IN THE HIGH COURT FOR ZAMBIA 2013/HP/0820
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MATHIAS ZULU & 26 OTHERS PLAINTIFFS

AND

INMOBIA MOBILE TECHNOLOGY DEFENDANT

BEFORE THE HONOURABLE LADY JUSTICE M.CHANDA THIS 29TH DAY OF SEPTEMBER, 2017

For The Plaintiffs : D.M. Mwewa
from K.B.F and Partners

For The Defendant : M. L. Sikaulu
from S.L.M. Legal Practitioners

RULING

LEGISLATION REFERRED TO:

1. ORDER III RULE 2 AND ORDER XLI RULE 4 OF THE HIGH COURT RULES.
2. ORDER 5 RULES 15 TO 18 OF THE HIGH COURT ACT, CHAPTER 27 OF THE LAWS OF ZAMBIA
3. ORDER 25/1/5 OF THE RULES OF THE SUPREME COURT OF ENGLAND (WHITE BOOK) 1999 EDITION
4. ORDER 34/2/1 OF THE WHITE BOOK RULE 25/8/1/F

CASES REFERRED TO:

1. CHIKUTA V CHIPATA RURAL COUNCIL (1974) ZR 241
2. POST NEWSPAPAER V RUPIAH BANDA SCZ JUDGMENT NUMBER 25 OF 2009
3. SHELL AND B.P. (Z) LIMITED V CORNIDARIS AND OTHERS (1974) ZR 354
4. *RE M'POYOU AND ANOTHER (1979) ZR 280*
5. KARIBA NORTH BANK COMPANY LIMITED V ZAMBIA STATE INSURANCE CORPORATION (1980) ZR 94
6. BIRKETT V JAMES (1978) A.C.297

7. CHRISTIAN DIEDRICKS V KONKOLA COPPER MINES 2010/HN/28
8. ISAAC TANTAMENI CHALI (EXECUTOR OF THE WILL OF THE LATE MWALLA MWALLA) V LISELI MWALLA (SINGLE WOMAN) (1997) S.J 22
9. THE LAW OF EVIDENCE IN ZAMBIA, CASES AND MATERIALS
10. ODGERS ON CIVIL COURT ACTIONS AT PAGE 323, PARAGRAPH 17.27
11. ALLEN V SIR ALFRED MCALPHINE AND SONS LIMITED (1968) 2 Q.B 229
12. HALSBURY'S LAWS OF ENGLAND 4TH EDITION, VOLUME 37 PARAGRAPH 448
13. JANOR V MORRIS (1981) 1 W.L.R 1389
14. BISS V LAMBETH, SOUTHWARK AND LEWISHHAM HEALTH AUTHORITY (1978) 2 ALL E.R 125 CA

This matter came up by way of an application by the defendant for an order to set aside orders for directions and to dismiss the action for want of prosecution pursuant to *Order III Rule 2* and *Order XLI Rule 4 of the High Court Rules*. The plaintiff filed an affidavit in opposition to the defendant's application.

The brief background to the case is that on 11th June, 2013, the plaintiffs herein commenced this matter by way of writ of summons and statement of claim seeking *inter alia* an exparte interim injunction. The exparte order was granted on 18th July, 2013 by Judge Bobo Banda.

On 23rd September, 2013, the defendant filed into Court conditional memorandum of appearance. The condition was to the effect that the plaintiff should provide the defendant further and better particulars of the claim. On 10th October, 2013, the defendant made an application to dismiss the exparte interim injunction and this matter was heard and determined on 4th June, 2014 when the exparte order was discharged.

On 30th October, 2013, the defendant made another application to set aside the writ in respect of eight plaintiffs and on 26th August, 2014, a ruling was delivered granting their application.

On 5th June, 2014, the defendant made an application before court that the plaintiffs provide further and better particulars and on 20th October, 2014, a ruling was delivered to the effect that further and better particulars be furnished to the defendant within seven days from the date of the order and that failure to furnish as ordered, the proceedings be stayed, until such further and better particulars are furnished.

The matter was reallocated to this Court on 11th March, 2015. Without realising that the plaintiff had not complied with the aforesaid order, the Court issued orders for directions and a notice of hearing on 14th April, 2015. This prompted the defendant to apply to set aside the order for directions and dismiss the action for want of prosecution.

