**IN THE SUPREME COURT OF ZAMBIA** **APPEAL NO. 207/2015**

**HOLDEN AT NDOLA**

**(Civil Jurisdiction)**



**BETWEEN:**

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| **ELIZABETH CATHERINE COOKE** | **APPELLANT** |
| **AND** | |
| **MOSES MPUNDU** | **1ST RESPONDENT** |
| **JOSEPH MUSONDA** | **2ND RESPONDENT** |
| **JEREMIAH MALAMBO & OTHERS** | **3RD RESPONDENT** |

**Coram : Wood, Mutuna and Chinyama, JJS**

**On 4th September 2018 and 6th September 2018**

**For the Appellant : N/A**

**For the Respondents : N/A**

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## J U D G M E N T

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MUTUNA, JS. delivered the judgment of the Court.

Cases referred to:

1) **Zambia Revenue Authority v Jayesh Shah (2001) ZR 60**
2) **Daniel Mwale v Njolomole Mutonga and Attorney General, SCZ judgment number 25 of 2015**
3) **Evelyne Helen Mwambazi v Wedson Chisha Mwambazi (1986) ZR 132**

Statute referred to:

1) **Supreme Court Practice, 1999, volume 1, White Book**

Other works referred to:

1) **Zuckerman on Civil Procedure: Principles of Practice, by Adrian Zuckerman, third edition, Sweet and Maxwell and Thomson Reuters, London**

## Introduction

1) When a Court schedules a matter for hearing, the expectation is that the parties will attend before it at the appointed date and time. If the plaintiff or applicant does not attend, the Court enjoys the discretion to strike the matter off its cause list. The reason for this is that the Court is not obliged to keep matters that are in abeyance, on

account of a party's procrastination, on its cause list.

2) Often times when the Court strikes a matter off its cause list, it gives the plaintiff or applicant the liberty to apply to restore within a specified period of time, failing which the matter or application stands dismissed. This is what is called an *"unless order"*.

3) The issue in this appeal relates to the powers of the Court to issue unless orders and to dismiss a matter which has not been restored in accordance with the directive of the Court. That is to say, in what circumstances is a Court empowered to issue an unless order and to enforce it when default occurs.

4) The appeal arises from a decision by the High Court in terms of which the Appellant's matter

was dismissed after she failed to attend Court on the hearing of an application to restore which was preceded by an order to restore within seven days. It also discusses the remedy open to a party aggrieved by a decision of a Court dismissing an action for want of prosecution.

**Background**

5) The facts leading up to this appeal are fairly simple. The Appellant who was the plaintiff in the High Court commenced an action against the Respondents as defendants by way of a writ of summons and statement of claim on 9th April 2009.

6) During the life of the action, the Learned High Court Judge invited the parties to a status conference on 5th April 2013. Counsel for the Respondents was in attendance but counsel for

the Appellant did not attend. After counsel for the Respondents informed the Learned High Court Judge that she intended to file an application to dismiss the matter for want of prosecution, she noted that the matter had been dormant since the filing of the defence and reply. She accordingly, sent the record back to the registry to enable counsel file the application.

7) The matter next came up on 16th January 2014 for another status conference at which the Appellant's counsel informed the Learned High Court Judge that he had filed the Appellant's bundles of documents and pleadings. This prompted the Respondents' counsel to request the Learned High Court Judge to give her three weeks in which to file the Respondents' bundle of documents. The Court directed the Respondents

to file their bundles of documents by 28th February, 2014 and set the matter down for trial on 1st and 2nd July 2014 at 9:00 hours.

8) On 1st July 2014, counsel for the Respondents attended Court but counsel for the Appellant was not in attendance. No reasons were given for the absence by the Appellant's counsel prompting the Respondents' counsel to observe that the Appellant had no desire of prosecute the claim.

9) Although the Learned High Court Judge acknowledged that the Appellant's counsel had not justified his absence from Court, she gave him the benefit of the doubt and struck the matter off the active cause list and did not dismiss it. She also granted the Appellant liberty to restore the matter within seven days failing which the matter would stand dismissed.

10) As a consequence of the directive by the Court, the Appellant applied to restore the matter to the active cause list and the Learned High Court Judge appointed the 18th of July 2014 at 8.30 hours as the date and time for the hearing of the application. Once again, the Appellant did not attend Court and neither were reasons given for the absence which prompted the Learned High Court Judge, upon application by the Respondents' counsel, to strike the application for restoration off the cause list and dismiss the matter for want of prosecution.

11) This is the order which has aggrieved the Appellant prompting this appeal.

**Grounds of appeal to this Court and arguments advanced by the parties**

12) In challenging the decision of the Learned High Court Judge, the Appellant has advanced two grounds of appeal couched in the following terms:

**12.1 The Court below erred at law by dismissing the Appellant's action for want of prosecution when there was no formal application to that effect before the Court;**

**12.2 The Court below erred at law by dismissing the action and striking off the matter on 21st July 2014 on the grounds of non appearance despite the Court having given two alternate dates on which the matter was to be heard, namely 1st July 2014 and 2nd July 2014.**

13) The Appellant argued the two grounds of appeal together from two limbs. In the first limb the Appellant emphasized the need for matters to be determined on the merits and not on technicalities. Reference, in this regard, was made to our decision in the case of ***Zambia Revenue Authority v Jayesh Shah***[1] where we reiterated this principle.

14) In addition, the Appellant argued that the decision by the Learned High Court Judge dismissing the action was harsh especially that there was no formal application to dismiss the application filed by the Respondents. She also contended that she explained the reason for not attending Court on 1st July, 2014 in the affidavit in support of the application to restore. Therefore, the Court ought to have exercised the option to adjourn the matter to the alternative date set for hearing of 2nd July, 2014.

15) The second limb of the arguments addressed instances when *"unless orders"* will be issued. The Appellant argued that, an *"unless order"* should be issued with caution and not at the very first opportunity of default. Further, Order 3 rule 5 (10) of the ***Supreme Court Practice, 1999,***

***volume 1, White Book***, stipulates that when considering whether to strike out proceedings, following a party's failure to comply with an unless order, the Court, should look at the overall justice of the case. That each case should be considered on its unique facts having regard to the costs set out in the Order as follows:

> "**1. An unless order was an order of last resort, not made unless there was a history of failure to comply with other orders. It was the party's last chance to put its case in order.**
>
> **2. Because it was the last chance, a failure to comply would result in the sanction being imposed.**
>
> **3. The sanction was a necessary forensic weapon which the broader interests of the administration of justice required to be deployed unless the most compelling arguments were advanced to exonerate the failure.**
>
> **4. It seemed axiomatic that if a party intentionally flouted the order he could expect no mercy.**
>
> **5. A sufficient exoneration would almost invariably require that he satisfied the court that something beyond his control had caused the failure.**

**6. The judge would exercise his judicial discretion whether to excuse the failure in the circumstances of each case on its own merits, at the core of which was service to justice.**

**7. The interests of justice required that justice should be shown to the injured party for procedural inefficiencies causing the twin scourges of delay and wasted costs. The public administration of justice to contain those blights also weighed heavily. Any injustice to the defaulting party, though never to be ignored came a long way behind the other two."**

16) Concluding arguments on the second limb, the Appellant submitted that the circumstances of this case did not justify the issuance of an unless order especially that the Court had the option of adjourning the case to the next day. Secondly, there was no history of failure by the Appellant to comply with other orders of the Court; nor is there evidence to show that the default by the Appellant was deliberate; and there is no evidence to show that the Court's order was

issued as a way of negating prejudice that would be occasioned to the Respondents.

17) In their response, the gist of the Respondents' arguments was that the Court below was on firm ground in striking off and dismissing the matter because no excuse was given for the Appellant's absence notwithstanding that her advocates and husband were present at the time the dates for trial were being issued by the Court. The Appellant is, therefore, entirely to blame for not attending Court.

18) The Respondents argued further that the Court below was on firm ground when it did not exercise its discretion to adjourn the matter to 2nd July 2014 because it was satisfied that the adjournment would merely have delayed

conclusion of a matter began six years earlier to the detriment of the Respondents.

19) The Respondents then turned to the issue of the *"unless order"* and argued that in view of the repeated defiance of the orders of the Court and inordinate, deliberate and excessive delay by the Appellant in prosecuting the matter, the Court was on firm ground in issuing the unless order.

