

IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)



2017/HPC/0246

BETWEEN:

QALIB TRANSPORT LIMITED  
AHMED ABDULLAHI

1<sup>ST</sup> PLAINTIFF  
2<sup>ND</sup> PLAINTIFF

AND

ZAMBIA NATIONAL COMMERCIAL BANK PLC. DEFENDANT

Coram: Hon. Lady Justice W. S. Mwenda (Dr.) in Chambers at  
Lusaka the 26<sup>th</sup> day of June, 2018.

For the Plaintiffs: Mrs. I. M. Kunda of George Kunda and Company.  
For the Defendant: Mrs. K. Musana, In-house Legal Counsel,  
ZANACO.

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## RULING

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**Cases referred to:**

1. *Zambia Revenue Authority v. Jayesh Shah SCZ Judgment No. 10 of 2001.*
2. *Stanley Mwambazi v. Morester Farms Limited (1977) Z.R. 108.*
3. *Nahar Investments v. Grindlays Bank International (Zambia) Limited (1984) Z.R. 81.*
4. *Zambia Telecommunications Company Limited (Zamtel) v. Aaron Mweene Mulwanda, Paul Ngandwe SCZ Judgment No. 7 of 2012.*
5. *In the Matter of Protection of Fundamental Rights and Freedoms of the Individual and In the Matter of Articles 20(6) and 29 of the Constitution of Zambia: Mundia Sikatana v. The Attorney-General (1982) Z.R. 109.*

**Legislation referred to:**

1. *Order 3, rule 5 of the Rules of the Supreme Court, 1999 Edition (the*



***White Book).***

2. ***Order 39, rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia.***
3. ***Order 2, rule 1 of the White Book.***

This is an application by the Plaintiffs for leave to file Witness Statements and Skeleton Arguments Out of Time pursuant to Order 3, rule 5 of the Rules of the Supreme Court, 1999 Edition (hereinafter referred to as "the White Book"). The application is supported by a verifying affidavit dated 15<sup>th</sup> December, 2017 sworn by Irene Mwezi Kunda, Counsel seized with the conduct of the Plaintiffs' case, from information within her knowledge and an Affidavit in Reply to Affidavit in Opposition to Summons for Leave to File Witness Statements and Skeleton Arguments, sworn by the same deponent, dated 26<sup>th</sup> January, 2018. The Plaintiffs' application is further buttressed by Skeleton Arguments and List of Authorities in support of the application dated 15<sup>th</sup> December, 2017 and Skeleton Arguments in Support of Affidavit in Reply to Summons for Leave to File Witness Statements and Skeleton Arguments Out of Time dated 26<sup>th</sup> January, 2018.

The application is opposed by the Defendant who filed an opposing affidavit and Skeleton Arguments on 18<sup>th</sup> January, 2018. The Affidavit was sworn by Kate Musana, the Defendant's In-house Counsel seized with the conduct of the Defendant's case.

The gist of the Plaintiffs' application is that while admitting that the Plaintiffs did not file the Witness Statements and Skeleton Arguments within the time stipulated in the Order for Directions issued by this Court on 11<sup>th</sup> September, 2017 and did not apply to



have the time for compliance extended by 26<sup>th</sup> October, 2016 as ordered by the Court, the reason for the failure was that the 2<sup>nd</sup> Plaintiff, who has his family in the United Kingdom had travelled to visit his family and therefore Counsel for the Plaintiffs had to email the documents for the 2<sup>nd</sup> Plaintiff to sign and send them to Zambia by a courier company called DHL. As proof of the 2<sup>nd</sup> Defendant's absence from Zambia during the material time, the Plaintiffs exhibited copies of the 2<sup>nd</sup> Defendant's passport, air tickets and boarding pass, as exhibit "IMK1" of the Affidavit in Support.

Mrs. Kunda submitted that contrary to the Defendant's Skeleton Arguments, the Plaintiffs are not seeking to defy the orders of this Court since such an action would be an abuse of the justice system. That the Plaintiffs duly filed their Bundles of Documents and Pleadings within the period stipulated in the Orders for Directions and the same are before Court. She submitted further, that on the authority of *Zambia Revenue Authority v. Jayesh Shah*<sup>1</sup>, where it was held that cases should be decided on their substance and merit where there has been only a very technical omission or oversight not affecting the validity of the process, and that any breach will not always be fatal if the rule is merely regulatory or directory, the Plaintiffs are seeking for an extension of time within which to comply with the Orders for Directions so that the matter can be decided on the merits and not on technicalities. Mrs. Kunda also cited the case of *Stanley Mwambazi v. Morester Farms Limited*<sup>2</sup>, where Gardner, JS stated at page 110 as follows:



*“Where a party is in default he may be ordered to pay costs, but it is not in the interest of justice to deny him the right to have his case heard. I would emphasise that for this favourable treatment to be afforded to the applicant, there must be no unreasonable delay, no malafides and no improper conduct of the action on the part of the Applicant.”*

Mrs. Kunda added that in the case of *Nahar Investments Limited v. Grindlays Bank International (Zambia) Limited*<sup>3</sup>, the Supreme Court held that in the event of inordinate delay or unfair prejudice to a Respondent, the Appellant can expect the appeal to be dismissed. She argued that in the present case, there was no inordinate delay since the witness statements and skeleton arguments were ready but could not be filed in time due to the 2<sup>nd</sup> Plaintiff's absence from the jurisdiction. Further, that granting leave to the Plaintiffs to file the witness statements and skeleton arguments out of time would not prejudice the Defendant.

Mrs. Kunda urged the Court to further take into account the fact that the order made by the Judge who was handling the matter before was merely part of Orders for Directions and not a judgment on the matter before the Court. She argued that directions are merely regulatory as to when certain documents should be filed. In further support of her clients' application, Mrs. Kunda cited the provisions of Order 39, rule 1 of the High Court Rules which provides as follows:

*“Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where a party shall have obtained leave to appeal and such*



*appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly, or in part, and to take fresh evidence and to reverse, vary or confirm his previous judgment or decision."*

According to Mrs. Kunda, the Defendant has misconstrued the issue at hand since Orders for Directions do not bring the matter to its finality as trial at this stage has not commenced, thus rendering the case of *Zambia Telecommunications Company Limited (Zamtel) v. Aaron Mweene Mulwanda, Paul Ngandwe* <sup>4</sup>, cited by the Defendant immaterial to the issue at hand. It was Mrs. Kunda's contention that the failure by the Plaintiffs to file witness statements and skeleton arguments was brought to the attention of the Court, hence the application for leave to file the said documents out of time. She further contended that Order 2, rule 1 of the White Book, which she referred to, provides as follows:

*"(1) Where, in beginning or purporting to begin any proceedings or at any stage in the cause of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein."*

Mrs. Kunda submitted that on the basis on Order 2, rule 1 of the White Book, cited above, the failure by the Plaintiffs to file witness statements and skeleton arguments cannot render the proceedings a



nullity. It was thus her prayer that the application before Court be granted.

In response Mrs. Musana submitted, that the Defendant would rely on the Affidavit in Opposition filed into Court on 18<sup>th</sup> January, 2018 and Skeleton Arguments of even date. She supplemented the same by submitting orally at the hearing. According to Mrs. Musana the Defendant's case is that on 11<sup>th</sup> September, 2017, the Court issued Orders for Directions, one of which was that the parties would file and exchange witness statements on or before 23<sup>rd</sup> October, 2017 and that the trial date would be set at a status conference to be held on 26<sup>th</sup> October, 2017. The Court further ordered that the parties were at liberty to apply for an extension of time for compliance on or before 26<sup>th</sup> October, 2017. It was the Defendant's contention that when the matter came up for status conference and setting of trial date on 26<sup>th</sup> October, 2017, the Plaintiffs indicated that they had been unable to file witness statements as they required signatures from their witnesses who were out of the country. The Court ordered that the Plaintiffs were out of time as they should have applied for an extension of time to comply with the orders by 23<sup>rd</sup> October, 2017 and ruled that it would not be in breach of its own orders and would therefore, not entertain an application for extension of time. The Court thereafter proceeded to set a trial date. That the Plaintiffs proceeded to file the application for leave to file witness statements and skeleton arguments out of time on 15<sup>th</sup> December, 2017. Mrs. Musana submitted further, that it is the Defendant's contention that by filing the application before



