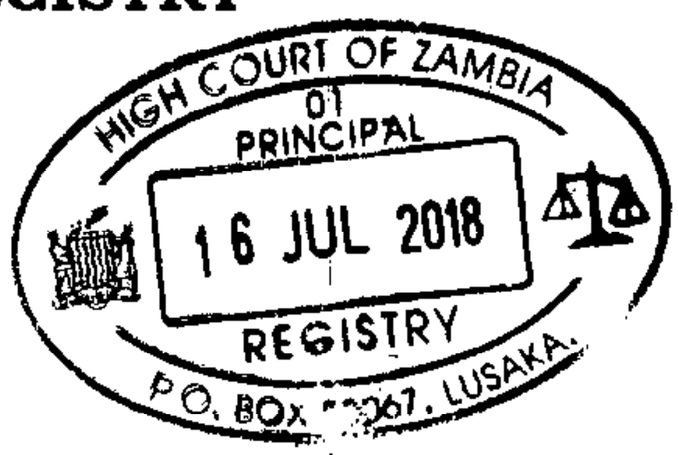
IN THE HIGH COURT FOR ZAMBIA **2015/HP/1495 &**

AT THE PRINCIPAL REGISTRY **2015/HP/2156**

AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

ZENSOF INVESTMENTS LIMITED	**PLAINTIFF**
AND	
TINA HADJIPETROU (Sued in her capacity as Joint Administrator of the estate of the late ELIZABETH MZYECE)	**1ST DEFENDANT**
WILLIAN MZYECE (Sued in his capacity as Joint Administrator of the estate of the late ELIZABETH MZYECE)	**2ND DEFENDANT**

BEFORE THE HONOURABLE MADAM JUSTICE P. K. YANGAILO

IN CHAMBERS ON THE 16TH JULY 2018.

For the Plaintiff: *Mr. F. Besa - Messrs. Besa Legal Practitioners*

For the Defendants: *Mr. M. Muchende - Dindi & Company*

RULING

CASES REFERRED TO:

1. *Water Wells Limited vs. Wilson Samuel Jackson (1984) Z.R. 98;*

2. *Jamas Milling Company Limited vs. Imex International (PTY) Limited (2003) ZR 79 P.83;*
3. *Ruth Kumbi vs. Robinson Caleb Zulu (2009) ZR 183;*
4. *Lewanika and Others vs. Chiluba (1998) ZR page 79;*
5. *Walusiku Lisulo vs. Patricia Anne Lisulo (1998) ZR 75;*
6. *Saban & Another vs. Gordc Milan (2008) ZR 233;*
7. *Beachley Properties vs. Edgar (1996) The Times 18; and*
8. *Leeds Zambia Limited vs. Mazzonites Limited (Z) SCJ No. 9 of 2001 (unreported).*

LEGISLATION REFERRED TO:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia; and*
2. *The Rules of the Supreme Court (White Book) 1999 Edition.*

The background to this matter is that on 6th April, 2016 the previous Court that had conduct of the matter delivered a Ruling in which Cause No. 2015/HP/1459 and Cause No. 2015/HP/2156 were consolidated. Prior to that, on 30th October, 2015 the parties under Cause No. 2015/HP/1495 had executed a Consent Order *Pendete Lite*, which the Plaintiff sought to set aside on 1st December, 2015. On 21st December, 2015, the Plaintiff filed herein an application for consolidation of 2015/HP/1459 and 2015/HP/2156. At the scheduled hearing for the Plaintiff's application to set aside the Consent Order *Pendete Lite* on 2nd February 2016, the Court directed the parties to file their submissions on the matter within the next ten (10) days, on which the Court would deliver its Ruling. The record shows that only the Plaintiff filed its submissions outside the time frame given by the Court on 24th February, 2016. The Ruling was never delivered and the record was subsequently re-allocated to this Court.

I scheduled the matter for hearing on 23rd March, 2017. The Notice was issued and served on all the Advocates on record, who are Besa Legal Practitioners, Dindi & Company and Nicholas Chanda & Associates. At the scheduled hearing, none of the parties were in attendance and no reason was advanced for their non-attendance. Having received no reasons for the absence of the parties and their Counsel, I struck out the matter off the active cause list with liberty to restore in accordance with the provisions of ***Order XXXV Rule 1*** of ***The High Court Rules***[1] and ordered that unless the matter was restored within the next twenty-one (21) days, it shall stand dismissed for want of prosecution. A formal Order was drawn up and issued by the Court. It was served on all the Advocates on record. The matter was never restored to the active cause list and on 8th May, 2017, this Court dismissed the matter for want of prosecution. The Order dismissing the matter for want of prosecution was served on all the Advocates on record. On 10th May, 2017, the Plaintiff's Co-Advocates Messrs. Besa Legal Practitioners applied to review the Order dismissing matter for want of prosecution. The application was accompanied by an Affidavit in Support deposed by Mr. Friday Besa, Counsel for the Plaintiff, in which he averred, *inter alia*, as follows: -

1. *That this matter came up for status conference on 23rd March, 2017, but he was unaware of this hearing date and as a result, he was not in attendance at court; and as the record shows, neither was any of the other parties to these proceedings present;*

2. *That a few days after the 23rd March, 2017, it came to his attention that the matter had come up on 23rd March, 2017 and he immediately sent his legal assistant one Oliver Chipili to conduct a search on the court file and establish what transpired on that date;*
3. *That the Registry staff told him that he could not conduct a search as the record was in the Judge's chambers awaiting a ruling;*
4. *That two more attempts were made to conduct a search on the file but they could not have access to the file, for the above stated reason;*
5. *That unknown to them, the matter had been struck out and the 21 days restoration period were expiring;*
6. *That it consequently came to him as a shock to learn that the matter had been dismissed for want of prosecution;*
7. *That he verily believes that if the Court was aware that they were making frantic efforts to conduct a search on the file and by extension comply with the Court's order thereon, the Court would not have dismissed the matter. That this is evidence which was not available to this Court at the time it made the decision to dismiss the matter;*
8. *That pursuant to the relevant rules on review, where the Court makes a decision in the absence of material evidence as presented above, the Court has power to within 14 days of its decision review the decision and quash or vary its earlier decision;*
9. *That there has therefore not been any failure to prosecute this matter and therefore he urges the Court to review the matter and set aside the order dismissing the matter so that the same can be heard and determined on merit.*

The Plaintiff's application is made under ***Order XXXIX Rule 1*** of ***The High Court Rules***[1], which states as follows: -

"Power of review

Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision:

Provided that where the judge who was seized of the matter has since died or ceased to have jurisdiction for any reason, another judge may review the matter."

I scheduled to hear the application to review my Order on 30th May, 2017. On the return date, the Defendants were not in attendance. Since there was no proof of service on record, the matter was adjourned to 14th July, 2017.

On the return date on 14th July, 2017, Learned Counsel Mr. Besa, who is the Co-Advocate for the Plaintiff and Mr. Muchende, Counsel for the Defendants were in attendance. In addition to the Affidavit in Support of the application, Mr. Besa also orally submitted that the application was made pursuant to ***Order XXXIX Rule 1*** of ***The High Court Rules***[1], which Order empowers this Court to review its own decisions and consequently overturn, vary or confirm its decisions. According to Mr. Besa, the premise upon which this Court may be invited to change its decision is where a party seeking such an order is able to bring to the Court's attention new evidence

that was not brought to the Court's attention even with the exercise of due diligence at the time the Court made such an order. It was his submission that had the Court been aware that the Order that they were supposed to comply with had not reached the intended target, the Court may not have dismissed the matter. He further submitted that the lack of service of the Order either through the pigeon hole or their failure to conduct a search despite having tried to do so, is evidence that was not before the Court on 8th May, 2017, when it evoked its powers to dismiss the action. He also submitted that the Order striking out the matter was an *"unless"* order and that the requirement for an unless order to take effect is that there must be evidence before the learned Judge that the party being directed to perform a specific act was either present at the time the order was made or that it was served on him or his advocates. He referred this Court to the Practice Directions (QBD Peremptory Order), which were issued for the Queen's Bench Division published in the Weekly Law Reports 1986 Volume 1 at page 948. It was Mr. Besa's submission that the said practice direction, which is applicable to this jurisdiction states at No. 4 that unless order should be worded that unless within 14 days of service of this order, the defence will be struck out and Judgment entered for the Plaintiff with costs. According to Mr. Besa, if the Defendant or the representative is not present, the order must start with *"unless within such days of service..."* and in the absence of proof that the affected party has had notice of the order, the unless order ought not to take effect. On the strength of the Practice Direction

alluded to above, Mr. Besa urged the Court to exercise its powers as contained in ***Order XXXIX Rule 1*** of ***The High Court Rules***[1], to review the Order of 8th May, 2017 and re-open the case so that the same can be determined on its merits. Mr. Besa referred this Court to the case of ***Water Wells Limited vs. Wilson Samuel Jackson***[1], where the Supreme Court held that it is the practice that in dealing with *bona fide* applications, that Courts should allow matters to proceed to trial and be determined on their merits. He submitted that there was no improper motive or *mala fide* for their non-appearance or indeed when they failed to restore the matter.

The Defendants did not file any Affidavit in Opposition, but their learned Counsel Mr. Muchende orally submitted that in response to the Plaintiff's application, he would raise points of law with regards to the procedure that has been adopted by the Plaintiff in moving the Court for review under ***Order XXXIX Rule 1*** of ***The High Court Rules***[1]. Mr. Muchende referred this Court to the case of ***Jamas Milling Company Limited vs. Imex International Limited***[2], where Chitengi JS. as he then was stated that: -

> ***"...the application for review is misconceived in attempting to set aside a default judgment..."***

It was Mr. Muchende's submission that this case is illustrative that review is not available where a decision of the Court has been arrived at for a short coming on the part of the affected litigant and that it is only available when there is fresh evidence that has been discovered. He submitted that what is before this Court is an

Unless Order dated 23rd March, 2017 which gave the parties 21 days to restore the matter to the active cause list and there was a default admittedly for reasons that the Plaintiff was not aware of that order. He further submitted that the ignorance of the order of the Court is not even by stretch of imagination fresh evidence. Mr. Muchende submitted that the correct procedure that ought to be adopted when dealing with an unless order was the bone of contention in the case of ***Ruth Kumbi vs. Robinson Caleb Zulu***[3], where the Supreme Court guided that the correct civil procedure in cases of non-compliance with an unless order is to apply for extension of time and that where there has been failure to comply with an order within a specified period, that does not necessarily mean that the matter is dead nor does it entail that the Court is deprived of its jurisdiction or power to extend the time for doing a specific act within the specified time. The Supreme Court also held in the said case that the Court has power or jurisdiction to examine the reasons the applicant had of not complying with the unless order and use its discretion to either grant leave or reject the application. Mr. Muchende contends that applications for extension of time have been catered for in Zambia and that there is no *lacuna* as these are contained under the provisions of ***Order II Rule 2*** of ***The High Court Rules***[1]. The said order provides as follows: -

> ***"Enlargement or abridgement of time***
>
> ***Parties may, by consent, enlarge or abridge any of the times fixed for taking any step, or filing any document, or giving any notice, in***

any suit. Where such consent cannot be obtained, either party may apply to the Court or a Judge for an order to effect the object sought to have been obtained with the consent of the other party, and such order may be made although the application for the order is not made until after the expiration of the time allowed or appointed."