20) In regard to the question whether or not the Court should have dismissed the matter, the Appellant invited us to revisit the provisions of Order 3 rule 5 sub-rule 12 of the ***White Book*** which set out the two factors a Court should consider before it dismisses a matter. We were also reminded of our decision in the case of ***Daniel Mwale v Njolomole Mutonga and Attorney General***[2] in which we observed as follows:

> **"The Learned counsel for the Appellant quoted pertinent authorities in which we have consistently stated that matters should as much as possible be determined on their merits rather than on technical points. This in our opinion is what the ends of justice demand. Yet justice also requires that persons facing possible claims should not be kept in a state of perpetual misapprehension of suits against them."**

21) Arguing in the alternative, the Respondents submitted that if we are inclined to allow the appeal we should exercise our discretion in favour of awarding them costs, in both this and the Court below because the Appellant has herself to blame for the predicament she finds herself in. A number of authorities were referred to, in this regard, which we have not reproduced because they have no bearing on the decision we have reached.

**Considerations by this Court and decision**

22) At the hearing, all the parties were not represented despite having been notified of the hearing. We proceeded with the determination of the appeal because the parties had complied with the requirement of filing their heads of argument prior to the hearing.

23) We have had opportunity to consider the record of appeal and arguments by counsel. We have already stated that the issue that this appeal raises involves when a Court is empowered to issue an unless order and when is it empowered to enforce it upon default.

24) We are compelled to make a distinction between two types of unless orders. The first type is one whose effect is that a party's action is dismissed upon non compliance with the order but the party is not deprived of his right to prosecute a matter

or an application because he has a right to recommence the action. An example of such an unless order is where the Court, as happened in this case, issues an order striking out a matter with liberty to apply to restore within a specified period of time failing which a matter stands dismissed. In these cases, a party has a right to recommence a fresh action if it is dismissed because he fails to apply to restore it in the prescribed time because the initial case was not determined on the merits but rather a technicality. This, of course, is subject to the limitation period and payment of costs to the other party.

25) The type of unless order which we have set out in the preceding paragraph is often used by the High Court because it assists the Judges in their case

flow and case management. By this we mean that, the art of modern adjudication must be cognizant of the fact that the resources of the Courts are limited and as such the door to justice must only be open to litigants who are willing to prosecute or defend their actions. This is not unique to Zambia but is a technique employed by the English Courts as well, from which we draw our practice and procedure. In articulating this position the learned author of ***Zukerman On Civil Procedure: Principles of Practice, third edition, by Adrian Zuckerman*** has the following to say at page 567:

> **"The power to make such orders is not new. It has always been one of the principal instruments by which the Court controlled its proceedings. Now that the Court has a responsibility for actively managing cases, the unless order assumes a more prominent role, since it can be used to prevent recalcitrant parties from defeating the Court's efforts to implement the overriding objective."**

Our understanding of the foregoing is that Courts can invoke such orders on their own motion or by way of an application by a party as a way of case management. In so doing, the Courts use the order to remove litigants who are needlessly not willing to prosecute their cases from their cause list.

26) What we have said in the preceding paragraph in no way compromises the ends of justice because, as we have stated, a party who loses his right to prosecute his case arising from the dismissal of an action can institute a fresh action. Further, by virtue of the fact that a party's case is removed, albeit temporarily, from the cause list ensures that space is created for another willing litigant.

27) The Courts are also in the practice of issuing such unless orders from the second default by a party

that is to say, where a party is a persistent defaulter or procrastinator. This would be in line with the test set out in Order 3 rule 5 sub-rule 10 of the ***White Book*** which the Appellant referred to in his argument, but in view of the fact that the end result is not to deny a party his day in Court, there is nothing wrong, for purposes of case management, for a Court to issue such an order on the first default.

28) The second type of unless order is one whose effect is that when enforced it deprives a party of his right to his day in Court. Such an order is issued where for instance: a party is ordered to pay security for costs failing which, the matter would stand dismissed; either a plaintiff or defendant is ordered to pay costs on account of default failing which, in the case of the plaintiff,

the matter would be dismissed or in the case of the defendant, the matter would proceed to that party's exclusion; or in appellate Courts where an appellant is ordered to file the record of appeal by a certain date failing which the appeal would stand dismissed.

