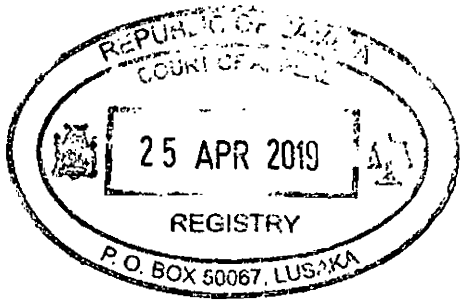
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 130/2018**

HOLDEN AT LUSAKA



(Civil Jurisdiction)

BETWEEN:

ZLATAN ZLATKO ARNAUTOVIC **APPELLANT**

AND

STANBIC BANK ZAMBIA LIMITED **RESPONDENT**

CORAM: ***Chashi, Lengalenga and Siavwapa, JJA***

ON: **15th March and 25th April 2019**

For the Appellant: *J. Madaika, Messrs J and M Advocates*

For the Respondent: *MM Mundashi, SC with D. M. Chakoleka and E. L. Sitali (Ms.), Messrs Mulenga Mundashi Kasonde and Company*

R U L I N G

CHASHI, JA delivered the Ruling of the Court.

Cases referred to:

1. **Access Bank (Zambia) Limited v Group Five/Zcon Business Park Joint Venture (Suing as a Firm) - SCZ/8/52/2014**
2. **Stanley Mwambazi v Morester Farms Limited (1977) ZR, 108**

Legislation referred to:

1. **The Supreme Court Practice (White Book) 1999**
2. **The Court of Appeal Rules, 2016**
3. **The Constitution (Amendment) Act No. 2 of 2016**

On 20th February 2019, in Ndola, we heard the appeal herein in the absence of the Respondent as there was proof of service from the Appellant.

However, on 20th February 2015, the Respondent filed an application by way of summons for an order to re-hear the appeal pursuant to Order 59/10 of **The Rules of the Supreme Court**[1] (**RSC**) as read with Order 10/19 of **The Court of Appeal Rules**[2] (**CAR**) and the inherent jurisdiction of the Court.

According to the Respondent, a single Judge of this Court on 14th August 2018 granted the Appellant an extension of time within which to file the record of appeal and heads of argument.

The same Judge on 23rd August 2018 delivered a ruling to the effect that the Appellant should pay security for costs before the appeal could proceed to be heard.

The said ruling was subsequently challenged by the Appellant who filed a motion before the full Court.

According to the affidavit deposed to by Mr. Mundashi, State Counsel, at the time he received the cause list for the February Appeal in Ndola, he had not been served with the record of appeal and heads of argument.

As there was a pending motion to challenge the Order for security for costs, he assumed that is what was coming up and he therefore proceeded to file an affidavit in opposition and arguments.

It is asserted that he only came to learn later that on 20th February 2019 the Court proceeded to hear the appeal immediately after an **ex tempore** ruling vacating the order of the single Judge.

State Counsel is of the view that a series of events had led to serious misunderstandings and misapprehensions which could have been avoided had the Respondents been served with the record of appeal and heads of argument.

The Respondent at the hearing of the application drew our attention to the provisions of Article 118, 2(e) of **The Constitution (Amendment) Act**[3] and the case of **Access Bank (Zambia) Limited**[2], and **Stanley**

Mwambazi v Morester Farms Limited on the need for matters to be heard on merit.

In opposing the application, it was the Appellants stance that after the Respondents were served with the notice of appeal and memorandum of appeal on 17th April 2018, they never filed and served the notice of address for service. That despite, the Appellant served the Respondent the record of appeal and heads of argument on 8th February 2019, twelve days before the date of hearing the appeal which was sufficient for the Respondent to take steps to protect its interests.

According to the Appellant, this is not a proper case for granting a re-hearing of the appeal at all as the facts relied upon by the Respondent to justify the same are on account of their own default. That the Respondent had received the cause list and willfully decided not to attend the hearing of the appeal.

We have considered the affidavit evidence and the parties respective arguments.

Although both parties had filed lengthy affidavits and arguments, we did not find it necessary to recapitulate all the contents save for what was

necessary for the purpose of the application before us, as most of the contents were extraneous.

We have also not found it necessary to rely on the provisions of the law as referenced by the Appellant, but to rely on this Courts inherent jurisdiction and Article 118, 2(e) of **The Constitution (Amendment) Act**[3].

Order 59/1/151 RSC, third paragraph states as follows:

> *" ... A respondent who has a reasonable excuse for his failure to attend the first hearing should not be treated differently from an appellant who has a reasonable excuse for non-appearance. Furthermore, it is surely irrelevant whether at the first hearing, the court summarily disposed of the appeal or whether it reached a decision based on the merits. The point is that the decision at the first hearing was reached without hearing arguments from an absent party who wished to be heard and the question should be whether, having regard to all the circumstances of the case, the interest of justice require that the order be set aside and the matter reheard, so that the party*

who was, for some good reason, not present, has the opportunity to put his case."

We note that there is a medley of events elaborated by both parties, which led to the confusion and misunderstanding in this matter.

The holding on to the record of appeal and heads of argument by the Appellant for so long and only effecting service less than two weeks before the hearing of the appeal did also not help matters.

The situation was also exacerbated by our **ex tempore** ruling on the motion for security for costs and contemporaneously allowing the appeal to proceed forthwith.

However, the blame is not confined to the aforestated. Having been served with a cause list, the Respondent should have made the necessary inquires and at the most ensured attendance. If that was done, they could have brought their misgivings to the Court and ensured that the appeal was adjourned to enable the parties attend to all the formalities.

In view of the aforestated, we are of the considered view that this is a proper matter for re- listing of the appeal to enable all the parties to be heard and the matter determined on its merit.

We accordingly order that the Respondent do file their heads of arguments within fourteen (14) days from the date hereof and the Appellant may file their arguments in reply seven (7) days thereafter.

The appeal shall come up for hearing on a date to be notified to the parties.

Costs of this application shall abide the outcome of the appeal.

J. CHASHI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE