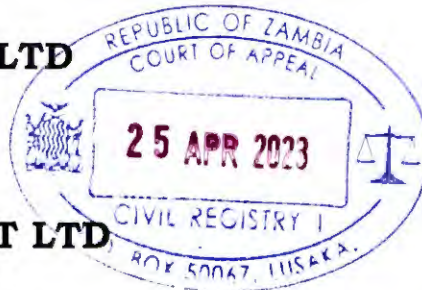


**IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**APPEAL No 193/2020  
CAZ/08/223/2019**

BETWEEN:

**MEGA EARTH MOVERS LTD**



**APPELLANT**

AND

**RAPID GLOBAL FREIGHT LTD**

**RESPONDENT**

**CORAM: SIAVWAPA, JP, CHASHI AND BANDA-BOBO, JJA**

On 1<sup>st</sup> February and 25<sup>th</sup> April, 2023

FOR THE APPELLANT: NOT IN ATTENDANCE

FOR THE RESPONDENT: MR. M. NYIRENDA OF MESSRS SLM  
LEGAL PRACTITIONERS

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## **R U L I N G**

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**SIAVWAPA, JP** delivered the Ruling of the Court.

**Cases referred to:**

1. *Standard Chartered Bank (Z) PLC v Wisdom Chanda and Another Appeal No. 92 of 2009*
2. *NFC Africa Mining PLC v Techro Zambia Limited (2009) ZR 263*
3. *Twampane Mining Corporation Society v E.M Storti Mining Limited (2011) ZR 67*

**Legislation referred to:**

*The Court of Appeal Rules No. 7 of 2016.*



## **1.0 INTRODUCTION**

- 1.1 This is a ruling on an application on behalf of the Respondent to dismiss the Appeal for non-compliance.
- 1.2 The application was made by Notice of Motion pursuant to Order X rule 9(9) of the Court of Appeal Rules.
- 1.3 The Notice of Motion was accompanied by an affidavit in support deposed to by one Martin Siwale, the Director of the Respondent.

## **2.0 BACKGROUND**

- 2.1 On 20<sup>th</sup> September, 2019, the Appellant filed into Court a Notice and Memorandum of Appeal against the Ruling of the Honourable Mr. Justice K. Chenda dated the 24<sup>th</sup> June, 2019.
- 2.2 On 9<sup>th</sup> October, 2020, the Appellant lodged into Court the Record of Appeal and heads of argument.
- 2.3 On 25<sup>th</sup> June 2021, the Respondent conducted a Search at the Court's Registry and discovered that the Record of Appeal had been filed on 9<sup>th</sup> October, 2020.

## **3.0 THE APPLICATION**

- 3.1 The appeal was scheduled for hearing on 14<sup>th</sup> June 2022 and when it was called, Mrs Kapapula, counsel for the Respondent,

informed the Court that the Respondent had never been served with the Record of Appeal. She then made a verbal application for an order to dismiss the appeal for want of prosecution.

- 3.2 There being no formal application, we ordered the Respondent to file a formal application within seven days of the order.
- 3.3 The Respondent complied with the order and filed the Notice of Motion and the supporting affidavit on 21<sup>st</sup> June, 2022.
- 3.4 We need to state here that on 14<sup>th</sup> June, 2022, after the order we made that the Respondent files a formal application to dismiss the appeal for want of prosecution, the Appellant hastily wrote a letter through counsel notifying the Respondent of the serving on the Respondent of the appeal documents.
- 3.5 In the affidavit in support of the Notice of Motion to dismiss the appeal, the deponent avers that the Appellant did not serve the Record of Appeal and heads of argument within the prescribed 14 days of lodging the appeal.
- 3.6 The deponent of the affidavit in support has also stated that the Appellant filed and served documents on the Respondent out of time but without leave of the Court.

#### **4.0 OPPOSITION**

- 4.1 The Appellant filed its affidavit in opposition on 23<sup>rd</sup> September, 2022 and it was deposed to by one Eugenio Gino Giannoccaro, the General Manager of the Appellant.
- 4.2 The deponent averred that the Appellant opposed the motion because it served the Record of Appeal and heads of argument on the Respondent before the Respondent filed its Notice of Motion to dismiss the appeal.

#### **5.0 DECISION**

- 5.1 The Record of Appeal reveals that the Appellant filed the Notice and Memorandum of Appeal on 20<sup>th</sup> September, 2019.
- 5.2 Order X rule 6(a) of the Court of Appeal Rules provides that the Record of Appeal, together with heads of argument, shall be filed within sixty-days of filing Notice of Appeal.
- 5.3 The cover of the Record of Appeal shows that the Record of Appeal and heads of argument were filed on 9<sup>th</sup> October, 2020.
- 5.4 Order X rule 9(9) of the Court of Appeal Rules provides that the Appellant shall serve a copy of the Record of Appeal together with heads of argument on each party within fourteen days of filing the same.

- 5.5 In this case, the Record of Notice of Motion shows that the Appellant only effected service of the Record of Appeal on 14<sup>th</sup> June 2022, the same day the appeal was scheduled for hearing, a period of one year nine months from the date the Record of Appeal and heads of argument were filed.
- 5.6 From the above chronology of events and the provisions of the rules cited, it is clear that the Appellant did not comply with Order X rule 9(9).
- 5.7 It is also clear that the one year nine months that elapsed before serving upon the Respondent is inordinate and without excuse.
- 5.8 The argument that the Appellant served the Record and heads of argument before the Respondent filed the Notice of Motion to dismiss the appeal does not help the Appellant because it was already out of time.
- 5.9 Further, having fallen out of time, the Appellant failed to apply for an extension of time as provided for by Order XIII rule 3 of the Court of Appeal Rules.
- 5.10 In essence therefore, the service effected on 14<sup>th</sup> June, 2022, is null and void for want of a Court order for extension of time within which to serve the Record of Appeal and heads of argument.



5.11 The Appellant has sought to rely on the case of Standard Chartered Bank (Z) PLC v Wisdom Chanda and Another<sup>1</sup>. This case holds that the Court will not prevent a party who has defaulted on a procedure from determining that matter on its merits more so where the party in default has taken remedial steps.

5.12 In this case, the Appellant's attempted remedial measure of serving on the Respondent was taken in further default of procedure for want of an order to extend time.

5.13 Moreover, the Appellant only effected service on the day that the Respondent made a verbal application to dismiss.

5.14 In that regard, the cases of NFC Africa Mining PLC v Techro Zambia Limited<sup>2</sup> and Twampane Mining Corporation Society v E.M Storti Mining Limited<sup>3</sup> are instructive.

5.15 In the first case, the Supreme Court of Zambia stated as follows;

*"...Rules of the Court are meant to assist in the proper and orderly administration of Justice and as such they must be strictly followed."*

In the second case the Supreme Court stated as follows;

*"To choose to ignore rules is to do so at one's own peril."*

5.16 In as much as we take no pleasure in dismissing appeals without considering their merits, we find it unavoidable to do so in this case for the following reasons;

- (a) The period of one year nine months was inordinately long.
- (b) The Appellant committed a second infraction of the Rules when it purported to serve without seeking and obtaining an order for extension of time.

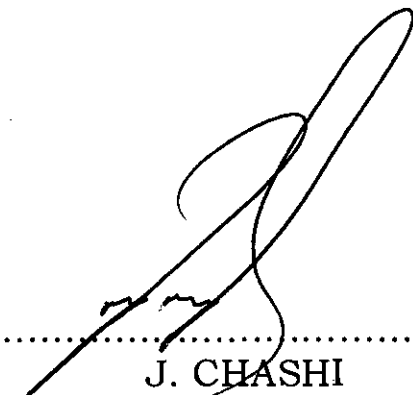
**6.0 CONCLUSION**

6.1 We therefore, find merit in the Respondent's application. We accordingly dismiss the appeal for want of prosecution.

6.2 Costs will be for the Respondent.



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**M. J. SIAVWAPA**  
**JUDGE PRESIDENT**



.....  
**J. CHASHI**  
**COURT OF APPEAL JUDGE**



.....  
**A.M BANDA-BOBO**  
**COURT OF APPEAL JUDGE**