

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2014/HP/1339



BETWEEN:

MASHENGO K. TSHIBANDA**PLAINTIFF**

AND

LIKEZO MUNGAMBATA**DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 6th
DAY OF MAY, 2024**

For the Plaintiff : Messrs Mayembe Legal Practitioners

For the Defendant : Mr. Paul Mulenga, Messrs Paul Mulenga Advocates

R U L I N G

CASES REFERRED TO:

1. *Enock Kavindele and another v Bologna Properties Limited and Diego Casili CAZ Appeal No 136 of 2020*

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court of England, 1965, 1999 Edition*
2. *The High Court Rules, Chapter 27 of the Laws of Zambia*

OTHER WORKS REFERRED TO:

1. *Black's Law Dictionary, by Bryan A. Garner, 9th Edition, Thomas Reuters West Publishing Co, 2009*
2. *Halsbury's Laws of England, 4th Edition Re-Issue Vol 37*

1. INTRODUCTION

1.1 On 15th March, 2024, Likezo Mungambata, the Defendant herein, filed a Notice of Motion raising preliminary issues, pursuant to **Order 14A of the Rules of the Supreme Court**

of England, 1965, 1999 Edition, to the application that was filed on 6th February, 2024, by Mashengo K. Tshibanda for leave to file the Bill of Costs out of time, pursuant to ***Order 62 Rule 21 of the said Rules of the Supreme Court of England***.

1.2 The Notice of Motion raised the following preliminary issue on points of law:

- i. *Whether or not, the application by Mashengo K. Tshibanda is competently before the Honourable Court in view of the fact that the application was made after more than a year's delay without issuance and service of a notice of intention to proceed after a years' delay on Likezo Mungambata.*

1.3 The said Notice of Motion was supported by an affidavit and a List of Authorities and Skeleton Arguments. In opposition, Mashengo K. Tshibanda filed an affidavit in opposition and Skeleton Arguments and a List of Authorities in opposition.

2. BACKGROUND

2.1 Mashengo K. Tshibanda commenced this action on 27th August, 2014 by Writ of Summons which was accompanied by a statement of claim, in which he sought;

- i. *Damages for breach of the verbal agreement by the Likezo Mungambata to repair Mashengo K. Tshibanda's car.*
- ii. *Damages for loss of the said motor vehicle resulting in hiring charges of K1, 000.00 per day until determination.*

- iii. *Loss of the value and repair of the motor vehicle registration number ABZ 8163 valued at K150, 000.00.*
- iv. *Any other relief the Court may deem fit.*
- v. *Costs.*

2.1 After trial was held, in a Judgment that was delivered on 29th April, 2019, I held as follows:

“The negligence on the part of the Defendant resulted in damage to the Plaintiff’s vehicle, and the Defendant is liable to make good that damage. He therefore breached the agreement to repair the Plaintiff’s vehicle....

However, the aspect of contributory negligence on the part of the Plaintiff does not arise in this matter, as I have already stated that under the Road Traffic Act No 11 of 2002, the Defendant had a duty to stop after he hit the Plaintiff’s vehicle from behind. He did not do so leaving the Plaintiff with no option but to pursue him to get the registration of the vehicle, and there was no negligence on the Plaintiff’s part.....

Therefore, the Plaintiff in this matter was under no obligation to agree with the Defendant’s proposal to have a person who was not established as having worked for Southern Cross to repair the vehicle and risk it being destroyed. He acted reasonably in getting quotations from Southern

Cross which is an established Mercedes Benz dealer....

Therefore, the Defendant is liable to pay the amount of the repair costs as indicated on the document at page 1 of the Plaintiff's supplementary bundle of documents. I accordingly enter judgment in favour of the Plaintiff for the amount of K105, 862.18, being the repair costs of the vehicle. The amount shall carry interest at the average short-term deposit rate from the date of the issue of the writ until Judgment, and thereafter at the Bank of Zambia lending rate until payment....

While in this case, the evidence does not show that the Plaintiff used the motor vehicle Mercedes Benz registration number ABZ 8163 as a profit making chattel, the principles in the above case are important as they lay down the principle that any Plaintiff who suffers loss must mitigate that loss, and that they cannot claim damages for loss of use forever....

There is no evidence on record to support the assertion that the Plaintiff hired a vehicle at K1, 000.00 a day after the accident. What is certain is that the vehicle was not repaired. Looking at the fact that damage was caused to the Plaintiff's vehicle and he had a duty to mitigate that loss, I

award him damages for loss of use of the vehicle for a period of six months. The damages shall be assessed by the Registrar and the amount found due shall carry interest at the average short-term deposit rate from the date of the issue of the writ until judgment, and thereafter at the Bank of Zambia lending rate until payment.....

The Plaintiff also claims the value and repair of the motor vehicle which is valued at K150, 000.00. I have already awarded him the costs of repair of the vehicle, and with regard to the value of the vehicle, having awarded him the costs of repair of the vehicle, to also award him the value of the vehicle would amount to unjust enrichment, as he has already been awarded the amount for repair of the vehicle, and he would therefore benefit twice.....

The fact that the vehicle has remained unrepaired and the body of the vehicle has discoloured, an observation that I made when I viewed the vehicle, does not help the Plaintiff as he was under a duty to mitigate his loss by having the vehicle repaired and claiming from the Defendant. The claim for the value of the vehicle will fail and it is dismissed. The Plaintiff having succeeded on the other claims is awarded costs to be taxed in default of agreement. Leave to appeal is granted.”

- 2.2 On 3rd February, 2020, Mashengo K. Tshibanda took out an application for Judgment Summons before the Deputy Registrar. That application was struck out of the active cause list, with liberty to restore within Fourteen (14) days on 3rd September, 2021. Then the application to file the bill of costs was filed on 6th February, 2024, pursuant to which the Notice of Motion, which is subject of this Ruling was filed.

3. SUBMISSIONS AT THE HEARING

- 3.1 At the hearing of the Notice of Motion, only Counsel for Likezo Mungambata was before Court. In making the application, he relied on the affidavit and List of Authorities and Skeleton Arguments which were filed in support of the application. It was stated in augmentation, that the gist of the Notice of Motion was that Mashengo K. Tshibanda proceeded to file an application for costs when the matter had been dormant for over a year.
- 3.2 Counsel stated that this was contrary to ***Order 2 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia***. Note was made, that Mashengo K. Tshibanda in the List of Authorities and Skeleton Arguments in opposition had relied on an Order and Rule in the ***Rules of the Supreme Court of England, 1965, 1999 Edition***, which in England admits an exception to the Rule, if the proceedings relate to taxation.
- 3.3 However, the submission was that their counter argument was that this Court and the Supreme Court had held on numerous occasions, that the ***Rules of the Supreme Court of England*** can only be resorted to, when there is a lacuna

in our legislation. Therefore, reliance could not be placed on the ***Rules of the Supreme Court of England***, when there is express provision in our High Court Rules on the subject matter.

- 3.4 It was also Counsel's submission that ***Order 2 Rule 3 of the High Court Rules*** is couched in mandatory terms, with only one exception being stated, which applies where the summons was previously filed, but no Order was made thereon. Therefore, it was submitted that the application to file the Bill of Costs out of time was incompetently before Court and should be dismissed.

4. DECISION OF THIS COURT

- 4.1 I have considered the Notice of Motion. It was made pursuant to ***Order 14A of the Rules of the Supreme Court of England, 1965, 1999 Edition***, whose provision is:

“(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

- (a) such question is suitable for determination without a full trial of the action, and***
- (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.***

(2) Upon such determination the Court may dismiss the cause or matter or make such order or Judgment as it thinks just.”

- 4.2 The kernel of the application, as evidenced by the affidavit filed in support of the application, which was deposed to by Likezo Mungambata, was that on 20th February, 2024, the advocates for Mashengo K. Tshibanda served on him summons for an Order for leave to file the Bill of Costs out of time, which was accompanied by an affidavit.
- 4.3 He averred that prior to the application being served on him, he was not given any Notice of Intention to proceed by Mashengo K. Tshibanda, as the matter had been dormant for more than a year. In that regard, it was stated that Likezo Mungambata was last served documents in relation to this matter on 17th November, 2022, being a Notice of Intention to proceed after One years' delay.
- 4.4 In the List of Authorities and Skeleton Arguments, the provisions of ***Order 2 Rule 3 of the High Court Rules*** were cited, and the decision by the Court of Appeal in the case of ***Enock Kavindele and another v Bologna Properties Limited and Diego Casili*** ⁽¹⁾ was stated as having been, that as there was no notice of intention to proceed filed under ***Order 2 Rule 3 of the High Court Rules***, the Deputy Registrar lacked the jurisdiction to proceed with the application for an Order of inquiry as to damages.
- 4.5 The gist of the affidavit in opposition, which was deposed to by Lucky Mayembe, Counsel seized with conduct of the matter

on behalf of Mashengo K. Tshibanda, was that proceedings for the taxation of costs do not require to be preceded by a Notice of Intention to proceed, after One (1) years' delay.

4.6 In the List of authorities and Skeleton Arguments, the provisions of **Order 3/6/2 of the Rules of the Supreme Court of England**, were referred to as having explained the term '*since the last proceeding*'.

4.7 **Order 2 Rule 3 of the High Court Rules** provides that:

“3. In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give one month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial although countermanded shall be deemed a proceeding within this rule.”

4.8 This provision is clear that where there has been delay of over One (1) year, since the last proceedings, notice of intention to proceed must be given One (1) month before a party proceeds, except where a summons was issued on which no Order was given.

4.9 The explanatory notes in **Order 3/6/2 of the Rules of the Supreme Court of England** are that:

“The rule refers to proceedings (not communications with the opposite party - cf. note Taking a step in the action, under s.4 (1) of the Arbitration Act 1950, Vol. 2, Section 21A). It refers

to interlocutory proceedings before final judgment, and has no reference to execution. See as to execution, O.46, rr.2, 4, 8).

It is not necessary to give a month's notice before entering Judgment in default of notice of intention to defend, where the Defendant has failed to acknowledge service, and where the default is more than a year before and no further proceedings have been taken, because O.65, r.9 now effectively dispenses with the requirement to serve such a notice on a defendant who has failed to acknowledge service. The cases to the contrary decided under the old rules in force before the revision of 1962 are no longer good law. On the other hand, it is necessary to give a month's notice before entering Judgment in default of defence, where the default is more than a year before and no further proceedings have been taken, or before moving for foreclosure absolute where a year has elapsed without proceedings since the foreclosure nisi. But an order giving leave to sign Judgment is equivalent for this purpose to the Judgment and so the rule had no application to the signing of Judgment a year after an order giving leave to sign Judgment. Nor does the rule apply to a summons to dismiss for want of prosecution, for such a summons is the proper method of terminating such

delays. Where notice has been given, this rule places no obligation on a Defendant who intends to apply to strike out for want of prosecution to do so within the one-month period of notice under the rule.

A notice of not less than one month of intention to proceed since the last proceeding must be given after, but not before, a year has elapsed, otherwise it will be invalid, and a default Judgment entered after a premature notice of intention to proceed will be set aside.

This rule does not apply to family proceedings (see Family Proceedings Rules 1991, r.10.18) nor to insolvency proceedings. O.3, rr.1 to 5 do apply to insolvency proceedings (see Insolvency Rules 1986, r.12.9).

By virtue of O.62, r.30 (6), O.3, r.6, no longer applies to taxation proceedings (see RSC (Amendment) 1986 (S.I. 1986 No. 632), rr.7 and 11 (1)).

Leave to set down out of time obtained in accordance with Practice Direction (Action: Setting Down) [1996] 1 W.L.R. 1431, does not excuse compliance with this rule where applicable.”

- 4.10 A careful reading of the explanatory notes, reveals that in relation to taxation proceedings, the requirement to give

Notice of Intention to proceed after a delay of One (1) year since the last proceedings is inapplicable, by virtue of the **RSC (Amendment) 1986 (S.I. 1986 No. 632), rr.7 and 11 (1)**. The **1999 Edition of the Rules of the Supreme Court of England** is what is applicable in this jurisdiction, and consequently, the 1986 amendment to the **Rules of the Supreme Court of England**, is of force in Zambia, having been made before 1999.

4.11 The term *proceeding* is not defined in the **High Court Act, Chapter 27 of the Laws of Zambia** or the **Rules of the Supreme Court of England**.

4.12 **Black's Law Dictionary, by Bryan A. Garner, 9th Edition, Thomas Reuters, 2009** at page 1324 defines *proceeding* as:

"1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of Judgment. 2. Any procedural means of seeking redress from a tribunal or agency. 3. An act or step that is part of a larger action. 4. The business conducted by a Court or other official body, a hearing."

4.13 The **High Court Act** does not define what a proceeding is, and **Order 2 Rule 3 of the High Court Rules** is the same in provision as **Order 3 Rule 6 of the Rules of the Supreme Court Rules, 1965, 1999 Edition** which states that:

"Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party

not less than one month's notice of his intention to proceed.

A summons on which no order was made is not a proceeding for the purpose of this rule."

- 4.14 Therefore, the explanatory notes in ***Order 3/6/2 of the Rules of the Supreme Court of England*** are applicable in the interpretation of ***Order 2 Rule 3 of our High Court Rules. Halsbury's Laws of England, 4th Edition Re-Issue Vol 37*** states in paragraph 35 as follows:

"A summons upon which no order has been made is not deemed to be a proceeding, for the purpose of the rule requiring notice of intention to proceed after a year's delay. For this purpose, 'proceeding' means an interlocutory proceeding before and not after final Judgment, and it has no reference to execution."

- 4.15 The case of ***Enock Kavindele and another v Bologna Properties Limited and Diego Casili*** ⁽¹⁾ which has been relied on by Likezo Mungambata arose from the refusal of a High Court Judge to review the decision of the Deputy Registrar and refer to another Deputy Registrar an inquiry as to damages arising from an Order discharging an Order of injunction which was made close to Two (2) years after the Order of injunction was discharged.

- 4.16 The Court of Appeal found that there is was need to give Notice of Intention to proceed, the last proceedings having been close to Two (2) years before the application was filed.

It can be seen that in that matter, the application that was in issue was an inquiry as to damages following the discharge of an Order of injunction.

- 4.17 That application was made before there was Judgment, and in fact the matter had been dismissed, before Judgment, entailing that there was no Judgment in the matter. It is distinguishable from this case, where a Judgment was delivered on the merits, and Mashengo K. Tshibanda seeks to proceed with an application to file the Bill of Costs out of time, and **Order 62 Rule 30 (6) of the Rules of the Supreme Court of England**, states that the provisions of **Order 3 Rule 6 of the said Rules** does not apply to taxation proceedings.

5. CONCLUSION

- 5.1 Having found that **Order 2 Rule 3 of the High Court Rules** does not apply to issues relating to costs, the application for leave to file the Bill of Costs out of time is competently before me, and the Notice of Motion fails and it is dismissed. The application shall come up on 20th May, 2024 at 12:30 hours. Costs shall be in the cause, and leave to appeal is granted.

DATED AT LUSAKA THE 6th DAY OF MAY, 2024


S. KAUNDA NEWA
HIGH COURT JUDGE

