored, and the Court may, for good and sufficient cause order that the action be restored upon such terms as it may think fit".

Rule 5(4) of Order XXB provides:

"If the Court on any hearing of the summons for directions requires a party to the action or his legal practitioner to give any information or produce any document and that information or document is not given or produced, then, subject to sub rule (5) the Court may –

(a) Cause the facts to be recorded in the order with a view to such special order, if any, as to costs as may be just being made at the trial, or

(b) If it appears to it to be just so to order the whole or any part of the pleadings of the party concerned to be struck out, or, if the party is the plaintiff or the claimant under a counterclaim to be dismissed on such terms as may be just".

The high Court under this sub rule could strike out pleadings filed by a defendant that is in default but cannot give judgment in favour of the plaintiff and this applies only in relation to proceedings during Summons for Directions. The High Court did not have power in 2006 to give judgment for the plaintiff where the defendant has failed to comply with directives given by the Trial Judge.

Pleadings did close on 26th May, 2006 and summons filed four months later. The appellants did not apply under *Order XXB Rule 1(4)* to have the action dismissed. On 26th September, Taylor J gave directions on witness statements and all documents to be used which should be exchanged within 21 days from the date of the Order and fixed 24th October, 2006 as the trial date. *Order XXD Rule 1(2)* provides:

> *"At the summons for directions in an action commenced by writ the Court shall direct every party to serve on the other parties, within 14 weeks (or such other period as the Court may specify) of the hearing of the summons and on such terms as the Court may specify, written statement of the oral evidence which the party intends to adduce on any issues of fact to be decided at the trial".*

Taylor J. fixed 21 days not 14 weeks and gave a direction that "the parties do discover and exchange all relevant documents to be used at the said trial". This was an accident involving a collision between two vehicles and *Order XXA Rule 2(3)* provides:-

> *"Unless the Court otherwise orders, a defendant to an action arising out of an accident on land due to a collision or apprehended collision involving a vehicle shall not make discovery of any documents to the plaintiff under sub rule (1)".*

The application under this rule is governed by sub rule 7 and the Court may order that the *defence be struck out and judgment entered for the plaintiff.*

The Directions recorded at Page 62 of the records dated 26th September, 2006 reads: *"This is an application for directions by way of Summons for Directions dated 15th day of September, 2006 on behalf of the plaintiff for the directions or orders prayed for on the face of the summons paper".*

COURT: Orders 1, 2, 3, 5 and 8 as prayed. The time within which the said list of exchange of all relevant documents to be used at the trial as prayed for in *Order 4* is 21 days from the date of the Order. The date to be fixed for the hearing of the action as prayed for in Order 4 is the 24th October, 2006". The time line was breached with no reasons given from 14 weeks as is provided in *Order XXD Rule 1(2)* which is 28 days to the commencement of the trial on 24th October, 2006. The procedure for applying for discovery and ordering discovery is provided for in *Order XXD and nor Order XXB of the Rules.*

From the records it is clear that time for compliance was extended by Taylor J. on 24th November, 2006 to 14th December, 2006 by an application by the Respondent. The Court bundle was filed on 14th December, 2006 and Taylor J. granted the Appellants Solicitor an extension of time to comply to 9th January, 2007. Counsel for the Appellant on 5th January, 2007 sought an extension to 6th February, 2007 in the absence of Respondent's Counsel.

When the file came up for hearing before Edwards J. on 13th January, 2007 he made an "unless order" in these words on an application by Mr. Williams Counsel for the Respondent "That unless the defendant complies with the Order of the Court dated 26th September, 2006 within 7 days after service of this order the defence filed will be struck out and judgment entered for the plaintiff". This order is not authorized under the rules but Edwards J. did adjourn the hearing to 28th February, 2007.

