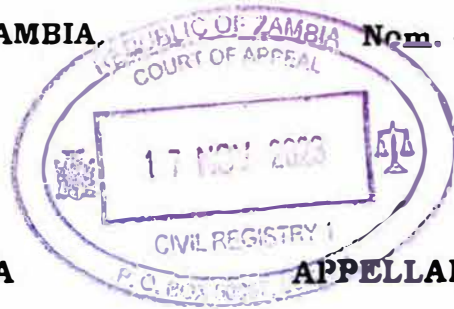


**IN THE COURT OF APPEAL OF ZAMBIA,  
HOLDEN AT NDOLA  
(Civil Jurisdiction)**



**Num. 42/2023**

**BETWEEN:**

**EUSTINA CHANDA SIMUSAMBA**

**APPELLANT**

**AND**

**AFRICAN BANKING CORPORATION LIMITED**

**RESPONDENT**

**CORAM : Siavwapa, JP, Chishimba and Banda-Bobo JJA**

**On 13<sup>th</sup> November, 2023 and 16<sup>th</sup> November, 2023**

For the Applicant : Mr. L. C. Banda – Messrs. Iven Levi Legal  
Practitioners

For the Respondent : Mr. – Messrs. Tembo, Ngulube &  
Associates

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## **R U L I N G**

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**CHISHIMBA JA, delivered the Ruling of the Court.**

**CASES REFERRED TO:**

- 1) Booksbank v Rawsthorne & Co. (1951) 2 All ER 413

**LEGISLATION CITED:**

- 1) The Court of Appeal Rules, 2016
- 2) The Rules of the Supreme Court of England, 1999 Edition



The appellant filed a motion for an order to restore the appeal made pursuant to **Order 10 rule 19(2) of the Court of Appeal Rules, 2016 (the CAR)** and **Order 59 rule 1(63) of the Rules of the Supreme Court of England, 1999 Edition (the RSC)**.

The grounds for restoration of the appeal being that the Civil Cause List dated 4<sup>th</sup> May, 2023 served on the Applicant's Advocates on 8<sup>th</sup> May, 2023 was the wrong Civil Cause List indicating a different appeal and did not have the appeal in casu. That the non-attendance by both parties was occasioned by an honest mistake of having received the wrong cause list.

The motion was supported by an affidavit, skeleton arguments and list of authorities dated 23<sup>rd</sup> May, 2023. The applicant reiterated the reason for non-attendance which was not in any way intended to disparage this Court. That restoration of the appeal will afford the parties an opportunity to be heard and no prejudice will be occasioned to the respondent.

Reliance was placed on the provisions of **Order 10 rule 19(2) of the Court of Appeal Rules, S.I. No. 65 of 2016** on the power of the court to restore for hearing an appeal that was dismissed or struck out under sub-rule (1). The case of **Booksbank v**

**Rawsthorne & Co.** <sup>(1)</sup> was cited where an appeal that was dismissed for non-attendance was restored and heard.

The applicant, in a nutshell, submitted that we have the requisite jurisdiction and power to restore the Appeal for hearing. The applicant prayed for an order to restore the appeal.

The respondent did not attend the hearing despite having been served the hearing date. An attempt was made by the parties to file a consent order restoring the matter for hearing. We declined to execute the consent order for obvious reasons.

We have considered the application to restore the appeal and the reasons advanced for the non-attendance by the applicant.

**Order 10 rule 19(1) and (2) of the CAR** provides as follows:

***(1) Subject to rule 18, if on any day fixed for the hearing of an appeal-***

***(a) the appellant does not appear in person or by practitioner, the appeal may be dismissed;***

***(b) the appellant appears, and the respondent fails to appear either in person or by practitioner, the appeal***

*shall proceed in the absence of such respondent unless the Court for any sufficient reason adjourns the hearing; or*  
*(c) no party appears either in person or by practitioner, the appeal may be adjourned, struck out, or dismissed.*

*(2) Where an appeal is dismissed, allowed, or struck out under sub-rule (1), a party who was absent may apply to the Court, within seven days of the dismissal, allowing or striking out of the appeal, for the rehearing or hearing of the appeal, as the case may be, and, where it is proved that there was sufficient reason for the absence of that party, the Court may order that the appeal be restored for hearing, upon such terms as to costs or otherwise as it considers just.*

In our view, **Order 10 rule 19(2)** empowers us to restore an appeal for hearing where it has been dismissed or struck out under sub-rule (1), or where an absent party applies to the Court within seven days as in *casu*. We are also of the view that the reasons

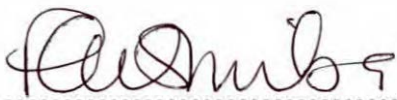
advanced for non-attendance are acceptable because the wrong cause list was served on the parties. Therefore, the parties were not aware of the date of hearing of the appeal.

For the foregoing reasons, we hereby restore Appeal Number 115/2021 to the active cause list of appeals for hearing. The said appeal shall be heard in the January 2024 session on a date to be communicated to the parties in the addendum cause list. Costs are in the cause.



.....  
M. J. Siavwapa

**JUDGE PRESIDENT**



.....  
F. M. Chishimba

**COURT OF APPEAL JUDGE**



.....  
A. M. Banda-Bobo

**COURT OF APPEAL JUDGE**