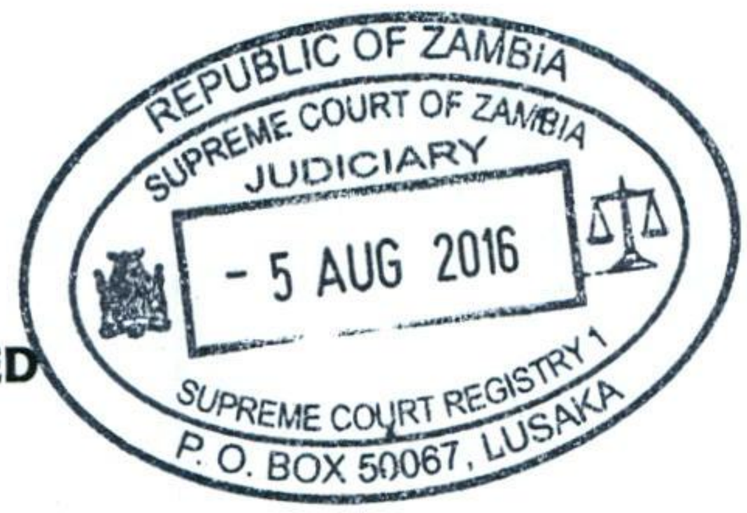
Selected Judgment No. 27 of 2016

P. 894

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

SCZ/8/269/2013
Appeal No. 49/2014

(Civil Jurisdiction)



BETWEEN:

LAPEMBA TRADING LIMITED **APPELLANT**

AND

PEMBA LAPIDARIES **1ST RESPONDENT**

INDUSTRIAL CREDIT COMPANY **2ND RESPONDENT**

Coram: **Mwanamwambwa, DCJ, Malila and Mutuna, JJS**
on 14th July, 2016 and 28th July, 2016

For the Appellant: Messrs Chibesakunda & Co. (Not present)

For the 1st Respondent: Dr. J. B. Sakala, SC, Messrs J. B. Sakala & Co.

For the 2nd Respondent: No appearance

JUDGMENT

Malila, JS, delivered the judgment of the Court.

Cases referred to:

1. *Wilson Masauso Zulu v. Avondale Housing Project (1982) ZR 172.*
2. *Ouachita Equipment Rental Co v. Trainer, 408 So. 2d 930, 935.*
3. *Waugh v. HB Clifford and Sons (1982) Ch. 374.*
4. *Taylor v. Yorkshire Insurance Co. Ltd. (1913) 2 1r. R1.*
5. *Boursot v. Savage (1866) LR 2 Eq. 134*
6. *Real Estate Opportunities Ltd. v. Aberdeen Asset Managers Jersey Ltd. (2007) 2 All ER 791.*

P. 895

This appeal is fraught with avoidable inattention and tardiness on the part of the appellant as we shall demonstrate in the narrative of this judgment. It is on an interlocutory point against a ruling of the High Court in terms of which that Court declined to grant special leave to review its judgment given on the 14th January, 2011.

The application for special leave to review was made on the 24th January, 2012 - just over a year after the judgment sought to be reviewed. It was made pursuant to Rule 39 (2) of the High Court Rules and was supported by a sixteen paragraphs affidavit sworn by one Phesto Ndololo Musonda. Among other things, he averred in that affidavit that he was a director in the applicant company (appellant in the present appeal), which was the second plaintiff in the lower court.

The application was stoutly opposed through an affidavit in opposition, and a further affidavit in opposition, both of which were sworn by one Julius Bikoloni Sakala, SC, who was counsel for the plaintiffs in the lower court.

In his ruling on the application, the learned High Court judge observed that the affidavit in support of the application for special leave was heavy on the merits but did not disclose any reason explaining the applicant's failure to make the application within the stipulated time. The judge was also of the view that since the Supreme court had dismissed an appeal against the same judgment, which appeal was lodged by the second respondent in the present appeal, he was *functus officio*. On that basis, the learned judge dismissed the application for special leave, but granted the appellant leave to appeal to the Supreme Court.

