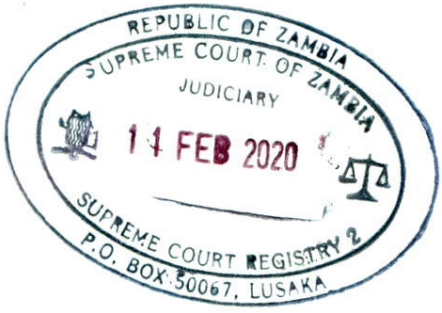
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 22/ 2017**

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

SAVOY FARMS LIMITED **APPELLANT**

AND

INVESTRUST BANK PLC **RESPONDENT**

Coram: Wood, Kaoma and Kajimanga, JJS

On 4th February, 2020 and 11th February, 2020

For the Appellant: *No appearance*

For the Respondent: *Mr. K Musonda -Ventus Legal Practitioners*

JUDGMENT

Wood, JS delivered the judgment of the court.

Cases Referred to:

1. *Nahar Investment Limited v Grindlays Bank International (Zambia) Limited (1984) Z.R. 81.*
2. *Stanley Mwambazi v Morrester Farms Limited (1977) Z.R. 108.*
3. *D.E. Nkhuwa v Lusaka Tyre Service (1977) Z.R. 43.*
4. *Falcon Press Limited and George Francis Roberts v Fackson Katongo and 44 Others SCZ Ruling No. 6/2015.*
5. *University of Zambia Council v Calder (1998) Z.R. 48.*

6. *Access Bank (Zambia Limited v Group 5 /Zcon Business Park Joint Venture SCZ/8/52/2014.*
7. *July Danobo (T/A Juldan Motors) V Chimsoro Farms Limited (2009) Z.R. 148.*
8. *Jeff Simpson Musonda v Mary Alice Lloyd and another SCZ/8/116/2015.*
9. *Thevarajah v. Riordon and others Case ID. UKSC 2014/0071 [2015] uksc 78.*

Legislation referred to:

1. *Section 4 (b) of the Supreme Court of Zambia Act and Rule 48 (4) of the Supreme Court Rules.*
2. *Order 12 Rule 1 of the Supreme Court Rules Cap 25.*
3. *Article 118 (2) (e) of the Constitution of Zambia.*
4. *Paragraph 32 of volume 37 of Halsbury's Laws of England 4th edition.*

Works referred to:

1. *Order 67 rule 6 of the Rules of the Supreme Court*

When we heard this motion, we dismissed it and informed the parties that we would give our reasons later. We now do so.

This is a notice of motion pursuant to section 4 (b) of the Supreme Court of Zambia Act and Rule 48 (4) of the Supreme Court Rules Cap 25 of the Laws of Zambia against the refusal of a single Judge of this court to grant the appellant leave to file its record of appeal and heads of argument out of time on the ground that the matter had been dismissed because the appellant had not complied with an *"unless"* order which had been granted earlier.

According to the affidavit in support sworn by Christy Chitalu Lumpa, the appellant had filed its notice of appeal and memorandum of appeal on or about 13th November, 2015. The record of appeal was not filed within the stipulated time due to difficulties in collecting documents and transcripts of proceedings in the lower court. The appellant applied for leave to file the record out of time and Malila JS, sitting as a single Judge, granted an "unless" order to do so within thirty days from 20th April, 2017. This was not done due to what the appellant called a serious miscommunication with its advocates Messrs Willa Mutofwe and Associates *("the first advocates")* who had initially agreed to file the record of appeal. The first advocates had informed the appellant and Messrs Dove Chambers *("the second advocates"),* that they had filed the record of appeal when in fact they had not done so. The filing of the record of appeal and the heads of argument was only done by the second advocates on 10th September, 2017 and the documents were rejected by the Supreme Court Registry staff for being out of time.

When the appellant asked the first advocates why they had not complied with the "unless" order, they advised the appellant that they had withdrawn from representing it. The appellant then complained to the Law Association of Zambia over what it termed as the negligence and incompetence of the counsel from the first advocate's firm. In the circumstances the appellant stated that there was no inordinate delay or *mala fides* on its part in respect of the preparation and filing of the record of appeal as well as the heads of argument.

On 12th October, 2017, the appellant filed an application for leave to file the record of appeal and heads of argument out of time but a single judge of this court refused to hear the application and insisted that the appeal stood dismissed in accordance with the order of 20th April, 2017.

The respondent has filed an affidavit in opposition sworn by Chisanga Ireen Komeki, the upshot of which is that the appellant's notice of motion has no merit because it had not complied with an "unless" order and as such the matter stood dismissed. Further, the negligence and incompetence of the first advocates was not an

excuse for the appellant's failure to file the record of appeal within the stipulated time.