this Court, the Plaintiffs are asking the Court to ignore its own order. That in the case of *Zambia Telecommunications Company Limited (Zamtel) v. Aaron Mweene Mulwanda, Paul Ngandwe*<sup>4</sup>, the Supreme Court held *inter alia*, thus:

*“1. The general rule as to the amendment and setting aside of judgments or orders after a judgment or order has been drawn up is as follows: except by way of appeal, no court, judge or master has power to rehear, review, alter or vary any judgment or order after it has been drawn up, either in application made in the original action or matter, or in fresh action brought to review such judgment or order. The object of this rule is to bring litigation to a finality.*

*2. The Court has inherent jurisdiction to vary, modify, or extend its own orders if in its review, the purpose of justice required that it should do so.”*

According to the Defendant, the record will show that on 26<sup>th</sup> October, 2017, the Court unequivocally ordered that the Plaintiffs were out of time to file an application for an extension of time within which to comply with the orders. The said Order was exhibited as “KM1” in the Affidavit in Opposition filed by the Defendant. The Defendant further submitted that the Court also unequivocally ruled that it would not entertain an application for extension and that therefore, the Plaintiffs’ application not only defies the said order of Court, but also seeks to move the Court to vary its own order in contravention of the *Zamtel v. Aaron Mweene* case. That despite the fact that the order in issue was made by a different High Court Judge,



it is still an order of the High Court and further, that it is trite that one High Court Judge cannot vary or set aside a decision of another High Court Judge. In this respect, the Defendant cited the case of *In the Matter of Protection of Fundamental Rights and Freedoms of the Individual and In the Matter of Articles 20(6) and 29 of the Constitution of Zambia: Mundia Sikatana v. The Attorney-General*<sup>5</sup>, where the Supreme Court held that a Judge of the High Court has no jurisdiction to reopen and reconsider and interfere with and comment upon a matter already determined by another Judge of equal jurisdiction. It was Mrs. Musana's submission that what the Plaintiffs should have done in the circumstances was to seek leave to appeal this Court's decision to a higher court. She submitted in addition, that the failure to comply with court rules should be distinguished from the failure to comply with court orders such as the order made on 26<sup>th</sup> October, 2017. That the mandate of this Court is a speedy determination of matters, therefore, it is important that parties comply with orders for directions or it may result in a delay of justice and derail the mandate of this Court.

Mrs. Musana submitted further, that if the Plaintiffs' witness was out of the jurisdiction as alleged, compliance with the Orders for Directions was still possible as the Plaintiffs would have merely been required to duly authenticate the documents executed out of the jurisdiction for use herein. That, therefore, the Plaintiffs' reason for the delay in this day and age of email and express courier services does not hold water. Further, that a perusal of the Defendant's Affidavit in Opposition to the application before Court will disclose



that this matter was previously dismissed under cause number 2016/HPC/0418 for reason of delay and want of prosecution. That despite this history, the Plaintiffs have again failed to take the requisite steps to comply with the Orders for Directions issued by this Court and move the case along. That the Plaintiffs have, therefore, exhibited procedural default disclosing contumelious disregard for rules of the Court, laxity, casual or a cavalier approach thereto. Mrs. Musana submitted further, that it is trite that in the public interest litigation should not only come to an end, but come to an end expeditiously since a delay of justice is a denial of justice. She prayed that the application before Court be dismissed forthwith with costs to the Defendant.

