

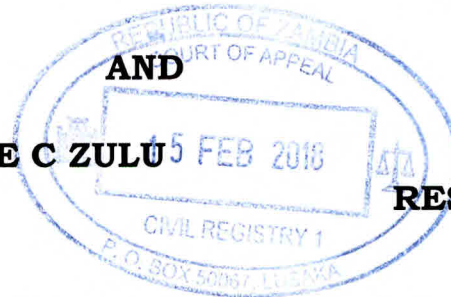
IN THE COURT OF APPEAL FOR ZAMBIA CAZ/08/006/2017
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

ZAMTEL LIMITED

APPLICANT

IRENE SIMATE, PERINE C ZULU
& 54 OTHERS



RESPONDENT

Coram: C.K. Makungu, J.Z. Mulongoti, D.L.Y. Sichinga J.J.A
On 5th February, 2018 and 15th February, 2018.

For the Appellant: Miss M. Mayaka of Mulenga Mundashi Legal Practitioners
For the Respondent: Mr. N. Okware of Okware & Associates

RULING

MAKUNGU, J.A delivered the Ruling of the Court.

Cases referred to:

1. *Zambia Revenue Authority v. Jayesh shah* (2001) ZR 60
2. *D.E Nkhuwa v. Lusaka Trye Service* (1977) ZR 43
3. *Access Bank (Zambia) Limited and Group Five v. Zcon Business Park Joint Venture* SCZ/8/52/2012

Legislation referred to:

1. *Court of Appeal Rules*, S.I. No. 65 of 2016 – Order XI Rule (1), Order XIII Rule 1, 2,3
2. *The Court of Appeal Act*, No. 7 of 2016 – Section 13

This is an application by way of consent summons for a grant of a Consent Order to permit the parties to appeal to the Supreme Court against the decision of this Court dated 9th November, 2017 as it relates to six non-unionized respondents whose names are listed therein. Further that, the appeal be filed before the Supreme Court within 21 days from the date of the Order and costs to be in the cause. The application was filed on 24th January, 2018 and accompanied by a Consent Order duly signed by the parties. An affidavit in support thereof was only filed six days later on 30th January, 2018. The gist of the said affidavit is that there is need for conclusiveness of the issues raised under grounds two and three of the appeal especially that there have been contradictory pronouncements by the High Court on the interpretation of the conditions of service for the employees in management of the Applicant's company.

Further that, there is an appeal before the Supreme Court under cause No. SCZ/8/236/2013 wherein the Supreme Court has been implored to make a "definitive determination" on the interpretation of the conditions of service for former management employees of the Applicant herein. The deponent went on to state that the appeal raises important issues of law and public policy.

At the hearing of the application, counsel for the Applicant Miss Mayaka, relied on the Consent Summons, Affidavit in Support and the Consent Order. The court noted that the summons did not indicate the law pursuant to which the application was made

and queried counsel. She stated that ordinarily, the application should have been made pursuant to **Order XI of the Court of Appeal Rules, 2016** ⁽¹⁾ and that the same should have been made within 14 days as stipulated under **Section 13 of the Court of Appeal Act.** ⁽²⁾ She vied that there being no objection by the respondent, the Court should exercise its discretion to grant the application.

In response, Mr. Okware conceded that an application for leave to appeal must be filed within 14 days from the date of the Judgment. He stated that he did not address his mind to that aspect of the law when signing the Consent Summons and Order. He submitted that the case of **Zamtel v. Felix Musonda and 29 others appeal No. 51 of 2013** relied upon by this Court in its Judgment addresses the issues raised herein. That the Court should take into account the aforestated case to determine whether or not there are prospects of an appeal to the Supreme Court succeeding. Mr. Okware stated that they should have instead applied for leave to appeal out of time.