Following the ruling of the High Court and the granting of leave to appeal aforesaid, the appellant, almost predictably, failed to lodge the appeal within the time stipulated by the rules, resulting in the appellant applying for leave to file the notice of appeal out of time on the 12th of July, 2012. A copy of the leave to appeal out of time was inexplicably not produced in the record of appeal. However, in the notice of appeal which appears in the memorandum of appeal and set out at page 3 of the record of appeal, it is stated that leave was granted on the 3rd of

September, 2013. Even with that leave for extension of time, the appellant still failed to file the record within the period stated in the order for leave. A consent order extending the period for filing the record of appeal by another sixty days had consequently to be settled on 24th March, 2015. As we shall show later on in this judgment, these were not the only lapses attributable wholly to the appellant's camp.

Two grounds of appeal have been enlisted as follows:

1. **The Honourable court below erred in holding that there was no reason advanced for the failure to make the application for review of judgment within the stipulated time when in fact paragraphs 4 and 5 of the affidavit in support of the summons for special leave to review, as well as paragraph 9 of the affidavit in reply filed clearly spelt out such reasons for the failure to make the application within the stipulated time.**

2. **The learned judge in the court below misdirected himself when he held that he had no power to review his decision pursuant to Order XXXIX rule 1 of the High Court Rules.**

Having filed in the heads of argument, the learned Advocates for the appellant, Messrs Chibesakunda and Co., dispensed with their attendance at the hearing of the appeal by filing a notice of non-appearance under Rule 69 of the Supreme Court rules.

We pause here to state that while parties are entitled to avail themselves of the benefit of the provision of Rule 69 of the Rules of the Supreme Court which allows them to dispense with their attendance at the hearing of their appeals, there are risks that lurk in taking that option. One natural consequence of choosing this option is that the court is denied the opportunity to engage counsel on matters that may not be clear from the submissions in the heads of argument, or issues that may not be so evident from the record of appeal. The implications could be dire. In this particular case, for example, we would have wished to get the appellant's counsel's explanation as to why the ruling of the court subject of this appeal was not placed immediately after the address for service as prescribed by rule 58(4)(f) of the Rules of the Supreme Court, chapter 25 of the laws of Zambia, but appears instead at page 265 of the record of appeal. In the absence of any explanation, we would be inclined to dismiss such an appeal in future.

At the hearing of the appeal, Dr. J.B. Sakala, SC, who represented the first respondent, was present. There was no appearance for the second respondent. Having satisfied ourselves

that the notice of hearing was duly communicated to all the parties, we proceeded to hear the appeal. Dr. Sakala, SC, indicated that he was placing reliance on the heads of argument which he filed on behalf of the first respondent on the 8th August, 2014.

The appellant's written arguments on the two grounds of appeal were short and concise. Under the first ground of appeal, it was contended that, contrary to the holding of the learned judge in the court below that the appellant had not preferred reasons for its delay in making the application to review, the affidavit evidence before the court, as well as the submissions of counsel at the hearing of the application, pointed to a clear explanation for the delay. It was the appellant's position that as stated in the affidavit in support of the application, the appellant was wholly unaware of the proceedings in the lower court, as he had on behalf of the appellant, instructed counsel to remove the appellant as a party from those proceedings. It follows that the appellant could not have been expected to bring its application to review the judgment within the time stipulated.

It was the appellant's further contention that at the time it became aware of the judgment, it could not bring its application for review as the defendant, in the lower court (the second respondent in the current appeal), had already lodged an appeal in this court.

We need to point out for completeness, that consequent, upon the judgment of 14th January, 2011, an appeal was launched by the second respondent (which was the defendant in the lower court). That appeal was, however, dismissed for want of prosecution.

According to the appellant, these issues were raised in the lower court through the affidavit in support and yet, the lower court still held that there was no reason advanced for the failure to make the application for review within the stipulated time.

Under ground two, the appellant's contention is that the lower court was wrong to have stated that it had no jurisdiction to deal with the appellant's application for special leave granted that an appeal by the second respondent to the Supreme Court had been dismissed for want of prosecution. It was the appellant's

argument that the dismissal of the second respondent's appeal by the Supreme Court was without prejudice to the rights of the appellant given that it was wholly unaware of the proceedings purportedly commenced in its name. The appellant pointed to the obligation of trial courts to adjudicate upon every aspect of the suit between the parties as articulated by this court in the case of **Wilson Masauso Zulu v. Avondale Housing Project**[1].

