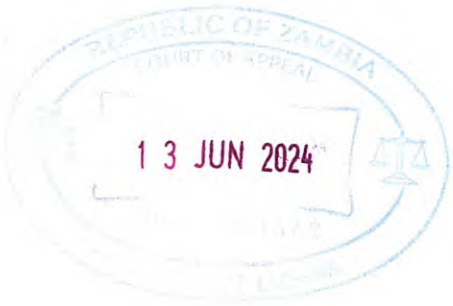
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL No. 154 of 2023**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



MUVI TV LIMITED APPELLANT

AND

MAKANDANI BANDA RESPONDENT

CORAM: SIAVWAPA JP, CHISHIMBA, PATEL, JJA

On 13th May & 13th June 2024

For the Appellant: No Appearance

Messrs. Milner & Paul Legal Practitioners

For the Respondent: Mr. G. Malipilo of Messrs Nchito & Nchito Advocates standing in for
Messrs ECB Legal Practitioners

JUDGMENT

Patel, JA, delivered the Judgment of the Court.

Legislation & Rules referred to:

1. The Copyright and Performance Rights Act Chapter 406 of the Laws of Zambia.
2. The Copyright and Performance Rights (Amendment) No. 25 of 2010.
3. The Rules of the Supreme Court of England 1965 (1999) Edition.
4. The High Court Rules, Chapter 27 of the Laws of Zambia.
5. The High Court (Amendment Rules) Statutory Instrument No. 58 of 2020

Cases Referred to:

1. John R. Ng'andu vs. Lazarous Mwiinga (1988-1989) Z.R 197 (S.C.)
2. Patel Abishek Vijay Kumar v Henry Sampa and Bia Zambia Limited- CAZ Appeal No. 65 of 2020
3. Vas Sales Agencies Limited v Finsbury Investment Limited & Others (SCZ Judgment 2 of 1999) [1999] ZMSC 2.
4. Anti-Corruption Commission v Sambondu (Appeal 54 of 2013) [2017] ZMSC 136.
5. Chimanga Changa Limited v Stephen Chipango Ng'ombe -SCZ Judgment No.5 of 2010.
6. Hu Herong and Luo Feng v Kapotwe and Kalwa Food Products Limited (Appeal 65 of 2007) [2014] ZMSC 55.
7. Stanley Mwambazi v Morester Farms Limited (1977) ZR 108.
8. Nahar Investment Limited v Grindlays Bank International (Zambia) Limited -(SCZ Judgment 1 of 1984) [1984] ZMSC 1.

Other works referred to:

1. Halsbury's Laws of England, Vol. 37, 4th Edition
2. Jonathan Law, 'A Dictionary of Business and Management', 6th edition, Oxford University Press, 2016.

1.0 INTRODUCTION

1.1 This is an appeal against the ex-tempore Ruling of **Lamba J.** delivered at the High Court at Kitwe on 6th December 2022, in an action under the Copyright and Performance Rights Act[1] and Copyright and Performance Rights (Amendment) Act No. 25 of 2010[2] commenced in the lower court by the Respondent, against the Appellant.

2.0 BACKGROUND

2.1 The Respondent (the Plaintiff in the Court below), commenced these proceedings against the Appellant (Defendant as it was in the court below), by way of Writ of Summons and Statement of Claim on 20th February 2019, seeking the following reliefs:

i. *Damages in the sum of K300,000.00 pursuant to Section 25 of the Copyright and Performance Rights Act of Zambia Chapter 406 of the Laws of Zambia;*
ii. *An Injunction to prevent the Defendant either by itself or any of its agents from using any of the Instrumentals in any of its broadcasts.*
iii. *Interest on the above sum;*
iv. *An Account of Profits;*
v. *Any other relief the Court may deem fit;*
vi. *Costs.*

2.2 For reasons that will become apparent, the facts in contention, are of no significance in the appeal before us, which seeks to challenge the lower court's dismissal of the two *ex parte* applications made by the Appellant, 2

years and 4 months after the commencement of the process, for want of prosecution on the part of the Appellant.

2.3 We interrogate hereunder, the exercise of discretion coupled with case management powers of the court and the duty of counsel first and foremost as officers of the court, as well as to its client.

