IN THE SUPREME COURT OF ZAMBIA **SCZ/8/285/2014**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

LUSAKA CITY COUNCIL	**1ST APPELLANT**
ZESCO LIMITED	**2ND APPELLANT**
CHIKUTANO NKHOMA	**3RD APPELLANT**
VICTOR MWAPE	**4TH APPELLANT**
AND	
ASTRO HOLDING LIMITED	**RESPONDENT**

Coram : Hamaundu, Kabuka and Mutuna, JJS

On 8th May 2018 and 16th May 2018

For the Appellant : Mr. J. Madaika of Messrs J and M Advocates

For the Respondent : Mr. M. Ndhlovu of Messrs MRN Legal Practitioners

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J U D G M E N T

MUTUNA, JS. delivered the judgment of the court.

Cases referred to:

1) **Khalid Mohammed v The Attorney General (1982) ZR 49**
2) **Wilson Masauso Zulu v Avondale Housing Project Limited (1983) ZR 172**
3) **Stanely Mwaambazi v Morester Farms Limited (1977) ZR 108**

4) **Covindbhain Bahabhai Patel and Vallabhai Baghabhai Patel V Monile Holdings Company Limited (1993) S.J. 19**
5) **Mususu Kalenga Building Limited and another v Richman's Money Lendors Enterprises (1999) ZR 27**
6) **Newplast Industries v Commissioner of Lands and Another (2001) ZR Page 51**
7) **Savenda Management Services v Stanbic Bank Zambia Limited SCZ judgment No. 10 of 2018**

Other authority referred to:

1) **Supreme Court Practice, 1999, volume 1**

Works referred to:

1) **Writing of Judgments: A Practical Guide for Courts and Tribunals by Syed Ahmed Idid, Lexis Nexis , Malaysia, 2011**

Introduction

1) This appeal is against a decision of a Learned High Court Judge granting possession of Stand number 4518 Lusaka to the Respondent against the First, Third and Fourth Appellants.

2) The appeal raises two fundamental issues of practice and procedure in regard to the instances when process may be issued pursuant to Order

113 of ***The Supreme Court Practice, 1999, (White Book)*** and the duty of a Judge to hear and determine a matter.

3) The latter issue in the preceding paragraph relates to the need for a party to present and prove his case if he is to be given a judgment.

Background

4) The background leading up to this appeal is that the Respondent was at the material time the registered proprietor of property known as Stand number 4518 Lusaka (the property).

5) In consequence of this fact, it was issued with certificate of title number L 4438 by the Commissioner of Lands.

6) Sometime in 1996, the Respondent was desirous of developing the property and it, therefore, caused to be submitted to the First Appellant

copies of the plans of the building it intended developing on the property. The First Appellant, however, did not approve the plans and at a certain point in time appeared to have misplaced them.

7) After a long wait for the approval of the plans, the Respondent decided to proceed with the construction of the building anyway but was hampered from executing its intentions by the Appellants who had decided to settle on its property prompting it to take out an action in the High Court.

The Respondent's Claim in the High Court

8) The Respondent moved the High Court by way of an originating summons pursuant to Order 113 of the ***White Book***.

9) The claim as endorsed on the originating summons was for an order for possession of the property on the ground that the Respondent is entitled to possession and that the Appellants and all other persons in occupation are in such occupation without licence or consent of the Respondent.

The evidence, proceedings before the High Court and decision

10) The evidence in support of the Respondent's claim was by way of an affidavit deposed by one Christopher Chilonga, general manager of the Respondent.

11) It revealed that the Respondent is a registered proprietor of the property pursuant to which it is in possession of title deeds. The evidence also revealed the Respondent's intention to develop the

property and the problems encountered in having the plans approved by the First Appellant.

12) The evidence ended by revealing the discovery by the Respondent of the presence of the Appellants on its property as trespassers.

