IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 140/2015**
HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

BARCLAYS BANK ZAMBIA PLC **APPELLANT**

AND

JEREMIAH NJOVU & 41 OTHERS **RESPONDENT**

Coram: **Mambilima CJ, Malila, and Kaoma JJS**
on 15th May, 2018 and 21st June, 2018

For the Appellant: Mr. Robert Mwanza of Messrs Roberts & Partners

For the Respondent: Ms. Nelly Mutti and Mr. Moses Chitambala of Messrs Lukona Chambers, with Mr. Milner J. Katolo of Milner & Paul, Advocates.

RULING

MALILA, JS delivered the Ruling of the Court.

Cases referred to:

1. *Zambia Revenue Authority v. T & G Transport (2007) ZR 13*
2. *Mutantika & Another v. Chipungu, (Appeal No. 94 of 2012)*
3. *NCF Africa Mining Plc v. Techcro Zambia Ltd (2009) ZR 236*
4. *Ram Averbach v. Alex Kafwata, Appeal No. 65 of 2000*
5. *Access Bank (Zambia) Ltd. v. Group Five/ZCON Business Park Joint*
6. *Venture (SCZ/8/52/2014) [2016]*
7. *Stanley Mwambazi v. Morester Farms Limited [1977] ZR 108*
7. *Water Wells Limited v. Jackson [1984] ZR 98*
8. *D.E. Nkhuwa v. Lusaka Tyre Services Ltd (1977) ZR 59*
9. *Kanyanta Kachana v. Exhilda Mpuku, Appeal No. 76/2012*

10. *Examinations Council of Zambia & Another v. Tecla Investments Ltd. Appeal No. 65 of 2012*
11. *Lackson Mukuma & 43 Others v. Barclays Bank Plc. Appeal No. 002/2013.*
12. *Bookers Bus Services Company Ltd. v. Stanbic Bank Ltd. (SCZ/8/226/2014)*

Legislation referred to:

1. *Supreme Court Rules, Chapter 25 of the laws of Zambia.*

This appeal was scheduled for hearing on Tuesday 15th May, 2018. However, on the Friday preceding the hearing (11th May, 2018), the learned counsel for the appellant, upon obtaining leave from a single judge of this court on 10th May 2018, filed an amended notice of appeal; amended memorandum of appeal; and amended heads of argument. The amendments to these documents were fairly extensive. Coming as they did barely one clear day before the hearing, granted also that in the order of things the respondents would wish to amend their responses, we were inclined to adjourn the hearing of the appeal to the July, 2018 session to allow both the court to reflect on the amendments and the respondents to file their amended responses, if they were so inclined.

When the matter was called, however, the learned counsel for the respondents prodded us to deal with the notice of intention to raise preliminary objection to the appeal which notice had been filed on 23rd April 2018. The notice was taken out pursuant to Rule 19(1) and Rules 48(1), 54 and 55 of the Supreme Court Rules, chapter 25 of the laws of Zambia. By that notice the respondents sought the court to determine whether:

(1) **the record of appeal and the whole appeal was properly before the court granted that the record of appeal was filed on 14th September, 2015 without leave of court; and**

(2) **the ruling of this court delivered on 28th July, 2015 granting leave to withdraw the record of appeal under appeal No. 107/2017 extended to refiling of the record of appeal without the leave of court?**

Together with the notice to raise preliminary objection, the respondents' learned counsel filed the respondents' list and extracts of authorities in support. Mr. Chitambala, one of the learned counsel for the respondents, addressed us on the preliminary objection, and in doing so intimated that he would rely on the notice and the list of extracts of authorities filed.

In the list and extracts of authorities filed in support of the objection, the learned counsel for the respondents quoted a passage from our judgment in the case of **Zambia Revenue Authority v. T & G Transport**[1] where we emphasized that the requirement of leave to appeal goes to the jurisdiction of the court and that jurisdiction is never conferred by the express consent of the parties. Also quoted in the list and extracts of authorities were the case of **Mutantika & Another v. Chipungu**[2] and Rule 12(1) of the Supreme Court Rules, chapter 25 of the laws of Zambia. The learned counsel also cited our decision in **NCF Africa Mining Plc v. Techcro Zambia Ltd**[3] where we stated that litigants who fail to adhere strictly to the rules of court are at risk of having their appeals dismissed. Furthermore, they adverted to the case of **Ram Averbach v. Alex Kafwata**[4], where we carried similar sentiments. More purposely, they quoted a passage from our judgment in **Access Bank (Zambia) Ltd. v. Group Five/ZCON Business Park Joint Venture**[5] (pages J23-J24) as follows:

> **We have in many cases consistently held the view that it is desirable for matters to be determined on their merits and in finality rather than on technicalities and piece meal. The cases of *Stanley Mwambazi v. Morester Farms Limited*[6], and *Water Wells Limited v. Jackson*[7] are authority for this position. We reaffirm this position. Matters should, as much as possible, be**

> **determined on their merits rather than be disposed of on technical or procedural points. This, in our opinion, is what the ends of justice demand. Yet, justice also requires that this court, indeed all courts, must never provide succor to litigants and their counsel who exhibit scant respect for rules of procedure. Rules of procedure and timeliness serve to make the process of adjudication fair, just, certain and even-handed. Under the guise of doing justice through hearing matters on their merit, courts cannot aid in the bending or circumventing of these rules and shifting goal posts, for while laxity in application of the rules may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.**

The list and extracts of authorities ended with a recitation of a passage from our judgment in **D. E. Nkhuwa v. Lusaka Tyre Services Ltd**[8] regarding the significance of adhering strictly to prescribed time lines and the consequence of failure to do so.

