**IN THE HIGH COURT FOR ZAMBIA** **2019/HP/1127**
**AT THE PRINCIPAL REGISTRY**
**HOLDEN AT LUSAKA**
***(CIVIL JURISDICTION)***



**BETWEEN:**

**ZAMBIA DAILY MAIL** **PLAINTIFF**

**AND**

**ANDREW CHOLA** *(T/A Christian Arts Promotion)* **DEFENDANT**

***Before: Honourable Lady Justice C. Chinyanwa Zulu***

***For the Plaintiff:*** *Mr. W.Mweemba of Mweemba & Company*
***For the Defendant:*** *Mr. M.C. Kanga of Makebi Zulu Advocates*

# RULING

**CASES REFERRED TO:**

1. **Birket V James (1977) ALL E.R.801;**
2. **Finance Bank (Z) Ltd V Demitrios Monokandadilos and another 2012 Vol 1 ZLR P 484;**
3. **Muvi Tv Limited v Makandani Banda (APPEAL No. 154 of 2023) ZMCA 138.**

**LEGISLATION REFERRED TO:**

1. **The Rules of Supreme Court of England 1999 edition**

## 1.0 INTRODUCTION

1.1 This is a ruling on an application dated 3rd November, 2021 made by the Defendant to dismiss the matter for want of prosecution. The application

was made pursuant to **Order 25 Rule L (1)** of the **Rules of the Supreme Court of England, the White Book, 1999 Edition.**

## 2.0 BACKGROUND

2.1 The background leading to this application is that the Plaintiff commenced this action against the Defendant on 22nd July, 2019 by way of writ of summons seeking the following reliefs;

1. ***Payment of K360,000.00 being debt due from the Defendant to the Plaintiff.***
2. ***Interest thereon at current bank lending rate from the date of the writ until payment.***
3. ***Costs of and incidental to the action.***

2.2 On 10th February, 2020 the Defendant filed a defense. That was the last activity on the file till the Defendant decided to make this application on 3rd November, 2021.

## 3.0 AFFIDAVIT EVIDENCE IN SUPPORT OF THE APPLICATION

3.1 The affidavit in support of the application was filed into court on 3rd November, 2021 and was deposed by one **Micheal Chola Kanga,** an advocate in the employ of Messers Makebi Zulu, the advocates for the Defendant in this matter.

3.2 Counsel deposed inter alia that the Plaintiff commenced this matter on the 22nd July, 2019 and the Defendant filed his defense on 10th February, 2020. Thereafter, the Plaintiff failed or neglected to file a reply to the said defense hence this matter has suffered inaction on the part of the Plaintiff and its Advocates. He went on to exhibit a copy of the search form for the search that was conducted marked **"MCK 1"**.

3.3 He further deposed that owing to the above reasons, it is clear that the Plaintiff is not desirous of prosecuting this matter thereby delaying the ends of justice in this matter.

3.4 He also deposed that this is a proper case for the Court to exercise its discretion and dismiss this matter for want of prosecution.

## 4.0 AFFIDAVIT EVIDENCE OPPOSING THE APPLICATION

4.1 The affidavit in opposition to this application was filed into court on 18th November, 2021 and was deposed by one **Tafuna Mumba Phiri,** Company Secretary in the employ of the Defendant herein.

4.2 She deposed that there was no delay in prosecuting this matter attributable to the Plaintiff herein. That a reply to the defense was filed into Court as shown by exhibit marked **"TMP1."**

4.3 Further that she was advised by Counsel that in the new dispensation, matters are Court driven and what should have happened after the defense was filed, was that the Court should have called for a Scheduling Conference to give Orders for Directionss, which is still being awaited for to date.

4.4 She, therefore, averred that the Plaintiff is desirous of pursuing this matter to its logical conclusion.

## 5.0 AFFIDAVIT EVIDENCE IN REPLY

5.1 The affidavit in reply was filed into court on 13th January, 2022 and was deposed by **MICHEAL CHOLA KANGA** an advocate in the employ of Messers Makebi Zulu, advocates for the Defendant in this matter.

