

IN THE HIGH COURT FOR ZAMBIA
AT THE NDOLA DISTRICT REGISTRY
HOLDEN AT NDOLA
INDUSTRIAL/LABOUR DIVISION

IRD/ND/31/2009

BETWEEN:

GODFREY MUKWATO & OTHERS

APPELANTS

AND

KAGEM MINING LIMITED

RESPONDENT

Before: Hon. Judge D. Mulenga this 14th day of July, 2017.

For the Complainants : Mr. T. Chabu - Not in attendance

For the Respondent : Mr. Mbindo - Not in attendance

JUDGMENT

Cases referred to:

1. **Evans v Bartlam (1837) A.C. 473 at 478**
2. **Darlington v Mitchell Construction Company Limited (1966) Z R 10
(HC)**
3. **Zambia Consolidated Copper Mines Limited v James Matale (1995-97)
Z R 144**

4. **Zambia Consolidated Copper Mines Limited v Siame & Others (2004)
Z R 193**
5. **D.E. Nkuwa v Lusaka Tyre Services (1977) Z R 43**
6. **Twampane Mining Cooperative Society Limited v E and M Storti
Mining Limited (2011) Z R 67 Vol. 3**

Legislature referred to:

1. **Rule 47 of the Industrial Relations Court Rules**
2. **Rule 48 (1) (2) of the Industrial Relations Court Rules**
3. **Article 118 (1) (2) of the Constitution of Zambia (Amendment) No. 2 of
2016**

This is an appeal by the Complainants hereinafter referred to as the 'Appellants', against the whole Ruling of the Learned Deputy Registrar dated 2nd August, 2016 in which she dismissed the Appellants' application for special Leave to Appeal out of time and stay of execution pending determination of Appeal.

The Ruling against which the Appellants sought special Leave to appeal against before the Learned Deputy Registrar is dated 17th April 2015 and an Order dated 14th February, 2016.

The background to the appeal is that the Appellant herein filed a Notice of Complaint on 29th April, 2009 on the following grounds:-

- (a) The summary dismissal of Complainants were unlawful, illegal, null and void and without justification.

(b) The Complainants were unfairly treated and victimised because none of them was ever found with stones alleged to have been stolen.

The Appellants sought the following relief:

- (a) An order and declaration that the purported summary dismissal of the Complainants were unlawful, illegal and null and void.
- (b) Damages for illegal and unlawful dismissal.
- (c) An order that the Complainants be paid their salary arrears and other benefits pertaining thereto from the date of dismissal to the date of judgment.
- (d) Any other relief the Court may deem fit.
- (e) Costs

Upon hearing the parties, the Court rendered its decision through the judgment dated 20th January, 2012, deciding in favour of the Appellants to the effect that their employment was terminated by the Respondent contrary to the implied terms thus the same rendered the dismissal unlawful or wrongful. The Court accordingly referred the matter to the Learned Deputy Registrar for assessment of damages.

The Learned Deputy Registrar rendered her judgment on assessment of damages on 25th March, 2013, awarding the appellants twelve (12) months salary plus their perquisites as damages for loss of employment.

The Appellants through their then advocates Messrs V.K. Mwewa & Company via a letter dated 15th April, 2013 with a schedule of computation of the appellants' judgment sums demanded a sum of K302, 780,305.40.

The Computation of judgment sum for each Complainant was as follows:-

- | | | |
|--------------------|---|----------------|
| 1. Godfrey Mukwato | - | K64,979,222.40 |
| 2. Joseph Bwalya | - | K88,329,960.00 |
| 3. Justin Katala | - | K67,582,303.20 |
| 4. Nathan Mbewe | - | K81,896,820.00 |

The demanded judgment sum of K302, 780,305.40 together with KR85, 000.00 Legal Costs was liquidated by the Respondent through Messrs V.K. Mwewa & Company, by 20th May, 2013.

On 2nd April, 2015, the then Applicants advocates Messrs V.K. Mwewa and Company filed a Noticed of withdrawal as advocates for Appellants, the said notice was supported by an affidavit.

