

**IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**SCZ/8/239/2016**

**B E T W E E N :**

**ELIAS TEMBO**



**APPLICANT**

**AND**

**FLORENCE CHIWALA SALATI**

**1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL**

**2<sup>ND</sup> RESPONDENT**

**LUSAKA CITY COUNCIL**

**3<sup>RD</sup> RESPONDENT**

**Before Hon. Justice Dr. Mumba Malila SC, in chambers on the 25<sup>th</sup> March  
2021 and 30<sup>th</sup> December 2021.**

*For the Applicant:* Mr. James Mataliro of Messrs James & Doris, Legal  
Practitioners

*For the 1<sup>st</sup> Respondent:* Mr. B. M. Chakolela of Messrs Mulenga Mundashi & Co.

*For the 2<sup>nd</sup> Respondent:* N/A

*For the 3<sup>rd</sup> Respondent:* N/A

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**R U L I N G**

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**Cases referred to:**

1. *Stanley Mwambazi v. Morrester Farms Limited* (1977) ZR 108
2. *Leopold Walford (Z) Ltd v. Unifreight and Zambia Revenue Authority* (1985) ZR 203
3. *Zinka v. The Attorney General* (1990-1992) ZR 73

4. *Antonio Ventriglia and Manuela Ventriglia v. Finsbury Investments Ltd* (SCZ Judgement No. 02/2019)
5. *JCN Holdings Limited v. Development Bank of Zambia* (2013) 3 ZR 299
6. *Owners of the Motor Vessel 'Lillian S' v. Caltex Oil Kenya Limited* (1989) KLR 19
7. *Finance Bank Limited v. Frank James Kalambatila* (SCZ No. 4 of 2013)
8. *Dar Farm Transport Limited v. Moses Nundwe* (Appeal No. 46 of 2014)
9. *Barclays Bank Zambia Pc v. Jeremiah Njovu & 41 Others* (SCZ/9/21/2019)
10. *Investrust Bank Plc v. Build It Itardward Ltd* (Appeal No. 3/2013)
11. *Walusiku Lisulo v. Patricia Anne Lisulo* (1998) ZR 75 12
12. *Richard Sakala v. Attorney General* (2010/HP/984)
13. *Nahar Investment Ltd. v. Grindlays Bank International Limited* (SCZ Judgment No. 1 of 1984)
14. *Corindbhai Baghabhai Patel & Vallabhai Baghabhai Patel v. Monile Holding Company Limited* (1993) ZR 19
15. *Mwambazi v. Morester Farms Limited* (1977) ZR 108

**Legislation referred to:**

1. *Supreme Court Act, Chapter 25 of the Laws of Zambia*
2. *Supreme Court Rules, Chapter 25 of the Laws of Zambia*
3. *Order 42/3 of the White Book*

I sincerely regret the long delay in delivering this ruling. It was caused by an administrative oversight on my part.

The application before me is for an order for leave to file notice of motion to set aside a ruling out of time pursuant to section 4(a) of the Supreme Court Act and Rule 12(1) of the Supreme Court Act, Chapter 25 of the Laws of Zambia. It is supported by an affidavit sworn by Elias Tembo. In it he gives the background facts. They are simply that on the 3<sup>rd</sup> September 2019, the Supreme Court heard the



applicant's appeal at its sitting at Ndola, whereupon judgment was reserved. A notice of judgment was subsequently issued indicating that judgment would be delivered on the 16<sup>th</sup> September 2019 at 09:00 hours.

The judgment was read to the parties on the 16<sup>th</sup> September 2019 by the Master of the Supreme Court and a sealed copy thereof furnished to each one of them. The dates on the judgment were 3<sup>rd</sup> and 10<sup>th</sup> September 2019.

When the applicant read his copy of the judgment, he noticed what he calls 'some inadvertent and accidental slips' in the judgment. He, thereupon, filed a notice of motion in court on 25<sup>th</sup> September 2019, seeking an order to reopen the appeal and set aside the judgment.

The notice of motion was heard by the full court which promptly dismissed it on account of want of jurisdiction as the motion was filed outside the 14 day period prescribed by the rules.

The applicant believes that in handing down the said ruling the court erroneously believed that the motion was filed out of time, taking 10<sup>th</sup> September 2019 rather than the 16<sup>th</sup> September 2019 as

the date of the judgment and of reckoning for purposes of any subsequent application. The judgment was delivered, he says, on the 16<sup>th</sup> September 2019 and not the 10<sup>th</sup> September 2019 and the 14 days within which to make an application under the slip rule, thus started running on the 16<sup>th</sup>.

Elias Tembo stressed in his affidavit that he intends to move the Supreme Court on an application to set aside the order dismissing the motion as he believes it was inadvertently made. As he is now out of time, he seeks leave to file the motion out of time. He avers that failure to instruct counsel to file within 14 days was because he had encountered financial challenges to instruct counsel. The Corona virus pandemic, he says, compounded his financial position.

Elias Tembo prayed that I grant his application as it would present no prejudice to the respondent or anyone else for that matter.

