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IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL № 127/2017

BETWEEN:

DIAMOND GENERAL INSURANCE Appellant

AND

LWIINDI C. MOONGA Respondent

Coram: **Mchenga, DJP, Mulongoti** and **Lengalenga, JJA**
on 23rd January, 2018 and 21st September, 2018

For the Appellant: Mr. C. Nhari – Messrs Nhari Advocates

For the Respondent: Mr. Friday Besa – Messrs Besa Legal Practitioners

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J U D G M E N T

LENGALENGA, JA delivered the Judgment of the Court

Cases referred to:

1. **STANLEY MWAMBAZI v MORESTER FARMS (1977) ZR 108**
2. **ZAMBIA REVENUE AUTHORITY v JAYESH SHAH (2001) ZR 60**
3. **WILSON ZULU v AVONDALE HOUSING PROJECT LTD (1982) ZR 172 (SC)**
4. **J. K. RAMBAI PATEL v MAKESH KUMAR (1985) ZR 220**

5. **GENERAL NURSING COUNCIL OF ZAMBIA v INUTU MBANGWETA (2008) 2 ZR 105**
6. **KHALID MOHAMED v THE ATTORNEY GENERAL (1982) ZR 49 (SC)**

Legislation referred to:

1. **High Court Act, Chapter 27 of the Laws of Zambia.**
2. **The High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia.**

Other works referred to:

1. **HALSBURY'S LAWS OF ENGLAND, Fourth Edition, Volume 37, page 336 and paragraph 448.**
2. **South African Law Journal (1995) Volume 115**

This is an appeal against the ruling of the court below delivered on 29th May, 2017 in which the learned trial judge dismissed the matter for want of prosecution by reason of the respondent's non-appearance on the trial date on the ground that the respondent's Counsel had a bereavement.

The brief background of the case is that the respondent, who was the plaintiff in the court below, took out an action by way of Writ of Summons against the appellant herein, claiming the following reliefs:

(i) Payment of the insured sum of K225 000.00 or in the alternative, payment for the repairs caused to the motor vehicle arising from an accident;

(ii) Interest on the sums due at current bank lending rate from 12th June, 2014;

(iii) Damages for breach of contract;

(iv) Costs;

(v) Any relief the Court may deem fit.

According to the Statement of Claim exhibited in the record of appeal, the respondent being the owner of a motor vehicle, Cadillac Escalade, registration number ALG 4700, on unknown date in June, 2014, took out a comprehensive insurance cover with the defendant covering the period 12th June, 2014 to 30th June, 2015. Thereafter, on or about 8th March, 2015 the respondent's driver, whilst driving the said motor vehicle, was involved in a road traffic accident as he drove along the ring road near the traffic lights on Kafue road. Arising from the said accident, damage was caused to the respondent's vehicle and the respondent promptly informed the appellant of the damage to the said vehicle.

The appellant, however, through a letter dated 7th December, 2015 addressed to the respondent, allegedly rejected or refused the respondent's claim, without giving any apparent reason for its refusal and allegedly merely stated that the respondent withheld material facts.

The respondent claimed that inspite of making several demands and reminders for payment to the appellant, it refused and/or neglected to settle the insurance claim. He claimed further that by reason of the matters aforestated, he had suffered loss, damages and inconvenience hence the claim.

The appellant filed a Defence and Counter-claim. In the Counter-claim, the appellant claimed that as a result of the respondent's fraud and fraudulent actions, it had suffered loss and damage.

It was, therefore, claiming the following:

(i) Damages for fraud

(ii) Interest

(iii) Costs.

According to the proceedings in the record of appeal, when the matter came up for hearing before the court below, the respondent and his Counsel were not in attendance and only Mr. Musoka, the appellant's

Counsel, was present. He informed the trial judge that the previous day, he had called the respondent's advocates and informed them that Counsel who had conduct of the matter on behalf of the appellant, had a bereavement and he had asked them if they could apply for an adjournment and they had agreed. He further informed the judge that the respondent's Counsel was appearing before the Subordinate Court as he had no objection to the appellant's Counsel's application for an adjournment.

The trial judge upon hearing that the parties or their advocates agreed between themselves to have the matter adjourned, declined to grant the adjournment and instead dismissed the matter for want of prosecution.

Subsequent to the court's dismissal of the action for want of prosecution, the appellant filed this appeal as it is dissatisfied with the ruling of the court below. The appellant advanced three grounds of appeal as follows:

(i) The trial court erred in both law and fact when it failed to determine all matters in controversy;

(ii) The trial court misdirected itself in law when it dismissed the matter without liberty to restore or review;

(iii) The trial court erred in law and fact when it awarded costs to the respondent.

