**IN THE SUPREME COURT OF ZAMBIA** **SCZ/8/67/2016 &**

**HOLDEN AT LUSAKA** **SCZ/8/63/2016**

*(Civil Jurisdiction)*



**BETWEEN:**

**CHAKAKA VILLAGE COUNTRY HOUSE LIMITED** **1ST APPELLANT**

**LAWRENCE SIKUTWA** **2ND APPELLANT**

**CHAKAKA PROCUREMENT COMPANY LIMITED** **3RD APPELLANT**

**AND**

**AFRICAN BANKING CORPORATION ZAMBIA LIMITED** **RESPONDENT**

**CORAM: Mwanamwambwa, DCJ, Phiri and Musonda, JJS**

**on 23rd January, 2017 and 30th January, 2018**

For the Appellants: Mr. D. M. Chakoleka, of Messrs Mulenga, Mundashi & Kasonde Legal Practitioners

For the Respondent: Mr. K. Chenda, of Messrs Simeza Sangwa & Associates

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# JUDGMENT

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**MUSONDA, JS, delivered the Judgment of the Court**

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**Cases referred to:**

1. **Nahar Investments Ltd. v. Grindlays Bank International Zambia Ltd. (1984) Z.R. 81**
2. **Mwambazi v. Morester Farms Limited [1977] Z.R. 108**
3. **John Sangwa and Simeza Sangwa & Associates (Appealing as a Firm) v. Hottelier Limited & Ody's Works Ltd.: SCZ/8/402/2012**
4. **Access Bank (Zambia) Ltd. v. Group Five/ZCON Business Park Joint Venture: SCZ/8/52/2014**
5. **Twampane Mining Co-operative Society Ltd. v. E and M. Start, Mining Limited: SCZ Judgment No. 20 of 2011**
6. **Oswald Chulu v. Moses Muteteka & Electoral Commission of Zambia: SCZ/8/051/2013**
7. **Jamas Milling Company Limited v. Imex International (Pvty) Limited: (2002) Z.R. 79**
8. **Henry Kapoko v. The People: 2011/CC/0023**
9. **Mutantika & Mulyata v. Chipungu: SCZ Appeal No. 94 of 2012**
10. **Costellow v. Somerset County Council: [1993] 1 ALL. E.R. 952**

**Legislation referred to:**

1. **Rule 48(4) of the Rules of the Supreme Court, CAP. 25 of the Laws of Zambia**
2. **Rule 49(5) of the Rules of the Supreme Court, CAP. 25 of the Laws of Zambia**
3. **Article 118(2)(e) of the Constitution of Zambia Act as amended by Act No. 2 of 2016**
4. **Rule 55 of the Supreme Court Rules, CAP. 25 of the Laws of Zambia**

This is a combined judgment in respect of two motions which were separately filed by the appellants on 4th August, 2016 in

Causes SCZ/8/63/2016 and SCZ/8/67/2016. The two motions were mounted pursuant to the provisions of Rule 48(4) of the Rules of the Supreme Court, CAP. 25 of the Laws of Zambia. Pursuant to those motions, the appellants separately sought to have this court set aside the Rulings dated 18th July, 2016 which had separately been handed down by a single judge of this court and in terms of which that single judge had dismissed the appeals which had been pending in this court at the time under the cause numbers which we have identified above, for want of prosecution.

The relevant factual background to the motions in question is that, on 23rd March, 2015, the respondent instituted a mortgage action in the court below (Commercial List) under Cause No. 2015/HPC/0122 against the 1st Appellant and its guarantors for the recovery of a debt in excess of USD9 million.

On 9th December, 2015, the dealing High Court judge delivered an interlocutory ruling granting leave to the respondent to amend an affidavit. That ruling was not well taken by the appellants who, on 14th March, 2016, launched an appeal against the same by filing the relevant Notice of Appeal. As things

happened, that Notice of Appeal was not filed simultaneously with the requisite memorandum of appeal as enjoined by Rule 49(5) of the Rules of the Supreme Court, CAP. 25 of the Laws of Zambia which was only filed on 15th March, 2016.

