

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

CAZ/08/316/2019

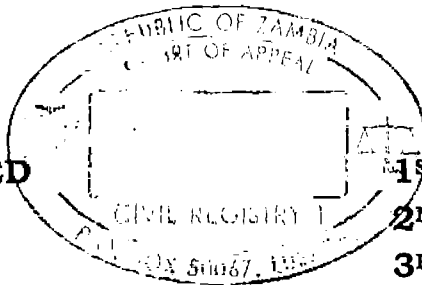
BETWEEN:

SA AIRLINK (PTY) LIMITED

APPELLANT

AND

ZAMBIA SKYWAYS LIMITED
YOUSUF VALLI ZUMLA
LEWIS KUNDA
SULEMAN AHMED PATEL
GILLIAN LEE CASILLI
DIEGO GAN-MARIA CASILLI



1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT

BEFORE THE HON. MRS. P. C. M. NGULUBE IN CHAMBERS
ON 27TH JANUARY, 2021.

For the Applicant: Mr. D. Chakoleka, of Messrs. Mulenga
Mundashi Legal Practitioners.

For the Respondents: No Appearance.

R U L I N G

Cases referred to:

1. *Fratelli Locci Sr. Estraxion Minesal vs Road Development Agency, Appeal No. 112/2017.*
2. *Zlatan Zlatko Arnautovic vs Standard Bank Zambia Plc and Stanbic Bank (Z) Limited, SCZ/8/300/2014.*
3. *Nahar Investment Limited vs Grindlays Bank International (Zambia) Limited (1984) ZR 81.*

4. *Standard Chartered Bank vs Celine Nair*, SCZ/23/2019.
5. *Jeff Simpson Musonda vs Mary Alice Lloyd and Mary Mukatea Triplett Lloyd* (Administrators of the Estate of the Late Peter David Lloyd), SCZ/8/116/2015.
6. *D. E. Nkuwa vs Lusaka Tyre Services Limited* (1977) Z.R. 43

Legislation referred to:

1. *The Court of Appeal Rules*, Statutory Instrument Number 65 of 2016.
2. *The Court of Appeal Act No. 7 of 2016*.

1. This is a Ruling on the appellant's application for an order for extension of time within which to file an application for leave to appeal to the Supreme Court, pursuant to **Order XIII Rule 3(1) of the Court of Appeal Rules¹**.
2. The application is supported by an affidavit sworn by the appellant's counsel, Mr. David Moses Chakoleka, whose evidence was that this court delivered an extempore judgment on 23rd of December, 2020 but the parties were only availed with a hard copy of the judgment on 30th December, 2020, as the court was still effecting corrections to the judgment. It was his evidence that the appellant had closed for the holiday season at the time the parties were availed with the judgement.
3. Mr. Chakoleka deposed that the appellant was supposed to file an application for leave to appeal within fourteen days from

the date of judgment. He explained that because the parties were availed the hard copy of the judgment on 30th December, 2020, the appellant was deprived of seven days within which to thoroughly study the judgment and be able to make a well-informed decision on whether or not to seek leave to appeal against the judgment. The appellant therefore seeks an extension of time of seven days within which to file the application for leave to appeal.

4. This application was opposed by the respondents who filed an affidavit in opposition sworn the second respondent. He deposed that the judgment of this court was read out open court in the presence of the advocates for all the parties to this case, and the parties were aware of the reasoning of the court. Therefore, the appellant's claim that it needed a hard copy of the judgment to make up its mind whether to appeal cannot be accepted. It was his further evidence that in any event, the court availed a hard copy of the judgment seven days before the expiry of the fourteen-day statutory period within which the appellant could seek leave to appeal.

5. The second respondent testified that leave to appeal to the Supreme Court is not a matter of right. According to him, the appellant's appeal does not meet the threshold set by **Section 13 of the Court of Appeal Act²**. He alleged that the appeal sought to be filed out of time is frivolous and vexatious, as it emanates from the appellant's desire to evade payment of the awarded sums.
6. The second respondent disputed the evidence of the appellant's counsel, that the appellant had closed for the holiday season, stating that the appellant is an airline which does not go on break during the Christmas period because that is the busiest season of the year for airlines. The gist of his evidence was that this is not a fit and proper case for this court to grant an extension of time as sought by the appellant because there was no basis upon which this court should exercise its discretion.
7. On behalf the appellant, Mr. Chakoleka filed skeleton arguments in which he submitted that the appellant brought this application pursuant to **Order XIII Rule 3(1) of the Court of Appeal Rules¹**, which provides that: -

“3(1) The Court may, for sufficient reason extend the time for -

(a) making an application, including an application for leave to appeal;

(b) bringing an appeal;

(c) taking any step in or in connection with an appeal.”

