IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 191/2015**
HOLDEN AT NDOLA **SCZ/8/200/2014**

(CIVIL JURISDICTION)

BETWEEN:

SUSAN MWALE HARMAN **APPELLANT**

AND

BANK OF ZAMBIA **RESPONDENT**

Coram: **Mambilima, CJ, Malila and Kaoma, JJS**
on 1st December, 2020 and 4th December, 2020

For the Appellant: In Person

For the Respondent: Mr. H. A. Chizu and Mrs. E. Mweene-Chanda of Messrs Chanda Chizu & Associates

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JUDGMENT

Malila, JS delivered the Judgment of the Court

Cases referred to:

1. *Zambia Telecommunications Company Limited v. Mulwanda and 2 Others (2012) Vol. 1 ZR 404.*
2. *Minister of Home Affairs & Another v. Habasonda (2007) ZR 207.*
3. *Zambia Breweries Plc. v. Sakala (2012) Vol. 2 ZR 460.*
4. *Stanley Mwambazi v. Morester Farms Limited (1977) ZR 108.*
5. *Stanbic Bank (Z) Ltd v. Savenda Management Services Ltd (CAZ 08/40/2016).*
6. *Pule Elias Mwila and Others v. Zambia State Insurance Corporation Ltd (2015) ZR 3 152.*
7. *Zambia Revenue Authority v. T & G Transport (2007) ZR 13.*
8. *NCF Africa Mining v. Techpro (Z) Ltd. (2009) ZR 236.*
9. *Philip Mutantika, Mulyata Sheal v. Kenneth Chipungu (2014) Vol. 1 ZR 352*
10. *Robert Lawrence Roy v. Chitakata Ranching Co. Ltd (1980) ZR 72.*
11. *Jamas Milling Co, Ltd v. Amex International Pty Ltd (2002) ZR 78.*

12. *Socotec International Inspection (Zambia) Ltd v. Finance Bank (SCZ Appeal No. 149 of 2011).*
13. *Bank of Zambia v. Vortex Refrigeration Co. & Dockland (SCZ Appeal No. 004/2013).*
14. *Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172.*

Legislation referred to:

1. *High Court Rules of the Laws of Zambia.*
2. *High Court Rules chapter 27 of the Laws of Zambia.*

Other works referred to

1. *Direction (QBD) Preemptory Order (1980) WLR vol. 1 at p. 948.*
2. *Judicial Opinion Writing Handbook (4th ed.; William Stein & Co).*

1.0 INTRODUCTION

1.1 The current appeal arises from a dismissal of a matter by operation of an "unless order" given by the High Court. Following the said order, the appellant approached that court to review it. The court, however, declined the appellant's application on account of the appellant's failure to obtain special leave to review.

1.2 The appellant then again moved the court, this time with a prayer that it grants special leave to review. This appeal is against the High Court's refusal to grant special leave to review its decision.

2.0 BACKGROUND FACTS

2.1 The action in the High Court was taken out in September, 2009 by the appellant against the respondent, as first defendant, Madison Insurance Company Ltd, as second defendant, and Workers Compensation Fund Control Board, as third defendant.

2.2 The concatenation of events leading to the action was, to say the least, dumbfounding. It involves a series of adversities occurring in short order, which appeared to have persisted in oppressing the appellant. To the appellant it no doubt appeared to have been tragedy after tragedy.

2.3 The first in that streak of the appellant's apparent bad luck as narrated by her, was that as a Note Examiner in the respondent Bank, she operated a machine which bundles soiled notes in readiness for disposal. That, in itself, is ordinarily harmless. In her case, however, she regrettably injured her left hand in the course of her duties. The injury, which was in the shoulder, eventually affected her spine. This, according to her, would not have been the case had the respondent agreed to reassign her to a different work department.

2.4 The respondent allegedly also failed, refused or neglected to report the appellant's injury to Madison Insurance Company Limited which provided a Group Accident Insurance Scheme that covered the appellant. In consequence of that failure, the appellant alleged that she sadly lost the opportunity to seek insurance payment for her injury under that insurance policy. Not only that, the respondent did not report the appellant's injury to the Workers' Compensation Fund Control Board. The result of that omission is that the appellant could not claim from the Workers Compensation Fund Control Board either.

2.5 On a different note of mischance, the appellant owned an automobile which she bought with the financial assistance in the form of a loan from the respondent. That vehicle, which was comprehensively insured with Madison Insurance Company Limited, was woefully involved in a road traffic accident. While the appellant was abroad receiving medical attention for her injury. which we have referred to earlier, the insurance company processed the appellant's insurance claim and forwarded a cheque for K23,700,000 to the respondent which the respondent

accepted. Consequent to that acceptance, the respondent signed the loss agreement form, thereby effectively discharging the insurance company.

2.6 As an aside, the appellant lamented that while she was out of the country receiving treatment for her injury, the respondent inconsiderately discharged her from employment for having deserted work. That grievance was a subject of separate legal proceedings commenced in the Industrial Relations Court under cause No. 235/2009. Needless to state that the appellant's claim was unsuccessful.

2.7 The appellant claims that her motor vehicle had been insured for K35,000,000 and that by accepting the sum of K23,760,000, the respondent had occasioned the appellant a loss in the sum of K11,240,000.

2.8 It is on the basis of these facts that the appellant took out actions against the three parties as we have stated at paragraph 2.1 of this judgment, claiming as against the respondent, payment of the shortfall on the insurance

claim, and as against the other two parties, compensation for the injury suffered in her work as a Note Examiner.

2.9 Not surprisingly, there was an application for misjoinder pursuant to Order 14 Rule 5(2) of the High Court Rules by Madison Insurance Company Limited. Eventually an amended writ of summons was filed on 20th October, 2011, reflecting only two parties, i.e. the appellant and the respondent, with the appellant's claim being adjusted appropriately.

2.10 Pleadings were exchanged by the parties and the matter was subsequently listed for hearing before Sharp-Phiri J on 22nd October, 2013. On that date, however, neither party nor their legal representatives was in attendance and no explanation for their absence was furnished to the court.

2.11 The learned judge thereupon struck out the matter with liberty to restore it to the active cause list within 30 days from the date of the Order, failing which the action would stand dismissed.

2.12 There was no application to restore made and on the 9th December, 2013, the learned judge signed an order of dismissal of the action. It is then that the appellant's counsel spurred into action, filing some four days later, an application to review. That application was dismissed by the learned judge on 5th February, 2014 for "being misconceived on the basis that a period of 54 days had elapsed before the application was brought and special leave to review had not been sought."

2.13 In a move reminiscent of fire fighting, the appellant's counsel then applied to the learned judge for special leave to review under Order 39(2) and Order 3 rule 2 of the High Court Rules, chapter 27 of the Laws of Zambia. That application suffered no better fate: it too, was dismissed.

2.14 Aggrieved by the judge's refusal to grant special leave, counsel for the appellant took up the cudgels to assail the learned judge's decision.

3.0 APPEAL TO THE SUPREME COURT

3.1 The appeal to this court is premised on six grounds formulated as follows:

GROUND ONE

The learned trial judge in the court below erred in law and in fact when she stated that the matter was scheduled for hearing on 22nd October 2013, when on that date, the matter was in fact scheduled for status conference, by which date the plaintiff had already complied with orders for directions. [sic!]

GROUND TWO

The learned judge in the court below erred in law and in fact when she held that the notice of hearing which the plaintiff's counsel contended his firm had not received was in fact received when she herself was not sure this was done by her Marshal as she stated in her ruling "The notice MUST have been circulated..." As opposed to "This notice WAS circulated to both advocates." [sic!]

GROUND THREE

The learned judge in the court below fell in error in both law and fact when she held that her Marshal had placed the formal striking out order in the plaintiff's advocates in the total absence of evidence challenging the plaintiff's advocates evidence to effect that they never received ANY NOTICE OR ORDER of 22nd October, 2013 and were unaware that the matter had been struck out. [sic!]

GROUND FOUR

The learned judge in the court below erred both in law and in fact when she neglected to address in her ruling the plaintiff's counsel's evidence at paragraph 8 of the affidavit which stated that the order dismissing matter for want of prosecution was not placed in the plaintiff's counsel's pigeon hole but that of Messrs Frank Tembo and partners,

former advocates for the plaintiff, which err on the part of the judge's marshal clearly established that she had been sending the notices and/or orders complained of to the wrong law firm, and which evidence was not disputed or challenged. [sic!]

GROUND FIVE

The learned judge in the court below erred both in fact and in law when she held that fresh evidence showing the plaintiff's counsel had not received notice of hearing would not constitute sufficient fresh evidence likely to have a material effect on her decision to strike out and dismiss the matter for want of prosecution as it is in our view not the practice of the courts to strike out and dismiss matters without the notices being sent to counsel for the plaintiff more especially at status conference where the party affected by the said orders has complied with the orders for directions.

GROUND SIX

The learned judge in the court below erred in both law and act when she held that counsel for the plaintiff should have seen the court's handwritten notes and order striking out the matter on the file when he was filing the request to set down the matter for trial when it is clear practice that the court registry staff receive and file the documents on the file as opposed to giving the file to counsel's legal assistants to peruse and consequently if there was any striking out order or indeed any other order forbidding the filing of documents, it was the duty of the High Court Registry Staff to bring to the attention of such orders to counsel's legal assistants filing the request to set matter

down for trial, thus such failure on the part of the Registry Staff could not be blamed on counsel.

4.0 THE APPELLANT'S CASE ON APPEAL

4.1 The appellant filed heads of argument in which her case on appeal was principally set out. Those heads of argument were filed on behalf of the appellant by Messrs Besa Legal Practitioners.

4.2 At the hearing of the appeal, however, the appellant appeared in person and intimated that she was placing full reliance on those heads of argument.

4.3 The substance of the grievance in ground one of the appeal is largely factual. The appellant alleges that the lower court judge erred when she stated that the matter was scheduled for hearing on 22nd October, 2013 when on that date the matter was in fact scheduled for a status conference.

4.4 In arguing this ground of appeal, the appellant gave a narration of the factual backdrop, namely that the record of appeal reveals that the matter came up for a scheduling conference on 27th June, 2013 whereat the court issued fresh orders for directions. She submitted that by 22nd

October, 2013 when the matter came up and was struck out, the appellant had already complied with the orders for directions while the respondent had not.

4.5 The appellant also posited that she had not yet filed the request to set the matter down for trial at that stage. In these circumstances, argued the appellant, the trial judge, regardless of her eagerness to have the matter proceed to trial without delay, could at best only hold a status conference.

4.6 The appellant alluded to another factual issue, namely that the notice of hearing for the 22nd October, 2013 was not filed and that none of the parties saw it. She urged us to uphold ground one of the appeal.

4.7 Turning to ground two, the appellant impeached the lower court's holding that the notice of hearing had been served when the judge was herself unsure that service of the notice was effected on the parties.

4.8 She submitted that service of process or hearing dates is a mandatory requirement and there ought to be reasonable proof that a party has been served with the notice or process

before any adverse decision may be made by a judge arising from the party's non-attendance or failure to take action in obedience to the notice or process.

4.9 The appellant went on to state that the moment her counsel informed the court that the notice of hearing had not been served, the court should have given convincing justification as to why it surmised that the converse was the case. This the court did not do, preferring instead, to proceed on the basis of assumptions. To confirm her submission, the appellant quoted the following statements from the ruling [at R7] of the learned judge given on 7th August, 2014:

> **I have observed from the record that the notice of hearing for the matter to be heard on 22nd October, 2013 was issued by the court and was addressed to both counsel representing the plaintiff and the defendant. This notice must have been circulated to both advocates on record by the Court Marshal through their pigeon holes.**

4.10 The appellant contested the use by the learned judge of the words the notice *must have been circulated* rather than *the notice was circulated.* This, she claimed indicated uncertainty on the part of the learned judge. The judge,

according to the appellant, had no evidence that the notice was served.

4.11 Referring to her former counsel's affidavit in support of the application to review filed on 16th December 2013, the appellant pointed to the disputed narration of the facts and observed that:

> **The learned judge was infuriated that counsel was accusing her officer and ordered that the affidavit dated 16th October 2013 be withdrawn and she would only consider the applicant's application of any reference to her Marshall was removed from the affidavit.**

4.12 The appellant's counsel withdrew the affidavit and filed a different one without reference to the Marshall. By this background, however, the appellant submitted that the lower court judge became fully aware that the appellant had not received the notice of hearing for the 22nd October 2013, and hence that she was wrong to strike the matter out with an order for dismissal if not restored.

4.13 The appellant also referred us to Practice Direction **(QBD) Preemptory Order**, which speaks to the wording of an "unless order" and emphasized the aspect of service to stress the

point that there ought to be clear evidence of service. She urged us to uphold ground two of the appeal.

4.14 Moving to ground three of the appeal, the appellant's challenge of the lower court's ruling was not substantively different from the challenge under ground two. Once again the appellant argued that the lower court judge goofed when she held that her Marshall had placed the formal order striking out the matter in the appellant's counsel's pigeon hole in the absence of evidence challenging the appellant's assertion that no such notice was received by her.

4.15 The appellant contended that her counsel's statement in the affidavit filed in support of the application was sworn evidence which should have been believed unless rebutted. The respondent did not oppose the assertion or rebut its veracity. The appellant swore that the notice or the striking out order was sent to Frank Tembo and Partners and this was not challenged by the respondent and, therefore, the learned judge had no basis to hold, as she did, that the formal order striking out the matter had been placed in the appellant counsel's pigeon hole.

4.16 Under ground four the appellant raises nothing new. She challenges yet against the finding of the lower court that the notice was placed in the appellant's counsel's pigeon hole against the affidavit evidence produced by the appellant to the effect that the order dismissing the matter for want of prosecution was not placed in the pigeon hole for Messrs Besa Legal Practitioners, but rather that of Messrs Frank Tembo & Partners, the appellant's former advocates.

4.17 The appellant admitted that the argument in support of this ground had already been made under ground three of appeal. What the appellant added, however, was that a review of the ruling of the lower court shows that the judge did not 'produce' the evidence; the arguments of the parties and did not discuss or evaluate the merits of the parties' respective arguments. According to the appellant, the judge made conclusions based on assumptions.