2.4 On 6th February 2020, the lower court entered Judgment in Default of Appearance and Defence against the Appellant in which it was adjudged as follows:

i. *The Defendant shall pay the Plaintiff damages for the infringement of his Copyright pursuant to Section 25 (2) of the Copyright and Performance Rights Act Chapter 406 of the Laws of Zambia that the damages are to be assessed by the Deputy Registrar.*

ii. *The Defendant either itself or its agents is prohibited from using any of the Plaintiffs instrumentals in its broadcast.*

iii. *The Defendant shall pay the Plaintiff interest on all amounts found due at all the current bank of Zambia lending rates from date of Judgment herein until date of full payment.*

iv. *That Defendant shall give an account of profits, for the period within which the Plaintiff's instrumental was used in its broadcast within 7 days of the date herein.*

v. *Costs for the Plaintiff to be taxed in Default of Agreement.*

2.5 On 17th May 2021, pursuant to the said judgment, the Respondent filed its application for assessment of damages in accordance with **Order 37 Rule 1 of the Rules of the Supreme Court of England 1965.**[3] The Respondent also filed its skeleton arguments and list of authorities.

2.6 On 7th June 2021, the Appellant filed two *ex parte* applications, firstly, seeking an order to set aside judgment in default of appearance and defence pursuant to **Order 20 rule 3** of the High Court Rules[4] and secondly, for an order to stay assessment of damages pending the determination of the aforementioned application. (*hereinafter referred to as the Appellant's ex parte applications).*

2.7 On account of inactivity on the matter, the Respondent, on 12th October 2022, filed an application to dismiss both the *Appellant's ex parte applications* for want of prosecution pursuant to Order pursuant to **Order 25 L/1 and Order 3 Rule 5 (12)** of the Rules of the Supreme Court[3]. (*hereinafter referred to as the Respondent's application to dismiss).*

2.8 The Appellant opposed the *Respondent's application to dismiss* by its opposing affidavit filed on 22nd November 2022.

2.9 On 6th December 2022, the lower court delivered a ruling in favor of the Respondent and dismissed the *Appellant's ex parte applications*, for want of prosecution, giving rise to this appeal.

3.0 DECISION OF THE LOWER COURT

3.1 The learned Judge considered the arguments as well as the affidavits of both parties. She held the view that the Appellant did not act on the directive to have its *ex-parte* application to set aside default judgment re-filed as an *inter-partes* application. In the opinion of the learned Judge, the Appellant and its advocates went to sleep after filing its applications and did not bother to follow up on them.

3.2 The learned Judge was not satisfied with the Appellant's excuse that it did not receive the directive of the court, nor was it served with any notice of hearing for its *ex parte applications*.

3.3 She reasoned that having filed its applications on 7 June 2021, a prudent and diligent litigant, would have ensured to follow up the applications to determine whether the *ex parte* application had been attended to by the court without hearing counsel, which is a common practice, or that a date for their hearing had been issued.

3.4 The learned Judge took the view that the efforts by the Appellant were too little too late and of no value because the onus was on it to follow up the process.

3.5 The learned Judge arrived at the conclusion that the Respondent's application to dismiss the Appellant's applications is what jolted the Appellant from its slumber, in an effort to contest the application to dismiss. She found no merit in the Appellant's arguments opposing the

application and dismissed the Appellant's applications for want of prosecution.

4.0 THE APPEAL

4.1 Dissatisfied with the Ruling of the Court below, the Appellant filed a Notice and Memorandum of Appeal on 20th December 2022, advancing five (5) grounds of appeal, namely;

i. *The Learned Judge in the court below misdirected herself in law and in fact when she held that the Defendant and its Advocates went to sleep and did not bother to follow up on their applications, when there was no notice of hearing issued in respect to the Defendant's applications which was pending hearing.*

ii. *The Learned Judge in the Court below erred in law and fact when she held that the excuse that the Defendant did not receive the directive of the Court to file inter parte applications nor were they served with any notices of hearing for their applications does not hold water, without evidence to show proof that the said directive by the Court was served on the Defendant's Advocates or its duly appointed agents.*

iii. *The Learned Judge in the Court below erred in law and in fact when she held that it is common cause that the Defendant did not act on the directive to have their ex parte application to set aside default Judgment be refiled as inter partes, contrary to the law and evidence on file that such directives was never communicated to the Defendant or its Advocates.*

iv. *The Court below erred in law and fact by holding that it is very evident that the Plaintiffs application to dismiss the Defendant's application is what has jolted the Defendant from its slumber to try and contest this said application without due regard to the evidence on record.*

v. *The Court below erred in law when it held that I see no merit in the Defendant's arguments opposing the application despite the Defendant having given an explanation for not complying with the directive as given by the Court.*