13) The Learned High Court Judge heard the application on 5th November 2014. At the hearing, the Second Appellant's counsel applied to have his client removed from the proceedings and the Court duly granted the order.

14) Counsel for the other Appellants sought an adjournment to facilitate the filing of an affidavit in opposition. The Learned High Court Judge declined to grant the application on the ground that the originating process had been served much earlier and as such the Appellants had had ample time to respond and proceeded to hear the

matter. In doing so he invited counsel for the First, Third and Fourth Appellants to submit verbally.

15) The response from counsel was that the dispute in the matter hinged on factual and not legal issues. In so doing he intimated that the Appellants had no legal submissions to make.

16) Thereafter the Learned High Court Judge proceeded as follows:

> **"I take it therefore that there is no submission to be made on behalf of the 1st Defendant.**
>
> **There being no opposition to the application same is hereby granted as prayed with costs, to be taxed in default of agreement.**
>
> **Leave to appeal granted."**

17) Prior to making the decision we have set out in the preceding paragraph, the Learned High Court

Judge did not invite the Respondent's counsel to present the Respondent's case.

Grounds of appeal and arguments presented before the Court

18) The Appellants are unhappy with the decision of the Learned High Court Judge, prompting them to launch this appeal on three grounds as follows:

18.1 That the Court erred in law and in fact when it granted the order for possession when Order 113 of the Rules of the Supreme Court, 1965 (1999) edition) had not been complied with.

18.2 That the Court below erred in law and in fact when it did not allow the matter to be determined on its merits but instead penalized the Appellant for a procedural default.

18.3 That the Court below erred in law and in fact when [it] failed to determine that an originating Summons and an Order for possession shall not be granted where there is a real controversy to be tried.

19) At the hearing, counsel for the Respondent drew our attention to the fact that the memorandum of appeal was filed for and on behalf of the First Appellant only and, therefore, the other Appellants were not party to the appeal. Counsel for the Appellants conceded and we accordingly proceeded on the premise that there was only one Appellant, being Lusaka City Council.

20) The Appellant advanced three main arguments in the heads of argument filed in support of the appeal in relation to grounds 1 and 3 of the appeal. The first argument was that it was wrong for the Respondent to proceed pursuant to Order 113 of the ***White Book*** because that Order envisages a situation where the occupants on the land who are sought to be evicted are trespassers.

The Appellant in this, matter cannot be considered as such trespasser.

21) The second argument was that where an application is brought before court by way of Order 113 of the ***White Book*** and the proceedings reveal contentious issues, the court is obliged to invoke the provisions of Order 28 of the ***White Book*** and conduct a trial as if the matter were commenced by way of writ of summons. The issues presented before the Learned High Court Judge were highly contentious such that he ought to have invoked the provisions of Order 28 of the ***White Book***.

22) In the *viva voce* arguments, counsel for the Appellant Mr. J. Madaika, argued that the Appellant is responsible for alienating land in the municipality of Lusaka and as such cannot be a

trespasser on any land situate in Lusaka. The Learned High Court Judge should, therefore, have been put on alert the minute he noticed that the Appellant was party and ordered that there were triable issues warranting the matter going for a full trial as if it were commenced by writ. According to counsel, this position was reinforced by the fact that ZESCO was also settled on the land which is a parastatal company and thus, cannot be a trespasser.

23) The third argument essentially alleged that, although the Learned High Court Judge granted the relief sought, the Respondent did not discharge the onus placed upon it to prove its case. Further, the Learned High Court Judge failed to adjudicate upon all the matters presented before it by the parties. Reliance was placed on

our decisions in the cases of ***Khalid Mohammed v The Attorney General***[1] and ***Wilson Masauso Zulu v Avondale Housing Project Limited***[2]. In these two cases we restated the need for a Plaintiff to prove his case if he is to succeed and the need for courts to adjudicate upon all matters presented before them for purposes of finality in proceedings.

