

**IN THE COURT OF APPEAL**

**APPEAL NO. 136 OF 2022**

**HOLDEN AT NDOLA**

*(Civil Jurisdiction)*

**B E T W E E N:**

**TIGER ANIMAL FEEDS LIMITED**

**AND**

**COLLINS BOWA & 7 OTHERS**



**APPELLANT**

**RESPONDENTS**

**CORAM: KONDOLO SC, MAJULA AND PATEL, JJA**

**ON: 22<sup>nd</sup> February, 2024 and 29<sup>th</sup> February 2024**

*For the Appellant: Mr. O. Sambo of, Messrs Mwenye & Mwitwa Associates*

*For the Respondent: In Person*

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## **J U D G M E N T**

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**KONDOLO SC JA**, delivered the Judgment of the Court.

**Cases referred to:**

- 1. Zinka v The Attorney General (1990-1992) ZR 73**
- 2. Natural Valley Limited v Zambia Revenue Authority and the Attorney General SCZ/Appeal/12/2021 at pages 19 and 20**

3. **New Plast Industries v Commissioner of Lands & The Attorney General (2001) ZR 51 at 55 and 56**
4. **General Medical Council v Spackman [1943] All ER 345**
5. **DE Nkhuwa v Lusaka Tyre Services Ltd (1977) ZR 43**
6. **Jonathan Lwimba Mumba Mwila v World Vision Zambia SCZ/193/2005**
7. **Chilumba Gerald v ZESCO Ltd SCZ/106/2014**
8. **Minister of Home Affairs & Another v Lee Habasonda (2007) ZR 207**
9. **Tebuho Yeta v African Banking Corporation (ABC Bank) Zambia Limited SCZ/117/2013**
10. **Belenden (formerly Satterthwaite) v Satterthwaite [1948] 1 ALL ER 343 at page 345**
11. **Charles Osenton and Company v Johnson [1941] 2 ALL E.R. 245. at page 250**

Statutes & Publications referred to:

1. **High Court Act as amended by S.I. No.58 of 2020**
2. **Halsburys laws of England 4<sup>th</sup> Edition Volume 1 (1), paragraph 105**
3. **Chitty on Contracts: General Principles, volume 1, 29<sup>th</sup> Edition by H.G. Beale General Editor, Sweet & Maxwell & Thomson Reuters, London page 42**

## **1.0 INTRODUCTION**

- 1.1 This is an appeal against the Ruling of Justice J. Banda delivered on 12<sup>th</sup> April, 2022 under Cause No

APP/IRCLK/232/21 in which he dismissed the Appellants' appeal from a decision of the learned Registrar granting the Respondents an extension of time within which to file Complaint out of time.

1.2 In the Court below the Respondent was the Complainant and the Appellant was the Respondent.

1.3 We shall refer to the parties as they appear in this appeal.

## **2.0 BACKGROUND**

2.1 The Respondents were dismissed from employment and desired to seek legal redress but were out of time.

2.2 On 10<sup>th</sup> November, 2021 they filed summons for leave to file Complaint out of time and the matter was set down for hearing on the 26<sup>th</sup> November, 2021 and when it came up, the Registrar dispensed with the hearing and proceeded to deliver a Ruling on the basis of the documents on record and she allowed the application.

2.3 The Appellant was aggrieved and appealed to a Judge who heard and dismissed the appeal.

2.4 The Appellant has now appealed to this Court.

### **3. HIGH COURT PROCEEDINGS**

#### **3.1 Appellant's Arguments in the High Court**

3.2 The Appellant appealed on two grounds;

*1. That the Registrar erred in granting the Respondents leave to file their complaint out of time without giving the Appellant an opportunity to be heard.*

*2. That the Registrar erred by granting the Respondents leave to file their complaint out of time in the absence of any good reasons.*

3.3 In support of ground 1 Counsel for the Appellant submitted that the Appellant was served with the summons on the 23<sup>rd</sup> November, 2021 and they were promptly appointed and proceeded to file the notice of appointment as Advocates on the 25<sup>th</sup> November, 2021.

3.4 They appeared at Court the following morning on the 26<sup>th</sup> November, 2021 only to be informed that the Registrar would deliver a Ruling without meeting the parties. She delivered a Ruling allowing the Respondents' application.

3.5 The Appellant submitted that the Registrar erred by delivering a Ruling without hearing the parties as the Appellant had the right to be heard on their objection.

3.6 In ground 2 it was argued that the Court can only grant leave to file a complaint out of time where good reasons have been provided. It was submitted in this ground that an application for leave must be supported by good reasons for it to be granted.

**3.7 Respondents' Arguments in the High Court**

3.8 The Respondents submitted that the Registrar was on firm ground because the delay in filing the complaint occurred because the Appellant wrote to them advising that they would all be paid their dues. The Respondents kept on writing to the Appellant over the issue and they went somewhere to look for employment hoping that the Appellant would pay them.

**3.9 High Court Decision**

3.10 In relation to ground 1, the learned trial Judge observed that the Appellant was served with the summons on 23<sup>rd</sup> November, 2021 and engaged Counsel.

3.11 According to the lower Court, the sequence of events suggested that the Registrar gave sufficient notice and thus did not deny the Appellant's the opportunity to be heard.

3.12 That the Appellant had the opportunity to file an affidavit in opposition on the day that they filed the notice of appointment as Advocates.

3.13 In ground 2, the learned Judge held that nothing bars the Court from exercising its discretion to extend time within which to file the Complaint outside the 90 days prescribed by the provisions of section **85 (3) of the Industrial Relations Act, Chapter 269, Laws of Zambia.**

3.14 The Court further stated that as a Court mandated to give substantial justice, it is just and proper to entertain applications such as this one as long as reasons given for the delay are excusable and the delay is not inordinate and the Respondent would not suffer prejudice.

3.15 Both grounds of appeal were dismissed.

3.16 The Appellant thus turned its attention to this Court by appealing the learned trial Judge's decision.

#### **4. APPEAL**

4.1 The Appellant filed 2 grounds of appeal as follows;

- 1. The learned High Court Judge misdirected himself in law when he dismissed the Appellant's appeal on the ground that the honorable Registrar gave***

*sufficient notice and did not deny the Appellant an opportunity to oppose the Respondents' application to file the complaint out of time.*

*2. The learned High Court Judge erred in law when he held that there is nothing that bars the Court from exercising its discretion to extend time within which to file a Complaint outside the 90 days prescribed by the provisions of section 85 (3) of the Industrial Relations Act, Chapter 269 of the Laws of Zambia as amended by Act No. 8 of 2008, in the absence of any justifiable reasons from the delay to file the complaint.*

*3. The learned High Court Judge erred in law when he failed, neglected or omitted to deliver a Ruling that meets the basic standards of a Court decision.*

#### **4.2 Appellant's Arguments**

#### **4.3 Ground 1**

4.4 It was submitted that the Appellant was served the application to file complaint out of time on 23<sup>rd</sup> November, 2021 around 15:00hrs and promptly appointed advocates

who filed a notice of appointment on 25<sup>th</sup> November, 2021 in readiness for hearing on the 26<sup>th</sup> November, 2021.

- 4.5 When Counsel attended Court, the marshal informed the parties that the hearing would not take place and the learned Registrar would deliver a Ruling on the application. The Appellants were subsequently served with a Ruling dated 26<sup>th</sup> November, 2021 granting the Respondents' application.
- 4.6 It was submitted that the Appellant should have been given the opportunity to be heard as the right to be heard is a fundamental principal of natural justice and cited the case of **Zinka v The Attorney General** <sup>(1)</sup> and also referred to **Halsburys laws of England 4<sup>th</sup> Edition Volume 1 (1), paragraph 105.**
- 4.7 That the learned Registrar should have acted judiciously and allowed the Appellant to oppose the application *viva voce* on points of law. The learned Judge erred by finding that the Appellant was ultimately given an opportunity to be heard.
- 4.8 Also cited was the case of **Natural Valley Limited v Zambia Revenue Authority and the Attorney General** <sup>(2)</sup> where the Supreme Court interpreted **Order 30 Rule 6A of the High Court Act as amended by S.I. No.58 of 2020** and stated

that where a matter has been filed *inter partes*, the parties have a legitimate expectation to appear before the Court on the hearing date and a decision arising from a situation where the parties did not appear before the Court an order arising from such proceedings deserves to be declared a “*no decision*”.

4.9 On the point of the lower Court stating that the Appellant should have filed an affidavit in opposition, the case of **New Plast Industries v Commissioner of Lands & The Attorney General** <sup>(3)</sup> was cited where the Supreme Court stated that what amounts to a hearing of the parties in any proceedings can take either form of oral or written evidence. It was on this basis argued that in the absence of an affidavit in opposition the Appellant should have been allowed to argue *viva voce*.

4.10 It was finally submitted that where a decision is made in violation of the principles of natural justice, it is no decision at all. The House of Lords case of **General Medical Council v Spackman** <sup>(4)</sup> as per Lord Wright, was cited to that effect.

4.11 **Ground 2**

4.12 In ground 2, it was submitted that a perusal of the affidavit filed in support of the application before the Registrar shows

that no excusable reason was shown to justify the delay. That the Respondents have not shown proof of any administrative procedures that could have delayed them from filing their complaint.

- 4.13 The case of **DE Nkhuwa v Lusaka Tyre Services Ltd** <sup>(5)</sup> was cited. It was submitted that though not an industrial relations case, it highlighted the principle that a party seeking leave can only obtain it by providing good reasons.
- 4.14 The Appellant drew our attention to the case of **Jonathan Lwimba Mumba Mwila v World Vision Zambia** <sup>(6)</sup> in which it was held that when granting leave to file delayed Complaints, sufficient reasons for the delay must be given and the merits of the case cannot counter the delay.
- 4.15 That the only reasons given for the delay were that the Respondents were pursuing their dues from the Appellant and that the Appellant was being uncooperative.
- 4.16 The Appellant recited the Supreme Court in **Chilumba Gerald v ZESCO Ltd** <sup>(7)</sup> in which it was stated that leave cannot be granted as a matter of course, as though the pursuer of such leave were merely pushing an open door.

4.17 **Ground 3**

4.18 That the learned Judge issued a three-page Ruling without taking into consideration the documents and arguments that were made by the parties and did not show his reasoning for agreeing with the decision of the learned Registrar.

4.19 The Appellant submitted that the Ruling did not comply with the guidance for Judgment writing, given in the cases of **Minister of Home Affairs & Another v Lee Habasonda** <sup>(8)</sup> and the **Natural Valley Ltd Case** supra, and ought to be set aside.

**5. RESPONDENTS' ARGUMENTS**

5.1 The Respondent did not file heads of argument in opposition.

**6. THE HEARING**

6.1 At the hearing, Collins Bowa appeared in person on behalf of the Respondents who were all self-represented. He informed the Court that the Respondents had not filed any heads of argument. We duly notified him that we would be unable to receive any arguments from the Respondents as they had not filed any heads of argument.

6.2 Mr. Sambo on behalf of the Appellant relied on the record of appeal and the filed heads of argument.

6.3 He augmented the filed arguments by submitting the substantial justice should be applied not only to the Complainant but to all parties mentioned in an action. He supported the argument by citing the case of **Tebuho Yeta v African Banking Corporation (ABC Bank) Zambia Limited** <sup>(9)</sup>.

## 7. ANALYSIS AND DECISION

7.1 We have considered the arguments advanced by the parties.

7.2 The sum total of the three grounds is that the Appellant was not given an opportunity to be heard on its desire to oppose the Respondents' application to file complaint out of time and that when she allowed the application, the Registrar did not exercise her discretion judiciously and in so doing delivered a Ruling that did not comply with the principles of Judgment writing.

7.3 We shall address the three grounds of appeal together.

7.4 The manner in which the learned Registrar handled the matter before her raises eyebrows because she did not abide by the principle of *audi alteram partem* ("listen to the other side" or "let the other side be heard as well"), a prime pillar of our justice system which thrives on the principle of the right

to be heard. The principle applies to both criminal and civil matters alike.

- 7.5 The Learned Registrar did not consider that the application was filed on 10<sup>th</sup> November, 2021 but only served on the Appellant on the 23<sup>rd</sup> November, 2021 three days before the hearing on the 26<sup>th</sup> November, 2021.
- 7.6 In our view, instead of delivering a Ruling, only on the basis of the Respondents' affidavit in support, the learned Registrar should have heard both parties on the day scheduled for hearing because parties are at liberty to not file an affidavit in opposition and proceed by arguing the law. The learned Judge failed to consider that by proceeding without hearing the parties, the learned Registrar offended **Order 30 Rule 6A of the High Court Act as amended by S.I. No.58 of 2020**, and as held in the **Natural Valley Case** *supra*, her Ruling deserves to be declared "a no-decision"
- 7.7 The learned Registrar's two paragraph Ruling offends all the principles of Judgment writing as it does not recite the reasons given by the Respondents as to what caused the delay in filing the complaint, and does not explain why she agreed with the reasons.

- 7.8 The learned Judge proceeded along a similar path by not explaining his reasons for disagreeing with the compelling arguments and authorities advanced by the Appellant with regard to the exercise of discretion where a party seeks leave of Court.
- 7.9 The mere fact that a party needs to obtain leave of Court means that the Court must be furnished with material upon which to exercise its discretion to grant leave. As stated in the **Chilumba Gerald Case** *supra* an application for leave, and in our view leave of any kind, is never an open door one can simply stroll through. There is a requirement for good reasons to be provided.
- 7.10 As stated in numerous authorities, appellate Courts do not usually interfere with an inferior Court's exercise of discretion and will not upset a lower Court's decision simply because it (the appellate Court) would have arrived at a different decision. See the case of **Belenden (formerly Satterthwaite) v Satterthwaite** <sup>(10)</sup>.
- 7.11 However, the exercise of discretion is never absolute nor beyond question as it must be exercised judiciously and on sound legal principles. Where it is not, it can be challenged.

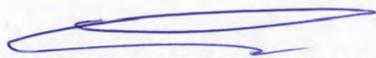
See the case of **Charles Osenton and Company v Johnson** (11).

7.12 *In casu*, despite the learned Judge having stated that “*it is just and proper to entertain applications such as this one as long as the reasons given for the delay are excusable and the delay is not inordinate* (p. 10 of the record of appeal), he did not address the fact that when exercising her discretion, the learned Registrar did not explain how she arrived at the decision that she did. She simply stated that, “*Having read the affidavit filed by the Complainant it is clear that the delay was not deliberate*”. She did not disclose which reason/s provided by the Respondents made her arrive at the conclusion that the delay was not deliberate.

7.13 We do not propose to offer an opinion on the Registrar’s exercise of discretion nor the learned Judge’s failure to comment on her failure to reason her decision but rather take note of the fact that the Appellant was not heard and further, the learned Registrar did not explain the reason/s for allowing the Respondents’ application for leave to file their complaint out of time.

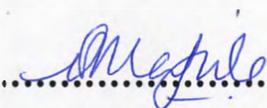
7.14 As quite rightly pointed out by Counsel for the Appellant, substantial justice applies to all the parties to a matter and substantial justice requires that all parties be afforded the opportunity to be heard.

7.15 In the circumstances this matter is sent back to the High Court for hearing before a different Registrar to enable the Appellant oppose the Respondents' application for leave to file their complaint out of time. Each party shall bear their own costs.



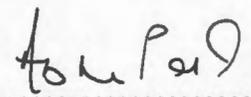
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**M.M. KONDOLO SC**  
**COURT OF APPEAL JUDGE**



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**B.M. MAJULA**  
**COURT OF APPEAL JUDGE**



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**A.N. PATEL SC**  
**COURT OF APPEAL JUDGE**