It is worthy of note that the record relating to the subject motions does not reveal what was happening between 9th December, 2015 (when the Ruling now under attack was delivered) and the 14th March, 2016 (when the Notice of Appeal was filed), that is, a period of close to 3 months. Given the nature of the ruling which was being appealed against, we can only assume that the appellants were pursuing a formal application for leave to appeal.

Following the appellants' failure to lodge the record of appeal within the prescribed statutory period of 60 days, the respondent proceeded to file an application, pursuant to Rule 55 of the Supreme Court Rules, CAP. 25, seeking to have the appeal in question dismissed for want of prosecution. That application was filed on 17th May, 2016 and was returnable before a single judge of this court. For the removal of any doubt, the application to a single

judge of this court was duly served upon the appellants on 19th May, 2016.

On 23rd May, 2016, the appellants filed an opposing affidavit to the respondent's application to dismiss their appeal. Concomittantly with the filing of the said opposing affidavit, the appellants launched an application of their own, seeking to have the single judge extend the time within which they were to lodge the Record of Appeal.

In seeking to fend off the respondent's application to dismiss the appeal for want of prosecution, the appellants filed an affidavit in which they asserted that they had failed to file the record of appeal within the prescribed timeline owing to the voluminous documentation which had characterised the proceedings in the court below.

With respect to the application to extend the time within which to lodge their record of appeal, the appellants deposed in their supporting affidavit that they had failed to prepare and file the record of appeal within the prescribed timeline due to the fact

that the High Court judge's notes had not been availed to them in a timely manner.

Counsel for the respondent filed Skeleton Arguments to buttress the application to have the single judge dismiss the appeal for want of prosecution. For their part, counsel for the appellants filed like arguments fervently opposing the application to dismiss. The parties also cited various authorities to support their respective positions. Counsel for the appellants even went so far as to invoke Article 118(2)(e) of the Constitution of Zambia as amended by Act No. 2 of 2016 in terms of which the courts of the Republic of Zambia, in exercising judicial authority are enjoined to be guided by a number of principles including the principle that *"... justice [must] be administered without undue regard to procedural technicalities."*

The single judge considered the affidavit evidence which had been deployed before him in the context of the legal arguments which had been canvassed before him and reasoned that the appellants had not acted diligently given that the matter invoked was a commercial one which required to be handled with

expedition. The learned judge took the view that the appellants had acted lackadaisically *vis-à-vis* the prosecution of their appeal and that they had literally been awakened from their slumber consequent upon the filing of the application to dismiss by the respondent. The judge was also of the settled view that disallowing the application to dismiss would greatly prejudice the respondent in that their commercial matter, whose further progress had been stayed, would be further delayed. The single judge did not even consider that pronouncing an award of costs would sufficiently assuage the prejudice which would be occasioned to the respondent if the application in question were dismissed. The learned judge also discounted the appellants' reliance upon Article 118(2) (e) of the Constitution of the Republic of Zambia as amended by the Constitutional (Amendment) Act No. 2 of 2016 as recited early on in this judgment. The judge accordingly concluded his Ruling by allowing the respondent's application with costs.

The appellants were most displeased with the Ruling of the single judge of this court and have now sought to impugn that

Ruling by moving this full court on the basis of the following grounds:

> **"1. (That) the appeal before the court was not determined on its merits and in finality and there is a serious question to be tried affecting the respective rights of the parties.**
>
> **2. (That) the grounds upon which the appeal was dismissed were procedural and curable, and if cured would not have caused prejudice to the respondent as there was no inordinate delay on the part of the appellant(s).**
>
> **3. That the single judge should have considered all the grounds which had been canvassed before him for the failure to file the Record of Appeal and Heads of Argument and would not have dismissed the appeal."**

The appellants' application to this full court by Notice of Motion was supported by an affidavit which was sworn by Lawrence Samva Sikutwa and whose material depositions were that the single judge of this court had dismissed the appellants' appeal against the earlier Ruling of a High Court judge on a procedural point instead of proceeding to determine the same on its merits; that the appellants' failure to meet this court's statutory timeline within which to file the relevant record of appeal and

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Heads of Argument had been occasioned by reason of the voluminous nature of the documents in the court below coupled with the fact that the record of the proceedings in that court had not been timeously availed to the appellants for the purpose of incorporation in the Record of Appeal. We were accordingly invited by the deponent of the affidavit in question to dismiss the respondent's application so that the appeal which the appellants had launched can proceed and have the same determined on its merit in the interests of justice.