5.0 APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 We have considered and appreciated the Appellant's Heads of Argument of 22nd May 2023. With reference to grounds 1, 2 and 3, it is the Appellant's submission that a notice of hearing or a return date for the *inter partes* summons should be dated by the Court, in order that the Applicant knows the return date or generally the status of the matter. It was its argument that this was a serious error by the lower Court.

5.2 The Appellant placed reliance on the case of **John R. Ng'andu vs. Lazarous Mwiinga**[1] in which it was held that:

> *"The trial Judge had no jurisdiction to dismiss the appeal for want of attendance of the appellant's advocate. In the absence of proof of service of a notice of the new hearing date, the only course open to the Court were to allot a fresh hearing date and to cause notices thereof to be served on the advocates for the parties or to strike the*

case out of the list and leave it to the parties to make application to restore."

5.3 It is the Appellant's submission that there was procedural injustice occasioned on the Appellant when its two applications pending before the lower court were dismissed, as neither the Appellant, nor its Agents, were aware of the directive of the lower court.

5.4 It is further its submission that the lower court should have satisfied itself before dismissing the Appellant's application for want of prosecution that the directive or instruction which the lower court gave on 20th January 2020, was duly brought to the attention of the Appellant or that her order was duly served on the Appellant. The Appellant placed further reliance on the case of **Patel Abishek Vijay Kumar v Henry Sampa and Bia Zambia Limited[2].**

5.5 The Appellants further submitted that the lower court should have considered whether its instruction given in the absence of the Appellant, on 20th January 2020, was brought to the attention of the Appellant or that the said instruction or directive was served on the Appellant or its agent before it could act on the Respondent's application to dismiss the (Appellant's applications) for want of prosecution.

6.0 THE RESPONDENT'S HEADS OF ARGUMENT

6.1 We have equally considered and appreciated the Respondent's Heads of Response filed on 13th October 2023.

6.2 It is the Respondent's contention that it is a strong allegation that the Appellant makes to suggest that the lower Court falsely alleges that it did not make a directive to the Appellant to file its applications *inter partes*. The Respondent dispelled this argument in two parts. Firstly, it was his submission that the court was in fact within its jurisdiction to make such a directive without issuing a hearing date and secondly that the Court should not be compelled to adduce evidence to authenticate its directive to the Appellant.

6.3 With reference to the 1st & 2nd grounds of appeal, the Respondent has called in aid the words of the Supreme Court in the case of **Vas Sales Agencies Limited v Finsbury Investment Limited & Others.**[3] The Court held as follows:

> *''We have said before and wish to reiterate here that in any ex-parte application, if the court is inclined to refuse the application then the proper procedure to adopt is to order that the application do stand as inter-partes summons and hear both sides instead of hearing the applicant only and then embark on a lengthy ruling which is not on the merits to justify the refusal.''*

6.4 It is the Respondent's submission that it is not disputed that the lower court held the power to hear the interlocutory application and decide its fate. It is submitted that the learned Judge, acted within her jurisdiction, and refused the application to set aside the Judgment in default and directed that the application be re-filed *inter-partes* before the Court could attend to the aforementioned *ex-parte* application but since the above

stated instruction from the Court was issued, the Appellant neglected to submit the *inter-partes* application and took no further steps to have the applications prosecuted.

6.5 It is also submitted that the court should not be required to adduce evidence of its directive, in the same way it does not have to adduce evidence of it serving of court process. The Respondent placed reliance on the case of **Anti-Corruption Commission v Sambondu.**[4]

7.0 THE HEARING

7.1 At the hearing, Counsel present placed reliance on the Heads of Argument.

8.0 DECISION OF THIS COURT

8.1 In considering the grounds of appeal before us, we note that the Appellant has clustered its arguments and addressed grounds 1, 2 & 3 together and thereafter argued grounds 4 & 5. We are of the considered view, that a holistic approach is best suited to consider all the grounds of appeal together, as simply stated, the appeal attacks procedural issues combined with arguments relating to natural justice.

