IN THE SUPREME COURT OF ZAMBIA APPEAL No.SCZ 21 OF 1994

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

B E T W E E N:

LEONARD CHISHIMBA APPELLANT

AND

MWAISENI STORES LIMITED RESPONDENT

Coram: Bweupe, D.C.J., Chaila and Muzyamba J.J.S.

20th June 1994 and 9th August 1994

For the Appellant: In person

For the Respondent: R.N. Mandona, Permanent Chambers

J U D G M E N T

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

This is an appeal against a judgment of the Industrial Relations Court given on 21st January, 1994 refusing to order a re-instatement of the appellant by the respondent.

The facts of the case were that the appellant was employed by the defendant at their Bwacha Department Store at Kabwe as a Store Manager and had supporting staff under him, one of whom was Richard Banda, a cashier. On 21st January, 1991 he was charged with dishonest conduct. It was alleged that in October and November 1990 he authorised the cashier to encash mealie meal coupons amounting to K17,230. He was taken before a Disciplinary Committee which found him guilty and on 26th March, 1991 he was dismissed. He then filed a complaint in the Industrial Relations Court alleging that he was discriminated against in that the area Manager, South Mr. Kamopo and Store Manager, Lusaka Mr. Namanza who were implicated at their respective stations, of same misconduct weren never dismissed.

The appellant filed two grounds of appeal which in essence amounted to that the lower court erred in its finding that the appellant was not discriminated against. In arguing his appeal the appellant said that he did not authorise the cashier to encash the coupons. That when the cashier encashed the coupons he was not present. He was at home. That whereas the cashier was interrogated by the Police he was not. That it was therefore wrong for the court to have found, as the Disciplinary Committee did, that he was involved in the encashment of the coupons. He further argued that Mr. Kamopo and Namanza who were involved in encashing mealie meal coupons were not dismissed but merely demoted. That the lower court was therefore wrong to have found that he was not discriminated

against and urged the court to allow the appeal. In response, learned Counsel for the respondent Mr. Mandona said he would rely on the heads of argument he filed in court on 19th April, 1994.

We have considered the evidence on record and the arguments on both sides. In his evidence the appellant said he and Mr. Banda, the cashier were dismissed for encashing the coupons. As regards Kamopo and Namanza he said in cross examination at page 10 of the record:

> "Kamopo was acquitted by a Disciplinary Committee. When one (was) is acquitted he (was) is a free man. I do not know the details of Namanza's case. I do know Namanza was charged with the offence of causing shrinkage".

And the respondent's witness at page 12 said:

> "Mr. Kamopo is an employee of the respondent. He was disciplined for shrinkage just as Namanza."

It is quite clear from the evidence that Kamopo and Namanza were charged and disciplined for a different offence from that which the appellant was charged of and subsequently dismissed and it is common ground that Mr. Banda who was charged with a similar offence as the appellant was also dismissed. The complaint by the appellant was that he was discriminated against in that he received a severe punishment than Mr. Kamopo and Mr. Namanza. Discrimination, in our view, in the context it is used in the Industrial Relations Act and in the circumstances of this case means treating an employee differently for the same offence and same degree of involvement. In this case the appellant was found guilt of a different offence from that which Mr. Namanza and Mr. Kamopo were facing or found liable. The question of discrimination did not therefore arise and we would agree with Mr. Mandona's argument that the lower court did not in any way err in its conclusion. We would therefore dismiss the appeal with costs in this court to the respondent to be taxed in default of agreement.

