

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Registry)

2016/HPC/0430

B E T W E E N :

XUE JIANG XU



PLAINTIFF

AND

LEWIS MOSHO
(Sued as Receiver of Platinum
Gold Equity)

1st DEFENDANT

Lewis Nathan Advocates
(Sued as a Law Firm)

2nd DEFENDANT

RULING

CASES REFERRED TO;

1. *Finance Bank Zambia Limited v. Dimitrios Monokandilos Filandria Kouri (2012) Vol. 1 ZR 494;*
2. *Costellow v Somerset County Council (1993) 1 W.L.R 256;*
3. *Chibote Limited Mazembe Tractor Company Limited Minestone (Zambia) Limited Minestone Estates Limited V Meridien Biao Bank(Zambia) Limited (In Liquidation);*
4. *Miyanda v. Handahu (1993-1994) Z.R. 184*

LEGISLATION AND OTHER WORKS REFERRED TO:

- 1. Order 26., rule 1 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;***
- 2. Order 14A of the Rules of the Supreme Court of England, 1965, Supreme Court Practice (1999), White Book;***
- 3. Order 26 rule 4 of the High Court Rules, High Court Act Chapter 27 of the Laws of Zambia;***
- 4. Rule 10 (10) of Order LIII of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;***
- 5. Advanced Learner's Dictionary, A S Hornby, 8th Edition, p1172***

This is an application on the part of the Defendants for an Order that this cause be dismissed for want of prosecution. The application was made by way of Summons filed on 20th February, 2017.

Before I address my mind on the application, I must profusely apologise to the parties for the belatedness in the issuance of this Ruling. The delay was occasioned by an administrative lapse which led to an earnest but incorrect belief that the Ruling had, together with a class of other determinations before me, already been printed and dispatched.

Looping back to the matter at hand, the record reflects that the brief background of this application is that this cause was instituted by the Plaintiffs against the Defendants by dint of a Writ of Summons taken out on 31st August, 2016.

The Writ was endorsed with the Plaintiff's claim for inter alia: (i) An order for the payment of the sum of USD\$ 8, 186, 432.00 plus interest, being monies had and received on behalf of the Plaintiffs by the Defendants in their capacity as Receivers of Platinum Gold Equity Limited and Kitwe Development Limited; (ii) An order for the payment of the sum of USD\$ 4, 900,000.00 plus interest, being the value of shares held by the Plaintiff in the Kitwe Development Company Limited and Platinum Gold Equity Limited; (iii) Damages for loss of use of monies and for breach of fiduciary relationship; (iv) An Order for the refund to the 2nd Plaintiff all monies misapplied by the Defendant; (v) An Order that the Defendant surrenders all company properties in his possession; and (vi) an Order of Attachment of Bank Accounts of the Defendants pending settlement of the sums demanded.

Simultaneous with the issuance of the originating process, the Plaintiffs made an interlocutory application pursuant to **Order 26., rule 1 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia**, for interim attachment of all monies in the Defendants' bank accounts held at Barclays Bank. That application was set for hearing on 9th September, 2016.

The Plaintiff's Writ provoked the entry, on 5th September, 2016, of Conditional Appearance by the Defendants, with an attendant application to dispose of the cause of action on a point of law, pursuant to **Order 14A of the Rules of the Supreme Court of England**,

1965, Supreme Court Practice (1999), White Book. This application was scheduled to be heard on 16th September, 2016.

On 9th September, 2016, being the date set for hearing of the Plaintiffs' application for attachment, the Plaintiffs took out a summons under **Order 26 rule 4 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia**, to be heard on an application for an Order that the Defendants furnish Security prior to the hearing of the Plaintiffs' application for interim attachment of properties.

The Plaintiffs' applications for attachment could not progress on 9th September, 2016, in the light of their application for security for costs. Accordingly the application was adjourned to 16th September, 2016 to be heard concurrently with the Defendants' application to dispose of the matter on a point of law. Neither party was in a position to proceed on 16th September, 2016 and by consent the applications were adjourned to 10th November, 2016.

Prior to the hearing of the applications, the Defendants filed, on 28th October, 2016, a notice of intention to raise a preliminary issue against the Plaintiffs' application for security for costs. When the applications came up for hearing on 10th November, 2016, the parties informed the Court of their intentions to reconcile their applications and to attempt to settle the matter *ex curia*. Resultantly, they requested for an adjournment. The applications were adjourned to 9th February, 2017.

On 9th February, 2017, whereas the Plaintiff's advocates did not attend Court, the Defendants were represented. Counsel advised the Court that attempts to reconcile had yielded no fruit and as such applied for an adjournment. The adjournment was granted.

On 13th February, 2017, the Defendants filed an application for an Order that the action be struck off for non-attendance. The application was set down for 17th February, 2017 but it was withdrawn. Subsequently, the Defendants filed this application to dismiss the action for want of prosecution.

The application for dismissal is supported by an Affidavit in Support and List of Authorities and Skeleton filed on 20th February, 2017. The Affidavit was deposed to by Zhunga Alick Simwalanga, Counsel for the Defendants.