Mr. Muchende submitted that the procedure under this rule is for the defaulting party to engage the other party for a Consent Order for extension of time and if the other party is being unreasonable, then the defaulting party can now move the Court for an application for extension of time. According to Mr. Muchende, this is not what has happened in this case and it is on the foregoing that he contends that the application before this Court is incompetent and should be dismissed with costs.

In reply, the Plaintiff's Learned Counsel Mr. Besa submitted that the case of ***Ruth Kumbi vs. Robinson Caleb Zulu***[3] can be distinguished from the action *in casu*, in that the cited case dealt with a situation where a party had been given an unless order and failed to comply with it, which is different from the case *in casu* which deals with a situation where an unless order was made but a party was unaware of it. It is his contention that there is a fundamental difference between not complying with an unless order that you have been served and an unless order that has not been served on you, hence the Practice Direction that he cited, which gives guidance. Mr. Besa also contends that the cited case is also distinguishable for the case *in casu* as *in casu* there is an order that

has dismissed the matter and as long as the order dismissing the matter remains unchallenged, there is nothing to extend as the matter is at an end. It is his submission that proceeding in the manner alluded to by Mr. Muchende would amount to a misconceived application as a Consent application would not be accepted where the matter has been dismissed.

In response to Mr. Muchende's contention that ignorance of an unless order does not amount to new evidence, Mr. Besa contends that if we are guided by the Practice Direction that he referred this Court to, ignorance of an unless order if properly brought to the Court is indeed new evidence. He also contends that if the Court knew that the parties had not received the unless order, the Court would not have dismissed the matter for want of prosecution. Mr. Besa prayed that the application be granted.

I have considered the arguments advanced by both Counsel for which I am grateful. I have also considered the application and authorities cited by counsel against the back drop of the events leading to the dismissal order, which the Plaintiff now seeks to be reviewed and set aside.

The law on review has been aptly summed up by the authorities relied upon by Counsel for the two parties. This power of the Court to review its decision is derived from ***Order XXXIX (1)*** of ***The High Court Act***[1] under which the application has been brought. It provides for review of any Court judgment, or decision upon such grounds as the Court shall consider sufficient, and upon such

review, re-hear the case wholly, or in part, and to reverse, vary, or confirm, the previous decision. It is couched as follows: -

> ***"Power of review***
>
> ***Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision:***
>
> ***Provided that where the judge who was seized of the matter has since died or ceased to have jurisdiction for any reason, another judge may review the matter."***

I refer to the case of ***Lewanika and Others vs. Chiluba***[4], which confirms the Court's power to review under ***Order XXXIX*** of ***The High Court Act***[1] and goes further to explain the stages that exist for having recourse to review. It states as follows at page 81: -

> ***"Review under Order 39 is a two stage process. First, showing or finding a ground or grounds considered to be sufficient, which then opens the way to actual review."***

By the foregoing authority, a party seeking to have a decision reviewed, must initially demonstrate that he has sufficient grounds for seeking the said remedy before the Court can open its doors to review. In his Affidavit in Support of the application, the Plaintiff's Counsel contends that he was unaware that the matter had been struck out as all efforts that he made to conduct a search of the Court record were unsuccessful and he had been informed by the

Registry staff that the record was in the Judge's Chambers awaiting a Ruling. Accordingly, he was unable to apply for restoration of the matter within the period required in the Order and consequently, he learnt that the matter had been dismissed for want of prosecution.

Being mindful that the order of dismissal of the matter sought to be reviewed and set aside was basically a default pre-emptory order for procedural non-compliance with the time limit set by Court, I have noted the two guiding principles to be considered for dismissal of matters for want of prosecution as espoused under ***Order 3 Rule 5 (12)*** of ***The Rules of the Supreme Court***, which are: -

1. ***that the rules of court and the associated rules of practice devised in the public interest to promote the expeditious dispatch of litigation must be observed; and***
2. ***that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate.***

Clearly, the general approach of the Courts is to advocate the main objective of the law, which is the advancement of justice. The above principles were articulated in the case cited by Mr. Besa of ***Water Wells Limited vs. Jackson***[1], where the Supreme Court held that: -

> ***"Although it is usual on an application to set aside a default judgment not only to show a defence on the merits, but also give an explanation of that default, it is the defence on the merits, which is the more important point to consider. If no prejudice will be***

caused to a plaintiff by allowing the defendant to defend the claim, the action should be allowed to go to trial."