4.18 Given the argument made in the foregoing paragraph, it was the appellant's submission that the ruling of the court below violated the basic tenets of a good judgment as explained by us in the case of **Zambia Telecommunications**

Company Limited v. Mulwanda and 2 Others[1]. He also referred to the writing of Joyce J. George in her **Judicial Opinion Writing Handbook** to buttress the same point.

4.19 The appellant also referred to the cases of **Minister of Home Affairs & Another v. Habasonda**[2] and **Zambia Breweries Plc. v. Sakala**[3] to stress the point that a good judgment must have some essential elements which the ruling under attack lacked. We were urged to uphold ground four of the appeal.

4.20 Ground five challenges the finding by the lower court judge that fresh evidence showing that the appellant's counsel had not received a notice of hearing, would not constitute sufficient evidence likely to have a material effect on her decision to strike out and dismiss the matter for want of prosecution.

4.21 She contended that if the judge was to learn after the order that she made striking out the action, it was contrary to the dictates of justice for her to refuse to review her decision in those circumstances. The appellant quoted Order XXXIV rule 1 of the High Court rules which specifies condition for review by a judge of his/her decision, pointing out that that

out that that rule allowed the judge in the circumstances the lower court judge was in to review her decision. Counsel implored us to uphold this ground of appeal.

4.22 Ground six impeached an observation made by the lower court judge in her ruling that counsel for the appellant should have seen the court's handwritten notes and the order striking out the matter on the file at the time of filing the request to set the matter down for trial.

4.23 The appellant contended that it is clear practice that the court registry staff receive and file documents as opposed to giving the file to persons filing documents with the liberty to peruse files at the time of filing. In the present case, it was the responsibility of registry staff to have rejected the filing on behalf of the appellant, of the notice to set the matter down for trial on 1st November 2013 because the matter had on 22nd October 2013 been struck out with liberty to restore.

4.24 The appellant also contended that the learned judge, in apparent disregard of the known procedure for filing documents at the High Court Registry stated as follows:

> **"The record shows that the plaintiff's advocates would have attended court to file a request for setting down of the matter on the file on 1st November 2013. On this date, the court's hand-written notes and the typed order striking out the matter were both on file..."**

4.25 The appellant furthermore submitted that the approach taken by the lower court judge was contrary to the approach advocated by the Supreme Court in the case of **Stanley Mwambazi v. Morester Farms Limited**[4], namely that the court should as much as possible allow triable issues to come to trial despite default on the part of the parties. In the present case, according to the appellant, the court should have looked at the overall interests of justice and allowed the matter to proceed to trial.

4.26 We were urged to uphold ground six of the appeal and consequently the entire appeal.

5.0 THE RESPONDENT'S CASE

5.1 The respondent challenged the appeal on all fronts. Before turning to rebut the substantive grounds of appeal, the respondent's learned counsel raised three issues by way of preliminary objection. These were as follows:

5.1.1 The notice of appeal indicates that the appeal is against a ruling dated 17th August, 2014. There is, however, no such ruling in the whole record of appeal.

5.1.2 The record of appeal shows that there are two rulings: one dated 5th February, 2014 and the other dated 7th August. The appellant's heads of argument have not, according to the observation of counsel for the respondent, addressed or challenged the ruling of 5th February, 2014. It follows that any decision of this court will be inconsequential as the unchallenged ruling of 5th February 2014 will remain unchanged – meaning the matter will remain dismissed.

5.1.3 Counsel contended that going by the record, the actual original main ruling in this matter is that of 5th February, 2014 which dismissed the appellant's application for review and which granted the appellant leave to appeal. However, the record of appeal does not mention that ruling at all, nor does the memorandum of appeal mention it specifically.

5.2 Quoting from the judgment of the Court of Appeal in the case of **Stanbic Bank (Z) Ltd v. Savenda Management Services Ltd**[5] that when a judge receives an incompetent application

he is not obliged to expend valuable time hearing it but should on paper indicate that such application is incompetent. This, according to counsel, is in keeping with good case management. Here, the respondent was effectively making the point that even if the court considered the appeal on the assumption that the appellant is appealing the last of the two rulings, namely, that of 7th August 2014, the dismissal of the case by the earlier order of 5th February 2014 will still remain. The appellant has not requested the court to determine or adjudicate on that decision.

5.3 The respondent's learned counsel contended that this court cannot indirectly be urged to entertain an appeal against the lower court's ruling of 5th February 2014 as no leave was obtained to appeal that decision within thirty days. He relied, in this regard, on the case of **Pule Elias Mwila and Others v. Zambia State Insurance Corporation Ltd[6].** He also cited our decision in the case of **Zambia Revenue Authority v. T & G Transport[7]** where we pointed out that the requirement of leave to appeal goes to the jurisdiction of the court, and

this jurisdiction cannot be conferred by the expressed consent of the parties.

