

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

CAZ/08/100/2018

BETWEEN:

BETRICH INVESTMENTS LIMITED

APPELLANT

AND

FINANCE BANK ZAMBIA LIMITED

RESPONDENT



Before the Hon. Mrs. Justice J.Z. Mulongoti
in Chambers on the 7th day of August, 2018.

For the appellant:

Mr. M. Haimbe of Sinkamba Legal Practitioners

For the respondent:

Mr. I. Nonde of Isaac & Partners

R U L I N G

Cases cited:

1. *Victor Madiabi v. Abraham Shintuba (CAZ/08/069/2017)*
2. *Twampane Mining Co-operative Society Limited v. E and M Storti Mining Limited Limited (2011) ZR 67 Vol. 3*
3. *Zambia Revenue Authority v. Armcor Security Limited (SCZ Judgment No. 56 of 2014)*

4. Chapota and Mobitel Zambia Limited v. Casat Technologies (2012) ZR 31
5. Christopher Lubasi Mundia v. Zambia Electricity Supply Corporation Limited (2013) ZR 37
6. Arnautovic v. Standard Bank Zambia Plc and another (SCZ/8/300/2014)
7. Leopold Walford (Z) Limited v. Unifrieght (1985) ZR 302 (SC)
8. Nkhuwa v. Lusaka Services Limited (1977) Z.R. 43
9. Access Bank Ltd v. Group Five / ZCON Business Park Joint Venture (Suing as a firm) (SCZ/8/52/2014)
- 10 National Pension Scheme Authority v Metrack Zambia Limited, Handy Air Conditioning Limited and Charles Phiri (CAZ /08/80/2016)

Legislation referred to:

1. Court of Appeal Rules, Statutory Instrument No. 65 of 2016
2. Court of Appeal Act No. 7 of 2016

This is a ruling for the respondent's application to raise preliminary issues *in limine* pursuant to **Order 14A of the Rules of the Supreme Court, 1999 edition (RSC)**.

At this stage it is necessary to say a little about the background of the matter. On 16th April, 2018, the appellant being dissatisfied with a ruling of the High Court, Commercial List lodged an appeal to this

Court. After filing the Notice and Memorandum of appeal, the appellant's next action was filing an application for stay of proceedings pending an application to consolidate the appeal with another appeal under cause no. CAZ/08/098/2018 on 15th June, 2018. The appellant only served the Notice and Memorandum of Appeal on the respondent on 19th June, 2018 as shown by the Affidavit of Service dated 22nd June, 2018. On 21st June, 2018, the appellant also proceeded to file a notice of non-attendance pursuant to **Order X rule 18 (1) of the Court of Appeal Rules (CAR)** to dispense with the appellant's or its counsel's attendance at the hearing of the application for consolidation of appeals, which according to the appellant, was scheduled for hearing on 29th June, 2018 at 08:30 hours. Before the application for stay of proceedings could be heard, the respondent raised the following preliminary issues subject of the ruling as follows:

- "1. That this appeal, and consequently the application for stay of proceedings dated 15th June, 2018, be dismissed for the appellant's failure to comply with Order 10 rule 3 (9) of the Court of Appeal Rules, 2016 as the appellant failed to serve the Notice of Appeal and Memorandum of Appeal on the respondent within the prescribed period of time; and***

2. ***That this appeal, and consequently the application for stay of proceedings dated 15th June, 2018, be dismissed on the ground that the appellant has failed to comply with Order 10 rule 6 of the Court of Appeal Rules, 2016 as the appellant failed to diligently prosecute this appeal by filing and serving their record of appeal and heads of argument within the prescribed period of time."***

In the affidavit in support sworn by the respondent's legal counsel, Jay Chisanga, it was averred that the Notice and Memorandum of Appeal were filed on 16th April, 2018 and served on 18th June, 2018, about 64 days late, when they ought to have been served on or before 30th April, 2018. That this Court should not entertain the application for stay and the appeal altogether because the appellant failed to file the record of appeal and heads of argument within 60 days of lodging the appeal whose deadline fell on 15th June, 2018. According to the deponent, there has been deliberate and inordinate delay in prosecuting the appeal and non-adherence to the Rules of Court. Further, that the respondent believes that the appellant has conducted itself in a manner that is casual and discourteous to the Court considering the clear Rules of the Court and the nature of the

case which should have been determined expeditiously in the interest of both parties.

