IN THE SUPREME COURT OF ZAMBIA **SCZ/8/199/2008**
HOLDEN AT LUSAKA **Appeal No. 82/2009**

(Civil Jurisdiction)

BETWEEN:

RICHARD NSOFU MANDONA **APPELLANT**

AND

TOTAL AVIATION AND EXPORT LIMITED **1ST RESPONDENT**

ZAMBIA NATIONAL COMMERCIAL BANK PLC. **2ND RESPONDENT**

ZAMBIA NATIONAL OIL COMPANY LIMITED (In Liquidation) **3RD RESPONDENT**

INDENI PETROLEUM REFINERY COMPANY **4TH RESPONDENT**

Coram: **Hamaundu, Wood and Malila, JJS**

on 23rd January, 2017 and 16th February, 2017

For the Appellant: Mr. W. A. Mubanga, SC, Messrs Chilupe and Permanent Chambers with Mr. A. D. Mwansa of Messrs A. D. Mumba and Co.

For the 1st Respondent: Mr. S. Chisenga of Messrs Corpus Legal Practitioners

For the 2nd Respondent: Mrs. M. Mwaanga, Litigation Head, Zambia National Commercial Bank (ZANACO).

For the 3rd Respondent: N/A

For the 4th Respondent: N/A

JUDGMENT

Malila, JS, delivered the judgment of the Court

Cases referred to:

1. *Finsbury Investments Ltd and Another v. Antonio Manuela Ventriglia, Appeal No. 11 of 2009.*
2. *Trevor Limpic v. Rachel Mawere and Two Others, SCZ/8/156/2015.*
3. *Chibote Ltd, Mazembe Tractor Co. Ltd, Minestone (Z) Ltd., Minestone Estates Ltd. v. Meridien BIAO Bank (Z) Ltd (in liquidation) (2003) ZR 105.*
4. *Access Bank (Z) Ltd. v. Group Five/ZCON Business Park Joint Venture, SCZ/852/2014.*
5. *Nahar Investments v. Grindlays Bank (Z) Limited (1984) ZR 81.*
6. *July Donobo T/A Judan Motors v. Chimsoro Farms Ltd. (2009) ZR 148.*
7. *Stanley Mwambazi and Morrester Farms Ltd. (1977) ZR 108.*
8. *Huddersfield Police Authority v. Watson (1947) 2 ALLER 193 at 196.*
9. *Zambia Revenue Authority v. Jayesh Shah (Judgment N. 10 of 2001).*
10. *DPP v. Margaret Whitehead (1997) ZR 181.*
11. *NFC Africa Mining v. Techpro Zambia Ltd (2000) ZR 236.*
12. *Philip Mutantika and Mulyata Sheal v. Kenneth Chipungu (SCZ Judgment No. 13 of 2014).*

Other Legislation referred to:

1. *Words and Phrases Legally Defined – Vol. 3 K-Q at page 346.*

The applicant in this motion, is a senior legal practitioner. Prior to the placement of the third respondent, Zambia National Oil Company Limited (ZNOC), into liquidation, the applicant served as its receiver. In that capacity, he had entered into certain contracts for the sale and purchase of petroleum products with the first respondent under which certain liabilities were incurred. He sought to be indemnified by the

second, third and fourth respondents against those liabilities, claiming that his appointment as receiver of ZNOC was without personal liability. In a judgment delivered on 18th July, 2008 the High Court dismissed the appellant's claim for indemnity.

Discomposed by that judgment, the applicant filed a notice of appeal on the 6th August, 2008 and started to pursue retrieval of the record of proceedings in the Lusaka High Court Registry for purposes of preparing the record of appeal. His efforts in this regard were, however unsuccessful, prompting the applicant to file in court on the 10th of July, 2009 an incomplete record of appeal in the hope that once the record of proceedings had been obtained, he would make an application to amend the non conforming record of appeal to make it compliant with the rules of court on the preparation and filing of records of appeal. The applicant also did not file his heads of argument, claiming that he could not do so in the absence of the transcript of the judge's notes. The first and second respondents, however, filed their respective heads of argument in the absence of the record of proceedings of the lower court.

The applicant asserts that he continued to pursue the procurement of the record of proceedings from the High Court following the filing of the incomplete record, but that his exertions were in vain.

On the 13th January, 2012 the applicant's appeal was adjourned *sine die* with liberty to restore so as to give the applicant time to recover the missing record of proceedings and prepare an amendment to the record accordingly. The appellant states that following the adjournment of the appeal *sine die* he continued to actively pursue the issue of the record of proceedings but was still unsuccessful because the court record had supposedly gone missing from the High Court Registry.

The matter was subsequently cause-listed for hearing on the 31st July, 2015. However, on the 17th July, 2015 the applicant applied, by notice of motion supported by an affidavit, for the adjournment of his appeal. When the appeal was called, the court decided to dismiss it, ignoring in the process the applicant's application to adjourn. The dismissal of the applicant's appeal has so aggrieved the applicant that he has

now taken out the current motion, assailing the decision of the court to dismiss the action. In his motion for this court to set aside the judgment dismissing the appeal, the applicant has enlisted two grounds, namely:

1. that the court has no jurisdiction to dismiss the applicant's appeal without having given the parties an opportunity to be heard, contrary the provisions of Article 18(9) of the Constitution of Zambia;

2. that the dismissal of his appeal was made *per incuriam.* For this ground the applicants alluded to a diverse range of circumstances.

Although the appellant lists nine factors supporting his claim that the decision to dismiss the appeal was made *per incuriam,* they essentially boil down to the fact that his failure to file the record of appeal was occasioned by his inability to access the record of proceedings in the lower court which was, in turn, caused by administrative lapses in the High Court Registry. The applicant's case is set out in a prolix affidavit running into 29 paragraphs.

The first respondent opposes the motion and did on the 28th October, 2015 file an affidavit in opposition as well as heads of argument. The affidavit was sworn by Patrick Chimfwembe Chiluba, the General Secretary in the first respondent company. He avers that the appeal was filed in court on 10th June, 2009 and that there was a certificate in the record of appeal signed by counsel for the applicant, confirming that the record of appeal had been prepared and filed in accordance with the rules of court and that by the date of the court order dismissing the matter, the applicant had not filed his heads of argument. The deponent also avers that on 19th January, 2012 there was an application to adjourn at the instance of the applicant and that the applicant still failed to file the record of appeal in the prescribed manner despite his having been given sufficient indulgence by the court to do so. It is for these reasons that the first respondent supported the court's dismissal of the appeal premised on the fact that the filing of an incomplete record in this matter, rendered the appeal incompetent, particularly given that six years had elapsed since the filing of the incomplete record.

At the hearing of the motion there was no appearance on behalf of the third and fourth respondents. We proceeded to hear the appeal upon satisfying ourselves from the Clerk of Court that service was effected on those respondents or their advocates on record.

Mr. Mubanga, SC, applied for and was granted leave to file his heads of argument out of time. Thereafter he indicated that he would rely on the notice of motion and the affidavit in support filed on the 24th July, 2016, as well as the list of authorities filed on 30th July, 2015 and the heads of argument just filed.

In the filed heads of argument, it was contended by the applicant's learned counsel that it is now established practice that wherever there is a pending application on record, the court should first dispose of the pending application before hearing the main matter; that the court should have exercised its inherent jurisdiction by calling for the production of the judges' notes of hearing by invoking the provisions of rule 58(4)(j) of the Supreme Court Rules, chapter 25 of the laws of Zambia. They argue further that refusal to hear and determine

the pending interlocutory application and failure to call for the judge's notes in the court below, amounted to failure by the court to exercise its inherent jurisdiction judiciously which resulted in bias against the applicant.

The learned counsel quoted Article 18(9) of the Constitution of Zambia which enacts as follows:

> **"Any court or other adjudicating authority prescribed by law for determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."**

According to counsel for the applicant, for there to be a fair hearing, the parties ought to be given an opportunity to present their respective cases before the court. The learned counsel further adverted to Article 118(2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 which provides that in exercising judicial authority the courts shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities.

A good part of the applicant's written heads of argument took the form of a factual narrative of what transpired with regard to the applicant's search for the judge's notes of proceedings.

Regarding the applicant's failure to file the heads of argument, it was submitted that in the absence of the judge's notes, it was impossible to formulate sensibly any heads of argument. The applicant's learned counsel submitted that they find it "baffling and incomprehensible for even the 1st respondent's Advocates to have filed the respondent's heads of argument in the dismissed appeal."

Counsel distinguished the case of **July Donobo T/A Judan Motors v. Chimsoro Farms Ltd.**[6] from the present case in that in conducting the appeal in this case the appellant did not in any way act malafides and in a misleading manner to the court. The case of **Stanley Mwambazi and Morrester Farms Ltd.**[7] was relied upon to buttress the point that for favourable treatment to be afforded to an applicant who delays to take an action within a prescribed time there ought to be no unreasonable delay, no malafides and no improper conduct on his part.

Counsel also attacked this court's finding in the decision subject of the motion in as far as it stated that the "documents missing in the record of appeal were produced by the appellant in the court below and there was more than sufficient time to file the documents in the supplementary record of appeal." The learned counsel described that statement as "startling" and "strange". He submitted that the court arrived at a decision to dismiss the appeal on a wrong footing and, therefore, the decision was arrived at *per incurriam*. We were referred to the learned authors of **Words and Phrases Legally Defined** – Vol. 3 K-Q at page 346 for the definition of the term *per incurriam* and to Goddard CJ's statement on the same in **Huddersfield Police Authority v. Watson**[8]. Counsel also referred to other English authorities defining the term '*per incurriam*".

According to the applicant's counsel, this motion has "raised a very serious constitutional issue of having been denied the right to the protection of the law pursuant to Article 18(9) of the Constitution of Zambia and Article 118(2)(e) of the Constitution of Zambia (Amendment) Act No. 2 of 2016."

In counsel's view, the applicant was entitled to have his appeal heard and the merits of his case vindicated. Counsel also referred to the case of **Zambia Revenue Authority v. Jayesh Shah**[9] to buttress the point.

Veering off the basis of the motion as set out in the notice of motion itself, the learned counsel for the applicant went at large to argue three more issues, namely first, substantial prejudice to the applicant; second, whether under section 114(1) of the Companies Act and the law on receivership the applicant was still receiver/manager at the time of the transaction in question, and third, whether or not the applicant received the money subject of the action in the lower court. We can state right away that these arguments were beyond the thrust of the motion.

On behalf of the first respondent heads of argument were filed on 28th October, 2015. At the hearing of the motion Mr. Chisenga, learned counsel for the first respondent, intimated that he was relying on those heads of argument in addition to the affidavit in opposition. On behalf of the second respondent,

Mrs. Mwaanga adopted the first respondent's heads of argument.

It was argued by the first and second respondents in their heads of argument that an application for an adjournment is not granted by the court as of right. The case of **DPP v. Margaret Whitehead**[10] was cited as authority. It was counsel's submission that the applicant/appellant, having filed into court his notice of appeal and an incomplete record of appeal in 2008, and the matter having also been adjourned on diverse dates, the court did the right thing not to entertain an application for an adjournment but instead proceed to dismiss the appeal.

The learned counsel quoted rule 58(4) of the Supreme Court Rules relating to the contents of a record of appeal. He submitted that the applicant's record did not satisfy the provisions of the rules relating to the preparation of records of appeal. The consequences of the applicant's failure to comply with those requirements, according to counsel for the first and second respondents, was that the appeal is liable to be dismissed in accordance with the provisions of rule 68(2) of the Rules of the Supreme Court. Counsel also referred to case of

NFC Africa Mining v. Techpro Zambia Ltd[11] on the purpose of the rules of court and the consequences of non observances thereof. He also referred to **Philip Mutantika and Mulyata Sheal v. Kenneth Chipungu**[12] where we stated that an order for the dismissal of an appeal can be reversed only where a party to the proceedings is not present before court on the date of the hearing of the appeal in accordance with rule 71(1) of the Rules of the Supreme Court. We were urged to dismiss the motion.

We have considered carefully and with interest the arguments of the parties in this case. As we stated at the outset of this judgment, two grounds form the basis of the present motion. The first is that this court did not have jurisdiction to dismiss the applicant's appeal without having given the parties an opportunity to be heard while Article 118(2)(e) enjoins us not to have undue regard to procedural technicalities in our role as dispensers of justice. The reason for this submission in a nutshell is that Article 18(9) of the Constitution gives the applicant the right to be heard. The second is that the decision of the court was made *per incurriam* for all the factors set out in the motion.

To us, the argument made by the applicant regarding jurisdiction is crucial from at least two stand points. The broader, and perhaps more significant of these two questions is whether, in view of the creation by the Amended Constitution of the Constitutional Court, this court any longer has jurisdiction to deal with 'serious constitutional issue,' to use the words of the learned counsel for the applicant. The narrower issue is whether the Supreme Court could still determine an issue on the basis of procedural rules where a constitutional question is raised.

We are fully alive to the provision of Article 128(2) of the Amended Constitution which states that:

> **"Subject to Article 28(2), where a question relating to this Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court."**

Article 28(1) on the other hand provides that:

> **"Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 28 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall-**

(a) hear and determine any such application;

(b) determine any question arising in the case of any person which is referred to in pursuance of clause (2); .....

Granted that matters dealing with the bill of rights are constitutionally still very much within the jurisdictional ambit of the High Court to determine at first instance, with appeals on any such matters determined by the High Court lying to the Supreme Court under Article 28(1)(b), we are in no doubt that this court has jurisdiction to determine any issue raised touching on the bill of rights in the Constitution provided, of course, it comes to us by way of appeal from the High Court. This is so, notwithstanding the provisions of article 28(1) of the Amended Constitution. Where, however, a matter arises whose substance is primarily interpretation of a provision of the Constitution, this court would be obliged to refer such matter to the Constitutional Court in terms of Article 28(1) to which we have alluded. This does not in any case mean that every time the Constitution is mentioned in arguments made before this court, we shall close our records of appeal and rise until the Constitutional Court determines any such arguments. Making

observations on obvious constitutional provisions as we determine disputes of a non constitutional nature, is not, in our view, necessarily averse to the letter and spirit of the Constitution nor would it encroach or usurp the jurisdiction of the Constitutional Court. This court, as any other superior court for that matter, is made up of judges of note, capable in their own way of understanding and interpreting the Constitution.

However, even if we do have the jurisdiction to interpret the constitution in regard to the bill of rights and generally to refer to the constitution when dealing with matters of a non constitutional nature, we do not have original jurisdiction to do so.

An allegation that a provision of the bill of rights has been violated is redressable through a petition in the High Court. It is not in the province of this court to deal with issues arising from the bill of rights at first instance through motions such as the one before us.

More significantly perhaps, we see that the issues raised in the motion are ones that hinge purely on the rules of procedure. Their interpretation, therefore, is hardly one that should take us into the realm of constitutional interpretation. For good measure, we can do no better than repeat what we said in the case of **Access Bank (Z) Ltd. v. Group Five/ZCON Business Park Joint Venture**[4] that:

> **"the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts."**

The first ground of the motion is destitute of merit and is dismissed.

As regards the second ground that our decision to dismiss the appeal was made *per incurriam*, we wish to make a number of observations. First, the decision to dismiss the action was made by the full court. Rule 48(5) pursuant to which the motion is made does not, in our view, provide a pathway for the application the applicant has made. That subrule flows from the parent rule 48 which is akin to applications before a single judge.

Our understanding of rule 48 is that subrule (1) generally states how applications to a single judge shall be made. Subrule (2) deals with service of the motion and affidavit filed before a single judge. Subrule (3) deals with adjournment of the application before a single judge with a view to having it heard by the court (full court). Subrule (4) relates to what should happen when a person is aggrieved by the decision of a single judge. Subrule (5) deals with how an application should be made to the court (full court) following a decision of a single judge. That rule envisages application to the full court following a decision by a single judge of this court. It is not a stand alone provision that grants any party a right to move the court in any circumstance. To the extent that the application arises from a decision of the full court. We do not think, therefore, that the application is well anchored.

We note that the applicant has also indicated in the Notice of Motion that it is also taken out pursuant to order 8(3) and 59(14) of the Rules of the Supreme Court (White Book) 1999 edition.

A perusal of order 8 rule 3 of the White Book shows that the order merely relates to the form and issue of the notice of motion. It does not provide substantively under what circumstances such notice of motion should be made. Order 59 rule 14 on the other hand deals with applications to the court of appeal – which should be made to a single judge or the registrar. Where such application is refused, it could be renewed before two Lord Justices.

Granted that decisions of this court are final, this application, is in effect a request for a reopening of our decision with a view to reviewing it. It also could be viewed to be an appeal against a final decision of the court.

Although, as we stated in **Finsbury Investments Ltd and Another v. Anthonio Manuela Ventriglia**[1], this court has unfettered inherent jurisdiction and in appropriate cases it can reopen its final decision and rescind or vary such decision as we in fact did in the case of **Trevor Limpic v. Rachel Mawere and Two Others**[2] that power is to be used sparingly and in the most deserving of cases. In **Chibote Ltd, Mazembe Tractor Co. Ltd, Minestone (Z) Ltd., Minestone Estates Ltd. v. Meridien BIAO Bank (Z) Ltd (in**

liquidation)[3], we stated that an appeal determined by the Supreme Court will only be reopened where a party, through no fault of his own, has been subjected to an unfair procedure and will not be varied or rescinded merely because a decision is subsequently thought to be wrong. In reopening any case, the interest of justice has to be weighed against the equally essential principle of finality. Above all the applicant must bring herself within the parameters justifying the reopening of the decision of the court dismissing the appeal. (To the extent that the applicant has not done so in this case the application is incompetent).

Can we in this case say that the applicant has satisfied the preconditions for having the final decision of this court reheard? This invariably brings us to the second observation we have to make, and this is that the applicant clearly manifested an intolerable level of laxity, indifference and a lack of discernment in prosecuting this appeal. Although he made a splendid explanation for the delay in filing in a compliant record of appeal, the reasons given are incredible. As we stated in **Nahar Investments v. Grindlays Bank (Z) Limited**[5], the

responsibility to prepare and file a conforming record of appeal lies squarely with the appellant. Where he is unable to prepare and file the record for any reason, including failure to obtain the notes of proceedings, the appellant must make a prompt application for enlargement of time. Shifting the blame on to third parties is unavailing. We stated in that case specifically as follows:

> **"We wish to remind appellants that it is their duty to lodge records of appeal within the period allowed, including any extended period. If difficulties are encountered which are beyond their means to control (such as the non availability of the notes of proceedings which it is the responsibility of the High Court to furnish), the appellants have a duty to make prompt application to the court for enlargement of time. Litigation must come to an end and it is highly undesirable that respondents should be kept in suspense because of dilatory conduct on the part of appellants."**

Thirdly, we note that the applicant is a legal practitioner of many years standing. He is at the very least, aware that rather than file an incomplete record of appeal under a certificate that purports that the preparation of the record complied with the rules, a better and more appropriate course is to apply for an

extension of time within which to file the record of appeal as provided for in Rules 12 and 54 of the Supreme Court.

In their heads of argument, the applicant's learned counsel sought to engage us in discourse of semantics when they argued that the certificate in question used the words "prepared by me so far as these are relevant to this appeal," which was intended to refer to documents which were actually available in the incomplete record. This argument is a brave attempt to sway us into accepting that a certificate as to the record can mean different things depending on whether the record is complete or not. We cannot accept that argument.

The certificate as to the record of appeal serves the important purpose of confirming that the record of appeal has been prepared correctly and in accordance with the rules. There cannot be a certificate designed for an incomplete or non conforming record. To use a certificate in any other way, especially with a view to circumventing the rules of court, is to abuse it. It is regrettable that the applicant deliberately did what is not legally permissible in the hope that it would be

corrected by an amendment at a later stage. This, in our view, was most irregular and is deprecated.

For the reasons we have given we are inclined to dismiss the motion with costs and we so do.

E. M. HAMAUNDU
SUPREME COURT JUDGE

A. M. WOOD
SUPREME COURT JUDGE

M. MALILA, SC
SUPREME COURT JUDGE