8.2 Historically, in our jurisdiction, litigation in the courts was generally progressed by the litigant acting on his own pace and matters very often, slipped through the cracks, where there was little or no activity by the litigant. There has, in the recent past, been deliberate and robust changes to our rules of court in order to make case management a preserve of the Court. Judges are expected to take charge of matters allocated to them

and direct a more proactive approach in accordance with the Rules. **The High Court (Amendment Rules) Statutory Instrument No. 58 of 2020**[5] heralded in this new era, to which litigants and adjudicators alike have no option but to conform.

8.3 We are alive to the fact that the action the subject of the appeal, was commenced in 2019, prior to the change in the rules referred to above. However, the timelines in *casu*, tell their own story and on the basis of which, we will consider the *ex tempore* Ruling of the lower Court and the subject of appeal herein.

8.4 In its grounds of appeal, the Appellant has approached this Court, clutching at straws, and continues in its trajectory of heaping blame on everyone, except itself, for its persistent failure to defend this action. We are satisfied that the Writ filed on 20th February 2019 was served on the Appellant within days of its filing. Exhibit marked **'MB1'** on **page 4** of the Supplemental Record of Appeal refers. (SROA). We have further noted that a search was conducted by the Respondent on 18th March 2019 which revealed that appearance had not been entered by the Appellant. This is seen on **page 5** of the SROA.

8.5 We have also noted that counsel for the Appellant sent a letter dated 17th March 2021, to the Respondent's Advocates acknowledging service of the Judgment in default of appearance and defence. It is astonishing to note that Counsel for the Appellant demanded that its counterpart should attend to setting aside its own judgment on account of it having been entered without service. This letter is seen at **page 10** of the SROA.

8.6 In what we consider a pure act of professional courtesy, Counsel for the Respondent, by letter of 24th March 2021, enclosed a copy of the Affidavit of Service **(not on the ROA)** confirming that the Appellant had in fact been served on 25th February 2019, and further informed Counsel that it was in the process of filing a Notice for Assessment of damages. It also invited an *ex curia* settlement. This letter is seen at **page 11** of the SROA.

8.7 The Appellant has boldly relied on a decision of the Supreme Court in the cited case of **John R. Ng'andu v Lazarous Mwiinga** [1] in support of its argument that the lower court misdirected itself by dismissing the Appellant's applications for want of prosecution, as there was no proof that the Appellant had been informed or served with any notice to show that the court wanted to hear its applications inter partes. Without hesitation, we hold the view that the authority cited is misplaced in the context of the facts in *casu*. In the **John R. Ng'andu** [1]matter, the High Court dismissed an appeal when both parties did not appear at the hearing. The Supreme Court allowed the appeal only on the ground that the court had not issued a notice of hearing of the appeal.

8.8 In *casu*, Counsel for the Appellant, armed with the knowledge that a default Judgment had been entered against his client, under cover of letter of 10th March 2021, exhibited little or no desire to prosecute the applications to set aside the Judgment. We have already observed that the Appellant, upon receiving notice of the default judgment, demanded that the Judgment be set aside by the Party that obtained it. Its ill-fated applications were only filed on 7th June 2021, a period of almost three

months after service of the default judgment. Further, and as we have noted above, **paragraphs 8.5 & 8.6,** reflect a brazen and misinformed approach taken by the Appellant, who formed the view that the lower court ought to pursue Counsel to inform him of the fate of its *ex parte* application. There is no proof of any search reports or letters to show that the Appellant made any follow ups with the Court, or its marshal, or indeed through its duly appointed Agents, to pursue the fate of its own applications. To the contrary, Counsel appears to challenge the authority of the lower court for its own failure to prosecute and or follow up the activity on its applications. This is certainly conduct unbecoming of Counsel.