The argument tendered in support was launched with the contention that the Rules of the Commercial Court are time bound to facilitate the expeditious determination of matters without undue delay. With that in mind, reference was made to **Rule 10 (10) of Order LIII of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia**. Sub-rule 10 of Rule 10 of Order LIII entitles a party to an action to, if sixty days elapses without any progress after the action is filed, apply to dismiss the action.

To further aide their application, the Defendants canvassed the case of **Finance Bank Zambia Limited v. Dimitrios Monokandilos**

Filandria Kouri (2012) Vol. 1 ZR 494¹ where the erstwhile High Court Judge Dr Matibini, SC, had occasion to address the considerations to be applied by the Court in relation to the power to dismiss actions for want of prosecution. In so doing, the Court held, *inter alia*, as follows:

"where there has been inordinate and inexcusable delay in bringing or defending an action, this in itself can constitute an abuse of Court process, and therefore warrant the dismissal of the action"

My attention was also drawn to the English case of ***Costellow v Somerset County Council (1993) 1 W.L.R 256***² where the Court iterated the principle that prescribed time limits were not targets to be aimed at as expressions of pious hope, but were requirements to be met. The Court explicated that the principle was reflected in a series of rules that give the Court discretion to dismiss on failure to comply with the limit.

Ultimately, the Court was invited to consider the case of ***Chibote Limited Mazembe Tractor Company Limited Minestone (Zambia) Limited Minestone Estates Limited V Meridien Biao Bank(Zambia) Limited (In Liquidation)***³ where the Supreme Court acquiesced to there being two distinct circumstances in which an action could be dismissed for want of prosecution, namely: when a party has been guilty of intentional and contumelious default; and where there has been inordinate and inexcusable delay in the prosecution of the action.

The essence of the Defendants' submissions, as I have discerned from the authorities cited, is that, *in casu*, there has been an inordinate and inexcusable delay that merits dismissal. The categorization of the delay as being inordinate and inexcusable was given a nexus to the prescribed period of inactivity of 60 days.

In opposing the application the Plaintiff's filed Skelton Arguments and an Affidavit in Opposition deposed to by the 1st Plaintiff.

According to the Affidavit in Opposition, not only had the parties been engaged in negotiations for *ex curia* settlement, but during the period of perceived abeyance, there was a Christmas vacation where all the lawyers went on break.

The gist of the Plaintiffs' opposition is that the delay in this matter cannot be classified as inexcusable on account of the existence of a reasonable and justifiable excuse that the parties were engaged in negotiations, with an intervening Christmas break.

I have carefully studied the submissions, authorities and affidavit evidence before Court. I do not propose to regurgitate the authorities cited by the Defendants for the simple reason that I find nothing amiss with the said authorities and enunciated principles. I do however, find two prominent obstacles when the law attempt to date the facts of this case.

Firstly, Rule 10 (10) of Order LIII speaks of the absence of any progress at the expiry of 60 days after the action is filed. My understanding of Rule 10 (10) is that the 60 days period prescribed to assess progress commences on the date the action is filed.

As regards what constitutes progress, the rules are silent. Nevertheless, it is a canon of statutory interpretation that statutes are to be interpreted using the ordinary meaning of the language of the statute unless a statute explicitly defines the term otherwise or unless the result would be cruel or absurd. That Rule of interpretation is often referred to as the Literal Rule, which Rule formed the basis of the ratiocination of the Supreme Court in the case of *Miyanda Handahu (1993-1994) Z.R. 187⁴*.

Turning back to the definition of the word progress, the meaning ascribed by the *Advanced Learner's Dictionary, A S Hornby, 8th Edition, p1172* is:

"the process of improving or developing, or getting nearer to achieving or completing something..."

Bearing in mind the definition of the word progress, it can be seen from the background to this application, which I deliberately took time to expansively recount, that from the date the action was filed, the Plaintiffs attempted to progress the matter, laden only by

interlocutory applications which sought to protect or preserve their interests.

I have also considered the more flexible interpretation that the period of 60 days was not intended to strictly start running on the date the action was filed but applied to any period of inertia for 60 consecutive days. In that case, it would appear that the passage of time would have to commence on a date where the matter was exposed to inactivity.

In this case, inactivity can only plausibly be alleged from the date the parties informed the Court that negotiations had fallen through, being 9th February, 2017, to the date that the application for dismissal was made, being 20th February, 2017, a period of merely 11 days. Clearly, that 11 days period falls far short of the period of 60 days of inertia.

Aside from the aforementioned crimps, the second hindrance to this application relates to the reason for the lack of progress. As has been articulated, there must be either an intentional and contumelious default; or an inordinate and inexcusable delay. *In casu*, both parties indicated their desire to reconcile their outstanding applications and to pursue an amicable settlement. It is trite that negotiated settlements are encouraged by the Courts in Zambia. Thus, I cannot bring myself to conclude that a lag occasioned on the desire to negotiate is inexcusable. Moreover,

there is nothing before court to imply any intention or contumelious default.

Having dispelled the existence of any of the catalysts for dismissal, I hold the view that dismissing this matter on account of a delay occasioned by efforts, albeit unsuccessful, to resolve the matter amicably would turn justice sour.

For the foregoing reasons, this application fails, and is dismissed with costs.

Leave to appeal is granted.

Dated this 12th day of February, 2018



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Hon. Lady Justice B. G. Lungu
High Court Judge