

**IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 236 OF 2020  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**BETWEEN:**



**DSS DESIGN LIMITED**

**APPELLANT**

**AND**

**CPL LIMITED**

**RESPONDENT**

**CORAM: Chashi, Sichinga and Banda - Bobo, JJA**

**ON: 15<sup>th</sup> June and 30<sup>th</sup> July 2021**

*For the Appellant: D. M. Sichombo, Messrs D. M. Sichombo  
Legal Practitioners*

*For the Respondent: N/A*

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## **J U D G M E N T**

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**CHASHI, JA** delivered the Judgment of the Court.

**Cases referred to:**

- 1. Godfrey Miyanda v Mathew Chaila (Judge of the High Court)  
(1985) ZR, 193**

2. **Sanat Limited v Shaileshkumar Suryakant Amin - CAZ Appeal No. 146 of 2017**
3. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR, 172**

**Rules referred to:**

1. **High Court Rules, Chapter 27 of the Laws of Zambia**

**Other works referred to:**

1. **Bryan A. Gardner, Black's Law Dictionary, 10<sup>th</sup> edition, 2014**

## **1.0 INTRODUCTION**

1.1 This appeal is against the ruling of Hon. Mr. Justice K. Chenda, (Commercial Division, High Court) which was delivered on 29<sup>th</sup> October, 2019 in chambers, wherein, the Appellant's action was dismissed for want of prosecution.

## **2.0 BACKGROUND**

2.1 The Appellant, who was the Plaintiff in the court below, commenced an action against the Respondent claiming *inter alia* the sum of US\$ 738,000.00 for professional services rendered to the Respondent and damages for breach of

contract and loss of business. The matter was allocated to Hon. Mr. Justice W. S. Mweemba.

2.2 On 10<sup>th</sup> May, 2016, the Appellant filed an application to enter Judgment on admission. The parties were heard *inter partes* and the Judge reserved ruling, which he indicated would be delivered on 30<sup>th</sup> June, 2016, which ruling was never delivered. Thereafter, the Appellant, verbally and in writing engaged the Marshal to Mweemba, J to bring to the attention of the Judge that there was a pending ruling. However, the ruling was never delivered up to the time the matter was reallocated to Chenda, J.

2.3 When the matter first came up before Chenda J, on 11<sup>th</sup> October, 2019, for a status conference, the Judge noted the absence of the parties without explanation.

The Judge further noted from the record that a consent Order was filed on 19<sup>th</sup> February, 2016 which required amendments to be made to the originating process, but the amendments were never made.

2.4 In the premise, the Judge struck out the matter with liberty to restore within fourteen (14) days. In default, the matter was to stand dismissed for want of prosecution.



On 29<sup>th</sup> October, 2019, the Judge called for the record and noted that there had not been an application for restoration of the matter and therefore ordered that the matter stands dismissed for want of prosecution.

### **3.0 GROUNDS OF APPEAL**

3.1 Dissatisfied with the Order of the lower court, the Appellant launched an appeal before this Court and advanced two grounds of appeal couched as follows:

1. The honourable court below erred in law and fact when it made an Order on 29<sup>th</sup> October 2019, dismissing the matter for want of prosecution, when the application filed on 10<sup>th</sup> May, 2016 for Judgment on admission before the said court and heard on 8<sup>th</sup> June, 2016 awaited ruling from the Honourable court.
2. The honourable court below erred in law and fact when it held on 2<sup>nd</sup> June, 2020 that it had become *functus officio* and could therefore not entertain the Appellant's application for leave to restore the matter to the active cause list when a prior

substantive application for Judgment on admission filed on 10<sup>th</sup> May, 2016 and heard on 8<sup>th</sup> June 2016 awaited ruling from the honourable court.

#### **4.0 ARGUMENTS IN SUPPORT OF APPEAL**

- 4.1 Mr. Sichombo, Counsel for the Appellant, relied entirely on the filed heads of argument dated 23<sup>rd</sup> November, 2020. In support of ground one, Counsel submitted that there was sufficient evidence on record indicating that the Appellant actively and diligently prosecuted the matter until the period where it had to wait for a ruling relating to its application for Judgment on admission. According to Counsel, the said ruling has up to date, over four years still not been delivered.
- 4.2 Counsel referred us to the case of **Godfrey Miyanda v Mathew Chaila (Judge of the High Court)**<sup>1</sup> and submitted that the Appellant had no remedy against the delay in the delivery of the ruling relating to its application for Judgment on admission and that it is during this period that substantive parts of the court's record went missing.
- 4.3 Counsel called into aid the case of **Sanat Limited v Shaileshkumar Suryakant Amin**<sup>2</sup> and submitted that, the



Appellant was not properly served with a notice of the status conference, as such, it could not have filed an application to restore the matter to the active cause list within the thirty (30) days ordered by the court. In addition, Counsel submitted that, the law firm remained closed during the Covid-19 precautionary measure period and only re-opened on 1<sup>st</sup> June 2020.

- 4.4 It was further argued that, it is practice that the first substantive application filed into court takes precedence before unrelated procedural technicalities can be entertained.
- 4.5 Counsel further contended that, the learned Judge did not adjudicate on the issues raised by the Appellant relating to its application for Judgment on admission. Further that the Judge was not being requested to re-examine a decision related to any substantive issues but was merely being requested to correct a wrong procedural action.
- 4.6 In support of ground two, Counsel referred us to **Black's Law Dictionary** definition of *functus officio* and contended that, the lower court still had jurisdiction to entertain the Appellant's application as no Judgment had been rendered

on the substantive application for a Judgment on admission.

We were again referred to the case of **Sanat Limited**<sup>2</sup>.

4.7 Counsel submitted that the failure to attend the status conference was not intentional on the part of the Appellant and that it had proffered a valid reason for its absence; being that the notice of the status conference was never served on the Appellant. Our attention was drawn to Order 53 (7) (of **The High Court Rules**<sup>1</sup>, and submitted that based on the said provision, a Judge can only dismiss an action if the parties failed to attend a scheduling or status conference on two occasions without justifiable cause.

4.8 It was further contended that, while the lower court ordered that the Appellant had the liberty to restore its application within 30 days, such period fell during the period when the firm and court business were closed due to the COVID 19 pandemic and that upon, filing of the application for restoration on 2<sup>nd</sup> June 2020, a day after the courts resumed business, the lower court notified the Appellant that it was *functus officio*. According to Counsel, the learned Judge disregarded the closure of court business during the COVID19 pandemic period.



4.9 Counsel relied on the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**<sup>3</sup> and submitted that the lower court erred by failing to adjudicate on the substantive application for Judgment on admission despite being furnished with evidence of the actual status of the proceedings. We were urged to allow the appeal.

4.10 At the hearing of this appeal, there was no attendance from the Respondent. However, we did note that the Respondent was served with the notice of hearing and in the absence of an explanation as to their absence, we decided to proceed with the appeal, as we were of the view that they will not be prejudiced

## **5.0 DECISION OF THIS COURT**

5.1 We have considered the evidence on record, the ruling of the lower court and the submissions by the Appellant.

5.2 The Ruling, subject of this appeal appears at page 63 of the record and reads in part as follows:

*“CAUSE NO: 2015/HPC/0563*

*DATE: 29/10/2019*

*TIME: 08:10 HOURS*

*CORAM: JUSTICE K. CHENDA*



*For the Plaintiff: Ex parte*

*For the Defendant: Ex parte*

**PROCEEDINGS**

*Court: Following the Order recorded on 11<sup>th</sup> October, 2019 I note that there has been no restoration of the matter which accordingly stands dismissed for want of prosecution.*

*Signed*

*K. CHENDA*

*JUDGE”*

5.3 Further, the Order of 11<sup>th</sup> October, 2019, reads as follows:

**“PROCEEDINGS**

*Court: I called for a status conference in this matter following its re-allocation to me and the parties are absent without explanation.*

*I also note from the record that a consent Order was made on 19<sup>th</sup> February 2016 which required amendments to be made to the Originating process which have not been made to date.*

*In the premise I will strike out the matter with liberty to restore within 14 days in default of which it shall stand dismissed for want of prosecution.*

*Signed*

*K. CHENDA*

*JUDGE”*

- 5.4 Upon a close scrutiny of the Orders of the lower court and a further reading of the Appellant's affidavit evidence at pages 39 - 48 of the record, we are convinced that, the court's record at the time it went to Chenda J, had been tampered with.
- 5.5 It is the case for the Appellant, that when it conducted a search on the record, it discovered that the application and all proceedings relating to the application for Judgment on admission had been removed. The Appellant further exhibited the said application filed on 10<sup>th</sup> May, 2016 appearing at pages 42 – 48 of the record.
- 5.6 Equally as noted by the learned Judge, the amended originating process which was filed on 22<sup>nd</sup> March, 2016 pursuant to the consent Order appearing at page 17 of the

record was also missing, when in actual fact, the Appellants complied with the consent Order and accordingly, amended the originating process as can be seen at pages 27 – 32 of the record. This is a further indication of the court's record having been tampered with.

5.7 In our view, if all these documents were on record, the learned Judge, would have called for a hearing of the application *de novo* before considering the dismissal of the matter for want of prosecution.

5.8 Therefore, in the interest of justice, this matter ought to be heard on its merit. We do hereby set aside the Order by Chenda J, for dismissal of the action for want of prosecution. We, accordingly find merit in ground one of the appeal, which inevitably takes care of ground two.


## **6.0 CONCLUSION**

6.1 The net effect of our decision is that, the Appeal having succeeded, we order that the record be reconstructed with the help of IT, if the documents were scanned and also with the help of the parties.



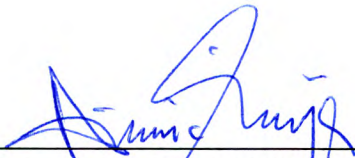
6.2 We further Order that the application for Judgment on admission be heard *de novo* before the same Judge. The matter is hereby sent back to Chenda, J.

6.3 Costs to abide the outcome of the main matter in the court below.

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**J. CHASHI**  
**COURT OF APPEAL JUDGE**

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**D. L. Y. SICHINGA**  
**COURT OF APPEAL JUDGE**

A handwritten signature in black ink, appearing to read 'A. M. BANDA' in a stylized, cursive font.

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**A. M. BANDA - BOBO**  
**COURT OF APPEAL JUDGE**