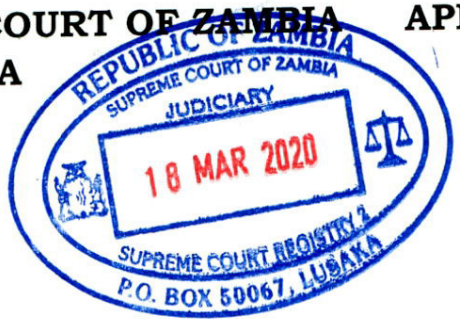
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 137/2008**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

CHEN DEN LIMITED	**1st APPELLANT**
VENUS PRISCA KALIMINA	**2nd APPELLANT**
FELIX KAMILO MUTONDO	**3rd APPELLANT**
BUBALA KALIMINA	**4th APPELLANT**
FLORENCE MUTONDO	**5th APPELLANT**

AND

IMS FINANCIAL SERVICES LIMITED	**RESPONDENT**

CORAM: **Wood, Kaoma and Kajimanaga, JJS**
On 4th February 2020 and 18th March 2020

For the Appellant: **Mr. C. N. Sianondo of Messrs Malambo and Company**

For the Respondent: **Mr. S. Sikota, SC of Messrs Central Chambers**

J U D G M E N T

Kajimanga, JS delivered the judgment of the court

Cases referred to:

1. **Pule Elias Mwila and Others v Zambia State Insurance Corporation Limited - SCZ Judgment No. 35 of 2015**

2. **Moses B. Mulevu v Major Baxter C. Chibanda and Others - Appeal No. 21/2010**
3. **Elsie M. Moobola v Harry M. M. Mwanza – SCZ Judgment No. 3 of 1991**
4. **Bonar Travel Limited v Lewis Susa (1993/1994) Z. R. 98**
5. **University of Zambia Council v Jean Margret Calder (1998) Z.R. 48**
6. **Zambia Telecommunications Company Limited v Liuwa, (2002) Z.R. 66**
7. **Aristogerasmos Vangelatos and Others v Metro Investments and Another – Selected Judgment No. 35 of 2016**
8. **Emmanuel Kwenda v Norman Kampengele – Appeal No. 80/2009**

Statutes referred to:

1. **Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia; section 4 and rules 48(1), and 70**
2. **Statutory Instrument No. 26 of 2012**

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

The appellants took out a motion pursuant to section 4(b) of the Supreme Court of Zambia Act and rule 48(4) of the Supreme Court Rules Chapter 25 of the Laws of Zambia raising the following issues:-

1. **The appeal having been filed in 2008, the same has been ready for cause listing and hearing and the single judge erred in holding that the same could only be cause listed with heads of argument and consequently dismissing the appeal.**
2. **The single judge erred in applying the Statutory Instrument No. 26 of 2012 (hereafter referred to as the "new regime") when the same does not operate retrospectively.**
3. **The single judge erred in hearing the application when the said application can only be raised in the main appeal particularly**

that the record of appeal is already filed.

The affidavit in support of the motion sworn by the 2nd appellant discloses that the appellants filed their record of appeal in 2008 and served the same on the respondent. On 20th April 2018, an application to have the appeal dismissed was heard and the court delivered a ruling dismissing the appeal. According to the appellants, it is not a requirement to have the heads of argument for a matter to be listed and particularly that the appeal was filed in 2008 and more so, that the cases which were filed later were listed without heads of argument as per exhibit marked "VPK3". The appeal having been filed in 2008, the requirement was that the heads of argument could be filed 7 days before the hearing of the appeal and the appellants were equally anxious to have the matter heard but they have not received any notice of hearing. Therefore, the solution does not lie in dismissing the appeal but to seek to have it cause listed. In any case, it was deposed, an application seeking to have an appeal dismissed can only be raised as an issue in the main appeal. Further, that apart from the application having been improperly brought before a single judge of this court, this is not a proper case in which to dismiss an appeal as the date of hearing was being awaited.