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B.K. BWEUPE
DEPUTY CHIEF JUSTICE

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M.S. CHAILA
SUPREME COURT JUDGE

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W.M. MUZYAMBA
SUPREME COURT JUDGE

IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL NO.2 OF 1994
HOLDEN AT NDOLA
(Civil Jurisdiction)
B E T W E E N:

CHIWINDI SIULUTA AND 18 OTHERS Appellants

and

PHILLIP SEVEN SITANZYE Respondent

Coram: Gardner, Sakala and Chirwa JJJs at Ndola on 10th June 1992, 9th March and 7th September, 1994

For the Appellants: Mr. M. Chitabo, Chitabo Chiinga Associates

For the Respondent: Mr. R.E. Mwape, R.E Mwape and Co

J U D G M E N T

Chirwa J.S. delivered the judgment of the Court

In this appeal for clarity, we will refer to the respondent as plaintiff and the appellants as defendants as that is what they were in the court below. To give a better picture of this case it is necessary to set out the history of the matter.

The dispute involves that piece of land known as Subdivisions 31 and 32 of Farm "T" situated in the Mbala District of the Northern Province of Zambia and involves about 10,696.322 acres. This land was under the indigenous local people until on 1st January 1922 when the land was given under "Permit of Occupation" to Denis Frank Dugan and Henry Hubert Ostler by the British South Africa Company who had the administrative authority over the then Northern Rhodesia. After the issuance of this permit, there is no other title document on the court record affecting this land until the third "Provisional Certificate" issued to the plaintiff dated 12th December 1972 and this Provisional Certificate has an endorsement that the first Provisional Certificate was issued on 11th February, 1946.

2/...Then in September 1990

Then in September 1990 there were issued two unnumbered Certificates of Title in the name of the plaintiff but containing registration numbers. The first is that of Subdivision 31 which is registered under T31/13 and is for 10014.403 acres; the second is for Subdivision 32 and registered under T32/11 and is for 681.92 acres.

On 4th October 1974 the plaintiff issued a specially indorsed writ against the defendants, and, according to the statement of claim attached to this writ, the plaintiff sought possession of the two farms, a declaration that the defendants were not entitled to enter or remain upon or cross the said farms and also an injunction to restrain the defendants whether by themselves or servants, agents or otherwise howsoever from entering using or remaining upon the said land. In the statement of claim, the plaintiff alleged that the defendant had on divers dates wrongfully entered the plaintiff's farms and taken possession of the said farms and had thereafter wrongfully remained in possession and that they had refused to vacate the farms unless ordered by the court. Whatever its significance, it should be noted that this action was commenced before the plaintiff obtained full certificates of title to these farms.

It is the plaintiff's case that the defendants were served with the copies of the writ and there was no appearance as a result of which the plaintiff on 28th November, 1974 obtained judgment in default of appearance.

Having thus obtained judgment in default, it would appear the plaintiff wanted to enjoy the fruits of this judgment in his favour but could not. The political leadership got involved in trying to solve the dispute without any regard to the court's judgment. It appears that a number of meetings were held; the last one, according to exhibit exhibited by one David Kowa, was on 26th May, 1976.

3/...At that meeting

At that meeting according to the uncertified and unsigned minutes some understanding was reached whereby the plaintiff agreed to give the defendants some of his land. It appears further that this understanding was not effected as on 8th August 1990 the defendants through their advocates filed a "Notice to apply for ex-parte order to stay execution of the judgment" and the body of this notice refers to the judgment obtained by the plaintiff on 28th November 1974. The application was supported by an affidavit by David Kowa, one of the defendants in which he alleged that he and others were never served with the writ of summons but does not indicate how he came to know of the judgment. He further claimed that the plaintiff does not need all that piece of land in excess of 10,000 acres and that the Kowa people have lived on that land from time immemorial. The ex-parte order was duly granted the same day, the 8th August 1990, and it seems the matter was finally decided interpartes on 15th November 1990 when the District Registrar dismissed the application saying:

> "I have considered the application by the defendants and the reply of the plaintiff. Although the defendants have given good reasons for their default they have breached one fundamental principle in that the delay on their part to apply to set aside judgment is grossly inordinate and they slept on their right for 16 years. I therefore decline to set aside judgment with costs to the plaintiff."

