

**IN THE COURT OF APPEAL FOR ZAMBIA**

**APPEAL 17/2019**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)

**BETWEEN:**



**COUNTRY PUB LIMITED**

**1<sup>st</sup> APPELLANT**

**ZENSO OF INVESTMENT LIMITED**

**2<sup>nd</sup> APPELLANT**

**AND**

**TINA HADJIPETROU** (*Sued in her capacity as  
Joint Administrator of the Estate of the Late  
ELIZABETH MZYECE*)

**1<sup>ST</sup> RESPONDENT**

**WILLIAM MZYECE** (*Sued in his capacity as  
Joint Administrator of the Estate of the Late  
ELIZABETH MZYECE*)

**2<sup>ND</sup> RESPONDENT**

**CORAM: Makungu, Mulongoti and Siavwapa, JJA,  
On 22<sup>nd</sup> May, 2019 and 12<sup>th</sup> July, 2019**

*For the Appellants: Mr. F. Besa of Messrs Friday Besa &  
Associates*

*For the Respondents: Not in attendance*

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## **J U D G M E N T**

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**MULONGOTI, JA,** *delivered the Judgment of the Court*

*Cases referred to:*

1. **Ruth Kumbi v Robinson Caleb Zulu (2009) ZR 183**

2. ***Leeds Zambia Limited v Mazzanites Limited selected Judgment No. 9 of 2001 (SC)***
3. ***Stanley Mwambazi v Morester Farms Limited (1997) ZR 108 (SC)***
4. ***Samuels v Linzi Dresses Limited (1980) 1 ALL ER 803***

Legislation and other works referred to:

1. ***The High Court Rules Chapter 27 of the Laws of Zambia***
2. ***Rules of the Supreme Court, 1999, edition***

The appeal is against a Ruling of the High Court dismissing the appellants' case for want of prosecution.

At this stage it is necessary to say a little about the background of the case. The parties had their matters under cause numbers 2015/HP/1495 and 2015/HP/2156, consolidated. Prior to that, under cause number 2015/HP/1495, the parties had executed a consent order *pendete lite* which the appellant sought to set aside.

The High Court per Kondolo J, as he then was, directed the parties to file submissions upon which the Court would then deliver its Ruling. However, this was never done and the matter was allocated to Yangailo J, who set the 23<sup>rd</sup> March, 2017, for a status conference. None of the parties nor their lawyers from three law firms, were in attendance that day i.e (Friday Besa Legal

Practitioners, Dindi & Co and Nicholas Chanda Associates). No reasons for non attendance were tendered. The matter was accordingly struck out from the active cause list, with liberty to restore within 21 days, failure to which it would stand dismissed for want of prosecution.

After more than 21 days no application for restoration was made. On 8<sup>th</sup> May, 2017 a formal Order was drawn up by the Court dismissing the matter for want of prosecution.

On 10<sup>th</sup> May, 2017 the appellants' co- advocates, Messrs Friday Besa Legal Practitioners, applied for review of the Order dismissing the matter pursuant to **Order 39 of the High Court Rules**; on grounds that he was not aware of the hearing date of 23<sup>rd</sup> March, 2017. After he became aware that the matter came up on 23<sup>rd</sup> March, 2017, he attempted to conduct a search on the record. However, several efforts to conduct a search were futile. He was informed that the file was with the Judge pending a Ruling. Unknown to him the matter was eventually struck out and then dismissed.

He further deposed that the Court was not aware that he was attempting to do a search and thus this was material for review of the Order of dismissal, in line with **Order 39 of the High Court Rules**.



The respondents opposed the application on the ground that there was no fresh evidence but an '**Unless Order**' striking out the matter, with liberty to restore within 21 days. According to the respondents' counsel, the correct procedure was for the appellants to apply for extension of time as elucidated by the Supreme Court in its decision in **Ruth Kumbi v Robinson Caleb Zulu**<sup>1</sup>.

After hearing the application and considering the respective arguments, the court below found that the **Ruth Kumbi v Robinson Caleb Zulu**<sup>1</sup> case was distinguishable from the matter before it. The Court reasoned that the appellants, in this case, breached a peremptory Order. It found that the reasons for counsel not being able to access the Court record were inexcusable because he could have accessed the record through the marshal or he could have had a print out of the proceedings made for him as the proceedings were scanned on 23<sup>rd</sup> March, 2017.

The court below concluded that the appellants' counsel exhibited a complete disregard of the Rules of the Court, laxity, casual or cavalier approach towards prosecuting the matter.

Consequently, the application to review or set aside the Order dismissing the matter was refused.

Dissatisfied, the appellant appealed to this Court on the following grounds:

1. *The learned Judge in the court below erred in law and fact when it held on page 10 that the parties herein failed to demonstrate the sufficient grounds for seeking the remedy when the evidence on record indicates that the submissions by counsel that the order striking out the matter was an unless Order and failed to take into account the prerequisite of giving effect to an unless Order which is requirement of evidence before the Court that the party should be directed to perform the specific act.*
2. *The learned Judge in the court below erred in law and fact when it failed to take into account that the nature of the matter requires determination of the matter on merit which opportunity the Court did not seize and /or take advantage of the same to enable the parties conduct their full trial.*

Mr. Besa, who appeared for the appellants, also filed heads of argument in support of the appeal. In ground one, it is argued that one of the requirements of the Rules of Court, regarding an '**Unless Order**', is that it does not take effect unless there is evidence that the party being directed to perform a particular task is aware of it.

According to counsel, after the court below was allocated the matter, it set the 23<sup>rd</sup> of March, 2017 for a status conference. However, none of the parties were in attendance that day and none confirmed receiving the notice of hearing, which was allegedly placed in pigeon holes of the respective law firms. This, therefore raised a strong possibility that the notices were not placed in the pigeon holes by the marshal, as alleged.

