IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 87/2011**
HOLDEN AT LUSAKA **SCZ JUDGMENT NO. 23 OF 2011**
(Civil Jurisdiction)

B E T W E E N:

ROBERT SIMEZA (Suing in his capacity as Executor of the Estate of Andrew Hadjipetrou) **1ST APPELLANT**

MOTEL ENTERPRISES LIMITED (T/A Andrews Motel) **2ND APPELLANT**

MARIANTHY NOBLE **3RD APPELLANT**

YOLANDE HADJIPETROU **4TH APPELLANT**

AND

ELIZABETH MZYECHE (Sued as the mother and Guardian ad litem of minor beneficiaries) **RESPONDENT**

Coram: Chibesakunda, Phiri and Musonda, JJS.
On 6th October 2011 and 25th November 2011

For the Appellant: *Mr. Chenda of Simeza Sangwa & Associates with him Mr. K. Chenda*

For the Respondent: *Mr. B. C. Mutale SC of Ellis & Company with him Ms. F. Kalunga*

J U D G M E N T

Musonda, JS., delivered the Judgment of the Court.

Cases referred to:-

1. ***Waterwells Limited Vs Wilson Samuel Jackson (1984) ZR 98.***
2. ***Stanely Mwambazi Vs Morrester Farms Limited (1977) ZR 108.***
3. ***Imbwae Vs Imbwae, SCZJ No. 12 of 2003.***

4. ***Premesh Bhai Megan Patel Vs Rephidim Institute Limited, SCZJ No. 3 of 2011.***
5. ***Chibuye and Others Vs The People, SCJZ No. 33 of 2010.***
6. ***August Vs Electoral Commission and Others (1999) BHRC 122.***

This was an appeal against the ruling of the learned Deputy Registrar on assessment dated 6th August 2010 by the Executor of the Estate of Andre Hadjipetrou, first appellant Motel Enterprises Limited (Trading as Andrews Motel), second appellant Marianthy Noble, the sister to the deceased and Yolande Hadjipetrou the fourth appellant who is now deceased. The learned Deputy Registrar ordered the First Appellant (Executor) to pay the deceased's children's school arrears which were paid by the Respondent (the widow) in this court and in the court below.

The deceased had five children, two with the respondent and the other three from his first wife. The deceased also adopted the respondent's daughter Tina-Marie born on 3rd November 1987, who is also a beneficiary in the Estate following the High Court judgment herein.

The essence of the appeal is the refusal by the learned Deputy Registrar to set aside the assessment for irregularity as there was procedural injustice, as there were trialable issues which ought to have gone to trial. The learned Deputy Registrar refused to set aside the assessment. In his view there was no irregularity with the assessment order of 6th August 2010. The Respondents in this matter were fully aware that the hearing of the assessment was scheduled for 6th August 2010 after the First Appellant's Counsel applied for an adjournment. For no apparent reason there was no representation from the Respondents and no reasons were advanced for the absence. The learned Deputy Registrar proceeded with the hearing after satisfying himself that appellants in this court Respondents in the court below were aware of the proceedings.

It was also argued in the court below that the Respondent was seeking benefits herself instead of the school fees. The learned Deputy Registrar did not agree to that argument. The appellant whilst admitting that he was not paying school fees because of the

court case and submitting in the same proceedings that there are no arrears of school fees at any of the schools the children attended. In conclusion the learned Deputy Registrar said:

> ***"My considered view is that the reason why there are no arrears is because, the applicant in this matter was paying the school fees using monies from other sources. This money has now accrued as a debt which the estate must pay back. The judgment of the Supreme Court does not in any way state that if the debt is owed to the applicant then it is not a debt and must not be paid. What is important is that the debt is school fees related. Therefore there is nothing irregular if the applicant were to personally benefit from the Estate because she is just recouping what she spent"***

The appellants filed three grounds of appeal and augmented the written grounds with oral arguments. In ground one it was

argued that the court below erred in law and fact, when it held that there was no irregularity with the assessment order of 6th August 2010. The assessment having been made in absence of appellant ought to have been set aside on sufficient cause pursuant to order 35 Rule 1. The principle applies to interlocutory applications. To buttress that argument Mr. Chenda cited to us the cases of ***Waterwells Limited Vs Wilson Samuel Jackson***[1] and ***Stanely Mwambazi Vs Morrester Farms Limited***[2] where we held that:

> ***"Triable issues should come to trial despite the default of the parties. It is not in the interest of justice to deny him the right to have his case heard"***

The other limb to ground one, which we think would have been a ground on its own, was that the lower court erred to make assessment of fees allegedly accumulated beyond the date after the demise of Andre Hadjipetrou. The lower court therefore exceeded the scope of the Ruling/Judgment, which was a subject of assessment. The lower court included fees incurred eight years

after the demise of the deceased to Cavendish University and yet Cavendish University was never a subject of any order made by the High Court and Supreme Court.