The appellant has argued that Order 12 Rule 1 of the Supreme Court Rules Cap 25 gives the court power for sufficient reason, to extend time for making any application whether the time limited for such purpose was so limited by the order of the court or by the rules or by any written law. In addition, Order 3 rule 5 of the Rules of the Supreme Court allows the extension or abridgment of the period within which a person is required or authorized by the rules or by any judgment order or direction, to do any act in any proceedings. The appellant has conceded that it did not file the record of appeal and heads of argument as ordered by the single Judge, but has nevertheless contended that the failure was not intentional and that such an omission was not a substantive default but was a procedural one and was curable. We were urged to reverse the decision of the single Judge who declined to hear the appellant's application as not doing so would cause substantial injustice to the appellant which was not responsible for the failure to file the record of appeal and heads of argument in time. We were

also referred to Article 118 (2) (e) of the Constitution of Zambia on the need to administer justice without undue regard to procedural technicalities and to the cases of *Nahar Investment Limited v Grindlays Bank International (Zambia) Limited*[1] *and Stanley Mwambazi v Morrester Farms Limited* [2]. In the *Nahar* case, this court held that appellants who sit back until there is an application to dismiss their appeal before making their own application for extension of time, do so at their own peril. We further held that in the event of inordinate delay or unfair prejudice to a respondent, the appellant can expect the appeal to be dismissed.

In the *Mwambazi* case, we held that it is the practice in dealing with *bona fide* interlocutory applications for courts to allow triable issue to come to trial despite the default of the parties. We, however, also stated that for this favourable treatment to be afforded to the applicant, there must be no unreasonable delay no *mala fides* and no improper conduct of the action on the part of the applicant. The appellant has on the basis of these authorities argued that it is not in the interest of justice to dismiss the appeal.

The appellant has also argued, citing the case of *D.E. Nkhuwa v Lusaka Tyre Service,*[3] that there is good cause to vary the decision of the single Judge. Lastly the appellant argued that in the case of *Falcon Press Limited and George Francis Roberts v Fackson Katongo and 44 Others*[4] we granted leave to file a record of appeal and heads of argument out of time on two occasions.

The respondent has on the other hand argued that the matter had already been dismissed, the notice of motion was out of time and that the appellant had not taken any steps for ten months after the appeal had been dismissed. The respondent has argued that the *Nahar* judgment was good authority for refusing to grant this motion because the appellant was granted an extension of 30 days which included the condition that should the appellant fail to file its appeal within 30 days the appeal would stand dismissed. The appellant had clearly defaulted as it only attempted to apply for an extension of time in or about October, 2017 which was effectively five months after the allowed window had elapsed and as a result the appeal stood dismissed. Further, since the appellant's application was being made pursuant to section 4 (b) of the

Supreme Court Act and Rule 48 (4) of the Supreme Court Rules Cap 25 of the Laws of Zambia it was caught up by our interpretation of these provisions in the case of *University of Zambia Council v Calder*[5] in which we stated as follows:

> *"Our understanding of both section 4 (1) (b) and Rule 48 (4) is that for any litigant to take advantage of these provisions he must in the first place apply to the full court within, but before the expiry of the period extended by a single Judge, when the appeal is pending by virtue of the extension. When the order, direction, or decision made by a single Judge has taken effect, nothing remains on the record that can be varied, discharged or reversed by the full court. A party aggrieved by any decision of a single Judge and desires to have such decision varied, discharged or reversed by the court should do so before the expiration of the time set by a single Judge.*
>
> *In the present application the applicant has come to the full court, rather too late after the expiration of the 14 days extension. The application at this stage is therefore misconceived and is accordingly refused."*

The current application according to the appellant, was made nine months and eighteen days after the decision appealed against was made. This was rather late as the application should have been made before the expiration of the thirty days' time set by the single Judge. The failure to file the application within thirty days was therefore done at its own peril. The respondent then

demonstrated that our decision in *Access Bank (Zambia) Limited v Group 5 /Zcon Business Park Joint Venture*[6] and *July Danobo (T/A Juldan Motors) v Chimsoro Farms Limited*[7] both show the need to comply with court rules and the consequences for not doing so are that such an application is liable to be dismissed.

