IN THE HIGH COURT FOR ZAMBIA **2013/HP/1006**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN

BISHOP JOHN MAMBO AND 354 OTHERS **PLAINTIFF**

AND

FRANCIS KABONDE AND 31 OTHERS **APPLICANT**

CHILANGA DISTRICT COUNCIL **2ND DEFENDANT**

COMMISSIONER OF LANDS **3RD DEFENDANT**

ATTORNEY GENERAL **4TH DEFENDANT**

BEFORE HONORABLE MR. JUSTICE MUBANGA KONDOLO, SC

For the Plaintiff	*: Mr. G. Chibangula of GDC Legal Practitioners*
For the Applicants	*: Mr. F Mutale of FM Legal Practitioners*
For the 2nd Defendants	*: Mr. M. Phiri Messrs Mwansa Phiri Shitimi and Theo Legal Practitioners*
For the 4th Defendants	*: Ms. M. Kampamba Senior State Advocate*

R U L I N G

STATUTES & TEXT

1. **Article 118(1), Constitution of Zambia, Chapter 1, Laws Of Zambia**

2. **The Supreme Court Practice (White Book), 1999 Edition**
3. **High Court Act, Chapter 27, Laws of Zambia**
4. **A Treatise On Equity, William F Walsh, 432**
5. **Jackson and Powell on Professional Liability. Seventeenth edition (London, Sweet and Maxwell, 2012)**

CASES

1. **Fanny Muliango & Samson Muliango v Namdou Magasa & Murus Transport & Farms Limited SCZ/26/1988 ZL 209**
2. **Jean Mwamba Mpashi v Avondale Housing Project Limited (1988/89) ZLR 140**
3. **Jackson and Powell, on Professional Liability[1], Seventeenth edition (London, Sweet and Maxwell, 2012) paragraph 11 198,at page 850.**
4. **Saheen Investments v Triddle General Dealers & Others 2010/HPC/0112 at P. R. 9**
5. **William David Carlise Wise v E.F. Harvey Limited (1985) Z.R. 179**
6. **Lyons Brook Bond Zambia Limited v Zambia Tanzania Road Services Limited (1977) Z.R. 317**
7. **Christopher Lubasi Mundia v Senator Motors Limited (1982) Z.R. 66**
8. **Daniel Mwale v Njolomole Mtonga and Attorney General SCZ Judgment No. 25 of 2015.**
9. **Twampane Mining Co-Operative Society Limited v E And M Storti Mining Limited SCZ/20/2011**
10. **Nahar Ivestments Limited v Grindlays Bank International (Z) Limited (1984) Z.R. 81First Merchant Bank v Jayesh Shah**
11. **Fanny Muliango & Samson Muliango v Namdou Magasa & Murus Transport & Farms Limited SCZ/26/1988 ZL 209**
12. **Jean Mwamba Mpashi v Avondale Housing Project Limited (1988/89) ZLR 140**
13. **Fox Motor Spares Limited v Khalid Gulam Mohammed Saleh & The Attorney General 2010/HPC/0500**
14. **Access Bank (Z) Limited v Group Five/Zcon Business Park Joint Venture (sued as a firm) SCZ/8/52/2014**
15. **Philip Mutantika & Mulyata Sheal S v Kenneth Chipungu SCZ/13/2014**
16. **Saheen Investments v Triddle General Dealers & Others 2010/HPC/0112 at P. R. 9**
17. **Smith v Clay (1767) 3 Bri.ch.cc 639**

18. **Zambia Revenue Authority v Post Newspapers Limited SCZ/36/2016**
19. **Industrial Finance Company Limited V Jacques & Partners (1981) Z.R. 75 (H.C.)**
20. **New Horizon Printing Press Limited v Waterfield Estates Limited Commissioner of Lands (2012) ZR 268**
21. **Allen v Sir Alfred Me Alpine and Sons Limited and Another [1968]2Q.B.229, 245**

This Ruling comes on the heels of an application by the 2nd Defendant to allow him to file his Defence, List of Authorities, Bundle of Pleadings & Documents out of time Pursuant to **Order 19** as read with **Order 2 Chapter 27, Laws Of Zambia**. The application was accompanied by an Affidavit in Support which the Plaintiffs opposed with their own Affidavit. The Applicants filed an affidavit in reply.

