IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 4/2005**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

NATIONAL COLLEGE FOR MANAGEMENT AND DEVELOPMENT STUDIES — **APPELLANT**

AND

KENTLEX INVESTMENT LIMITED — **RESPONDENT**

Coram: LEWANIKA, DCJ., Chibesakunda and Mushabati JJS.
On 27th September 2006 and 6th June 2007

For the Appellants — Mr. I.C. Ng'onga of Messrs I.C. Ng'onga and Company.
For the Respondent — Mr. Kabesha of Messrs Kabesha and Company.

JUDGMENT

Chibesakunda, JS delivered the Judgment of the Court.

Cases referred to:

1. John R. Ngandu vs. Lazarous Mwila (1988/89) ZR 197
2. Zambia Consolidated Copper Mines Ltd Vs. Moffat Sinkala SCZ Appeal No. 149/98
3. Fanny Mulliango Vs. Nambou Magasa and Maruja Transport Farming Limited (1988/89) ZR 209

Legislation referred to:

2. Rule 9 of the High Court Practice and Direction (amended) rule of (1999).

When we heard this appeal, we announced our decision of the Court allowing the appeal. We sent it back to the High Court for continued hearing. We left costs in the cause. We undertook to give reasons later, which we now do.

The appeal before this Court was an appeal against the High Court's refusal to review its Order to dismiss the actions for want of prosecution.

Because of the approach we took when we heard this appeal, we will not restate any facts of the case except to explain that this was a Sale Agreement between the Appellant and the Respondent.

The brief history of this matter is that the Appellant who were the Plaintiffs at the High Court took out a Writ of Summons claiming inter alia:-

(i) Refund of the said sum of K54, 041,000.00.
(ii) Interest from the date of issue of Writ to date of payment at current bank rate.
(iii) Costs.

When the matter come before Court on the 19th of February 2004, for reasons not stated before the court, the parties did not appear. So the mater was struck out due to non-appearance. Then the advocates of the Appellant took out Summons seeking restoration on the grounds that the notice of hearing had not been brought to their attention. On 25th April 2004, the

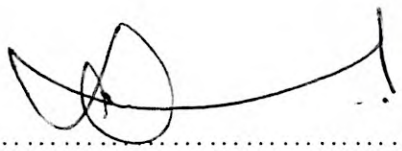
matter was restored to the active cause list. The Court then made an Order of Direction. The advocates to the Appellant filed in Statements of facts by witnesses. After one or two adjournment the matter was set for hearing on the 12th July 2004. On that day the parties did not appear. The matter was struck out again. The Appellants applied for the matter to be restored. The court set 8th September 2004 for hearing. Again none of the parties appeared. So the court dismissed this matter.

The Appellants now applied for review of this ***Order under Order 39 of the High Court Rules.***(2). The Court now rejected the application, as there was no fresh evidence explaining why the parties did not come to court on the 8th September 2004. The Appellants have now appealed to this Court.

Before this Court Mr. Ng'onga relied on his written heads of arguments. Mr. Kabesha also relied on his written heads of arguments. In his heads of arguments, Mr. Ng'onga urged this Court to set aside the High Court Judgment and direct that the matter proceed to trial. He cited three cases: ***John R Ng'andu Vs. Lazarous Mwila*** (1), ***Zambia Consolidated Copper Mines Ltd vs. Moffat Sinkala*** (2), ***Fanny Muliango Vs. Nambou Magasa and Muruja Transport Farming Limited*** (3) in support of his argument. He argued that in all these three cases the courts held that in the interests of justice, in the absence of proof of service of notice of hearing on the parties the matters had to be allowed to proceed to trial. He argued that in these cases also in the interest of justice this matter should be allowed to proceed to trial. Mr. Kabesha in response supported the High Court decision. He argued that the case cited were distinguishable from the case

before us because in all the three cases cited by the Appellants there was no proof of service of notice of hearing on the parties concerned whereas in the cases before us the Appellants and their Advocates knew the various dates of hearing. So he urged this court not to fault the lower court but to uphold the lower court's judgment. He further argued that the cases cited were dealt with long before the establishment of the Commercial List. So these cases presented old law before the ***High Court Rule 9 (Amended) Rules of 1999 – Order LIII of the Practice and Directions (4)***, which says " ***If a matter had been stuck out for non attendance is restored and the Applicant again fails to attend the hearing the Judge shall dismiss the Application forthwith***" So the lower courts hands were tied. This court therefore must uphold the lower court judgment.

We announced our decision that the appeal had merit. Our view was that it is trite practice in our Courts that all triable issues must be allowed to be heard in Courts for full inquiry and adjudication. Any technicalities, which don't go to the root of the matter, should not be allowed to hinder adjudication of all disputes before the Courts. Also although we accept that the law as stated in the three cases citied was before ***Rule 9 (4)*** and the establishment of Commercial List, nevertheless, the Commercial List rules in our view do not oust the other High Court Rules. It is our considered view that all Court Rules (whether High Court General or Commercial List Rules) must be in tandem. We therefore found merit in the appeal. We sent this case back to High Court to the same Judge for continued trial. We left costs in the cause.



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D. M. Lewanika
DEPUTY CHIEF JUSTICE

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L P Chibesakunda
SUPREME COURT JUDGE

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C.S. Mushabati
SUPREME COURT JUDGE