

**IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 309/2022
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

BETWEEN:

**STONE COAT SURFACING ZAMBIA APPELLANT
LIMITED**



AND

JMZ PROPERTIES LIMITED

RESPONDENT

CORAM: Chashi, Makungu and Sichinga, JJA
On the 18th day of September and on the 30th day of October, 2024

For the appellant: Mrs. S. Phiri Hindi with Mrs. S. Mushibwe Mwewa both of Messrs Chifumu Banda and Associates.

For the respondent: Mr. N. Ngandu of Messrs Shamwana & Co.

JUDGMENT

MAKUNGU JA, delivered the Judgment of the Court.

Case referred to:

1. *Stanley Mwambazi v. Morrester Farms Limited (1997) ZR 108*
2. *Zambia Revenue Authority v. Jayesh Shah – SCZ judgment No. 10/2001.*
3. *G4S Secure Solutions Zambia Limited v. Lupupa Kabezya Lewis – SCZ Appeal No. 170/2015*
4. *Dipak Kumar Patel and Yakub Patel v. David Kangwa Nkonde – SCZ Selected Ruling No. 33 of 2017*
5. *Daniel Mwale v. Njolomole Mtonga and Attorney General – SCZ Judgment No. 25 of 2015*

6. *Arbuthnot Lathan Bank Limited and Others v. Trafalgar Holdings Limited and Others* (1998) 2 ALL ER 181
7. *Hildah Lombanya T/A Hilomu Travel & Car Hire v. Getrude Saviye Kayombo T/A Ilanga Travel & Car Hire – CAZ Appeal No. 119/2021*
8. *Elizabeth Catherine Cook v. Moses Mpundu – SCZ Appeal No. 207/ 2015*
9. *Chibote Limited, Mazembe Tractor Company Limited, Minestone (Zambia) Limited, Minestone Estate Limited v. Meridien Biao Bank Zambia Limited (in liquidation) – SCZ Appeal Number 11 of 2002*
10. *Hu Herong and another v. John Kapotwe & Another – SCZ Appeal No. 65/2007.*

1.0 INTRODUCTION

1.1 This appeal emanates from the ruling delivered by the Honourable Lady Justice S. Kaunda Newa of the High Court on 17th August 2022, wherein an application for an adjournment by the plaintiff company now appellant was dismissed and so was its action against the defendant company, now respondent.

2.0 BACKGROUND

2.1 For clarity, in the initial part of this judgment, we will refer to the parties as they were designated in the lower court. The plaintiff commenced this matter by a writ of summons and statement of claim dated 4th October 2019, claiming outstanding payments for works done under the contract

between the parties with interest and costs. The plaintiff also claimed an injunction to restrain the defendant from engaging another contractor until the plaintiff's dues were paid.

- 2.2 The plaintiff later made an application to amend the Court process. On 29th October 2019, the defendant filed a notice of intention to raise a preliminary issue. The issue raised was that the affidavit supporting the summons to amend the process contained contentious matters and should have been sworn by a servant of the plaintiff rather than its legal counsel.
- 2.3 On 2nd December 2019, the lower court ruled that there was nothing contentious about the said affidavit. Consequently, the plaintiff was granted leave to file an amended writ and statement of claim.
- 2.4 On 27th January 2020, the lower Court issued several orders *inter alia* that: the plaintiff was to file its amended writ of summons and statement of claim by 31st January 2020, and the defendant was to file its amended defence and counterclaim by 7th February 2020.
- 2.5 On 30th January 2020, the plaintiff filed an amended writ of summons and statement of claim, seeking the following reliefs:

- a. *Damages for breach of contract.*
- b. *Payment of USD 45,500.00 as the outstanding amount under the agreement.*
- c. *Payment of USD 5,809.50 as the balance for the demolition of existing structures on site.*
- d. *An interim injunction restraining the defendant from engaging another contractor until the plaintiff's outstanding payments are settled.*
- e. *Payment of ZMW 209,000.00 for the construction of the Kalingalinga Police Post by the plaintiff.*
- f. *Payment of ZMW 216,000.00 for work done on the car park resurfacing and drainage at Kapiji Mall, Solwezi.*
- g. *Interest.*
- h. *Costs.*
- i. *Any other relief the Court deems appropriate.*

2.6 On 19th January 2021, the lower court noted that the defendant had failed to file an amended defence, thereby breaching the orders for directions. Despite the said default, the Court extended the deadline for compliance with the orders for

directions by forty-five days. By 22nd June 2020, the defendant had not complied with the orders. The matter was subsequently adjourned to 5th March 2021, for a status conference.

