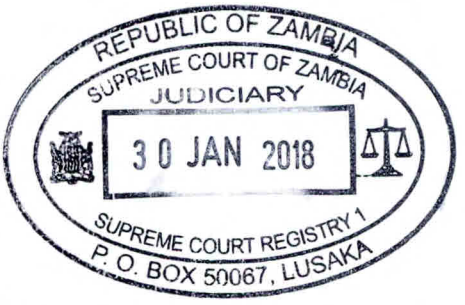
IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. 003/2013**
HOLDEN AT LUSAKA **SCZ/8/355/2012**

(Civil Jurisdiction)

BETWEEN:



INVESTRUST BANK PLC **APPELLANT**

AND

BUILD IT HARDWARE LIMITED **1ST RESPONDENT**

YOUSUFF ESSA **2ND RESPONDENT**

Coram: **Chibomba, Malila, and Kaoma, JJS.**

On 8th October, 2014 and 30th January, 2018

For the appellant: Mr. M. Nchito, SC and Mrs. N. Simachela of Messrs Nchito and Nchito

For the respondents: Mr. M. Zulu of Messrs Makebi Zulu Advocates.

JUDGMENT

Malila, JS, delivered the judgment of the court

Cases referred to:

1. *D. E. Nkhuwa v. Lusaka Tyre Services Limited (1977) Z.R 43.*
2. *Zambia Revenue Authority v. Jayesh Shah (2001) SCZ Judgement No. 10.*
3. *Zambia Revenue Authority v. T and G Transport (2007) ZR (S.C).*
4. *Mobile Zambia Limited v. Msiska (1983) Z.R 86 (S.C).*
5. *Sipalo v. Mundia (1966) Z.R. 105 (H.C.)*
6. *Carmine Safaries Limted and Another v. Zambia National Tender Board and 6 Others (Appeal No. 145/2003).*
7. *Twampane Mining Corporative Limited and E and M Storti Mining (2011) Z.R 67.*
8. *Palata Investments Limited and Others v. Burt & Sinfield Limited and Others (1985) ALL E.R 517.*
9. *Water Wells Limited v. Wilson Samuel Jackson (1984) Z.R 98 S.C.*
10. *Stanely Mwambazi v. Morester Farm (1997) Z.R 108 S.C.*

Legislation referred to:

1. *Rules of the Supreme Court (1999) Order 59/4/17*
2. *Supreme Court Rules, Cap.25 Rule 12 and Rule 50*

We regret the rather inordinate delay in delivering this judgment caused by an administrative lapse on our part.

The appeal is against a ruling of the High Court, rejecting the appellant's application to appeal out of time. The main cause before the High Court was an application by the second respondent, as the judgement debtor, to set aside an intended conveyance or foreclosure of a property and for an order for directions pursuant to Order 2, Rule 2 and Order 88/5/13 of the Rules of the Supreme Court. This application was filed on the 12th of May, 2010, but was only heard on the 7th of August, 2012 as the parties had sought to settle the matter *ex curia,* but failed. The background to the application was elaborated in the affidavits filed in support of the application. The learned Judge delivered his ruling in favour of the respondents on 14th August, 2012 and granted leave to the appellant to appeal. The appellant however failed to do so within the period prescribed.

On 18th October, 2012, the appellant filed into the lower court a summons for leave to appeal out of time pursuant to Rule 12 of the Supreme Court Rules chapter 25 of the laws of

Zambia, supported by an affidavit. Before the learned High Court judge, Mrs. Simachela, learned counsel for the appellant, relied on the averrements in the affidavit. She stated that under Rule 12 of the Supreme Court Rules, the court had power to extend the time within which a party may file a notice of appeal and in exercising such power the court should consider the circumstances of the delay, the length of the delay, and the reasons which provide the material on which the court may exercise its discretion.

The second respondent filed an affidavit in opposition, stating that the reasons given by the appellant for not filing the notice of appeal within the time prescribed were not plausible enough to warrant an order for leave to appeal out of time, as the exploration of the possibilities of an *ex curia* settlement was not a bar to the timely filing of a notice of appeal.

