

IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 6 of 2022
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

NATIONAL BREWERIES PLC

AND

CHAKAMA INVESTMENTS LIMITED

Appellant

Respondent



CORAM: Kondolo, Sichinga and Sharpe-Phiri, JJA
on 16th November 2022 and 15th December 2022

For the Appellant: No appearance

For the Respondent: Mr. J. C. Sinkala of Messrs Chileluka &
Company

J U D G M E N T

SHARPE-PHIRI, JA, delivered the Judgment of the Court

Legislation referred to:

1. *The Constitution of Zambia, Chapter 1 of the Laws of Zambia*
2. *The High Court Rules, Chapter 27 of the Laws of Zambia*
3. *The Court of Appeal Act, No. 7 of 2016 of the Laws of Zambia*

Cases referred to:

1. *Henry Kapoko v the People* 2016/CC/23
2. *Muchinka Farm Limited v The Attorney General and 2 others* Appeal No 47/2017
3. *Access Bank Zambia Limited vs Group Five/ZCON Business Park Joint Ventures (suing as a Firm)* SCZ/8/52/2014/2016
4. *Mazembe Tractor Company Limited v Meridian BIAO Bank Limited (in Liquidation)* 8/209/97 (Unreported)

5. *Jamas Milling Company Limited v Imex Ternational (Pty) Limited* (SCZ Judgment No 20 of 2002)
6. *Henry M. Kapoko v The People* (Constitutional Court) Selected Judgment No. 43 of 2016
7. *Century Enterprises v Green Bank (in Liquidation)* (HCT-00-MA-0916 of 20224) (arising from HCT-00-CC-CS-0877-2004)

Other works

1. *Patrick Matibini, Zambian Civil Procedure, Commentary and Cases, Volume 2* at pages 1160 and 1161 at 21.25

1.0 INTRODUCTION

- 1.1 This is an appeal against the ruling of Patel J of the High Court delivered at Kitwe on 16th April 2021.
- 1.2 By that ruling, the learned trial Judge declined the appellant's application for an order for extension of time within which to comply with the Orders for Directions and ordering that the appellant was barred from filing any pleadings in this matter.

2.0 BACKGROUND

- 2.1 The background of the matter is that the respondent (plaintiff in the Court below) commenced an action in the Commercial Division of the High Court on 7th October 2020 against the appellant by way of writ of summons. The appellant filed its defence and counterclaim on 28th October 2020. At the scheduling conference of 10th November 2020, the Court referred the matter to mediation and issued the mediation order accordingly. During the status conference on 14th December

2020, post-mediation, Counsel reported that although the mediation had not taken place, they invited the court to issue directions and confirmed that parties would undertake the mediation whilst adhering to the directions.

2.2 The Order for directions was issued on 14th December 2020 providing the following directives to the parties:

- a. **The Plaintiff's advocates shall deliver a Reply to the Defence and Defence to counterclaim, if any on or before 18th January 2021;**
- b. **The Defendant's advocates shall deliver a Reply to the Plaintiff's Defence and Counterclaim, if any on or before 25th January 2021;**
- c. **Discovery by List and Inspection of Documents on or before 1st February 2021;**
- d. **The Plaintiff shall file bundles and agreed bundles of pleadings and documents on or before 8th February 2021;**
- e. **The Defendant is at liberty to file any additional documents by or before 8th February 2021;**
- f. **The parties shall file and exchange Witness Statements on or before 22nd February 2021;**
- g. **Skeleton Arguments and List of Authorities shall be filed at the time of filing the Witness Statements by or before 22nd February 2021;**
- h. **The parties shall file an agreed list of issues in dispute for the determination by the Court by or before 1st March 2021. If the parties do not agree on the list of issues, each party shall file its list of issues for determination by the Court by or before 1st March 2021;**

- i. **A Compliance Conference to set the date for trial shall be held on 10th March 2021 at 9 hours.**
- j. **The parties shall be at liberty to apply provided that the application is made before the date fixed for compliance and before the default relating to the subject matter of the directions sought to be varied.**

2.3 Following the issuance of the said Order for Directions, the Appellant did not take steps to comply with the Order for Directions. Just before the date set for the Compliance Conference but after the default that was sought to be rectified, the appellant brought an application for an order to extend time within which to comply with the Order for Directions.

2.4 In the supporting affidavit, the appellant's Counsel deposed that the appellant had failed to give relevant documents to Counsel, and that the appellant's witness being based outside jurisdiction at the material time led to the appellant's failure to file its bundles, skeleton arguments, and witness statements respectively.

2.5 In opposing the application, the respondent contended that the appellant was not compliant with the Orders for Directions as issued by the court on 14th December 2020 and that the non-compliance could not be remedied by an application brought before court after the default had occurred contrary to provisions contained in paragraph (j) of the Orders for Directions.

2.6 In reply, the appellant pleaded with the court to exercise its discretion and grant the application sought. It was contended that the court ought to overlook the procedural technicalities and instead hear and determine the matter on its merits as provided for under **Article 118(2) of the Constitution**¹.

3.0 **DECISION OF THE COURT BELOW**

3.1 In considering the Appellant's application for an extension of time to comply with the Order for Directions, the learned Judge highlighted that **Order 53 Rule 7(1) of the High Court Rules**² imposes a mandatory duty on the High Court to issue directions for trial. Failure to comply with court directives has serious consequences. Therefore, the fact that the matter was commenced in the Commercial Division ought to have placed the Defendant and its Counsel on alert of the standard and timelines expected in the matter.

3.2 The Judge further stated that it was not in the interest of justice that parties by their shortcomings, or indeed the shortcomings of their own client, should delay the quick disposal of cases and cause prejudice and inconvenience to the other parties. That those who come into the Commercial List must strictly abide by the Rules in that list.

3.3 The learned Judge concluded by opining that the Defendant's application for extension of time was devoid of merit and had not been supported by any evidence. She further stated that, to call

upon the court to exercise its discretionary powers, without showing the exceptional circumstances that justify it to do so, in a matter which would compromise the dictates of justice, is neither justiciable nor equitable.

- 3.4 The Judge accordingly refused to grant the application and ordered that as a consequence of the Ruling, the Defendant was barred from filing any pleadings in the matter.

4.0 **THE APPEAL**

- 4.1 Being dissatisfied with the judgment of the lower Court, the appellant filed a Notice of Appeal and Memorandum of Appeal on 21st October 2021 advancing two grounds of appeal namely:

- i. **That the learned Judge erred in law and fact when she stated that the Defendant's application for an order for extension of time within which to comply with the Orders for Directions would compromise the dictates of justice, when in fact, the Defendant being denied the opportunity to comply with the orders for directions and also being barred from filing any pleadings in this matter would lead to manifest injustice on the part of the Defendant as they would be unable to defend their case.**
- ii. **The learned Judge erred in law and in fact when she failed to take into consideration the provisions of Article 118 (2) (e) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia which states that 'In exercising Judicial Authority, the Courts shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities.**

5.0 **APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL**

- 5.1 In arguing grounds 1 and 2 together, the appellants contended that the trial Judge erred in law and fact when she held the view that the application for an order for extension of time within which to comply with the Orders for Directions would compromise the dictates of justice, when in fact it is the appellant which is being denied the opportunity to comply with Orders for Directions and also being barred from filing pleadings.
- 5.2 The appellant argued that by holding as she did, the trial Judge erroneously failed to take into consideration the provisions of **Article 118(2)(e) of the Constitution of Zambia**¹ which provides as follows:

'In exercising judicial authority, the Courts shall be guided by the following principles:

- e) justice shall be administered without undue regard to procedural technicalities."*

- 5.3 The appellant also referred to the case of **Henry Kapoko v the People**¹ in its quest to attach meaning to **Article 118(2)(e) of the Constitution**¹, where Munalula JC held as follows:

'The Article's beneficial value is achieved if it is applied in an eclectic fashion depending on the nature of the rule before it. Each Court will need to determine whether in the peculiar circumstances of the peculiar case, what is in issue is a technicality and if so whether compliance with it will hinder determination of a matter in a just manner.'

5.4 The Court went further to hold, in that case, that:

‘While facts and law in each case will vary the principle laid out by this Court on the meaning and application of Article 118(2)(e) remains constant. The Court’s word is clear. Article 118(2)(e) is not intended to do away with existing principles, laws, and procedures, even where the same constitute technicalities. It is intended to avoid a situation where manifest injustice would be done by paying unjustifiable regard to a technicality.’

5.5 The appellant also cited the case of **Muchinka Farm Limited v The Attorney General and 2 others**² in which the Supreme Court stressed that:

‘...From the extracts, it is clear that the provision was not intended to do away with existing principles, laws or rules of procedure. Depending on the circumstances, Courts are urged to be flexible in cases where strict compliance with rules of procedure may lead to injustice.’

5.6 The appellant submitted that on the strength of the above-mentioned authorities, the lower Court ought not to have paid undue regard to technicalities that obstruct the course justice. It was submitted that the procedural technicality not performed by the appellant was not meant to disrespect the Court. It was as a result of unfortunate circumstances of Counsel not having been provided with necessary documents in time in order to enable him compile a bundle of documents and that the appellant’s witnesses were equally unable to give and sign

witness statements as they were outside jurisdiction. It was contended that an email account evidencing the unfortunate circumstances the appellant found itself in was provided in the affidavit seeking leave to appeal from the Court below.

5.7 The appellant contended that the strict enforcement of the rules of procedure by the Court below had led to great injustice on its part, adding that although it had delayed complying with the Orders for Directions, the respondent had not demonstrated that it would suffer prejudice if the extension of time to comply with Orders for Directions was to be granted.

5.8 In demonstrating the extent of prejudice suffered by the appellant because of the lower Court's Ruling of 16th April 2021, the appellant invited this Court to be cognizant of the Order of the lower Court striking out its Defence and entering judgment in default on 26th August 2021.

6.0 **RESPONDENT'S HEADS OF ARGUMENTS**

6.1 The respondent filed heads of argument on 11th February 2022. The respondent submitted that the ruling which the appellant was appealing against was sound at law and made in the interest of justice.

6.2 The respondent cited the case of **Access Bank Zambia Limited v Group Five/ZCON business Park Joint Ventures (Suing as a Firm)**³

relied upon by the Judge in the lower Court in her ruling at page R20, which stated that:

“Yet justice also requires that this court, indeed all courts, must never provide succor in litigants and their Counsel who exhibit scant respect for rules of procedure. Rules of procedure and timeliness serve to make the process of adjudication fair, just, certain and even-handed. Under the guise of doing justice through hearing matters on their merit, Courts cannot aid in the bending or circumventing of these rules and shifting goal posts for while laxity in application of the rules may seem to aid one side, it unfairly harms the innocent party who strives to abide the rules.”

- 6.3 The attention of the Court was drawn to paragraphs 8.4 to 8.9 of the lower Court’s ruling at page R8, where the Judge highlighted the appellant’s conduct which showed the scant respect for rules of procedure and laxity, which conduct fell short of seeking that justice be done. The respondent submitted that the appellant demonstrated lack of respect for justice by deciding to disobey the court’s Order for Direction without any proper justification as it did not present before Court any evidence in support of its excuse as noted in paragraphs 8.8 and 8.9 of the said ruling.
- 6.4 It was argued that under **Order 53 Rule 7(1) of the High Court Rules**, the Judge has the power to issue an order for directions on how they desire the matter to be conducted in their Court in the furtherance of justice. Any party that decides to ignore the Court’s Order does so at its own peril as was observed by the

Supreme Court in the case of **Mazembe Tractor Company Limited v Merideian BIAO Bank Limited (In Liquidation)**⁴ cited at page R9 of the lower Court ruling as follows:

“The rules are often augmented by Order for Directions, including orders made by a judge in the exercise of the Court’s inherent jurisdiction to control proceedings before itself. The judge’s order clearly stands on a higher footing than the rules, and it is an extremely naïve litigant who can think of disobeying and challenging the authority of the judge in his own Court room without consequences”.

- 6.5 Further, that the importance of Order 53 of the High Court Rules had been eloquently emphasized in the case of **Jamas Milling Company Limited v Imex Ternational (Pty) Limited**⁵ in which the Supreme Court stated that:

“The Commercial List, where the action was commenced and Order 53 of the High Court Rules which was introduced to regulate procedure in the Commercial List are not without history. The introduction of the Commercial List was a reaction to the business community’s complaints that cases of commercial nature were taking too long to dispose of so that by the time judgment was rendered the parties had suffered economic ruin. The Judiciary’s response was to introduce the Commercial List as a fact track. Of course, the Commercial List would have meant nothing if the dilatory procedures in the General List were made applicable to the commercial List also. Hence, the introduction of Order 53 to specifically deal with commercial cases. The sanctions in Order 53 are meant to make parties move with all the speed required to dispose of the case as quickly as possible...The Rules in Order 53 are not peculiar

to Zambia. In order jurisdictions, particularly in England and Wales where we adopted these Rules, the Rules are enforced with full vigor and breach of these Rules can have serious consequences. We will hate to have a situation where lax application of the Rules in the Commercial List will result in the Commercial List itself being just like the general List with a different name. In the circumstances, the arguments that the rules will work injustice do not find favour with us. In fact, it is not in the interest of justice that parties by their short comings should delay the quick disposal of cases and cause prejudice and inconvenience to the other parties. Those who come to the Commercial List must strictly abide by the rules in that List. Everything has a price. Those who want their cases quickly disposed of must strictly abide by the rules of the Commercial List. Parties and advocates litigating in the Commercial List must take heed of this warning”.