Then the record shows that there was notice of appeal to a judge in chambers filed on 23rd November 1990 in which the grounds of appeal were that the learned District Registrar erred in law and fact having regard to attaining circumstances when he held that the dependants had "slept" on their rights and that the learned District Registrar erred in law and failed to observe the principles governing the setting aside of default judgment not obtained on merit.

4/...This notice of appeal

This notice of appeal has an endorsement that it was to be heard by Commissioner Mwaba on 20th February, 1990 at 09.00 hours and although the record of proceedings before the learned Commissioner are not there his ruling is at page 4 of the record in which he dismissed the defendant's appeals agreeing with the learned District Registrar's observations that the delay of 16 years was inordinate and whatever rights the defendants had had been barred and extinguished; and to resurrect the action would complicate matters in that since 1974 a number of transactions have taken place affecting the land. This then is the long history of the matter.

The defendants having further been dissatisfied with the learned Commissioner's dismissal of their appeal appealed to this court filing two grounds namely that it was a misdirection by the learned Commissioner to hold that:- (a) the inordinate delay lasting for 16 years before lodging the appeal has by implication barred the remedy sought and extinguished the rights and privileges claimed and (b) that the claims in question are overtaken by events so that if the issues which have been dead for sixteen years were to be resurrected complications on the already difficult process should be expected in the sense that since 1974 to date a number of transactions effecting the same premises have taken place.

In arguing the appeal before this court Counsel for the defendant argued that the learned Commissioner erred in not exercising his discretion in not setting aside the judgment bearing in mind that service of the writ was disputed and there was need for proof of service of the same. Further the learned Commissioner should have taken into account the fact that the Mbala District Land Dispute Committee resolved that the plaintiff should give up part of the land in dispute and that this agreement was after the signing of the judgment. It was further argued that the Certificate of Title should not have been issued to the plaintiff as there was a caveat.

5/...It was finally

It was finally submitted that on public policy one man cannot deprive others of such vast piece of land.

In reply it was submitted that although the defendants deny having been served with the writ, they were served with the judgment order and they waited for too long to ask the court to set aside the judgment. On the caveat entered on the property, it was submitted that the defendants had no interest in the land and therefore the caveat is of not validity.

After hearing both Counsel, the court adjourned the matter sine die to allow the parties to explore all possible avenues to settle the matter out of court. After one year and nine months the parties restored the matter having failed to reach any agreement and it now remains for us to consider the appeal.

We have considered the arguments put to us in this appeal and in considering them we bear in mind the history of the case. The setting aside of judgment in default is the courts' discretion and in exercising this discretion the court aims at avoiding injustice which may be caused if judgment were let to stand. The primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed. There is also need to take into account the explanation of the defendant as to how the default occurred and also the time lapse between the obtaining of default judgment and the application to set it aside.

In the present case as outlined above, judgment was obtained on 28th November 1974 and the defendants applied to set aside the judgment on 8th August 1990, a period of nearly 16 years. It cannot be said that the defendants were not aware of this judgment until 1990. They were aware but preferred to involve politicians to persuade the plaintiff to give them some of his land. They have not given any reason why they preferred to pursue the matter out of court.

6/...There was no way

There was no way that the various authorities could have overruled the court's order. The plaintiff legally bought this land and we do not see any merit in the allegation that the Kowa people have been in the area for a long time and that it would be morally wrong for one man to be in possession of over 100,000 acres. Courts do not deal with morals but law. Taking into account the principles on which judgment in default can be set aside, we do not think that the defendants have satisfied those conditions and further the delay in applying to set aside judgment has been inordinate and if the defendants prayer were granted, it would cause injustice to the plaintiff. We therefore see no merit in this appeal and it is dismissed with costs to be agreed, in default to be taxed.

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B.T. Gardner
SUPREME COURT JUDGE

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E.L. Sakala
SUPREME COURT JUDGE

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D.K. Chirwa
SUPREME COURT JUDGE