On the same date, 2nd April, 2015 the Appellants acting in person, filed a Writ of Fieri facias to levy an amount of K2, 2002, 890.73 the said Writ of Fieri facias was executed and a number of the Respondents assets were seized by Court Bailiffs.

The Respondent through its advocates moved the Court to set aside the Writ of Fieri facias for irregularity and the learned Deputy Registrar by his ruling dated 17th April, 2015 granted the Respondent's application. The Writ of Fieri facias was set aside for irregularity with costs to the Respondent. The Respondent further obtained an Order of Stay of

Proceedings pending the settlement of costs by the Applicants, dated 14th April, 2016.

The Appellants new advocates Messrs Terrence Chabu & Company filed a Notice of appointment of Advocates on 27th April, 2016 and on 20th May, 2016 filed on behalf of their clients an application for special Leave to appeal out of time and stay of the Ruling dated 17th April, 2015 and Order dated 14th April, 2016 (staying Proceedings pending settlement of costs).

The Learned Deputy Registrar by her ruling dated 2nd August, 2016 which is a subject of this appeal, ruled that the period of nearly one year was unreasonable delay and that the excuse for the delay given by the Complainants (Appellants) was unacceptable, she further found that the appeal had no merit and accordingly dismissed the application.

Both Learned advocates for the Appellants and the Respondent filed written Heads of arguments dated 20th April, 2017 and 12th April, 2017 respectively. Both parties' advocates entirely relied on their written Heads of Arguments and authorities.

The Appellants through their Learned advocates have argued on reliance on **Order 58/1/3 of the Rules of the Supreme Court 1999 (White Book)** that this Court should deal with the within Appeal by way of re-hearing of the application which led to the Order or Ruling subject of this appeal. I have no doubt that, that is the proper position of the law and it is for the said reason there has been an endeavour to give a detailed background to the application herein.

The holding in **Evans v Bartlam**¹ and the affirmation of the said holding in the case of **Darlington v Mitchell Construction Company Limited**², as the same relates to the exercise of discretion by this Court in ascertaining whether or not to grant special Leave to appeal out of time is well taken and cannot be disputed.

Learned Counsel for the Appellants submitted that, the appeal herein should be allowed on the ground that the within Court is a Court of substantial justice which has discretionary powers to extend time for appealing even if the same has expired, as provided for under **Rule 47 of the Industrial Relations Court Rules** which provides:-

The time prescribed by these Rules or by order of the Court for doing any act may be extended (whether it has already expired or not) or abridged, and the date appointed for any purpose may be altered, by order of the Court.

Rule 48 (1) (2) of the Industrial Relations Court Rules provides:-

- (1) Failure to comply with any requirements of these Rules shall not invalidate any proceedings unless the Court otherwise directs.*
- (2) The Court may, if it considers that to do so would lead to the more expeditious or economical disposal of any proceedings, or would be desirable in the interest of justice, dispense with the taking of any steps required or authorised by these Rules.*

The Appellants argues that, in the interest of justice, this Court has discretionary powers to dispense with the requirement of thirty (30) days' period for appealing. They also rely on **Article 118 (1) (2) of the**

Constitution of Zambia (Amendment) Act No. 2 of 2016, which emphasises that the Courts shall be guided by the principles such as adequate compensation to be awarded, where payable and that justice shall be administered without undue regard to procedural technicalities.

The Appellant's Counsel also referred the Court to the case of **Zambia Consolidated Copper Mines Limited v James Matale**³ and that of **Zambia Consolidated Copper Mines Limited v Siame & Others**⁴ in which the Supreme Court emphasised that the Industrial and Labour Relations Court has a mandate to administer substantial justice unencumbered by rules of procedure.

According to Learned Counsel for the Appellants, the cases of **D.E. Nkhuwa v Lusaka Tyre Services**⁵, and **Twampane Mining Cooperative Society Limited v E and M Storti Mining Limited**⁶, have been overtaken by events, namely Article 118 (1) (2) of the Constitution of Zambia (Amendment) No. 2 of 2016.