It is the further submission of counsel that according to **Order 3/2/12 of the Rules of the Supreme Court (RSC)**, it is mandatory for a Court to demonstrate that the party was aware of the date by proving that the party had been served, which the court below did not do. Additionally, that the matter was coming up for the first time before the court below. Yet, at her first opportunity she struck it out and subsequently dismissed it. The conclusion that the appellants' counsel had shown a complete disregard of the Rules of the Court, laxity, casual or cavalier approach towards prosecuting the matter, was reached without any supporting evidence on record.

The cases the Court cited to justify her decision not to hear the matter on merit, are inapplicable. In **Leeds Zambia Limited v Mazzonites Limited**<sup>2</sup>, the Supreme Court refused to set aside a



Judgment obtained without hearing the defendant on account of such persistent defaults and lack of meaningful defence. In *casu*, there is no evidence of persistent default.

In ground two, it is argued that it is a long established position of the law that matters should be determined on their merits, so as to bring finality to litigation. The case of **Stanley Mwambazi v Morester Farms Limited**<sup>3</sup> was relied upon that:

*"(ii). It is the practice in dealing with bona fide interlocutory applications for Courts to allow triable issues to come to trial despite the default of the parties; where a party is in default, he may be ordered to pay costs, but it is not in the interest of justice to deny him the right to have his case heard.*

*(iii) For this favourable treatment to be afforded, there must be no unreasonable delay, no mala fides and no improper conduct on the action on the part of the applicant."*

Thus, by dismissing the matter for want of prosecution, after the appellant did not restore it and refusing to review her Ruling, the court below departed from this well established position of the law.

The reasoning by the court below that the appellants' failure to access the file because it was in the Judge's chambers was inexcusable because counsel could have accessed it through the

marshal or obtained a print out from the registry, is unjustified. According to counsel, it is not the duty of counsel to handle files. But for the judiciary's registry staff, to liaise with the marshal to the Judge, to let counsel access the record from the Judge's chambers, upon failure to find it in the High Court Registry.

The application for review was not delayed, as upon becoming aware of the Order dismissing the matter, the appellants promptly applied for review, two days later. There was sufficient ground for the Court to review the Order dismissing the action and set it aside, restore the matter and allow it to be heard on merit.

The respondents did not file arguments in response and did not attend the hearing of the appeal.

We have considered the arguments by counsel and the Ruling subject of the appeal. The cardinal issue the appeal raises, as we see it, is, what happens to a case after failure to comply with an '**Unless Order**' within the stipulated period, in this case 21 days?

In the case of **Ruth Kumbi v Robinson Caleb Zulu**<sup>1</sup> the Supreme Court stated the procedure to adopt after failure to comply with an '**Unless Order**' as follows:



*"...In Zambia where the 'Unless Order' has been made, and there has been failure to comply with the order within a specified period, that does not necessarily mean that the action is dead or defunct or that the Court is thereby deprived of the jurisdiction or power to extend time for doing a specific act within a specified time.."*

Furthermore, 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."*

The Supreme Court actually revisited its earlier decisions on **"Unless Orders"**. It observed that the position at law in Zambia as well as in England up to 1981, was that failure to comply with the conditions stipulated in an **'Unless Order'** resulted in a case being dismissed, and as such not capable of restoration to the active cause list. In changing its earlier decisions, the Supreme Court followed the English case of **Samuels v Linzi Dresses Limited**<sup>4</sup> per Roskill L. J that:

*"...the law today is that a court had power to extend the time where an "Unless Order" has been made but not complied with but that is a power, which should be exercised cautiously."*

Thus, following the **Ruth Kumbi v Robinson Caleb Zulu**<sup>1</sup> decision, the procedure is that one has to apply for extension of time, after failing to comply with the time stipulated in an '**Unless Order**'

This is also in line with **Order 3/5/9 of the Rules of the Supreme Court**, upon which the decision in **Samuels v Linzi Dresses Limited**<sup>4</sup> was premised. **Order 3/5/9** is couched thus:


*"Unless" or Conditional Order to extend time: where the Court makes an 'Unless' Order, or Conditional Order that a party is required to do an act within a specified time but the Order to do that act is not complied with, within the time specified, the Court nevertheless retains the power to extend the time within which such act should be complied with."*

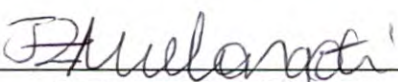
In **Ruth Kumbi v Robinson Caleb Zulu**<sup>1</sup>, the Supreme Court restored the matter and extended time by ordering the applicant to file the record of appeal within 45 days.

We are of the considered view therefore, that the appellants' counsel made the wrong application when he applied for review under **Order 39 of the High Court Rules**. The court below also erred in law when it proceeded to review its Order dismissing the matter. The law on review is very clear as noted in the Ruling of the court below at pages 14 to 15 of the record.

Going by the **Ruth Kumbi v Robinson Caleb Zulu**<sup>1</sup> case, the appellants should have applied for extension of time for restoration of the matter. As the matter, though dismissed, was not dead or defunct. The Court, was then obliged to consider the grounds or reasons and if they are sufficient to restore the matter.

The appeal is therefore, dismissed but the appellants are at liberty to go back to the High Court and make the appropriate application. We make no Order as to costs.

  
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**C.K. MAKUNGU**  
**COURT OF APPEAL JUDGE**

  
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**J.Z. MULONGOTI**  
**COURT OF APPEAL JUDGE**

  
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**M.J. SIAVWAPA**  
**COURT OF APPEAL JUDGE**