IN THE COURT OF APPEAL FOR ZAMBIA **CAZ/08/250/2017**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

REPUBLIC OF ZAMBIA
COURT OF APPEAL
28 NOV 2017
CIVIL REGISTRY 1
P.O. BOX 50067, LUSAKA

B E T W E E N :

SEVENTH-DAY ADVENTIST ASSOCIATION IN ZAMBIA-REGISTERED TRUSTEES **APPELLANT**

AND

PASTOR MUMBA NSANTA **RESPONDENT**

Before Justice F. M. Chishimba in Chambers.

For the Appellant : Mr. G. Nyirongo of Messrs Nyirongo & Co whose Agents are Messrs SLM Legal Practitioners
For the Respondent : Mr. C. Sianondo of Messrs Malambo & Co

R U L I N G

CASES REFERRED TO:

1. Chola Chama Vs. ZESCO Limited SCZ Judgment No. 20 of 2008
2. Kitwe City Council Vs. William Ng'uni (2005) Z.R. 57 (S.C.)
3. Grindlays Bank International (Z) Limited Vs. Nahar Investments Limited (1990-1992) ZR 86
4. Sonny Paul Mulenga and Others Vs. Investrust Merchant Bank Limited (1999) Z.R. 101
5. Philip Muntantika and Another Vs. Kenneth Chipungu SCZ Judgment No. 13 of 2014
6. Twampane Mining Co- operative Society Limited Vs. E and M Storti Mining Limited (2011) ZR
7. Dr. Sylvester Mashamba Vs. The Council of the Copperbelt University SCZ/8/262/2011
8. D.E Nkhuwa vs Lusaka Tyre Services Limited (1977) ZR 43 (SC)
9. Stanbic Bank Zambia Limited vs Savenda Management Services Limited (2016) CAZ/08/040

LEGISLATION AND OTHER WORKS REFERRED TO:

1. The Court of Appeal Rules, Statutory Instrument No. 65 of 2016

The Appellant seeks leave of the Court to file the application for extension of time to appeal out of time made pursuant to **Order 13 Rule 2 of the Court of Appeal Rules, Statutory Instrument Number 65 of 2016**. The Applicant further sought a stay of execution of Judgment on assessment made pursuant to **Order 10 Rule 5 of the Court of Appeal Rules, Statutory Instrument Number 65 of 2016**. The applications were supported by affidavits dated 18th September, 2017 and 25th September, 2017.

The Respondent obtained Judgment on assessment in which he was awarded the sums of ZMW1, 695, 505.77 and ZAR 93, 430.28 stemming from a Judgment dated 25th April, 2016. The Appellant engaged new advocates, who advised that they ought to have appealed against the Judgment of the Court which ordered the reinstatement of the Respondent, payment of all his salaries and perks during the period of his absence upto the date of the actual reinstatement. It was deposed that the Appellant has been advised

by its current advocates that the order made by the lower court amounts to unjust enrichment.

The Applicant stated that it did not apply to appeal on time owing to the fact that its previous advocates did not guide the Appellant on the law, to the effect that an employee cannot be paid for the period they did not work. Since the law is settled that an employee cannot be paid for the period not worked for, the Appellant's appeal is meritorious. The Appellant therefore, seeks the indulgence of the Court to stay the execution of the Judgment on assessment pending the determination of the application to appeal out of time.

The Respondent filed into Court a combined affidavit in opposition. It was stated that the Appellant failed or neglected to appeal against the Judgment of the lower Court but instead applied to settle the Judgment debt in installments. The lower Court granted the sought order and the Appellant was given a period of 6 months within which to pay the Judgment debt. The Appellant ought to have made its final payment on or by 31st January, 2017. No single payment was made by the Appellant. Further, an order

was made to the effect that the matter proceeds to assessment by the Deputy Registrar.

It was deposed that the Appellant now seeks to appeal against the initial Judgment despite the fact that there has been a Judgment on Assessment. Further, that the allegation that the delay to lodge the appeal was as a result of the advice of its then Advocates cannot not be a reason to allow the application as the relationship between the Appellant and its Advocates is not a concern of the Court.