5.4 The learned counsel for the appellant finally referred us to the case of **NCF Africa Mining v. Techpro (Z) Ltd.**[8] where we stressed the need, in appropriate cases, to obtain leave from the lower court, or this court before proceeding further. He implored us to dismiss the appeal on the preliminary objections.

5.5 In the event that we did not entertain the preliminary objection for any reason, counsel urged us to consider their substantive responses to the grounds of appeal.

5.6 Turning to the grounds of appeal proper, the learned counsel for the respondent argued grounds one, two, three and four compositely, while grounds five and six were responded to individually.

5.7 In regard to the first cluster of grounds, the learned counsel impugned the submission by the appellant that it was an error for the lower court judge to hold that the matter was scheduled for hearing on 22nd October 2013 and that the

notice or order was placed in the appellant's advocate's pigeon hole.

5.8 Counsel contended that it was fallacious to argue that when a matter is cause-listed for a status conference then it cannot be said to be coming up for a hearing. According to counsel, the mere fact of cause-listing a matter entails that it will be heard and the parties are obliged to attend. A failure to do so will entitle the court to proceed in any manner properly authorized by the rules.

5.9 As regards the argument that the appellant's lawyers, namely, Messrs Besa Legal Practitioners, were not aware of the notice or order since, contrary to the claim that the notice of hearing was placed in their pigeon hole, counsel for the respondent revealingly submitted that as of 22nd October 2013, Messrs Besa Legal Practitioners were not on record as representing the appellant. According to counsel, the lawyer for the appellant on record were in fact Messrs Frank Tembo and Partners who have since ceased to represent the appellant. Further, that there was no intimation whatsoever on the record that Messrs Frank Tembo & Partners had ceased to represent the appellant or

that Messrs Besa Legal Practitioners had been appointed to represent the appellant. This, according to counsel, was an issue that as the record will show [page 279 line 8], the lower court judge had even raised.

5.10 Learned counsel referred us to Order 67/1 of the Rules of the Supreme Court (White Book) 1999 and 67/6 of the same rules regarding notice to sue or defend by solicitor and what should happen when such solicitor ceases to represent a party. Counsel also quoted from Order 5 rule 1 of the **High Court Rules, chapter 27 of the Laws of Zambia** on the necessity to file a notice of change of Advocatc where necessary and what happens when such notice is not filed.

5.11 It was also submitted that although the record in this particular matter will show a number of lawyers such as Messrs Frank Tembo & Partners, Messrs Besa Legal Practitioners, and Messrs M. Chalwe & Co. Advocates, as having filed some documents on behalf of the appellant, none of those advocates filed any notice of appointment, nor made any application in accordance with order 67/1 and 67/6 of the While Book, or Order 5 rule 1 of the High Court

Rules. Consequently, it was only Messrs Frank Tembo and Partners, who were properly on record, having initiated the court process on behalf o the appellant. Counsel stressed that Messrs Besa Legal Practitioners were not on record.

5.12 Quoting from the case of **Pule Elias Mwila & Others v. Zambia State Insurance Corporation Ltd**[6], counsel submitted that litigants and their advocates should not expect that the court will condone a lackadaisical attitude towards their cases characterized by blatant breaches of the rules of court. Counsel submitted that as the appellant, by her own affidavit, conceded that documents in respect of these proceedings were filed by Messrs Frank Tembo & Partners [page 93 of the record of appeal], the court cannot in these circumstances be faulted.

5.13 Citing the case of **Philip Mutantika, Mulyata Sheal v. Kenneth Chipungu**[9] as authority, counsel submitted that a litigant who suffers any prejudice arising from the incompetence or negligence of his/her counsel in having an appeal dismissed, should have recourse to his legal counsel. A

similar holding was made by the Court of Appeal in **Stanbic Bank (Z) Ltd v. Savenda Management Services Ltd[5]**.

5.14 Counsel thus urged us to dismiss grounds 1 to 4 of the appeal for, as was stated in **Pule Elias Mwila & Others v. Zambia State Insurance Corporation Ltd[6]**, litigants should not expect the court to aid litigants by correcting their errors.

5.15 With respect to ground five of the appeal, the respondent's learned counsel maintained that the lower court judge did not err when she held that fresh evidence showing that the appellant's advocates had not received the notice of hearing, would not constitute sufficient fresh evidence likely to have a material effect on her decision to strike out and dismiss the matter for want of prosecution.

5.16 According to counsel, the order made on 22nd October 2013 was made in the absence of the parties. Later on 9th December 2013 the court formalized the order dismissing the matter. The appellant had the option of either applying to set aside the order made in her absence, or to review it. She opted for the latter course. This course, however, comes with conditions, namely that the application should be

made within 14 days of the order sought to be reviewed and there ought to be fresh evidence which must have been in existence at the time the decision was made.

5.17 When the appellant made the first application which resulted in the ruling of 5th February 2014 the precondition set out in section 39 was not met.

5.18 Regarding the need for fresh evidence for purposes of review, counsel quoted a passage from the case of **Robert Lawrence Roy v. Chitakata Ranching Co. Ltd**[10] where we stated that:

> **Setting aside a judgment on fresh evidence would be on ground of discovery of material evidence which would have had material effect upon the decision of the court and has been discovered since the decision but which could not with reasonable diligence have been discovered before.**

5.19 He also reproduced a passage from our decision in **Zambia Telecommunication Co. Ltd v. Ng'andwe**[1] where we stated that:

> **For a review under Order 37 rule 2 of the High Court Rules to be available, the party seeking it must show that he has discovered fresh evidence upon the decision of the court, and could not with reasonable diligence, have been discovered before.**

5.20 A statement to the same effect was made in **Jamas Milling Co. Ltd v. Amex International Pty Ltd**[11].

5.21 The final argument made by counsel for the respondent against ground five of the appeal is procedural. They contended that in the ruling of 5th February 2014, the lower court judge had granted leave to appeal. The appellant decided not to do anything about that ruling, but chose instead to relaunch another similar application which the court dismissed. Procedurally, the ruling of 5th February 2014 has not been appealed against. Counsel urged us to dismiss ground five of the appeal.

5.22 Under ground six the respondent's learned counsel supported the position taken by the lower court judge that counsel for the appellant must have seen on file the handwritten notes and order striking out the matter when filing the request to set down the matter for trial.

5.23 Counsel submitted that it is the responsibility of counsel to prosecute his or her client's case. It is equally their responsibility to conduct necessary searches. Relying on the **Pule Elias Mwila case**[6], counsel submitted that it is not

for the court to conduct the case for a party and that courts are not bound by decisions or omissions of registry staff. We were thus urged to dismiss ground six of the appeal and consequently the whole appeal.

6.0 THE APPELLANT'S REPLY

6.1 When called upon to rebut the respondent's argument in response, the appellant indicated that she had no arguments in reply to make adding that she was only served with the respondent's submission on Friday 27 November 2020 which left her with no opportunity whatsoever to respond.

6.2 We took due note of the fact that the respondent's heads of argument were filed as way back as 15 July 2020 and sadly that the appellant appears to have problems with legal representation.

7.0 ANALYSIS AND DECISION

7.1 We have considered the respective positions of the parties, and have taken note, with interest, of the issues raised by the respondent's learned counsel. Although no formal notice to raise a preliminary objection was filed by the

respondent's counsel, the preliminary arguments elicited are nonetheless significant. In fact so significant are the glaring transgressions of the rules relating to the preparation of the records of appeal that this court would have raised them *suo moto* without prompting by the respondent's preliminary arguments.

7.2 We would quite appropriately have preferred to bring forth the issue of the record of appeal with Messrs Besa Legal Practitioners who prepared it on behalf of the appellant had they continued to represent the appellant. Being a lay litigant in person made it plainly inappropriate for us to engage the appellant on the rules relating to the preparation of the record, particularly granted that she did not prepare it or purport to have done so. This notwithstanding, we are not precluded from ventilating our reflections on the record of appeal.

7.3 We join the respondent's learned counsel in observing that by her notice of appeal, the appellant was **dissatisfied with the Ruling of Hon. Mrs. Justice N. A. Sharp-Phiri given in the High Court at Lusaka on the 17th August, 2014....**

7.4 Yet, the lower court judge notably never made any ruling on the 17th August, 2014, nor has indeed the appellant produced any decision or order of the High Court given on that date.

7.5 What has been produced in the record of appeal are two rulings - one given on the 5th February, 2014 and another delivered on the 7th August, 2014. We assume the appeal is against the latter ruling. We are prepared to accept the appellant's submission made at the hearing of the appeal that the date 17th August, 2014 must have been inserted inadvertently by her previous advocates in place of 7th August, 2020

7.6 Aside the issue of the ruling being appealed against, there are other concerns regarding the record of appeal in this case.

7.7 The record of appeal filed is clearly not in conformity with rule 58 of the Supreme Court Rules, chapter 25 of the Laws of Zambia. That rule provides as follows:

(1) The record of appeal shall be prepared in accordance with rule 10 and shall include a memorandum of appeal and copies of the proceedings in the High Court and in any court below.

