

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2023/HP/0682

BETWEEN:

DBK MANAGEMENT CONSULTATION LIMITED PLAINTIFF
AND
DANGOTE CEMENT (ZAMBIA) LIMITED DEFENDANT



Before the Honourable Ms. Justice S. Chocho, in Chambers.

For the Plaintiff : Mr. M Lisimba Messrs Mambwe, Siwila & Lisimba
Advocates
For the Defendant : Mrs. S.K. Sinkamba & Mr. Z. Phiri Messrs Lynda
Mataka & Partners

R U L I N G

Cases referred to:

- i) *James Miling Com Limited V Imex International (Pty) Ltd the SCZ No. 20 of 2002*
- ii) *Amanita Zambia Limited Nkhosi Breweries Limited 2011 ZR*

Legislation referred to:

1. *Order XXXIX Rule 2 of the High Court 27 of Laws of Zambia*
2. *order XXXIX Rule 1 of the High Court 27 of Laws of Zambia*
3. *Order XIX Rule 7, Amendment Rules, SI 58 of 2020, Chapter 27 of the Laws of Zambia.*

1. **INTRODUCTION**

1.1. This Ruling is in respect of an application made by the Plaintiff seeking an Order for special leave to apply for review of this Court's Ruling of 19 December 2023. The Plaintiff's application is made pursuant to Order XXXIX Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia.

2. **BACKGROUND**

2.1. The Plaintiff commenced their action against the Defendant on 25th April, 2023 by Writ of Summons and Statement of Claim for liquidated sum of K 3,624,841.23, interest and costs.

2.2. The Defendant filed its Defence and entered Appearance to the Plaintiff's claim on 16th May, 2023.

2.3. This Court struck the matter off the active cause list on 21st August, 2023 at a status conference hearing. At said hearing the Defendant informed the Court that the Defendant had since made full payment of the Plaintiff's claims save for costs and the parties were engaging in discussions on costs and withdrawal of the action.

2.4. The Plaintiff filed an application to restore the matter to active cause list on 20th September, 2023 which application was granted on 27th September, 2023.

2.5. The Court issued Notice of hearing on even date 27th September, 2023 which Notice was served on the Plaintiff together with the order restoring the matter to active cause list. Matter was scheduled for status conference on 15th November, 2023.

2.6. The Defendant filed an application for dismissal of the matter on 26th September, 2023 which application was denied on 2nd October, 2023 by reason of paragraph 2.4 and 2.5 above.

- 2.7. The Plaintiff failed to appear before court on the 15th November, 2023. The Defendant informed the Court that the status was that the Plaintiff had basically been paid off save for costs. This court adjourned the matter to 19th December 2023 to allow for the Plaintiff to attend Court and confirm the status. Notices of Hearing were issued and served on both parties by the Court.
- 2.8. The Plaintiff once again did not appear before court on 19th December, 2023 and no excuse was advanced by the Plaintiff for their absence. This court proceeded to dismiss with costs, the Plaintiff's action pursuant to Order XIX Rule 7, Amendment Rules, S.I 58 of 2020, Cap 27 of the Laws of Zambia.
- 2.9. The Defendant filed a typed out order of the dismissal of action on 10th January, 2024 which was signed by this Court on 17th January, 2024.
- 2.10. The Plaintiff filed on 31st January 2024 an application for review of this Court order of 19th December, 2023.
- 2.11. The Defendant filed process in opposition to the Plaintiff's review application on 12th April, 2024.
- 2.12. The Plaintiff filed a Notice of withdraw of its application for review, on 23rd April 204 and on even date filed an application for special leave to apply for review out of time pursuant to order XXXIX Rule 2 of the High Court 27 of Laws of Zambia.
- 2.13. The Defendant proceeded to file on 8th May, 2024 Notice of Intention to raise preliminary issues and an affidavit in opposition to Plaintiff's application for special leave to apply for review out of time.
- 2.14. At the hearing on 9th May, 2024, the Plaintiff conceded to the Defendant's preliminary issue and sought leave to withdraw their

application of 31st January 2024, which leave was granted and the Defendant was granted costs.

- 2.15. The parties were given, two weeks to attempt excuria settlement after which time this Court would proceed to issue it's ruling.

3. **AFFIDAVIT EVIDENCE**

- 3.1. The Plaintiff relies on the averments in the Affidavit in Support of the Summons herein. The gist of the application as gleaned from the said affidavit is that the Plaintiff avers that the Defendant's Counsel should have informed the Court that the parties were engaged in excuria settlement with draft consent orders exchanged between them, as they had spoken before the hearing of 19th December 2023.
- 3.2. It is avered that the Defendant only filed the formal order on 10th January and served the Plaintiff on 22nd January, 34 days after the hearing of 19th December, 2024.
- 3.3. The Plaintiff further avered that the Defendant's Counsel should have given this Court the material fact of the excuria settlement discussions. Calling this inappropriate and unfair.
- 3.4. The Plaintiff further sought to entreat this court to grant special leave to review its order dismissing the entire matter.
- 3.5. The application is opposed by the Defendant who in it's Affidavit in opposition avers that this matter has come up for status conference thrice and at all dates the Plaintiff has not/never appeared nor offered explanation for their absence.
- 3.6. The Defendant avered that the action was struck off the cause list once before for failure by the Plaintiff to attend Court.

