IN THE COURT OF APPEAL OF ZAMBIA HOLDEN AT LUSAKA

APPEAL NO. 187/2021

2ND APPELLANT

(Civil Jurisdiction)

BETWEEN:

PAULMAN CHUNGU (Suing as partner of the firm STORE APPELLANT Ranchhod/Chungu Advocates)

DIMPLE RANCHHOD (Suing as partner of the firm Ranchhod/Chungu Advocates)

AND

FRECA MINING AND MANUFACTURING LTD RESPONDENT

CORAM: CHISHIMBA, NGULUBE AND SIAVWAPA JJA.

On 23rd September and 28th October 2021

FOR THE APPELLANTS: MR. P. CHUNGU OF MESSRS RANCHHOD CHUNGU & CO. WITH BRIAN OF THE SAME FIRM

FOR THE RESPONDENT: MR. MOSHA OF MESSRS MOSHA & CO.

JUDGMENT

SIAVWAPA, JA delivered the Judgment of the Court.

Cases referred to:

- 1. Finnegan v Parkside (1998)1 WLR 411
- 2. Schafer v Blyth (1920) 3 KB 140
- 3. Mundia v Zesco Limited SCZ/8/043/2013

Legislation referred to

The Rules of the High Court Rules, Chapter 27 of the Laws of Zambia

1.0 **INTRODUCTION**

1.1 This is an appeal against the Ruling of Mr. Justice E. L. Musona dated 16th June, 2021 in the High Court, Commercial Division. By that Ruling the Honourable Judge refused to grant the Appellant an application for extension of time within which to comply with an order for directions.

2.0 BACKGROUND

- 2.1 The Appellants filed a writ of summons and statement of claim against the Respondent on 5th March, 2021 after which the learned Judge issued an order for directions.
- 2.2 The order for directions set 12th May 2021 for the filing of appearance, defence and counterclaim. The date set for the filing of a reply to the defence and defence to the counterclaim was 26th May, 2021 while trial was set for 20th July, 2021
- 2.3 The order for directions was issued on 4th May, 2021 in the presence of both parties and the Respondent complied with the direction and filed its defence and counter claim on 12th May, 2021.
- 2.4 The Appellants however, fell short of compliance as the Respondent was not served with the reply and defence to the counterclaim. This was brought to the Appellants' attention by letter dated 7th June 2021, thirteen days after

the date the Appellants should have filed their reply and defence to the counterclaim.

2.5 This prompted the Respondent to apply for an order to dismiss the matter but at the hearing of the application on 16th June, 2021, the parties withdrew the application by consent. The Appellant then applied to the Court for an order for extension of time within which to comply with the order for directions.

3.0 **DECISION OF THE COURT BELOW**

3.1 Upon considering the application and the arguments thereof, the learned Judge dismissed it for the reason that there was no need to do as the Appellants should have complied with the order for directions. This was on the understanding that even after being served with a summons for dismissal of the actions, the Appellants should have proceeded to file and serve their reply and defence to the counterclaim because they were still within time as submitted by counsel for the Appellants at the hearing of the application for extension of time.

4.0 THE APPEAL

4.1 The Appellants filed their Notice and Memorandum of Appeal on 28th June 2021. The Memorandum of Appeal contains the following grounds of appeal;

- (i) the honourable Judge erred in his finding that the Plaintiff stopped complying with the order for directions upon receipt of the Defendant's application to dismiss because the plaintiffs were in fact not served with any such application.
- (ii) The honourable Judge erred in his determination that the Plaintiff had in fact complied with the directions of the Court and ought to have continued to comply when in fact the non-delivery of the reply and defence and counterclaim on the Defendant had the effect loss of time and the Defendant could therefore not have been able to undertake the steps ordered of it within the times set in the order for directions.
- (iii) The honourable Judge erred in determining that there was no basis on which the application to extend time was made since all steps had been complied with when in fact no step had been undertaken beyond the filing of the reply to defence and to counterclaim and the time ordered for the reply to defence to counterclaim discovery and exchange of witnesses statements had expired even as of the date of the hearing the application to extend time on 16th June 2021.

5.0 ARGUMENTS IN SUPPORT

5.1 The arguments in support of the three grounds of appeal are anchored on the disputed findings of fact by the learned

Judge namely that the Appellants had stopped complying with the order for directions when they received the summons to dismiss the action; that the Appellants had in fact complied with the order for directions and ought to have continued and that there was no basis for the application to extend time.

- 5.2 The Appellants argue that they in fact were not served with the application to dismiss the action and that they only realized the default on 7th June 2021 and immediately applied for an extension pursuant to Order 2 Rule 2 of the High Court Rules.
- 5.3 The Appellants argue that even though they did file the reply to the defence and defence to the counterclaim as directed, they did not serve on the Respondent which caused a loss of time on full compliance and hence the prompt application for an order to extend time.
- 5.4 Above all, the Appellants argued that the particular steps that they ought to have taken namely; serving the pleadings, were out of time but that the Court had the discretion to grant an extension or not. Cases of <u>Finnegan v</u> <u>Parkside and Schafer v Blyth</u> were cited.