In ground two, it was submitted that the court below erred in law and fact when it held that there was nothing irregular in the Respondent benefitting from the Estate because she was recouping what she spent. The tenor of our judgment did not allow the Respondent to recoup monies paid to schools on account of her children. The High Court did not order a refund of monies paid already to the schools. The lower court's ruling specifically directs the First Appellant to settle arrears to the schools (BAOB Trust School and Kingswood College). The judgment did not characterise the Respondent as a creditor to the Estate.

In ground three, it was submitted that the court below erred in law and in fact when it held that the application before it was misconceived and lacked merit. As the First Appellant had shown that he had a defence to the claims in the assessment. This ground

reiterated what was said in ground one about procedural justice. We think Mr. Chenda was right to argue the three grounds as one in his oral arguments.

If the court below's ruling is not set aside it will amount to unjust enrichment, it was argued as the sums awarded by the lower court and the judgment are at variance. Order 47 RSC 1999 is specific that the assessment should stem from the judgment order. Mr. Chenda submitted that there was inconsistency between judgment and the assessment undertaken by the court below. He went on that assuming there was no limitation on the school fees arrears payable in terms of the cut-off date, the appellant exhibited proof of payment of some school fees, which leaves the actual quantum disputable. The Respondent's standing was attacked, as she was a Guardian ad Litem and by virtue of Order 80 Rule 2 sub-rule 17 RSC 1999 is confined to taking measures for the benefit of the infants.

Ms. Kalunga relied on the Heads of Arguments and Memorandum of Response which she augmented with oral arguments and she argued the three grounds as one. In response to ground one, she argued that the court below did not err in law and in fact, when it held that there was no procedural irregularity with assessment order of 6th August, 2010.

Ms. Kalunga submitted that there was nothing irregular about the assessment order of 6th August, 2010, nor was it irregular for the Respondent to recover monies she had expended to pay school fees when the First Appellant refused to pay school fees. The court below exercised its discretion to proceed in absence of the appellant who did not attend the hearing without advancing any reasons. The Appellant was aware of the date hearing, but chose not to appear. Appellant was represented on 7th July, 2010 by Counsel Mrs. Jean Convarus who applied for an adjournment as summons for assessment were served on them late and needed time to get instructions. The court was gracious enough to allow an adjournment to 6th August, 2010, an adjournment of close to 30

days and no affidavit in opposition was filed by the First Appellant. Ms. Kalunga referred us to our decision in ***Imbwae Vs Imbwae***[3] where we said:

> ***"There is no procedural injustice occasioned when a court proceeds, where there has been inaction on the part of a party despite being aware of proceedings"***

Ms. Kalunga cited our judgment in ***Premesh Bhai Megan Patel Vs Rephidim Institute Limited***[4] where we said:

> ***"We wish to restate that in dealing with an application to set aside a default judgment, the question is whether a defence on the merits has been raised or not and whether the applicant has given a reason, able explanation of his failure to file a defence within a stipulated time and that it is the disclosure of the defence on the merit which is a more important point to consider"***

Ms. Kalunga submitted that Order 12 Rule 8 of the High Court Rules empowers the court to proceed on the evidence of one party where there has been default of one party. The appellant did not file an affidavit in opposition. The court cannot force them to prosecute the matter. The reasons given at paragraph 2.5 of the appellants' Heads of Arguments were not given in the court below. At page 208 the court was satisfied that the appellant did not have a defence on the merits. The executor was to move in the shoes of the testator to settle school fees. The judgment on assessment was based on receipts which were exhibited by the Respondent during a lengthy hearing of the Respondent's oral testimony. The assessment was based on the High Court judgment.

In reply Mr. Chenda said Ms. Kalunga did not address issues raised by the first appellant in his affidavit especially paragraphs 7 – 14 at pages 94 – 95. We were urged to allow the appeal.

We have considered the Heads of Arguments and the oral arguments in this appeal. There are three issues in this appeal. The first is that there was no procedural justice, the second is that the tenor of the judgment triggering the assessment, was not that the Respondent should personally benefit, the third one is that the First Appellant has no liability of school fees at BAOB and the child who was at Kingswood College in South Africa completed years back and is now married in Lusaka.

In the court below, the First Appellant applied for an adjournment. The learned Deputy Registrar graciously adjourned the matter for 30 days. The First Appellant did not file an affidavit in opposition, when he was aware of the date. We agree with Ms. Kalunga that no procedural injustice is occasioned when a party who is aware of the proceedings does not turn up as we said in ***Imbwae Vs Imbwae supra***. In ***Chibuye and Others Vs The People***[5] which was a criminal matter we said:

> ***"It is for an accused person to avail himself in court when called upon and let due process of law take its course. An accused should not be allowed to dictate whether or not to be tried or unreasonably hold the court to ransom. Procedural rights must be invoked"***

The tenor of our judgments in these two cases is that '**you cannot force a litigant who does not want to litigate to litigate'.**

Mr. Chenda, in dealing with Order 35 RSC 1999 only highlighted the provision to set aside the judgment, he did not highlight "general indications" to be taken into account when considering to set aside the judgment. We restate the relevant ones in this case. These are:

> ***(1) Where a party with notice of proceedings has disregarded the opportunity of appearing and participating in the trial, he will normally be bound by the decision.***

(2) Where judgment has been given after a trial it is the explanation for the absence of the assent party that is most important, unless the absence was not deliberate, but was due to accident or mistake, the court will be unlikely to allow the hearing.

(3) Where the setting aside of judgment would entail a complete re-trial on matters of fact which have already been investigated by the court the application will not be granted unless there are strong reasons for doing so.

(4) The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospect of success.

It is clear that the First Appellant had notice, as the matter was adjourned at his counsel's request. He took no steps to file an affidavit in opposition. Even in the Supreme Court he never filed the appeal within time. The first appellant's attitude in this

litigation has been similar to that in the lower court and this court. He appears to be seized with the notion that he must drive the litigation and not the Judges. The High Court and Supreme Court judgments decided on the facts. For reasons given the prospect of success of the appeal are dim. The first ground of appeal lacks merit.

The learned Deputy Registrar, though his decision was right fell into error by saying, **"there is nothing irregular if the applicant were to personally benefit from the Estate",** because she is recouping what she spent. The Concise Oxford English Eleventh Edition defines, **"personal as affecting or belonging to a person"**. An examination of receipts from page 15 to page 82 of the Record of Appeal, illustrates that all the monies awarded to the Respondent was paid by her, as fees to schools for the benefit of the infants' education, child education is a human right. The money was not expended on her personal consumption. The conduct of the Respondent and the ruling of the lower court do not in anyway offend the tenor of this court and the High Court

judgments. It is startling to this court for the First Appellant to argue that the Respondent would have sat back when the First Appellant did not pay school fees, which was the First Appellant's obligation as Executor and see her children not going to school. Such an argument is immoral, unconscionable and disingenuous. The fees were a liability to the Estate. The learned Deputy Registrar was on firm ground when he ordered that the Estate pays Respondent the amount she had paid on the Estate's behalf. The second ground of appeal lacks merit as well, as such conduct cannot be justified in terms of children's rights. This ground run in complete contradiction to those rights. Child Justice is a foundation of a civilized society. We cannot therefore with good conscience uphold this ground. The courts should robustly defend child rights.

The third ground, dealt with the issue of Respondent being refunded by the Estate for the Estate's liability to pay school fees. We have dealt with this ground when dealing with the second

ground. The three grounds lack merit and are accordingly dismissed.

It would be inappropriate for this court and those below to keep our backs turned on such a slow burning desire by the First Appellant not to honour the Estate's liabilities.

Child rights and indeed any right cannot be limited without justifications and legislation dealing with child rights must be interpreted in favour of child rights rather than against those rights. And the courts resolutely reacted in accordance to this concept. If the courts have to err we have to err on the side of the welfare of the infants. This is a constitutional value, Constitutional Court of South Africa Per Sachs J, in ***August Vs Electoral Commission and Others***[(6)]. The first Appellant must realize that education, especially child education is a badge of dignity and personhood. The duties of an executor means constant practice of self-limitation and modesty.

We are of the view that this litigation was totally unnecessary and should be paid for by the appellants and not the Estate. We say this because if the First appellant's law firm continues receiving legal fees from the Estate, that could be an inducement to engage in pointless litigation. We say this because from the beginning there has been no fundamental change to the intent, that of resisting to pay school fees. Costs to be taxed in default of agreement.

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L. P. CHIBESAKUNDA

SUPREME COURT JUDGE

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G.S. PHIRI

SUPREME COURT JUDGE

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P. MUSONDA

SUPREME COURT JUDGE