29) Turning now to the case at hand, we have already stated that the unless order issued by the Learned High Court Judge fell in the former category as set out in paragraph 24 of this judgment. The question though is, was the Order and subsequent dismissal of the action justified?

30) The facts of the case as revealed by the record of appeal show that the Appellant was a persistent defaulter. This is evident from the fact that, although, the writ and statement of claim were filed on 9th April 2009 and directions given on 24th

May 2010, by 5th April 2013 when the Learned High Court Judge first dealt with the matter, the matter was only at the stage of reply in terms of exchange of pleadings. This is notwithstanding the fact that pleadings should have been closed within the year 2010.

31) In addition, the Appellant only filed her bundle of documents on 15th January 2014 a day before the status conference called by the Learned High Court Judge when the record was allocated to her. This move by the Appellant appears to have been prompted by the status conference and was not preceded by way of discovery by list nor was there inspection of documents or indeed, were the documents accompanied by the bundle of pleadings. For all intents and purposes, though

the matter was given trial dates, it was not ready for trial.

32) The facts we have set out in the preceding two paragraphs satisfy the test we have set out in paragraph 25 of this judgment especially that the Appellant continued her recalcitrant conduct even after trial dates were fixed as revealed in the background to the case. One might argue that that the Appellant's delay in prosecuting her case was on account of the various interlocutory applications that were filed on the record. We respectfully do not accept this excuse, and to her credit she has not raised it, because compliance with the order for the directions issued by the Court and consented to by the parties was not subject to the interlocutory applications.

33) We also do not accept the argument advanced on behalf of the Appellant that the dismissal of the action by the Learned High Court Judge was harsh in view of the fact that there was no formal application laid before her to that effect. The record reveals that counsel for the Respondents did apply *viva voce* for the dismissal of the action on 18th July 2014. The fact, in and of itself, that such application was not preceded by a summons and affidavit does not render the application invalid. Summons and affidavits serve the purpose of notifying a party of an application before Court and its nature and directing him to attend. In this case, the Appellant was aware that her application to restore was due to come up on the 18th of July 2014 and she knew the consequences of default.

34) Finally, we have also found no merit in the argument by the Appellant that when she did not turn up on the 1st of July 2014 for trial, the Learned High Court Judge should have adjourned the matter to 2nd July 2014 because the trial was set for these two days. There is no merit in this argument because firstly, it is in the entire discretion of a Court to grant an adjournment. In this case the Learned High Court Judge found no reason to exercise such discretion because the Appellant had not provided any reasons for her non attendance to assist the Learned High Court Judge in the exercise of her discretion. Secondly, we know of no rule of practice or law which says that where a Court gives two or more dates for trial the parties have an option to attend on the day suitable to

them. The practice in our Courts is that if two or more dates are set and the plaintiff, without cause being shown, does not attend on the first day, the presumption is that it is not his wish to have the matter prosecuted as such all subsequent trial dates are vacated.

35) The decision we have reached in this matter should be distinguished from the one we made in the case of ***Evelyne Helen Mwambazi and Wedson Chisha Mwambazi***[3] that where a plaintiff fails to appear at a hearing, the proper course, under Order 35 rule 2 is to strike out the cause from the active cause list. The reason is that in the ***Mwambazi*** case, the default by the petitioner was only one, whilst in this case there were several defaults. There was, therefore, need on the part of the Court in the ***Mwambazi*** case to

be less severe as indeed, the Learned High Court Judge in this case was in respect of the first and second defaults by the Appellant

**Conclusion**

36) The net result of our holding is that there are no merits in the two grounds of appeal and we accordingly dismiss the appeal in its entirety. We uphold the decision of the Learned High Court Judge and hold that the matter in the High Court stands dismissed. As for costs, the same are awarded to the Respondents both in this and the Court below, to be taxed in default of agreement.

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**A.M. WOOD**
**SUPREME COURT JUDGE**

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**N.K MUTUNA**
**SUPREME COURT JUDGE**

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**J. CHINYAMA**
**SUPREME COURT JUDGE**