- 6.6 The case of **Henry M. Kapoko v The People**⁶ in which the Constitutional Court of Zambia had occasion to interpret the provisions of **Article 118 (2) (e) of the Constitution of Zambia (Amendment) Act No 2. of 2016**¹, in relation to the existing principles, laws and procedure of Court, stated as follows at pages J36 and J37:

“Article 118 (2) (e) is not intended to do away with existing principles, laws and procedures even when the same constitute technicalities, it is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality...Rules are enacted with a purpose in mind, which purpose the rules must actually serve...The introduction to the Rules of the Supreme Court (White Book) 1999, states in part 1 that “The Rules have the overriding objective of enabling

the Court to deal with cases justly. Whenever the Court exercises a power under the Rules or interprets them, it must seek to give effect to this overriding objective by trying to ensure that the parties are on an equal footing...all this must be done to ensure that the case is dealt with expeditiously and fairly"...In general, rules are necessary to enable the parties to participate their riles in legal proceedings and make sense of the litigation process. The common law adversarial system which is the foundation of our legal system is founded on procedural justice as the means to and manifestation of substantive justice. By following prescribed rules, the court is held on an objective standard. Justice is not only done, it is seen to be done. We are therefore of the view that the rules of procedure in criminal trial as a whole, are not in themselves technicalities and Article 118 (2) (e) is not intended to turn them into technicalities that fall within its ambit".

- 6.7 The respondent submitted that the appellant ignored Order 53 and the Court's directions with impunity and as such, the lower Court was within its right in the administration of justice to refuse to extend the time within which the appellant was to comply as the opportunity to apply had long passed and that the appellant did not furnish any evidence to the Court to support its excuse. The case of **Century Enterprises v Green Bank (in Liquidation)** cited in the **Kapoko** case at page J15⁷ was referred to, in which it was held that:

"The administration of justice should normally require that substance of all disputes be investigated and decided on the merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his right. However, that this did

not mean that rules of procedure should be ignored with impunity.

- 6.8 The respondent argued further that this appeal was a mere academic exercise as the lower Court had already delivered its judgment, which judgment had not been appealed against nor was it addressed in the appellant's prayer before this Court. The learned author of **Zambian Civil Procedure, Commentary and Cases, Volume 2** at pages 1160 and 1161 at 21.25¹ explains in brief that:

“as a matter of general principle, courts frown upon making academic judgments, (reference to the case of Attorney General v Law Association of Zambia that is to say, courts do not entertain proceedings or give judgments where the question is purely academic or hypothetical”.

- 6.9 The respondent further submitted that this appeal was frivolous, misconceived, lacked merit and that it was a mere academic exercise and that as such, the Court should dismiss it.

7.0 **DECISION OF THIS COURT**

- 7.1 We have carefully considered the evidence on record; the ruling being impugned and the arguments of the parties. The two grounds of appeal shall be addressed together as they are connected.

- 7.2 The contention of the appellant is that the lower Court's ruling refusing to extend time within which the appellant would comply

with the Orders for Direction on the basis that such an order would offend the dictates of justice was erroneous as it is the appellant that has suffered injustice by being barred from filing any pleadings which, according to the appellant, has resulted in manifest injustice as the matter in the lower Court has not been determined on the merits.

- 7.3 The appellant also argued that such a decision demonstrated the Court's undue regard to procedural rules and technicalities in the dispensation of justice contrary to **Article 118(2)(e) of the Constitution**¹ aforesaid.
- 7.4 A perusal of the record of appeal, particularly the relevant facts as determined by the lower Court in its Ruling shown in part at page 10, reveals that the action was commenced in the Commercial Division of the High Court and that while the trial Court had given the parties an opportunity to settle the matter by way of mediation, Counsel for the parties proceeded post-mediation to report to the trial Court that though mediation had not taken place, they were inviting the trial Court to issue directions while they undertook mediation on the sidelines.
- 7.5 The Court proceeded to give Orders for Directions, by agreement of the parties, on 14th December 2020 which directions scheduled the date of the compliance conference to 10th March 2021 to fix the date for trial.

7.6 The trial Court went further to observe at page R3 to R4 of its Ruling found at pages 10 to 11 of the ROA that Paragraph J of the Orders for Directions provided as follows:

‘The parties shall be at liberty to apply provided that the application is made before the date fixed for compliance and before the default relating to the subject matter of directions sought to be varied.’