Notwithstanding, the intimation, that he would rely on the notice and extract of authorities, however, Mr. Chitambala also orally submitted, rather plentifully. The substance of his oral argument was simply that in the ruling of this court dated 28th July 2015, in terms of which we allowed the appellant to withdraw the record of appeal with a view to attending to the anomalies identified and thereafter to refile it, we directed that the appellant should comply with Rule 58(5) of the Supreme Court Rules.

According to the learned counsel, the appellant could not comply with that rule without moving the court under Rule 12 of the Supreme Court Rules for enlargement of time within which to file.

Mr. Chitambala also argued a different issue, namely, that the notice of appeal was taken in Appeal No. 107 of 2012, yet the record of appeal as refiled is reflected as Appeal No. 140 of 2015. He contended in a nutshell that the appeal now before the court is incompetent and ought to be visited by the inevitable sanction of dismissal of the appeal.

In augmenting Mr. Chitambala's *viva voce* submissions, Mr. Katolo briefly spoke to the time of filing. He contended that in relation to appeal No. 140 of 2015, the default in compliance with Rule 54 of the Supreme Court Rules has to be measured in relation to the date of the notice of appeal, i.e. 5th September 2011. The record of appeal was filed on 14th September 2015, entailing a delay of 4 years 10 days. Leave to file the record of appeal out of time was, therefore, absolutely necessary. Based on the case of **Zambia Revenue Authority v. T & G Transport**[1], he submitted that the court has no jurisdiction to entertain the present appeal and it should be dismissed accordingly.

For its part, the appellant opposed the notice to raise preliminary objections to the appeal. On behalf of the appellant there was filed a notice in opposition as well as a list and extracts of proceedings and authorities. Mr. Mwanza, learned counsel for the appellant, relied on these documents but also augmented them with oral submissions.

In the notice in opposition, the appellant opposed the respondents' notice on grounds that the assertion by the respondents that the record of appeal filed on the 14th September, 2015 was filed without leave of court, is not tenable; that the respondents' claim that the court's ruling of 28th July, 2015 merely granted the appellant leave to withdraw the record of appeal and not to file it, is misplaced; and finally that the preliminary objection to the appeal was an attempt by the respondents to belatedly and indirectly reopen and seek interpretation of the ruling of the court made almost three years ago through rule 19(1) of the Supreme Court Rules.

The contention of the appellant in a nutshell was that in granting the appellant leave to withdraw the record of appeal under cause No. 107/2012, this court also did grant the appellant

leave to refile the record of appeal, along with the heads of argument so as to comply with Rule 58(5) of the Supreme Court Rules.

In the list and extracts of proceedings, the learned counsel reproduced portions of the proceedings in this case prior to our ruling of 28th July 2015; extracts of proceedings in the case of **Kanyanta Kachana v. Exhilda Mpuku**[9]; those from **Examinations Council of Zambia & Another v. Tecla Investments Ltd**[10] and some from **Lackson Mukuma & 43 Others v. Barclays Bank Plc**[11]. The substance of the extracts reproduced from the proceedings of those cases is that we allowed withdrawal of the records of appeal in each of those cases with a clear intimation that they be refiled.

In his submission before us, Mr. Mwanza was at pains to press the point that leave to refile the record of appeal together with the heads of argument was not required as the same had been 'impliedly' given in our ruling of 28th July, 2015. Our efforts to extract a direct answer from Mr. Mwanza on the question whether our ruling should be understood to have exempted the appellant from complying with rule 12 regarding the necessity to

seek leave to file appeal documents out of time, were not very successful.

The learned counsel for the appellant also cited the ruling of a single judge of this court in **Bookers Bus Services Company Ltd. v. Stanbic Bank Ltd.**[12] where two appeals were filed by counsel for the appellant. We understand counsel for the appellant to have cited this case for purposes of distinguishing it from the present situation.

Mr. Katolo's reply was in the form of a question – whether leave to (re)file the record of appeal was required or not. His view was that the case of **Kanyanta Kachana v. Exhilda Mpuku**[9] relied upon by the appellant was not helpful to the appellant's position as there was, in that case, emphasis on the term "out of time." As soon as the record of appeal is withdrawn, there is no record and, therefore, any further filing would be out of time and would thus require leave. We were urged to uphold the preliminary objection.

