IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 234 of 2023**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

PARKRITE ZAMBIA LIMITED APPELLANT

AND

LUSAKA CITY COUNCIL RESPONDENT

CORAM: SIAVWAPA JP, CHISHIMBA, PATEL, JJA

On 13th May & 13th June 2024

For the Appellant: Mr. M. Silungwe
Messrs. Friday Besa & Associates

For the Respondent: Ms. K. Sikwibele, Ms. A.S. Mwanamakondo &
Mr. N.A. Nsama for
Director of Legal Services
Lusaka City Council

JUDGMENT

Patel, JA, delivered the Judgment of the Court.

Rules and Legislation referred to:

1. The High Court Act, Chapter 27 of the Laws of Zambia.
2. The High Court (Amendment) Rules, Statutory Instrument No. 27 of 2012
3. The High Court (Amendment) Rules Statutory Instrument No. 58 of 2020

Cases referred to:

1. Jamas Milling Company Limited v Imex International (PTY) Limited (2002) Z.R. 79
2. Zambia Telecommunications Company Limited v Mulwanda and Ngandwe (Appeal 63 of 2009) (2012) ZLR, Vol. 1, 404
3. Akashambatwa Mbikusita Lewanika and 4 Others v Frederick Jacob Titus Chiluba SCZ No. 14 of 1998.
4. Walusiku Lisulo v Patricia Anne Lisulo (1998) Z.R. 75
5. National College for Management and Development studies v Kentlex Investment Limited (Appeal 4 of 2005) [2007] ZMSC 29 (6 June 2007)
6. Falker v Scottish Imperial Insurance Company (1886 -1890) All E.R. 768
7. Fearnought Systems Limited v Fearnought Systems (Z) Limited & Another (Appeal No. 35 of 2015) [2017] ZMSC 76
8. John Menyani Phiri v Daka (HP 2069 of 2017) [2018] ZMHC 439 (23 February 2018)
9. NFC Africa Mining PLC vs Techro Zambia Limited (2009) ZR 236
10. Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (SCZ 8 52 of 2014) [2016] ZMSC 24 (26 February 2016)

11. Twampane Mining Co-operative Society Limited v E and M Storiti Mining Limited (2011) ZR Vol 3, (2)

Other works referred to:

1. Halsbury's Laws of England, 3rd Edition, Volume 22.

1.0 INTRODUCTION

1.1 This is an appeal against the whole Ruling of **Mbewe I.Z. J,** delivered at the commercial division of the High Court, on 8th May 2023, on an action raised by the Appellant against the Respondent, which is now the subject of the dispute.

1.2 This Appeal brings to the fore, issues of case management and the role of the adjudicator in advancing the progress of a matter through the courts. It will be noted further that the matter in the court below, was commenced in the aftermath of the promulgation of the **High Court (Amendment) Rules of June 2020.**

1.3 It also speaks to conduct expected of litigants who chose to prosecute their claims in the commercial division and the more robust approach now required by all stakeholders across the divisions of the Court.

2.0 BACKGROUND

2.1 For the purposes of this section, we shall refer to the parties as they were in the court below.

2.2 The Appellant (Plaintiff in the court below) commenced proceedings against the Respondent (Defendant below) on 10th November 2020, claiming the following:

i. Damages for Breach of Contract amounting to USD4,826,800.00;
ii. Any other relief that the Court may deem fit;
iii. Interest;
iv. Costs incidental to these proceedings.

2.3 The Defendant duly filed its defence on 24th November 2020, following which orders for directions were issued by the Court on 16th March 2021.

2.4 The series of events that transpired thereafter, are on record, and speak to several instances where the trial, initially scheduled to commence on 30th August 2021, was adjourned on account of the Plaintiff for various reasons, to include not having filed its witness statement and skeleton arguments, to its subsequent application to amend its witness statement and file supplementary bundle of documents, all of which applications were granted by the Court, ultimately setting the matter for trial on 17th May 2022.

2.5 On 26th April 2022, the Parties filed a Consent Order, granted by the lower Court on 5th May 2022, indicating a desire to settle the matter by consent judgment.

2.6 The Court, not having received the proposed consent judgment, set the matter for status on 2nd November 2022. There being no appearance nor explanation for the absence of the Plaintiff, the Court upon hearing the intention of the Defendant to have the matter proceed to trial, set the matter down for hearing on 26th January 2023. The Notice of Hearing was issued by the court on 2nd November 2022.

