IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 92/2009

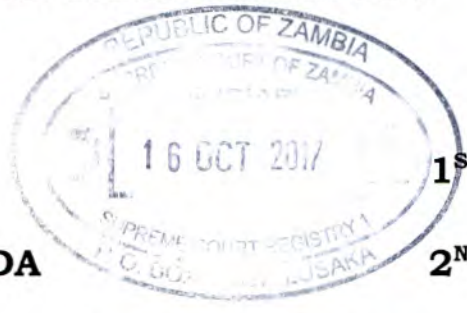
HOLDEN AT LUSAKA

(*Civil Jurisdiction*)

BETWEEN:

STANDARD CHARTERED BANK ZAMBIA PLC APPELLANT

AND



WISDOM CHANDA 1ST RESPONDENT

CHRISTOPHER CHANDA 2ND RESPONDENT

Coram: Hamaundu, Wood, Malila, Kabuka and Mutuna JJS.

On 26th September, 2017 and 16th October, 2017.

For the Applicant: *Mr. K.M.G. Chisanga - KMG Chisanga Advocates*

For the Respondents: *Mr. E.B. Mwansa SC – EBM Chambers*

RULING

WOOD, JS, delivered the Ruling of the Court.

CASES REFERRED TO:

(1) *Pule Elias Mwila and others v ZSIC Limited, SCZ Judgment No. 35 of 2015.*

(2) *Kingsley Lilamono v Mary Fulilwa Appeal No. 119 of 2014.*

(3) *Topline Shoes Limited v. Corporation Bank (2002) 6 SCC 33.*

(4) *Stanley Mwambazi v. Morrester Farms (1977) ZR 108.*

(5) *Zambia Revenue Authority v. Jayesh Shah SCZ/10/2001.*

(6) *Analtika Business Solutions Limited v Barclays Bank Plc (SCZ No. 8/49/2009).*

(7) *Nahar Investments Limited v Grindlays Bank International (Zambia) Limited (1984) ZR 81.*

(8) *Post Newspapers and others v CBU Council and others (Appeal No. 84 of 1997).*

(9) *Chibote Limited and others v. Meridien Biao Bank (Zambia) Limited (In Liquidation) ZR (2003) 76.*

(10) *Trinity Engineering v. Zambia National Commercial Bank Limited (1995-97) ZR 166.*

(11) *University of Zambia v. Jean Margaret Calder (1998) ZR 48.*

(12) *Ruth Kumbi v Robinson Kaleb Zulu SCZ Judgment No. 19 of 2009.*

Legislation referred to:

(1) *Section 3, Rule 12 (1), 48(5) and 78 of the Supreme Court Rules Cap 25 of the Laws of Zambia.*

Other works referred to:

(1) *Orders 3/5/9, 3/5/12 and 3/6/2 of the Rules of the Supreme Court 1999 Edition.*

(2) *Dictionary of Law, 2009 Edition.*

(3) *Black's Law Dictionary, 9th Edition.*

(4) *Practice Direction No.1 of 2013.*

This is a motion made pursuant to Rule 48(5) of the Supreme Court Rules Cap 27 against a judgment of a full bench of this Court delivered on 5th May, 2014 dismissing an appeal on a technicality.

Ordinarily, we would have immediately dismissed the motion on 23rd January, 2017, on the ground that it was heard by a full bench but we were persuaded by Mr. Chisanga's argument that even though it was a full bench, it had sat to decide an interlocutory matter and did not deal with the merits of the appeal for the matter to have been considered as finally determined. We increased the panel of judges to five and heard the motion de novo on 26th September, 2017.

It is necessary to give a brief background leading to this motion in order to appreciate the applicant's dissatisfaction with Selected Judgment No. 18 of 2014 of 5th May, 2014, the judgment from which this motion arose.

The applicant had lodged an appeal against a decision of the High Court sometime in 2009. The appeal was scheduled to be heard on 24th April, 2012 but the applicant was not ready as it had not filed its heads of argument. On account of this, the appeal was adjourned sine die with liberty to restore on condition that the applicant paid the respondents' costs and filed its heads of argument. After protracted correspondence and taxation which was

abandoned, the applicant paid the respondents' costs in the sum of K20,000.00 on 11th October, 2012. On 11th December, 2012, the applicant's advocates informed the respondents' advocates that they were applying to restore the appeal. On 26th April, 2013, the respondents filed a motion to dismiss the appeal for want of prosecution. The applicant then filed a motion to restore the matter to the active cause list on 5th July, 2013. The respondents did not oppose the application to restore. Both applications were scheduled for hearing on 24th July 2013. The Court decided to hear the application to dismiss first and granted that application. The Court gave two reasons for dismissing the application to restore. The first was that the appellant's appeal was placed on an "unless" order the moment it was adjourned sine die with liberty to restore upon payment of costs before the appeal was to be restored. The second was that the appellant had failed to apply to restore the appeal and sought to do so more than sixty days after the respondents had filed the motion to dismiss the appeal for want of prosecution. The Court agreed with the grounds advanced in support of the motion to dismiss for want of prosecution and dismissed the motion to restore.