Dr. Sakala, SC, prefaced his written submission by impugning the veracity of the averement by Mr. Phesto Ndololo Musonda in his affidavit in support of the application for special leave. Pointing to the affidavit evidence of Jan Paakensen in opposition to an application to stay execution and to set aside judgment in cause No. 2006/HN/33 which was admitted in the court below, and is contained in the record of appeal, Dr. Sakala, SC, submitted that the said Phesto Ndololo Musonda did not disclose that he was a minority shareholder in the appellant company and that he was not instructed by the said company to apply to review the judgment sequel to which the application for special leave was made.

Turning to the grounds of appeal proper, the learned State Counsel Sakala submitted in respect of ground one of the appeal, that the reasons given by the deponent of the affidavit in support of the summons for special leave to review, were false and an abuse of the due process of the court. The learned State Counsel referred us to page 213 of the record of appeal, showing that the deponent of the affidavit in support did discuss with him the judgment of the court below on 25th March, 2011 at 16 hours. The application was, according to Dr. Sakala, SC, misconceived.

Under ground two, Dr. Sakala, SC, made a pointed legal argument. A party in default should not be allowed to have an unqualified or unlimited right to extension of time notwithstanding what was stated in **Wilson Masauso Zulu v. Avondale Housing Project**[1]. We were urged to dismiss the whole appeal with costs against Mr. Phesto Ndololo Musonda in his personal capacity.

There is a dispute as to whether Messrs J.B. Sakala and Co. represented the appellant. Mr. Phesto Ndololo Musonda has exhibited a letter dated 15th December, 2006 addressed to Messrs

J.B. Sakala and Co. in which he states that no instructions had been issued to the firm to represent the appellant in the action against the respondent in this appeal. There were in that letter, allegations of fraud and false representation by the two persons, namely Mr. Kasenge Mulenga and Mr. Paul Farnham, who appear to have supported the instructions to Messrs J.B. Sakala and Co. to represent the appellant in the proceedings in the lower court.

In opposing the position taken by Mr. Phesto Ndololo Musonda, it is contended by Mr. J.B. Sakala that instructions to join the appellant to the proceedings in the lower court were given to his firm by the majority shareholder of the appellant, a Mr. Jan Paakensen, who as we have already stated, swore a separate affidavit in opposition to summons to stay execution in the lower court. That affidavit is in the record of appeal (at page 214). In that affidavit, Mr. Paakensen deposes that he is one of the majority shareholders in the appellant company and that Mr. Phesto Ndololo Musonda was never appointed as director of the appellant company, nor was his one-third shareholding in the appellant company formalized. No share certificate was issued to him either.

In his affidavit in opposition to the application for special leave to review, on the other hand, Mr. Sakala, SC, raises a further issue that he met with Mr. Phesto Ndololo Musonda on 23rd June, 2011 following the judgment of 14th January, 2011 and that they discussed the said judgment, particularly on how the matter subject of the judgment should be resolved.

In the further affidavit in opposition sworn by Dr. Sakala, SC, there are suggestions raised that Mr. Phesto Ndololo Musonda was acting less than honestly in this matter.

We have perused the ruling of the lower court dated 31st May, 2012 in which it declined in forthright language, the appellant's application for special leave. We have also taken into account the submissions made on behalf of the parties.

The application for special leave to review was made pursuant to Order 39 rule 2 of the High Court Rules, chapter 27 of the laws of Zambia, which provides as follows:

> **"Any application for review of any judgment or decisions must be made not later than fourteen days after such judgment or decision. After the expiration of fourteen days, an application for**

review shall not be admitted except by special leave of the judge on such terms as seem just."

It hardly bears mentioning that every application before a court is grounded on specific requirements which must be established for the court to grant the relief sought. Thus, an application for leave to appeal for example, requires that the applicant shows prospects of success of the intended appeal. An application to set aside a default judgment should disclose a defence on the merit. In the case of an application for special leave to review a judgment, a plausible reasons for the delay ought to be adduced. And we could go on with these examples.

A court considering an application for special leave to review is not expected to grant every application as a matter of course. The purpose of the rules insisting that those seeking special leave to review should do so through an application supported by an affidavit, is to ensure that the applicant furnishes to the court reasons for the failure to make the application to review within the time prescribed. It follows that such reasons must be veritable, verifiable and should, in any case, offer a reasonable account for the delay.

P. 906

In his ruling, subject of the present appeal, the trial judge stated that no reason for the delay was assigned. The appellant's position is that those reasons were in fact furnished in the affidavit in support.