5.2 He deposed that provisions of Statutory Instrument No. 58 of 2020 cannot apply to the matter at hand since this matter was commenced in 2019. That Statutory Instrument No. 58 of 2020 cannot be applied retrospectively. Further, that on 28th December, 2021 the Hon Chief Justice issued a circular that Statutory Instrument No. 58 of 2020 shall only apply to matters commenced on or after the 19th of June, 2020. He went on to produce a copy of the circular marked **"MCK1."**

5.3 In addition, he stated that the record will show that the Plaintiff in this matter actually only filed their reply on the 8th of November, 2021.

5.4 He stated that he was advised by his advocates and believed the same to be true that the Plaintiffs were only awakened by the Defendant's application to dismiss this matter for want of prosecution. That the Plaintiff has shown laxity in prosecuting this matter.

## 6.0 SUBMISSIONS

6.1 The parties filed lists of authorities and skeleton arguments which shall be considered in the determination of the application.

## 7.0 HEARING OF THE APPLICATION

### 7.1 ARGUMENTS IN SUPPORT

7.1.1 When the matter came up for hearing, Counsel for the Defendant relied on the documents filed in support of the application namely, affidavit and accompanying skeleton arguments.

7.1.2 Counsel further submitted that the Plaintiffs had filed an affidavit in opposition to the application dated 18th November, 2021 which they

replied to through an affidavit in reply filed on 13th January, 2022. Counsel cited the case of **ACCESS BANK (Z) LIMITED AND GROUP FIVE ZCON BUSINESS PARK JOINT VENTURE 2016 SCZ 52** wherein the Supreme Court stated that:-

> ***"Justice also requires that this Court, indeed all Courts must never provide succor to litigants and their Counsel who exhibit scant respect for rules of procedure."***

7.1.3 Counsel argued that in this particular matter there has clearly been inordinate delay in prosecuting this matter by the Plaintiff. Further, that as the record will show, the last meaningful movement in this matter was on 10th February, 2020 when the Defendant filed into Court its defense. That from 10th February, 2020 to the 3rd of November, 2021, there had been no movement whatsoever on this file by the Plaintiff which in itself amounted to inexcusable and inordinate delay in prosecuting this matter.

7.1.4 It was Counsel's prayer that this particular matter by the Plaintiff be dismissed with costs for reasons stated in their documents and the oral submissions before Court.

## 7.2 ARGUMENTS IN OPPOSITION

7.2.1 In opposing the application Counsel for the Plaintiff stated that they would entirely rely on the affidavit in opposition as well as the accompanying skeleton arguments filed into court on 18th November, 2021.

7.2.2 Counsel went on to state that the Defendant's complaint was that the Plaintiff had not taken any steps in the matter ever since the

defense was filed. That in fact, the Plaintiff has been waiting for Orders for Directions pursuant to Order 19 of the High Court Rules as amended by SI No. 27 of 2012. That this rule mandates the Court to call for a Scheduling Conference as soon as the defense is filed.

7.2.3 He argued that at the Scheduling Conference the Court has a number of options one of them being to give Orders for Directions or after looking at the matter and the claims, to refer the matter to mediation.

7.2.4 Counsel further stated that the provisions are couched in mandatory terms. That this means that there is no alternative route to take, therefore until the Court has exercised the two (2) options there is nothing a party can do.

7.2.5 Further that the Defendant's misgivings are, therefore, neither here nor there and the Plaintiff is still desirous to prosecute the matter. This is shown by the fact that the Plaintiff filed its reply on 8th November, 2021 even without Orders for Directions.

**7.3 <u>ARGUMENTS IN REPLY TO THE OPPOSITION</u>**

7.3.1 In reply Counsel for the Defendant, Mr Kanga maintained the position, that the duty to ensure that the matter is prosecuted remained with the Plaintiff. He submitted that the reasons advanced by the Plaintiff in opposition are still captured under inexcusable and inordinate delay to prosecute this matter.