8. According to him, this provision imbues this court with discretionary power to extend the time for making an application, including an application for leave to appeal. He submitted that it is settled law that appeals to the Supreme Court are not a matter of right in that leave of this court must be obtained. He cited the case of **Fratelli Locci Sr. Estraxion Minesal vs Road Development Agency¹**, in which it was held that-

“Appeals to the Supreme Court are now no longer a matter of right. Leave must be sought from the Court of Appeal, and if not granted by that Court, from a single Judge of [the Supreme Court].”

9. Counsel submitted that **Section 13 (2) of the Court of Appeal Act²** provides that an application for leave to appeal shall be made within fourteen days. He however argued that **Order XIII Rule 3(1)** as read with **Rule 3(3) of the Court of Appeal Rules¹** demonstrate that this court has power to extend time provided

that sufficient reasons are given. He also submitted that the Supreme Court in the case of **Zlatan Zlatko Arnautovic vs Standard Bank Zambia Plc and Stanbic Bank (Z) Limited²**, was adamant that where a difficulty is encountered, that would constitute sufficient reasons.

10. Mr. Chakoleka pointed out that the reasons given by the appellant are sufficient for the granting of an order for extension of time. Counsel cited the case of **Nahar Investment Limited vs Grindlays Bank International (Zambia) Limited³**, in which it was held that:

"We wish to remind appellants that it is their duty to lodge records of appeal within the period allowed, including any extended period. If difficulties are encountered which are beyond their means to control (such as the non-availability of the notes of proceedings which it is the responsibility of the High Court to furnish) appellants have a duty to make prompt application to the court for enlargement of time. Litigation must come to an end."

11. Mr. Chakoleka submitted that this application has merit as the appellant requires more time to review the judgment and to adequately formulate an application for an appeal to the Supreme Court. He maintained that there are sufficient

reasons for the granting of an application for extension of time.

12. In response, the respondent's advocates filed skeleton arguments on 25th January, 2021, in which it was submitted that there was no sufficient reason given by the appellant for its failure to lodge its application for leave to appeal. According to counsel, it is now trite law that an appeal to the Supreme Court is not as of right. A party cannot approach the court in a cavalier fashion without exhibiting any draft grounds of appeal to demonstrate that the intended application for leave to appeal has reasonable prospects of success, in accordance with **Section 13 of the Court of Appeal Act²**. Counsel argued that the failure by the appellant to demonstrate reasonable prospects of success is fatal to this application because this Court cannot entertain disgruntled litigants who simply want to continue litigating for purposes of avoiding paying judgement sums.
13. According to Counsel, there is a plethora of case law which shows that leave to appeal to the Supreme Court is an exceedingly rare thing that is only granted on rare occasions to

deserving cases which meet the threshold under **Section 13 of the Court of Appeal Act²**. He further submitted that the considerations for grant of leave to appeal to Supreme Court were set out in the case of **Standard Chartered Bank vs Celine Nair⁴**.

14. Counsel stated that although she appreciates that the appellant is applying for an extension of time at this stage, the court must act as a sieve against frivolous and vexatious matters. According to Counsel, the prospects of the appellant being granted leave to appeal are non-existent. Therefore, this court has a duty to sieve out vexatious matters at this stage and not allow such matters to proceed, otherwise this court will be unnecessarily inundated.
15. The respondent's counsel went on to argue that the appellant had not provided a reasonable excuse or explanation for failing to make an application for leave to appeal. Counsel pointed out that the reasons given by the appellant were shallow and an afterthought.
16. In response to the reason given by the appellant's counsel that the reason for the delay was that the appellant was on

Christmas break, it was counsel's argument that the relationship between lawyers and their clients is of no concern to the law, especially when no undue burden was placed on them by the court. For this argument, counsel relied on the case of ***Jeff Simpson Musonda vs Mary Alice Lloyd and Mary Mukatea Triplett Lloyd (Administrators of the Estate of the Late Peter David Lloyd)***⁵, in which the Supreme Court said that:

"...it is cardinal principal of our legal practice that the lawyer is the alter ego of his client. We have said before, for example, in the case of Philip Mutantika and Another v Kenneth Chipungu, that the relationship between a party and his lawyer is private and of no concern to the court. We said in that case that the incompetence or negligence of a party's advocate was not a sufficient ground for restoring the Appeal that had been dismissed."

