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IN THE SUPREME COURT OF ZAMBIA **SCZ JUDGMENT NO. 39 OF 2014**
HOLDEN AT KABWE **APPEAL NO. 73/2011**
(Civil Jurisdiction) **SCZ/8/122/2011**

BETWEEN

GAEDONIC AUTOMOTIVES LIMITED **1ST APPELLANT**
PATRICK CHISENGA MUNDUNDU **2ND APPELLANT**

AND

CITIZENS ECONOMIC EMPOWERMENT COMMISSION **RESPONDENT**

Coram: Mwanamwambwa, Chibomba and Musonda, JJS.

On 14th August, 2012 and on 22nd August, 2014.

For the Appellants: Mr. K. I. Mulenga of Kumasonde Chambers.
For the Respondent: Mrs. M.Mwanza, Legal and Compliance Manager, Citizens Economic Empowerment Commission (CEEC).

J U D G M E N T

Chibomba, JS, delivered the Judgment of the Court.

Cases Referred to:-

1. **Tata Zambia Limited vs. Shilling Zinka (1986) ZR 51.**
2. **R. B. Policies at Lloyd's vs. Butler (1950) 1 KB 76.**
3. **Development Bank of Zambia and Mary Nc'ube (Receiver) vs. Christopher Mwanza and 63 Others – SCZ/8/103/08.**
4. **Blair Freight International Limited vs. Credit Africa Bank Limited – SCZ Appeal No. 2009 of 1997.**
5. **Zambia Revenue Authority vs. Jayesh Shah (2001) ZR 60.**
6. **NFC Africa Mining vs. Techro (Z) Limited SCZ Judgement (2009) ZR 236.**
7. **Cusa Zambia Limited vs. Zambia Feed Company Limited – SCZ Appeal No. 47 of 2000.**
8. **Bank of Zambia vs. Jonas Temboand Others (2002) ZR 103.**

Legislation and Other materials referred to:-

1. **The High Court Act, Chapter 27 of the Laws of Zambia.**
2. **The High Court (Amendment Rules), 1999, CAP 27, the Laws of Zambia.**
3. **The Supreme Court Act, Chapter 25 of the Laws of Zambia.**
4. **Black's Law Dictionary, 8th Edition, London: Thomson and West, 2004.**

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5. Collins English Dictionary, William Collins Sons and Company Limited, 1979.

When we heard this Appeal, Honourable Mr. Justice, Dr.Musonda, sat with us. He has since resigned. This, therefore, is a Judgment by the majority.

The Appellants appeal against the Ruling of the High Court at Lusaka, in which the learned Judge in the Court below held that a plaintiff can commence a fresh action after dismissal of his case for being inactive for 60 days or more after filing pursuant to Order 53 Rule 12 of **the High Court (Amendment Rules), 1999** (**the Commercial Court Rules**).

The facts leading to this Appeal are not in dispute. These are that on 1st December, 2010 the Respondent in this Appeal (the Plaintiff in the Court below), by Writ of summons, commenced an action under Cause Number 2010/HPC/0702 against the Appellants (the Defendants in the Court below) in the Commercial Registry, at Lusaka, seeking the following reliefs:-

> **"1. An Order to foreclose and/or sale of the mortgaged property, being Lot 15651/M Kafue.**
>
> **2. Further or in the alternative, payment of the sum of ZMK368,680,977.24 being monies due and payable by the Defendant on an agreement entered into between the parties whereby the Plaintiff offered a loan facility to the Defendant and at the Defendant's instance.**

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3. Damages for breach of contract.

4. Any other relief that the Court may deem fit.

5. Interest.

6. Costs."

The Appellant entered a Conditional Memorandum of Appearance and then applied by Summons accompanied by an Affidavit, to dismiss the action for abuse of the Court process on ground that the Respondent had filed an earlier case under cause No. 2010/HPC/0516 which contained the same claims as in cause No. 2010/HPC/0702 and was dismissed pursuant to Order 53 Rule 12. The application was filed pursuant to Section 13 of **the High Court Act** which provides for law and equity to be concurrently administered by the High Court. The Respondent filed an Affidavit in Opposition. The learned Judge heard the application and ruled as follows: -

"Court:

I have considered the affidavit evidence, skeleton arguments authorities cited and the oral submissions of Counsel.