When the matter came up for hearing on 28th August, 2015, both parties were before court and Counsel for the defendant raised a preliminary issue. The preliminary issue was that paragraphs 7, 8 and 9 of the affidavit sworn by the plaintiffs' Counsel contained hearsay evidence and not arguments of facts as required in an affidavit. Counsel for the defendant also asserted that the plaintiffs' affidavit contained legal arguments in paragraphs 10,11,13,14 and 15 and not arguments of facts. His application was that the Court determines whether the aforementioned paragraphs could be expunged from the record. He cited the

cases of **Chikuta v Chipata Rural Council**[1] and **Post Newspapaer v Rupiah Banda SCZ Judgment Number 25**[2] to support his argument.

Counsel for the plaintiffs' response was that the content of paragraphs 7 and 8 of the affidavit in opposition did not amount to hearsay evidence as the information therein was perceived by the deponent Kelvin Fube Bwalya, with one of his senses and he therefore was competent, and had personal knowledge to give the information. She argued that the issues raised in the affidavit were relating to legal matters in the Court process, in particular, dismissal of the matter for want of prosecution and that was the reason Counsel saw it fit to swear the affidavit on behalf of the plaintiffs.

Counsel for the defendant's reply was that the opposition to the affidavit was not on the basis that the affidavit was sworn by Counsel, but on grounds that the contents of the affidavit contained hearsay evidence and that Counsel was making legal arguments in an affidavit as opposed to limiting it to stating facts. He cited paragraph 7 in which counsel deposed to have been informed of certain facts.

I will dispose of the preliminary issue first before considering the main application. It has been settled in a myriad of cases that Counsel is advised to desist from swearing affidavits on behalf of their clients in matters that are highly contentious.

In the case of **Chikuta v Chipata Rural Council** as cited by the defendant's Counsel, the Court did not ban the swearing of affidavits by Counsel; it however stated that Counsel should not swear affidavits in contentious matters. That is, affidavits making hearsay allegations which might elicit cross-examination.

In another case of **Shell and B.P. (Z) Limited v Cornidaris and Others**[3]**,** Moodley, J. stated at page 357:

> **"The increasing practice amongst lawyers conducting cases of introducing evidence in such a manner [by filing affidavits containing hearsay evidence] is not merely ineffective but highly undesirable particularly where the matters are contentious."**

Further in ***Re M'poyou and Another***[4] the Court stated that it is inadvisable for an advocate to swear an affidavit deposing as to facts on behalf of a client in contentious matters, especially where there is a risk that the facts deposed to by the advocate could be disputed by the other side.

The attention of the parties is also drawn to *Order 5 Rules 15 to 18 of the High Court Act, Chapter 27 of the Laws of Zambia* which sets out the guidelines for Counsel when they swear affidavits. The said rules provide that an affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion but shall contain only statements of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true. Further, that where a witness deposes to facts derived from a source other than his own personal knowledge he

shall set forth explicitly the facts and circumstances forming the ground of his belief and that where the belief of a witness is derived from information received from another person, the name of his informant shall be stated, and reasonable particulars shall be given in respect of the informant, and the time, place and circumstances of the information.

A perusal of the affidavit evidence of counsel for the plaintiffs, Kelvin Fube Bwalya, reveals in paragraph 7 that he was given information by the Advocates for a company called Spice Africa but he however does not state the facts and circumstances forming the ground of his belief, and neither does he state the particulars representing the time, place and circumstances of the information. This is the same with the contents of paragraphs 8 and 9. This is in contravention of Order 5 and is in fact hearsay evidence and therefore inadmissible.

I further note that Counsel in his affidavit sworn on behalf of the plaintiffs also explained the law on dismissal of an action, the documents that the defendant's counsel should file and the consequences of failure to set down the case for trial. All these were legal arguments which should not have been in the affidavit as that contravened the aforementioned rules. For these reasons, I am inclined to grant the defendant's application to have the said paragraphs expunged from the record as they are in total disregard of the rules on swearing of affidavits.

I now turn to consider the main application, to set aside orders for directions and dismiss the matter for want of prosecution. In

support of the main application both parties filed written submissions and skeleton arguments to buttress their respective positions.

Counsel for the defendant submitted that the purpose of particulars in an action was to inform each party of the nature of the case so as to avoid them being taken by surprise. It also aids the defendant to know what evidence it ought to prepare for at trial. He cited the case of **Kariba North Bank Company Limited v Zambia State Insurance Corporation**[5] and argued that the failure by the plaintiffs herein to furnish particulars had hindered the progress of this matter.

He also stated that the failure to furnish these particulars within a reasonable time amounted to an inordinate delay by the plaintiffs and made it impossible for the defendants to render a defence without the particulars it needed. He cited the case of **Birkett v James**[6] which defined inordinate delay as a period of time which is longer than the time usually regarded as acceptable and stated that it had been over 10 months *in casu* and there were still no particulars furnished.

