IN THE HIGH COURT OF ZAMBIA **2010/HPC/0739**

HOLDEN AT LUSAKA

BETWEEN:

SOUTHERN AFRICA MEDIA DEVELOPMENT FUND **PLAINTIFF**

AND

SKY FM RADIO LIMITED **DEFENDANT**

BEFORE HON. JUSTICE NIGEL K. MUTUNA THIS 7TH DAY OF FEBRUARY 8TH, 2013

For the Plaintiff : Mrs. N. Simachela of Nchito and Nchito

For the Defendant : Mr. E. B. Mwansa SC of EBM Chambers

R U L I N G

Cases referred to:

1) ***Lisulo vs Lisulo (1998) ZR page 75***

2) ***Lewanika and others vs. Chiluba (1998)ZR page 79***

3) ***Analytika Business Solutions Limited vs Barclays Bank (Z) PLC SCZ No. 8/49/2009***

Other authority referred to:

1) The High Act, Cap 27

This is the Plaintiff's application for review of this Court's order dated 30th May, 2012. It is made by summons pursuant to Order 39 rules 1 and 2 of the ***High Court Act*** and is supported by an affidavit sworn by one Ngosa Simachela.

The Defendant has opposed the application by way of an affidavit sworn by one Emmanuel Bupe Mwansa SC.

The back ground of this application is as follows. After the Plaintiff commenced this action against the defendant, the latter applied to Court for security for costs pursuant to Order 40 rules 7 and 8 of the High Court Ace. Following the hearing of the application, I delivered a ruling on 26th July, 2011 by which I ordered the plaintiff to pay security for costs in the sum of K150,000,000.00. I directed further that the amount should be paid within a month from the 26th July, 2011.

The plaintiff did not comply with the order because it defaulted in paying the sum within the stipulated time. This prompted the defendant to apply to dismiss the matter for want of prosecution. The application was filed on 25th November, 2011 and I finally heard it on 30th May, 2012, following several adjournments. On that day, I ordered the plaintiff to pay the security for costs by 1st June, 2012, after I received assurance from counsel for the plaintiff that she would ensure that the payment was made by close of business on 1st June, 2012. My order also directed that if there was default the matter would stand dismissed. There was default on the part of the plaintiff for the reasons that will be revealed in the affidavit evidence. Pursuant to the said default, the plaintiff seeks an order to review the order of 30th May, 2012 by way of enlarging time within which the plaintiff was required to pay the security for costs.

The evidence in support and opposition to this application is contained in the affidavit in support and in opposition. These are both sworn by counsel for the two partied. The former reveals how counsel for the plaintiff attempted to pay the sum ordered as security for costs after the hearing of 30th May, 2012. She stated that her efforts were frustrated on 30th May, 2012 by the fact that the Registry staff informed her that the Court received payment only in the morning because the funds had to be deposited into the High Court bank account by 12:00 hours. Subsequently on 31st May, 2012, counsel returned to Court and made two attempts to pay but was advised that there were no receipt books. She sent her clerk the following day on Friday, 1st June, 2012 to court to pay, who was also advised that there were no receipt books, therefore the payment could not be accepted. This prompted counsel to call upon the marshal to the Court to explain the reason for her failure to comply with the order and was advised by the marshal that she would inform the Court. Later in the day, counsel called upon the Court in the afternoon to explain her dilemma and was advised to inform counsel for the defendant. Acting upon this advise, on Monday 4th June, 2012, she wrote a letter to the defendant's advocates explaining the difficulties she was having complying with the order. The letter was copied to the marshal to the court and is marked exhibit "NS1".

Counsel deposed further that she finally made the payment into Court on 6th June, 2912 and the Registry Staff accepted the notice of payment, the staff, she deposed, advised her to collect the receipt the following day when she was issued with a receipt number 2864488 to confirm payment of the two cheques. She ended by stating that she verily believe that when this court made the order of 30th may, 2012, it was not aware that the High Court administration had not receipt books. As a consequence of which, the

plaintiff failed to make the payment on the due date which was not an account of its neglect. Further that payment by cheque was the most secure way to effect the payment and that she believed the order of the Court was not for a bank guarantee. In any event, she stated, she could not have made arrangements for a bank guarantee due to the short period of time prescribed for payment by the Court.

In the affidavit in opposition, counsel for the defendant, Emmanuel Bupe Mwansa SC, highlighted the date when the initial order to pay for security for cost was made,, the delay in affecting payment, and procrastination by the plaintiff. He also referred to the efforts he made to dismiss the action and the latitude and flexibility he exercised despite the delays by the plaintiff in paying the security for costs. He therefore stated that there is nothing for the court to review because the plaintiff was given enough time to comply with the order. Further that, the court cannot be faulted for the plaintiff's failure to pay the security for cost. Counsel also stated, that there were other options and avenues open to the plaintiff to follow in effecting payment into court such as making a bank transfer, depositing a bank guarantee with the court, filing the notice of payment into court and collecting the receipt later and sending the money to court by Western Union money transfer. He concluded by stating that the plaintiff's recourse lies in appealing.

The application came up for hearing on 22nd January, 2013. Counsel relied upon the skeleton arguments and affidavits.

In the plaintiff's skeleton arguments, counsel for the plaintiff Mrs. N. Simachela argued that there are sufficient grounds in accordance with Order 39 of the **High Court Act** that exist that warrant the review of the Court order of 30th May, 2012. She argued that at the time of making the order of

30th may, 2012, the Court was not aware that there were no receipt books as such it should exercise its discretionary power to review. Further that, only the relief of review can put matters right in this matter.

In articulating her arguments counsel relied upon the cases of **Lisulo vs Lisulo (1)** and **Lewanika and others vs Chiluba (2)**. It was argued that the circumstances as revealed in the affidavit evidence indicate that this is a proper case to reverse and or vary the order of the court. She prayed that the application should be granted.

In the skeleton arguments Mr. E> B. Mwansa SC argued from four limbs. The first limb was that the plaintiff had not respected the court's order. In advancing the said argument counsel catalogued the events that followed delivery of this court's ruling of 26th July, 2011. In doing so he demonstrated the plaintiff's failure to comply with the directive of this court to pay the security for costs within thirty days and the defendant's subsequent application to dismiss action. Counsel argued that the subsequent failure by the plaintiff to pay cost as per the order of 30th May, 2012 shows a serious lack of respect of court orders. He therefore urged this court to dismiss this application as per the decision in the case of **Analytika Business Solutions Limited vs Barclays Bank of Zambia plc (3)**. Counsel argued that in the said case the Supreme Court dismissed an application for further extension of time within which to file the record of appeal on account of the conduct of counsel for the appellant which the court described as a mockery of the Court's orders.

The second limb was that the plaintiff had been given enough time in which to pay the security for costs. It was argued that between the date of the ruling of 26th July, 2011 and 25th November, 2011 when the defendant filed

the application to dismiss action, there was ample time in which the plaintiff should have paid the security for costs. It was argued that the plaintiff failed to even take advantage of the various adjournments between the day the defendant filed the application to dismiss and the hearing of 30th May, 2012. The cumulative delay, he argued, was for a period of ten months which could not be condoned.

The third limb was that the court officers and the defendant can not be blamed for the plaintiff's failure to pay security for costs on time. Counsel reiterated his argument that the plaintiff had been offered sufficient opportunity to pay and that the lack of receipt books at court is not an acceptable excuse. He also reiterated that there were other avenues open to the plaintiff to effect payment in the absence of the receipt books.

The last argument was that there were insufficient grounds to warrant the review. Under this limb counsel by and large repeated his earlier arguments. He prayed that the application should be dismissed.

I have considered the affidavit evidence and arguments by counsel. The events leading up to this application which have not been disputed by the defendant make very sad reading. They demonstrate how counsel for the plaintiff attempted in vain to comply with the order of this court of 30th may, 2012 and pay the security for costs within the time prescribed. Her efforts were, in my considered view, not only hampered but frustrated by an administrative hiccup at the court, in the form of lack of stationery, in terms of receipt books. This can not by any stretch of imagination be equated to lack of respect for the Court order by the plaintiff or its counsel, as Mr. E. B. Mwansa SC has alleged. It requires introspection, not only by the courts but all the players in the administration of justice because this is a case of a

clear break down in administration of justice. The plaintiff in my considered view, was an innocent by-stander who bore the full brant of the said break down. It cannot therefore, be faulted and there is an obligation placed upon this court, in the interest of justice to remedy the consequence of the unfortunate events that I have narrated. The plaintiff has sought to do this by way of moving this court by way of review under order 39 (1) of the **High Court Act**. The order stated as follows:

> ***"Any judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn) and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision."***

By the said order this court can by any ground it deems sufficient, reopen a matter and among other things reverse, vary or confirm its previous judgment or order. The purpose for such review has been explained by the Supreme Court in the case of **Lewanika and others vs Chiluba (2)**, as being, among other things, enabling the court to put things right.