Mr. Zulu, on behalf of the second respondent, augmented the affidavit, stating that the property which had been in the possession of the appellant for the past thirty (30) months had not generated any income, yet the appellant continued to charge interest at commercial rate, rendering the second respondent to be heavily indebted. The learned counsel further argued that the property had deteriorated in value as it had not

been maintained during the period of the appellant's possession of it. According to counsel, granting leave would be to the detriment of the second respondent. It was further submitted that the court ought to be satisfied that the intended appeal had merit and was likely to succeed before it granted leave. He submitted that the appellant did not exhibit a draft copy of the notice of appeal to show that the appeal had merit. Mr. Zulu further submitted that the case of **D. E. Nkhuwa v Lusaka Tyre Services Limited**[1] cited by the appellant, did not apply in this matter as it related to the extension of time which arises in circumstances where the applicant was still within time but would not be able to file process within the stipulated time, and hence the application to extend time. This, he argued, was different from the situation where an application for extension is filed out of time.

After hearing and considering the submissions for and against the application, the learned judge stated that the appellant had not given sufficient reasons for the court to grant leave to appeal out of time. The judge found that there was nothing that prevented the appellant from filling a notice of appeal within the stipulated time while any *ex curia* negotiations were going on. Further, that the applicant did not

show the court any prospects of success of the appeal. The application was accordingly refused.

The appellant, being dissatisfied with the ruling of the learned judge, then appealed raising the following grounds:

1. **The learned Judge in the Court below erred in law and in fact when he held that the reason advanced by the appellant for the application to file a Notice to Appeal out of time was not sufficient to grant the order sought by the appellant.**

2. **The learned Judge in the court below erred in law and fact when he held that he could not grant the application for leave to file a Notice of Appeal out of time because the appellant did not show that it had prospects of success on appeal.**

The appellant filed its heads of argument on 8th January, 2013. At the hearing Mr. Nchito SC, appeared on behalf of the appellant. He relied on the heads of argument wherein it was pointed out that the application to file a notice of appeal out of time was made pursuant to Rule 12 of the Rules of the Supreme Court. Mr. Nchito argued that although the appellant was supposed to file the Notice of Appeal on 28th August, 2012, but only made an application to appeal out of time on 18th October, 2012, there was a good reason for the failure, namely that the parties had engaged in negotiations with the view of resolving the matter out of court, but that such an attempt had

since fallen through. The learned State Counsel relied on our decision in **D. E. Nkhuwa v. Lusaka Tyre Services Limited**[1], where we held 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.**

It was argued further that in exercising such discretion the court must consider the circumstances of the delay and the reasons showing that the delay was not inordinate. Relying on **Zambia Revenue Authority v. Jayesh Shah**[2], State Counsel Nchito argued that the appellant should not be denied an opportunity to have its case decided on substance and merit by determining it merely on a technicality which is curable.

In augmenting the second ground of appeal, State Counsel Nchito alleged that the court below contradicted itself in refusing to grant leave when it had initially granted leave upon recognising that there were meritorious issues which could possibly succeed on appeal.

In response, the learned counsel for the respondents relied on the heads of arguments filed on 2nd October, 2014. He submitted that the proper procedure for applying for leave which has been refused should be to a single judge by way of

summons or motion with accompanying affidavits where necessary as provided for by Rule 50 of the Supreme Court Rules. This Rule essentially provides that leave to appeal against a judgment or order of the High Court may be granted or refused at the time when the judgement is given and if so granted, the party shall proceed to give a notice of appeal. However, in all other cases such an application should be by summons or motion, intituled and filed in the proceedings from which it is intended to appeal. The learned counsel further stated that the Rule provides that the order for the grant or refusal of such leave should be produced as part of the record and in case of a refusal, that order should be produced on the application for leave to appeal. He referred us to **Zambia Revenue Authority v. T and G Transport**[3] and **Mobile Zambia Limited v. Msiska**[4] which elucidate the principles on the application of leave to appeal. For the foregoing reasons, counsel prayed that the application should fail on this procedure point as it was not competently before this Court, since the jurisdiction of this Court is confined to hearing a refusal for grant of leave as a renewed application for leave.