The respondent then proceeded to argue that the lawyer client relationship described in the affidavit in support was of no concern to this court and relied on the case of *Jeff Simpson Musonda v Mary Alice Lloyd and another*[8] in which we held as follows:

> *"It is a cardinal principle of our legal practice that the lawyer is the alter ego of his client. We have said before, for example in the case of Philip Mutantika and another v Kenneth Chipungu*[9]*, that the relationship between a party and a lawyer is private and of no concern to the court. We said in that case that the incompetence or negligence of a party's advocate was not sufficient ground for restoring the appeal that was dismissed....."*

Furthermore, Order 12 Rule 1 of the Supreme Court Rules Cap 25 provides (in part) as follows:

> *"The court shall have power for sufficient reasons to extend time for making any application...."*

According to this rule, the court only extends time for making an application for sufficient reason. No sufficient reason was advanced by the appellant to warrant the appeal being restored. The respondent also argued that the *Falcon Press Limited case* could be distinguished from the present case because in the *Falcon Press Limited* case one of the reasons which led to the granting of leave was as a result of the file missing at the court, whereas in this case the record of appeal was not filed due to the fault of the appellant's advocates as admitted by the appellant.

We are grateful to both counsel for their arguments. The issues being raised are in a narrow compass. They relate to the effect of an *'unless'* order and whether or not the delay by an advocate is a sufficient ground for setting aside an "unless" order.

A reading of paragraph 32 of volume 37 of Halsbury's Law of England 4th edition shows that an "unless" order is essentially a conditional order which stipulates that a specified act is required to be done within a specified time, and it is made a condition of the order that, unless it is complied with within the time specified certain consequences would follow. In this case the consequence

was that the appeal would stand dismissed. It should, however, be noted that the court nevertheless retains the power to extend the time within which the order should be complied with but the discretion to do so should be exercised sparingly.

On 16th December, 2015 the United Kingdom Supreme Court handed down its judgment in the case of *Thevarajah v. Riordon and others.*[9] In the *Thevarajah* case, the appellants were debarred from defending a claim brought against them due to their repeated failure to provide adequate disclosure. It was held in that case that late compliance with an "unless" order cannot without more amount to a material change of circumstances for the purpose of CPR 3 (7). To be successfully invoked, there must be a material change in circumstances, the facts on which the original order was made must have been misstated, or there must have been a mistake on the part of the judge formulating the original order. We must of course mention that the Civil Procedure Rules of 1999 of the United Kingdom are not applicable to us but they contain powers which are similar to our rules.

The *Thevarajah* judgment provides useful guidance on dealing with "unless" orders. It shows that for an application setting aside an "unless" order to be successful, there must have been a material change in circumstances, the facts on which the original order was made must have been misstated, or there must have been a manifest mistake on the part of the Judge in formulating the original order. It also stresses the need to challenge any adverse order early and it demonstrates a reasonably strict judicial approach to relief from sanction.

On the facts before us we do not see any material change in the circumstances, as the reason is still the alleged negligence of the first advocates. There is nothing from the record which suggests that the facts on which the original order was made were misstated or that there was a manifest mistake on the part of the judge in formulating the original order. Coupled with this, is the delay in mounting a challenge against the adverse order which was made on 12th October, 2017, as the record shows that the appellant only filed its notice of motion on 19th January, 2018. No plausible reason was advanced by the appellant for filing that application so late.

Even assuming that there was serious miscommunication with the first advocates, there is no explanation as to why the notice of motion was filed on 19th January, 2018. There is no manifest mistake by the single judge in formulating the order. When all these issues are taken into account it can be seen that on the basis of the *Thevarajah* case alone, this motion has no merit.

The appellant has argued that it was not at fault because the default was caused by the first advocate's incompetence or negligence. We can only sympathize with the appellant for being let down by its own agents, the first advocates but must dispel the notion that this can be a valid and serious argument for setting aside the "unless" order. Even if the first advocates were wholly to blame for the appellant's failure to comply with the "unless order, the remedy does not lie in attempting to set it aside on this basis, but rather in seeking recompense from the first advocates. We therefore reaffirm what we stated in *Jeff Simpson Musonda v Mary Alice Lloyd and another*[8] that the relationship between a party and a lawyer is private and of no concern to the court. We also said in that case that the incompetence or negligence of a party's advocates

was not sufficient reason for restoring the appeal that was dismissed.

Before we conclude, we must state in passing that O.67,r.6 of the Rules of the Supreme Court provides for the procedure of how an advocate can withdraw his services from a client. It is by summons and affidavit. An advocate does not have the liberty of simply walking away from a client as was done in this case. We hope advocates will in future follow this rule when parting company with their clients.

It follows from what we have stated that no sufficient reason has been shown for us to allow this motion. The motion is dismissed with costs to the respondent to be taxed in default of agreement.

A.M. WOOD
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT JUDGE

C.KAJIMANGA
SUPREME COURT JUDGE