In reply, Mrs. Kunda emphasised that orders for directions do not constitute a final determination of the matter which should result in the dismissal of an action. She reiterated that the Plaintiffs' Bundle of Documents and Pleadings are already before Court and what is missing are witness statements whose delay in filing had been explained in the two affidavits filed by the Plaintiffs. That, as explained in the affidavits, the delay was unintentional. With regard to the Defendant's submission that this Court has no power to review its own decisions, Mrs. Kunda submitted that she had referred to the Order which gives High Court Judges the power to review their own decisions. That on that basis, she still maintained her prayer that this Court grants the application to file witness statements out of time. Reacting to the submission by Mrs. Musana that granting of the application would result in a delay of the case and thus a delay



of justice, Mrs. Kunda submitted that one of Judge Lungu's sentiments was that she would go ahead and set the trial date, which she did and since a trial date had been set, the issue of delaying justice did not arise.

I have perused the documents filed both for and against the application before Court. I have also considered the *viva voce* submissions by Counsel on both sides. It is not in dispute that my sister Judge Lungu did, on 11<sup>th</sup> September, 2017, issue Orders for Directions which provided, *inter alia*, as follows:

"1. ...

2. ...

3. *The Parties shall file and exchange witness statements on or before 23<sup>rd</sup>*

**October, 2017.** *At the time of filing their witness statements, the Parties shall*

*also file their skeleton arguments and list of authorities.*

4. *Trial dates shall be set at the Status Conference that shall be held on 26<sup>th</sup>*

**October, 2017, at 08:15.**

5. *The Parties shall be at liberty to apply to amend these orders or extend time for*

*compliance on or before 26<sup>th</sup> October, 2017 provided that the Court will not*

*entertain applications to vary these Orders or extend time for compliance after*



*a party has failed to comply with the order or item subject to the application...”*

On 26<sup>th</sup> October, 2017, the matter came up before Judge Lungu for status and setting of trial dates where the Plaintiff's advocate informed the Court that the Plaintiffs were unable to file witness statements because of difficulties in securing the signatures of the witnesses who live out of the country. The Judge drew the attention of the Parties to paragraph 5 of the Orders for Directions and ruled that the Plaintiffs were out of time to consider applying for an extension for filing the documents that ought to have been filed by 23<sup>rd</sup> October, 2017. The Judge then went on to state that the Court would not breach its own orders and she would not, therefore, entertain the application for extension and proceeded to set the trial date, being 27<sup>th</sup> February, 2018.

It is not in dispute that the Plaintiffs failed to file their witness statements and skeleton arguments within the time stipulated in the Orders for Directions given by Judge Lungu on 11<sup>th</sup> September, 2017. Having found that the Plaintiffs defaulted in complying with the said Orders for Directions, the question which I am called upon to determine, is whether such default should result in the denial by this Court of the application for leave to file the said documents out of time.

The Defendant has opposed the application for the reasons aforesaid and cited some authorities to support its case. The Defendant has further submitted that by making the application before Court, the Plaintiffs are asking the Court to ignore its order of



26<sup>th</sup> October, 2017. However, it is my considered view that by lodging the application before Court the Plaintiffs are not asking this Court to ignore the said order but are in effect asking the Court to vary its decision not to entertain an application for extension of time. (Emphasis by the Court).

The Defendant has cited the case of *Zambia Telecommunications Company Limited v. Aaron Mweene*<sup>4</sup>, as authority that this Court has no power to rehear, review, alter or vary any judgment or order after it has been drawn up, except by way of appeal and therefore, the Court should not entertain the application before Court. However, as the Supreme Court stated in the said case, the above is the general rule and as is the case with general rules, they are subject to exceptions. The Supreme Court case provided the exception to the general rule in paragraph 2 where it stated thus:

*"The Court has inherent jurisdiction to vary, modify or extend its own orders if in its review, the purpose of justice required that it should do so."* (Underlining by the Court for emphasis only).