It is clear that the Order of 13th February, 2007 ought not to have been made under *Order XXB* and that the Order was made in the absence of one party without hearing evidence

was not a judicious exercise of discretion. The judgment given in default was wrong and ought to be set aside. It is clear that this was a default judgment and there being no trial. In *Evans v. Bartlam (1937) A.C. 437 at 438 Lord Alkin* said:

> *"The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure. (Emphasis mine)*

The interpretation given by the Court of Appeal on *Order XXB Rule 1(1)* was quite correct and in place as it did state in mandatory terms what the plaintiff should do within a month of close of pleadings. He should take out a Summons for Direction but if he fails it is not an incurable irregularity as *Rule 1(4)* provides that the defendant may do so or apply for an order dismissing the action. The Court of Appeal should have clearly held that *Order XXB* did not authorize the Court to enter judgment for a plaintiff where a defendant has failed to comply with a Summons for Direction.

This matter has been too long on this Court and hope that an end would now be put to the long delay which has been due to both Appellants and Respondent in their treatment of this matter despite some faults on the part of the previous panel due to certain unforeseen circumstances.

As the Court of Appeal did put it at *Page 115* of the records:

> *"The conduct of both parties in this case, by their respective failure to comply with the rules of procedure at one time or another is also a matter we have taken into consideration in deciding whether the learned Trial Judge exercised the discretion rightly. Both parties were guilty of a breach of the rule and one party cannot be heard to say that the other party alone should be penalised".*

We now come to the relief sought by the Appellant which is contained in Order 3 relating to the amount taken in execution of the said judgment. This Court is not disposed to grant this order in view of the recent decision of this Court in *Sup. Ct. Misc. App. 1/2015 International Construction Company Ltd. v. Zackhem International Construction Co. Ltd.*

delivered on 14th May, 2015 (unreported) in which the High Court did set aside a default judgment this Court upheld the decision to be right and decided that monies taken in execution of that judgment from the Defendant Company ought not to be returned to it. Mr. Jenkins-Johnston now Counsel for the Appellants in this case was in that case and is well aware of the decision. This Court is not persuaded and sees no reason to depart from that position. The delay in this matter is greatly caused by the Appellants, their solicitors and counsel. This Court will not order the return of the money as the case has not yet been heard on its merits which will now be ordered. This being the sole ground of the Appellants it is hereby dismissed and I so ordered. For all the reasons discussed above the Respondent's appeal dated 16th September, 2009 lacks merits and is dismissed.

The Court makes the following Orders:

(1) Civ. App. 1/2009 filed on 24ths July, 2009 is dismissed.

(2) Civ. App. 2/2009 filed by the Appellant is dismissed.

(3) The Order of Hon. Justice D.B. Edwards J. dated 13th February, 2007 and the Judgment and Order dated 28th February, 2007 are accordingly set aside.

(4) The part of the Order of the Court of Appeal dated 18th June, 2009 wherein it is stated "the Respondent is hereby granted an extension of time to file his summons for directions and shall file same within 7 days from the date of this order" is set aside.

(5) This Court directs that the Appellants in Civ. App. 1/2009 do comply with the directions given by Taylor J. on 26th September, 2006 within 14 days of the date of this Order and that 21 days after the date of the Order herein that the file be put before a Judge in the High Court to ensure the compliance with those directions in accordance with the *High Court Rules 2007* and that the matter be tried speedily.

No order as to cost both in the High Court and the Court of Appeal.

HON MR. JUSTICE V. V. THOMAS, I Agree

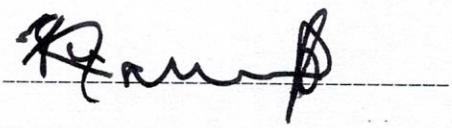
ACTING CHIEF JUSTICE.

HON MR. JUSTICE N.C.BROWNE-MARKE, I Agree

JUSTICE OF THE SUPREME COURT

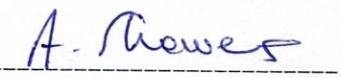
HON JUSTICE V. M.SOLOMON, I Agree

JUSTICE OF THE SUPREME COURT



HON MR. JUSTICE P.O. HAMILTON, I Agree

JUSTICE OF THE SUPREME COURT



HON MRS. JUSTICE A. SHOWERS, I Agree

JUSTICE OF THE COURT OF APPEAL