We have considered, with interest, the arguments of the parties so ably debated by learned counsel. As we see it, the controversy in this appeal concerns the interpretation of our ruling in this very matter given on the 28th July, 2015. The specific

question that emerges and calls our attention is whether, by allowing the appellant to withdraw the record of appeal and to refile it together with the heads of argument, we gave to the appellant a free licence, so to say, to refile the record together with the heads of argument at any future time convenient to the appellant.

It is important, we think, that the wording of the relevant parts of our ruling is closely examined if proper meaning is to be assigned to it. Before doing so, however, we reproduce Rule 58(5) of the Rules of the Supreme Court which was at the heart of the arguments that precipitated our ruling of the 28th July, 2015. That rule states that:

> **The appellant shall file in the Registry thirteen hard copies of the Record of Appeal, including an electronic copy thereof, together with the heads of argument.**

It will be recalled that the appellant in this case had initially filed the record of appeal on 20th July, 2012 without the heads of argument contrary to the provisions of Rule 58(5) which we have reproduced. The appellant then applied before a single judge of this court for leave to file its heads of argument out of time. In reaction, the respondents promptly raised a preliminary objection,

urging us to dismiss the appeal for failure to comply with Rule 58(5). This prompted the appellant's learned counsel to apply to withdraw the record. The learned counsel for the respondent then raised a dignified objection to the application to withdraw the record of appeal, pointing out that such application was alien to our rules which do not provide for withdrawal of a record of appeal once it is lodged; that a withdrawal of the appeal has, in terms of Rule 63 of the Supreme Court Rules, the same effect as a dismissal of the appeal.

We reflected on the position of the parties. After considering the distinction between a record of appeal and a notice of appeal, we stated as follows:

> **Withdrawal of a record of appeal, even if it contains a copy of the notice of appeal, is not synonymous with withdrawal of the appeal. This is more so where the withdrawal of the record of appeal is with a view to correcting a defect, either in the record itself or the process leading to its filing.**

While agreeing with the respondent's lawyers that there is no rule in the Supreme Court Rules that allows a party to withdraw a record of appeal, we pointed out that Rule 68 of the Supreme Court Rules, which entitles a party to amend a record

of appeal, inevitably entails in effect, a withdrawal of the record sought to be amended for purposes of replacing it with the corrected or amended record. We also pointed to our inherent jurisdiction and the need to do justice as founding our authority to reprieve an appeal by allowing a withdrawal of a record even in the absence of a clear stipulation to that effect in our rules. Having said so we concluded as follows:

> **We accordingly grant the appellant leave to withdraw the record of appeal so as to comply with Rule 58(5) of the Supreme Court Rules.**

It is this ruling that we are, in effect, being asked to explicate. The respondent believes that compliance with Rule 58(5), as we directed in our ruling, should proceed from the standpoint that from the date the permission to withdraw was given, there was no record of appeal, and working backwards to the date of the notice of appeal, the appellant was out of time. Any compliance with Rule 58(5) necessarily entails invoking rule 12 requiring an application for leave to file the record and heads of argument out of time. The appellant for its part believes that, given the peculiar circumstances that animated the ruling, the allowance to withdrawn the record and to refile same in compliance with Rule

58(5), was a full package that carried with it, or at any rate implied, leave to refile the record and heads of argument without the necessity of taking any other action.

We think, with respect to counsel for the parties, that our ruling of 28th July, 2015 was plain in its import. The appellant was allowed to withdraw and refile the record in compliance with Rule 58(5). That rule is specific to filing the record of appeal, together with the heads of argument. It says nothing about the timing which is governed separately by rules 54 and 12. It is remarkably unfortunate that a schism should have arisen over the implications of our granting the appellant the specific order they prayed for, namely to withdraw with a view to filing again.

Following the appellant's application to withdraw the record of appeal and the granting of that application, any subsequent filing of the record of appeal together with the heads of argument came within a milieu of delayed filing of the requisite appeal documents in terms of rule 54 which directs that the filing should be done within sixty days of the notice of appeal.

For the avoidance of doubt, we must restate that the appeal risked being dismissed for failure to comply with rule 58(5). The ruling we made was thus prophylactic. It was confined to the appellant's specific request to withdraw and refile the record of appeal. Beyond that the appellant was back in the realm of rules of procedure including rules 12 and 54, and had to comply, like any other appellant who is late in meeting prescribed time lines. It would indeed be naïve to assume that our ruling allowing the appellant to withdraw and properly file the appeal documents in compliance with rule 58(5) signified a seachange in our insistence that rules of procedure ought to be followed.

We agree, therefore, with counsel for the respondent that the appellant, being out of time to file (by way so refiling) the record of appeal, accompanied by heads of argument, should have applied for leave to file out of time. Its failure to do so was fatal. The preliminary objection must therefore succeed. The result is that the appeal collapses.

Costs shall follow the event.

I.C. MAMBILIMA
CHIEF JUSTICE

M. MALILA
SUPREME COURT JUDGE

R. M. C. KAOMA
SUPREME COURT JUDGE