The appellants' motion was also supported by arguments and authorities which the appellants had caused to be filed on their behalf. In those arguments, counsel for the appellants recounted the genesis of the respondent's application before the single judge which had culminated in the dismissal of the subject appeal for want of prosecution. The basis of the decision by the single judge has since been adverted to in this judgment. Counsel for the appellants contended in their arguments that the single judge ought not to have allowed the respondent's application in terms of which the appellants' appeal was dismissed but should, instead,

have summoned his discretion and allowed for the extension of the time within which to have the appellants lodge the Record of Appeal and Heads of Argument, particularly in the light of the fact that the delay involved had not been inordinate and the appellants had since filed the relevant application to extend the time. To support this contention, counsel referred us to our decision in **Nahar Investments Ltd. v. Grindlays Bank International Zambia Ltd.**[1]. In the view of learned counsel, given the explanation which they had proffered for their failure to timeously lodge the record, appellants had not been guilty of anything approximating a contumelious disregard of the rules of this court. The appellants' counsel further contended that the Ruling of the single judge ought to be reversed in order that the greater interests of justice can be better served. Counsel went on to cite our decision in **Mwambazi v. Morester Farms Limited**[2] to support the contention that the appellants ought not to have been denied the opportunity to have their appeal heard adding that whatever prejudice or inconvenience that the respondent might have suffered on account of the appellants' failure to comply with the Rules could have been assuaged by an award of costs. According to the appellants'

counsel, their client was entitled to some favourable treatment because they had not been guilty of unreasonable delay, that is, in so far as the filing of the application to extend the time within which to file the Record of Appeal was concerned. Counsel went on to cite our Ruling in **John Sangwa and Simeza Sangwa & Associates (Appealing as a Firm) v. Hottelier Limited & Ody's Works Ltd.**[3] which had involved a dismissal of the appellants' appeal for want of prosecution and went on to contend that the approach which we had adopted in that case ought to have been adopted by the single judge in the context of this matter.

In the view of the appellants' counsel, it was utterly wrong for the single judge to have ignored the sound guidance which, following our earlier decision in **Mwambazi v. Morester Farms Ltd**[2], this court had offered in the **John Sangwa/Simeza/Sangwa**[3] Ruling.

Counsel also argued that, while in the **John Sangwa/Simeza Sangwa**[3] Ruling where the cross-application to extend the time within which to lodge the Record of Appeal was filed some two months after the expiration of the prescribed period, in the case at

hand, the appellants had filed a similar application within a period of less than 10 days. Under these circumstances, counsel contended, this is a proper case in which this court should reverse the Ruling of the single judge.

The appellants' counsel also reiterated the arguments which he had canvassed around Article 118(2) (e) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 before the single judge. In this regard, learned counsel criticized the single judge for having dismissed the interlocutory appeal in question in circumstances which suggested that the learned single judge had paid *"...undue regard to "procedural technicalities"* which, counsel added, the Constitution, as amended, proscribes.

In closing, learned counsel for the appellants urged us to reverse the Ruling of the single judge so that the appellants can be heard and their appeal determined on the merits.

For his part, learned counsel for the respondent filed an affidavit opposing the Notices of Motion. In addition, counsel filed fairly detailed arguments contesting the Notices of Motion.

In its opposing affidavit, the respondent deposed via one Chilufya Chisanga Kaka, that the reasons which the appellants had advanced for their failure to prosecute the interlocutory appeal in question were wholly unviable and, in some respects, constituted an afterthought. In this regard, the respondent posited that no credible reason had been advanced even to explain the appellants' failure to take the cautionary step of seeking an extension of the time within which to lodge the record of appeal.