7.3.2 Further, he argued that even if Counsel was to submit that the Plaintiff was indeed awaiting Orders for Directions from this

Honorable Court, the period in issue, which was almost two (2) years, ought to have prompted the Plaintiff to move this Honorable Court for issuance of Orders for Directions so that progress would have been made in this matter.

7.3.3 It was Counsel's prayer that this matter be dismissed with costs.

## 8.0 DECISION

8.1 I have seriously considered the application together with the affidavit evidence and the arguments advanced by the parties.

8.2 It is common cause that this matter was commenced on 22nd July, 2019 by the Plaintiff via writ of summons. On 10th February, 2020 the Defendant filed a defense. That was the last activity on the file till the Defendant made the current application on 3rd November, 2021. Thereafter, on 8th November, 2020, the Plaintiff filed its Reply to the defence.

8.3 In determining whether this matter should be dismissed for what of prosecution am guided by the holding in the case of **Finance Bank Zambia Limited V Dimitrios Monokandilos & another** where Justice Dr. Matibini (as he then was) citing the English case of **Birkett v James** stated the following regarding the Court's jurisdiction to dismiss an action for what of prosecution;

> ***"that the jurisdiction to dismiss an action for want of prosecution should be exercised only were the Court is satisfied either:***
> ***i) that the default has been intentional and contumelious, for example, disobedience to a peremptory order to the Court or conduct amounting to abuse of court; or***

*ii) that there has been inordinate and inexcusable delay on the Plaintiff or his lawyers; and*

*b) that such a delay will give raise to a substantial risk that it is not possible to have a fair trial of the issue of the action, or is such as is likely, to cause or to have caused such serious prejudice to the defendant either between themselves, and the Plaintiff or between them and a third party."*

8.4 The first question that begs to be answered, therefore, is whether the default by the Plaintiff has been intentional and contumelious. It has been the Plaintiff's argument that the inactivity in this matter was due to the fact that the Plaintiff was waiting for Orders for Directions from the Court. That in the new dispensation, matters are court driven, therefore, what should have happened after the defense was filed was that the Court should have called for a Scheduling Conference to give Orders for Directions.

8.5 In responding to these arguments, Counsel for the Defendant asserted that the Plaintiff ought to have followed up with the Court to get Orders for Directions. That instead, the Plaintiff did nothing until after the Defendant filed summons to dismiss the matter for want of prosecution on 3rd November, 2021. That, that is when the Plaintiff woke up from its slumber and filed its reply to the defense on 8th November, 2021. Furthermore, that the provisions of Statutory Instrument Number 58 of 2020, which provide for scheduling conference, cannot apply to the matter at hand since this matter was commenced in 2019 and laws do not apply retrospectively.

8.6 I note that issuance of Orders for Directions is the preserve of the court. That even before the enactment of S. I No. 58 of 2020, order 19 of the

High Court Rules still placed the mandate to issue Orders for Directions on the court, on its own motion.

8.7 The foregoing notwithstanding, I am still of the considered view, as argued by Counsel for the Defendant, that the Plaintiff ought to have followed up with the Court when it noted that the Court was taking long to issue Orders for Directions. The Plaintiff ought to have been proactive in following up with the Court to ensure that the Orders for Directions were issued promptly. I say so because I find the period of almost 1 year 9 months to be too long for a vigilant litigant to simply sit and perpetually wait for the Court to do something. The Plaintiff must have prompted the Court especially considering that the matter had been referred to the Registrar prior to its going into abeyance.

8.8 This position is fortified by the holding of the court of Appeal in the case of **Muvi Tv Limited v Makandani Banda (APPEAL No. 154 of 2023) ZMCA 138** where a litigant equally placed the blame for its case's inaction for a period of almost 1 year 4 months, on the court's failure to issue a date of hearing. In this case the Court of Appeal stated that:-

> ***"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."***

8.9 The court went on to dismiss the appeal. It is my considered view that similarly, the Plaintiff herein went to sleep and did not bother to follow up on its case. The Plaintiff waited several months before filing its reply

which the Plaintiff was able to file even without this Court's Orders for Directions after the Defendant filed this application. There is no evidence of any search having been conducted to check whether there was any progress in its matter or correspondence to this Court's marshal to find out when the Orders for Directions would be issued. The Plaintiff surely exhibited an extremely laxity approach to the matter. It shows a lack of urgency in the prosecution of the matter by the Plaintiff which ultimately is prejudicial to the Defendant and raises a serious risk of not having a fair trial of the issues in contention.

