

**IN THE COURT OF APPEAL OF ZAMBIA** Application No. 75/2024  
**HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*



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

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|---|----------------------------------|
| <b>ASTRO HOLDINGS LIMITED</b>   | <b>1<sup>ST</sup> APPLICANT</b>  |
| <b>SANMUKH R. PATEL</b>   | <b>2<sup>ND</sup> APPLICANT</b>  |
| <b>FURNITURE HOLDINGS T/A OFFICE WORLD</b>  | <b>3<sup>RD</sup> APPLICANT</b>  |
| <b>RONAC SUPPLIES LIMITED</b>   | <b>4<sup>TH</sup> APPLICANT</b>  |
| <b>AND</b>  |                                  |
| <b>EDGAR HAMUWELE</b> ( <i>Sued as Receiver of Courtyard Hotel Limited in Receivership</i> )      | <b>1<sup>ST</sup> RESPONDENT</b> |
| <b>CHRISTOPHER MULENGA</b> ( <i>Sued as Receiver of Courtyard Hotel Limited in Receivership</i> ) | <b>2<sup>ND</sup> RESPONDENT</b> |
| <b>AYUB MULLA</b> ( <i>Sued as Borrower and Guarantor</i> )                                       | <b>3<sup>RD</sup> RESPONDENT</b> |
| <b>GAZELLE LIMITED</b> ( <i>Sued as Guarantor</i> )   | <b>4<sup>TH</sup> RESPONDENT</b> |
| <b>SKYWAYS TRUCK INN LIMITED</b> ( <i>Sued as Guarantor</i> )                                     | <b>5<sup>TH</sup> RESPONDENT</b> |
| <b>ZABUNISSA ISMAIL</b> ( <i>Sued as Guarantor</i> )  | <b>6<sup>TH</sup> RESPONDENT</b> |

**CORAM:** Chashi, Banda-Bobo and Muzenga, JJA  
**ON:** 14<sup>th</sup> and 31<sup>st</sup> January 2025

**For the 1<sup>st</sup> and 2<sup>nd</sup> Applicants:** *J. R Mutemi (Ms), Messrs Theotis Mutemi Legal Practitioners*

**For the 3<sup>rd</sup> and 4<sup>th</sup> Applicants:** *N/A*

**For the 1<sup>st</sup> and 2<sup>nd</sup> Respondents:** *S. Nalumino and Z. Sampa, Messrs Simeza Sangwa & Associates*

**For the 3<sup>rd</sup> and 4<sup>th</sup> Respondents: M. P Kapandula, Messrs NCO  
Advocates**

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## **RULING**

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**CHASHI JA**, delivered the Ruling of the Court.

**Cases referred to:**

1. ***Lawal v Circle - 33 Housing Trust (2014) EWCA Civ 1514***
2. ***Chibote Limited & 3 Others v Meridian Biao Bank Zambia (in Liquidation) (2003) ZR, 76***
3. ***Times Newspapers Zambia Limited & Another v Koukoudis & Another - SCZ Appeal No. 66 of 2010***
4. ***Zambia Telecommunications Company Limited v Simate & Others - SCZ Appeal No. 85 of 2018***
5. ***Nahar Investments v Grindlays Bank International Zambia Limited (1984) ZR, 81***
6. ***Pineroads & General Contractors Limited & Others v Access bank Zambia Limited – CAZ Appeal No. 22 of 2022***
7. ***Thynne v Thynne (1955) 3 All ER, 129***
8. ***Chiragben Rashkbhai Pandoliker v African Banking Corporation Limited (T/A Banc ABC) - CAZ Nom. 11/2018***

**Legislation referred to:**

1. ***The Supreme Court Act, Chapter 25 of the Laws of Zambia***
2. ***The Court of Appeal Act, No. 7 of 2016***

Rules referred to:

1. ***The Court of Appeal Rules, Statutory Instrument No. 65 of 2016***
2. ***The Supreme Court Practice (White Book) 1999***

**1.0 THE MOTION**

- 1.1 This Court has been moved by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants (*the Applicants*) for an Order to file a motion for leave to file motion for extension of time, within which to file notice of motion to reopen CAZ Appeal No. 213 of 2020 and correct Judgment out of time. The motion was filed on 27<sup>th</sup> August 2024.
- 1.2 The motion has been made by notice pursuant to Order 13/3 (2) and (3) of **The Court of Appeal Rules<sup>1</sup> (CAR)** and is accompanied by an affidavit, all contained in the record of motion.
- 1.3 The Order being sought in the intended motion is for the Applicants, who were the Appellants in the appeal before this Court, to be granted leave to file notice of motion to re-open the appeal and revisit the Judgment of this Court delivered on 12<sup>th</sup> July 2021, for correction of accidental slips or omissions out of time.

1.4 The Applicants assertion is that they were constrained with making the applications for extension of time and for correction of accidental slips or omissions in the Judgment, within the prescribed time period, owing to the filing of the motion for leave to appeal in this Court and the Supreme Court.

## **2.0 BACKGROUND**

2.1 On 12<sup>th</sup> July 2021, we delivered our Judgment, in which we substantially found in favour of the Respondent, except on two grounds of appeal. Dissatisfied with our Judgment, the Applicants applied for leave to appeal to the Supreme Court, which application was refused vide Ruling dated 11<sup>th</sup> October 2021. The application was renewed before the single Judge, of the Supreme Court who also refused the application. Subsequently the application was renewed before the full court who on 25<sup>th</sup> April 2024, declined the application as per the Ruling appearing on page 96 of the record.

## **3.0 1<sup>ST</sup> AND 2<sup>ND</sup> APPLICANTS' ARGUMENTS IN SUPPORT OF THE MOTION**

3.1 According to the affidavit deposed to by Sanmukh Ramanlal Patel, the 2<sup>nd</sup> Applicant, the Applicants are

desirous of re-opening the appeal and correcting accidental slips or omissions on the ground that the Applicants were subjected to unfair procedure on appeal.

- 3.2 It was asserted that the Applicants were unable to file the application within seven (7) days from the date of delivery of the Judgment, as following the delivery of the Judgment, they made an application for leave to appeal to the Supreme Court, which was declined. As earlier alluded to, the renewed applications to the Supreme Court were equally declined.
- 3.3 Further according to the Applicants, between the period of obtaining Judgment and the time of the motion, they have been carefully considering the best mode of proceeding with the matter, given that it has no alternative remedy.
- 3.4 The Applicants, based on the advise of their advocates, believe that the intended application for extension of time and the motion to reopen the appeal have prospects of success, as the Applicants were subjected to an unfair procedure and an injustice, when the court maintained the standard of proof beyond reasonable

doubt, for proof of a debt adopted by the court and that the Judgment of this Court is not reflective of the evidence. That, rectifying the slips or omissions is crucial for ensuring that the Judgment of the court reflects the entire proceedings and evidence presented during trial, in the interest of justice.

- 3.5 The Applicants have in the affidavit exhibited the intended notice of motion to reopen the appeal, which appears at page 139 of the record. According to the intended motion, an erroneous result was perpetrated when the court misapprehended the computation of interest on the statement, which appears at page 154 of the record.
- 3.6 In addition, that an erroneous result was perpetrated by what appears as an omission to consider the evidence as a whole, in respect to the said statement by placing reliance on sentiments of the High Court Judge made on the strength of the provisions of Order 88 of **The Rules of The Supreme Court<sup>2</sup> (RSC)**, despite earlier finding that such reliance was wrong.
- 3.7 It was also contended that they were subjected to a standard of proof beyond a balance of probabilities in

adducing evidence of indebtedness. That the Applicants have shown that they have no alternative avenue but to come to this Court because it has been denied leave to appeal by the Supreme Court.

3.8 Reliance was placed on the case of **Lawal v Circle - 33 Housing Trust**<sup>1</sup>, where Sir Terrence Etherton summarized the principles as follows:

*“The broad principle is that for an appeal to be reopened the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation. There must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined.”*

3.9 Further reliance was placed on the case of **Chibote Limited & 3 Others v Meridian Biao Bank Zambia (in Liquidation)**<sup>2</sup>, where the Supreme Court held that:

*“An appeal determined by the Supreme Court will only be reopened where a party, through no fault of its own has been subjected to an unfair*

*procedure and will not be varied or rescinded merely because a decision is subsequently thought to be wrong.”*

3.10 According to the Applicants, the injustice that will be occasioned if the appeal is not reopened is so grave as to overbear the pressing need for litigation.

#### **4.0 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS ARGUMENTS IN OPPOSITION**

4.1 The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their arguments in opposition on 25<sup>th</sup> November 2024. They submitted that clearly Order 13/3 (1), (2) and (3) **CAR** confers discretion on the Court of Appeal to extend time, within which a party is to take a step prescribed by the rules or Judgment, whether such time has lapsed or not. That it follows therefore that for the court to exercise its discretion, the party must identify a step that is prescribed by the rules or Judgment and must demonstrate sufficient reason as to why such a step could not be taken within a prescribed time.

4.2 That similarly, the party must point to a provision of the law that allows for the reopening of the Judgment. According to the Respondents, the Court of Appeal has no jurisdiction to reopen a Judgment delivered by it.



That in fact no provision of law has been cited by the Applicants, because the same does not exist. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended that Order 13/8 **CAR**, which deals with amendments to a Judgment for clerical errors does not confer on the court, jurisdiction to reopen a Judgment, but merely to amend it, as to reflect manifest intention of the court.

4.3 According to the Respondents, clearly the court is not being asked to amend clerical errors but the Applicants are seeking to delve into legal issues canvassed in the Judgment.

4.4 Our attention was drawn to Rule 78 of **The Supreme Court Act**<sup>1</sup>, which is similar to Order 13/8 **CAR**. The case of **Times Newspapers Zambia Limited & Another v Koukoudis & Another**<sup>3</sup> was cited where the Supreme Court gave guidance on when the slip rule can be used, as follows:

*“Rule 78 of The Supreme Court Rules is the Rule that provides the substantive right to a party who believes that a Judgment delivered by this Court has typographical clerical or such other*

*errors or omissions, to apply to have the same rectified. It provides as follows:*

*Clerical errors by the court or, a Judge thereof in documents or process or in any Judgment arising from any accidental slip or omission may at any time be corrected by the court or a Judge thereof.”*

4.5 The Supreme Court went on to state as follows:

*“In Attorney General, Development Bank of Zambia v Gershom Moses Button Mumba, we reiterated the position that the slip rule is meant to enable the court to correct clerical errors omissions or mistakes in a Judgment arising accidentally and is not intended to provide an opportunity for a dissatisfied party to have the matter or Judgment reviewed. In BP Zambia Ltd v Lishomwa & Others in declining to entertain a motion to interfere with a Judgment under rule 78, we observed as follows:*

*“In our view the Respondents are simply dissatisfied with our Judgment and would have us to vary our Judgment so as to bring*

*about a result more acceptable or favourable to them. They simply want to have another bite of the cherry.”*

- 4.6 It was the Respondents contention that the Applicants cannot rely on Order 13/8 **CAR**, as the basis for extending time within which to reopen the appeal to correct clerical errors as sought by the Applicants. It was argued that the intended application is aimed at merely attempting to reargue the appeal by advancing fresh grounds and arguments, alleging matters such as the lower court’s alleged failure to apply the correct standard of proof to the Applicants evidence, which arguments fall outside the ambit of the slip rule.
- 4.7 The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the notice of motion to reopen the appeal is doomed to fail as it merely seeks to reargue the appeal, in which the Court of Appeal rendered its final Judgment. That clearly the notice of motion has no prospects of success at all.
- 4.8 It was further submitted that the motion is an abuse of the court process, having sought to appeal the Judgment and on failing to do so, now seek to reopen the appeal. Our attention was drawn to Order 18/19/18

**RSC.** According to the Respondent, the motion amounts to forum shopping, which is an abuse of the court process. We were urged to dismiss the application with costs.