(4 The record of appeal shall contain the following documents in the order in which they are set out:

(a) a complete index of the evidence and all proceedings and documents in the case showing the pages at which they appear ....;

(b) a certificate of record signed by the Registrar of the High Court;

(c) the notice of appeal with a copy of the order granting leave to appeal where appropriate;

(d) the memorandum of appeal;

(e) a statement showing the address of service of each party to the appeal....;

(f) a copy of the judgment appealed against, or a certificate issued under rule 52;

(g) copies of the documents in the nature of pleadings so far as it is necessary for showing the matter decided and the nature of the appeal...

7.8 In the record of appeal before us, the certificate of record is not signed by the Registrar of the High Court in terms of rule 58(4)(b), nor was indeed any provision made for such signature. The address of service is wrongly positioned before the notice and the memorandum of appeal.

7.9 The ruling appealed against does not follow in the prescribed sequence. Instead the ruling of 5th February, 2014 which is not appealed against, precedes that of the 7th August, 2014.

7.10 Much as the respondent's learned counsel has raised fairly pertinent issues in their preliminary submissions and we have identified our own shortcomings, we are sympathetic to the appellant's intimation to us at the hearing that she did not have the opportunity to respond to the respondent's arguments in *limine,* having been served only of Friday 27th November, 2020. This is quite apart from the fact that no notice necessary to raise preliminary issues under rule 19 of the Supreme Court Rules, chapter 25 of the Laws of Zambia was given by the respondent's counsel.

7.11 We would in these circumstances be less inclined, to dismiss the appeal in terms of rule 68(2) of the rules on account of the record being non-compliant.

7.12 As we have repeatedly stated in many case authorities, our discretion to dismiss an appeal on account of a non-compliant record, is exercised on a case by case basis depending on the peculiar circumstances of the case. As we stated in **Socotec International Inspection (Zambia) Ltd v. Finance Bank**[12], whether an appeal will be dismissed will depend on the relevant peculiar circumstances

7.13 In the present case, not only has the respondent not raised issue with the order of the documents in the record of appeal, we are able to determine the appeal on the basis of the documents as they appear in the record. A single judge of this court was probably correct in observing in the case of **Bank of Zambia v. Vortex Refrigeration Co. & Dockland**[13] that:

> **While a court is not expected to countenance laziness in the proper presentation of court documents as prescribed, it is also not expected to make minefields of minor deviations from prescribed formats. Justice risks being the victim if a straight jacket approach is employed when considering documents before the court.**

7.14 Turning to ground one of the appeal, the question raised is simply this: for what purpose was the matter listed on 22nd October, 2013? Was it for a status conference or a trial? Our view is that this question is a factual issue rather than a legal one.

7.15 Being a factual question the answer to it can be established by examining the actual notice sent to the parties. The appellant argues that no notice was seen. The court indicated that a notice of hearing was served through the pigeon hole belonging to the appellant's counsel Messrs Frank Tembo & Partners.

7.16 The learned counsel for the respondent have also argued that the notice of hearing was served on Messrs Frank Tembo and Partners rather than on Messrs Besa Legal Practitioners because the latter firm was not on record. This is an issue that has not been rebutted. In fact it has been readily admitted. Much of the arguments prepared by the appellant's learned counsel around this issue are premised on the fact that they were not served, not that the notice

was not served on the lawyers on record, namely Messrs Frank Tembo and Partners.

7.17 We believe that given the circumstances to which the respondent's learned counsel has ably spoken, namely that Messrs Frank Tembo and Partners were the lawyers on record – which fact has not been refuted, we are inclined in the absence of any contrary evidence to accept the position taken by the lower court that a notice of hearing was served on the appellant's learned counsel, Messrs Frank Tembo and Partners, through their pigeon hole.

7.18 We have also been urged by counsel for the appellant to consider the question that a status conference and a trial are two different processes and that if any notice was ever given in this case it was for a status conference rather than a trial. Our view is that the learned counsel for the appellant is attempting to make a mountain out of a mole hill. Whether the notice of hearing issued was for a status conference or for a trial proper does not change the options available to a judge when parties, cspccially the plaintiff, fails to appear and offer no just cause for their absence. The

judge is entitled to take any appropriate action including striking off the matter and outrightly dismissing it. Order 25 of the High Court Rules is in this respect instructive. We thus think that ground one is without merit and we dismiss it accordingly.

7.19 Ground two impeaches a finding of fact by the judge that in her assessment the notice must have been circulated by her Marshall. Clearly the judge's statement contained a factual conclusion informed by the circumstances before her which she assessed.

7.20 From a conspectus of a host of our decisions, it is well settled that findings of fact will rarely be disturbed by the appellate court. As we pointed out in **Wilson Masauso Zulu v. Avondale Housing Project Limited**[13],

> **Before the court can reverse findings of fact made by a trial judge we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which on a proper view of the evidence, no trial court acting correctly could reasonably make.**

7.21 The appellant has not alleged perversity in the learned lower court judge's finding, nor has she attempted to demonstrate in what respects the finding was a misapprehension of facts. In this connection, we once against note the uncontroverted position articulated by the learned counsel for the respondent that Messrs Besa Legal Practitioners were not the lawyers on record when the notice was served on Messrs Frank Tembo and Partners.