The brief background to this matter is that the Applicants failed to comply with Orders for Directions which were issued in July, 2013. When trial commenced the Plaintiffs first witness PW1 testified without the Applicant having filed its Defence. During that period the Applicants were represented by Messrs Sinkamba Legal Practitioners who suddenly stopped coming to court without filing a Notice to Discontinue. The Applicant, the Applicant herein, decided to engage Messrs FM Chambers who have made the application now before the Court.

Learned Counsel for the Applicant Mr. Mutale and learned counsel for the 1st Plaintiffs both filed skeleton arguments and submitted viva voce. Mr. Mutale submitted that the Applicants failure to adhere to the Orders for Directions and consequent failure to file the Defence was purely on account of the conduct of the Applicants previous Counsel and that they should not be made to suffer on account of their previous advocates conduct. He stated that this Court has inherent jurisdiction to allow the Applicants to file their Defence out of time

and that the Plaintiffs would not suffer any prejudice because even though the Plaintiffs' first witness had already testified, once availed with the Defence, he would be able to address issues raised therein during cross examination and re-examination. He added that in the event that the Defence raised new issues, the Plaintiffs would be at liberty to call rebuttal witnesses.

Mr. Mutale further reminded the Court that it was trite law that matters must be determined on the merits and not on procedural technicalities. He cited the case of **Fanny Muliango & Samson Muliango v Namdou Magasa & Murus Transport & Farms Limited** [1] in which it was held as follows;

> ***"where there is a defence to an action, it is preferable that a case should go for trial rather than be prevented from doing so by procedural irregularities"***

He reinforced this argument by referring to **Article 118(1) of the Constitution of Zambia**[2] which provides as follows;

> ***"Justice shall be administered without undue regard to procedural technicalities."***

He further cited the case of **Jean Mwamba Mpashi v Avondale Housing Project Limited**[3] where the court held as follows;

> ***"The rules of the Supreme Court make it clear that if a defendant raises triable issues those are grounds for refusing summary judgment and for granting leave to defend, whether conditional or unconditional."***

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[1] *Fanny Muliango & Samson Muliango v Namdou Magasa & Murus Transport & Farms Limited SCZ/26/1988 ZL 209*
[2] *Article 118(1), Constitution of Zambia, Chapter 1, Laws Of Zambia*
[3] *Jean Mwamba Mpashi v Avondale Housing Project Limited (1988/89) ZLR 140*

Mr. Mutale concluded his submissions by posing the following question to the Court: "*How will the Applicants effectively cross examine the Plaintiffs witnesses without referring to documents?*"

Mr. Chibangula on behalf of the 1st Plaintiff, relied on his clients Affidavits filed on 19th and 20th January, 2017 and on their skeleton arguments and the list of authorities. He augmented his submissions *viva voce*.

He submitted that the Applicant's application was made under ***Order 19 Rule 2 HCR***[4] and that an extension of time under that **Order** could only be granted if specific requirements were met.

He said that the first of these is that there must be sufficient reason for the delay and he argued that in this particular case the only reason provided for the delay was inaction by the Applicants own lawyer. Mr. Chibangula submitted that this was not a sufficient reason as that was a matter between the Applicant and their previous advocates and that the Applicants could seek recourse against their said advocates for any loss they might suffer by taking out a Law Suit for professional negligence and/or lodging a complaint to the Law Association of Zambia. He added that the Applicant had not shown any documentary proof on any steps they had taken to address their counsel on his failure to file the Defence and that in any event, it was their duty to follow up on their case.

