SCANNING

IN THE HIGH COURT FOR ZAMBIA 2018/HP/0469
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

MARGARET CHANDA	1ST PLAINTIFF
DOREEN K CHOBE	2ND PLAINTIFF
LLOYD CHILENGA	3RD PLAINTIFF
STANLEY BWALYA MULUNGU	4TH PLAINTIFF

AND

STANBIC BANK ZAMBIA LIMITED	1ST DEFENDANT
JOSEF KARL WELTIN	2ND DEFENDANT
JOHN LESA MUTALE	3RD DEFENDANT
CHIPO HARUPERI	4TH DEFENDANT
JOYCE MUMBI	5TH DEFENDANT

BEFORE JUSTICE ELITA PHIRI MWIKISA

FOR THE PLAINTIFF: MR. B. PHIRI OF T.S. NGULUBE & COMPANY
FOR THE DEFENDANT: MR. L. MWAMBA OF SIMEZA SANGWA & ASSOCIATES

RULING

Cases Referred To:

1. *Sanat Limited v Shaileshkumar Suryakant Amin Appeal No. 146 of 2017.*
2. *Milan Gordic v Jophael Mbizule Appeal No. 18/2017.*

3. *Elizabeth Catherine Cooke v Moses Mpundu & 2 Others Appeal No. 207/2015.*

This is the plaintiffs' application to set aside order to dismiss action for want of prosecution pursuant to Order XXXV Rule 5 of the High Court Rules of the High Court Act Chapter 27 of the Laws of Zambia. The said application is supported by an affidavit dated 17th September, 2019, deposed to by Stanley Bwalya Mulungu, the 4th plaintiff herein. He deposed that this matter was dismissed for want of prosecution on 3rd July, 2019, in the absence of the plaintiffs. He went on to depose that the application to dismiss this action for want of prosecution was premature as there was no inordinate delay on the part of the plaintiffs to prosecute this matter.

It was deposed that this matter was not determined on its merits and that the plaintiffs will be prejudiced if this application is not granted. That this is therefore a proper case in which an order for dismissal of action for want of prosecution can be set aside.

The plaintiffs also filed skeleton arguments dated 17th September, 2019, which I have taken note of and will not reproduce in full. It was submitted therein that on 7th November, 2018, this Court rendered a ruling wherein an injunction earlier granted to the plaintiff was discharged. The plaintiff being dissatisfied with the

said Ruling then filed a notice of appeal in the Court of Appeal on 9th November, 2018, but that the 1st defendant, in disregard of the rules of service of Court process, moved the Court of Appeal to dismiss the appeal for want of prosecution which order was granted on the same date. It was submitted that the 1st defendant herein then prematurely and in the absence of the plaintiffs moved this Court on 24th July, 2019, to dismiss the main action under cause No. 2018/HP/0469 for want of prosecution, which application was granted on 3rd July, 2019.

It was submitted that the plaintiffs have a defence on the merits in this action and implored this Court to apply the rules of equity as per Section 13 of the High Court Act so as to accord the plaintiff a hearing on the merits. Counsel submitted that in this case, the serious question to be tried has not been adjudicated upon and that it is essential that this honourable Court makes a profound pronouncement on the scope, enforceability and merits of this action for the sake of growing the jurisprudence. Counsel implored the Court to set aside the Order dismissing action for want of prosecution to enable the plaintiffs' case be heard and determined on the merits.

That in the alternative, should this Court deem the converse to be true, the Court should apply the rules of equity to set aside order of

dismissal of action for want of prosecution thus, according the plaintiff a constitutional and equitable opportunity to be heard on the merits of the case at hand as revealed by the numerous authorities cited in support.

The defendants herein did not file in an affidavit in opposition but filed skeleton arguments in opposition dated 10th October, 2019. It was submitted that on 18th December, 2018, this matter was struck off the cause list and that the plaintiffs subsequently applied to restore the matter to the active cause list which application was granted.

That the Court thereafter issued a notice of status conference scheduled for 21st June, 2019, and the plaintiff without giving any reason or excuse again did not attend the hearing which prompted the 1st defendant to make an application for dismissal of action for want of prosecution. The application was granted and order for dismissal of action perfected on 3rd July, 2019.

It was submitted that on 17th September, 2019, almost 3 months after dismissal of the action, the plaintiffs filed this application seeking to set aside the order for dismissal.

It was submitted that the plaintiffs' application is totally misconceived because there is no legal provision that allows this

Court to set aside an order for dismissal of action. That the position of the law is that an order for dismissal of an action is final and once made, the only recourse available to an aggrieved party is to appeal the order or recommence a fresh action subject to costs. Counsel quoted the learned authors of Atkins Court Forms Vol. 14, 4th edition at page 20 as stating that:

> ***"Dismissal finally terminates the dismissed action, and no further steps can be taken in it in relation to the claim made in it although the plaintiff can proceed to enforce a previous order as to costs in his favour which is not contingent on the success of the main claim in the action."***

Counsel also cited the case of **Sanat Limited v Shaileshkumar Suryakant Amin Appeal No. 146 of 2017**[1] and stated that the Court of Appeal therein stated as follows:

> ***"As explained by the Supreme Court in the Gaedonic Automotives Limited case, the effect of a dismissal is that no further action can be taken under that cause by the High Court Judge. However, a new action can be commenced under a different cause."***

Counsel submitted that once an action has been dismissed for want of prosecution, no further action can be taken under that cause by the High Court Judge as the Court becomes functus officio. That the Court cannot hear any application or grant an order setting aside its own order for dismissal because the law does not permit or provide for such an application. Counsel submitted that what the

plaintiffs ought to have done is to either appeal against the order or commence a fresh action under a different cause.

Counsel submitted that it is no wonder the plaintiffs have shockingly moved the Court pursuant to Order 35 Rule 5 of the High Court Rules which deals with setting aside default judgments. That the issue before Court is an order for dismissal of an action and not a default judgment and that the rule is therefore inapplicable to the case at hand.

It was also submitted that even assuming the law permitted such an application, it would still have been devoid of merit because the reason for dismissal herein was because of lack of seriousness by the plaintiffs who chose not to attend Court at the previous two sittings. That no reason or excuse was given by the plaintiffs for the non attendance and that that is sufficient reason for the Court to dismiss the action for want of prosecution.

When the matter came up for hearing on 20th April, 2020, Counsel for the plaintiffs was not in attendance. Counsel on behalf of the 1st defendant, Mr Mwamba, submitted that in opposing the application to set aside order for dismissal of action for want of prosecution, he would rely on the skeleton arguments. Mr Mwamba re-echoed his written submissions viva voce and re-emphasised the case of **Sanat**

Limited v Shaileshkumar Suryakant Amin and submitted that the Court of Appeal in that case held inter alia that the effect of a dismissal is that no further action can be taken under that cause by the High Court Judge.

Mr Mwamba contended that therefore once an action is dismissed the plaintiffs can only file a fresh action or appeal and that this Court is bound by the case cited. Counsel submitted that this action is therefore incompetent.

Mr Mwamba went further to submit that the action herein has been brought pursuant to Order 35 (5) of the HCR which deals with default judgments. He argued that a party can only rely on that rule if what is before Court is a default judgment and that in this case what is being dealt with is not a default judgment but an order for dismissal for want of prosecution. It was submitted that the rule that the plaintiffs have cited as a basis upon which this application is anchored has no basis.

Counsel contended further that the third reason for its non applicability is that in order to set aside that order, one has to demonstrate the reasons why one did not attend Court and that it was not deliberate. He went on to argue that in the affidavit in support of this application, no reason or explanation has been

given as to why the plaintiffs did not attend Court on that day when the matter was heard. Counsel contended that the plaintiffs, in their affidavit stated that there was no inordinate delay to warrant the order and that there is therefore no basis for dismissal of the matter. Mr Mwamba submitted that the plaintiffs ought to have given specific reasons as to why they did not attend Court. He submitted that there was no relationship between the matter before the Court of Appeal and this one and that the reason for the dismissal of the matter was not for inordinate delay but for the plaintiffs' failure to attend Court on 2 or 3 occasions. Counsel prayed that the matter be dismissed.

I have carefully considered the affidavit evidence, skeleton arguments from both Counsel for the plaintiffs and Counsel for the 1st defendant as well as the oral submissions made by Counsel for the 1st defendant.