Several grounds have been advanced in support of this motion to persuade us to discharge or reverse the judgment. The first ground is that the interpretation of the order dated 24th April, 2012 adjourning the appeal sine die with liberty to restore, conditional upon the appellant paying the costs of the respondents so far in this Court and filing its heads of argument, as an "unless" order was itself erroneous. The second ground is that the decision to dismiss the appeal for want of prosecution, in the face of the evidence that the appellant had fully complied with the conditions at the instance of adjourning the appeal sine die with liberty to restore, was a miscarriage of justice and a radical departure from the established principle that matters must be heard on their merits. The third ground was that the Court had no jurisdiction to entertain and hear the application to dismiss the appeal for want of prosecution when the matter was not on the active cause list. The last ground was that it was improper for the Court to have dismissed the appeal in the light of the respondents' non-objection to restore the matter to the active cause list.

When the matter was heard on the 26th September, 2017, Mr. Chisanga quite rightly informed the Court that no leave for

extension of time pursuant to Rule 12 of the Supreme Court Rules was obtained prior to pursuing this motion. He attributed this to the predicament he found himself in because the judgment was not served nor read to the parties. In addition to this anomaly he was also pursuing the registry staff to have a corrected version of the judgment. Because of these events, he was unable to file the motion within 14 days in accordance with Rule 48(1) of the Supreme Court Rules. Again we pause here to state that the absence of leave to extend time in a proper case is fatal as this Court is not clothed with jurisdiction, even inherent jurisdiction, to hear a motion for which no leave has been obtained. We have been consistent on this point as can be seen from our decision in *Pule Elias Mwila and others v ZSIC Limited*[1] and in the more recent case of *Kingsley Lilamono v Mary Fulilwa*[2]. We would have again dismissed this motion peremptorily but for reasons which will become apparent later on in this ruling.

With respect to the first ground, Mr. Chisanga submitted that contrary to the observation of the Court that the appellant had clearly failed to comply with the "unless" order before the application to dismiss was made by the respondents, there is

nowhere in the affidavits exchanged where it shows that the appellant failed to comply with the "unless" order. He contended that the classification of the order adjourning the matter sine die with liberty to restore was fallacious. He submitted that the natural and ordinary meaning of the phrase adjourn sine die is, according to the Dictionary of Law, 2009 edition at page 467 *"adjourning the hearing of the case indefinitely without a further hearing date having been allocated."* In Black's Law Dictionary, 9th Edition, sine die is defined as *"to end the deliberative assembly or a court session without setting a time to reconvene."* He pointed out that in circumstances where a matter is adjourned sine die with liberty to restore, the delay by the party in whose favour the order was made to seek restoration cannot constitute a defect. Further, a matter that is adjourned sine die with liberty to restore can be restored by either party at any time that is appropriate. That is what the interest of justice in any court case demands. The interpretation of the order adjourning the appeal sine die as an "unless" order and the classification of the delay in seeking restoration on the part of the applicant as "a defect" were an embodiment of unnecessary ingenuity as the Court has a duty to interpret rules of procedure in

a fashion that advances the cause of justice and not to defeat the cause of justice as was held in the case of *Topline Shoes Limited v. Corporation Bank* [3].

The respondents argued that the Court had correctly interpreted the sine die adjournment as an "unless" order on condition that the applicant paid the respondents' costs and filed its heads of argument upon paying the costs. The third condition, according to the respondents, was that upon paying costs and filing its heads of argument, the applicant was to restore the appeal to the active cause list. No explanation was given by the respondents how the heads of argument would be filed before the appeal was restored to the active cause list.

The respondents have argued that the applicant could have applied to restore its appeal to the active cause list within thirty days from the date it paid the agreed costs; that the applicant took eight months to apply to restore the matter by which time the respondents had applied to dismiss the matter for want of prosecution. Further, that the applicant did not give a plausible reason for not applying to restore the appeal before the respondents

filed a motion to dismiss the appeal. It was, according to counsel for the respondents, therefore appropriate to hear the respondents' motion to dismiss the appeal first because it was filed earlier. The route taken by the Court of hearing the respondents' motion first was, according to the respondents, suitable and reasonable as the applicant had neglected to file a motion to restore the matter in time.