7.7 In responding to the submissions of the appellant in the Court below, which were anchored on the same authorities and contentions as submitted herein, the trial Court noted at page R6 of her Ruling, found in part at Page 13 of the Record of Appeal as follows:

‘Whilst this Court is alive to the pronouncements in the case cited by the Defendant..., this Court is equally alive to the warning echoed by the Supreme Court in the case of Access Bank Zambia Limited vs Group Five/ZCON Business Park Joint Ventures (suing as a Firm) on the need for parties to observe the rules of Court and procedure, more especially for matters litigated in the Commercial Division.’

7.8 In arriving at the conclusion that the application for extension of time had no merit upon which to exercise its discretion, the trial Court also referred itself to the case of **Mazembe Tractor Company Limited v Meridian BIAO Bank Limited (in Liquidation)**⁴ in which the Supreme Court observed as follows:

‘The rules are often augmented by Orders for Directions, including orders made by a Judge in the exercise of the Court’s inherent jurisdiction to control the proceedings before itself. The Judge’s order clearly stands on a higher footing than the rules, and it is an extremely naïve litigant who can think of disobeying and challenging the authority Judge in his own Court room without consequences.’

7.9 In consideration of the history of proceedings on the record, it is undeniable that while the trial Court had given the parties an option to settle the matter by way of mediation, the parties, instead of exhausting that option, opted to invite the Court to make directions while mediation was being contemplated on the sidelines of litigation. Accordingly, by agreement with Counsel on the mode of progressing with the action, the Court issued directions on 14th December 2020.

7.10 In paragraph (j) of the said Orders for Directions reproduced above, the parties were at liberty to apply on condition that the application was made before the date fixed for the Compliance Conference and before the default relating to the subject matter of directions sought to be varied.

7.11 A perusal of the Orders for Directions found at pages 34 to 35 of the Record of Appeal reveals under paragraph (g) that the appellant was to have filed all its pleadings by 22nd February 2021 save for an agreed list of issue in dispute or independent lists of issues for determination by 1st March 2021.

7.12 Contrary to the directions in paragraph (j) of the Orders for Directions, the appellant defaulted on its obligations under the Orders for Directions, save for filing a Defence. Further, the Defendant sat on its right to apply for variation until after the lapse of time and default of the Orders for Directions. It only made an application for extension of time on 2nd March 2021. In its contention in the Court below and in this Court, the appellant seeks recourse under article **118(2)(e) of the Constitution**¹ contending that the Court should not have undue regard to procedural technicalities.

7.13 The justification for the appellant's failure to file its bundle of documents, witness statements and skeleton arguments within the time frames provided in the Directions is that Counsel for the appellant was unable to get relevant documents from the appellant and secure witness statements as his clients were outside jurisdiction.

7.14 In a matter that is brought before the Commercial Division, a court which demands strict adherence to rules and procedures, a party and indeed its Counsel should not wait until they have defaulted and abrogated the Orders for Directions issued by the Court before bringing an application for extension. The laxity of a party or failure to promptly instruct Counsel is not a reasonable or satisfactory explanation for non-compliance with the Court directions.


7.15 A manifest examination of the conduct of the appellant shows clear disregard of the Order of the court and a lackluster approach to litigation in a matter before the Commercial Division of the High Court.

7.16 In view of the aforesaid, we see no reason to fault the trial Judge's reasoning anchored on the principles established in the case of **Mazembe Tractor Company Limited v Meridian BIAO Bank Limited (in Liquidation)**⁴ that Judges' orders stand on a higher footing than the rules, and only a naïve litigant can think of disobeying the authority of the Court without consequences. Further reference is made to the case of **Access Bank Zambia Limited vs Group Five/ZCON Business Park Joint Ventures (suing as a Firm)**,³ in which the Supreme Court propounded that the courts cannot aid in bending or circumventing the rules under the guise of doing justice through hearing matters on their merits.

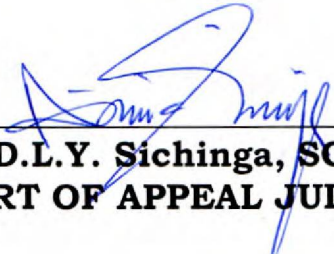
7.17 The rules of procedure in relation to court proceedings do not exist in a vacuum and are meant to assist the courts dispense justice in a fair, just, and orderly manner. A party that wantonly disobeys the court directives cannot cry foul, citing **Article 118(2)(e) of the Constitution** and expect to escape the consequences of non-compliance.

8.0 **CONCLUSION**

8.1 In the premises, we find no merit in the appellant's appeal and dismiss it with costs. The costs are to be taxed in default of agreement.



M.M. Kondolo, SC
COURT OF APPEAL JUDGE



D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE



N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE