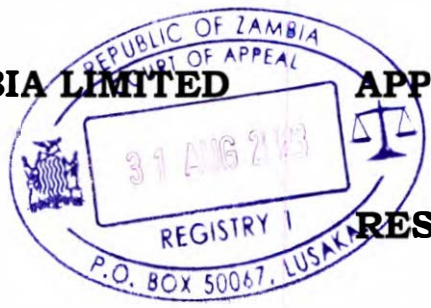
IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 170/2021
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

OMNIA FERTILIZER ZAMBIA LIMITED **APPELLANT**

AND

LIKANDO KAMAYOYO **RESPONDENT**



CORAM: ***Sichinga, Patel and Chembe, JJA***

On 25th August, 2023 and 31st August, 2023

For the Appellant: *Mr. M. Nyirenda of Messrs SLM Legal Practitioners*

For the Respondent: *No Appearance*

JUDGMENT

Sichinga, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Hu Herong and Another v John Kapotwe and Another SCZ Appeal No. 65 of 2007*
2. *Kasumba Wilfred Ngulube and 86 Others v Nitrogen Chemicals of Zambia SCZ/8/210/2015*
3. *Khalid Mohamed v The Attorney-General (1982) ZR 49*
4. *Diamond General Insurance v Lwiindi C. Moonga CAZ 127 of 2017*
5. *Stanley Mwambazi v Morester Farms Limited (1977) ZR 144*

Legislation referred to:

1. *High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court of England (1999) edition (White book)*

1.0 Introduction

1.1 The position of the Supreme Court reverberating across a number of cases including that of ***Hu Herong and Another v John Kapotwe and Another***[1] is *inter alia* that *"on an application to dismiss for want of prosecution the court will take into account all circumstances of the case, including the nature of the delay and the extent to which this has prejudiced the defendant, as well as the conduct of all the parties and their lawyers..."*

1.2 This appeal is against the High Court's ruling of Mrs. Justice Yangailo, (General List Division) which was delivered on 27th May, 2021, wherein, the appellant's action was dismissed for want of prosecution.

2.0 Background

2.1 The sequence of events is that, the appellant, who was the plaintiff in the court below, commenced an action by way of writ of summons on 7th September, 2016 against the respondent, Likando Kamayoyo, claiming *inter alia* the sum of US$ 182,041.00 being the sum allegedly misappropriated by him during the course of his employment with the plaintiff.

2.2 In its statement of claim, the plaintiff averred that on or about 8th June, 2018, the defendant admitted to being responsible for the entire amount in issue and that he undertook, in writing, to repay the said sum in installments between May 2018 and September 2019.

2.3 On 20th September, 2018, the defendant filed his defence in which he denied that he misappropriated the alleged sum of US$ 182,041.00. He further averred that the admission he made of any misappropriation was induced and obtained under duress and extreme pressure, and coercion exerted by the plaintiff through its Managing Director, Finance Manager and a third party, by way of threats of being taken to the police to be detained.

2.4 On 17th September, 2018, the plaintiff (appellant) filed an application to enter Judgment on admission. The application was scheduled for hearing *inter partes* on 4th October, 2018. The defendant's counsel, Mr. Nyirongo, sought an adjournment on the premise that he had just been appointed and intended to file a notice of appointment. He informed the court that he was yet to receive full instructions. He further informed the court that the parties were involved in discussions with a view to an *ex-curia* settlement. The learned Judge granted the adjournment to 23rd October, 2018 with a directive for the parties to file a consent judgment in the event that their discussions yielded a mutual settlement.

2.5 When the matter came up on 23rd October, 2018, for a status conference, Mr. Nyirongo informed the court that his efforts to obtain instructions were in vain as his client was unwell following his release from detention. The plaintiff's counsel, Mr. Nzonzo requested for orders for directions in the event that the parties failed to reach an amicable settlement.

2.6 In her ruling, the learned Judge struck out the application from the active cause list. She referred the parties to mediation, and directed that the parties cause to be filed summons for directions within fifteen (15) days after mediation failure.

2.7 On 8th July, 2019 the matter was scheduled for a status conference to ascertain compliance with the Order for Directions filed on 28th March, 2019. The parties had failed to comply with the Order for Directions. The learned Judge ordered the timeframe to be extended for 30 days. In default, the matter was to stand dismissed for want of prosecution.

2.8 On 21st November, 2019, the learned Judge called for a status conference to ascertain compliance with the extended Order for Directions. She noted that the plaintiff was compliant. The defendant and or his counsel were absent. The learned Judge set the matter down for trial on 15th July, 2020.

2.9 At the date set for trial the learned Judge informed the plaintiff's counsel who was in attendance that a court room had not been allocated to her due to the Covid-19 pandemic.

She adjourned to matter to 17th February, 2021 for trial, and directed the plaintiff's counsel to notify the defendant accordingly.

2.10 The record reveals that on 27th May, 2021 the learned Judge directed trial to commence. The plaintiff's counsel requested an adjournment on the grounds that the plaintiff's witnesses, who reside in the Copperbelt were absent. He beseeched the court to grant an adjournment. The learned Judge found the reason advanced that the witnesses were based out of town, and one of them was before another court, to be un-compelling. She noted that no proof had been placed on record that one of the witnesses was before another court. She found counsel's conduct in requesting an adjournment to be too late in the day. That he was not willing to timely prosecute the matter. Therefore, she ordered that the matter stands dismissed for want of prosecution.

3.0 Grounds of appeal

3.1 Dissatisfied with the ruling of the lower court, the appellant launched this appeal before this Court advancing three grounds of appeal couched as follows:

1. **The court below erred in law and fact when it prematurely dismissed the matter for want of prosecution, thereby failing to determine the matter on merits contrary to the Supreme Court guidance in the case of *Khalid Mohamed v The Attorney-General (1982) ZR 49*;**

2. **The court below erred in law and fact when in dismissing the action, it did not take into consideration the provisions of *Order 35 of the High Court Rules, Chapter 27 of the Laws of Zambia* as well as *Order 35 Rule 1 of the Rules of the Supreme Court of England (1999) Edition*; and**

3. **The learned trial court erred in law and in fact when it held that when the appellant is ready to prosecute its matter, it may recommence the matter afresh when the record will show that the appellant had not inordinately or inexcusably delayed the prosecution of its matter.**

4.0 Submissions in support of appeal

4.1 At the hearing, Mr. Nyirenda, learned counsel for the appellant relied on the record of appeal and the appellant's heads of argument filed on 29th July, 2021. In support of all the grounds, it was submitted that the lower court's action to dismiss the matter was premature and went against the provisions of ***Order 35 Rules 1 and 2 of the High Court Rules***[1] and ***Order 35 Rule 1 of the Rules of the Supreme Court***[2]. It was argued that whilst the court had the power to strike out a matter, such action ought to be with liberty to restore within a specified time frame. Reliance was placed on the case of ***Kasumba Wilfred Ngulube and 86 Others v Nitrogen Chemicals of Zambia***[2] where the Supreme Court held as follows:

> ***"We have considered the affidavit evidence and arguments by counsel. In terms of rule 16/4 of this court's rules, if at the hearing of an application, counsel for the applicant does not***

turn up and no reasons have been given for his absence, the court may strike out the application. The rule does not allow the court dismiss the application. To the extent, therefore, that the single Judge dismissed the application and not struck it off, it was a misdirection on his part. We therefore order that:

1) ***The order dismissing the application is hereby discharged and the application that was before the single judge is hereby restored.***
2) ***The record be remitted back to the single judge for the hearing of the said application for leave to file record of appeal and heads of argument out of time...***"

4.2 It was submitted that the lower court's dismissal of the matter prematurely went against the cited provisions of the law and the principle enunciated in the case of ***Khalid Mohamed v The Attorney-General***[3] that matters must be heard on their merit. It was contended that this principle has been followed in subsequent cases including that of ***Diamond General Insurance v Lwiindi C. Moonga***[4].

4.3 We were urged to note from the record that there was no inexcusable or inordinate delay attributable to the appellant in prosecuting its claims against the respondent. That the record confirms that at the time the matter was dismissed, the appellant had, in fact, complied with the order for directions, and was set for trial. It was argued that the appellant had only ever applied for one adjournment on meritorious grounds shown at page 55 to 57 of the record of appeal.

4.4 It was contended that the subsequent adjournment on 15th July, 2020 was at the instance of the court owing to the fact that the lower had not been allocated a court room in light of the Covid-19 pandemic.

4.5 In light of these circumstances it was submitted that the decision of the lower court to dismiss the action on 27th May, 2021 as opposed to striking out with liberty to restore was premature and to too harsh when the record shows that the appellant had always been desirous to prosecute its matter.

4.6 We were urged to set aside the impugned ruling dismissing the matter and further order that the matter be sent back to the court below so that it may be heard and determined on its merits.

5.0 Submissions in opposition of appeal

5.1 At the time of hearing of the appeal, there were no submissions from the respondent on the record.

6.0 Decision of this Court

6.1 We have considered the evidence on record and the submissions by the appellant's counsel.

6.2 The appellant has argued all three grounds as one. The main contention in this appeal, is therefore whether or not the lower court was entitled to dismiss the matter for want of prosecution on the basis of the events that unfolded in this matter. We will address all the three grounds as one.

6.3 From the proceedings at page 62 of the record of appeal, on 27th May, 2021 the matter had been scheduled for commencement of trial. Ms. Kapapula, learned counsel for the appellant, applied to the court for an adjournment citing the absence of the appellant's witnesses, who reside outside Lusaka. She stated that one witness was attending to another matter in the Copperbelt. She expressed regret for the inconvenience to the court and sought an adjournment.

6.4 The respondent's counsel was not in attendance. The learned Judge considered the application to adjourn and the reasons advanced by counsel. She noted that the matter had been cause listed for trial as far back as 11th March, 2021. That the appellant had adequate time to prepare for its case including the calling of two witnesses it intended to call. That their absence was without proof that one of them was before another matter, or that counsel had made arrangements for the other to be in court. She took the view that the application for an adjournment had been made too late in the day, and that this conduct pointed to the fact that counsel was not willing to prosecute the matter in a timely manner. The learned Judge then pronounced at page 8 of the record as follows:

> ***"The conduct exhibited today by counsel clearly points to the fact that counsel is not willing to timely prosecute this matter. Accordingly, this matter is dismissed for want of prosecution. This has been done to give other litigants the***

opportunity to prosecute their matters. When the plaintiff is ready to prosecute its matter, it may recommence the matter afresh."

6.5 We have considered the provisions of ***Order 35 Rules 1 and 2 of the High Court Rules***[2]. They provide as follows:

> ***"1. Where a civil cause on the cause list has been called, if neither party appears, the Court shall, unless it sees good reason to the contrary, strike the cause out of the cause list.***
>
> ***2. If the plaintiff does not appear, the Court shall, unless it sees good reason to the contrary, strike out the cause (except as to any counter-claim by the defendant), and make such order as to costs, in favour of any defendant appearing, as seems just:"***

6.6 Similarly, ***Order 35 Rule 1 (1) of the Rules of the Supreme Court*** provides that:

> ***"If, when the trial of an action is called on, neither party appears, the action may be struck out of the list, without prejudice, however, to the restoration thereof, on the direction of a Judge."***

6.7 Further, ***Rule 8 of the High Court (Amendment) Rules***[3] ***Statutory Instrument No. 58 of 2020*** provides as follows:

> ***"8. A Judge may dismiss an action if, sixty days after filing of an action, there is no progress."***

6.8 Our view upon a close scrutiny of the rules cited is that a court or a Judge may dismiss a case for want of prosecution

when the plaintiff fails to take necessary steps or actions to move the case forward within a reasonable time period. In the instances provided by the rules: after 60 days of the filing of an action where there is inactivity in progressing the matter to trial; or at the date set for trial when either both parties do not appear or when the plaintiff fails to appear. In all circumstances the court must see good reason to strike out the cause, without prejudice to the restoration of the matter to the active cause list.

6.9 Dismissal typically occurs when the plaintiff shows a lack of interest or fails to diligently pursue the case, leading to an undue delay in the resolution of the matter. Circumstances indicative of lack of interest would include failure to comply with an order for directions, other court orders or failure to appear at hearings.

6.10 The appellant, has cited the case of ***Khalid Mohamed v The Attorney-General*** *supra* on the principle that cases must be heard on their merit. The holding of the Supreme Court was infact that a plaintiff cannot automatically succeed whenever a defence has failed. The matter actually went to trial. The learned Judge rejected the defence. However, the failure of the defence did not automatically entitle the plaintiff to succeed. Hence the holding of the Supreme Court that a plaintiff must prove his case. It therefore appears that this case is misapplied here.

6.11 In the present case, we note that the matter was adjourned at least five times, at the instance of the respondent and the court. The appellant only asked for an adjournment once when its witnesses did not appear for trial, and the learned Judge responded by dismissing the action for want of prosecution. We find the dismissal harsh in light of the appellant's single request for an adjournment, given that there was no prejudice occasioned to the respondent who had caused previous adjournments and was not present at the commencement of trial. To buttress this point we refer to the case of ***Stanley Mwambazi v Morester Farms Limited***[5] where the Supreme Court held *inter alia* as follows:

> ***"It is the practice in dealing with bona fide interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties; where a party is in default he may be ordered to pay costs, but it is not in the interests of justice to deny him the right to have his case heard."***

6.12 In our view, after taking all the circumstances of this case into account, there was a misdirection of the part of the learned Judge, to dismissal the matter for want of prosecution.

6.13 Therefore, in the interest of justice, this matter ought to be heard on its merit. We do hereby set aside the Order by the learned Judge for dismissal of the action for want of prosecution.

7.0 Conclusion

7.1 The net effect of our decision is that, the appeal having succeeded, we order that the matter be restored to the active cause list and be determined at trial before a different Judge. We, accordingly find merit in the grounds of the appeal.

7.2 Costs to abide the outcome of the main matter in the court below.

D.L.Y. Sichinga, SC

COURT OF APPEAL JUDGE

A.N. Patel, SC

COURT OF APPEAL JUDGE

Y. Chembe

COURT OF APPEAL JUDGE