Having stated the applicable law on review and its purpose, I now turn to determine whether this is a proper case to apply the remedy for review. The plaintiff in seeking review requires this court to endorse the late payment of the security for costs which was made on 6th June, 2012 instead of, on before 1st June, 2012. She has explained the delay as being the refusal by the court administration to accept the payment because at the material time the court administration did not have receipt books. The defendant has argued that

the plaintiff had ample time to make the payment but if neglected to do so out of disrespect to the Court. Further that it should have used alternative methods of payment when counsel was informed that they were no receipt books.

It is important to identify the delay that the plaintiff made in making the payment, the defendant alleges a period of ten months, that is from 26th July 2011, when the ruling first was delivered, to 30th may, 2012, when the second one was made. The basis upon which the defendant made this contention is that the ruling of 26th July, 2011 required the plaintiff to pay the security for costs within thirty days.

This may well be so, but as the record will show, at the hearing of 30th may, 2012, on the defendant's application to dismiss the matter, counsel for the plaintiff indicated to the court that the plaintiff was now ready to pay the security for costs. She further stated that she would ensure that the payment was made by close of business on 1st June, 2012. In response counsel for the defendant Mr. E. B. Mwansa SC indicated that he had no objections to the payment being made in that manner. In my considered view, by these actions, the two parties agreed to ignore the ruling of 26th June, 2011 and gave the plaintiff despite by allowing it to pay the security for costs by 1st June, 2012. The parties having so agreed, the court endorsed the agreement by way of the order of 30th May, 2012. Having so done, the defendant cannot revisit the delays of failure by the plaintiff to pay the security for costs in accordance with the ruling of 26th June, 2011. I therefore dismiss its arguments in that respect.

The only period of delay the defendant can justifiably complain about is the period between 1st June, 2012 and 6th June, 2012. Arising from this, the issue

that I have to determine is, was the delay justifiable and of so do the reasons for the delay serve as sufficient grounds for me to review my decision of 30th May, 2012.

I have already found as a fact that the administration of justice let down the plaintiff. This is clear from the undisputed facts of this case which show the efforts made by counsel for the plaintiff to pay the security for costs into court on time. These efforts, as I have found, were frustrated. I therefore find that the plaintiff was justified in delaying the payment of the security for cost into court. Having so found, the next question is, is the reason for the delay sufficient cause for me to review my decisions.

It is clear from the fact that the situation that presented itself to the plaintiff is unacceptable. Therefore, in the interest of justice, this court has no obligation to put things right by reviewing its decision as per the **Lewanika and others (2)** case. This is particularly so because, as counsel for the plaintiff argued, this court was not aware that the administration section of the Court had no receipt books for purpose of receiving the cheques and issuing receipts. If it had known, it would not have imposed a short time frame in which to pay the security for costs. I therefore, find that this is a proper case warranting the review of the order of 30th may, 2012 to the extent I shall explain in the latter part of this ruling.

In arriving at the decision I have made in the proceeding paragraph, I have considered the case cited by counsel for the defendant of **Analytika Business Solutions Limited vs. Barclays (Z) Plc (3)**. Counsel for the defendant urged me to dismiss this application in line with the holding of the Supreme Court in the said case which holding is at pages J4 to J 6. The holding is as follows:

"In the current case, the learned counsel for the appellant applied before a single Judge of this court for leave to file the record of appeal out of time. The learned counsel requested for a 30 days period. The single Judge granted the thirty (30) days period as requested. However, the Record of Appeal was not filed within the thirty (30 days period. Once counsel realized that it was not possible for him to comply with the period that he requested for and was given, he ought to have applied for an extension of time instead of sitting back and waiting until after the period had expired.

As such, in the circumstances of this case, we do not, therefore, find the explanation given by the learned counsel to be good reason as counsel sat back until after the period had expired.

Therefore, as much as we agree with the authorities cited by the learned counsel for the appellant, our firm view is that the authorities are not available to the appellant in this particular case where there was a total disregard of the court order which granted the appellant leave to file the Record of Appeal within thirty (30) days that the learned counsel for the appellant requested for and was granted.

To allow this kind of application would amount to the court condoning this type of behaviour by counsel and thereby making a mockery of court orders. Court orders should be

strictly complied with and those that fail to comply, do so at their own peril."

It is clear from the foregoing holding that the court frowned upon the cavalier attitude exhibited by counsel for the appellant in his total disregard of a court order.

The finding I have made in this matter is that the plaintiff and its counsel are blameless for the delay that is in issue. As such the facts in this case are distinguishable from the facts in the **Analytika (3)** case to that extent. I therefore find that the said case does not aid the defendant's cause. Further, the fact that the plaintiff made this application after the expiry of the period prescribed by the court for the payment does not place it in the ambit of the **Analytika (3)** case for the reasons I shall explain in the latter part of this ruling.

I have also considered the argument by the defendant that the plaintiff should have pursued alternative options of paying the moneys into court. Counsel highlighted the alternative options as follows:

1) Transferring the funds into the court's account
2) Depositing the cheques into the court's account
3) Depositing a bank guarantee with the court
4) Filing notice of payment with court, with the cheque attached to it, and collecting receipts later
5) Sending the funds to court by Western Union money transfer.

I have dismissed the said argument because the court order was specific in that it directed the plaintiff to pay the said moneys into court. By the said

order the plaintiff was required to present a cheque or cheques along with the notice of payment into court to the assistant registrar at the court. Following the presentation of the cheque or cheques and notice of payment into court a receipt should have been issued and the notice of payment into court stamped and returned to the plaintiff's representation. This is what counsel for the plaintiff attempted in vain to do.

The order did not provide for payment in any way other than the way I have explained in the proceeding paragraph and as such the alternative options given by the plaintiff, quite apart from being practically impossible, were not avenues the plaintiff could pursue. I state that they were practically impossible because the order of 30th May, 2012 was delivered in the afternoon which was a Wednesday. The deadline of 1st June, 2012 fell on a Friday. I do not see how the plaintiff's counsel could have successfully obtained a bank guarantee within that period, given that by the time counsel were leaving the court's on 30th May, 2012 in the afternoon the banks may well have been closed. In any event on 30th May 2012 she had not been informed that there were no receipt books, so she had no reason to pursue alternative avenues at that stage.

This meant that it only gave counsel for the plaintiff about twenty-four hours to attempt to get a bank guarantee, that is between Thursday 31st of May, 2012, after she was informed that the court had not receipts books and Friday 1st June, 2012. Further, the suggestion of depositing funds directly into the court's account or transferring them there was also not practical because it would have meant counsel pressing the Assistant Registrar to give her the court's bank account numbers. As for the suggestions number (4) and (5), I am at sea as to why Mr. E. B. Mwansa SC suggested them for two reasons. Firstly, I am sure State Counsel is aware that the Courts will not

accept a notice of payment into court and a cheque attached thereto, in the absence of the same being receipted. This is because the method suggested does not constitute payment into court. Secondly, the method of sending funds to court by western union money transfer is not an acceptable method because, not only is it unprecedented but preposterous. I cannot begin to imagine how an Assistant Registrar acting on behalf of the Court can be expected to call at Western Union money transfer and collect cash in the sum of K150,000,000.00.

I have also considered the fact that the delay in affecting payment complained of is only for a period of five days. In my considered view, the said period cannot be described as inordinate nor can it be said to have resulted in the defendant's rights being prejudiced. It is therefore acceptable or tolerable delay.

In view of my findings in the proceeding paragraphs, I find that there are sufficient grounds that exist for me to review my decision of 30th May, 2012. I accordingly review it to the extent that the deadline for the plaintiff to pay the security for costs is 6th June, 2012, on the day that the payment was made. The plaintiff is therefore, taken to have complied with the order. Further, by way of making progress in the matter, I direct that the matter came up for a status conference on 13th March, 2013 at 14:00 hours. My expectations on that day will be that the parties will have complied in full with the order for direction dated 10th May, 2011.

As regards cost, although the plaintiff has succeeded in this application, I find that the circumstances of the case militate against awarding one party and condemning the other to costs. I therefore direct that each party will bear their respective costs in relation to the application.

Delivered in Chambers this 7th day of February, 2013

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NIGEL K. MUTUNA
HIGH COURT JUDGE