In support of this he cited and provided a copy of Judge Nyambe, SC's ruling in the unreported case of **Saheen Investments V Triddle General Dealers & Others**[5] in which an application to file a Notice of Appeal out of time was

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[4] *Order 19 Rule 2, High Court Rules, High Court Act, Chapter 27, Laws of Zambia*
[5] *Saheen Investments v Triddle General Dealers & Others 2010/HPC/0112 at P. R. 9 (copy of Ruling provided).*

dismissed despite blame having been heaped on the Applicant's previous Counsel.

Mr. Chibangula pointed out that the Applicants had engaged their new lawyers very late, after trial had commenced and the Plaintiffs' key witness has given evidence in chief and was cross examined. He submitted that **Order 19 Rule 2 HCR**[6] on Orders of Directions provided for extension of time to file documents before trial. He said that allowing this application would prejudice the Plaintiffs because the Applicant would design its defence on the basis of the evidence adduced by the Plaintiffs first witness which would shift the scale of justice in favour of the 1st Plaintiff. He cited several cases which all basically pointed out the well established principle that the purpose of pleadings is to define the bounds of the action and to afford the other party an opportunity to set up its defence and reply to specific allegations[7]. He argued that on this basis it would be prejudicial to allow pleadings to be filed at this late stage.

Mr. Chibangula further cited the case of **Twampane Mining Co-Operative Society Limited v E And M Storti Mining Limited**[8] which in considering an extension of time held as follows;

1. *Applications for extension of time should be made promptly.*

2. *It is important to adhere to Rules of Court in order to ensure that matters are heard in an orderly and expeditious manner.*
   Those who choose to ignore Rules of Court do so at their own peril.

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[6] *Order 19 Rule 2, High Court Rules, High Court Act, Chapter 27, Laws of Zambia*
[7] *William David Carlise Wise v E.F. Harvey Limited (1985) Z.R. 179*
Lyons Brook Bond Zambia Limited v Zambia Tanzania Road Services Limited (1977) Z.R. 317
Christopher Lubasi Mundia v Senator Motors Limited (1982) Z.R. 66
Daniel Mwale v Njolomole Mtonga and Attorney General SCZ Judgment No. 25 of 2015.
[8] *Twampane Mining Co-Operative Society Limited v E And M Storti Mining Limited SCZ/20/2011*

He submitted that this application has been made two years after the Orders for Directions, after trial had commenced and after the Court had issued the Unless Order of 16th January, 2014 and that the Applicant had ignored both orders with impunity. He stated that rules and orders of the court must be complied with so as to ensure that matters are heard in an orderly and expeditions manner. He opined that it was irresponsible for a litigant to wait for two years for his lawyer to file process and the Applicants had therefore sat on their rights and failed to comply with the procedure at their own peril and cannot now complain if their application is dismissed.

Learned Counsel for the Plaintiffs further submitted that despite the fact that this Court exercises law and equity concurrently, equity only helps the vigilant and not those who slumber as the Applicant has done. He referred to the doctrine of laches as defined by William F Walsh in his book, **A Treatise on Equity**[9] as follows;

> *"the doctrine of laches ... is an instance of the reserved power of equity to withhold relief otherwise regularly given where in the particular case the granting of such relief would be unfair or unjust"*

Mr. Chibangula closed this leg of his submissions by citing the **Nahar Investments Case**[10] in which it was held that in the event of inordinate delay or unfair prejudice to the other party an applicant can expect an application to be dismissed.

He then turned his attention to the cases cited by learned Counsel for the Applicant which he alleged were meant to mislead the Court. He stated that the **Fanny Muliango Case**[11] was with respect to an application to set aside a

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[9] *A Treatise On Equity, William F Walsh, 432 (Full Citation Not Provided)*
[10] *Nahar Ivestments Limited v Grindlays Bank International (Z) Limited (1984) Z.R. 81*
[10] *First Merchant Bank v Jayesh Shah*
[11] *Ibid 1*

Default Judgment and not an application for extension of time whilst the **Jean Mwamba Mpashi Case**[12] was with respect to Summary Judgment.