It was stated that the Appellant had made an application to file its appeal out of time which was declined with leave to appeal in a Ruling dated 11th July, 2017. The Appellant ought to have appealed against the decision of the lower Court within 14 days. The Appellant only made the application on 18th September, 2017. In addition, that the Judgment that the Appellant seeks to appeal against was delivered about 17 months ago.

The Respondent stated that the application before Court is tantamount to an abuse of court process. The Appellant merely seeks to avoid the Judgment of the Court below and the resultant

assessment by the Deputy Registrar. Further, that the applications are meant to deprive the Respondent of the fruits of the Judgment. In addition, that the Appellant's appeal has no prospects of success as the Respondent was properly reinstated by the court below.

It was further stated that the applications are improperly before the Court as the issues raised now ought to have been raised in the main appeal and not on a renewal of the application before the Court. The Court was urged to dismiss the applications and discharge the order for stay of execution.

In reply, the Appellant stated that though the intended appeal was made after the expiration of the 30 day period, the Courts frown upon the paying of an employee for the period not worked. Further, that the Appellant could not make any payments as per the order dated 25th July, 2016 owing to the fact that the Respondent served the Appellant with an application for assessment which culminated into the Judgment on assessment.

The Appellant has not appealed against the Judgment on assessment owing to the fact that it intended to appeal against the main Judgment. Further, that the issues raised by the Appellant

are points of law which can be raised at any stage of the proceedings. In addition, that the Appellant's appeal is meritorious. Further that the applications by the Appellant are not meant to frustrate the Respondent's eagerness to enjoy the fruits of his judgment but is simply meant to ensure that the judgment complies with the case law set by the Supreme Court.

When the matter came up for hearing, Counsel for the parties made viva voce submissions. Counsel for the Appellant, Mr. Nyirongo submitted that the Supreme Court in the cases of ***Chola Chama Vs. ZESCO Limited*** [1] and ***Kitwe City Council Vs. William Ng'uni*** [2] stated that an employee ought not to be paid for a period not worked for. Counsel argued that the Court ought to consider the application despite it coming late in the day owing to the fact that it seeks to cure an illegality. Counsel argued that this was the view taken by the Supreme Court in ***Grindlays Bank International (Z) Limited Vs. Nahar Investments Limited*** [3].

With regards the application for stay of execution, Counsel for the Appellant cited the case of ***Sonny Paul Mulenga and Others Vs. Investrust Merchant Bank Limited*** [4] in which the Supreme Court stated that before a stay of execution is granted the Court

ought to preview the prospects of success. It was argued that the appeal has prospects of success warranting the grant of the sought Orders.

In response, Counsel for the Respondent, Mr. Sianondo, argued that the Court ought to dismiss the applications as the reason advanced for the delay allege incompetence on the Appellant's previous advocates. Counsel for the Respondent argued that dealings between a lawyer and his client is not a concern of the Court. As authority, Counsel cited the decision of the Supreme Court in ***Philip Muntantika and Another Vs. Kenneth Chipungu*** [5]. Counsel further argued that the delay in making the application by the Appellant is inordinate. I was referred to the case of ***Twampane Mining Co- operative Society Limited Vs. E and M Storti Mining Limited*** [6] where the Supreme Court stated that applications for extension of time ought to be made promptly. I was also referred to the case of ***Dr. Sylvester Mashamba Vs. The Council of the Copperbelt University*** [7] where the Supreme Court refused to restore an appeal following a delay of 6 months.

Counsel argued that the case of ***Chola Chama Vs. ZESCO Limited*** [1] does not support the Appellant's applications. Further,

that the case of ***Kitwe City Council Vs. William Ng'uni*** [2] is inapplicable herein as it did not deal with a reinstatement. The Court was urged to dismiss the applications with costs.

Counsel for the Appellant in response contended that the blame is not being placed on the Appellant's previous advocates but on the fact that an illegality was discovered at a late stage. Further, that the **Court of Appeal Rules** under **Order 13 Rule 3 (2)** allow a party to make an application despite being out of time.

I have considered the application for leave to file the application for extension of time within which to appeal and for a stay of execution. I will first determine the application for leave to file an application for extension of time within which to appeal as the latter application is dependent on the outcome of the former.