In addition, the respondent's counsel filed a list of authorities in support of the Notice. Counsel referred to **Order 10 rule 3 (9) and Order 10 rule 6 CAR and Order 14A rules 1 and 2 RSC** along with the following cases on extension of time:

1. **Victor Madiabi v. Abraham Shintuba¹;**
2. **Twampane Mining Co-operative Society Limited v. E and M Storti Mining Limited²;**
3. **Zambia Revenue Authority v. Armcor Security Limited³;**
4. **Chapota and Mobitel Zambia Limited v. Casat Technologies⁴;**
5. **Christopher Lubasi Mundia v. Zambia Electricity Supply Corporation Limited⁵; and**
6. **Arnautovic v. Standard Bank Zambia Plc and another⁶.**

The appellant filed an affidavit in opposition on 29th June, 2018 together with skeleton arguments.

Counsel submitted that the preliminary issues are misconceived and premature because the application to stay proceedings was made before the expiry of sixty days of filing the Notice of Appeal and Memorandum of Appeal. Counsel contended that at the time the

application for stay was made, the appeal was still alive and there was no need to file any application prior to filing the application for stay. Thus, the application was properly before Court and ought to be determined on its merits.

Counsel argued that **Order XIII rule 3 (1) CAR** on extension of time does not only refer to filing of the record of appeal and heads of arguments but also relates to making applications or taking any step in connection with an appeal.

It was further submitted that the appellant has not neglected to prosecute the appeal or slept on its rights because it made the application for stay within time and has applied for extension of time within which to file the record of appeal and heads of argument. The appeal cannot be dismissed because the appellant has taken steps in connection with the appeal. Further, that the authorities cited by the respondent on extension of time do not apply except for the **Twampane case** as they relate to instances where the appellant failed to prosecute the appeal and waited until an application to

dismiss the appeal was made before taking action which is not the case in the present case.

At the hearing, both parties were represented. Mr. Nonde who appeared for the respondent relied on the affidavit in support and list of authorities. By way of emphasis, he drew the Court's attention to the case of **Twampane Mining Co-operative Society Limited v. E and M Storti**² that it is important to adhere to the Rules of Court in order to ensure that matters are heard in an orderly and expeditious manner and those who ignore the rules do so at their own peril.

He went further to submit that the filing of an application for stay after expiry of the mandatory time cannot and does not amount to an application for extension of time. He relied on the case of **Chapota and Mobitel Zambia Limited v. Casat Technologies**⁴ where the Supreme Court held that the Rules of Court ought to be obeyed and that appellant's who sit back until an application to dismiss their appeal is filed without applying for an extension of time or leave to file their record of appeal out of time do so at their own peril. He

argued that the appellant is out of time and any step it takes now is an afterthought.

In response, Mr. Haimbe, who appeared for the appellant, relied on the appellant's skeleton arguments after the affidavit in opposition was expunged from the record on grounds that the deponent's signature was not authentic as it appeared very different from his signature in the earlier affidavit. Mr. Haimbe agreed with these observations by his colleague though he insisted that both affidavits were signed by the deponent. The affidavit was thus expunged and counsel proceeded to make oral submissions on points of law.

I have considered the submissions, the affidavit evidence and authorities cited by counsel.

I shall consider the two preliminary issues together as they are interrelated. The cardinal issue to be determined is whether this appeal should be dismissed because of the appellant's non-adherence to the timeline for serving the appeal, and its failure to file the record of appeal and heads of argument within the prescribed period of sixty days.

The respondent contends that the appellant breached the provisions of **Order X rule 3(9) CAR** which states that:

"A notice of appeal, together with the memorandum of appeal shall be lodged and served, within a period of fourteen days, on all parties directly affected by the appeal or on their practitioner."

Meanwhile, **Order X rule 3 (5) CAR** states that:

"The notice of appeal and memorandum of appeal shall be entitled in the proceedings from which it is intended to appeal and shall be filed with the Registrar within thirty days after the judgment appealed against."