Other than the appellants' alleged failure to anchor its motion to the full court on some credible basis, the respondent complained in its affidavit that the laxity and lukewarm disposition which the appellants had exhibited *vis-à-vis* the prosecution of the interlocutory appeal which the single judge had dismissed had been fueled by the fact that the *appellants "... had nothing to lose having already received the benefit of the undisputed loan advances [from the respondent] which [loan] the [1st appellant] had not been servicing as agreed."*

The respondent further complained in its affidavit that:-

"13. That the [1st] Appellant is in arrears by [over 39] instalments on the monthly repayments on its mortgage debt which now stands at a total of USD11,075,623.38 inclusive of the principal amount and interest as at 31 December, 2016.

14. That the Respondent, for its part, [has been] severely affected by the continued delay in the conclusion of the case with the [1st Appellant] as:

a) The Respondent has been forced to hold a US$10.5 million provision expense on the [1st] Appellant's mortgage debt thereby weighing heavily on the Respondent's capital;

b) The [1st] Appellant is the single largest defaulting customer of the Respondent account for 60 percent of the non-performing loan portfolio in the Respondent's books;

c) An important metric that is used to measure the health of a bank's credit portfolio is the default rate which is the ratio between the total value of non-performing loans to the bank's total loan portfolio. The current ratio for the [1st] Appellant stands at 21% versus the industry average of 10%, thereby severely affecting the outlook of the Respondent to institutional investors, as an investment haven, who see this as an extremely bad ratio and indicative of high risk. Of the 21% ratio, the [1st] Appellant accounts for 12%, such that without the Appellant's debt the Respondent's ratio would normalize to the industry's acceptable average;

d) The lack of forecasted income which the Respondent would have generated had the [1st] Appellant been servicing its

**mortgage debt has gravely affected the Respondent's financial performance;**

**e) The Respondent is at risk of failing to meet its statutory capital adequacy requirements with the Bank of Zambia in the short to medium term;**

**f) The Respondent has not benefitted from having commenced its action against the Appellant on the commercial list of the High Court which is supposed to be a fast track court for speedy resolution of disputes of a commercial nature; and**

**g) The appellant has effectively [mis]used the Court system to indefinitely defer its repayment obligations to the Respondent.**

**15. That the interlocutory appeal which was dismissed by a Single Judge of this Court was an unnecessary appeal and a mere delaying tactic by the Appellant."**

In his arguments contesting the motions before this court, learned counsel for the respondent started off by asserting that the filing of the motion was flawed and procedurally defective and incompetent by reason of the following:

**"(a) While the Ruling of the single judge now being attacked was delivered on 18th July, 2016, the present motion was only filed on 4th August, 2016, that is to say, about 4 days after the expiry**

**of the 14-day period prescribed in Rule 48 sub-rules (1) and (4) of the Rules of the Supreme Court, CAP. 25;**

**(b) There is nothing on the record to suggest that the appellants had successfully sought leave to file the motion in question out of time; and**

**(c) That arising from (a) and (b) above, the motion in question is incompetent and ought to fail."**

The second procedural pillar upon which the respondent's counsel anchors his objection to have this full court decline to entertain this motion is the fact that the appeal which the appellants are seeking to resurrect following its dismissal by a single judge had, in fact, been still-born by reason of the fact that the Notice which was filed in respect of the same was not accompanied with the requisite memorandum of appeal as enjoined by Rule 49(5) of the Supreme Court Rules CAP. 25 which provides that:

**"A notice of appeal, together with the memorandum of appeal, shall be lodged and served within a period of 14 days..."**

In the view of learned counsel for the respondent, the two procedural factors which we have highlighted above rendered the

present motions incompetent and, consequently, incapable of being proceeded with by this court.