The learned counsel for the respondent then reacted to the first ground of appeal by stating that Rule 12 (1) of the

Supreme Court Rules provides for the powers of the Supreme Court to, with sufficient reason, extend time for making an application. He submitted that according to Rule 12, the power to grant leave is vested in the Supreme Court and cannot be used to move the High Court or be invoked by way of an appeal before this Court. It was contended that the mode of application that is provided for in the circumstances of this case does not require this Court to consider whether or not the lower court erred, but whether the reasons given are sufficient to grant the leave sought. Counsel submitted further that even if this Court considered that this application was competently before it, the discretion to grant leave nonetheless lies with the court and should be exercised only where there is sufficient and satisfactory material before it to warrant the grant of leave. To support this argument, he cited **Sipalo v. Mundia**[5], a High Court decision, and **D. E. Nkhuwa v. Lusaka Tyre Services Limited**[1] which had also been cited by the appellant, where we said that:

> **Where the court has discretion to enlarge time for a procedural step, it will not exercise that discretion in favour of the applicant unless there is some material on which the discretion can be exercised.**

And that:

> **The rules prescribing times within which steps must be taken must be adhered to strictly and practitioners who ignore them will do so at their own peril.**

Based on the above cited authorities, counsel submitted that the question is not whether the delay was inordinate but whether the reasons for such delay were sufficient. He contended that the reason put forward by the appellant was not sufficient and as the lower court rightly found, pursuing a possible settlement was not a bar to filing a notice of appeal.

In arguing against ground two of the appeal, Mr. Zulu cited **Carmine Safaris Limited and Another v. Zambia National Tender Board and 6 Others**[6] where we held that:

> **the court does not make a practice of depriving a successful litigant of the fruits of litigation except where the applicant satisfies the court that there is good reason and that there are reasonable prospects of the applicants success at trial.**

The learned counsel submitted that the court ought to satisfy itself that the appellant has an arguable case. He contended that the appellant had not shown the merits of the appeal or grounds upon which the appeal was based, but instead merely stated that the appeal had merit. This, he argued, is not sufficient material for this Court to consider in granting the application sought.

In response to the argument raised by counsel for the respondent that the application was made under a wrong provision, counsel for the appellant stated that the course of action taken by the appellant under Rule 12 of the Rules of the Supreme Court Rules, was appropriate. He referred us to the case of **Twampane Mining Corporative Limited and E and M Storti Mining**[7], on which he relied for his submission.

We have considered the submissions from counsel for the parties and the authorities cited. The respondent has argued that the application is erroneously before us. The appellant states that this application was made pursuant to Rule 12. We wish to begin by dealing with this point of disagreement.

Rule 12 of the Supreme Court Rules allows this Court to hear an application for extension of time, in this case, within which to apply for leave to appeal. In terms of Rule 50, the High Court may grant or refuse leave to appeal without formal application at the time when judgment is given. Where leave is given, the appellant shall proceed to give notice of appeal in accordance with the provision of Rule 49. Where leave was neither granted nor denied at the time judgement is given, the application for leave shall be by motion or summons, which shall state the grounds of the application, and shall, if

necessary, be supported by affidavit. Clearly this Rule applies when the court which delivered the judgment, grants leave to appeal or when it refuses to grant leave. In the case before us, the learned judge granted leave to appeal against his ruling and the appellant, not having appealed within time, sought leave to file a notice of appeal out of time.

It is not disputed that the ruling upon which the appellant sought leave to appeal out of time was delivered on 14th August, 2012 and leave to appeal was granted at the time of the delivery of the ruling. On 18th October, 2012 the appellants filed an application for leave to file appeal out of time. That application was refused by the learned judge, hence the present appeal.

In our view, this appeal should turn on the question whether or not following the refusal by the High Court to grant leave to appeal out of time the correct procedure as set out in the Rules was followed. Although the parties argued extensively on the question whether or not the reasons given for the delay in lodging the appeal in time were cogent and whether or not the appeal has merit, the real question is whether the appellant should have come to this court by way of appeal, rather than

by way of a renewed application before a single judge of this court for leave to appeal.