## **5.0 3<sup>RD</sup>, 4<sup>TH</sup>, 5<sup>TH</sup> AND 6<sup>TH</sup> RESPONDENTS ARGUMENTS IN OPPOSITION**

5.1 In the skeleton arguments filed into Court on 13<sup>th</sup> December 2024, it was argued that, whilst the court has powers to extend time or grant leave to make an application for extension of time, the Court can only do so, where there are valid reasons.

5.2 It was submitted that there was inordinate delay on the part of the Applicants in making the application and no valid reason has been advanced for the delay. Our attention was drawn to the case of **Zambia Telecommunications Company Ltd v Simate & Others**<sup>4</sup>, where the Supreme Court held as follows:

*“...An application for extension of time will require the applicant to disclose a plausible reason for the delay and why more time is required. The court will consider prospects of injustice, the length of the delay and the degree*

***of prejudice if any to the other party. Each application ought to be determined using a different set of consideration.”***

5.3 According to the Respondents, allowing the application would be prejudicial to the Respondents as it will perpetuate litigation and put the Respondents in a constant state of vigilance in these proceedings. The case of **Nahar Investments v Grindlays Bank International Zambia Limited**<sup>5</sup> was cited on the need of finality where it was held as follows:

***“...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 the Appellants.”***

5.4 It was further submitted that the Applicants are seeking to reopen the appeal by reconsidering its decision on the merit and not to correct accidental errors, slips and omissions, which powers this Court does not have. According to the Respondent, there is no procedure that allows this Court to reopen its Judgments. The case of **Pineroads & General Contractors Limited & Others v**

**Access Bank Zambia Limited**<sup>6</sup> was cited, where we had this to say:

*“The question that arises therefore is whether this Court can set aside its Judgment for the foregoing reasons so that the issues in contention are dealt with under cause number 2017/HP/1408 which was the first action. We form the view that having determined the matter and rendered a Judgment in the appeal, we became functus officio and we do not have the jurisdiction to deal with the matter anymore.”*

5.5 We were urged to dismiss the application as it had no merit and for lack of prospects to succeed.

## **6.0 1<sup>ST</sup> AND 2<sup>ND</sup> APPLICANTS ARGUMENTS IN REPLY**

6.1 The Applicants in their reply contend that, the contention by the Respondents that this Court lacks jurisdiction to reopen its Judgment is misconceived. That the Applicants are not seeking a wholesale reopening of the appeal under general jurisdiction, rather what they are seeking is to correct specific errors

arising from accidentals slips and/or omissions under Order 13/8 **CAR**.

- 6.2 It was submitted that the **Times Newspapers Zambia Limited**<sup>3</sup> case is distinguishable as that case dealt with an attempt to review substantive findings, whereas the application before this Court targets computational errors and misapprehension of evidence.
- 6.3 The Applicants drew the attention of the court to the case of **Thynne v Thynne**<sup>7</sup> on the powers of the court to vary, modify or extend its Orders.
- 6.4 According to the Applicants, their application is not an abuse of process as it is not forum shopping but rather the pursuit of a specific statutory remedy. It was argued that the Respondent's arguments have misconceived the nature of the application under Order 13/8 **CAR** on the distinction between reopening an appeal and correcting specific errors and the exceptional circumstances warranting intervention.

## **7.0 OUR ANALYSIS AND DECISION**

- 7.1 We have considered the motion and the arguments by the parties. We note that the motion for leave to file motion for extension of time was filed into Court on 27<sup>th</sup>

August 2024, three (3) years after the Judgment of this Court which was delivered on 12<sup>th</sup> July 2021. The intended motion for an Order to reopen the appeal is premised on Order 13/8 **CAR**, which provides as follows:

**“(i) Clerical errors by the court or a Judge in any court document or process, or in any Judgment, or errors therein arising from any accidental slip or omission, may with leave of the court and within seven days of the Judgment be corrected by the court.”**

7.2 All things being equal and assuming this was the applicable provision of the law and that what the Applicant intended was to correct clerical errors arising from accidental slips or omissions, if any, there was no impediment to stop the Applicants from moving the court within the prescribed time of seven (7) days before embarking on the process of appealing to the Supreme Court.