On the other hand Learned Counsel for the Respondent submitted that contrary to the submissions of the Learned Counsel for the Appellants, the cases of **D.E. Nkhuwa v Lusaka Tyre Services Limited** and **Twampane Mining Co-operative Society Limited v E and M Sporti Mining Limited** are not only authoritative but binding on this Court.

It is certain that the Appellant's appeal herein is against the whole ruling of the Learned Deputy Registrar, dated 22nd August, 2016, in which she

refused to grant the appellants' application for special Leave to appeal against the earlier ruling, setting aside the Writ of Fieri facias, dated 17th April, 2015 and an order of stay of Proceedings pending settlement of costs, dated 14th April, 2016.

Considering the fact that the ruling which was being appealed against was rendered on 17th April, 2015 and the application for special Leave to appeal was made on 20th May, 2016, it took the appellants herein one year to seek the said leave to appeal out of time.

I am in agreement with the submission of Learned Counsel on reliance on the persuasive decision of the High Court in the case of **Darlington v Mitchel Construction Company Limited**², that on appeal to a Judge from a Registrar, the former must exercise his judgment and discretion anew and independently as though the matter came before him for the first time, though he must give the weight it deserves to the Registrar's decision.

I am mindful of the arguments and submissions of Learned Counsel for the Appellants in reference to the Supreme Court's decision in the case of **Zambia Consolidated Copper Mines Limited v James Matale**³ as it relates to the requirement by this Court to do substantial justice between the parties and not to be restrained by technicalities. However, it must be appreciated that there are guidelines which ought to be observed in ascertaining whether or not to grant an application for Leave to file a notice of appeal out of time.

Contrary to the submissions of Learned Counsel for the Appellants that the decisions in *D.E. Nkhuwa v Lusaka Services Limited*⁵ and *Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited*⁶, have been overtaken by events namely Article 118 (1) (2) of the Constitution of Zambia (Amendment) No. 2 of 2016, the decision therein are directive, authoritative and binding on this Court.

In **D. E. Nkhuwa's** case the Supreme Court directed that:

- i. *The granting of an extension of time within which to appeal is entirely on the discretion of the Court, but such discretion will not be exercised without good cause.*
- iii. *In addition to the circumstances of the delay and reasons therefore which provide the material on which the Court may exercise its discretion another most important factor is the length of the delay itself.*

A critical perusal of the Court record does not reveal any reasonable cause given by the appellants herein for the delay in lodging an appeal. I agree with the Learned Deputy Registrar's observation that from the actions of the appellants they had no intention of appealing against the ruling in issue. Also that the period of one year is unreasonable delay.

This Court is alive to the fact that it cannot delve into the merits and demerits of the main appeal, but it has jurisdiction in ascertaining whether or not to grant leave to appeal out of time and Stay of Execution of the Order granted to the Respondent for stay of proceedings pending payment of Costs, to weigh whether there are prospects of the appeal succeeding.

In the case in casu, the former advocates for the appellants attended to the computation of the Appellants' judgment sum and Legal costs which they presented to the Respondent's advocates. The Respondent liquidated the judgment sum and Legal Costs to the appellants thorough their former advocates.

As observed by the Learned Deputy Registrar in her ruling, the appellants after receipt of the judgment sum but upon withdrawal of their former advocates proceeded to issue a Writ of Fieri facias without an application or an order for recalculation of the judgment sum. It is the said issuance of the Writ of fieri facias which was found to be irregular and was accordingly set aside. I therefore, find the appellants have not demonstrated that their appeal against the ruling of setting aside the Writ of Fieri Facias for irregularity has any prospects of success.

For the foregoing reasons I find that the appeal herein has no merit, the Learned Deputy Registrar was on firm ground when she dismissed the application. The appeal herein is accordingly dismissed with costs to the Respondent.

Informed of Right of Appeal to the Court of Appeal within thirty (30) days of the date hereof.

Dated at Ndola this **14th** day of **July, 2017**.

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Hon. Justice D. Mulenga
JUDGE