In the affidavit opposing the motion, Neravati Prasad, the respondent's Systems Analyst, deposes that he had been advised by the respondent's advocates and verily believes it to be true that after the change of the legal regime in 2012, it became a requirement for an appellant to file heads of argument together with the record of appeal and the appellants ought to have taken note of this change and filed their heads of argument. If the appellants were truly anxious to have their appeal listed for hearing, they should have taken steps in that regard but instead elected to do nothing because the position favoured them.

The deponent also states that he has been advised by the respondent's advocates and verily believes it to be true that a single judge of the Supreme Court has power to dismiss an appeal for want of prosecution and therefore, the application was properly before the court. The appellants who lost the case in the High Court appealed to this court in 2008, filed a record of appeal and left everything at that and for nearly 10 years, did nothing to have the appeal prosecuted, thereby rendering their appeal dismissible. The appellants ought to have taken steps to ensure that the appeal was

listed for hearing but elected to do nothing because they were benefitting from the situation. Ten years, according to the deponent, is too inordinate a delay and the single judge was in order to dismiss the appeal for want of prosecution. This motion has no merit and ought to be dismissed with costs.

In the appellants' brief affidavit in reply sworn by the 2nd appellant, it is deposed that it is not correct that the issues were left at just filing the record of appeal. Apart from the appellants' advocates following up the matter, the respondent's advocates also wrote to request the listing of the appeal as per exhibit marked "VPK1" but to no avail.

In support of the motion, Mr. Sianondo, counsel for the appellants submitted in respect of the first two issues raised in the motion that at the time the appellants filed the record of appeal in 2008, rule 70 of the Supreme Court Rules Chapter 25 of the Laws of Zambia stipulated that the heads of argument should be filed not later than 7 days before the date of hearing. Thus, depending on the queue, the record of appeal or indeed the matter would be cause listed without heads of argument. He argued that matters which were filed later

than the present case were cause listed without heads of argument. As such, counsel argued, it was not a pre-requisite that heads of argument ought to be filed for the appeal to be listed and we were urged to discount the holding that the matter could only be cause listed with the heads of argument being filed. According to counsel, this position is strengthened by the fact that Statutory Instrument No. 26 of 2012 which has been styled as the "new regime", does not operate retrospectively so as to warrant dismissal of appeals filed before then. He accordingly urged us to reverse the order of the single judge of this court dismissing the appeal on that basis. He relied on the case of *Pule Elias Mwila and Others v Zambia State Insurance Corporation Limited*[1] to buttress this argument.

Regarding the third issue raised in the motion, it was submitted that it is without much debate that the record of appeal was filed and ready for listing. The said appeal could not be short circuited by an application to dismiss the same before a single judge as it involved the final decision of the main appeal which the single judge of this court cannot do as stipulated in section 4 of the Supreme Court of Zambia Act. He referred us to the case of *Moses B. Mulevu v Major*

Baxter C. Chibanda and Others[2] where we frowned upon an attempt by the 1st Respondent to circumvent the main appeal.

Counsel argued that the only thing achieved by the application to dismiss the matter before a single judge is to circumvent the main appeal. The record of appeal having been filed, it was contended, any matter relating to the main appeal ought to be dealt with in the appeal. It is in that regard that the appellants seek the reversal of the ruling of the single judge by entertaining an application which has the effect of dislodging the main appeal with finality. He accordingly prayed that this court allows the motion.

In the respondent's heads of argument in opposition to the motion, Mr. Sikota, SC submitted that the respondent supports the decision by the single judge to dismiss the appeal for want of prosecution. It is a cardinal principle of public policy that court cases, especially those of a commercial nature, must be disposed of as early as possible. The nearly 10 years delay of this matter in which the appellants just sat back and did nothing is too inordinate and the single judge of this court was in order to dismiss the appeal for want of prosecution. While it is appreciated that the appeal was filed

in 2008 when the legal regime required heads of argument to be filed not later than 7 days before the date of hearing and the appellants did not file heads of argument because the appeal was not listed for hearing, they should have filed their heads of argument to enable the appeal to be listed for hearing. At the very least, it was contended, the appellants should have filed their heads of argument when the respondent applied to have the appeal dismissed for want of prosecution but elected not to do so.