2.7 On the aforementioned date of trial, there being no appearance on behalf of the Plaintiff, the Court dismissed the Plaintiff's action for want of prosecution by order dated 26th January 2023.

2.8 On 31st January 2023, the Plaintiff filed an application for review of the above-mentioned decision. Dissatisfied with the arguments of the Plaintiff, the Court in its Ruling dated 8th May 2023, dismissed the Plaintiff's application which is now the subject of this appeal.

3.0 DECISION OF THE LOWER COURT

3.1 The learned Judge considered the affidavits, skeleton arguments and counsels' submissions respectively.

3.2 The learned Judge noted that the Court's power to review its own decision is discretionary, and that the party applying for review, ought to demonstrate that there is fresh evidence which would materially affect the decision sought to be reviewed and such evidence should have existed at the time of the decision but could not have been discovered with due diligence.

3.3 The learned Judge noted the Appellant's submission that the matter having been determined by Consent Order of 5th May 2022, they were under the impression that the matter was scheduled for hearing of the application for assessment of damages on 26th January 2023.

3.4 It was also noted that the Consent Order indicated the parties' intention to settle the matter by Consent Judgment and that a final Consent Judgment would be filed a month from the date of execution upon parties concluding on specific terms.

3.5 The learned Judge noted, that, as at 11th October 2022, when the notice for status conference was issued by the Court, the final Consent Judgment had not been filed. The learned Judge therefore, had difficulty in appreciating the Appellant's argument, that the matter was concluded by Consent Order dated 5th May 2022, when in fact not.

3.6 The learned Judge further noted the Appellant's contradictory submissions, in which it was argued on one hand, that the application for assessment of damages was not given a date, and on the other

hand that it was under the impression that the matter was coming up for hearing of the said application on 26 January 2023.

3.7 The learned Judge reasoned that it was not possible for the Appellant to submit that it was unsure of what the matter was coming up for, as the notice is clearly exhibited on record.

3.8 In arriving at her conclusion, the learned Judge noted the Appellant's submission that it would have been appropriate for the Court to strike out the matter with liberty to restore in accordance with **Order 35 Rule 2 of the High Court Rules** as opposed to dismissing it for want of prosecution.

3.9 The learned Judge took the view that the Appellant's argument is not appropriate under an application for review, which is instructive and **Order 39 Rule 1 of the High Court Rules** requires that the Appellant ought to show fresh evidence that would materially affect the decision.

3.10 It was the learned Judge's considered view that the Appellant did not show the existence of fresh evidence and had exhibited dilatory conduct throughout the proceedings. Ultimately, she found that there was no basis for the Court to review the order of dismissal for want of prosecution of 26th January 2023 and dismissed the Appellant's application.

4.0 THE APPEAL

4.1 Dissatisfied with the Ruling of the court below, the Appellant filed a Notice and Memorandum of Appeal on 22nd May 2023, advancing three (3) grounds of appeal, namely;

i. *That the Learned Judge in the Court below erred at law and in fact when she held that the Plaintiff should have led fresh evidence that would have a material effect on the initial decision of the Court for the Court to review its decision, despite the matter having been dismissed without being heard on the merits.*

ii. *That the Learned Judge in the Court below erred at law when she held that an omission to consider a particular law (Order 35 Rule 2 of the High Court Rules) in relation to a particular decision of the court cannot be subject of review under Order 39 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia.*

iii. *That the Learned Judge in the Court below erred in fact when she held that the Plaintiff had not provided sufficient reasons to exercise her discretion to review her decisions, as she had misapprehended the reasons advanced by the Plaintiff.*

5.0 THE APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 We have considered and appreciated the Appellant's Heads of Argument filed on 21st July 2023. With reference to the grounds of appeal before us, Counsel for the Appellant referred to **Order 39 Rule 1** of the High Court Rules[1] which stipulates as follows:

> *"1. Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision."*

5.2 It is the Appellant's submission that it is clear from the provisions of the Rules of the High Court, that the Court has jurisdiction to review its own decision, upon the party seeking to have a decision reviewed, furnishing sufficient reason. It is its submission that the Court below agreed with the Appellant that the Court does have the power to review its decision but stated that this power can only be exercised where the Applicant has provided fresh evidence that could not be initially contemplated by the party making the application. The court below placed reliance on the guidance of **Jamas Milling Company v Imex International (PTY) Limited**[1] and **Zamtel v Aaron Mweenge and Another** [2].

5.3 It is the Appellant's contention that this is a restrictive approach to the application of **Order 39 Rule 1** of the High Court Rules[1] which cannot be derived from the rule itself. The Appellant placed reliance on the case of **Akashambatwa Mbikusita Lewanika and 4 Others v Federick Jacob Titus Chiluba**[3] which held that:

> *"Review under Order 39 is a two staged process. First showing or finding a ground or, grounds considered to be sufficient, which then opens the way to actual review. Review enables the court to put matters right. The provision for review does not exist to afford a dissatisfied litigant the chance to argue for an alteration to bring about a result considered more acceptable."*

5.4 It was further submitted that **Order 39** of the High Court Rules[1] does not specify the grounds upon which the court can exercise its discretion to review its decision. The Appellant referred to the case of **Zamtel v Aaron Mweene Mulwanda and Another**[2] which stated as follows:

> *"For review under Order 39 Rule 2 of the High Court Rules to be available, the party seeking it must show that he has discovered fresh material evidence, which would have material effect upon the decision of the court and has been discovered since the decision but could not, with reasonable diligence, have been discovered before."*

5.5 It is the Appellant's submission, that this Court should be able to distinguish between review of a decision, made out of the default of one party, and a decision made, following the full participation of all parties. It is their argument that the wealth of jurisprudence interpreting **Order 39** of the High Court Rules,[1] stems from a series of decisions, involving matters heard on the merits and what was actually the subject of review, was a judgment where all the parties were heard.

5.6 It was submitted, that even if there was insistence on the rule, that fresh evidence be provided to the Court, before it can proceed to review a decision or judgment, where a decision was made in the absence of the party seeking review, every issue of fact brought before the Court in the application for review should then be considered "fresh evidence" that was not considered at the time the decision or judgment was being made.

5.7 It was its submission that the reasons acceptable for the Court to proceed to review its decision, in as much as they are limited, cannot only be restricted to the need to furnish fresh evidence. It is its argument, that what is important, is that the Court also considers the safeguards explained in the case of **Walusiku Lisulo v Patricia Anne Lisulo**[4] in arriving at a decision as follows:

> *"The power to review judgment or orders is discretionary, and there must be sufficient grounds to exercise that discretion. The power is not designed for parties to have a second bite at the*

cherry. Litigation must come to an end, and successful parties must be given the opportunity to enjoy the fruits of their judgment."

5.8 It is the Appellant's submission, that the danger to get a second bite of the cherry in this matter, is eliminated by the fact that this matter has not been heard on its merits or the Appellant was not heard before the decision complained of was made and that dismissing the matter, is counter-productive to the notion, that litigation ought to come to an end.

5.9 It was the Appellants contention that the lower court should have exercised its discretion to review its decision, even on the ground alone that the Appellant was taken by surprise by the decision complained of. It is its submission that the Appellant was under the impression that the matter would be heard from chambers, for the purpose of setting a date for the hearing of its application for assessment, and was shocked instead, to find the Court in the middle of rendering its ruling dismissing this matter.

5.10 The Appellant placed reliance on the case of **National College for Management and Development Studies v Kentlex Investment Limited**[5], to support its argument that if a matter was dismissed as a result of default of one party and it comes to Court on review, the overriding consideration is not whether there is fresh evidence discovered, but whether there are triable issues that need to be heard by the Court, despite procedural default.

5.11 It is the Appellant's submission, that the Appellant has taken all the steps necessary for this matter to proceed for trial, and that not only would it be a miscarriage of justice, but also a waste of resources for the parties and the Court if this matter was not allowed to proceed to trial at this stage.

5.12 In relation to ground 3, the Appellant essentially reiterated its argument, that it was of the view, that the application for assessment of damages, was itself an attempt by the Appellant to do away with the need for trial, and that it was its assumption that when the matter was scheduled for trial, the Court would not constitute itself for trial, but rather, arrange to have the application for assessment for damages, to be heard first.

6.0 THE RESPONDENT'S HEADS OF ARGUMENT

6.1 We have equally considered and appreciated the Respondent's Heads of Argument filed on 25th September 2023.

6.2 In essence, the Respondent has argued that the law relating to review is settled and placed reliance on **Halsbury's Laws of England, 3rd Edition,** and **Volume 22** paragraph 1670[1] at page 791 as follows:

> *"An action will lie to rescind a judgment on the ground of the discovery of new evidence which would have had material effect upon the decision of the court. It must be shown that*

such evidence is a discovery of something material in the sense that it would be a reason for setting aside the judgment if it were established by proof; that the discovery is new, and that it would not with reasonable diligence have been discovered before. A mere suspicion of fresh evidence is not sufficient."

6.3 The Respondent placed further reliance on Kay J in **Falker v Scottish Imperial Insurance Company** [6] who explained as follows at page 769:

"...leave is not given unless first, the evidence is material: second, that it has been discovered since the decision; and third could not with reasonable diligence have been discovered before."

6.4 It is its submission that the steps referred to were affirmed in this jurisdiction, by the Supreme Court, in the case of **Jamas Milling Company Limited v Imex International Pty Limited**[1].

6.5 It is its submission that the party applying for review, ought to demonstrate that there is fresh evidence, which would materially affect the decision sought to be reviewed, as guided by the Supreme Court in the foregoing authority, and such fresh evidence should have existed at the time of the decision but could not be discovered with due diligence.

6.6 It is the Respondent's contention that it is unsubstantiated for the Appellant to assert, that the requirement to show the existence of fresh evidence, which could not be discovered with due diligence, is a restrictive approach of interpretation from the decisions of the Supreme Court, relied on by the Court.

6.7 It is the Respondent's further argument that the Court below cannot be faulted for dismissing the Appellant's application for review for the obvious fact that the Appellant failed to demonstrate the existence of such fresh evidence which could not be discovered with due diligence which position the Supreme Court has severally stated in **Zamtel v Aaron Mweene Mulwanda and Another[2].**

6.8 It is further submitted that the Appellant's assertion, that an application for review of a court decision under **Order 39 Rule 1** of the High Court Rules,[1] should consider every issue of fact brought before the Court as "fresh evidence," on grounds that the Appellant was not present at the trial, when the Appellant has no actual fresh evidence to adduce to justify review of the order of the lower Court.

6.9 It is the Respondent's submission that to consider every issue if brought before the Court as "fresh evidence," as contended by the Appellant, would not only defeat the purpose for which an application for review is intended, but also tantamount to giving a dissatisfied party seeking review, a second bite at the cherry and placed reliance on the authority of **Walusiku Lisulo v Patricia Anne Lisulo[4].**

6.10 It was the Respondent's argument, that the conduct of the Appellant, displayed little or no desire to conclude the matter, as is evident from the Record, in their continued quest to prolong the disposal of the matter.

6.11 As it relates to ground 3, the Respondent noted the Appellant's contradictory submission, in relation to counsel for the Appellant's misconstrued impression that the matter scheduled for 26th January 2023, was a hearing of its application for assessment of damages.

6.12 It is their argument that the Notice issued by the lower Court for trial on 26th January 2023, was unequivocal and that the Court below, was on firm ground to have proceeded to dismiss the matter for want of prosecution. The Respondent has also referred to correspondence on the Record of Appeal clearly stating that having failed to agree the terms of settlement, the matter was to proceed to trial, including their intent to apply to dismiss the action, if the Appellant continued to absent itself from Court.

7.0 THE HEARING

7.1 At the hearing, learned Counsel placed reliance on their respective Heads of Arguments as filed in Court.

8.0 DECISION OF THE COURT

8.1 We have carefully considered the grounds of appeal, the impugned Ruling and the submissions of counsel respectively. Although the Appellant has argued the grounds seriatim, we shall discuss them in a holistic manner as they all speak to issues of case management, conduct of the Appellant and the ill-fated application to review.

8.2 The cardinal issue, which will address the grounds of appeal, can be addressed by considering the following question:

i. *Did the Appellant demonstrate sufficient ground to warrant review of the lower court's order dated 26th January 2023?*

8.3 We have taken into consideration the lengthy submissions of counsel. In this case, the learned Judge at ***page R13*** of the Ruling dismissed the Appellant's application on the ground that there was no basis for the Court to review its Order of 26th January 2023.

8.4 We deem it fit to emphasize, as did the Supreme Court, in the case of **Zambia Telecommunications Company Limited (Zamtel) v. Aaron Mweene Mulwanda and Paul Ngandwe**[2] that review under **Order 39, rule 1** of the High Court Rules has very limited scope. In our considered opinion, the limited scope is intended to curtail the prospect of abuse, which would be occasioned by litigants seeking a second bite of the cherry. In **Lisulo v Lisulo**[4] the Supreme Court pronounced that **Order 39** is not designed for parties to have a second bite, as litigation must come to an end.

8.5 We are equally alive to at least six circumstances in which the Court may review its own decisions. These are:

i. If there is some clerical mistake in a judgment or order which is drawn up, which is not applicable in *casu*;

ii. If there is some error in a judgment or order which arises from any accidental slip or omission, which is not applicable in *casu*;

iii. If the meaning and intention of the court is not expressed in its judgment or order, which is not applicable in *casu*;

iv. If a party is wrongly named or described, which is not applicable in *casu*;

v. if a party named in a judgment or ruling is non-existent; and where depending on the circumstances the ruling was obtained by fraud, which is not applicable in *casu*."

vi. If new evidence comes to light and can be called, which no proper and reasonable diligence could earlier have secured, which is the ground being relied upon in this case.

8.6 In our view, the latitude given to a Court to review its decision where fresh material evidence seeks to be relied on, is limited to fresh evidence that is discovered after the ruling sought to be reviewed has been rendered. In addition, it must be demonstrated that the discovery of fresh evidence could not, with reasonable diligence, have been made before. Our opinion is founded on the holding of the Supreme Court in the **Zamtel** case, which we have referred to. In that case it was held as follows:

"For review under Order 39, rule 2 of the High Court Rules to be available, the party seeking it must show that he has discovered fresh material evidence, which would have material effect upon the decision of the Court and has been discovered since the decision but could not with reasonable diligence, have been discovered before."

8.7 According to the Affidavit in Support of Summons for Review, which is noted at **page 188** of the Record of Appeal, the reasons offered by Counsel, in *paragraphs 6 to 13* thereof, seriously reflect a complete lack of understanding on the part of Counsel, who attempted to aver that there being a binding Consent Order, all that remained was to proceed to have damages assessed.

8.8 Counsel for the Appellant appears to have completely misunderstood the effect of the Consent order which only expressed an intention to settle the matter on agreed terms within 30 days of filing the consent order. There being no agreement on terms, it is obvious that the consent order fell away. It is also clear that Counsel not having attended the Status Conference on 2nd November 2022, made no effort to note what had transpired on the said day.

8.9 The Affidavit in opposition at *paragraphs 6 to 10* seen on **pages 201 to 202** of the Record of Appeal, clearly reflects the intention of the Respondent to progress the matter through the Court, the attempt at settling by consent having fallen through. We also note a letter dated 21st November 2022, at **page 209/210** of the Record of Appeal, from

the Respondent, received and acknowledged by the Appellant, which clearly stated the express intention of the Respondent to have the matter dismissed for want of prosecution at the next scheduled date of hearing.

8.10 The genesis of the commercial list was aptly stated in the case of **Jamas Milling Company Ltd V Imex International (Pty) Ltd**[1] where the Apex Court noted as follows:

> *"The commercial List, where the action was commenced, and Order 53 of the High Court Rules which was introduced to regulate procedure in the Commercial List are not without history. The introduction of the Commercial List was a reaction to the business community's complaints that cases of commercial nature were taking too long to dispose of so that by the time judgment was rendered the parties had suffered economic ruin. The Judiciary's response was to introduce the Commercial List as a fast track. Of course, the Commercial List would have meant nothing if the dilatory procedures in the General List were made applicable to the Commercial List also. Hence, the introduction of Order 53 (1) to specifically deal with commercial cases. The sanctions in Order 53 (1) are meant to make parties move with all the speed required to dispose of the case as quickly as possible.*

The Rules in Order 53 (1) are not peculiar to Zambia. In other jurisdictions, particularly in England and Wales where we adopted these Rules, the Rules are enforced with full vigor and breach of these Rules can have serious consequences. We will hate to have a situation where lax application of the Rules in the Commercial List will result in the Commercial List itself being just like the General List with a different name.