It is plain from the Affidavit evidence that cause No. 2010/HPC/517 was dismissed on the ground that no action had been taken by the Plaintiff after 60 days of its filing.

The dismissal was not on the merits but due to the Plaintiff's failure to take further action after 60 days of filing the action.

As the dismissal was not on the merits, there is no law or authority that prevents a party whose action has been dismissed in the context stated above from commencing a fresh action.

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The authorities cited by Counsel for the Defendant are sound but they do not apply to the facts of this case. Similarly this is not a proper case where the Plaintiff could have applied for review of the dismissed cause. It is obvious to me that the only option available to the Plaintiff in the circumstances of this case was to commence a fresh action.

Let me also underscore the principle enunciated in various cases by our Supreme Court that Courts must as much as possible decide cases on their merits.

In my view dismissing the Plaintiff's action would be a perverse of justice as the dispute between the parties will remain unresolved.

For the reasons stated above, I conclude that the Defendant's application lacks merit and it is accordingly dismissed with costs."
(See pages 12 and 13 of the Record of Appeal).

Dissatisfied with the Ruling of the Court below, the Appellants have appealed to this Court advancing two Grounds of Appeal as follows: -

"1. That the Court below misdirected itself both in law and fact when it held that I have considered the Affidavit evidence, skeleton arguments, authorities cited and the oral submissions of Counsel. It is plain from the affidavit evidence that Cause No. 2010/HPC/0516 was dismissed on the ground that no action had been taken by the Plaintiff after 60 days of its filing. The dismissal was not on the merit but due to the Plaintiff's failure to take further action after 60 days of filing the action. As the dismissal was not on the merit, there is no law or authority that prevents a party whose action has been dismissed in the context stated above from commencing a fresh action and that it is obvious to me that the only option available to the Plaintiff in the circumstances of this case was to commence a fresh action.

2. That the Court below misdirected itself both in law and fact when it held that let me also underscore the principle enunciated in various cases by our Supreme Court that Courts must as much as possible decide cases in their merits. In my view dismissing the Plaintiff's action would be a perverse of justice as the dispute between the parties will remain unresolved. For the reasons stated above, I conclude that the defendants' application lacks merit and it is accordingly dismissed with costs."

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The learned Counsel for the Appellants, Mr. Mulenga, relied on the arguments in the Appellant's Heads of Argument. The thrust of the Appellants' argument in support of the first ground of appeal is that following the dismissal of the Respondent's action under cause 2010/HPC/0516, for being inactive for 60 days or more under the **Commercial Court Rules**, the Respondent commenced a fresh action against the Appellants under cause No. 2010/HPC/0702. Order 53 Rule 12 of **the Commercial Court Rules, 1999** provides that: -

> **"If after an action has been filed, 60 days elapse without any progress, the matter shall be taken before a Judge for dismissal."**

Counsel argued that **Order 53 Rule 12** does not allow a party to an action that had been dismissed under **Rule 12**to commence a fresh action and that if this was the intention of the drafter, a provision to this effect could have been made. To illustrate this point, Counsel cited **Order 53 Rules 6, 7** and **8** which provide as follows: -

> **"6. Where an application is struck out for non-attendance by the Applicant, the application to restore it, shall upon filing, be charged fees higher than those charged normally. Such fees shall be prescribed in the schedule of fees.**
>
> **7. A party whose application has been struck out for non-attendance shall apply to restore it within 30 days failing which the application shall stand dismissed.**
>
> **8. If a matter that had been struck out for non-attendance is restored and the Applicant again fails to attend the hearing, the Judge shall dismiss the application forthwith."**

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Counsel submitted that a distinction should be made between the current cause and the case of **Tata Zambia Limited vs. Shilling Zinka**[1] in which it was held that there is no rule of procedure preventing a party from withdrawing and then taking out a summons in exactly the same terms. Mr. Mulenga submitted that the distinction between the two cases is that in the earlier case, the party had first withdrawn the action and then took out summons on exactly the same terms in a fresh action and not like in this case where the matter was dismissed. Further, that by allowing a dismissed matter to be recommenced, then litigation would not end.