In the *Zambia Telecommunications* case above, the Supreme Court made it clear that the Court has inherent jurisdiction to vary or review its own orders if the interest of justice so requires. Further, the case of *Mundia Sikatana v. The Attorney General*, which the Defendant has cited to the effect that a Judge has no jurisdiction to reopen and consider and interfere with and comment upon a matter already determined by another Judge of equal jurisdiction, is in my view, not applicable to the application before this Court for the simple reason that the said lack of jurisdiction applies to a matter already



determined by another Judge. In the case in *casu*, the Judge only issued orders for directions and set the trial date; the matter was not finally determined on the merits. Indeed, as the Plaintiff's correctly argued, the issuing of orders for directions does not bring a matter to its finality since the matter is yet to be heard on the merits. Therefore, by hearing the application for leave to file witness statements and skeleton arguments out of time, I am not reopening, or considering, or interfering with or commenting on a matter already determined by my learned sister, as envisioned by the Mundia Sikatana case.

As regards the need for matters to be decided on the merits, the Supreme Court, in the case of *Zambia Revenue Authority v. Jayesh Shah*<sup>1</sup>, held as follows:

*"Cases should be decided on merit and that any breach will not always be fatal if the rule is merely regulatory or directory. Counsel contended that in view of this decision and taking into consideration that the Appellants were aggrieved against the Judgment and applied for review but were mistaken in their belief, this Court should consider the meritorious nature of the appeal rather than the breach."*

Further, Order 2, rule 1 of the White Book stipulates as hereunder:

*"(1) Where, in beginning or purporting to begin any proceedings or at any stage in the cause of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these*



*rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein."*

Mrs. Musana argued that there should be a distinction between a failure to comply with court rules and a failure to comply with orders of court. While that may be the case generally with regard to court orders, I opine that the distinction is unsustainable with regard to orders for directions because, just like rules of court, they are regulatory or directory in nature. Orders for directions are given to direct when certain documents are to be filed and certain actions are to be done during the course of the proceedings for an orderly and speedy disposal of cases. While it is important that parties comply with orders for directions, being regulatory in nature, their breach should not by itself, lead to a nullification of any action, but should be treated as an irregularity in accordance with Order 2, rule 1 of the White Book.

I agree with Mrs. Musana's submission that even if the 2<sup>nd</sup> Plaintiff was out of the jurisdiction, compliance with the Orders for Directions was still possible in this day and age of email and courier services. Indeed, the fact that the Plaintiffs failed to comply with the order for filing witness statements and skeleton arguments, let alone seek for an extension of time before the deadline set in the order, is evidence of some laxity on their part but it cannot be said to have gone to the extent of exhibiting a contumelious disregard for rules of court, as alleged by the Defendant. I make this finding



notwithstanding the previous dismissal of the matter for delay and want of prosecution.

In my opinion, since the irregularity is not fatal and the Plaintiffs have complied with the rest of the directions and filed their Bundles of Documents and Pleadings, justice requires that they be given the opportunity to file their witness statements, which will constitute their evidence-in-chief, before the matter comes up for trial. Further, I concur with the Plaintiffs' submission that no prejudice will be done to the Defendant by granting leave to the Plaintiffs to file their witness statements and skeleton arguments out of time.

Order 3, rule 5 of the White Book provides that:

*"The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings."*

The above Order gives this Court the power to extend or abridge the period within which to do any act in any proceedings. This Court, therefore, has the power, after reviewing its previous order, to extend the time within which the witness statements can be filed into Court.

The net result is that the application for leave is successful. Leave is granted to the Plaintiffs to file their witness statements and skeleton arguments within fourteen (14) days of the date of this order. However, I am condemning the Plaintiffs in costs of this application. Therefore, costs of and incidental to this application are awarded to



the Defendant, which costs shall be agreed between the parties or taxed in default of agreement.

Delivered at Lusaka the **26<sup>th</sup>** day of **June, 2018**.



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**Winnie S. Mwenda (Dr.)**  
**HIGH COURT JUDGE**