In the circumstances, the arguments that the rules will work injustice do not find favour with us. In fact, it is not in the interest of justice that parties by their shortcomings should delay the quick disposal of cases and cause prejudice and inconvenience to the other parties. Those who come to the Commercial List must strictly abide by the rules in that List. Everything has a price. Those who want their cases quickly disposed of must strictly abide by the rules of the Commercial List. Parties and advocates litigating in the Commercial List must take heed of this warning."

8.11 In view of the question, we have posited in *paragraph 8.2* above, we again refer to the decision of the Supreme Court in the case of **Jamas Milling Limited v Imex International (PTY) Limited**[1] which established the materiality of ground/s considered to merit the review of a decision, namely that:

i. There must be fresh evidence which existed at the time of the decision; and

ii. A demonstration of failure to discover such fresh evidence with due diligence.

8.12 In the case of **Fearnought Systems Limited v Fearnought Systems (Z) Limited & Another**[7], the Supreme Court stated that the review of a judgment or decision was a two-stage process as follows:

(i) Considerations when determining whether review is appropriate; and

(ii) Determining what material effect, if any, fresh evidence may have had on an initial decision.

8.13 In that case, the Supreme Court held:

> *"There are principles that give guidance as regards how Order 39 should be applied in practice. First, an application for review must be heard. At this stage the Applicant must show to the satisfaction of the judge the grounds that warrant the review of the decision. If the grounds are shown, then the order for review is granted. The next stage is now for the judge to re-open the matter and review the judgment."*
> (underlining is ours).

8.14 We also note the decision in the case of **John Menyani Phiri v Daka,**[8] albeit a decision of the High Court, in which the court took the view, that there had been no new evidence established to warrant the

Court to review its ruling. The Court took the view that the recourse that was available to the Defendant, (in that case), was to appeal to the Superior Court, because it was not a fit and proper case to order a review.

8.15 In *casu*, any attempt, on the part of the Appellant, to canvass the argument, that it thought the matter was coming up for assessment, of a judgment that does not exist, is dismissed outright. The attitude and conduct of counsel for the Appellant has been noted throughout the proceedings and the learned Judge, in the lower Court, was on firm ground, in not only, dismissing the matter for want of prosecution, but also in dismissing the attempt at a review of that Order.
Review in these circumstances is simply not tenable.

8.16 Authorities abound in this jurisdiction, that speak to the duty of Counsel to progress its matters swiftly through the Courts. As noted at the onset, this action was not only commenced in the Commercial Division of the Court, but also under the new dispensation of the amended High Court Rules, which represent a paradigm shift from the traditional adjudication, where a passive adjudicator waited for the parties to steer, or not, the course of litigation.

8.17 Having considered the grounds of appeal extensively, we endorse the Ruling of the learned Judge at **page R12** as follows:

> *"Essentially, I am of the view this argument ascribed by Counsel cannot be achieved under the province of Order 39 rule 1 of the High Court Rules, Cap 27 of the laws of Zambia.*

This can only be resolved by way of appeal and not review. I say so on the basis that in regard to an application for review, Order 39 Rule 1 of the High Court Rules is instructive and as guided by the Supreme Court in Jamas Milling case, the Plaintiff ought to show fresh evidence that would materially affect the decision and how that fresh evidence was discovered."

8.18 The lack-lustre approach of the Appellant is clear from the Record. It is also clear that the excuse that Counsel was of the opinion that the matter was scheduled for assessment, when Judgment was not entered, is dismissed without hesitation. The swift conclusion of matters without undue procrastination, is the desired hallmark for disposal of matters in the Commercial Division.

8.19 We equally find no favour, in the half-hearted argument, that the unpleasant sanction of dismissal, arising from a history of non-compliance, coupled with liberty to commence a fresh action, amounts to undue regard to technicality, such that it could be viewed as a gratuitous prevention of the just disposition of a case before Court.

8.20 In dismissing this appeal, we must express our strong disapproval of appeals of this nature, which are simply, at best, an attempt to obtain a second bite of the cherry, and at worst, the efforts of a drowning man clutching at straws. The Appellant, if it had any intention of prosecuting its case, would have made more progress by

commencing a fresh action, than waiting to have this appeal dismissed.

The fact that the appeal will be dismissed was a foregone conclusion.

9.0 CONCLUSION

The appeal having been unsuccessful, we dismiss it with costs to the Respondent to be taxed in default of agreement.

M. J. SIAVWAPA
JUDGE PRESIDENT

F.M CHISHIMBA
COURT OF APPEAL JUDGE

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