Leaving aside the alleged procedural defects we have identified above, learned counsel for the respondent further contended that even if the present motions were to survive or escape from the pangs of those procedural defects, the motion was so bereft of the requisite merit that it cannot possibly succeed. To support this contention, learned counsel cited a sample of the decisions which we have previously rendered and in which we have placed a premium upon the duty of all that seek to access the services offered by our court system to observe the relevant facilitative rules. Those decisions include **Access Bank (Zambia) Ltd. v. Group Five/ZCON Business Park Joint Venture**[4] and **Nahar Investments Ltd. v. Grindlays Bank International Ltd**[1] and **Twampane Mining Co-operative Society Ltd. v. E and M. Start, Mining Limited**[5] where we not only emphasized the importance of observing the rules of court which guarantee the orderly, fair, certain and predictable administration of justice but cautioned about the risks that attend non-compliance with those

rules. One of the risks of non-compliance that we have highlighted in those decisions is that an appeal can incur the terminal sanction of dismissal as a result of failure to strictly adhere to what the rules dictate.

With respect to the second ground upon which the present motion was founded, counsel for the respondent contended, in effect, that the mere fact that the procedural rules which regulate the conduct of appeals before this court may, if breached, be cured does not preclude a court, in an appropriate case, to pronounce the sanction of dismissal where a defaulting party has not taken advantage of the avenue available for securing such cure. To drive his point home, counsel for the respondent cited our judgments in **Nahar Investments Limited[1], Twampane Mining Co-operative Society Limited[5], Oswald Chulu v. Moses Muteteka & Electoral Commission of Zambia[6]** and a few others where we emphasized the point that appellants who choose to ignore the court's rules relating to the conduct of appeals run the risk of imperiling such appeals. In the context of the subject matter of this motion, the respondent's counsel argued that the single judge properly

exercised his discretion by deciding that the appellants' failure to observe the Rules had unduly prejudiced the respondent given the commercial nature of the matter involved. In this regard, learned counsel cited our judgment in **Jamas Milling Company Limited v. Imex International (Pvty) Limited**[7] where we made the point that:

> **"... it is not in the interests of justice that parties by their shortcomings should delay the quick disposal of cases and cause prejudice and inconvenience to others" (at p.83).**

With respect to the ground (the third) by which the appellants contended that the single judge ought to have been persuaded against dismissing the appeal by the reasons which were canvassed before him in relation to the appellants' failure to file the record of appeal and Heads of Argument in a timely manner, counsel for the respondent argued that the single judge was perfectly in order to discount those reasons.

Counsel for the respondent then turned to address what he described as the appellants' 'desperate' reliance on our Ruling in **John Sangwa & Simeza Sangwa & Associates**[3], the circumstances of which were presented before the single judge by

the appellants as having being on all fours with the circumstances of the matter now before us.

Counsel for the respondent then went on to argue that the circumstances of the **John Sangwa/Simeza, Sangwa**[3] Ruling were markedly different from the matter before us. According to counsel, the following factors clearly distinguished the present matter from the **John Sangwa & Simeza, Sangwa**[3] matter:

(a) In **John Sangwa/Simeza, Sangwa**[3], the reason which was advanced for the appellants' failure to lodge the record of appeal in a timely manner was that the parties had been engaged in *ex-curia* settlement discussions coupled with a delay in the preparation of the transcript of the proceedings in the court below. In relation to the present matter, the appellant's failure to lodge the record of appeal in a timely manner was attributed to the 'voluminous' nature of documents which had been filed in the court below;

(b) Unlike in **John Sangwa/Simeza, Sangwa**[3] which involved a non-commercial dispute, the present matter involves a commercial dispute/mortgage action on the commercial list; and

(c) Unlike in **John Sangwa/Simeza, Sangwa**[3] the respondent in the present matter asserted before the single judge that serious prejudice had been occasioned to it as a result of the appellants' default.

According to counsel for the respondent, the factors which have been highlighted above perfectly entitled the single judge not to mechanically apply the reasoning in the **John Sangwa/Simeza, Sangwa**[3] case.