On the 25th of April, 2016, the High Court delivered a judgment in favour of the Respondent ordering that he be paid salary and perks during the period of his absence up to the date of reinstatement. The parties proceeded for assessment and judgment on assessment was delivered on 8th May, 2016. The applicant then applied to pay the judgment sum within six months. By Order of

the Court dated 25th July, 2016 the applicant was given six months within which to settle the judgment sum. The Applicant now seeks leave of the Court to file the application for extension of time to appeal out of time. The basis being that their previous Advocates had not advised them accordingly with effect to the principle of law on payment of salaries and perks for during the period of absence up to reinstatement.

It is trite law that the Court has the discretional power to grant an order for extension of time within which to appeal. The Court will only grant such an order upon being furnished with sufficient reasons. In the case of ***D.E Nkhuwa vs Lusaka Tyre Services Limited*** [8] the Supreme Court stated that;

> ***"The granting of an extension of time within which to appeal is entirely in the discretion of the Court, but such discretion will not be exercised without good cause. In addition to the circumstances of the delay and the reasons therefore which provide the material on which the Court may exercise its discretion another most important factor is the length of the delay itself"***

The reasoning of the Supreme Court was echoed by this Court in the case of ***Stanbic Bank Zambia Limited vs Savenda Management Services Limited*** [9] where the Court stated that;

"Therefore, in determining an application for extension of time within which to appeal, the Court will have regard to the circumstances of the delay, the reasons for the delay, and the length of the delay. Further, it will in certain instances look at the merits of the proposed appeal."

It is trite law that a successful litigant must only be denied the enjoyment of the fruits of a Judgment on compelling grounds. Though I am vested with the discretion to order a stay of execution, there must be sufficient grounds warranting such an order.

Order **10 Rule 5 of the Court of Appeal Rules** provides that;

"An appeal shall not operate as a stay of execution or of proceedings under the Judgment appealed against unless the High Court, quasi-judicial body or the Court so orders and no intermediate act or proceeding shall be invalidated, except so far as the Court may direct."

The learned authors of **Odgers on civil Court Action 24th Edition at page 460 paragraph 24.47** state that;

"Although the Court will not without good reasons delay a successful Plaintiff in obtaining the fruits of his judgment, it has power to stay execution if justice requires that the Defendant should have this protection."

In respect of the leave sought to file the application for extension of time within which to appeal, I have considered the reasons advanced for the delay. I am of the view that the alleged incompetence of the former Advocates has nothing to do with the Court. It is a professional relationship between a litigant and its Advocates and of no concern to the Court. I echo the sentiments of the Supreme Court in the cited case of ***Philip Mutantika and Mulyata Sheal S. Vs Kenneth Chipungu*** [5] in which it was stated that;

> ***"Although it has also been argued and spiritedly so, if we may say, that the Appellant should not be prejudiced by the default of their Counsel and/or his negligence or incompetence, 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. Hence, it cannot be used as a ground for ordering restoration of an appeal that was dismissed due to absence of the Appellants and their legal Counsel. Surely, the incompetence or negligence of one's legal Counsel cannot be sufficient ground for restoring an Appeal that was dismissed."***

Therefore, the reasons advanced cannot be the basis for granting leave to file the application for an extension of time. Further the conduct of the Applicant in the Court below does not, to me, suggest any desire to appeal.

The facts reveal that upon delivery of the judgment, no appeal was filed. The Applicant instead even participated in the assessment proceedings before the Learned Registrar without indicating dissatisfaction with the judgment subject of assessment. The Applicant further applied to have the judgment sum paid in instalments. Upon failure to meet the deadline, it launched an application for leave to appeal out of time which was refused by the lower Court.

Certainly, a delay of over a year from date of judgment in April, 2016 till date of application for leave to appeal out of time is inordinate delay which I cannot condone.

There must be finality to litigation. Litigants desirous of appealing must do so within the stipulated time frames and extensions to appeal out of time must be made within a reasonable time without inordinate delay. I will therefore not belabor the arguments on the merit of the substantive appeal.

For the foregoing reasons, the application for leave to file application to appeal out of time fails. The ex-parte order of stay of

execution is, without stating the obvious, discharged. Costs to the Respondent.

Dated the 28th day of November, 2017



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Hon. Mrs. Justice F. M. Chishimba

COURT OF APPEAL JUDGE