State Counsel submitted that S.I. No. 26 of 2012 had retrospective effect and applied to the appeal filed by the appellants in 2008 and they ought to have filed their heads of argument once the same came into force. To buttress this argument, reliance was placed on the cases of *Elsie M. Moobola v Harry M. M. Mwanza*[3] and *Bonar Travel Limited v Lewis Susa*[4].

On the appellants' contention that a single judge of this court erred in hearing the application when the same could only be raised in the main appeal, State Counsel submitted that applications to dismiss an appeal for want of prosecution are made to a single judge of this court. This, according to State Counsel, was consistent with

the position taken by this court in *University of Zambia Council v Jean Margaret Calder*[5]. That in any case, no objection was raised by the appellants when the application to dismiss the appeal for want of prosecution was heard. The appellants proceeded to argue the application and are only raising the questions of jurisdiction now after their appeal has been dismissed. The appellants' argument is akin to a party raising new issues on appeal which were not raised in the court below. We were accordingly urged to reject the position that a single judge of this court does not have jurisdiction to dismiss an appeal for want of prosecution.

It was finally submitted that the *Moses Mulevu*[2] case is distinguishable from and does not apply to the present case. In the *Moses Mulevu*[2] case, State Counsel contended, the appeal was properly before the court and before it could be heard, the 1st respondent filed a notice of motion contending that the matter had been adjudicated upon in a number of appeals and was therefore *res judicata*. This court declined to dismiss the appeal, holding that the issue raised in the notice of motion ought to have been raised in the main appeal. According to State Counsel, that situation is different from this case where the appeal was properly filed and was in

violation of S.I. No. 26 of 2012 as the appellants did not file heads of argument and the appeal was dismissed for want of prosecution. We were accordingly urged to uphold the decision of a single judge and dismiss this motion with costs.

In the appellants' heads of argument in reply, counsel submitted that the status of S.I. No. 26 of 2012 being retrospective was specifically dealt with in the *Pule Elias Mwila*[1] case. The dismissal of appeals discussed in the *Jean Margaret Calder*[3] case relates to matters where the appellant had been granted two extensions of time within which to file a record of appeal and the third application is denied by a single judge. According to counsel, this is what happened in the *Jean Margaret Calder*[3] case where there was failure to file the record of appeal. In this case, it was argued, the issue is beyond the notice of appeal as the record of appeal had been filed. It was contended that the issue of jurisdiction of a single judge was raised and the ruling of the single judge addressed it. The single judge stated that:

> **"Lastly, the fact that the appeal is not ready for hearing allows me at this stage to entertain an application for dismissal."**

It therefore follows, counsel argued, that the issue of jurisdiction of a single judge was a question to be determined and indeed, the single judge pronounced himself on it. That in any case, the application before the full bench is not an appeal but a re-hearing of the matter and as such an issue not raised before a single judge can be raised before the full bench. Reliance was placed on the case of *Zambia Telecommunications Company Limited v Liuwa*[4]. Thus, it was argued, the application before the full bench being a renewed application means that it is an entirely fresh application and it is not improper to raise issues which were not before a single judge.

More importantly, counsel contended, in the case of *Aristogerasmos Vangelatos and Others v Metro Investments and Another*[5], this court had this to say:

> **"However, it is a general rule that an issue that has not been raised in the court below cannot be raised on appeal, the question of jurisdiction can be raised on appeal notwithstanding the fact that it was not raised in the court below."**

Counsel submitted that additionally, the court has been consistent in declining applications to short circuit the appeal by way of an application outside the main appeal and the case *of Emmanuel*

Kwenda v Norman Kampengele[6] was cited in support of this argument. We were accordingly urged to allow this motion as the respondent's application was intended to circumvent the appeal which is properly before this court.