- 3.7. The Defendant avers that it had informed the Court of the excuria settlement engagements and consent order would be filed but the Parties failed to settle.
- 3.8. The Defendant refutes allegations that the Plaintiff informed them of their absence at Court on the 19th December, 2023.
- 3.9. The Defendant further avers that the Defendant returned the draft consent order after 4 months with a new claim for K223,549.12.
- 3.10. The Defendant further avers that the duty to prosecute the matter lies with the Plaintiff who failed to conduct a search to determine what transpired on the scheduled hearing of 19th December, 2023.
- 3.11. The Defendant avers that the Plaintiff has failed to provide the Court with a justifiable reason for their delay in filing application for review within the legally provided 14 days.

4. **THE LAW**

- 4.1. I have had occasion to review and consider that Plaintiff's application having heard Counsel for the Plaintiff and Defendant, the Parties' evidence, skeleton arguments and list of authorities cited herein for which I am grateful.
- 4.2. This Court has jurisdiction to grant terminal ruling as issued against the Plaintiff and also power to grant special leave to file for review out of time. The same is provided for under Order 19 Rule 7 of the High Court (Amendment) Rules SI 58 of 2020 and Order 39 Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia.
- 4.3. The parties rely on various authorities for its application which I shall not repeat as the same are on record.

Order 19 Rule 7 provides: -

“A Judge shall dismiss an action if the parties fail to attend a scheduling conference on two occasions without justifiable cause.”

Order 38 Rule 2 provides:-

“Any application for review of any judgment/decision must be made no later than fourteen days after such judgment/decision. After the expiration of fourteen days, an application for review shall not be admitted, except by special leave of the Judge on such terms as seem just.”

- 4.4. I the case of **JAMES MILING COM LIMITED V IMEX INTERNATIONAL (PTY) LTD THE SUPREME COURT¹** held:-

“For review under Order 39 Rule 2 of the High Court to be available, the party seeking it must show that he has discovered fresh material evidence which has had material effect upon the decision of the Court and has been discovered since the decision but could not with reasonable diligence have been discovered before.”

5. COURT'S ANALYSIS AND DECISION

- 5.1. The clear and undisputed facts are that this Court dismissed the Plaintiff's action in its entirety on 19th December, 2023. The said ruling was indeed passed solo moto.
- 5.2. The facts surrounding this matter are clear that the Plaintiff has never, prior to the terminal ruling, appeared before this Court on any of the scheduled hearing dates.
- 5.3. It appears to me that the Plaintiff bases it's application on fact that the Defendant served the formal order 34 days it was made by this court.

I am of the opinion that the Plaintiff cannot leave the prosecution of its matter with the Defendant or Court and expect Its interests to be considered without some form of fatal repercussions. This Court's terminal ruling was passed on 19th December, 2023, at a scheduled date of hearing known by the Plaintiff and duly communicated, by both the Court and the Defendant. The Plaintiff should have attended Court and present its case or at the very least conducted a search to determine what transpired at the hearing, in his absence.

The Plaintiff not having actively prosecuted this matter nor attended any of the said hearing dates has no one but themselves to blame for the repercussions of their non-appearance.

- 5.4. The other ground/reason the Plaintiff advances for special leave to review out of time is that, it has discovered fresh material evidence, in that the Plaintiff believes the Defendant did not inform this Court that the parties were engaged in excuria settlement discussions.

How this excuses the Plaintiff's failure to attend Court on all occasions is not clear in my mind. The record is clear that the Defendant in fact informed the Court of the said discussions on two hearing dates – August 21st 2023 and November 15th 2023.

- 5.5. In the Jamas Milling case, it is clear that the test for granting such special leave as sought by the Plaintiff in casu, **a party needs to show that it has discovered fresh material evidence which has had material effect upon decision and further the fresh material evidence could not with reasonable diligence has been discovered before.** (Emphasis my own).

I opine that in casu, no stretch of the imagination can afford the circumstances / facts to fall within the definition of fresh evidence which could not have been, with reasonable diligence discovered before

my decision of December 19th 2023. It is abundantly clear from the record that the Plaintiff has not prosecuted this matter nor attended any of the court's hearing dates.

5.6. I further opine that the plaintiff has totally failed to show reasonable excuse for it's disregard to the 14 day rule in which a party is to file for review.

5.7. I find that the Plaintiff has no excuse for it's failure to attend court on pre-scheduled hearing dates nor its disregard of court rules and orders.

It is trite law that a party that disregards or fails to strictly follow to the rules of court does so at its own peril. The case of **AMANITA ZAMBIA LIMITED NKHOSI BREWERIES LIMITED 2011 ZR²** is referred to.


6. **CONCLUSION**

6.1. With the above in mind I cannot exercise my discretion in favour of the Plaintiff. Therefore, the Plaintiff's application fails.

6.2. I must state for the record that counsel as an officer of the Court, owes a very important and cardinal duty to the Court and should not be seen to aid parties in abusing court process, and disregard Court rules.

6.3. I hereby dismiss the Plaintiff's application with costs to the Defendant, to be taxed in default of agreement.

Delivered at Lusaka on 29th May, 2024.


S. CHOCHO
HIGH COURT JUDGE