An examination of the affidavit in support shows that the deponent of the affidavit was "shocked" to learn that the appellant was party to the proceedings in the lower court as second plaintiff. He further states that the advocates for the appellant had been instructed to remove the appellant from the proceedings in the lower court; that the appellant was unaware of the proceedings until it was furnished with a copy of the judgment.

This, in our view, is the closest the appellant came in its affidavit to explaining the delay in making the application for review. A pertinent question is whether the ignorance by a shareholder in the company (the deponent of the affidavit in the present case) of the appellant's continued participation in the proceedings in the lower court can be taken to be the ignorance of company (appellant) itself. This question would lead us to the thicket of company law, and the position of a shareholder *vis-a-*

vis decision making in the company. Fortunately, as we shall show anon, it is neither desirable nor necessary to enter that discourse. That issue does not constitute the critical determinant of the dispute in the present appeal.

We have examined the writ of summons and statement of claim filed in the lower court. In those proceedings, as we have pointed out already, the appellant was the second plaintiff. The proceedings were commenced as way back as November, 2006. All the documents on the record of appeal clearly show that the appellant was, in the lower court, represented by Messrs J.B. Sakala and Co. up until the judgment of the lower court. It is not suggested that Messrs J.B. Sakala and Co. had never had instructions to represent the appellant in the lower court. The contention of the appellant through the deponent of the affidavit in support of special leave to review is that Messrs J.B. Sakala and Co. were not instructed by himself in the first place to represent the appellant and were instead instructed to remove the appellant from the proceedings in the lower court, which Messrs J.B. Sakala and Co. apparently did not do.

To us, the arguments by the appellant regarding Messrs J.B. Sakala and Co. acting on its behalf are entirely peripheral. They are a matter between the appellant and their lawyers. What we are satisfied over is that Messrs J.B. Sakala and Co. had instructions from another shareholder and director. They did not act without any colour of instructions, so to say.

We must also point out, without hesitation whatsoever, that the issues raised by State Counsel regarding the authority or the lack of it of Mr. Phesto Ndololo Musonda to act on behalf of the appellant in instructing the appellant's counsel, are hugely contentious and cannot be resolved by this court at this level of the proceedings.

In the present case, we have already indicated that Messrs J.B. Sakala and Co. started to act for the appellant and another company in the proceedings in the lower court way back in 2006. The deponent of the affidavit in support of the application for special leave has stated that he had given Messrs J.B. Sakala and Co. instructions to remove the appellant from proceedings in the lower court, in December 2006, not to protest their acting on

behalf of the appellant in the proceedings in the court below. Notwithstanding the dispute regarding whether or not Messrs J.B. Sakala and Co. had proper instructions to continue acting for the appellant in the lower court, and given the disputed positions of the shareholders, we hold that in the circumstances of the case, Messes J.B. Sakala acted at all material times as lawyers for the appellant, having been instructed by Mr. Paakensen, which instructions were supported by Mr. Kasenge Mulenga and Mr. Paul Farnham. There was as between them a lawyer-client relationship. And that lawyer-client relationship is a commonsensical illustration of agency. A lawyer acts on behalf of his client, representing the client in legal proceedings, with consequences that bind the client. The lawyer is in this sense an agent of the client. (See **Waugh v. H. B. Clifford and Sons**[3]).

We are, of course, mindful that despite its foundational significance to the lawyer-client relationship, the law of agency does not, by itself, capture all the legal consequences of the relationship between lawyer and client. Lawyers are agent of their clients, but lawyers also perform functions that distinguish them from other agents. They are much more than their client's agents.

They are officers of the court, thus subjecting themselves to the court's supervision and to duties geared to protect the vitality, fairness and integrity of the judicial process.

Alongside the enormous benefits that come through agency, are significant risks and exposures. One such risk or exposure comes through the imputed knowledge rule. A principal may be deemed to have legally received certain knowledge or notice that has, in fact, been received only by the agent. This possible consequence of an agency relationship rests at the very heart of agency law.

The knowledge of the agent is imputed to the principal when it is received by the agent while acting in the course and scope of his employment. The plethora of cases that constitute the law on this principle include **Taylor v. Yorkshire Insurance Co. Ltd[4], Boursot v. Savage[5]** and **Real Estate Opportunities Ltd. v. Aberdeen Asset Managers Jersey Ltd[6].** And this knowledge is imputed to the principal even if the agent neglects to specifically convey that information to the principal. (See **Ouachita Equipment Rental Co v. Trainer[2]**.

