IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 149 OF 2005

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

APG MILLING LIMITED APPELLANT

AND

DANIEL ZULU RESPONDENT

CORAM: Chirwa, Mumba and Silomba, J.J.S.
On the 19th September, 2006 and 31st January, 2008.

For the Appellant: Mr. W. Kabimba of W. M. Kabimba & Company
For the Respondent: In person

JUDGMENT

SILOMBA, J. S., delivered the judgment of the Court.

Case Referred to:

Stanley Mwambazi Vs Morester Farms Ltd (1997) ZR, 108

This is an appeal against the ruling of the Industrial Relations Court dated the 29th July, 2005. The facts of the case that gave rise to the dispute and

subsequently to this appeal were that the respondent herein complained to the Industrial Relations Court against the appellant for unlawful dismissal on an allegation that he stole money of the respondent. The complaint was lodged on the 26th November 2004. When the appellant failed to lodge the answer and the affidavit in opposition to the complaint as per the Rules of the Industrial Relations Court the respondent applied to the aforesaid Court to have the appellant debarred from taking part in the proceedings pursuant to Rule 42 of the Industrial Relations Court rules.

The application to debar the appellant from taking part in the proceedings was head *inter-partes*. The record of appeal shows that both the respondent and the appellant respectively filed affidavits in support of and in opposition to the application. The record further shows that the respondent had not said much in support of the application but simply told the Court that he was applying to debar the respondent who had not filed an answer. In response, the appellant relied on the affidavit in opposition and pointed out that when the respondent made the application, the intention was to settle for a default judgment on a matter that is supposed to be determined on merit. The appellant cited the case of ***Stanley Mwambazi Vs Morester Farms Limited*** in aid. The appellant also indicated to the Court that the answer was ready for filing.

In its ruling, the Industrial Relations Court noted that the issue at hand was not whether or not there were triable issues but whether the appellant filed an answer to the complaint. The Court further observed that from the affidavit in opposition, the appellant was aware of the need to file an answer but it had not done so in breach of the law. Having observed thus, the Industrial Relations Court found that the appellant deliberately breached the requirements of the law. The application of the respondent was accordingly granted and the appellant was ordered not to take further part in the proceedings. The case of Stanley Mwambazi Vs Morester Farms Limited was distinguished as being at variance with the case at hand.

There is only one ground of appeal, which is, that the learned trial Judge erred in law and fact by holding that the appellant company be debarred from taking any further part in the proceedings in accordance with Rule 42 of the Industrial Relations Court Rules when the said Rule was not mandatory at law.

The appellant filed written heads of argument and relied on them in their entirety. In support of the ground of appeal, counsel quoted the said Rule 42 in full in the heads of argument. We reproduce it for the sake of clarity. It reads -

"If a Respondent to any proceedings fails to deliver an answer within the time appointed under these Rules, or if any party to the proceedings

fails to comply with an order or direction of the Court, the Court may order that he be debarred from taking any further part in those proceedings (except for the purpose of being heard on any application for discovery or recovery of documents, or the answering of interrogatories or a statement of facts, or the payment of costs or expenses by him), or may make such other order as the Court thinks just"

He submitted in the heads of argument that at the time of hearing the respondent's application to debar the appellant from taking further part in the proceedings, there was an answer to the complaint. According to counsel, Rule 42 requires the Industrial Relations Court, in case of default, to either order that the party in default be debarred or make such other order as it thinks just. In this regard, counsel submitted that the law obliged the trial Court to follow the principle of law laid down by the Supreme Court in the case of Stanley Mwambazi Vs Morester Farm Limited.

In response, the respondent submitted that he supported the ruling of the Industrial Relations Court.

We have considered, very carefully, the issues in this appeal. In our considered view, the only issue is whether the Industrial Relations Court has got power to debar the respondent from taking further part in the proceedings simply

because it did not file an answer to the complaint within the stipulated time. After a careful reading of Rule 42, we agree with counsel for the appellant that the Rule is not framed in mandatory terms. The Rule gives discretion to the trial Court to either debar the respondent from taking further part in the proceedings or make such other order as the Court thinks just.

We have said in several of our decisions, the Stanley Mwambazi case included, that it is the practice in dealing with bonafide 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 interest of Justice to deny him the right to have his case heard.

In view of the foregoing principle of law, we are surprised that the Industrial Relations Court had the audacity to distinguish the Stanley Mwambazi case when it is on all fours with the case at hand. From the record of appeal, we have not come across an incident of unreasonable delay, mala fides or improper conduct on the party of the appellant, which would have necessitated the trial Court to take such drastic action.

The appeal is allowed and the order of the Industrial Relations Court, debarring the appellant from taking further part in the proceedings, is set aside. There will be no order for costs, each party to bear its own costs.

In conclusion, we would like to make an observation in the manner the ground of appeal is framed. It is noted that the Ruling of the Industrial Relations Court appealed against was made by the Court consisting of the learned Deputy Chairman and two honourable members. It was not made by a single Judge of that Court as is shown in the ground of appeal because if this was so, it would not have been the subject of appeal to this Court as a single Judge of that Court does not constitute the Court.

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D. K. CHIRWA
ACTING DEPUTY CHIEF JUSTICE

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F. N. M. MUMBA
SUPREME COURT JUDGE

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S. S. SILOMBA
SUPREME COURT JUDGE