

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

Appeal No. 413/2023

BETWEEN:

NALUSANGA TRADING LIMITED

APPELLANT

AND

ATTORNEY GENERAL

RESPONDENT



CORAM: Ngulube, Muzenga and Chembe, JJA
On 27th March, 2024 and 5th April 2024

For the Appellant: Mr. G. Hakainsi of Messrs LM Chambers

For the Respondent: Mr. E. S. Phiri, Acting Principal State Advocate,
Attorney General's Chambers

J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Castellow v. Somerset County Council (1993) 1 ALL ER 952**
- 2. Flynn v. The Minister for Justice and Others (2017) IECA 178**
- 3. Anglo Irish Beef Processors Limited v. Montgomery (2002) IESC 60**

4. **Dipak Kumar Patel & Yakub Patel v. David Kangwa Nkonde (2017) ZR 33**
5. **Hu Herong and Luo Feng v. John Kapotwe and Kalwe Food Products – SCZ Appeal No. 65 of 2007**
6. **Stanley Mwambazi v. Morester Farms Limited (1977) ZR 108**
7. **Hellen Mwambazi v. Chisha Mwambazi (1986) ZR 182**
8. **Brikett v. James (1978) AC 297**

Legislation referred to:

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

1.0 INTRODUCTION

1.1 This is an appeal against a Ruling by Mwenda-Zimba, J, dated 11th August 2023, dismissing the cause for want of prosecution.

2.0 BACKGROUND

2.1 The background to this appeal is that the appellant commenced an action in the court below on 21st February 2023 against the respondent, in the Commercial Division seeking the following reliefs:

- (i) Payment of the sum of ZMW581,750.00 for the motor vehicle spares supplied to the Department of National Parks and Wildlife;**
- (ii) Damages for breach of contract;**
- (iii) Damages for loss of use of money;**

- (iv) Interest on all amounts found due;**
- (v) Any other relief the court may deem fit; and**
- (vi) Costs of and incidental to the proceedings.**

- 2.2 The defendant entered appearance and defence.
- 2.3 The court proceeded to issue pre-trial Orders for Directions, in which the trial dates were set as 4th and 11th August 2023 at 09:00 hours on both dates. Following a status conference which the court below had, subsequent to the pre-trial Orders for Directions, 11th August was the remaining date on which trial could take place.
- 2.4 On 11th August 2023, the parties turned up for trial. The appellant was not ready as its only witness was in South Africa and according to counsel, was unable to travel as he was unwell. Learned counsel thus sought an adjournment of the cause. He informed the trial court that he requested the witness to send him documents to prove illness. The witness told counsel that the documents were sent to him but counsel had not received them.
- 2.5 Learned counsel for the respondent was ready to proceed for trial, with its witnesses, but prayed for costs in the event that the court would consider granting the application for an adjournment.

3.0 DECISION OF THE COURT BELOW

- 3.1 The court below considered the application for adjournment and found that it had no merit as the reasons given for the adjournment were not convincing. The lower court arrived at this conclusion based on the fact that counsel did not provide any proof that the witness was unwell through either an e-mail or a message through various forms of social media.
- 3.2 The court found that the appellant commenced the matter and as such had a duty to ensure that it was promptly prosecuted. Consequently, the application for an adjournment was declined and since there was no one to give evidence on behalf of the plaintiff, the matter was dismissed for want of prosecution.
- 3.3 The court below stated that since the matter had not been determined on its merits, the appellant was at liberty to file a fresh cause.

4.0 GROUNDS OF APPEAL

- 4.1 Unhappy with the Ruling of the court below, the appellant appeals to this court on the following grounds:
- 1. The court below erred in law and in fact when it dismissed the matter for want of prosecution when it (the matter) came up for the very first time to**

commence trial thereby ignoring the need to have the matter determined on the merits.

- 2. The court below erred in law and fact when it dismissed the matter for want of prosecution despite the reasonable explanation proffered by the appellant's advocates regarding the absence of the witness who was reported to be sick in Johannesburg.**

5.0 APPELLANT'S ARGUMENTS

- 5.1 In support of ground one of the appeal, learned counsel contends that the learned trial court erred in law and in fact when she dismissed the matter for want of prosecution when the matter came up for the first time for trial, ignoring the need to have the matter determined on its merits. It was learned counsel's submission that even if the court wields power to dismiss a matter for want of prosecution, the same should be exercised judiciously and in exceptional circumstances. Learned counsel drew our attention to the case of **Castellow v. Somerset County Council**¹ where the court stated that:

"Firstly, that the rules of the court and associated rules of practice devised in the public interest to promote expeditious dispatch of litigation must be observed. Secondly, the plaintiff should not in the ordinary way be denied an adjudication on his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which the award of costs cannot compensate."

5.2 We were also referred to the case of **Flynn v. The Minister for Justice and Others**² and in **Anglo Irish Beef Processors v. Montgomery**³ where the court laid down the factors to be considered when dismissing the matter for want of prosecution in the following terms:

- (i) **Whether the delay in the prosecution was inordinate and inexcusable.**
- (ii) **Whether or not due to the passage of time a fair trial is no longer possible.**
- (iii) **Whether or not the defendant is or will be prejudiced by the delay.**

5.3 Learned counsel further referred us to the case of **Dipak Kumar Patel & Yakub Patel v. David Kangwa Nkonde**⁴ where the Supreme Court stated that:

"A dismissal for want of prosecution on the other hand imputes inordinate delay, absence of diligence or interest to proceed with an action."