The appellant has placed considerable reliance on Rule 12 of the Rules of the Supreme Court which enacts as follows:

> **The court shall have power for sufficient reason to extend time for making any application, including an application for leave to appeal, or for bringing any appeal, or for taking any step in or in connection with any appeal, notwithstanding that the time limited therefore may have expired, and whether the time limited for such purpose was so limited by the order of the court or by these Rules, or by any written law.**

There is no doubt whatsoever that this court has the power to extend time. It is how the court is moved that should matter. It is also pertinent to observe that by section 4 of the Supreme Court, Act chapter 25 of the laws of Zambia, a single judge of this court is empowered to exercise any power rested in the court not involving the decision of an appeal or a final decision in the exercise of its original jurisdiction. This then means that a single judge of this court may grant an order for extension of time.

As regards moving a single judge Rule 17 of the Supreme Court Rules is instructive. It states as follows:

Whenever application may be made to the court or to the High Court, it shall be made in the first instance to the High Court.

An application for leave to file an appeal out of time which is made in terms of rule 50 of the Supreme Court Rules and declined by the High Court, could still be granted by the single judge of the Supreme Court on application made in terms of Rule 17 of the Supreme Court Rules. That means such application will take the form of a renewed application before a single judge. It should not come to the full court by way of appeal from the High Court.

We agree therefore with counsel for the respondent, that upon the High Court declining the application for leave to file appeal out of time, the appropriate thing for the appellant to have done should have been to renew the application before a single judge of this court, with the prospect of escalating the application to the full court, in the event that the single judge declined to grant it.

By lodging an appeal rather than a renewed application before a single judge, the procedure adopted by the appellant was, therefore, wrong and this appeal is bound to fail on that basis alone.

However, for good measure, we also consider whether the substance of the appeal itself has any merit. We take this course because both parties had gone to considerable lengths to debate the merits or lack thereof, having paid no more than passing reference to the procedural question which, as we have intimated, is in fact determinative of this appeal. We need hardly stress that all remarks beyond this point, except of course, our order as to costs, may well be treated as obiter.

The fact of the delay in filing the appeal is not disputed. It is whether or not the reason for the delay was sufficient to justify the grant of leave to file appeal out of time that was disputed.

We note that the power vested in this Court by virtue of Rule 12 of the Supreme Court Rules is not unfettered; it is to be exercised only where it can be shown that there was sufficient reason to exercise the discretion to extend the time. In other words the court has to be satisfied that there is good cause. The case of **Nhkuwa v. Lusaka Tyre Services Limited**[1], which both counsel have referred to, explicitly elaborates this point in a passage the learned counsel for the appellant quoted and which we have already reproduced in this judgment. Yet, we also stated in that case that:

> **In addition to the circumstances of the delay and the reasons therefore which provide the material on which the Court may exercise this discretion another important factor is the length of the delay itself.**

The court is entitled to look at the material before it to determine whether there is good cause to exercise the discretion to grant the application.

A perusal of the record shows that the parties did attempt to settle the matter *ex curia*. Mr. Nchito argued before us that by alluding to that attempted settlement out of court the appellant had put up sufficient reason for the court to exercise its discretion to extend the time. We note that the judge below, in his ruling, did allude to and consider the reasons put forward by the appellant for the delay when he stated that:

> **The explanation given by the judgement creditor is not sufficient in my view to grant leave to appeal out of time. There was nothing to prevent the judgement creditor from filing a notice of appeal so as to be within time while the *ex curia* negotiations were going on. Further, the court has not been shown that the judgement creditor has prospects of success on appeal. The judgement creditor has had more than sufficient time to file a notice of appeal.**

As the learned judge rightly observed, the only reason provided by the appellant and upon which the court was expected to base its decision, is that the parties sought to settle the matter

ex curia and that such negotiations caused the delay. We reiterate the sentiments we expressed in the **Nkhuwa**[1] case that:

> **The rules of court must prima facie be obeyed and in order to justify a court in extending the time during which some steps in procedure require to be taken there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time- table for the conduct of litigation.**

We are of the settled view that under the circumstances of this case, the material provided was not satisfactory. The fact of entering into negotiations in order to settle a matter *ex curia* cannot be termed as circumstances that made it impossible or extremely difficult for the appellant to follow the rules of procedure. It is a settled position at law that once time has started to run, it continues until proceedings are commenced or a claim is barred. Therefore, negotiations for purposes of settling a matter *ex curia* cannot, and do not bring time in progress to a halt.