7.3 Instead, the Applicants opted to seek leave of this Court, to appeal to the Supreme Court which application was declined. They then renewed the same before a single



Judge of the Supreme Court and thereafter the full court as earlier alluded to. Even during this whole process and endeavour, there was nothing to stop the Applicants from moving the court under Order 13/8 **CAR**. We further note that even after the Supreme Court rendered its Ruling on 25<sup>th</sup> April 2024, the Applicants still sat back and only moved the Court on 27<sup>th</sup> August 2024. The reason given for the delay was the Applicants attempt to exercise their right of appeal to the Supreme Court. It is evident that the Applicants only resolved to move the court under Order 13/8 **CAR** after their attempt to appeal to the Supreme Court failed.

- 7.4 Therefore, the motion in our view was a complete after thought. As admitted by the Applicants, between the date the Judgment was delivered and the making of the motion for extension of time, they had carefully been considering the best mode of proceeding with the matter, given that it had no alternative remedy (refer paragraph 10 of the affidavit in support of the motion).
- 7.5 In an application for extension of time, the main considerations are: has there been inordinate delay or

not and whether sufficient material has been laid before the court to enable it exercise discretion.

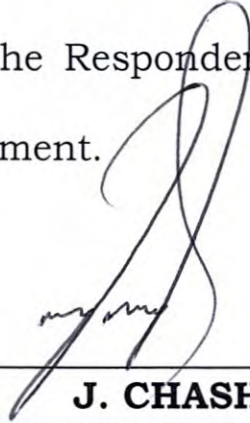
- 7.6 In the case of **Chiragben Rashkbhai Pandoliker v African Banking Corporation Limited**<sup>8</sup>, we noted that in the exercise of discretion by the court, when a party is seeking to extend time, it is clear that the circumstances and the reasons proffered for the delay are justifiable. We also emphasized that, it is not enough to simply make an averment without placing before the court sufficient material which the court must base its decision on in exercising its discretion.
- 7.7 The duty therefore is on the Applicant to provide the Court with sufficient material and failure to do so must lead to the exercise of that discretion in the negative by dismissing the application.
- 7.8 We are of the view that there was inordinate delay in making the application and the reason proffered by the Applicants for the delay is not sufficient and justifiable and therefore this is not a proper case for granting the application.
- 7.9 We would have stopped at dismissing the motion based on the aforestated, but we have been compelled to go

further on the application because of the intended motion to reopen the appeal. The intended motion is premised on Order 13/8 **CAR**. It is always prudent on the part of the applicant to refer to the proper provisions of the law they are relying on. That assists the court in determining whether it has jurisdiction to entertain and make a determination on the matter.

7.10 As ably demonstrated by the Respondents, there is no law or procedure under the Court of Appeal Act and the Rules, as well as under Order 59 **RSC** which permits the Court of Appeal to reopen the hearing of the appeal, once Judgment has been delivered.

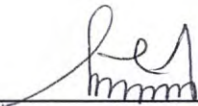
7.11 Furthermore, Order 13/8 is not intended for what the Applicants would be seeking if they were to be granted an extension of time. It is evident from the Applicants affidavit evidence and skeleton arguments that they wish to advance arguments in respect of evidence, interest, standard of proof and unfair procedure which do not fall under the ambit of Order 13/8 **CAR**. Granting the application therefore for an extension of time will be a total waste of the valuable judicial time as the intended motion is not attainable.

7.12 In view of the aforesaid, the motion must be dismissed with costs to the Respondents. Same to be taxed in default of agreement.



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**J. CHASHI**  
**COURT OF APPEAL JUDGE**



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**A.M. BANDA-BOBO**  
**COURT OF APPEAL JUDGE**



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**K. MUZENGA**  
**COURT OF APPEAL JUDGE**