5.4 It was learned counsel's contention that in *casu*, there was no delay in prosecuting the matter nor was there passage of time which would negate the possibility of a fair trial.

5.5 Learned counsel referred us to a number of cases including the case of **Hu Herong and Luo Feng v. John Kapotwe and Kalwe Food Products**⁵ where the Supreme Court stated that:

"Although courts have inherent jurisdiction to dismiss matters for want of prosecution, this should only be done in exceptional circumstances."

5.6 Learned counsel contended that the dismissal of the action was a miscarriage of justice as the case ought to have been determined on its merits to bring it to finality. Reliance was placed on the case of **Stanley Mwambazi v. Morester Farms Limited**⁶ where the Supreme Court stated that:

"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."

5.7 We were urged to allow the appeal on this ground.

5.8 In support of ground two, counsel submitted that the court below erred in law and in fact when it dismissed the matter for want of prosecution despite the explanation proffered by the appellant's advocates regarding the absence of the witness who was reported to be sick in Johannesburg. Counsel contends that in the light of the explanation, the court below should not have dismissed the matter for want of

prosecution but rather strike it out of the cause list pursuant to **Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia** which provides that:

"If the plaintiff does not appear, the court shall, unless it sees good reason to the contrary, strike out the cause (except as to any counter-claim by the defendant), and make such order as to costs, in favour of any defendant appearing, as seems just."

5.9 Reliance was also placed on the case of **Hellen Mwambazi v. Chisha Mwambazi**⁷ where it was stated that:

"Before a matter is dismissed, it is a legal requirement that it be struck out from the active cause list and that the plaintiff be given liberty to have the matter restored."

5.10 It was learned counsel's contention that the court below should not have dismissed the matter especially that counsel for the appellant was before court, who proffered the reasons of his inability to proceed and applied for an adjournment. Counsel submitted further that this was a clear sign that the appellant had the desire to prosecute the matter.

5.11 We were urged to allow the appeal with costs.

6.0 THE HEARING

6.1 At the hearing of this appeal, learned counsel for the appellant placed reliance on the filed documents. Learned counsel for the respondent

sought leave to file his arguments in opposition which leave we declined as they had no valid reason for failure to file the same within time.

8.0 DECISION OF THE COURT

- 8.1 We have carefully considered the record and the argument in support of the appeal. The issue in this appeal is whether in the circumstances of this case, the cause could be dismissed for want of prosecution.
- 8.2 Learned counsel for the appellant in support of ground one has contended that the learned trial court erred when she dismissed the matter for want of prosecution when the matter came up for the first time for trial, ignoring the need to have the matter determined on its merits. We must state on the onset that although a court has inherent powers to dismiss a matter for want of prosecution, this power must be exercised sparingly and in deserving cases. This is because of the overriding principle that matters should be determined on their own merits. A court can thus only exercise such power where there is inordinate and inexcusable delay in prosecuting the matter.

8.3 Lord Diplock in the case of **Brikett v. James**⁸ considered the exercise of discretion to dismiss a matter for want of prosecution and said the following:

"The power should be exercised only where the court is satisfied either:

- (1) That the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or**
- (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and**
 - (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."**

8.4 What is abundantly clear is that whether or not there is inordinate delay is a question of fact, which will vary from case to case. It is not a '**one size fits all**' situation. In the **Birkett case** *supra*, inordinate delay was defined as being a period of time that had lapsed which is

materially longer than the time which is usually regarded by the court and the profession as an acceptable time.

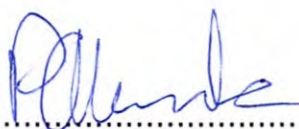
- 8.5 In this case, the cause was commenced on 21st February 2023. The appellant complied with all the directives of the court and the matter was coming up for the first time for trial on 11th August 2023. In the circumstances of this case, it cannot be said that the failure by the plaintiff to proceed with the matter on one occasion can be classified as inordinate delay, which would necessitate the use of a **"bazooka"** to shoot the case down.
- 8.6 If the trial court felt strongly about the reasons not being excusable or justifiable for the adjournment which counsel for the appellant sought before the court, it could, in the least, have condemned the appellant in costs but still adjourned the matter. In an extreme case, the lower court could have struck out the matter with liberty to restore (an **"unless order"**).
- 8.7 We therefore agree with learned counsel for the appellant that there was no inordinate delay and in the circumstances we see no need to consider whether the reasons given for the delay are justifiable or excusable. We consequently find merit in the appeal and allow it.

8.8 We find it unnecessary to consider ground two of the appeal. The appeal is allowed and matter sent back to the High Court for trial.

9.0 CONCLUSION

9.1 Having allowed the appeal, we set aside the order of the trial court dismissing the cause for want of prosecution. We send the matter back to the High Court to proceed with trial.

9.2 Costs will abide the outcome of the cause in the court below.



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P. C. M. NGULUBE
COURT OF APPEAL JUDGE



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K. MUZENGA
COURT OF APPEAL JUDGE



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Y. CHEMBE
COURT OF APPEAL JUDGE