IN THE SUPREME COURT OF ZAMBIA — APPEAL NO. 18 OF 1993

HOLDEN AT NDOLA

(Civil Jurisdiction)

ZAMBIA ELECTRICITY SUPPLY CORPORATION LIMITED — Appellant

Vs

DOUGLAS DIMBA MWANGO — Respondent

Coram: Sakala, Chaila and Muzyamba, JJJ.S.
9th June and 9th September, 1993.

Mr. G.Zulu, Legal Counsel, Zesco, for the appellant.
Mr. S. Malama of Jaques and Partners, for the respondent.

J U D G M E N T

Sakala, J.S., delivered the judgment of the court.

On 9th June, 1993 when we heard this appeal, we allowed the appeal, set aside the assessment by the District Registrar and remitted the question to the High Court before a District Registrar at Ndola. We ordered the question of costs in this court and in the court below to abide by the outcome of the assessment before the District Registrar. We said then that we shall give our reasons later. We now give those reasons.

This is an appeal from an assessment of damages by the District Registrar at Kitwe High Court in which the respondent was awarded damages in the total sum of K4,703,822.80 with interest at the rate of 35 percent from the 14th of November, 1988 up to the date of payment for the loss and expense caused by the negligence of the appellant, its agents or servants or workman whereby the respondent's farm was set on fire.

For convenience, we shall refer to the appellant as the defendant and the respondent as the plaintiff which they were in the court below.

The brief relevant facts leading to this appeal as can be ascertained

from the record are that sometime in November, 1988, the plaintiff issued a writ of summons claiming damages for loss and expense caused by the negligence of the defendant, its servants, agents or workman whereby the plaintiff's farm No. 3093 near Kitwe was set on fire. On 15th January, 1991, the plaintiff obtained judgment against the defendant on liability. The question of assessment of damages was referred to the District Registrar at Kitwe. On 28th January, 1991 notice of appointment for assessment of damages was issued for 7th March 1991 at 11.30 hours. This notice was supported by an affidavit. The record of proceedings is silent as to what happened on the 7th of March 1991 at 11.30 hours but paragraphs (6) and (7) of the affidavit in opposition in an application for leave to review the judgment of 18th June 1991, which was the assessment of damages reads as follows:-

> "6 That following receipt of the documents above Mr. Zulu travelled to Kitwe High Court, on the 7th of March,1991.
>
> 7 That unfortunately, owing to the absence of the District Registrar the matter was not heard. Mr. Maiba then advised myself and Mr. Zulu to appear for assessment on the 9th of April, 1991."

And paragraphs 5 and 6 of the affidavit in support of an application for leave to review the assessment of damages reads as follows:-

> "5 That when this matter came up for assessment I instructed Mr. Chulu of Ellis and Company in Kitwe to attend on our behalf and ask for an adjournment firstly because I was unable to travel from Lusaka and secondly because we had received no affidavit in support for us to consider the issue and make an effective reply.
>
> 6 That after the application for adjournment was granted, no notice of hearing was sent to me or to Mr. Chulu and I am surprised that Mr. Chulu made an appearance on my behalf."

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On 30th April, 1991, proceedings for assessment were held. Mr. Chulu as agent for the defendants advocate had this to say:-

> "I was informed that my Principal will attend to this matter. I don't Know why he has not appeared. I can not defend the matter, I have no instructions."

The court decided to proceed with the matter in the absence of the Principal. Although Mr. Chulu was present, he did not cross examine the plaintiff. At the end of the plaintiff's evidence, counsel for the plaintiff informed the court that he wished to put in written submissions "before the end of next week." The judgment was accordingly reserved. On 18th June, 1991, the reserved judgment was delivered. On 5th July, 1991, the defendant issued summons for leave to apply for review of the judgment dated 18th June, 1991. In a reserved ruling dated 10th November, 1992 (17 months later) the learned District Registrar ruled that sufficient grounds had not been shown to warrant a review of judgment on assessment. The application for review was dismissed.

To complete the history of the appeal, the defendant applied for leave to appeal against the judgment. The leave was also refused by the High Court. Leave was only granted by the Supreme Court.

We have deliberately set out the history of this appeal because of Mr. Malama's request to us that we should take advantage of this case to set out guide lines making it clear to the courts below as to when proceedings can take place in the absence of a party and on how many times is a party allowed to be absent before the proceedings can commence in his absence. In our view guidelines are already there. These are contained in Orders 35 and 39 of the High Court Rules relating to non attendance of parties at hearing and review of judgment respectively.

The history of this appeal suggests that both the court and the parties did not address themselves to these rules. The gist of the

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summarised ground of appeal argued before us in so far as it is relevant to the issue raised was that the District Registrar erred in proceeding with the hearing on assessment in the absence of the defendant or its counsel.

Order 35 of the High Court Rules explains the procedures where in the first place there is no appearance of both parties and where there is non appearance of the plaintiff. Rule (3) which specifically applies to the non appearance of the defendant reads as follows:-

> "If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant."

From the rule the court can only proceed to hear the cause and give judgment on the evidence adduced by the plaintiff in the absence of the defendant if

(a) the defendant does not appear or sufficiently excuse his absence or neglect to answer when duly called, and

(b) upon proof of service and notice of trial.

The court however still has a discretion to postpone the hearing of the case and direct notice of such postponement to be given to the defendant. In the instant case it is quite clear that while the defendant did not appear or sufficiently excuse himself there was no proof of service of notice of trial on the date the court proceeded. It is significant to observe that there was no explanation from the court why the assessment was not heard on the appointed day of 7th March 1991. The matter was heard on 30th April, 1991 in the absence of the defendant and its advocate although the agent was present but without instructions. Although the court appeared in a hurry on that day to hear the matter, it still

granted an application for written submissions to be filed within one week from that date. The reserved judgment was only delivered on 18th June, 1991, a period of about one month and eighteen days.

The advocates for the defendant did not know the correct procedure to adopt when judgment was obtained against them in their absence. Instead of making an application under Order 35 to set aside judgment obtained in their absence, they applied under Order 39 which provides for power of review in matters where a judgment has been obtained on merit in the presence of parties. The advocates for the defendant did not help the situation either. The learned District Registrar should not have entertained their application for review either. The application for review was misconceived although the learned District Registrar properly refused it but for wrong reasons.

From the foregoing, we are satisfied that judgment having been obtained in the absence of the defendant the proper course for the defendant was to apply for it to be set aside. We are unable to say that had a proper application been placed before the District Registrar, she would still have come to the same conclusion of refusing it. It was for the foregoing reasons that we allowed the appeal, set aside the assessment and remitted the matter to be heard before a District Registrar at Ndola and costs here and in the court below to abide by the out come of the decision of the court below.

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E.L. Sakala,
SUPREME COURT JUDGE.

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M.S. Chaila,
SUPREME COURT JUDGE.

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W. M. Muzyamba,
SUPREME COURT JUDGE.