In support of the above contention, the case of **R. B. Policies at Lloyd's vs. Butler**[2] was cited in which it was held that: -

> **"It is a policy of the Litigation Act that those who go to sleep upon their claim should not be assisted by the Courts recovering their property, but another, and, I think, equal policy behind these Acts is that there should be an end to litigation."**

Further, that in **Development Bank of Zambia and Mary Ncube (Receiver) vs. Christopher Mwanza and 63 Others**[3], it was observed that there must be finality and a party that is clearly in default should reap the consequences of its inertia and cannot be allowed to roam the Courts like a headless chicken keeping the other party in suspense more so that the party was represented by Counsel.

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On the requirement to adhere to the Rules of Court, Counsel cited the case of **Blair Freight International Limited vs. Credit Africa Bank Limited**[4] where this was emphasized and the Court held that: -

> **"The appeal on grounds of failure to comply with the rule was in our view properly dismissed. The rules of the Court are for the smooth administration of justice. They ought to be obeyed."**

In support of Ground two, it was contended that although Counsel was aware of the principle enunciated in the various cases that Courts must as much as possible, decide cases on their substance and merit and that this is true where there has been only a very technical omission or an oversight not affecting the validity of the process, however, where the Rule in question is mandatory, the effect of the breach would be fatal. Counsel referred to the case of **Zambia Revenue Authority vs. Jayesh Shah**[5], in which it was held that "**cases should be decided on their substance and merit".**

Mr. Mulenga submitted further that the word "**shall**" used in Order 53, Rule 12 denotes mandatory duty or performance. And that in **NFC Africa Mining vs. Techro (Z) Limited**[6], it was held that the word **"shall"** as used in **Section 24 (1) (e) of the Supreme Court Act**, is mandatory.

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Black's Law Dictionary, 8th Edition was also cited where the word "**shall**" is defined as: "**has duty to; more broadly, is required to**." It was submitted that this is in the mandatory sense which the Court typically upholds. Therefore, that in the light of the above cited authorities, this case should be distinguished from the **Zambia Revenue Authority vs. Jayesh Shah**[5] in which the Court held that Rules must be followed but that the effect of a breach will not always be fatal if the rule is merely regulatory or directory.

Counsel submitted that **Order 53 Rule 12** is neither regulatory nor directory but mandatory and that it does not provide for alternative remedy to an action that is dismissed under that Rule. Therefore, that it is evident that the case falls within the ambit of the decision in **Cusa Zambia Limited vs. Zambia Feed Company Limited**[7] in which the Court held that **"the Appellant slept on its right".** Further, that in the case of **Bank of Zambia vs. Jonas Tembo and Others**[8]**,** the Court held that it is in the public interest that there should be an end to litigation. Counsel submitted that rules of court and associated rules of practice are devised in the public interest to promote expeditious dispatch of litigation.

On the other hand, in opposing this Appeal, the learned Counsel for the Respondent, Mrs. Mwanza, relied on the Respondent's Heads of

Argument. In response to Ground one, Mrs. Mwanza submitted that the Court below was on firm ground when it held that the only option available to the Respondent was to commence a fresh action after the earlier action was dismissed. It was Mrs. Mwanza's further submission that as aptly put by the learned Counsel for the Appellant, the earlier cause was dismissed for lack of progress under Order 53 Rule 12 of **the Commercial Court Rules**. And that as per **Collin's English Dictionary**, the word "**dismiss**," is defined (in the context of the cause of an action) to mean:"**to decline further hearing to (a claim or action**)".

It was Counsel's further submission that the order by the Court below dismissing the earlier cause meant that nothing more could be heard in relation to that cause, that however, this was without consideration of the merits or lack thereof of the Respondent's claim, as the dismissal was merely premised on the Respondent's failure to make progress within the prescribed time.

Mrs. Mwanza submitted that the position taken by the Appellant amounts to requesting the Court to sanction unjust enrichment of the Appellants to the tune of the sum of K315,000,000.00 as a reward for breaching the loan agreement and that this would amount to a blatant affront to justice. It was argued that although the Respondent commenced a fresh action with exactly the same terms as the earlier

dismissed cause, the position of the Respondent is that this is because the said terms had not been adjudicated upon on their merits or lack thereof, by any Court. Therefore, that the insinuation of preclusion of commencement of a fresh action is in itself a reflection of the Court's recognition of the trite legal requirement for all matters to be determined on their merits. And that the Respondent's argument is therefore, that holding otherwise, would be an affront to commercial transactions under which the loan in question was agreed.