With regard to ***Article 118 (1) of the Amended constitution of Zambia***[13] cited by Mr. Mutale, he responded by stating that the issue before court was not merely procedural because it went to the root of the rights of a party to a fair trial. In further support of this argument, he cited Chashi J, in the unreported case of **Fox Motor Spares Limited v Khalid Gulam Mohammed Saleh & The Attorney General**[14] when he said as follows;

> *"In my view that provision was not meant to be applied carte blanche whenever an objection was raised, neither was it meant to torpedo any substantive laws or rules, rights and privileges or enshrined and embedded practices but simply to address curable procedural mistakes or errors which can be said to be technical or harmless errors when they occur which do not affect a party's right or the cases outcome."*

On this basis, he opined that the application should be dismissed.

In reply, Mr. Mutale urged the Court to consider that the despite the Plaintiffs lead witness having already testified, the Plaintiffs could call other witnesses and the purpose of the application was to enable the Applicants rebut the averments in the Statement of Claim. He submitted that the court should allow the application for the simple reason that the application is for the purpose of placing all the relevant evidence before Court to enable the matter to be settled in its merits.

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[12] *Ibid 3*
[13] *Article 118 (1), Constitution of Zambia, Chapter , Laws of Zambia*
[14] *Fox Motor Spares Limited v Khalid Gulam Mohammed Saleh & The Attorney General 2010/HPC/0500 (copy of the judgment was provided)*

I have considered the Affidavits filed by the parties as well as the submissions by their respective counsel.

Counsel for the Applicant presented a very slim argument which can be summarized in the following points;

1. *The hard and fast position of the law is that, as much as possible, matters must be determined on their merits.*
2. *The court has inherent jurisdiction to grant this application in circumstances where none of the parties shall be prejudiced.*
3. *The perceived prejudice by the Plaintiffs of the defence being filed after their first witness had testified could be atoned by them calling other witnesses to address issues that might be raised in the Defence.*
4. *That the Applicant should not suffer as a consequence of their previous counsels failure to file their pleadings within the prescribed periods.*

Learned Counsel for the Applicant opposed this application most vigorously by stating that an extension of time should only be granted where there was sufficient cause and that, *in casu,* the only reason for the delay was the failure by the Applicants lawyer to comply with the Orders for Directions and consequent failure to file their pleadings on time. He said that this was a matter between the Applicants and their lawyers and not a valid ground for seeking an extension of time.

Mr. Chibangula also stressed that allowing the pleadings and particularly the Defence at this point in the trial was alien to our procedure and would seriously prejudice the Plaintiffs. He said that the Applicant had simply slept

on its rights to file the pleadings within time and should not complain if their application was thrown out.

I shall begin with the Constitutional provision cited by learned Counsel for the Applicant and, I would say that, I whole heartedly agree with Chashi J's comments on that provision. I would add to this the comments by our Lady, the Chief Justice in the case of **Access Bank (Z) Limited v Group Five/Zcon Business Park Joint Venture (sued as a firm)**[15]

When she said as follows;

> ***"All we can say is that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts."***

It is quite true, as Counsel for the Applicants put it, that there is a plethora of authorities which emphasise that matters must as much as possible be heard on the merits. The Supreme Court often reminds lower courts of this cardinal principal as it did in the case of **RDS Investments Ltd and Mounjelly Ouseph Joseph**[16] where it held as follows;

> ***"We have said before in a number of cases and wish to reiterate here that any Judgment not on merits is liable to be set aside and on merits means' both sides being heard."***

In the earlier case of **Covindbhai Baghibhai & Vallabhai Bagahbai Patel Vs Monile Holding company Limited**[17] the Supreme Court had this to say about this kind of conduct;

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[15] *Access Bank (Z) Limited v Group Five/Zcon Business Park Joint Venture (sued as a firm) SCZ/8/52/2014*
[16] *RDS Investments Ltd and Mounjelly Ouseph Joseph, SCZ APPEAL No. 52 of 1998*
[17] *Covindbhai Baghibhai & Vallabhai Bagahbai Patel Vs Monile Holding company Limited (1993-1994) ZR 20*

> ***"We find that in this case the 1st appellant well knew the result of failure to enter an appearance and it is doubtful either in such circumstances, any Defendant could say that he was bona fide and was entitled to defend his case on merit."***

In **Mwambazi Vs Morester Farms Limited[18] (1977) ZR, 108** it was said that a defaulting party could be treated favorably and be allowed to defend his matter on the merits but;

> ***"For this favorable treatment to be afforded, there must be no unreasonable delay, no malafides and no improper conduct of the action on the part of the applicant."***

The background to the delay *in casu* is that the Orders for Directions dated 24th July, 2013 were served on the Applicants on 26th July, 2013 and an affidavit of service to that effect was filed on 30th July, 2013. The Applicant did not comply with the Orders for Directions and the Plaintiffs applied to enter Judgment in Default of Appearance and Defence which application was heard on 16th January, 2014 but the Court accepted the Applicants' plea that it be given an opportunity to argue its case on the merits and this Court accordingly issued an Unless Order giving the Applicants 14 days within which to file its defence couched in the following language;

> ***"It Is Hereby Ordered and Directed that the Applicant do file their Memorandum of Appearance and Defence within 14 days from the date of this Order failing which Judgment in Default of Appearance and Defence shall be automatically entered against the Applicants without any further application being made by the Plaintiffs to this Honourable Court."***

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[18] *Mwambazi v Morester Farms Limited (1977) ZR, 108*

The Applicant was thus expected to file its Appearance and Defence on or before 1st February, 2014 but failed to do so which technically meant that Judgment in default was thereafter automatically entered against the Applicant. However, instead of applying for enlargement of time, Counsel for the Applicant, on 7th February, 2014, filed a **Summons to Dismiss Writ Of Summons and Statement of Claim for Being Statute Barred, Irregularity and Abuse of Court Process Under Order 14 A Rule 1 SCR (White Book) 1999 Edition**. Failure to apply for enlargement of time technically meant that the application to dismiss the Writ of Summons was incompetent as is the application presently before Court because Judgment has already technically been entered against the Applicant.

Notwithstanding the foregoing, none of the parties and not even the Court, raised issue that in terms of the Unless Order of 17th January, 2014 a default judgment had already been automatically entered against the Applicant. The application to dismiss the Writ of Summons was heard and the court ruled that the issue of determining whether or not the matter was statute barred should be addressed in the Defence and would be considered on the basis of evidence that would be adduced during the trial.

After the Courts ruling on 28th January 2015, the matter came up for trial on 20th January, 2016 and all the parties except counsel for the Applicant were present. The issue of the Applicant having breached the default judgment was again not brought up by any of the parties. The Orders for Directions were issued in July 2013, the default against the Unless Order occurred in February, 2014 the Court's ruling on the application to dismiss the Writ was in January 2015 and when by the time trial commenced in January 2016 the Applicant had taken no steps to enter an Appearance and file its Defence.

The application in casu is made under **Order 19 as read with Order 2 CAP 27, Laws of Zambia** which read as follows;

"Order 19

1. The Court or trial Judge shall, not later than fourteen days after appearance and defence have been filed, give directions with respect to the following matters:

(a) reply and defence to counter claim, if any;

(b) discovery of documents;

(c) inspection of documents;

(d) admissions;

(e) interrogatories; and

(f) place and mode of trial:

Provided that the period for doing any of these acts shall not exceed 14 days.

2. Notwithstanding rule 1, the Court may, for sufficient reason, extend the period within which to do any of the acts specified in rule 1.

Order 2.

"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."

Some might argue that **Order 19 Rule 2 HCR**[19] is only applicable after Appearance and Defence have been filed but whatever the case **Order 2** provides an avenue for making this application. This is an application for

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[19] *Order 19 Rule 2, High Court Rules, High Court Act, Chapter 27, Laws of Zambia*

extension of time and such applications can only be granted for sufficient cause.