Clearly, there are two time periods referred to for filing or lodging the Notice and Memorandum of appeal. The position is that fourteen days begins to run after the lodging of the Notice and Memorandum of Appeal referred to in sub rule 5. The appellant here filed the Notice and Memorandum of Appeal on 16th April, 2018. The appellant ought to have served the Notice and Memorandum of Appearance within fourteen days after lodging the documents, that is, on or about 1st May, 2018 and not 30th April, 2018 as suggested by the respondent. The record is clear that the appellant only served these documents on the respondent on 19th June, 2018 a period of about sixty four

days from the date of lodging the appeal. This was done without leave of the court to serve out of time. This move by the appellant was in breach of the Rules of Court and irregular.

The respondent also contends that the appellant breached **Order X rule 6 CAR**. The relevant portion of the rule provides that:

"Subject to an extension of time and to an order made under Order XIII rule 3, the appellant shall within sixty days after filing a notice of appeal lodge the appeal by filing in the Registry twenty one hard copies of the record of appeal together with heads of argument and an electronic copy of the record of appeal;..."

The appellant does not dispute that it failed to file the record of appeal and heads of argument within sixty days after lodging the appeal. This is also a clear breach of the rules.

The appellant's counsel argued that the breach of the rules on service of the appeal and filing the record of appeal and heads of argument by the appellant is curable. However, as enunciated in the case of **Leopold Walford v. Unifreight**, the Court must have regard to the nature of the breach and stage of proceedings to determine whether the defect is curable or fatal. There is no hard and fast rule as to what

amounts to curable or incurable defects. The Court is implored to exercise discretion to determine the effect of the breach on a case by case basis.

The breach by the appellant is twofold. First, the appellant failed to serve the Notice and Memorandum of Appeal within fourteen days of lodging the appeal. Second, the appellant failed to file the record of appeal and heads of argument within sixty days of lodging the appeal in accordance with **Order X rule 6 CAR**. At the time when the appellant should have been lodging the record of appeal or applying to extend time, the appellant opted to apply to stay proceedings pending a consolidation of this appeal with another appeal under cause no. CAZ/08/98/2018. The application for stay did not absolve the appellant from its obligation to put the present appeal in order by taking the necessary steps prescribed by the Rules of Court. The appellant should have applied for extension of time if for some reason, it did not see it prudent or possible to file the record of appeal within the sixty day period required by the Rules of Court. The result is that the appellant is out of time. The laxity displayed by the appellant demonstrates its hesitance in prosecuting this appeal as


argued by the respondent. I find the period of delay in serving the Notice and Memorandum of Appeal by the appellant to be inordinate and a contumelious disregard of the Rules of Court much to its detriment. I am fortified by the Supreme Court decision in **D.E. Nkhuwa v. Lusaka Services Limited** and the case of **Twampane Mining Co-operative Society Limited v. E and M Storti**, cited by the respondent's counsel.

I also note that the appellant filed the notice of application to extend time within which to file the record of appeal and heads of argument on 29th June, 2018. I observed that this application was prompted by the respondent's notice to raise preliminary issues which was filed on 25th June, 2018. When the matter came up for hearing of the preliminary issues on 29th June, 2018 at 08:30 hours, it was adjourned at the appellant's instance on ground that counsel needed instructions to respond. Later that day, the Notice of application to extend time was filed. Clearly, the appellant was in slumber and only woke up to apply for extension of time after the irregularities were exposed by the respondent's notice to raise preliminary issues. I am of the considered view that the appellant's manoeuvre was an

afterthought. As guided by the Supreme Court in **Access Bank Ltd v. group Five / ZCON Business Park Joint Venture (Suing as a firm)**, that though matters should as far as possible be determined on their merits rather than be disposed of on technical or procedural points, the ends of justice also require that courts never provide succour to litigants and their counsel who exhibit scant respect for rules of procedure as rules of procedure and timeliness serve to make the process of adjudication fair, just, certain and even-handed.

Furthermore, I carefully perused the record and agree with the respondent's submission that the nature of the substantive matter required expedient determination. As this Court opined in **National Pension Scheme Authority v. Metraclark (Zambia) Limited, Handy Air Conditioning Limited and Charles Phiri¹⁰**, the appellant's delay and laxity as in that case is exacerbated by the fact that this is an appeal against a ruling of the Commercial Court, a fast track Court.

In view of the foregoing, I find that the preliminary issues raised by the respondent have merit and I uphold them. Accordingly, this appeal is dismissed with costs to the respondent.


J.Z. Mulongoti
Court of Appeal Judge