7.22 The appellant has also contended under ground two that the language used by the lower court judge to described her conception of what her Marshall did with the notice of hearing confirms that she was in a state of doubt of the precise position. We do not discern any legal argument in that submission by the appellant.

7.23 It is for the foregoing that we find no merit in ground two of the appeal and we dismiss it accordingly.

7.24 We believe that grounds three and four of the appeal have been adequately addressed by our reflections in relation to the issue who were the lawyers on record between Messrs

Besa Legal Practitioners and Messrs Frank Tembo and Associates.

7.25 Order 4 rule 1 of the High Court Rules, chapter 27 is quite instructive in what ought to happen where there is a change of practitioners representing a litigant during the hearing of a cause or matter. It states as follows:

> **A party suing or defending by a barrister or advocate in any cause or matter shall be at liberty to change his advocate in such cause or matter without an order for that purpose, upon notice of such change being filed in the office of the Registrar. But until such notice is filed and a copy served, the former advocates shall be considered the advocates of the party until final judgment; unless allowed by the Court or a judge for any special reason, to cease from acting therein; but such advocate shall not be bound, except under express agreement or unless re-engaged, to take any proceedings to any appeal from such judgment.**

7.26 The factual issue of legal representation of the appellant at the material time is to us resolved once it is accepted that as lawyers not yet placed on record, Messrs Besa Legal Practitioners could not reasonably have expected the notice to be served upon them. As it turns out the notice was served on Messrs Frank Tembo and Partners. This is not a position that the appellant has disputed.

7.27 In the result we find no merit in both grounds three and four and we dismiss them accordingly.

7.28 Turning to ground five of the appeal, we accept the submissions of counsel for the respondent that the preconditions for review of a ruling of the lower court of 7th August 2014 were not satisfied. We find the authorities cited, namely **Robert Lawrence Roy v. Chitakata Ranching Co. Ltd[10], Zambia Telecommunications Co. Ltd v. Ng'andwe[1]** and **Jamas Miling Co. Ltd v. Amex Intenatonal Pty Ltd[11],** to be on point.

7.29 We do not believe that the appellant had satisfied the two preconditions for review. The lower court judge could not be faulted for holding that there was insufficient fresh evidence that could have influenced her decision had it been made available before she made it. To be clear, it would not have made any difference to the decision of the lower court judge had she known that Messrs Besa Legal Practitioners had not been served (as they were not lawyers for the plaintiff on record) but that service of the notice had instead been

served on Messrs Frank Tembo and Partners (who were still on record as representing the appellant).

7.30 We find no merit in ground five of the appeal and we dismiss it accordingly.

7.31 Turning to ground six of the appeal, we again perceive it as raising a factual grievance regarding the practice in the High Court registry as it relates to filing of documents. It bears little obvious connection to the issue whether the lower court's decision declining reviewing its decision should or should not be reversed. We must point out that it is not every inaccurate statement made by a judge in the course of delivering her decision that should be targeted for challenge. Statements must be situated in the overall decision making process. We do not find that the judge's particular statement advances the appellant's case any further. Ground six equally has no merit and it is dismissed.

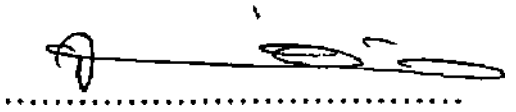
8.0 CONCLUSION

8.1 The appellant's case reads much like a menu of calamities. There is much to be said about the legal representation

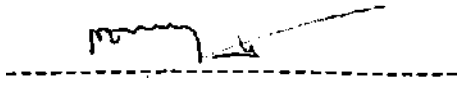
received by the appellant from the commencement of these proceedings. It is, however, not our place to get into these details save to state that we agree with the submissions of the respondent's counsel on the relevance to the appellant's circumstances of the case of **Pule Elias Mwila & Others v. Zambia State Insurance Corporation**[6] and **Philip Mutantika, Mulyata Sheal v. Kenneth Chipungu**[9].

8.2 The upshot of our decision is that all the grounds of appeal have no merit and they are accordingly each dismissed.

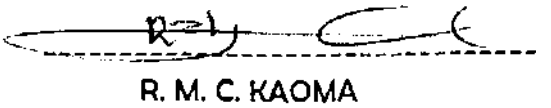
8.3 The whole appeal is in turn hereby dismissed with costs.



I.C. MAMBILIMA
CHIEF JUSTICE



M. MALILA
SUPREME COURT JUDGE



R. M. C. KAOMA
SUPREME COURT JUDGE