In relation to the length of the delay, a perusal of the record reveals that leave was granted at the time of the delivery of the judgment by the lower court. The appellant should, therefore, have taken the procedural steps to file a notice of

appeal by the 28th of August 2012. Particularly for the application which is subject of this appeal, the appellant was supposed to file the application for extension of time within 21 days of the expiry of the 14 day period for filling of the notice of appeal, which would have been about the 21st of September, 2012. The application was filed 50 days after the judgement even though leave to appeal had been in the appellants' hands.

In **Twampane**[7], we considered the length of the delay and concluded that 39 days was too long a period of delay, whilst in **Palata Investments Limited and Others v. Burt & Sinfield Limited and Others**[8], a delay of 3 days was considered to be a short delay. We hold the view, as we did in the **Twampane**[7] case, that the period of the delay in this matter cannot be regarded as short.

In **Water Wells Limited v. Wilson Samuel Jackson**[9], we considered that instead of the explanation for the default, it is the merits of the case that is of primary concern. And that where the period of delay is short enough a factor which could be compensated for by an order for costs, it remains to be considered whether the primary consideration, the merit of the case, exists.

The appellant has argued that there was merit in the matter, whilst the respondent oppose that argument by stating that the appellant did not in fact avail any material to show the purported merit of the appeal. The lower court, in its ruling did refer to the merits of the appeal and concluded that the appellant did not show the prospects of the appeal succeeding.

Under **Order 59/4/17**, of the Rules of the Supreme Court, the court is allowed to look into the merits. This enables the court to treat the parties with fairness so as not to deprive a party who has prospects of success at appeal a chance to put its case across merely due to a procedural error. In **Stanley Mwambazi v. Morester Farm[10]**, we said that:

> **it is in the interest of justice to allow triable issues to come to trial despite the default of the parties.**

On the other hand it would be pointless to allow an extension of time for an appeal which has no hope of any success. Even in a situation where the court is inclined to accord the party in default the right to be heard over technical lapses, it shall only grant, as we said in the **Mwambazi[10]** case, where there is no unreasonable delay, and no *malifides* or improper conduct on the part of the applicant in the action. In this instance, we find that the delay was inordinate and unreasonable. Having said

this, we find no merit in the argument by the appellant that it is a contradiction for the lower court, having initially granted leave to appeal, to later decline leave on grounds that there were no prospects of success. In any event, the record shows that the appellant, when arguing before the lower court, did not point out or even show to the court that there was merit in the appeal. The record indicates that the learned counsel for the appellant argued before the lower court that the issue before the court was the filling of the notice of appeal out of time and as such there was no need to show the merit or the basis of the appeal; that the only consideration is the length of the delay and the explanation for the delay. Indeed the learned judge would have been entitled to look at all the material, whether specifically advanced or not in order for justice to be done, had such material been before him. We do not fault the court below in finding that there was no merit to grant the extension of the time.

In sum, we find that the appellant did not provide sufficient material on which the court would have granted the extension of time as the *ex curia* settlement could not stop time from running, nor could it be a reason for non-observance of procedural rules. The appellant was in breach of the Rules by

failing to appeal within the prescribed period and for failing to apply timely for the extension of time. But more importantly the appellant adopted the wrong procedure of appealing rather than renewing the application before a single judge of this court. Either way, the appeal has no merit and it is bound to fail. We dismiss it with costs to the respondents.

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H. CHIBOMBA
SUPREME COURT JUDGE

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Dr. M. MALILA, SC
SUPREME COURT JUDGE

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R. M. C. KAOMA
SUPREME COURT JUDGE