IN THE SUPREME COURT OF ZAMBIA **SCZ/8/005/2018**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N:

ZAMBIA TELECOMMUNICATIONS CO. LTD. **INTENDED APPELLANT**

AND

IRENE SIMATE, PERINE C. ZULU
& 54 OTHERS **INTENDED RESPONDENTS**

Before Hon. Justice Dr. Mumba Malila in Chambers on 18th September, 2018 and 13th February, 2019

For the Appellant: Mr. M. Chiteba, Mulenga Mundashi Kasonde & Co.

For the Respondent: Mr. N. Okware, Okware & Associates

RULING

Cases referred to:

1. *Hebert Mbewe & Others v. ZAMTEL (SCZ/8/236/2013)*
2. *Twampane Mining Cooperative Society Ltd. v. E & M Storti Ltd. (2011) ZR(3) 67*
3. *Henry Kapoko v. The People (Selected Judgment No. 43 of 2016)*
4. *Lapemba Trading Limited v. Pemba Lapidaries, Industrial Credit Co. (Selected Judgment No. 27 of 2016)*

Legislations referred to:

1. *Constitution of Zambia Act, No. 2 of 2016*
2. *Supreme Court Act, chapter 27 of the laws of Zambia*

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3. *Supreme Court Rules*
4. *Court of Appeal Act, No. 7 of 2016*

I regret the delay in rendering this Ruling. It was occasioned by a combination of circumstances over which I had no control.

The application before me is for leave to appeal pursuant to Rule 11(4) of the Court of Appeal Rules made in terms of to the Court of Appeal Act, Act No. 7 of 2016. The application is also taken out in terms of section 24(b) of the Supreme Court Act, chapter 25 of the laws of Zambia.

The application is sequel to a refusal by the full Court of Appeal to grant leave to the intended appellant to appeal the judgment of that court given on the 9th November, 2017. That judgment dismissed an appeal from the High Court by the now intended appellant.

The details of the dispute between the parties is largely irrelevant to the issue before me. I should state, however, that it related to payment by the appellant of retirement benefits to its former unionised and management employees who alleged underpayment.

The intended appellant lost the case in the High Court, prompting it to appeal to the Court of Appeal. The latter court upheld the High Court judgment, stimulating the intended appellant to contemplate launching a further appeal to this court. Leave to appeal had to be sought in keeping with the provisions of section13 of the Court of Appeal Act.

Before launching the appeal, however, the parties embarked on discussing a possible settlement for themselves of the judgment sum outstanding to the employees. They reached some agreement of sorts as regards unionised employees. However, regarding management employees, the parties could not reach agreement owing to the existence in the Supreme Court of a matter that supposedly raised similar issues, namely *Hebert Mbewe & Others v. ZAMTEL*[1] which was then pending determination.

The parties agreed to file a consent summons and consent order before the Court of Appeal, granting the intended appellant leave to appeal the court's judgment of 9th November, 2017 as it related to former management employees. The Court of Appeal did not appear too enthused by the course adopted by the intended appellant and

the respondents. Rather than endorse the consent summons and consent order as structured and filed by the parties, the court gave a return date for hearing and subsequently delivered its reasoned ruling on 15th February, 2018.

By that ruling the consent application for leave to file appeal was dismissed, with the court opining that section 13(3)(a) to (d) of the Court of Appeal Act sets out the circumstances under which the Court may grant leave to appeal. By adopting the course which the parties had chosen in this case, that is to say, seeking to obtain the Court's leave to appeal through the consent of the parties, rather than allowing the deliberative consideration of the reasons for the appeal by the Court, the parties had deprived the Court of the crucial function of determining the appropriateness of the appeal as contemplated by section13 of the Court of Appeal Act.

With the court's sentiments as expressed in the judgment firmly in mind, the intended appellant then decided to apply for leave in the ordinary way. The period taken to negotiate a settlement with the respondent, however, meant that the intended appellant had ran out of time to file the application for leave within the stipulated 14 days

under section 13(2) of the Act. The intended appellant thus required special leave to file the application for leave to appeal.

An application for an order extending time within which to apply for leave was thus lodged before the Court by the intended appellant. That application was not opposed by counsel for the respondent. The court delivered its ruling on that application on 2nd August, 2018, refusing leave for extension of time on grounds that there were no prospects of the application for leave to appeal succeeding and that the delay in making the application was inordinate.

It is the rejection on the grounds stated by the Court of Appeal of the application to extend the time of filing the application for leave that has excited the intended appellant to renew the application before me, sitting as a single judge of this court.

The application is supported by an affidavit in which the deponent claims that the intended appeal has high prospects of success and that the intended appellant stands to suffer severe prejudice if leave to appeal is not granted. In any case, the intended respondents have consented to leave being granted.

Before me, Mr. Chiteba, learned counsel for the intended appellant, submitted that in terms of the Court of Appeal Act, among the considerations the court must have in mind in granting or refusing to grant leave under section 13 of the Act, is whether the appeal had reasonable prospects of success and whether there are other compelling reasons for the appeal to be heard. Under the proposed memorandum of appeal, according to counsel, it is clear that the appeal had prospect of success. Additionally, there is a compelling reason for the appeal to be heard, namely the pendency of another appeal in the Supreme Court as highlighted in the supporting affidavit.

The intended respondent opposed the application and filed an affidavit to that effect. Multiple grounds of opposition were canvassed, namely that six month and fourteen days had elapsed since the judgment sought to be appealed against was delivered. The issue of interpretation of the conditions of services for the intended appellant's management employees was fully addressed by the Court of Appeal in its judgment. The intended appellant has failed to demonstrate that there is any serious question of law or that the

appeal is of public importance or raises an issue of public interest warranting it being entertained by the Supreme Court.

At the hearing, Mr. Okware, learned counsel of the respondent submitted that the delay was so inordinate that this court ought not entertain the application. He cited our decision in *Twampane Mining Cooperative Society Ltd. v. E & M Storti Ltd.*[2] as having dealt exhaustively with situations of delay such as has occurred in the present case. There, the delay was only for 39 days. In the present case, it was for close to 200 days. The application should thus never be allowed.

In reply, Mr. Chiteba disputed the submission regarding the delay and offered an explanation. He submitted that shortly after the judgment of the Court of Appeal was delivered, the intended appellant had moved that court by way of consent summons and consent order. The court, rather than proceed as per agreement of the parties, summoned the parties for hearing on the application subsequent to which it delivered its ruling. The intended appellant then sought to obtain leave to extend time within which to appeal. That application was also declined. There was thus, according to Mr.

Chiteba, no inordinate and deliberate delay on the part of the intended appellant.

The learned counsel for the intended appellant also adverted to Article 118(2) of the Constitution of Zambia Act No. 2 of 2016, which urges courts not to pay undue regard to procedural technicalities when determining matters before them. He cited the decision of the Constitutional Court in *Henry Kapoko v. The People*[3] in which the court explained that all courts are bound by Article 118(2) and that it is only the Constitutional Court that can give the article meaning. Further, that the article does not do away with the rules of procedure and timelines, but every matter is to be determined on a case by case basis. That article, according to the Constitutional Court, is intended to avoid a situation where manifest injustice is caused by paying undue regard to technicalities.

Mr. Chiteba further submitted that when the interests of justice are considered, there is no prejudice that would be occasioned to the intended respondents as they had previously consented to the matter being determined by consent.

I have carefully considered the application and the arguments by the respective counsel for the parties. The key question I have to consider is whether the reasons assigned by the Court of Appeal for declining to grant leave are legally justified.

In terms of section13 of the Court of Appeal Act No. 7 of 2016

"(1) An appeal from a judgment of the Court shall lie to the Supreme Court with leave of the Court.

(2) An application for leave to appeal, under subsection (1), shall be made within fourteen days of the judgment.

(3) The Court may grant leave to appeal where it considers that-

(a) The appeal raises a point of law of public importance;

(b) It is desirable and in public interest that an appeal by the person convicted should be determined by the Supreme Court;

(c) The appeal would have a reasonable prospect of success;

(d) There is some other compelling reason for the appeal to be heard.

(4) Leave to appeal should not operate as a stay of execution of a judgment."

Order XI rule 1 of the Court of Appeal Rules echoes section 13(1) of the Act.

It is clear to me from this provision that there is no longer an automatic right of appeal to the Supreme Court. Leave ought to be sought and obtained from the Court of Appeal before any party

unhappy with the decision of the court may appeal to the Supreme Court. An application for leave to appeal to the Supreme Court ought, in terms of section13(2) of the Act, to be made within 14 days of the judgment.

In terms of Order XIII rule 3(1)(a) of the Court of Appeal Rules, the court may, for sufficient reason, extend time for making an application, including an application for leave to appeal.

Order XI rule 1(3) provides that where leave to appeal is refused by the court, an application for leave to appeal may be made to the Supreme Court. Such application being one on an interlocutory point not involving the determination of the appeal lies to a single judge of the Supreme Court in terms of rule 48 of the Supreme Court Rules.

Every application before a court should be anchored on a well-defined basis. As we observed in *Lapemba Trading Limited v. Pemba Lapidaries, Industrial Credit Co*[4], the requirements which ought to be satisfied before any application is granted will differ from application to application. Thus, for example, an application to set aside a default judgment should disclose a defence on the merit. An

application for leave to appeal, requires that the applicant shows prospects of success of the intended appeal. In the case of an appeal from a decision of the Court of Appeal, one of the circumstances listed in section13 as I had quoted it above, should be demonstrated. An application for extension of time will require the applicant to disclose a plausible reason for the delay and why more time is required. The court will consider prospects of injustice, the length of the delay and the degree of prejudice if any to the other party. Each application ought to be determined using a different set of considerations.

In the present case, the application that was rejected by the court below was not for leave to appeal. Rather, it was for extension of time within which to apply for leave to appeal. The court should, in determining that application, have focused on assessing what the reasons for the delay in making the application were and whether granting additional time would not cause injustice or prejudice to the other party. Once the court was satisfied that all these were established satisfactorily in support of the grant of the application, an appropriate decision based on those considerations should have been made, namely to grant the extension of time sought.

It is only following the extension of time that the intended appellant would have then applied for leave. At that stage, the court would then be guided by the considerations listed in section13 on whether or not to grant leave.

The reason for the court's rejection of the application for an order extending time within which to apply for leave to appeal was clearly set out on pages R9 and R10 as follows:

> "From the date of judgment to 23rd May 2018, when the application for extension of time was made, a period of 6 months and 14 days elapsed. Counsel for the Applicant has relied heavily on the fact that the parties were engaged in negotiations for an *ex-curia* settlement and that caused the delay. However, he has rightly pointed out that negotiations for ex-curia settlement do not stop the time for appealing from running. This position is supported by the case of *Twampane Mining Cooperative Society Ltd. V. E & M. Storti Mining Ltd*[2].
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> In light of the foregoing we are of the view that the delay in filing for extension of time in this case for 6 months and 2 weeks was too long. The Applicant decided not to file the application in time at its own risk. The Applicant should have filed a notice of appeal or an application for extension of time while negotiations were going on."

I cannot agree more with the lower court's sentiments which I hereby endorse.

My view is that the only relevant arguments when it comes to whether or not the rejection of leave for extension of time was appropriate, is whether, taken in the round, the circumstances for the delay are excusable. Only when the court agrees that the delay is excusable will it be necessary to consider the issue of prejudice to the other party. In this case, I have already agreed with the lower court that the delay was inordinate. I do not think that it is necessary to deal with the issue of prejudice even if it was raised.

All the other arguments advanced by counsel relating to the prospects of success of the appeal or whether there are questions of public interest involved, or whether the appeal raises a point of law of public importance, or indeed whether there are other compelling reasons for the appeal to be heard, are entirely of no moment to the subject matter of this application. Those arguments would only be relevant to consider if the application had been for leave to appeal, not in the current situation where the application is for leave for extension of time.

In the ultimate result, I find the application before me to be destitute of merit. I dismiss it with costs.

Dr. Mumba Malila
JUDGE OF THE SUPREME COURT