6.0 **ARGUMENTS IN OPPOSITION**

6.1 In its Heads of Argument filed into Court on 21st September,
2021, the Respondents argue that the learned Judge was on

firm ground to find as he did with regard to grounds one and two because, counsel for the Appellants submitted that they had partially complied with the order for directions and only stopped upon being served with the application to dismiss the action.

- 6.2 In that regard it was submitted that the Appellants' Heads of Arguments are in contradiction of counsel's submissions in so far as they argue non-service of the application to dismiss until 7th June, 2021, the day the application was scheduled for hearing.
- 6.3 As regards ground three, it is argued that the Appellants cannot blame the learned Judge for finding that there was no basis for the extension of time because the learned Judge accepted counsel's submission that there was no failure of compliance on the part of the Appellants.
- 6.4 The arguments also made reference to and cited some authorities that guide the procedure on issuance of directions (see Order 53 Rule 7(1) High Court Rules) and the consequences of failure to apply for extension of time until application to dismiss is filed (see Mundia v Zesco Limited). We were accordingly invited to dismiss the appeal with costs.

7.0 OUR ANALYSIS AND DECISION

- 7.1 Our critical consideration of the appeal in totality has informed us that the only question we stand to resolve is whether or not the Court below premised its refusal to grant an extension of time within which to comply with the Order for directions on relevant considerations.
- 7.2 As argued by the Respondent, the learned Judge arrived at his decision based on the submissions by Counsel for the Appellants that they had partially complied with the Order for directions but stopped upon being served the application for the dismissal of the matter.
- 7.3 What is not in dispute however, is the fact that the Respondent was not served with the reply to the defence and defence to the counterclaim.
- 7.4 The record shows that the Respondent filed its defence and counterclaim on 12th May, 2021 within the time ordered as shown at page 37 of the Record of Appeal. There is however, no exhibit of the reply to the defence and defence to counterclaim on the record to support the argument that the Appellants were in partial compliance until they were served with the application to dismiss the matter.
- 7.5 We also take note of the fact that the Respondent did indeed serve the summons and affidavit in support of an order to

dismiss the matter as shown at page 10 of the Respondent's Supplementary Record of Appeal.

- 7.6 The documents are dated 2nd June 2021 and stamped as RECEIVED by the Appellants' advocates on the same date by reason of which the Appellants cannot be heard to state that they only became aware of the application on 8th June the date the application was set to be heard.
- 7.7 The issue however, is that according to the order for directions issued by the learned Judge dated on 4th May, 2021, in the presence of both parties, *(See page 51 of the Record of Appeal)* the Record of Proceedings at page 53 of the Record of Appeal shows that the dates allocated for the filing of the reply to the defence and defence to counterclaim were 20th and 26th May, 2021 respectively.
- 7.8 Having already seen that the Respondent only served its application to dismiss the matter on 2nd June, 2021, and given that the application to dismiss the matter was withdrawn by mutual consent of the parties on 16th June, 2021, it follows that the Appellants were out of time to file their reply to the defence and defence to counterclaim.
- 7.9 We do not agree with the argument that the Appellants should have complied with the order for directions even after being served with the application to dismiss the matter for two reasons firstly, because they were already out of

time and secondly even if they were not out of time, it would be against etiquette and disrespectful to the court to do so.

- 7.10 We therefore opine that being out of time, it was appropriate for the Appellants to first seek an order for extension of time once the application for dismissal had been withdrawn.
- 7.11 We also take note that the Appellants were out of time by 20 days as at 16th June, 2021 when they applied for an extension of time. We do not consider the delay inordinate to call for the refusal of the same. This position is even more compelling because the parties mutually agreed to withdraw the application to dismiss with a view to having the claims heard and determined on merit.

8.0 CONCLUSION

- 8.1 In view of what we have said in this Judgment we find the refusal by the learned Judge to extend time on account that the same was not necessary, to be at variance with the facts before him.
- 8.2 The fact that subsequent actions leading to trial were still within time did not in any way bring the particular action the Appellants had defaulted on within time.
- 8.3 The effect of the learned Judge's refusal was to bring the action to a close in that it could not proceed without a closure to the pleadings. It also undermined the parties'

real intention of withdrawing the application to dismiss the action which was to have the matter heard and determined on merit.

- 8.4 We therefore allow the appeal and set aside the ruling appealed against. In that regard, we remit the record back to the High Court for the completion of the pleadings so that the matter can be heard before another Judge. The learned Judge will set fresh dates for the pending actions by the parties.
- 8.5 We award costs for this appeal to the Appellants.

F. M. CHISHIMBA COURT OF APPEAL JUDGE

P. C. M. NGULUBE COURT OF APPEAL JUDGE

M. J. SIAVWAPA COURT OF APPEAL JUDGE