He also submitted that dismissal of a matter for want of prosecution should not be granted so as to deny the plaintiff adjudication of his claims on the merits by reason of procedural default unless the default causes prejudice to his opponent for which costs would not compensate. This was stated by the court in **Christian Diedricks v Konkola Copper Mines**[7]. He argued that the consequences in the present case are dire as the

witnesses may have forgotten the issues in the case and therefore an award of costs would not be adequate compensation.

He further submitted that the plaintiffs affidavit referred to a discussion and settlement which was reached with Spice Africa which is not a party to these proceedings and whose interests the court should not consider pursuant to **Isaac Tantameni Chali (Executor of the Will of the Late Mwalla Mwalla) v Liseli Mwalla[8].**

Counsel for the defendant wound up his submissions by stating that the burden to prosecute the matter rested on the plaintiff. He went on to state that the learned authors of **The Law of Evidence in Zambia, Cases and Materials[9]** correctly put it that the party who desires judgment as to a legal right has the responsibility to produce evidence sufficient to persuade the trier of the existence or non-existence of facts in issue. He then argued that failure by Airtel to provide particulars on behalf of the plaintiffs does not shift the burden to Airtel as it is not a party to the proceedings. He contended that for the foregoing reasons, the plaintiffs have failed to prove their case and are therefore not entitled to judgment in their favour.

Counsel for the plaintiffs in her submissions opposing the application to set aside orders for direction and to dismiss the action for want of prosecution explained the relationship between Spice Africa, Onmobile and the plaintiffs. She submitted that Spice Africa has a licence with the plaintiffs and that Onmobile manages the plaintiffs' content on the Airtel Platform. It was her

submission that Spice Africa was competent to engage the defendant into a settlement agreement despite not being a party to the proceedings.

Counsel also submitted that the application before the Court was for dismissal for want of prosecution and that being the case, issues related to obtaining of instructions and the burden of proof where not the focus of the application.

She asserted that the defendant had not met the requirements of the law to warrant its application to dismiss the matter before me for want of prosecution. In support of her proposition Counsel drew the attention of the Court to the learned authors of **Odgers on Civil Court Actions at page 323, paragraph 17.27**[10] who had this to say on dismissal for want of prosecution, "failure by the plaintiff to issue summons for directions within a specified time as amounting to inordinate delay". Counsel further submitted that *Order 25/1/5 of the Rules of the Supreme Court of England (White Book) 1999 Edition* defines a specified time as one month after close of pleadings. She stated that the reason the plaintiffs had not issued summons for directions was because the pleadings were not closed. Counsel submitted that the Orders of Directions issued by this Court on 14th April, 2015 cured the plaintiffs' omission to issue summons for directions and for this reason, the requirement of the law had been met.

Counsel also referred the Court to *Order 34/2/1 of the White Book* which provides that the requirement to set down for trial is by *rule 25/8/1/f* which states that it should be done within 6

months from the date that pleadings are deemed to be closed. She reiterated that the pleadings in the matter were not closed and so the plaintiffs had met the requirement by the law.

She argued in the alternative that even if the pleadings were closed sometime in November, 2014, the Orders for directions were issued in April, 2015 which was within the required six months period and so in essence the plaintiffs were in compliance with the legal requirement. She implored the Court to treat the defendant's application for dismissal as fresh summons for directions.

In addition the Court was referred to cases where guidance has been given on the Courts inherent jurisdiction to dismiss matters for want of prosecution. She cited the case of **Allen v Sir Alfred McAlphine and Sons Limited**[11] wherein it was held that the power to dismiss should only be exercised where the court is satisfied either that the default has been intentional, or that there has been inordinate and inexcusable delay and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or cause prejudice.

She amplified her submission by referring to the learned authors of **Odgers on Civil Court Action paragraph 17.30** on what amounts to intentional and contumelious delay, namely:

1. that there must be deliberate default in complying with a peremptory order of Court;

2. that also the delay could be where there was an unless order, for example; that unless a party provides further and better particulars within a specified number of days, their pleadings will be struck out.

Counsel submitted that with regards to this case, the questions to be resolved were whether the plaintiffs' default was intentional and contumelious, whether there was inordinate delay and whether the defendant will be prejudiced by the delay.

It was her further contention that in line with paragraph 17.32 of Odgers on Civil Court Action, if a party could demonstrate that there was no intention to ignore or flout the order and that the failure was due to extraneous circumstances, such failure to obey an order would not be treated as contumelious and therefore the matter would not be dismissed.

