IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 7 OF 2002

HOLDEN AT KABWE/LUSAKA

(CIVIL JURISDICTION)

B E T W E E N:

CHIBOTE LIMITED **1ST APPELLANT**

MAZEMBE TRACTOR COMPANY LTD **2ND APPELLANT**

MINESTONE ESTATES LIMITED **3RD APPELLANT**

AND

MERIDIEN BIAO BANK LIMITED
(IN LIQUIDATION)

RESPONDENT

CORAM: Ngulube, CJ, Mambilima and Chitengi, JJS

On 16th April and 31st July, 2002

For Appellants - C.K. Banda, SC., of Chifumu Banda and Associates

For Respondents - A.M. Hamir, SC., of Counsel

J U D G M E N T

Ngulube, CJ, delivered the judgment of the Court.

Cases referred to:-

1. **Muliango –v- Magasa (1988-89) ZR 209**

The appellants are the plaintiffs and the respondents the defendants in the action. The plaintiffs had launched proceedings to seek cancellation of transfers and assignments of a substantial number of properties to the defendants; restoration of the same to the plaintiffs and recovery of rents or mesne profits. Apart from traversing the statement of claim, the defendants pleaded a counterclaim which was introduced as an amendment after this Court had ordered a retrial in an earlier appeal. The plaintiffs failed to plead to the counterclaim within the time ordered by the Court. The retrial never took off and the learned trial Judge accepted an application that the plaintiffs' action be dismissed for want of prosecution while at the same time allowing entry of judgment on the counterclaim. The counterclaim was for large sums of money owing as loans or advances to be recovered partly by receipt of rentals from some of the properties listed in the statement of claim and partly by assignment of the properties. In order to explain the circumstances which led to the dismissal of the claim and the entry of judgment on the counterclaim, and indeed to explain why the learned Judge refused to set aside his order, we can do no better than to quote from the Ruling of 30th November, 2001. The brief history of the case was given by the learned trial Judge in the following words:-

> ***"I intend to begin the determination of this application by giving a brief history of the case leading to the present application from the time the case was referred back to this Court by the Supreme Court for re-hearing in April, 1999.***
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> ***The case first came up on 24th April, 2000. On that day Mr. Mbindo who appeared on behalf of the plaintiffs informed the Court that he had been instructed to apply for an adjournment as Mr. Malama was still getting instructions. The case was then adjourned to 26th and 27th April for hearing. When the matter came up on 26th April, 2000, Mr. Malama applied for an adjournment as the days***

that were arranged were not convenient. There being no objection from Mr. Hamir the case was adjourned to 24th July, 2000 to 4th August, 2000. On 19th July, 2000, Mr. Malama filed a notice of motion for adjournment of the case from the dates that had been set on 26th April, 2000.

When the case came up on 24th July, 2000, Mr. Malama who appeared presented the application for an adjournment. That application was opposed by Mr. Hamir. The Court in its discretion granted the application and adjourned the case to 16th October to 20th October and 25th October to 27th October, 2000 for the hearing of the case. On 16th October, 2000 when the matter came up Mr. Malama applied for an adjournment on ground that the plaintiffs wanted to retain another Lawyer. The application was opposed by Mr. Hamir. The case was then adjourned to 19th October to enable the plaintiffs decide what to do. When the matter came up on 19th October, 2000, Mr. Mbindo who appeared on behalf of Mr. Malama informed the Court of an order to stay proceedings that had been obtained from the Supreme Court. The case was then adjourned to 22nd January, 2001 to 26th January, 2001.

On 22nd January, 2001, when the case came up Mr.Malama applied for an adjournment on the ground that their appeal had not been determined by the Supreme Court. The case was then adjourned sine die with liberty to restore.

When the matter next came up, it was adjourned to 20th August, 2001 to 24th August, 2001, for hearing. The case next came up on 27th august, 2001. On that day, Mr. Malama applied for an adjournment on the ground that Mr. Mwanawasa, SC., leading Counsel had joined the political race and he felt that he would not find time to devote to the case and the parties were attempting to find an out of court settlement, and further to enable the plaintiffs engage a State Counsel. That application was objected strongly by Mr. Hamir and Mr. Gani. However, the Court after considering the submissions decided to over rule the objections and granted application. The case was then adjourned to 26th September to 28th September, 2001, for the plaintiffs case and 29th October to 31st October, 2001, for the defendant's case.