In her response, Miss Mayaka acknowledged that she should have sought leave to appeal out of time. She relied on the Supreme Court case of **Zambia Revenue Authority v. Jayesh Shah** ⁽¹⁾ where it was held that cases should be decided on merit and that any breach will not always be fatal, if the rule is merely regulatory or directory. On the issue whether Section 13 of the Act ⁽²⁾ is mandatory, she stated that the first ‘**shall**’ under Section 13 of the Act relates to the Court to which the appeal will lie. In

Section 13 (2), the word “shall” refers to the time within which the application should be filed and as such the rule is regulatory.

We have considered the Affidavit evidence and the oral submissions made by counsel for both parties. **Order XI of the Court of Appeal Rules, 2016** ⁽¹⁾ states as follows:

“1. An appeal from a judgement of the Court shall be made to the Supreme Court with leave of the Court.”

Section 13 of the Court of Appeal Act ⁽²⁾ provides as follows:

1. An appeal from a Judgment of the Court shall lie to the Supreme Court with leave of the Court.

2. An application for leave to appeal, under subsection 1 shall be made within fourteen days of the judgement.
(Underlined by the court for emphasis only)

3. The court may grant leave to appeal where it considers that –

a. The appeal raises a point of law of public importance;

b. It is desirable and in the public interest that an appeal by the person convicted should be determined by the Supreme Court.

c. The appeal would have a reasonable prospect of success; or

d. There is some other compelling reason for the appeal to be heard.”

We are of the considered view that **Section 13 (1) ⁽²⁾** is mandatory because the legislative intention to make it mandatory is confirmed by **Order XI Rule 1 (1) of the Court of Appeal Rules, 2016 ⁽¹⁾** which provides the same.

We are of the view that the word ‘**shall**’ under Section 13 (2) should be interpreted loosely because under **Order XIII Rule 3 (1) of the Court of Appeal Rules, 2016 ⁽¹⁾** *the court may, for sufficient reason extend the time for:*

- a. Making an application, including an application for leave to appeal*
- b. Bringing an appeal; or*
- c. Taking any step in or in connection with an appeal.*

(2) An application to the court for extension of time in relation to a judgment or the date of expiration of the time within which the application ought to have been made, shall be filed in the Registry within twenty – one days of the judgment or such time within which the application ought to have been made, unless leave of the court is obtained to file the application out of time.

In the present case, the judgment was made on 9th November, 2017 and Counsel filed the Consent Summons on 24th January, 2018 i.e. 75 days after the date of the Judgment. Subtracting 14 days prescribed by the Rules from 75, we find that applicant is 61 days late. We find this to be an inordinate delay. According

to **Order XIII Rules 1 and 2 of the Court of Appeal Rules, 2016** ⁽¹⁾ the applicant should have under the circumstances applied for extension of time within which to apply for leave to appeal.

Without delving into the merits of the application, we find this application misconceived as it does not conform to the above mentioned rules of the court. In fact, it was highly irregular to omit to state the law under which the application was made and to omit to give reasons for the delay.

A perusal of Section 13 (3) (a) to (d) shows that it is not for the parties to enter into a Consent Order for leave to appeal to the Supreme Court. It is desirable to file an application for leave to appeal accompanied by an affidavit in support so that the court may perform its duty to determine whether any of the circumstances stated in Section 13 (3) (a) to (d) exist before granting an application for leave to appeal.

Allowing this application would in essence circumvent the law which provides for the procedure, the time frame and the circumstances under which this court may grant leave to appeal. Those who choose to ignore rules of the court, do so at their own peril. We are fortified by the cases of **D.E Nkhuwa v. Lusaka Tyre Services** ⁽²⁾ and **Access Bank (Zambia) Limited and Group Five v. Zcon Business Park Joint Venture.** ⁽³⁾

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For the foregoing reasons, the application is dismissed and each party shall bear its own costs.

Dated this 15th day of February, 2018.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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J.Z. MULONGOTI
COURT OF APPEAL JUDGE

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D.L.Y. SICHINGA
COURT OF APPEAL JUDGE