Some skeleton arguments and list of authorities were also filed to support Elias Tembo's cause. I was taken through a plethora of case authorities starting with **Stanley Mwambazi v. Morrester Farms Limited**<sup>(1)</sup> in which the Supreme Court stressed that it was always desirable that cases were determined on the merits rather on



technicalities through to **Leopold Walford (Z) Ltd v. Unifreight and Zambia Revenue Authority**<sup>(2)</sup>, where the Supreme Court expressed that breach of a regulatory rule is curable, and that the substance and merit should be the overriding consideration in determining disputes.

Counsel also invoked the spirit of justice in arguing that the motion should be allowed so as to vindicate the applicant's right to be heard. The case of **Zinka v. The Attorney General**<sup>(3)</sup> was called in aid, with counsel generously reproducing a passage from that judgment focused on natural justice and the right to be heard.

I was urged, on the basis of counsel's passionate submissions, to allow the application.

The application was strenuously opposed. The first respondent, Florence Chiwila Salati, swore an affidavit in which she averred that to the applicant's motion filed pursuant to rule 48(5) of the Supreme Court Rules, she had filed an affidavit in opposition raising a point of law to the effect that the applicant had filed his motion out of time without the leave of court. The applicant did not file any document challenging her contention that the motion was filed out of time.

Florence Chiwala Salati also stated in her affidavit that to the best of her knowledge and belief, for purposes of rule 48(5), time begins to run from the date of the decision complained of, and not from the date when the decision is read out or copies thereof handed to the parties.

It was the further averment in the opposing affidavit that the applicant was aware before the hearing of the motion before the full court that the decision which was the subject of the motion had been passed on the 10<sup>th</sup> September 2019 but rather than file for leave to file the motion out of time he chose to file the motion without seeking leave and, curiously, the issue was never raised by the applicant's two advocates when the motion was being heard.

That the applicant's motion having been dismissed by the full bench, a single judge of the Supreme Court has no jurisdiction to entertain a new motion based on the old dismissed motion. In any case, the motion sought to be made by the applicant has no prospects of success.

The second respondent's affidavit in opposition was sworn by Diana Musunga Mwewa, Principal State Advocate in the Attorney-



General's chambers. The deponent took a seemingly brusque approach of denying paragraphs of the supporting affidavit without elaborating. She, however, deposed that financial hardships are not a good enough reason to justify a delay in making the application or instructing counsel. She also posited that to the extent that the second respondent will be called upon to yet again to defend its rights, it will suffer prejudice.

The opposing affidavit on behalf of the third respondent was sworn by Niza Nachalwe, a Senior Legal Assistant of the Local Government Service Commission. She too denied in very broad terms the averments in the affidavit in support of the application and insisted that contrary to the affidavit in support, the Supreme Court did not inadvertently commit accidental slips in its decision and that the application in truth has no merit.

Heads of argument were also filed on behalf of the respondents. On behalf of the first respondent the heads of argument were principally around the question whether I have jurisdiction to deal with this matter. It was submitted that the application was incompetent because I have no jurisdiction and that this should be



the first issue I ought to address. The case of **Antonio Ventriglia and Manuela Ventriglia v. Finsbury Investments Ltd**<sup>(4)</sup> was cited as authority for the latter proposition.

Counsel for the first respondent cited **JCN Holdings Limited v. Development Bank of Zambia**<sup>(5)</sup> where the Supreme Court stated *inter-alia* that where a court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedy sought by a party to the matter.

To the same intent, the Kenyan case of **Owners of the Motor Vessel 'Lillian S' v. Caltex Oil Kenya Limited**<sup>(6)</sup> was cited. In that case the court guided that jurisdiction is everything. Without it, a court has no power to take one more step.

In explaining why, the first respondent believes I have no jurisdiction, the brief background to the filing of the motion was given. It was submitted that the dismissal of the motion by the Supreme Court for failure by the appellant to meet the 14 days period prescribed for filing such motions was correct. Further, that the time of reckoning is the date when the judgment was signed and sealed. Order 42/3 of the White Book was quoted. It reads:



- (1) **Subject to the provisions of Rule 3A, a judgment or order of the court or of an official or special referee takes effect from the day of its date.**
- (2) **Such judgment or order shall be dated as of the day on which it is pronounced, given or made, unless the court of referee, as the case may be, orders it to be dated as of some other earlier or later day, in which case it shall be dated as of that other day.**

In the present case, the judgment was dated 10<sup>th</sup> September 2019. More pointedly, counsel for the first respondent quoted a pertinent passage from the judgment of the Supreme Court in the case of **Finance Bank Limited v. Frank James Kalambatila**<sup>(7)</sup> as follows:

**However, it is clear that although the judgment was pronounced in open court on 15<sup>th</sup> September 2011, the perfected copy was only signed, sealed and availed on 17<sup>th</sup> November 2011. The appellant then filed their appeal on 25<sup>th</sup> November 2011. Indeed, taking into account Order 42/3/9 which is explicit in its provisions, we agree that the time for appeal should run from the time when the judgment or order is signed or perfected as the case may be.**

On the basis of the foregoing, it was submitted that the appellant's arguments have no support in law.