17. The respondent's counsel contended that the appellant cannot be said to have been deprived of any amount of time within which to make a decision on whether or not to appeal. He emphasized that no sufficient reason had been advanced to warrant the court's exercise of its discretion to grant the application for extension of time and it therefore should be dismissed with costs.

18. I have considered the affidavit evidence on record, the skeleton arguments and the authorities cited by counsel for the parties. The power of this court to extend time is provided by **Order XIII Rule 3(1) of the Court of Appeal Rules¹**, which states that: -

“3(1) The Court may, for sufficient reason extend the time for-

(a) making an application, including an application for leave to appeal;

(b) bringing an appeal;

(c) taking any step in or in connection with an appeal;

19. I must emphasize that this court can only extend the time for making an application if there is sufficient reason. This means that the granting of an extension of time within which to seek leave to appeal to the Supreme Court is entirely in the discretion of this court, but that discretion will not be exercised without good cause. In the case of ***D. E. Nkuwa vs Lusaka Tyre Services Limited⁶***, the Supreme Court guided that:

“The provisions in the rules allowing for extensions of time are there to ensure that if circumstances prevail which made it impossible or even extremely difficult for parties to take procedural steps within prescribed times relief will be given where the court is satisfied that circumstances demand it. It must be emphasized that before this court is able to exercise this discretion to


grant such relief there must be material before it on which it can act.”

20. In this case before me, I have considered whether there is sufficient material on which this Court can exercise its discretion to grant the application for extension of time. The appellant was required to make an application for leave to appeal within fourteen-days of the judgment of this court but failed to do so. The reason given for the delay is that this court only availed the parties with hard copies of our judgment seven days after it was delivered an extempore judgment in open court. It has been argued that the appellant was deprived of seven days to thoroughly study the judgment and to be able to make a well-informed decision on whether or not to seek leave to appeal against the judgment.
21. Considering the circumstances of this case, I agree with the appellant's counsel that it was important for the appellant to thoroughly study the judgment in order to decide whether to appeal. This is because in terms of ***Section 13(3)(a), (c) and (d) of the Court of Appeal Act²***, there are only three permissible grounds on which this court can grant leave to appeal to the

Supreme Court. These are: where the appeal raises a point of law of public importance; where the appeal would have reasonable prospects of success; or where there is some compelling reason for the appeal to be heard. In my view, the appellant could not have made an informed decision in the absence of a hard copy of the judgment on whether it could file a competent appeal which meets the threshold in **Section 13(3)(a), (c) and (d) of the Court of Appeal Act²**. I do agree that the appellant was deprived of seven days from the fourteen-day statutory period and this was no fault of its own. It is therefore my considered view that the appellant has given a plausible reason for the delay.

22. I have also noted that the appellant filed this application before the expiry of the period in which it was required to seek leave to appeal. This means that there was no inordinate delay. In the circumstances, I am convinced that the appellant has given sufficient material on which this court can extend the time within which the appellant can make an application for leave to appeal to the Supreme Court.

23. Counsel for the respondent has extensively argued that the appellant's appeal does not meet the threshold in **Section 13(3)(a), (c) and (d) of the Court of Appeal Act²**, including that the appeal has no prospects of success. In my considered view, it is premature at this stage for me to consider whether the appellant's appeal meets the threshold set in **Section 13(3)(a), (c) and (d) of the Court of Appeal Act²**. Those issues will be addressed when this court determines the application for leave to appeal.
24. For the foregoing reasons, I accordingly allow this application and grant the appellant seven days within which to file an application for leave to appeal to the Supreme Court. I make no order as to costs.



P.C.M. NGULUBE
COURT OF APPEAL JUDGE