In **Twampane Mining Co-operative Society Limited v E & M Storti Mining Limited**[20] in which the Applicant sought an extension of time within which to appeal, the Supreme Court held as follows;

> ***"…. in cases where the delay was very short and there was an acceptable excuse for the delay, as a general rule the appellant should not be deprived of his right of appeal and so no question of the merits of the appeal will arise. We wish to emphasize that the discretion which fell to be exercised is unfettered, and should be exercised flexibly with regard to the facts of the particular case."***

In the same case[21] the Court also said that, *"The provisions in the rules allowing for extension of time are there to ensure that if circumstances prevail which make it impossible, or even extremely difficult for parties to make procedural steps within prescribed times, relief will be given where the Court is satisfied that circumstances demand it."* (emphasis mine)

In casu, the delay in filing the Defence was very long and the only reason provided by the Applicant for the delay is that it was caused by its lawyers. In the case of **Philip Mutantika & Mulyata Sheal S v Kenneth Chipungu**[22], the court had this to say;

> ***"Although it has been argued and spiritedly so, if we may say, that the Appellants should not be prejudiced by the default of their Counsel and/or negligence or incompetence,***

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[20] *Twampane Mining Co-operative Society Limited v E & M Storti Mining Limited SCZ/20/2011*
[21] *Ibid 16*
[22] *Philip Mutantika & Mulyata Sheal S v Kenneth Chipungu SCZ/13/2014*

our firm position has always been that the relationship between a party and his lawyer is of no concern of the Court as that is a private matter which has nothing to do with the Court"

In the case of ***Access Bank (Z) Limited v Group Five/Zcon Business Park Joint Venture (sued as a firm)***[23] this is what the Supreme court said about breaches of procedure;

"We have in many cases consistently held the view that it is desirable for matters to be determined on their merits and in finality rather than on technicalities and piece meal. The cases of Stanley Mwambazi v. Morester Farms Limited and Water Wells Limited v. Jackson are authority for this position. We reaffirm this position. Matters should, as much as possible, be determined on their merits rather than be disposed of on technical or procedural points. This, in our opinion, is what the ends of justice demand. Yet, justice also requires that this court, indeed all courts, must never provide succor to litigants and their counsel who exhibit scant respect for rules of procedure. Rules of procedure and timeliness serve to make the process of adjudication fair, just, certain and even-handed. Under the guise of doing justice through hearing matters on their merit, courts cannot aid in the bending or circumventing of these rules and shifting goal posts, for while laxity in application of the rules may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. A fairly well established and consistent corpus Juns on the effects of

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[23] *Access Bank (Z) Limited v Group Five/Zcon Business Park Joint Venture (sued as a firm) SCZ/8/52/2014*

> ***failure to comply with rules of court exists in this jurisdiction.....*** (emphasis mine)

I remain mindful that the Applicant had alleged, albeit after failing to comply with the Unless Order, that this matter is statute barred. I ruled that the evidence raised during the preliminary hearing was murky and unclear and I said that, *"in this particular case I find that there are many issues that require clarification to enable the court to do justice as required by Order 3 rule 2 HCR, this can only be done by receiving evidence from witnesses."* The parties seemed satisfied with the ruling as there was no appeal against it. It follows that the issue regarding the allegation that the matter was statute barred should have been pleaded in the Defence which was never filed.

The Applicant had the responsibility to follow up on its case and was always in a position to do something about its Counsel's lack of action in this matter. The Applicant slept on its right to file a Defence and also slept on its right to make the current application within a reasonably short time after falling into default. Counsel for the Plaintiffs cited the case of **Saheen Investments v Triddle General Dealers & Others**[24] where Nyambe J, SC cited Lord Camdan in the English case of **Smith v Clay**[25];

> ***"A court of equity which is never active in relief against conscience or public convenience, has always refused its aid ..... where the party has slept upon its rights, and acquiesced for a great length of time, nothing can force this court into activity, but conscience, good faith and reasonable diligence; where these are wanting, the court is passive and does nothing."***