2.7 On 1st March 2021, the defendant filed an amended defence and counterclaim, seeking:

- a. Damages for breach of contract.*
- b. Damages for remedial works undertaken.*
- c. Damages for loss of business.*
- d. Interest.*
- e. Costs.*
- f. Any other relief the Court deems appropriate.*

2.8 At the status conference held on 5th March 2021, both parties informed the court that they had complied with the orders for directions. Nevertheless, the plaintiff applied for an extension of time within which to file a reply to the defence and counterclaim. The court in turn made further orders for directions as follows:

- The plaintiff was to file a defence to the counterclaim by 19th March 2021.

- The defendant was to file a reply to the defence to the counterclaim by 26th March 2021.
- Inspection of documents and filing of the defendant's bundle of documents, along with the supplementary bundle of pleadings, was to be completed by 1st April 2021.
- The matter was scheduled for trial on 17th and 18th August 2021 at 09:00 hours on both dates, with costs in the cause.

2.9 On 17th August 2022, the trial could not commence as scheduled because learned counsel, Mrs. Mushibwe, who now has conduct of the matter was not the one who had conduct of the matter at the time, although she attended court. Mrs. Mushibwe explained to the Court that counsel with the conduct of the matter had just given birth. Therefore, she needed time to obtain instructions in order to proceed. Counsel for the defendant opposed the application on the ground that on the 7th of April 2022, the plaintiff's counsel failed to attend Court because she was nursing a sick child. Thus, counsel applied for the dismissal of the action.

3.0 DECISION OF THE LOWER COURT

3.1 The decision of the lower Court on the preliminary issue was as follows:

“I have considered the application. When the matter came up on 7th April 2022 for trial, only counsel for the defendant was before the Court. He indicated that counsel with conduct of the matter on behalf of the plaintiff was unable to attend court as she was nursing a sick child. On that basis, I adjourned the matter to today with the directive that if counsel with conduct of the matter on behalf of the plaintiff was unable to attend Court, another counsel from the firm should attend as the matter had been adjourned on a number of occasions. From 7th April 2022 to date, counsel for the plaintiff had sufficient time to obtain instructions and on that basis, I dismiss the matter for want of prosecution with costs to the defendant to be taxed in default of agreement. Leave to appeal is granted.”

4.0 THE APPEAL

4.1 The appeal against the above ruling is based on the following grounds:

- 1. “The learned judge in the Court below erred in law and fact when she dismissed the matter for want of prosecution when the appellant’s advocate had only***

previously missed one status conference with a sufficient and justifiable reason.

2. The learned judge in the Court below misdirected herself in ordering that the matter had been adjourned on numerous occasions when the matter had only been adjourned once before at the instance of the appellants' advocates.

3. The learned judge in the Court below misdirected herself in failing to recognize that the other adjournment was at the instance of the respondent's advocates who had failed to comply with the orders for directions.”

5.0 APPELLANT'S HEAD OF ARGUMENT

5.1 Henceforth, we shall refer to the parties by their designations before this Court.

5.2 During the appeal hearing, the learned counsel for the appellant relied entirely on the arguments dated 27th December 2022, wherein all three grounds of appeal were argued together. The essence of her argument was that the record shows that the appellant complied with the lower Court's orders for directions. The appellant's advocate attended all court hearings and status conferences, including the session on 17th August 2022, during

which time the case was unfortunately dismissed. The only instance of non-attendance was on 7th April 2022, and the reason for nonappearance was justifiable. Therefore, dismissal of the appellant's action for want of prosecution was both unfair and unjust.