In the second ground, the applicant has argued that precedents that have been developed in civil procedure in Zambia show that where a party commits a procedural default, the court does not thereby prevent such party from having its matter determined on its merits and this is particularly so where such party has taken steps to remedy the consequences of its default; that if the court deems it fit, it condemns that party to an order for costs as opposed to dismissing the matter. It was further submitted that the applicant had met the two conditions set by the court namely to pay the respondents' costs and to file the heads of argument. As such there was no basis to dismiss the applicant's application to restore the matter to the active cause list. The applicant argued that dismissal of the appeal on the grounds stated

in the judgment of the Court was contrary to the long established principles of civil procedure enunciated in the cases of *Stanley Mwambazi v. Morrester Farms*[4] and *Zambia Revenue Authority v. Jayesh Shah*[5] which held that cases should be decided on their substance and merit.

The respondents countered this argument with the argument that the decision to dismiss the appeal for want of prosecution was not a miscarriage of justice because the applicant did not fully comply with the conditions applicable when the appeal was adjourned sine die with liberty to restore. The respondents repeated their argument that the applicant had itself to blame as it had slept on its rights and only applied to restore the appeal after the application to dismiss had been filed. They relied on our decision in the case of *Analtika Business Solutions Limited v Barclays Bank Plc*[6] in which we took a very dim view of parties who apply for extension of time outside the time provided in the rules. They also relied on the case of *Nahar Investments Limited v Grindlays Bank International (Zambia) Limited*[7] in which this court held that applicants who sit back until an application to dismiss their appeal is filed before they make their own application for

extension of time, do so at their own peril. The respondents also cited the case of *Post Newspapers and others v CBU Council and others*[8] in which this court held as follows:

> *"While parties must generally be heard on merits, litigants who sleep on their rights must expect the wheels of justice to turn in their absence for the sake of expedition and finality."*

According to counsel for the respondent, the enduring lesson to be gleaned from these authorities is that parties must comply with procedural requirements for extensions of time and should not do so after the time has elapsed or an application to dismiss has been set in motion as their application is more often than not going to be dismissed.

In the third ground, the applicant has argued that since the matter was adjourned sine die, it was removed from the active cause list and could not be reactivated without restoring it first. An application to restore the matter was therefore a condition precedent to any subsequent proceedings before the Court.

In response to the third ground, the respondents repeated their argument in the second ground that the appeal had been

adjourned sine die with liberty to restore on condition that the applicant paid the costs and filed its heads of argument and then applies to restore the matter to the active cause list.

The last ground filed in respect of the notice of motion was that the notice of motion to restore the matter to the active cause list was not opposed in any way by the respondents. All that the respondents wanted were their costs. The Court should not have ignored the imperative steps taken by the applicant in compliance with the Court order in preference to the respondents' application to dismiss the appeal which was not even substantiated. The applicant argued that since the respondents had not opposed the application to restore the appeal to the active cause list and further considering that the application to restore the matter was the only application competently and properly before the Court, the Court was duty bound to order a restoration of the appeal in view of Rule 12 (1) of the Supreme Court Rules Cap 27 which deals with applications made out of time.

The respondents on the other hand argued that they did not object to having both motions heard at the same time. That was

why they did not withdraw their motion to dismiss the appeal as they wanted it to be heard first. They argued that the Court exercised its jurisdiction in a proper manner by hearing the respondents' motion first because it was filed earlier; that the applicant was given an opportunity by this Court to be heard on the merits when the matter was adjourned sine die with liberty to restore but the applicant did not comply with the conditions and, therefore, has itself to blame. State Counsel also submitted that the applicant only filed its application after the respondents had filed their application to dismiss the appeal for want of prosecution. As such, it could not rely on Rule 12(1) of the Supreme Court Rules which deals with extensions and late applications. State Counsel then referred us to Practice Direction No. 1 of 2013 and argued that the appellant had lost the opportunity to have its matter heard as that Practice Direction specifically includes appeals or cross-appeals which had been adjourned sine die to be restored within 60 days with effect from 20th October, 2013 failing which they shall automatically stand dismissed finally. In the circumstances, the respondents urged us to dismiss the motion as it was devoid of any merit.

We have considered the motion, the affidavit in support, the authorities cited and the oral submissions made by counsel.