On 26th September, 2001, when the case came up at about 10.00 hours, the plaintiffs were not represented, neither Mr. Malama nor any State Counsel was present. Mr. Hamir informed the Court that Mr. **Malama was at Court at 09.15 hours and he told them that he was going** *to robe. They did not want to take advantage. They applied for the adjournment of the case to 11.30 hours. The application was granted and the case was adjourned to 11.30 hours. When the case came up at 11.30 hours, still the plaintiffs were not represented and no excuse was given as to why the plaintiffs were not represented.*

It was then that Mr. Hamir requested the Court to dismiss the plaintiff's claims as set out in the statement of claim as against the defendant, and to order the payment of moneys held by two Banks **to** *the defendant etc. The Court after considering the conduct of the plaintiffs by staying away from the Court without any justification as they were aware of the date the same having been set in the presence of all the parties and the fact that the case had been outstanding for long because of adjournments at the instance mostly of the plaintiffs granted Mr. Hamir's application and the orders as requested. It is because of the foregoing that this application is made."*

The application referred to was brought under Order 35 or alternatively under Order 39 to set aside the Order dismissing the action and granting judgment on the counterclaim. In response to the submission that the action should not have been dismissed but merely struck off for non-attendance, the Judge said the result was the same. The first ground of appeal attacks that view. It was pointed out that when a matter had been struck off, it could under Order 35 (6) be restored to the active list on application and on sufficient good cause being shown. In contrast, a case dismissed for want of prosecution attracted wholly different considerations. In fairness to the learned trial Judge, the statement criticized by the first

ground of appeal should be viewed in the context in which it appeared in the ruling. The Judge said:-

> ***"Whether a case has been dismissed or struck out off the cause list the end result is the same. The case is removed from the cause list. Further it does not necessarily mean that a case that has been struck out of the cause list is automatically restored on the application of the plaintiff. Order No. 35 Rule 5 of the High Court Rules provides that an order obtained in the absence of such party can only be set aside on sufficient cause shown.***
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> ***Coming to the present application as would be noted from the foregoing history the case had been adjourned on numerous occasions, since its being referred back to the High Court for retrial. For sometime the Learned Counsel for the plaintiffs has been aware of the Court's concern over the numerous applications. The Learned Counsel has further been aware of the courts warnings. It was therefore surprising that notwithstanding the concerns, warnings and the fact that the Court indicated when the case was last adjourned that that was the last adjournment, the learned Counsel could just disappear."***

Left in its context, the statement complained of was not a misdirection. The learned Judge then went on to consider the affidavit of Counsel and found that no sufficient cause had been shown for his having stayed away from Court on the particular day; fully knowing that the previous adjournment had been ordered to be the last and that other people on the opposite side had travelled from abroad, Counsel had been at the Court and had said he would go and robe, only to stay away, explaining subsequently that he stayed away because he could not see himself saying what he intended to say at chambers in open Court. The learned Judge did not consider this a sufficient cause; instead he considered it to be a scheme to further delay the case and as evidence that the plaintiffs were not keen to prosecute their case.

Mr. Banda who argued the case for the appellant plaintiffs submitted that some of the previous adjournments had been for good cause and that while he could not defend a situation where Counsel said he would robe and return, and then disappeared, counsel's conduct should not be held against the party. In response, Mr. Hamir catalogued the numerous occasions and reserved trial days wasted by previous adjournments to which the defendants had been objecting. Finally he said the walkout by Mr. Malama on 26th September, 2001 was unprecedented and in the absence of any reasonable explanation no sufficient cause existed for setting aside the learned Judge's order. Mr. Banda's submission was that Mr. Malama's reasons were his own and without any connivance of the clients. Having listened to the submissions and arguments, we do not see how it can be asserted – as Ground 2 sought to do – that the Judge was in error to hold that no sufficient cause was shown. Indeed, Mr. Banda quite candidly admitted that it was inexcusable and a contempt for Counsel to walk away from Court and not return. However, Mr. Banda sought to draw a distinction between Counsel and the clients and submitted that Counsel's conduct should not prejudice the clients who are otherwise willing to prosecute their case.

It has been argued in several grounds of appeal including Ground 3 that the Judge failed to appreciate the difference between striking out for non-attendance and dismissing for want of prosecution. In the ruling appealed against, these were the very issues raised and considered. Indeed this can be illustrated by an excerpt from the Ruling where the learned Judge said:-

"Coming to the question why I had to dismiss the action as opposed to striking the case out of the cause list. I made the decision after considering that the matter has been adjourned on numerous occasions and the conduct of the learned Counsel of deliberately staying away without any justification. Striking the case out of the cause list would have been tantamount to delaying the case and condoning the conduct of the plaintiffs. Because of the foregoing I felt that it as appropriate to dismiss the action."

Perhaps we should at this stage comment on the rule of Court dealing with the non-attendance of parties at the hearing. We are quite certain that the rule governing non-attendance of parties at a hearing does not contemplate a walk out by Counsel or the staying away by a party in direct disobedience to an order to the contrary previously made by the trial Court at the last adjournment. Conduct bordering on or amounting to defiance or contempt attracts an entirely different set of considerations. The Rules of Court whether directory or mandatory regulate the practice and procedure before the Court; they are designed to enable a fair and conducive framework for the resolution of disputes. A party flouts them normally at his own peril. The Rules are often augmented by orders for directions, including orders made by a Judge in the exercise of the Court's inherent jurisdiction to control the proceedings before itself. The Judge's orders clearly stand on a higher footing than the rules and it is an extremely naïve litigant who can think of disobeying and challenging the authority of the Judge in his own Courtroom without consequences. The sad history of the retrial ordered by this Court, as adumbrated by the learned trial Judge, revealed the clearest case of reluctance or unwillingness to prosecute let alone to expedite the trial and resolution of the case. There was default in pleading to the counterclaim in the terms of the directions given by the Court, even within any extended time allowed. Such default coupled with

lack of progress and the walkout entitled the Court to conclude that there was want of prosecution meriting the dismissal of the action while granting judgment on the undefended counterclaim by default of pleading.