24) In regard to ground 3 of the appeal, the Appellant condemned the Learned High Court Judge for refusing to grant the adjournment sought for purposes of filing an affidavit in opposition. According to the Appellants, the breach they had committed of failing to file an affidavit in opposition was curable and not fatal. Further, the default merited a sanction of costs rather than a denial to be heard. Our attention in

this regard was drawn to our decision in the case of ***Stanely Mwambazi v Morester Farms Limited[3]***.

25) The Appellant escalated the arguments in the preceding paragraph by stating that they had adequately explained their default in an affidavit in support of a subsequent application to set aside the default judgment.

26) In the *viva voce* arguments, Mr. J. Madaika argued that on the day of the hearing the matter was scheduled to come up on a preliminary application which was withdrawn. The Court should, therefore, not have proceeded to hear the substantive matter.

27) Coming back to arguments under ground 2 of the appeal, the Appellants reminded us that we have held in the past that a default judgment should be

set aside if triable issues are raised. Regard was had to our decision in the case of ***Convindhbhai Baghabhai Patel and Vallabhai Baghabhai Patel v Monile Holding Company Limited***[4]. We were urged to set aside the default judgment in view of the triable issues raised.

28) In response to the Appellant's arguments in respect of grounds 1 and 3 of the appeal, the Respondent argued that the evidence presented by the Respondent before the Learned High Court Judge was sufficient to enable him proceed to hear and grant the order of possession under Order 113. The Respondent took the position that there were no triable issues raised in the evidence nor did the Appellant raise any at the hearing to warrant the Learned High Court Judge holding a trial. The Court, therefore, had no right to

question the Respondent's right to possession on its own motion.

29) In addition, the Respondent argued that the Appellant was in any event entitled to apply to set aside the order of possession pursuant to Order 113 rule 8 of the ***White Book*** if it felt that the same was wrongly granted. That the Appellant, did infact file an application for this very purpose which was set down for hearing on 4th December 2014, but withdrew it and appealed. The Appellant escalated its argument by contending that since the application to set aside the order for possession was withdrawn the matters raised in that application were not considered by the Court below and could not, thus, be considered by us in accordance with our decision in the case of ***Mususu Kalenga Building Limited and***

Another v Richman's Money Lendors Enterprises[5].

30) In the *viva voce* arguments Mr. M. Ndhlovu reiterated the arguments in the heads of argument and following a query from the Court clarified that the originating summons in the record of appeal revealed that the return date endorsed on it was 5th November 2014. As such, the Learned High Court Judge was in order to proceed with the hearing of the substantive matter after the preliminary issue was withdrawn.

31) In regard to the manner in which the Learned High Court Judge proceeded at the hearing of 5th November 2014, Mr. M. Ndhlovu conceded that the notes of the proceedings revealed that the Court did not invite the Respondent to present its case. Further, the decision of the Learned High

Court Judge was based purely on the Appellant's default in filing the affidavit in opposition.

32) Coming to ground 2 of the appeal, the Respondent's arguments essentially repeated what was stated under grounds 1 and 3 of the appeal.

33) In reply to Mr. M. Ndhlovu's contention that the Appellant's remedy lay in an application for review of the order for possession rather than appeal, Mr. J. Madaika argued that a party can only have recourse to the provision of Order 113 rule 8 of the ***White Book*** where there is fresh evidence warranting a review. That in a situation where a possession order is wrong, as is the case in this matter, the remedy is that of appeal. Counsel drew our attention to Order 113 rule 8 sub-rule 16 of the ***White Book***.

Consideration of appeal and decision of the Court

34) We have had opportunity to consider the heads of argument filed by counsel for the parties and the record of appeal. In determining this appeal we think it important that we consider the manner in which the Learned High Court Judge proceeded, when the application, pursuant to which the order for possession was granted, came up.

35) The summary of the proceedings we have set out in the earlier part of this judgment reveals that the Respondent did not present its case as it was not invited by the High Court Judge to do so. Mr. M. Ndhlovu graciously conceded that this is the position. This was a misdirection on the part of the Learned High Court Judge because it amounts to his assuming that the fact, in and of itself, that the Respondent had filed the

application for possession, was sufficient presentation of the application.

36) When an application comes up before a Judge, he or she must specifically ask counsel for the applicant to present it and not assume, as did the Learned High Court Judge, that the application was presented as filed.

37) The events leading up to the Learned High Court Judge proceedings in the manner he did which we have found to be a misdirection in the preceding paragraph, must be distinguished from the events in the ***Newplast Industries v Commissioner of Lands and Another***[5] case. In that case we held that the consideration by the Judge of the matter based solely on the documents filed in the matter, without hearing counsel, amounted to a hearing. Our decision so stated arose from our holding

that where the evidence in support of an application is by way of affidavit, the deponent cannot be heard to say that he was denied the right to a hearing simply because he has not adduced oral evidence. Our holding arose from the fact that the Learned High Court Judge in that matter considered an application and gave a ruling on it immediately it was filed without inviting parties to a hearing. The situation as it was before the Learned High Court Judge which is the subject of this appeal was different in that the Learned High Court Judge invited the parties to a hearing and was thus, obliged to hear them.

38) The second lapse we have noticed is that the Learned High Court Judge proceeded to grant the order of possession without considering the application. As the Appellants have quite rightly

argued, a plaintiff is obliged to prove his case if judgment is to be granted to him, even if the defence collapses. See our decision in the ***Mohammed Khalid*** case. The notes of the proceedings we have reproduced in the earlier part of this judgment reveal that what prompted the Learned High Court Judge to grant the order of possession was the absence of the defence by the Appellants. This can be gleaned from his words as follows: *"there being no opposition to the application same is hereby granted..."* The earlier parts of this judgment reveal that once again Mr. M. Ndhlovu conceded that the Court's decision was based on the want of opposition to the application.

39) The adjudicative functions of judges require that orders and judgments they hand down reveal that

they considered the issues in dispute, evidence and arguments advanced by counsel before arriving at a decision. To this end the practice in this and other Courts is that a Judge specifically states that he or she has considered the evidence and arguments presented or in the case of appellate Courts, the record of appeal and submissions by counsel. This is a deliberate move by the Courts to reassure parties to a dispute that indeed they have been heard prior to the Court rendering a decision. Further, the Court must then proceed to make findings of fact based on the evidence and determination of the legal positions of the parties arising out of the arguments. This is what we meant in the case of ***Savenda Management Services v Stanbic Bank Zambia Limited***[6] when we held at page J150

and quoting from Syed Ahmad Idid, ***Writing of Judgments: A Practical Guide for Courts and Tribunals***, as follows:

> **"The decision must show the parties that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic..."**

40) Turning our attention to the next aspect of the manner in which the Judge proceeded. The Appellant is also aggrieved at the Learned High Court Judge's refusal to grant the adjournment in order to afford it an opportunity to file an affidavit in opposition. The notes of the proceedings reveal that the Learned High Court Judge declined to grant the adjournment because he found the delay in filing an affidavit in opposition by the Appellant unacceptable in view of the fact that the affidavit in support had been served upon it a long time before the date set for

hearing. He also refused to accept that the Appellant was excused from filing an affidavit in opposition in view of the impending motion to raise preliminary issue by the Second Appellant.

41) The position we have always taken is that adjournments are granted at the discretion of the Court. Such discretion is exercised where an applicant advances justifiable grounds for an adjournment and where the applicant is not guilty of unreasonable delay in doing an act in the orderly proceedings of the matter.

42) We have no reason to fault the Learned High Court Judge in declining to grant the application for an adjournment in view of the unjustified delay by the Appellant in filing an affidavit in opposition. Further, the fact that there is a motion by way of notice to raise preliminary issue

pending, does not then allow a party to postpone the filing of an affidavit in opposition to the substantive matter before Court, especially where, as was the case in this matter, the motion raised is such that its outcome would have no bearing on the substantive matter before the Court. Our decision is reinforced by the fact that the substantive matter was also scheduled to come up on 5th November 2014, along with the preliminary application. This is evident, as Mr. M. Ndhlovu argued, from the endorsement on the originating summons.

43) Last of all is a consideration of the argument raised by the Appellants that it was a misdirection on the part of the Learned High Court Judge when he failed to invoke the provisions of Order 28 of the ***White Book***. The argument here was that the

Appellants had raised triable issues which warranted the matter going for trial. Tied to this issue is the question whether or not the Appellant should have applied for review of the Order for possession rather than appeal.

44) The provisions of Order 28 rule 8 of the ***White Book*** are as follows:

> **"Where, in the case of a cause or matter began by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the case or matter had been began by writ, it may order the proceedings to continue as if the cause or matter had been so began and may, in particular, order that any affidavit shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof."**

45) Counsel for the Appellant has quite rightly argued that by virtue of Order 28 rule 8 of the ***White Book*** a Court may treat a matter commenced by originating summons as if it were commenced by writ and hold a trial of the issues

in dispute rather than summary proceedings. The rationale for this is that an application under Order 113 of the ***White Book*** is only appropriate in instances where it is against a person who is a trespasser and cannot explain his presence on the land to any legitimate origin. Therefore, where the alleged trespasser alleges in his affidavit in opposition that he is not a trespasser and shows, *prima facie*, that his presence on the land is by virtue of legitimate origins, the Court ought to invoke Order 28 rule 8.

46) The facts as presented before the Learned High Court Judge which we have referred to earlier reveal that at the time of hearing the matter, the Appellant had not filed an affidavit in opposition challenging the allegation by the Respondent that it was a trespasser. There was no basis,

therefore, for the High Court Judge to even contemplate recourse to Order 28 rule 8. Further, we cannot accept the argument by Mr. J. Madaika that the fact that the Appellant is the entity charged with the responsibility of alienating land in the Lusaka municipality implies that it cannot be a trespasser. There is no law that supports such contention, apart from the fact that the evidence presented by the Respondent before the Learned High Court Judge in the form of title deeds, *prima facie*, indicated that it is the owner of the property and, consequently, any persons or entities settled thereon are squatters.

47) Turning to the provisions of Order 113 rule 8 of the ***White Book***. These provisions provide for the setting aside of an order of possession by a Court following application by an aggrieved party. The

order must be read with the explanatory notes under Order 113 rule 8 sub-rule 16 which, as Mr. J. Madaika argued, provide for the recourse to setting aside in instances where, there are fresh grounds or material for altering the decision. Where, however, the contention is that the order is wrong, recourse lies in an appeal.

48) The Appellant's appeal as revealed from the grounds of appeal is a challenge against the decision of the Learned High Court Judge on the ground that it is wrong. Indeed, our decision is that there was a misdirection in the manner the Learned High Court Judge proceeded and as such, his decision was wrong. We thus, accept that the cure lay in an appeal and not review.

Conclusion

49) The net result of our determination is that the appeal only succeeds partially to the extent that the Learned High Court Judge did not hear and determine the matters placed before him but merely upheld the Respondent's claim on the default of the Appellant. The Learned High Court Judge also erred by failing to invite the Respondent to present its case. We, therefore, strike down the judgment of the Learned High Court Judge and direct that the matter be referred back to the High Court where a re-hearing should be held. It is only to this extent that we find merit in grounds 1 and 2 of the appeal, and accordingly allow them.

50) We find no merit in ground 3 of the appeal and dismiss it.

51) As to costs, since the appeal has only partially succeeded, we order the parties to bear their costs of this appeal. The costs in the High Court, will abide the outcome of the rehearing.

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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J. K. KABUKA
SUPREME COURT JUDGE

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N. K. MUTUNA
SUPREME COURT JUDGE