Messrs J.B. Sakala's knowledge of the judgment of 14th January, 2011 is, under the imputed knowledge rule, imputable to the principal, who is the appellant to this appeal.

Quite apart from all this, in the affidavit in opposition by Dr. Sakala, SC, (at page 210 of the record) the appellant's claim that he had no knowledge of the proceedings and the judgment in the lower court, has been impugned. We have already stated that we shall not be drawn into determining that dispute which, as we have pointed, is internal between the client and its lawyers, and is not part of the issues for determination in the present appeal.

Discounting, therefore, on the basis of the imputed knowledge rule in agency, the appellant's plea of absence of knowledge, the appellant still had to explain the delay to file its application for review in another way. This was not done in the affidavit in support of the application for special leave. That affidavit instead contained numerous averements which go to the merits of the review application itself, not the application for special leave. The lower courts could, therefore, not be faulted for holding that there was no explanation furnished for the delay by

the appellant. Ground one is without merit and we dismiss it accordingly.

Ground two of the appeal raises a fairly short issue. The Supreme Court having dismissed the second respondent's appeal, was the trial judge right in holding that the dismissal of the appeal brings to an end litigation on the matter? In specific terms the learned judge in his ruling on this issue reasoned that:

> **"On the other hand, I have also addressed my mind to whether or not it is appropriate to grant special leave for review following the dismissal of an appeal. In terms of Order 39 rule 1, a judge may not review his decision or judgment where an appeal against the said decision or judgment has not been withdrawn (paraphrased). This is important because whereas a withdrawal of an appeal does not preclude any party thereto from seeking other recourse against the judgment to include review, a dismissal of an appeal by the final court brings to an end litigation on that case. The only way to reopen the case would be through an application to the appellate court itself."**

We agree with the trial judge on this point. A judgment cannot be a subject of both an appeal in a higher court and a review in the lower court. In terms of Order 39 of the High Court Rules, a party is precluded from seeking a review of a judgment appealed against unless such appeal is withdrawn. Once the

appellate court pronounces itself on the matter, unless it is referred back to the lower court, the lower court has no jurisdiction to reopen and rehear its earlier judgment by way of review. The lower court lacks the vires to do so. Were the situation to be otherwise, there would be considerable confusion introduced in the appellate structure of our court system. Where the Supreme Court dismisses an appeal on any account, the dismissal entombs the matter into permanent dormancy. The trial court was therefore on firm ground in holding as it did. Ground two fails also. The net result is that the whole appeal fails and is dismissed.

Regarding costs, the learned counsel for the first appellant has requested us to order costs against the deponent of the affidavit in support of the application for special leave, Mr. Phesto Ndololo Musonda. We surmise from his affidavit and submissions that the reason for making that prayer was because, in his view, Mr. Musonda as a minority shareholder in the appellant company who had no authority to decide on behalf of the company, and that in any case, the contents of his affidavit were false.

We have already stated that beyond what we have held on the evidence on record, we are not the correct forum to resolve issues surrounding the veracity of averements in the conflicting affidavits, or questions respecting the authority or lack of it to instruct Messrs J.B. Sakala and Co. to represent the appellant in the proceedings in the lower court.

We are mindful that costs ordinary follow the event and that they lie in the discretion of the court. We are, however, unable to award costs against a non party to proceedings. Although we have in some cases ordered costs against legal practitioners who are not party to proceeding, the situation here is markedly different. Legal practitioners are also officers of this court, and are thus in a different category. The court has disciplinary powers over practitioners. Our expectations from legal practitioners cannot therefore, be the same as those from shareholders of a company, no matter how unreasonable, dishonest or fraudulent they may be. In the present case, even if it were to be established, and which we must emphasise it has not been, that the deponent of the affidavit in support of the application for special leave to review acted irregularly as a shareholder, we would not award

costs against him personally for as long as he is not a party to the proceedings. Such shareholder, would have to be dealt with in a manner sanctioned by the articles of the company, the general law and any other instrument affecting his membership in the company. Such sanctions may include an indemnity to the company

Costs shall follow the event. The appellant shall pay the first respondent's costs.

M. S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

M. MALILA, SC.
SUPREME COURT JUDGE

N. K. MUTUNA
SUPREME COURT JUDGE