This brings us to consider the rest of the grounds of appeal, including the question whether there are grounds for setting aside the judgment on the counterclaim in light of a defence to counterclaim surreptitiously introduced out of time and without prior service on the defendants in a fresh bundle of documents or pleadings.

Mr. Banda submitted that it was wrong to enter judgment without requiring the defendant to call evidence on the counterclaim. The learned trial Judge explained why this had been done in the following way:-

> ***"Concerning the award of the defendant's counterclaim without hearing evidence relating to the counterclaim. The Court decided to do so because the plaintiffs had not filed a reply or a defence to the counterclaim.***
>
> ***The defendant filed a defence in which it made a counterclaim on 29th March, 2000 pursuant to the order of the Court dated 20th March, 2000. In that order the plaintiffs were directed to file a reply and defence to the counterclaim within 21 days of the date of receipt of the amended defence. On 21st June, 2000 the plaintiff filed the summons for further and better particulars of the defendant's defence and on 24th August, 2000 the plaintiffs filed the summons to amend the writ. That application was heard and dismissed on 6th October, 2000 and an appeal was made to the Supreme Court which upheld the High Court decision. However, the application for further and better particulars was not prosecuted and no reply or defence to the counterclaim has been filed. Further no application for extension of time in which to file a reply and defence to counterclaim had been made at the time of the ruling and orders***

that are sought to be set aside. Needless to say that the 21 days that was given on 20th March, 2000 had long expired."

Of course, there is a distinction between a claim to which no defence is pleaded and one which has been traversed. Mr. Banda relied on the unserved defence which had been surreptitiously included in a fresh bundle of pleadings lodged in Court, arguing that the failure to file it in accordance with the order of the Court was a mere irregularity. He relied on MULIANGO –v- MAGASA (1) where there was a defence of contributory negligence filed late but which on its face showed some merit but which the Court below refused to consider. We said where there was a defence to an action, it was preferable that a case should go for trial rather than be prevented from so doing by procedural irregularities. Mr. Banda's argument was that regardless of how it came to be before the Court, the defence to the counterclaim was there before the judge and should have been considered. In response, Mr. Hamir drew a distinction between a defence served late in the pre-trial stages and that which was sneaked into he new bundle of pleadings when the case was already before the trial Judge and when there had been default of filing within 21 days as ordered or even within the extended time granted on the application of one the advocates for the plaintiffs. Mr. Hamir submitted that if the judgment is to be set aside, it is serverable and those claims relating to the loans and advances which have not been effectively traversed are separate and the judgment in their respect should stand. These were the advances of November 1994 and others as set out in the counterclaim.

For completeness, we should mention that there was a ground complaining that the Judge should not have criticized the non-prosecution of

an application for further and better particulars of the amended defence and counterclaim when these were offered by letter from the defendant's advocates. We consider this ground to have been peripheral.

We have given very anxious consideration to this appeal and all the submissions and arguments which we have heard. The defaulting plaintiffs were unable to do any thing more than throw themselves, as it were, at the mercy of the Court. We cannot ignore the principle in the **MULIANGO** case but as in that case, we have closely scrutinized the proposed defence to the counterclaim. Having done so, we can see that it is preferable for the dispute concerning the ownership of the fifty-one or so properties in the case to be resolved on the merit at a trial. However, since justice is for both sides, it is also correct that there was no effective traverse of the counterclaim in respect of the loans and advances. There is thus merit in the submission to consider severance more so that a counterclaim is an independent cause. As the loans and advances were not effectively traversed, those parts of the judgment given below as related to the loans and advances will not be disturbed. The remainder of the judgment and the order of dismissal will be set aside and the plaintiffs again be given the chance to take their own cause of action to trial. The defendant's own amended defence and the part of the counterclaim on which the judgment is set aside will be considered in the same fresh trial which we order. The new trial should be before another Judge of the High Court, preferably in the Commercial list where delay is not tolerated.

The appeal flowed from the default of the plaintiffs and in any case it has succeeded only partially to the extent we have indicated. This is a

proper case in which to order that the costs of the appeal will be borne by the defaulters, the plaintiffs, without whose default there would have been no need for it.

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M.M.S.W. Ngulube
CHIEF JUSTICE

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I.C. MAMBILIMA
SUPREME COURT JUDGE

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P. CHITENGI
SUPREME COURT JUDGE