This application was made pursuant to Order XXXV Rule 5 of the HCR which provides as follows:

> ***"Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the Court, upon such terms as may seem fit."***

Counsel on behalf of the 1st defendant, Mr Mwamba argued that a party can only rely on that rule if what is before Court is a default

judgment and that in this case what is being dealt with is not a default judgment but an order for dismissal for want of prosecution. It was submitted that the rule that the plaintiffs have cited as a basis upon which this application is anchored has no basis.

In the case of **Milan Gordic v Jophael Mbizule Appeal No. 18/2017**[2] the Supreme Court stated as follows:

> ***"The decision which the Appellant contests is a judgment made after his failure to attend Court for continued hearing...***
>
> ***What then is the remedy which is available to a defendant or respondent and indeed a plaintiff or applicant where judgment has been rendered following a hearing he/she did not attend? Order 35 rule 5 prescribes the remedy as follows:***
>
> "***Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the Court, upon such terms as may seem fit."***
>
> ***Hence, the remedy lies before the same Court, in this case the Deputy Registrar, to set aside the judgment, and not appealing. The reason for this is that a party in such a situation seeks to be heard by the Court as he or she was denied a hearing as a result of non attendance."***

This matter was dismissed by this Court because of the non appearance of the plaintiffs when the matter came up for hearing. The record herein shows that this Court, in its Ruling dated 7th November, 2018, discharged an injunction it earlier granted to the plaintiffs. On 9th November, 2018, the plaintiffs applied for a stay of the said Ruling and a hearing was scheduled for 17th December,

2018. However, the matter was struck off the active cause list because none of the parties appeared on that date but it was restored by Order dated 7th January, 2019, after the plaintiffs, in the affidavit in support of summons to restore matter to active cause list, deposed that the non- attendance was not deliberate but because their advocates had taken their industrial break by the material date.

The matter was then adjourned to the 21st June, 2019, but the plaintiffs were not before Court again when the matter came up for status after which the Court granted the 1st defendant's application to have the matter dismissed for want of prosecution.

On 17th September, 2019, the plaintiffs filed an affidavit in support of summons to set aside Order for dismissal of action for want of prosecution. The said application by the plaintiffs came up for hearing on 20th March, 2020, but only Counsel on behalf of the 1st defendant was in attendance.

In the case of **Elizabeth Catherine Cooke v Moses Mpundu & 2 Others Appeal No. 207/2015**[3] the Supreme Court stated as follows:

> ***"We are compelled to make a distinction between two types of unless orders. The first type is one whose effect is that a party's action is dismissed upon non-compliance with the order but the party is not deprived of his right***

> ***to prosecute a matter or an application because he has a right to recommence the action. An example of such an unless order is where the Court, as happened in this case, issues an order striking out a matter with liberty to apply to restore within a specified period of time failing which a matter stands dismissed. In these cases, a party has a right to recommence a fresh action if it is dismissed because he fails to apply to restore it in the prescribed time because the initial case was not determined on the merits but rather a technicality.***
>
> ***.... The Courts are also in the practice of issuing such unless orders from the second default by a party that is to say, where a party is a persistent defaulter or procrastinator... but in view of the fact that the end result is not to deny a party his day in Court, there is nothing wrong, for purposes of case management, for a Court to issue such an order on the first default."***

In the matter in casu, I am of the view that the plaintiffs herein have defaulted in prosecuting this matter as the record will show that time and time again, they have stayed away from Court when the matter was scheduled to come up. The record shows that about two months after the said matter was dismissed, Counsel for the plaintiffs filed summons to set aside the said order dismissing the matter. Counsel did file an affidavit as well as skeleton arguments but there was no appearance again when the matter came up for hearing. I note that the plaintiffs, in their affidavit, stated that the application to set aside this action was premature as there was no inordinate delay on the part of the plaintiffs to prosecute the matter. I am of the considered view that the reason this matter was

dismissed was because of the persistent absence of the plaintiffs in court as shown on record.

In the affidavit in support of the summons to set aside the order dismissing the matter, there was an exhibit showing order for dismissal of appeal for want of prosecution from the Court of Appeal and that to me only goes to show that the plaintiffs did not prosecute the matter even in the Court of Appeal though I will not delve into this.

In my considered view, all of the above seem to indicate that the plaintiffs herein were not serious to prosecute this matter hence the matter being dismissed for want of prosecution.

Delivered at Lusaka this ......7th...... day of ......October...... 2020

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ELITA PHIRI MWIKISA
JUDGE