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[24] *Saheen Investments v Triddle General Dealers & Others 2010/HPC/0112 at P. R. 9 (copy of Ruling provided).*
[25] *Smith v Clay (1767) 3 Bri.ch.cc 639*

The delay in filing the defence is compounded by the fact that trial has already begun and the Plaintiffs' first witness has already testified. I agree with Mr. Chibangula that allowing the Applicant to file its defence at this stage would be extremely irregular and prejudicial to the Plaintiffs. He cited several authorities in this regard which I shall not repeat suffice to state that allowing a party to file its defence after trial has commenced disadvantages those against whom the defence shall be deployed and should only be allowed, if at all, where special circumstances exist and where the potential prejudice can be completely purged.

Though as sad as the Applicants predicament might be, as was said in the case of **Zambia Revenue Authority v Post Newspapers Limited**[26] the court is expected to steer clear of sympathy;

> ***"...Courts should not be swayed by sympathy into making moral judgments. We wish to add that such judgments deviate from the Rule of Law, the principle which ensures consistency, certainty, uniformity, fairness in the delivery of justice."***

Even though the failings of the Applicants Counsel should have no impact on the Plaintiff, the Applicant is however not left totally stranded because, if it is as alleged, that their former Counsel is responsible for their predicament, they may seek recourse from him. In the case of **Industrial Finance Company Limited v Jacques & Partners**[27] it was held as follows;

> ***(i) Where a lawyer has instructions, he has a professional duty to protect his client so that where it is shown that the advocate has failed to exercise his duty to the cost of***

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[26] *Zambia Revenue Authority v Post Newspapers Limited SCZ/36/2016*
[27] *Industrial Finance Company Limited V Jacques & Partners (1981) Z.R. 75 (H.C.)*

his client, the lawyer must make good and pay for that damage.

On the same issue, in the case of **New Horizon Printing Press Limited v Waterfield Estates Limited Commissioner of Lands**[28] Dr. Matibini SC, J, as he then was, referred to the book **Jackson and Powell, on Professional Liability**[29] as follows;

"Once proceedings are underway, the claimant's solicitor has a duty to prosecute the action with reasonable diligence. If therefore, the action is struck out for delay such as failing to comply with time limits, he will have no defence to an action for breach of duty, unless the client has caused or consented to the delay. It appears that delay by counsel does not afford the solicitor a defence. If counsel is dilatory, the solicitor should regularly chase up, and if no response is forthcoming withdraw his instructions, and pass them to another barrister "for a more ready response....",

In the same case Dr. Matibini SC, J, cited Lord Denning M.R.'s words in the case of **Allen v Sir Alfred Me Alpine and Sons Limited and Another**[30] as follows:

"All through the years men have protested at the law's delay and counted it as a grievous wrong hard to bear. Shakespeare ranks it among the whips, and scorns of time. Dickens tells how it exhausts finances, patience, courage, hope. To put right this wrong, we will in this Court do all in our power to enforce expedition: and, if need be, we will

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[28] *New Horizon Printing Press Limited v Waterfield Estates Limited Commissioner of Lands (2012) ZR 268*
[29] *Jackson and Powell, on Professional Liability[29], Seventeenth edition (London, Sweet and Maxwell, 2012) paragraph 11 198,at page 850.*
[30] *Allen v Sir Alfred Me Alpine and Sons Limited and Another [1968]2Q.B.229, 245*

strike out actions when there has been excessive delay. This is a stern measure. But it is within the inherent jurisdiction of the Court. And the rules of Court expressly permit it. It is the only effective sanction they contain. If a plaintiff fails within the specified time to deliver a statement of claim or to take out a summons of direction, or set down the action for trial, the defendant can apply for the action to be dismissed."

I would hasten to add that the same applies to an errant Defendant. In casu, over and above inordinate delay in filing its defence, the Applicant has not provided an acceptable reason for the failure to do so. In the premises the Applicants' application is dismissed with costs to the Plaintiffs.

Dated at Lusaka this 28th **day of February, 2017**

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M. M. KONDOLO, SC

JUDGE