The case of ***Ruth Kumbi vs. Robinson Caleb Zulu***[3] relied on by Mr. Muchende, also followed the same principles. In that case, the Appellant initially defaulted in filing his Record of Appeal to the Supreme Court. On application, this period was extended by Court, but the Appellant again defaulted, for reasons that were fully explained, and which the Court found feasible, acceptable, and thus justifiable. These facts are distinguishable from the case *in casu.*

In casu, there was a pre-emptory order which was breached by the Plaintiff. The reasons advanced of not being able to access the Court Record as it was in the Judge's Chambers, is inexcusable. If that were the case, which is not, the Plaintiff's lawyers would have accessed the Court Record through the Marshal or they would have had a print out of the proceedings made for them, as the Record shows that the proceedings were scanned on 23rd March 2017. Further, the Order striking out the matter was placed in the pigeon holes of all the Advocates on record.

I refer to the Supreme Court case of ***Walusiku Lisulo vs. Patricia Anne Lisulo***[5], which was an appeal against the refusal by a High Court Judge to review his judgment on appeal from the Deputy Registrar on assessment of maintenance for the Respondent and three children of the family. The Supreme Court held that: -

> ***"The power to review under Order XXXIX Rule 1 is discretionary for the Judge and <u>there must be sufficient grounds to exercise that discretion</u>..."*** (Court's emphasis)

The Supreme Court also reiterated its holding in the above case in the case of ***Saban and Another vs. Gordic Milan***[6] by restating that the power to review under ***Order XXXIX Rule 1*** is discretionary and that ***"there must be sufficient grounds to exercise that discretion"***

In my view, the conduct of the Plaintiff's Counsel *in casu,* exhibits a complete disregard for Rules of the Court, laxity, casual or a cavalier approach towards prosecuting this matter. Counsel failed to attend on the scheduled date of hearing and to restore the matter without any justifiable explanation whatsoever. He also neglected to conduct a search of the Court Record to ascertain the stage of proceedings. This clearly, even in the absence of any prejudice to the other party involved, constitutes conduct failing to prosecute its case and is unacceptable. The view that I take is supported by the case of ***Beachley Properties vs. Edgar***[7], wherein the Court of Appeal in England, observed that: -

> ***"...the proper and regular administration of business in general before the Courts should not be disrupted as a result of breaches of the rules of the Court which occurred without any justification whatsoever and notwithstanding the absence of any prejudice to the other party involved..."***

Further, our own Supreme Court in the case of ***Leeds Zambia***

Limited v Mazzonites Limited (Z)[8], refused to set aside a judgment obtained without hearing the defence's case on account of persistent defaults and lack of a meaningful defence. The Court held that: -

> ***"...the record showed a history of default and lapses...coupled with the absence of any meaningful defence to his claim for professional fees, there can be no justification for a re-trial or for setting aside the judgment."***

Accordingly, I find that the Plaintiff's Counsel's failure to attend Court and to restore the matter, for the reasons advanced unjustifiable. In the circumstances of this case, the Plaintiff's Counsel failed to timely prosecute this matter and I do not find any grounds at all, let alone sufficient grounds for either setting aside or reviewing my Order. Leave to Review the Court Order of 8th May 2017 is accordingly declined. The Defendants shall have their Costs, to be taxed in default of agreement.

Delivered at Lusaka the 16th day of July 2018.

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P. K. YANGAILO
HIGH COURT JUDGE