IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

SCZ NO. 30/2006
APPEAL NO. 190/2005

BETWEEN:

BANK OF ZAMBIA	**Appellant**
And	
RICHARD NYAMBE	**1st Respondent**
JACKSON MADIMUSA	**2nd Respondent**
FRIDAY MWALE	**3rd Respondent**
FERDINARD CHIPOTA	**4th Respondent**

Coram: Chirwa and Chitengi, JJS. Kabalata, AJS
On 18th May, 2006 and 12th December, 2006

For the Appellant:	Mr. G. C. Mulenga Legal Counsel
For the Respondents:	Mr. H. H. Ndhlovu of Messrs H. H. Ndhlovu & Company

JUDGMENT

Chitengi, JS, delivered the judgment of the court.

Cases referred to: -

1. ***Mwenya (Moses) V The People 1973 ZR 261***
2. ***R V Sussex Ex Parte McCarthy (1924) 1 KB 256***
3. ***Metropolitan Properties V Lannon (1969) 1QB577***

Legislation referred to: -

1. ***Statutory Instrument No. 71 of 1997 Section 4 and 11.***

2. ***Statutory Instrument No. 26 of 2002 Sections 18, 21(1) and 24(1)(2).***

In this appeal, we shall refer to the Appellant as the Respondent and the Respondents as the complainants, which is what they were in the Industrial Relations Court.

Reduced to a narrow compass, for the purpose of this appeal, the facts of this case are that the complainants commenced an action against the Respondent in the Industrial Relations Court seeking an order of reinstatement or in the alternative damages for wrongful dismissal. The Respondent resisted the action.

This action was, however, not tried because on 17th August 2005 the Court made an order for Mediation. When the matter went to Mediation, the Respondent did not attend mediation on two occasions. Thereupon, the complainants obtained judgment in default pursuant to ***Section 24(1) (a)(b) and 2(a)(b) of the Industrial Relations Court (Arbitration and Mediation) Rules 2002.***

Subsequent to the entry of the judgment in default, the Respondent took out a Summons to set aside the judgment in default. In the Affidavit in Support of the Summons to set aside judgment in default, the Respondent explained the reasons for failure to attend mediation. In the same Affidavit the Respondent pointed out that there was an earlier similar action between the parties, which was dismissed by the court below. In a supplementary Affidavit in Support of the Summons to set aside the default judgment the Respondent deposed that the presiding Deputy Chairman when he was Principal Resident Magistrate dealt with the criminal aspect of this case and acquitted the Complainants.

The Court below refused to set aside the judgment in default saying the Respondent had failed to attend mediation as ordered by the court and that there was no cause to set aside the judgment.

The Respondent now appeals to this court against the refusal by the court below to set aside the judgment in default.

The Respondent filed five grounds of appeal. However, in the view we take of this appeal, the determination of the appeal turns on grounds (2) and (5) and, therefore, it is not necessary for us to deal with grounds (1) which relates to lack of service

and (3) which relates to the Respondent not being afforded a hearing etc.

The second ground of appeal is that the court below erred in law by proceeding to adjudicate this matter without the presiding Judge's recusal therefrom, the said Honourable Judge having been the Magistrate in the criminal trial of the Respondents.

The fifth ground of appeal is that the court below erred in law by placing reliance on ***Rules 24(1) and (2) of the Industrial and Labour Relations Court (Mediation and Procedure) Rules***, which said Rules are offensive to the letter and spirit of Section 85(5) of the Principal Act.

Both counsel filed detailed written heads of argument on which they relied. Counsel also made very brief oral arguments which are basically a repeat of the written heads of argument.

On ground two, Mr. Mulenga, learned counsel for the Appellant argued that the presiding Deputy Chairman in the Court below having presided over the criminal aspect of this case where the Complainants were the accused, the learned presiding Deputy Chairman should have recused himself in

this case. Mr. Mulenga pointed out that the presence of the presiding Deputy Chairman on the panel raised issues of partiality. Rephrased, Mr. Mulenga's submissions go on to say that the issues is not one of real likelihood of bias but the impression given to the people. In support of this statement Mr. Mulenga cited, inter alia, the case of ***Mwenya (Moses) V The People***[1], a High Court decision, in which the cases of ***R V Sussex Ex Parte McCarthy***[2] and ***Metropolitan Properties V Lanon***[3] were cited with approval.