Counsel also submitted that by the present application, the applicant seeks to have the motion that was dismissed by the full court restored. The full Supreme Court, let alone the single judge, has no jurisdiction to do so. The decision in **Dar Farm Transport**

**Limited v. Moses Nundwe**<sup>(8)</sup> was cited as authority for this submission.

The Supreme Court stated in that case as follows:

**We observed earlier in this judgment that the appeal was dismissed because the order granting leave to appeal was not included in the record of appeal. Needless to state, the appeal was incompetent and properly dismissed because it offends the mandatory requirement of Rule 50(2) of the Supreme Court Rules. In our view, an appeal dismissed under these circumstances cannot see the light of day again. Stated differently, such an appeal cannot be restored to the active cause list and heard. As aptly argued by Mrs. Kabalata, this court became *functus officio* after the appeal was dismissed.**

To buttress the same argument, the Supreme Court decision in **Barclays Bank Zambia Pc v. Jeremiah Njovu & 41 Others**<sup>(9)</sup> was also cited and relied upon. I was thus urged to dismiss the application.

In the submissions filed on behalf of the second respondent, it was contended that although a single judge of this court has jurisdiction to enlarge time, such jurisdiction is circumscribed by Rule 48(1) of the Supreme Court Rules which directs that a single judge may entertain motions or summons within 14 days of the decision complained of. To extend time, the single judge must be satisfied that cogent reasons for the delay exist as was held in **Investrust Bank Plc v. Build It Itardward Ltd**<sup>(10)</sup>. Going through the



reasons given by the applicant for the delay, counsel submitted that they were insufficient as no proof was provided.

Several other issues were raised including the need for finality of court proceedings. I have properly noted these though I see no need to repeat the arguments.

I was urged to dismiss the application.

The third respondent equally submitted skeleton arguments opposing the application. The gist of the third respondent's submission is that there is need to respect the concept of finality of litigation. Various case authorities were cited to support that submission. They include **Walusiku Lisulo v. Patricia Anne Lisulo**<sup>(11)</sup> and **Richard Sakala v. Attorney General**<sup>(12)</sup>.

On the effect of delay, counsel for the third respondent cited the case of **Nahar Investment Ltd. v. Grindlays Bank International Limited**<sup>(13)</sup> where the Supreme Court stated that litigants who fail to strictly adhere to court rules risk their appeal being dismissed. There was also reference made to the case of **Corindbhai Baghabhai Patel & Vallabhai Baghabhai Patel v. Monile Holding Company Limited**<sup>(14)</sup> where the Supreme Court qualified the principle explained in the case of

**Mwambazi v. Morester Farms Limited**<sup>(15)</sup>. In the **Covindbhai**<sup>(14)</sup> case the Supreme Court stated that while the principle in **Morester Farms**<sup>(15)</sup> was to be borne in mind, it is also significant to consider whether there is a triable issue. In this particular motion there was, counsel submitted, no triable issue and there were no inadvertent and accidental slips.

I was urged to dismiss the motion.

I have carefully considered the motion before me. The issue of jurisdiction has been raised on two fronts first, the subject matter jurisdiction (*jurisdiction racione materiae*), that is to say that I sitting as a single judge have no jurisdiction to entertain a motion whose effect would be to interfere with a decision of the full court. Second, that the decision of the full court dismissing the motion was final and cannot be set aside by the full court itself and less still by a single judge.

Finally, that because the motion was dismissed there is nothing to anchor the present application for extension of time on.

As the authorities that counsel for respondent has cited confirming, jurisdiction is the precondition for the exercise of any



judicial authority. It must indeed be determined as the initial issue whenever it is raised.

What is clear to me is that this matter has moved beyond the purview of a single judge and was ripe for determination by the full court. It was in fact determined by the full court on the merits and dismissed. The motion taken out colourably under the slip rule was equally dismissed by the full court on account of lateness. Any review of the decision of the full court dismissing the motion can only be done by the full court itself.

I, of course, appreciate that the application before me is for extension of time within which the appellant can approach the court on its slip rule application. That application should, in my considered view, have been made to the full court. It is never the practice of this court for matters to be handled on a rotational basis between a single judge and the full court.

My understanding of Rule 48(5) is that once a matter has been escalated to the full court and the latter makes a decision on it, it is no longer open for the single judge to hear any aspect of the same.

This is even more so where a final judgment on the merit has been rendered by the full court.

I am persuaded by the arguments put forth by the first respondent's counsel on jurisdiction. The motion in this matter was heard by the full court which dismissed it. The applicant wishes to have another go at having the judgment reopened and corrected for clerical errors. I am destitute of jurisdiction to extend the time within which the second application to 'review' the judgment should be filed.

Even a perusal of the purported errors sought to be corrected as set out in the affidavit in support show quite plainly that they are neither clerical errors nor omissions. They are substantive issues being raised, attacking the substance of the judgment itself.

I am satisfied that this application is not properly motivated. More solemnly it has been directed to the wrong court. It is declined. I dismiss it with costs.

*Malila*  
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Dr. Mumba Malila SC  
**CHIEF JUSTICE**