Counsel for the respondent also discounted, as misplaced, the appellants' reliance upon the provisions of Article 118(2) (e) of the Constitution of Zambia on the basis of the observation which we made in **Access Bank (Zambia) Ltd. v. Group Five/ZCON Business Park Joint Venture**[4], namely that *"... the Constitution never means to oust the obligations of litigants to comply with ... procedural imperatives as they seek justice from the courts."*

In conclusion, counsel for the respondent submitted that the present motions ought to fail as they had not only been mounted against the backdrop of procedural breaches but were completely devoid of merit.

We have intensely considered the arguments which counsel for the two sides canvassed in relation to the motions before us and in the context of the Ruling of a single judge of this court which is now being assailed.

As we begin our reflections around the motions in question, we propose to immediately address the appellants' constitutional argument founded on Article 118(2) (e) of the amended Constitution. We are, indeed, aware that during the period that immediately followed the enactment of the Constitution of Zambia (Amendment) Act No. 2 of 2016, there was a sizeable proportion of litigation whose pursuers got to believe that Article 118(2) (e) of the amended Constitution had introduced a radical sea change *vis-à-vis* the role and place of procedural rules in the conduct of litigation. For convenience, we recite the provision below:

> **"(2) In exercising judicial authority, the courts shall be guided by the following principles:**
>
> **...**
>
> **(e) Justice shall be administered without undue regard to procedural technicalities."**

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Over the past two years of its existence, various courts have had occasion to pronounce themselves on the meaning and effect of the above constitutional provision so much so that there is now universal consensus that the provision in question did not banish or outlaw the observance of procedural technicalities which are founded on the Rules of Court *vis-à-vis* the administration of justice. Indeed, in **Henry Kapoko v. The People**[8], the Constitutional Court of Zambia guided that Article 118(2) (e) of the Amended Constitution does not banish adherence to procedural technicalities which are a consequence of observing the Rules of Court. Rather, what the constitutional provision in question did was to enjoin courts of law in the Republic of Zambia against according *"undue regard"* or *"undue attention"* to procedural technicalities in the course of discharging their judicial mandate. Clearly, there is a whale of a difference between courts paying or according *'undue regard'* to procedural technicalities and not according any regard to them at all. As the point has been made in various court decisions, the administration or, at any rate, the orderly administration of justice cannot be assured unless rules exist which create and guarantee a framework for the same.

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In the light of the foregoing discussion, we do not consider that there is anything in the Ruling of the single judge which is now the subject of the Motions before us which suggests, even faintly, that the single judge had paid 'undue regard' to procedural technicalities. Accordingly, we wholly discount the constitutional argument as having been misconceived.

Moving away from the constitutional argument, we now turn to consider whether the grounds which had inspired the motions which were argued before us bear such degree of cogency as can persuade us to set aside the Ruling of the single judge and reinstate the dismissed appeal which had been the subject of that ruling.

Before we turn to examine the viability or otherwise of the grounds which had inspired the present motions, we propose to react to the invitation which was extended to us by counsel for the respondent in the way of requiring us to pronounce ourselves on the issue of whether or not the motions are competently or properly before us in the light of the following undisputed facts:

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(a) The motions contesting the Ruling of a single judge of this court were filed on 4th August, 2016 when, in terms of Rule 48(4) of the Rules of this court, the same ought to have been filed within 14 days from 18th July, 2016, being the date when the single judge delivered his Ruling. By reason of the aforestated matters, the filing of the motions was done outside the prescribed period by at least two (2) days while no leave had been sought nor granted to sanction the belated filing of the motions;

(b) The filing of the appeal which subsequently became the subject of the dismissal application before a single judge of this court was done in complete violation of Rule 49(5) of the Rules of this Court to the extent that the relevant notice was not filed concomittantly with the requisite memorandum of appeal as enjoined by the above-cited Rule.

In pointing out the appellants' transgressions which have been highlighted above, counsel for the respondent reminded us about the mandatory or imperative character of the rules in question and the fatal consequences which non-compliance attracts as we made clear in **Mutantika & Mulyata v. Chipungu**[9].