On ground five, Mr. Mulenga's arguments and submissions center on the ground that ***Rule 24(1)(2) of the Industrial Relations Court Mediation and Procedure Rules*** conflict with the letter and spirit of ***Section 85(5) of the Industrial and Labour Relations Act***. But on account of the view we take of this ground, the critical issue is not one of conflict between the Rules and the statute but the purpose of mediation. In the event, we shall not go into the details of Mr. Mulenga's submissions on this ground.

On ground two, Mr. Ndhlovu, learned counsel for the Complainants submitted that there was no need for the presiding Deputy Chairman to recuse himself as he was only relying on the finding of the mediator.

On ground five, which he wrongly referred to as ground four, Mr. Ndhlovu submitted that the court was right in relying on the Mediation Rules. Mr. Ndhlovu ended by saying that the Respondent failed to show sufficient cause for setting aside the judgment.

We propose to deal with ground five first.

The mediation conducted in the High Court and the Industrial Relations Court is Court Annexed Mediation; meaning it is part of the judicial system. Mediation is basically a process for resolving disputes, helping prevent disputes in the future, and mitigating the negative effects of disputes. Mediation has the benefit that it provides the greatest degree of party control over the process and over the outcome.

In Court Annexed Mediation proper cases for mediation are referred to Mediation by the trial Judge. Where, for whatever reasons, Mediation fails, the case should be referred back to the Judge who shall summon the parties to fix a hearing date(1)

These provisions are in line with the philosophy of Mediation, namely to give parties an opportunity to resolve their dispute with the assistance of a Mediator, but at same time retaining

the parties right to have their case heard and determined by the Court.

The impugned Rule in the Industrial Relations Court Mediation and Procedure Rules reads: -

> ***"24(1) Where a party fails to comply with the order of reference to arbitration under these rules, the Court or Judge shall: -***
>
> ***(a) make a default judgment or an appropriate order against that party if that party is the Respondent; or***
>
> (b) ***strike out or dismiss the case where the party is the Applicant or Complainant.***
>
> ***(2) For the purpose of this rule non compliance shall include -***
>
> ***(a) failure to attend a scheduled mediation hearing; or***
>
> ***(b) legal representatives attendance of a mediation hearing without full instructions or authority from the party"***[2]

In so far as it relates to Mediation, clearly, this Rule is in conflict with the philosophy of Court Annexed Mediation as we understand it. As we have already said, Court Annexed

Mediation was never intended to take away the parties' right to have their case heard and determined by the court. Even ***Rule 21(1) of the Industrial Relations Court Mediation Rules*** confirms this by directing that where the Mediation fails the record of proceedings should be returned to the Court.

In the event, though for different reasons, we agree with Mr. Mulenga's submissions that Rule 24 of the Rules is invalid on account of being incongruous with the philosophy of court Annexed Mediation. We direct that the Rules be amended quickly to delete Rules like Rule 24 and any other Rules that give effect to it. Further, all the Mediation Rules in the Industrial Relations Court should be in consonance with the High Court Mediation Rules which in all respects reflect the philosophy of Court Annexed Mediation. Ground five, therefore, succeeds.

As regards ground two we agree with Mr. Mulenga, for the reasons he has given and authorities he cited, that the Presiding Deputy Chairman in the Court below should have recused himself in this matter. The Presiding Deputy Chairman tried the Complainant on a case arising out of the facts of this litigation and acquitted them. For the Presiding Deputy Chairman to be presiding on the same case in a civil litigation creates a perception of partiality. The argument by

Mr. Ndhlovu that the Presiding Deputy Chairman was only relying on the finding of the Mediator is untenable in law. In any case, under Court Annexed Mediation the Judge is forbidden to know what went on before the Mediator. The Mediator is not supposed to keep a record of the Mediation: See Rule 18(1). This ground of appeal also succeeds.

In the result, we find that there is merit in this appeal and we allow it. We set aside the Order of the Court below refusing to set aside the judgment in default and order that the matter proceeds to trial in the normal way. For avoidance of doubt, this judgment does not preclude the parties from going to mediation again if they so wish. Costs will abide the outcome of the action.

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D. K. CHIRWA
SUPREME COURT JUDGE

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PETER CHITENGI
SUPREME COURT JUDGE

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T. A. KABALATA
ACTING SUPREME COURT JUDGE