We must first of all dispel the notion on the need for obtaining leave. Rule 48(1) of the Supreme Court applies to a decision of a single judge of this Court and does not contemplate a final decision by a panel of three or more judges of this Court. The application by the appellant to this Court can only be described as *sui generis* as it is not provided for in under Rule 48 for the simple reason that Rule 48 envisages a situation where an application is first made to a single judge and then later, escalated to the Court. It does not provide for an appeal from a panel of three to a different panel of three members or a panel of five members. Hence, the absence of a time limit. This does not however mean that the absence of a time limit validates the application as other factors have to be considered as well, as will be seen later in this ruling.

In this case, the Court was faced with a situation where the respondent applied to have the appeal dismissed because of the failure by the applicant to restore the appeal to the active cause list after paying costs. The applicant, two months later, applied before

the hearing of the application to dismiss, to have the matter restored.

The guidance given to courts in such situations is set out in O.3/5/12 RSC which states as follows:

> *"Two principles are to be considered. The first is 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. The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on the merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. Neither principle is absolute, but the court's practice has been to treat the existence of such prejudice as a crucial and often decisive factor. In the majority of cases, it will be appropriate for the court to hear both summonses together so that the case is viewed in the round. A rigid mechanistic approach is inappropriate and accordingly there can be no general rule that the plaintiff's application should be heard first with dismissal of his action as an inevitable consequence if he fails to show a good reason for his procedural default – the approach adopted by another Court of Appeal in Price v. Dannimac Ltd (1990) The Independent, August 3.*
>
> *On the other hand, cases involving procedural abuse or questionable tactics may call for special treatment as will cases of contumelious default or where a default is repeated or persisted in after a peremptory order. But in the ordinary way and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant."*

The arguments advanced by State Counsel Mwansa have not shown any prejudice that would have been caused to the respondents if the appeal was restored to the active cause list. The main thrust of his argument was that there was a period of about eight months from the time the costs were paid to the time the applicant filed its application to restore the matter to the active cause list.

What has been our position on requests or applications by parties who have in the past been dissatisfied with our final judgments? Most litigants have contrived all manner of arguments under the guise of Rule 78 of the Supreme Court Rules popularly known as the slip rule to have judgments they are not happy with corrected on the ground that there are clerical errors by the Court or a judge arising from an accidental slip or omission. The most liberal and ingenious interpretations have been attempted, all with a view to reopen cases which have been finally decided. We have maintained the position as we held in *Chibote Limited and others v. Meridien Biao Bank (Zambia) Limited (In Liquidation)*[9] that an appeal determined by this Court will only be reopened where a party through no fault of his own has been subjected to an unfair

procedure and will not be varied or rescinded merely because a decision is subsequently thought to be wrong. In *Trinity Engineering v. Zambia National Commercial Bank Limited*[10] we held that it was not permissible to simply use Rule 78 to seek to review and set aside a previous judgment of this Court.

The issue we have to seriously consider in this motion is whether the applicant through no fault of its own was subjected to an unfair procedure when the Court decided to determine the application to dismiss in the face of the application to restore. It seems to us that the Court was persuaded by the affidavits that the appellant's appeal was placed on an "unless" order the moment it was adjourned sine die with liberty to restore upon payment of costs before the appeal was to be restored. While we do not agree with this interpretation for a number of reasons which we shall illustrate shortly, we must emphasize that on its own, this decision cannot be set aside simply because it is a wrong decision. The principle of finality to litigation demands that only in extremely limited circumstances can a decision of this Court be reopened. We take the view that the appeal was not placed on an "unless order" because there was no time limit set for taking any step from the

time the costs were paid. Our reading of Order 3/5/9 RSC which deals with "unless" orders, shows that in an "unless" order a party is required to do a certain act or acts within a specified time. It should be noted that even if the "unless" order is made, the court nevertheless retains the power subject to stringent conditions, to extend the time within which such act should be complied with. No specific time was set when the matter was adjourned sine die with liberty to restore. The case of *University of Zambia v. Jean Margaret Calder*[11] should be distinguished from this appeal on the ground that in the *Calder* case, a single judge of this Court had given the appellant fourteen days within which to file its appeal but the appellant failed to do so. The case of *Ruth Kumbi v Robinson Kaleb Zulu* [12] referred to in the judgment also refers to parties complying with the time limit stipulated in an "unless" order. In the present case there was no time frame prescribed in the order adjourning the matter. It follows, in our view, that where no time limit is set and any other conditions are complied with, it cannot be an "unless" order with specific reference to time. What should then be considered in such circumstances is the guidance given in Order 3/5/12 RSC with regard to dismissal for want of prosecution.