It is worthy of note that, in their counter Arguments, the appellants offered nothing beyond the feeblest of resistances to the attack which the respondent had mounted against the procedural competence of the motions. In this regard, it is worth calling to mind the warnings which we have repeatedly sounded in such decisions as **Twampane Mining**[5]**; Access Bank (Z) Limited**[4]**; Mutantika & Mulyata**[9], among others, as to the consequences that non-adherence to the rules of the court attracts.

In the result, we are in no difficulty to announce that the motions which were purportedly argued before us were incompetent and, consequently, ought not to have been entertained by ourselves.

Notwithstanding the conclusion which we have just reached above, and upon the assumption that the respondent waived its right when it failed to mount a formal objection to the motions, we propose to examine the merits of the motions as canvassed before us by counsel for the two opposing sides involved.

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From what we have distilled from or around the two identical motions in question, there seems to be no dispute as to the following matters:

(a) The appellants had not observed the rules of this court which regulate the conduct of appeals;

(b) The single judge was perfectly entitled to enforce or apply the rules in (a) above in the manner he did;

(c) Notwithstanding (b) above, it was still open to the single judge to use his discretion and offer some respite to the appellants by refusing to dismiss the application whose outcome is now the subject of the motions at hand.

Having regard to the fact that the conclusion which we have reached in this judgment has been informed almost exclusively by the approach which we have taken *vis-à-vis* the matter which we have identified in (c) above, we propose to stay clear from an expedition around the rules which were at play in these motions and the jurisprudence which their interpretation has been generating over time suffice it to say that the law is now fairly well settled.

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It will be recalled that the conclusion which the learned single judge had reached in dismissing the appeal in question for want of prosecution had been informed by his earlier conclusion that the respondent had been greatly prejudiced and was going to continue to suffer prejudice if he were to disallow the application to dismiss. It will also be recalled that in reaching the conclusion to dismiss, the learned single judge was fully alive to the approach which we took in our Ruling in **John Sangwa/Simeza Sangwa**[3], which, in the estimation of counsel for the appellants, was on all fours with the matter with which the single judge had been confronted.

Having identified the decisive factor which had informed the single judge's decision to dismiss the appeal in question, can we fault the single judge for reaching the conclusion that he did?

Sir (later Lord) Thomas Bingham M.R. once observed, in the English case of **Costellow v. Somerset County Council**[10] as follows:

> **"...[a party] should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for**

**which an award of costs cannot compensate ... Procedural default [should not necessarily] lead to dismissal of actions without any consideration of whether [such] default had caused prejudice to the (other party). But the court's practice has been to treat the existence of such prejudice as crucial, and often, a decisive matter...".**

Having patiently examined the affidavit of Chilufya Chisanga Kaka opposing the motions before us, we are satisfied that the appellants' rather lackadaisical disposition towards the prosecution of their appeal as attested to by their repeated failure to observe the Rules of Court, had gravely prejudiced the respondent. In reaching this conclusion, we have remained acutely alive to the fact that that the action whose further progress was halted at the appellants' behest in the name of prosecuting the dismissed appeal was a mortgage action for the recovery of over USD11 million from the appellants. We also noted from the said affidavit of Chilufya Chisanga Kaka that the indebtedness in question has gravely affected the financial health of the respondent to the extent that it has become the focus of regulatory anxiety on the part of the Bank of Zambia, as the regulator of Banks and other financial institutions.

In our view, the grave and demonstrable prejudice to which the respondent had been exposed as a result of the appellants' dilatoriness, did perfectly entitle the single judge to exercise his discretion in the manner he did, by dismissing the interlocutory appeal which the appellants had lodged.

In the result, the appellants' twin motions have failed. In consequence, the respondent will have its costs which, unless agreed, should be taxed.

The meaning and effect of this judgment is that it displaces the order or orders by which the respondent's substantive action(s) was/were stayed pending the outcome of the appeal whose fate we have now finally resolved.

**M. S. MWANAMWAMBWA**
**DEPUTY CHIEF JUSTICE**

.....
**G. S. PHIRI**
**SUPREME COURT JUDGE**

.....
**M. MUSONDA, SC**
**SUPREME COURT JUDGE**