Counsel then went on to submit on the reasons and the background to the creation of the Commercial List and the reasons why the Rules of that Court were crafted in that way. It was Mrs. Mwanza's submission that no connotation of blocking a party of ever having an opportunity to have their dispute settled only for reason of failing to make progress on the case can be deduced from the said Rules and when the cause is not Statute barred. Therefore, that the cases cited by Counsel for the Appellant in support of this ground are either totally out of context or over-stretched to fit into the Appellants' desired position.

Counsel cited **R. B. Policies at Lloyds vs. Butler**[2] in which it was stated that: -

> "**I cannot think that it is the policy of the Act or that to construe its words in favour of the Plaintiff's argument would harmonise with the intention of the legislation."**

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Counsel argued that in that case it was also said that: "**protection shall be afforded against stale demands**."

It was contended that the Respondent did not sleep on its rights as was suggested by the Appellants and neither did the Respondent let its demand go stale as it pursued its cause within time and within the provisions of the law.

On the pertinent legal principle argued by the Appellants as brought out in **Brair Freight International vs. Credit Africa Bank Limited**[4] to the effect that the rules of court are for the administration of justice and that they ought to be obeyed, Counsel submitted that the Respondent cannot agree more with the Appellants but that it is in line with the above principle that the Court below dismissed the earlier cause for failure to make progress within the prescribed 60 day period. However, that the position of the Court below was also in line with this Court's decision in **Zambia Revenue authority vs. Jayesh Shah**[5] cited above, in which we stated that: "**a breach will not always be fatal if the rule is merely regulatory or directory**."

Counsel argued that lack of progress in the earlier cause by the Respondent cannot be said to have been fatal to the Respondent to forever be barred from claiming what was legally due to it from the Appellants. That the Respondent's position is that this Court cannot be

used by the Appellants for their intended sabotage acts against commercial prudence by riding on the back of procedural lapses on the part of the Respondent as bona fide claimants.

In response to Ground two, it was submitted that the Court below was spot on in holding against the Appellant as it would be a perverse of justice to hold otherwise as the dispute between the parties had not been adjudicated upon by any Court. Counsel argued that the Court below cannot be faulted as the Ruling by the Court below was in line with the position of this Court in **Zambia Revenue Authority vs. Jayesh Shah**[5] on cases being decided on their merits.

It was contended that for a cause to be decided on its merits, the dispute must be heard and determined by a Court of competent jurisdiction. And that in the current case, the parties were not heard and neither was any point determined in relation to the dispute by the Court. Hence, the Respondent had a legal right to be heard and that litigation can only come to an end after the Respondent is heard and that only then will the Respondent be precluded from bringing a fresh action against the Appellants through the principle of ***res judicata*** as enunciated in **Bank of Zambia vs. Jonas Tembo and Others**[8].

On the legal maxim: "**interest reipulicaisut sit finis litum**", meaning that **it is in the public interest that there should be an end**

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to litigation", Counsel argued that this does not apply in the current case as it can only apply after matter has-been determined on its merits and parties' rights and obligations spelled out by the Court. It was Counsel's further submission that the current cause does not fit into this category and hence, it should be distinguished.

On the case of **NFC Africa Mining vs. Techro (Z) Limited**[6] relied upon by Counsel for the Appellant, it was argued that it was in line with the principle in that case that the Court below went ahead to dismiss the earlier cause when the prescribed 60 days period lapsed. And that following the dismissal of the earlier cause and considering that the dispute between parties continued to subsist, the Respondent took out a fresh action and hence, the Respondent implores this Court to allow the action and dismiss the Appellants' arguments with costs.

We have seriously considered this Appeal together with the grounds of appeal advanced and the arguments in the respective Heads of Argument and the authorities cited. We have also considered the Ruling by the learned Judge in the Court below.

For convenience, we shall deal with both grounds of Appeal together as they are interrelated. It is our considered view that this Appeal raises one major question. This is whether a plaintiff whose case was dismissed for being inactive for 60 days under Order 53 Rule

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12 of **the High Court (Amendment Rules)**, **1999** (hereinafter referred to as **the 60 days Rule**), can commence a fresh action?