8.9 We note the reliance placed by the Appellant on the case of **Patel Abhishek Vijay Kumar v Henry Sampa and BIA Limited** [2] in support of its argument that the lower court ought not to have proceeded to dismiss its applications as there was no proof of service of the Court's directive on the Appellant. Again, we are of the considered view that the appellant has plucked this authority out of context, and purports to apply it to suit the facts in *casu.*

8.10 In support of our reasoning above, we rely on the decision of the Supreme Court in the cited case of **Anti-Corruption Commission v Sambondu**[4] where the Court stated as follows:

"In the present case, the Court below was entitled to infer from the circumstances in this matter that the appellant was aware of the hearing dates. Although the advocate seized with conduct of the matter was not personally served, the notices of hearing were marked for his attention and served on some other officers of the appellant who acknowledged service. We also note that the appellant did not dispute that it had a pigeon hole at the High Court, but instead it argued that there was no evidence that it received the notices. Court processes that are placed in the pigeon holes are usually put at the instance of the Court and it cannot be reasonably argued that the Court should adduce evidence that the processes were so placed and that litigants received them. In the face of this evidence, we are satisfied that the appellant was aware of the hearing dates and it cannot be said that it was prejudiced in any way. Moreover, the matter came up on two occasions but the appellant did not attend court."

8.11 Our attention has also been drawn to the case of **Chimanga Changa Limited v Stephen Chipango Ng'ombe**[5] where the Court held that:

"There is no sacrosanct method to prove service of process...A Court is at liberty to infer from the circumstances in a case whether a litigant is aware of the hearing date."

8.12 In considering the factors that a court must note, when faced with an application to dismiss for want of prosecution, we refer to the guidance rendered in the case of **Hu Herong and Luo Feng v Kapotwe and Kalwa Food Products Limited[6].** This case was an appeal against an order of the learned trial Judge dismissing the matter for want of prosecution. The dismissal followed an *unless order* striking out the matter for non-attendance. The *unless order* was not served on the Appellants. It was against this background that the Appellants appealed against the order of the learned trial Judge.

8.13 One of the two grounds of appeal raised in the **Hu Herong[6]** case may be directly comparable to the matter under appeal. The Appellant contended that the trial Court misdirected itself in law and fact when it deemed the Appellant's matter dismissed for want of prosecution, following the order to strike out the matter for non-attendance by the Appellants and their advocates, on 22nd May 2006, without any proof that the *"unless order"* was brought to the attention of the Appellants or their advocates.

8.14 The Supreme Court concluded that there had been no inordinate delay and that the adjournments caused by the parties were due to their attempts to settle out of court. The Supreme Court determined that there was no intentional and contumelious default on their behalf and allowed the appeal.

8.15 The Supreme Court at **page 4** of its judgment stated as follows:

"We have considered the principles governing dismissal of cases for want of prosecution. Although courts have inherent jurisdiction to dismiss matters for want of prosecution, this should only be done in exceptional circumstances. We say so because matters should be determined on their merits, unless there are circumstances giving rise to a substantial risk that a fair trial would not be possible or that the defendant would suffer prejudice by allowing the matter to go to trial. The principles which courts should apply in deciding whether or not to dismiss an action for want of prosecution were laid down by Lord Diplock in the case of ***Birkett v James [1977] 2 ALL ER 801*** *in which he laid down the principles which courts should apply in deciding whether or not to dismiss an action for want of prosecution in which he held as follows:*

"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..."

8.16 The Supreme Court also referred to the learned authors of **Halsbury's Laws of England,** at paragraph 448 page 337 which provides that: '' ***courts should***

take into account all circumstances of the case, including the nature of the delay and the extent to which it prejudiced the defendant, as well as the conduct of all the parties and their lawyers". (emphasis is ours).

8.17 In our considered view, the Appellant waited several months before filing its application to set aside the judgment in default of appearance and defence. It did so as an *ex parte* application, and left it without any follow up, search, attendance on the court or upon the marshal exhibiting a total laissez-faire approach to the matter and a lack of urgency, which ultimately is prejudicial to the Respondent and raised the serious risk of not being able to have a fair trial of the issues in this action. We have also noted that the Respondent periodically and consistently followed up the matter in the lower Court and referred to the searches at **pages 5 and 13** of the SROA.