8.10 I, therefore, find that the Plaintiff has not shown that the lack of progress on their matter was not intentional.

8.11 The second question I must answer is whether or not there has been inordinate and inexcusable delay by the Plaintiff or his lawyers in the prosecution of this matter. It is my considered view that a period of 1 year 9 months, from 10th February, 2020 when the defense was filed to 3rd November, 2021 when this application was made is definitely not a short period. The Supreme Court in the above cited case of **Finance Bank Zambia Limited,** cited the English case of **Briket V James** which explained the meaning of the term 'inordinate' as follows:-

> ***"materially longer than the time usually regarded by the profession and court as an acceptable period."***

8.12 A period of 1 year 9 months cannot by any means be regarded as acceptable period by the court. It is definitely materially longer than the time usually regarded by the profession and court as an acceptable period for a vigilant litigant, which is expected of all litigants to be, to have been

waiting for a court to issue Orders for Directions. It is my considered view, therefore, that the Plaintiff has inordinately or unreasonably delayed the prosecution of this matter.

8.13 I shall now proceed to consider the last question, whether or not this delay will give raise to a substantial risk of not having a fair trial of the issue in this action. Further, whether or not the delay is likely to cause or to have caused such serious prejudice to the Defendant either between themselves, and the Plaintiff or between them and a third party. In determining the foregoing, I shall place reliance on the English case of **Birkett V James** where Lord Salmon observed that

> ***"when cases as they often do depend predominantly on the recollection of the witnesses, delay can often be most prejudicial to the defendants and to the Plaintiffs also. Witnesses recollections grow dim with the passage of time, and evidence of honest men differs sharply on the relevant facts. In some cases, it is sometimes impossible for justice to be done because of the extreme difficulty in deciding which version of facts is to be preferred."***

8.14 I find the period of 1 year 9 months to be long enough to give a raise to a substantial risk of not having a fair trial of the issues in this action. This is because the witnesses' recollection of the events are likely to have grown dim by the time the matter is due for trial as a result of the passage of time.

8.15 The Supreme Court in the case of **Finance Bank Zambia Limited V Dimitrios Monokandilos** further stated that:-

> ***"The power to dismiss an action for want of prosecution is a draconian power which must be resorted to sparingly. This is also because it deprives a party of his or her right to trial. And also denies a party the opportunity to remedy procedural defects or irregularities. Dismissal of actions should be limited to plain and obvious cases where there is really no point in having trial. <u>However, where there has been</u>***

***inordinate, and inexcusable delay in bringing, or defending an action, this in itself can constitute an abuse of court process and therefore warrant the dismissal of the action."*** *(underline for emphasis only)*

8.16 In view of this Court's finding that the delay in the prosecution of this mater by the Plaintiff was intentional, inordinate, inexcusable and long enough to give a raise to a substantial risk of not having a fair trial of the issues in this action, I find the delay to constitute an abuse of court process warranting the dismissal of the action. This is surely not a proper case in which this Court can exercise its discretion to allow this matter go to trial in order to have it heard on its merits. As stated above, the Plaintiff has shown no vigilance in prosecuting its matter but has only woken up after the Defendant made this application.

8.17 Therefore, for the above reasons, the Defendant's application to dismiss this matter for want of prosecution is granted and this matter is accordingly dismissed.

8.18 Costs for and incidental to this action are awarded to the Defendant to be taxed in default of agreement.

8.19 Leave to Appeal is granted.

**Delivered at Lusaka this 14th day of April 2025**

**C. Chinyanwa Zulu**
**HIGH COURT JUDGE**