Although lengthy submissions were filed by the parties, the issue as stated above is: whether a fresh action can be commenced following the dismissal of the earlier action for being inactive under the **60 days Rule of the Commercial Court Rules**.

The thrust of the Appellants' arguments in support of grounds one and two of this Appeal is that Order 53 Rule 12 does not allow a matter that has been dismissed under **the 60 days rule** to commence a fresh action; that there should be finality to litigation and that the Respondent in this case slept on its own rights by not pursuing the earlier case. On the other hand, the thrust of the Respondent's argument is that Order 53 Rule 12 does not bar a plaintiff from commencing a fresh action as the parties were not heard in the first cause of action and the claims were not adjudicated upon or determined on their merits. Hence, the fresh action is not an abuse of the court process and the matter is not *res judicata.*

The view that we take of this Appeal is that the Plaintiff can commence a fresh action after dismissal of the earlier action under the **60 days Rule of the Commercial Court Rules**. The simple reason is

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that the matter was not adjudicated upon or determined on its merits, as the parties were not heard.

Although we agree with Mr. Mulenga's submission that there must be finality or an end to litigation, it is however, our considered view that this does not apply in the current case for the same reason that the cause was not determined or adjudicated upon by the court below nor were the parties heard before the earlier cause was dismissed under Order 53 Rule 12 of the Commercial Court Rules. We, therefore, agree with Mrs. Mwanza's submission that litigation only comes to an end after a dispute is heard and determined on its merits by a court of competent jurisdiction.

We do not also agree with Mr. Mulenga's "roundabout" argument that the new action should be dismissed on ground that it is *res judicata* as can be deduced from Counsel's citation and reliance on the case of **Bank of Zambia vs. Jonas Tembo and Others**[8]. The reason being that the matter that was dismissed was not adjudicated upon or determined on its merits nor were the parties heard in order for the fresh matter to be *res judicata*.

With regard to Mr. Mulenga's contention that Order 53 Rule 12 does not allow a party to an action whose cause was dismissed to commence a fresh action as the Rule does not so state and Counsel's

submission that had that been the intention, the drafter of the Rule could have spelt this out as was done under Rules 6, 7 and 8 of the same Order; we must firstly, point out that this argument by Mr. Mulenga is in fact, a double-edged sword as the converse can also be said to be the correct position as it can be argued that if the intention of the drafter of Rule 12 was to stop a part from commencing a fresh action, then the drafter could have also spelt out this. However, our firm position on Mr. Mulenga's argument in this respect is that it has always been the position of this Court that cases should be determined on their merits.

So, since the earlier case was not heard and/or determined on its merits before it was dismissed, the drafter of the Rule cannot be said to have intended to completely shut-out such a party from commencing a fresh action. A situation which we can think of and which comes to mind where such a party could be prevented from commencing a fresh action is where, in between, the cause of action has become affected by time limits or has become statute barred. In the current case, there is no dispute that the cause of action had not been affected by any time limits by the time the fresh action was commenced.

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So, as much as we agree with Mr. Mulenga's argument that Order 53 Rule 12 is couched in a mandatory manner and that the case of **NFC Africa Mining Plc vs. Techro Limited**[6] contain good law, the principle enunciated in that case does not apply in the current case and should, therefore, be distinguished in that in the current case, the earlier case was not heard or determined on its merits before it was dismissed under **the 60 days Rule** coupled with the fact that the cause of action had not become affected by the time limits as explained above. Hence, the earlier case was cited out of context.

Our understanding of dismissal under **the 60 days Rule** is that it means nothing else could be done under that cause. And hence, the reason why the Respondent had to commence a fresh action. We do not, therefore, agree that the second action was an abuse of the court process, as the first cause of action was dismissed under **the 60 days Rule,** before it was heard or adjudicated upon.

In summing up, both Grounds one and two having failed, the sum total is that this Appeal has wholly failed on account of want of merit. The Ruling by the learned Judge in the Court below is upheld. The

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Appeal is dismissed with costs to the Respondent to be taxed in default of agreement.

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M. S. Mwanamwambwa
SUPREME COURT JUDGE

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H. Chibomba
SUPREME COURT JUDGE ç