Counsel also drew the Court's attention to the **Halsbury's Laws of England 4th Edition, Volume 37 paragraph 448**[12] and stated that on an application to dismiss for want of prosecution, the court would take into account all circumstances of the case, including the nature of the delay and the extent to which it had prejudiced the defendant, as well as the conduct of all parties and their lawyers.

She asserted that in the matter before me the delay was not intentional and the reason for the delay was that the plaintiffs requested for the information required from Airtel so as to enable them furnish the further and better particulars. She went on to expand that the said request was not filed into court because the

plaintiffs received an email informing them that the plaintiffs' agent, Spice Africa, and the defendant were discussing settling the matter out of court. Counsel stated that the plaintiffs had therefore not sat on their rights but made effort to comply with the Court's order.

Counsel defined a peremptory order pursuant to *Order 25/1/3 of the White Book* and conceded that the Court's order did require that the further and better particulars be furnished within 7 days and a further order that the proceedings be stayed, until such further and better particulars are furnished. In the premises, the defendants ought to have made an application to discharge the stay and not one to dismiss the action.

It was also Counsel's assertion that inordinate delay as per **Odgers in paragraph 17.36** meant delay which is materially longer than the time usually regarded by the profession and courts as an acceptable period. She cited the case of **Janor v Morris**[13] in which the plaintiff failed to take any steps for a period of 10 months and the matter was ordered to be struck out unless summons for directions were served by a specified date. She contended that although the case was different from the one *in casu*, the delay in that case was more but the matter was not struck out. She also cited **Biss v Lambeth, Southwark and Lewishham Health Authority**[14] wherein an action had hung over the defendants for 11 years 6 months and stated that in the present case the delay was only for eight months.

Counsel finally submitted that prejudice was to be shown for the defendant to succeed with an application for want of prosecution and that prejudice entailed that the delay had affected the memory of the witness or that the witnesses had died or had disappeared reliance was placed on paragraph 17.37 of Odgers to support her argument. She further submitted that *Order 25/1/7 of the White book* requires the defendant to produce compelling evidence of substantial prejudice to justify dismissal of the proceedings. She argued that the defendants affidavit did not show the prejudice that would be suffered either by loss of memory or by death or disappearance of witnesses and for that reason, the defendant had failed to adduce compelling evidence of substantial prejudice it had suffered to warrant the dismissal.

I have carefully considered the submissions by both Counsel and it is my immediate affirmation that grounds exist to warrant the setting aside of the order for directions and the notice of hearing that were issued on 14th April 2014. This is so because at the said time the Court's order for directions was issued the plaintiff had not only failed to confirm with the order of Judge Banda-Bobo to furnish the defendant with further and better particulars within the requisite period but they also remained unresponsive for over eight months from the date of the order. In light of the foregoing the Court's order for direction and the notice of hearing dated 14th April, 2015 are accordingly set aside.

Having set aside the order for directions I must further determine whether the plaintiff default to obey the order to furnish the defendant with further and better particulars has resulted in

their failure to prosecute this matter within a reasonable time as contended by the defendant.

Counsel for the defendant has valiantly argued that the plaintiff have been caught up in the web of want of prosecution of the matter warranting dismissal and that their failure to provide the said particulars is indefensible.

Counsel for the plaintiffs on the other hand has contended that the default by the plaintiffs was not intentional and contumelious as averred in paragraph 7 to 9 of their affidavit because there was an indication by Spice Africa that the matter would be settled *excuria.*

I have perused through the entire correspondence exhibited by the plaintiffs in their affidavit in opposition on the proposed settlement and it is my observation that the proposed *excuria* settlement is made by the legal Counsel to Spice Africa who are not a party to this action. I entirely agree with the submission by Counsel for the defendant that Spice Africa being a non-party cannot affect these proceedings in any manner whatsoever. I am therefore constrained to take into account the interests of a non-party and I find that the plaintiffs' negotiations with Spice Africa cannot be a justifiable cause for them to fail to abide by the Court's order of 20th October 2014. There is no doubt in my mind that the delay to furnish the further and better particulars as earlier directed by the Court is likely to continue to be protracted because of the plaintiffs' reliance on a third party to provide the required information. It is my holding that this

conduct by the plaintiffs is prejudicial to the defendant's case and is likely to give rise to a substantial risk to render a fair trial impossible. I am therefore left with no choice but to dismiss this action for want of prosecution with costs to the defendant.

Delivered at Lusaka this ***29th*** day of ***September, 2017***.

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M. CHANDA
JUDGE