8.18 Conspicuously missing from the Record of Appeal is the Affidavit of Service, or the letters exchanged, which are noted at **paragraphs 8.4. 8.5 & 8.6** above. In the circumstances before us, it is clear that the Appellant has continued on its trajectory, portraying itself as the injured party and concealing vital information. It would also be remiss of us if we did not comment on the Record of Appeal compiled by the Appellant, and which prompted the Respondent to file a Supplementary Record of Appeal. Again, this smacks of either a lack of competence or an attempt to mislead the Court, both of which are frowned upon.

8.19 We are also refer to the case of **Stanley Mwambazi v Morester Farms Limited**[7] in which the Supreme Court held that:

"It is the practice in dealing with bona fide interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties...For this favourable treatment to be afforded to the applicant there must be no unreasonable delay, no mala fides and no improper conduct on the part of the applicant."

8.20 In *casu*, The Appellant ought to have attached urgency to its applications, as a judgment in default had already been entered and the Respondent had moved the Court to assess the damages in accordance with the Judgment of the Court.

8.21 The Supreme Court in the case of **Nahar Investment Limited v Grindlays Bank International (Zambia) Limited**[8] held as follows:

"We wish to remind appellants that it is their duty to lodge records of appeal within the period allowed, including any extended period. If difficulties are encountered which are beyond their means to control (such as the non-availability of the notes of proceedings which it is the responsibility of the High Court to furnish), appellants have a duty to make prompt application to the court for enlargement of time. Litigation must come to an end and it is highly undesirable that respondents should be kept in suspense because of dilatory conduct on the part of appellants....If the delay has been inordinate or if in the circumstances of an individual case, it appears that the delay to appeal has resulted in the respondent being unfairly prejudiced in the enjoyment of any judgment in his favour, or in any other manner, the dilatory appellant can expect the appeal to be dismissed for want of

prosecution, notwithstanding that he has a valid and otherwise perfectly acceptable explanation." (Emphasis ours).

8.22 We note that these remarks were made in the context of an application to dismiss an appeal for want of prosecution, but we hold the view that the guidance holds in the context of the facts in the case before us. Consequently, whether the Appellant had a probable defence or not, is irrelevant due to the dilatory conduct of the Respondent.

8.23 The letter dated 17th February 2022 on **page 120** of the Record of Appeal is noted, and once again, the Appellant chooses to place an obligation on Counsel for the Respondent, for it to render a status on the Appellant's pending applications filed on 7th June 2021. Correspondence such as this, ought to have been directed, as a matter of urgency and not 1 year and 4 months later, to the Court or its own Agent of record. We do not fault the lower court when it reasoned as follows:

> *"... Even the effort of writing to the Plaintiffs advocate to inquire of any dates in my view is meant to show a semblance of prosecuting the matter. These efforts by the defence are too little too late and of no value because, as argued, the onus was on them to follow up their process to ensure that their applications were dealt with to their logical conclusions."*

8.24 In the circumstances, we cannot fault the lower court for its reasoning that the haphazard and lack-lustre approach exhibited by the Appellant showed that it went to sleep and did not bother to follow up on its own

applications. It is clear that the Appellant had more than enough time and opportunity to defend its case. The maxim "**Vigilantibus non dormientibus jura subveniunt**" which means "*law aids the vigilant, not those who sleep over their rights*" rings true in context of this appeal.

8.25 For the reasons above, we do not fault the decision of the lower court, save to perhaps guide that if the lower court was not inclined to entertain the *ex parte* applications, it could have simply crossed it out and made it returnable *inter partes* or endorsed on the application itself, a directive for it to be filed inter partes. However, this observation does not, and did not, absolve the Appellant from conducting itself in the urgent manner required by the situation. Clearly the lower court cannot be faulted for finding that the Appellant's arguments had no merit. The Appellant cannot expect this Court to rescue it, at the eleventh hour.

9.0 Conclusion

9.1 We dismiss this appeal having found no merit in any of the grounds of appeal. We award costs to the Respondent, to be agreed or taxed in default.

M. J. SIAVWAPA
JUDGE PRESIDENT

F.M CHISHIMBA
COURT OF APPEAL JUDGE

A.N. PATEL S.C.
COURT OF APPEAL JUDGE