The guidance given in Order 3/5/12RSC is that while rules of court and the associated rules of practice must be observed, a party should not, in the ordinary way be denied an adjudication of his claim on the merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. Prejudice caused is treated as a crucial and often decisive factor in cases of this nature. No prejudice whatsoever to the respondents has been shown in this appeal. In any case, the respondent did not even oppose the application to restore. The only argument advanced by the respondents is that the applicant ignored or neglected to restore the appeal. Even though the judgment states that both motions were considered, they were not viewed in the round as it were. We say so because the result of the motion to dismiss was in the Court's view the decisive factor. This in our view immediately tilted the decision in favour of the respondents without fully addressing the arguments advanced by the appellant, namely that there was no time limit set for the payment of the costs or indeed the application to restore and file in the heads of argument. Even though there was some delay on *the* part of the applicant in applying to restore, no prejudice was

shown to persuade the Court to decide in favour of the respondent. However, all these valid reasons which would have formed the bedrock for launching an application to set aside the ruling of a single Judge pale into insignificance as this motion is essentially a disguised appeal against the decision of three Judges of this Court. Section 3 of the Supreme Court Act provides that when this Court is determining any matter, other than an interlocutory matter, it shall be composed of such uneven number of Judges, not being less than three. The determination of any question before the Court shall be according to the opinion of the majority. The three judges who sat earlier all agreed that the matter should be dismissed. There is no provision in the Act for a dissatisfied party to escalate his grievance to a panel of five, seven, nine, eleven or thirteen judges even if he feels that a decision of a panel of three judges is patently wrong. We therefore agree with State Counsel Mwansa, that litigation should end at some point and should not continue *ad infinitum*.

Mr. Chisanga had in his oral submissions raised the argument that Rule 48 (5) of the Supreme Court Rules should be interpreted to mean as including an appeal from a decision of three

judges. We do not agree with his interpretation. Rule 48(5) reads as follows:

> *"(5) An application involving the decision of an appeal shall be made to the Court in like manner as aforesaid, but the proceedings shall be filed in thirteen hard copies and an electronic copy and the application shall be heard in Court unless the Chief Justice or presiding judge shall otherwise direct."*

Rule 48 (5) uses the words "*...involving the decision of an appeal...*" The word involving means to include as a necessary circumstance, condition or consequence. When this meaning is applied to Rule 48(5) it means the application being made is in connection with the decision of an appeal. An example would be an application to correct clerical errors and accidental slips or omissions pursuant to Rule 78 which does not necessarily mean that a party is appealing against a decision of a panel of three. Unlike Rule 48(4) which makes reference to *"Any person aggrieved by any decision of a single judge who desires to have such decision varied, discharged or reversed by the Court under paragraph (b) of section four of the Act..."*, Rule 48(5) does not do so because it does not envisage an appeal from a panel of three judges. We therefore reject the argument that Rule 48(5) covers applications from a panel

of three judges. Mr. Chisanga had also advanced an argument to the effect that the Court had no jurisdiction to entertain and hear the application to dismiss the appeal for want of prosecution when the matter was not on the active cause list. This argument cannot succeed against a party who has applied to dismiss a matter for want of prosecution because an application to dismiss the action is not a proceeding within O.3.r.6 RSC which in certain cases requires a month's notice of intention to proceed and further a summons to dismiss is the proper method of terminating such delays.

We have perused Practice Direction No. 1 of 2013 and note that it was issued on 20th October, 2013. Item 2 of the Practice Direction does indeed include appeals and cross appeals which were adjourned sine die and makes it mandatory for such appeals to be restored within 60 days from 20th October, 2013. The difficulty we have in accepting State Counsel's argument in relation to the Practice Direction is that this matter was heard by a panel of three judges on 24th April, 2013 while the Practice Direction is dated 20th October, 2013 and the judgment was delivered on 5th May, 2014. The matter cannot therefore qualify to be a matter which had been adjourned sine die within the meaning of the

Practice Direction as it was pending judgment at the time the Practice Direction was issued. We therefore do not accept the argument that non-compliance with the Practice Direction was fatal given the circumstances.

It is for the above reasons that we take the view that this motion was ill fated. The motion is dismissed with costs to the respondents to be agreed or taxed in default of agreement.

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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A.M. WOOD
SUPREME COURT JUDGE

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M.MALILA, SC
SUPREME COURT JUDGE

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J.K. KABUKA
SUPREME COURT JUDGE

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N.K. MUTUNA
SUPREME COURT JUDGE