The thrust of the appellants' argument relating to the first and second issues is that the single judge of this court misdirected himself by dismissing the appeal for want of prosecution when he reasoned that the same could only be listed for hearing with heads of argument and that S.I. No. 26 of 2012 operated retrospectively. The case for the respondent is simply to support the dismissal of the appeal, arguing that the delay of almost 10 years is inordinate and that S.I. No. 26 of 2012 had retrospective effect.

What is overarching in the first two issues is whether S.I. No. 26 of 2012 has retrospective effect on appeals filed before the new regime came into force. This court was confronted with a similar issue not too long ago. In the *Pule Elias Mwila*[1] case cited by counsel for the appellants, we expressed ourselves in the following terms on the applicability of S.I. No. 26 of 2012:

> **"Nevertheless, to put this issue in its proper perspective, we are compelled to explain the court's position vis-à-vis filing Heads of**

Argument. This is that where the Record of Appeal was filed before 4th May 2012 when Statutory Instrument No. 26 of 2012 came into force, we hereby grant leave to file Heads of Argument in Court because the statutory instrument was not in force at the time the record of appeal was filed. The statutory instrument did not have retrospective effect and hence, those appeals were not affected. However, for the Appeals where the Records of Appeal were filed after 4th May, 2012 when statutory instrument No. 26 of 2012 became effective, we have religiously/consistently dismissed the appeals and interpreted rule 58(5) as mandatory."

There is no dispute between the parties that this appeal was filed in 2008 under the rule 70 regime which required heads of argument to be filed 7 days before the hearing of an appeal. The *Pule Elias Mwila*[1] case makes it clear and leaves no doubt that the new regime does not apply to this appeal. We therefore agree with the appellants that the single judge of this court was not on firm ground when he dismissed the appeal on the basis that S.I. No. 26 of 2012 applied retrospectively to the appeal.

Of course, the lamentations by the respondent that the delay of the appeal of almost 10 years from the time the record of appeal was filed in 2008 to the time the application was made to a single judge of this court is in ordinate cannot be glossed over. However, we do not think that the delay can be wholly attributed to the appellants as

the responsibility of listing appeals for hearing lies with this court. Even assuming that the delay was in ordinate and attributed to the appellants, the application for dismissing the appeal for want of prosecution where a record of appeal has been filed can only be made before the court and not a single judge of this court as it involves the decision of an appeal.

As regards the third issue, the appellants' grievance is that the single judge of this court was not clothed with jurisdiction under section 4 of the Supreme Court Act to dismiss the appeal for want of prosecution, which had the effect of dislodging the main appeal with finality. On the other hand, the case for the respondent is that applications to dismiss an appeal for want of prosecution are made to a single judge of this court.

Section 4 of the Supreme Court of Zambia Act enacts in part as follows:

> **"A single Judge of the Court may exercise any power vested in the court not involving the decision of an appeal or a final decision in the exercise of its original jurisdiction but –**
>
> **(a) ...**
>
> **(b) in civil matters any order, direction or decision made or given in pursuance of the powers conferred by this section**

may be varied, discharged or reversed by the court." [Emphasis added]

Needless to emphasise, the powers of a single judge of this court as set out in section 4 of the Supreme Court Act are limited to issues that do not involve the decision of an appeal or a final decision. In this case, the application before the single judge was for dismissal of the appeal for want of prosecution. We cannot agree more with the appellants that the record of appeal having been filed, any matter relating to the main appeal ought to have been dealt with in the appeal. In other words, since the record of appeal had been filed and the appeal was pending to be cause listed by the court registry staff for hearing, the proper forum for launching the application to dismiss the appeal for want of prosecution was not the single judge but the court. The argument by State Counsel that applications to dismiss an appeal for want of prosecution (in the circumstances of this case) are made to a single judge of this court is legally flawed as it is not supported by section 4 of the Supreme Court of Zambia Act. Therefore, the single judge of this court had no jurisdiction to dismiss the appeal for want of prosecution when the appeal was pending hearing by the court.

It is for the foregoing reasons that we allowed this motion. Costs shall follow the event and 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