5.3 Counsel further relied on the case of **Stanley Mwambazi v. Morrester Farms Limited**,¹ to fortify her argument that Courts should permit cases with triable issues to proceed to trial, even if there has been some default by the parties. She claimed that her failure to proceed with the trial on 17th August 2022 was neither intentional nor meant to show disrespect to the Court.

5.4 Additionally, reference was made to the Supreme Court case of **Zambia Revenue Authority v. Jayesh Shah**,² where it was held that:

“Cases should be decided on their substance and merit, where there has been only a very technical omission or oversight not affecting the validity of the process.”

5.5 In light of these arguments, we were urged to allow the appeal.

6.0 RESPONDENT'S HEADS OF ARGUMENT

- 6.1 During the appeal, counsel for the respondent relied on the heads of argument dated 31st January 2022, where the grounds of appeal were collectively addressed. Counsel cited the case of **G4S Secure Solutions Zambia Limited v. Lupupa Kabezya Lewis**, on the principle that the decision to grant an adjournment lies within the Court's discretion. An appellate Court should be cautious in interfering with this discretion unless it is evident that such interference is necessary to prevent injustice to the party requesting the adjournment.
- 6.2 Counsel contended that the Court below correctly exercised its discretion by denying the application for an adjournment. Counsel further stated that the appellant's assertion of an entitlement to an adjournment as a matter of right on 7th April 2022, lacks legal support. Furthermore, on 17th August 2022, the appellant's advocate sought an adjournment due to lack of instructions from her client. It was argued that the appellant had over four months to obtain instructions and prepare for the trial.

- 6.3 Citing the case of **Dipak Kumar Patel and Another v. David Kangwa Nkonde**,⁴ counsel argued that the appellant demonstrated a lack of interest in proceeding with the case. He pointed out that the initial adjournment was granted because the appellant's advocate was nursing a sick child, while the subsequent request was based solely on the absence of instructions. The appellant's failure to instruct counsel was inexcusable.
- 6.4 Additionally, counsel cited the case of **Daniel Mwale v. Njolomole Mtonga and Attorney General**,⁵ to argue that although cases should ideally be resolved on their merits rather than on technicalities, the Court must balance the rights and interests of the parties involved with those of other litigants awaiting justice. He also cited the case of **Arbuthnot Lathan Bank Limited and Others v. Trafalgar Holdings Limited and Others**,⁶ highlighting the necessity for litigants and their advisors to recognize that delays not only prejudice their cases but also affect the timely administration of justice for others.
- 6.5 Finally, counsel submitted that if the proceedings were not terminated by the Court below, it would have caused a delay in

the disposal of the case. Thus, the Court below exercised its discretion correctly by dismissing the appellant's case for want of prosecution.

7.0 ANALYSIS AND DETERMINATION

- 7.1 We have considered the record of appeal and the arguments by counsel representing both parties.
- 7.2 We note that some documents are missing from the record of appeal, such as the proceedings for 7th April 2022, and the other dates when the court is alleged to have sat. The initial writ of summons and statement of claim are also missing. Despite the gaps, the appeal will be determined based on the documents on record as they are comprehensive enough.
- 7.3 The appeal raises the question of whether the lower court was justified in dismissing the matter for want of prosecution. In the case of **Hildah Lombanya T/A Hilomu Travel & Car Hire v. Getrude Saviye Kayombo T/A Ilanga Travel & Car Hire**,⁷ this Court addressed a similar issue, stating that the High Court has inherent jurisdiction to dismiss a matter for want of prosecution either on its motion or upon application by a party.

- 7.4 The Supreme Court of Zambia, in **Elizabeth Catherine Cooke v. Moses Mpundu**,⁸ emphasized that the limited resources of the courts necessitate that access to justice be reserved for litigants willing to actively prosecute or defend their actions.
- 7.5 Regarding what constitutes "want of prosecution," the Supreme Court has clarified, in cases such as **Dipak Kumar Patel & Yakub Patel v. David Kangwa Nkonde**,⁴ that such a dismissal implies inordinate delay, lack of diligence, or absence of interest in proceeding with the action.
- 7.6 In the case of **Chibote Limited Mazembe Tractor Limited & others v. Meridien Biao Bank (Zambia) Limited (In liquidation)**,⁹ it was held that an action may be dismissed for want of prosecution when a party exhibits intentional and contumelious default or when there is an inordinate or inexcusable delay in prosecuting an action.
- 7.7 To determine whether the circumstances of this case warranted a dismissal for want of prosecution, we refer to the case history outlined earlier in this judgment. It is clear from the record that the appellant initiated this action in 2019, and nearly three years elapsed before the matter was set down for trial.

- 7.8 In the ruling appealed against, the lower Court noted that on 7th April 2022, only the respondent's counsel appeared before the Court. The respondent's counsel indicated that the appellant's counsel was nursing a sick child. Consequently, the Court adjourned the matter and directed that if counsel with conduct of the matter could not attend Court on the next hearing date, another counsel from the same firm should represent the appellant, given the number of previous adjournments.
- 7.9 From 7th April 2022 to 17th August 2022, the record lacks information regarding other trial dates or reasons for adjournments. However, on 17th August 2022, the court concluded that the counsel for the appellant had sufficient time to obtain instructions and therefore should have proceeded to do so. For this reason, the matter was dismissed for want of prosecution.
- 7.10 In our view, the lower court was unjustified in denying the application for an adjournment, as there were compelling reasons for granting it. Specifically, Mrs. Mushibwe, who is now handling the case, was not responsible for it at the time of the

previous proceedings, although she did attend court. Mrs. Mushibwe explained to the court that the original counsel handling the matter had just given birth and that she needed time to receive instructions to proceed. This state of affairs warranted an adjournment as the appellant had shown eagerness to prosecute the action.

7.11 Having in mind the case of **Dipak Kumar Patel and Chibote Limited and Others** *supra*, we hold that in this case there was no inordinate delay or contumelious default on the part of the appellant to prosecute the matter.

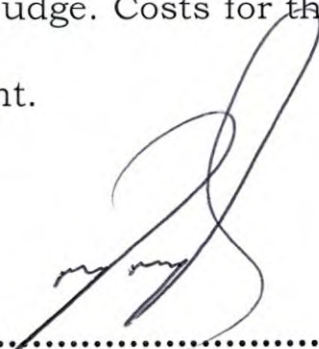
7.12 In **Hu Herong and Another v. John Kapotwe & Another**,¹⁰ the Supreme Court reiterated that while courts possess the inherent authority to dismiss matters for want of prosecution, such actions should be taken only in exceptional circumstances. The court emphasized that cases should be resolved based on their merits unless there is a substantial risk of an unfair trial or prejudice to the defendant.


7.13 In the present case, there were no circumstances that would have created a substantial risk of an unfair trial if an adjournment was to be granted.

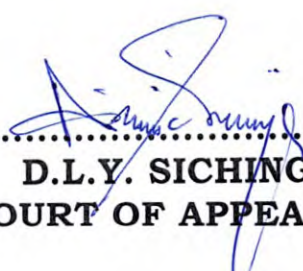
7.14 Having regard to all the circumstances of the case, the lower Court ought to have granted an adjournment so that the matter be determined on its merits. See the cases of **Stanley Mwambazi v. Morrester Farms Limited** and **ZRA v. Jayesh Shah** *supra*.

8.0 CONCLUSION

8.1 All being said, the appeal is upheld and the lower Court's decision made on 17th August 2022, is hereby set aside. This entails that the appellant's action is restored. We accordingly order that the matter be sent back to the High Court for trial before a different Judge. Costs for the appellant to be taxed in default of agreement.


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J. CHASHI
COURT OF APPEAL JUDGE


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C.K. MAKUNGU
COURT OF APPEAL JUDGE


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D.L.Y. SICHINGA, SC
COURT OF APPEAL JUDGE