The respondent filed a Memorandum of Cross Appeal on 17th August, 2017 appealing against the whole ruling of the court below. He also advanced three grounds of appeal as follows:

GROUND ONE

The learned trial judge erred in law and fact when he ruled that the parties are not desirous of prosecuting this matter expeditiously in the face of evidence to the effect that Counsel for the respondent was ready to proceed but he was requested for an adjournment by Counsel for the appellant on the ground that Counsel for the appellant was attending a funeral and whereupon he extended courtesy to his colleague and agreed.

GROUND TWO

The learned trial judge erred in both law and fact when he dismissed the matter and gave a specific order that no application for review or restoration shall be entertained in the face of evidence showing that

the appellant had complied with the Orders for Directions and the matter was coming up for trial for the very first time.

GROUND THREE

The learned trial judge erred both in law and fact in dismissing the matter for want of prosecution in that, even assuming the judge was correctly entitled to refuse the application for an adjournment, he should have struck the matter off the active cause list with liberty to restore as opposed to dismissing it completely.

The appellant filed heads of argument on which Counsel, Mr. Nhari relied to support the grounds of appeal.

In support of ground one, Counsel for the appellant relied on section 13 of the High Court Act which provides as follows:

> **"In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court in the exercise of the jurisdiction vested in it, shall have the power to grant and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appeal to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be**

completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided, and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."

He also relied on the case of **STANLEY MWAMBAZI v MORESTER FARMS**[1], where it was held that where there are triable issues, actions should be allowed to proceed to trial, despite the default of the parties and that the defaulting party, may be ordered to pay costs. It was further stated that it is not in the interest of justice to deny him the right to have his case heard.

Mr. Nhari further relied on the case of **ZAMBIA REVENUE AUTHORITY v JAYESH SHAH**[2], where it was held that cases should be decided on their substance and merit. He further referred the court to the case of **WILSON ZULU v AVONDALE HOUSING PROJECT LTD**[3], where the Supreme Court observed as follows:

"I would express the hope that trial courts will always bear in mind that it is their duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. A decision which, because of uncertainty or want of finality leaves the doors open for further litigation over the same issues between the same parties can and should be avoided."

In *casu*, appellant's Counsel submitted that the trial court erred both in law and fact when it dismissed the matter without having regard to the fact that the appellant had a counter-claim against the respondent hence failing in its duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality and on its substance and merit. He further submitted that the trial court actually denied the parties the right to be heard when it dismissed the matter in the manner that it did.

With regard to ground two, Mr. Nhari referred this court to the provisions of Order 35 of the High Court Rules. He specifically relied on Rules 2 and 4 of the said Order. Rule 2 provides as follows:

> **"If the plaintiff does not appear, the Court shall, unless it sees good reason to the contrary, strike out the cause (except as to any counter-claim by the defendant) and make such order as to costs, in favour of the defendant appearing, as seems just;**
>
> **Provided that, if the defendant shall admit the cause of action to the full amount claimed, the Court may, if it thinks fit, give judgment as if the plaintiff had appeared."**

He further quoted Order 35, Rule 4 which provides for counter-claim where the plaintiff does not appear and states as follows:

> **"Where the defendant to a cause which has been struck out under Rule 2 has a counter-claim, the Court may, on due proof of service on the plaintiff of notice thereof, proceed to hear the counter-claim and give judgment on the evidence adduced by the defendant, or may postpone the hearing of the counter-claim and direct notice of such postponement to be given to the plaintiff."**

Appellant's Counsel submitted that in this case, the appellant had a counter-claim against the respondent and that on the authority of Order 35, Rules 2 and 4, it is his humble submission that the trial court misdirected itself in law and fact by dismissing the case without giving the appellant an opportunity to have its counter-claim heard.

With regard to ground three Mr. Nhari relied on the case of **J. K. RAMBAI PATEL v MAKESH KUMAR**[4] in which the Supreme Court held as follows:

> **"It is a settled principle of law that a successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper to be granted costs."**

In view of the Supreme Court's holding on the issue of costs and in relation to the matter *in casu*, appellant's Counsel argued that the respondent

absented himself at his own peril or will after being informed that the appellant herein would apply for an adjournment for the reasons aforestated and that his conduct and that of Counsel was improper as it led the court to mistakenly believe that the parties had agreed to adjourn by consent.

He relied further on the case of **GENERAL NURSING COUNCIL OF ZAMBIA v INUTU MBANGWETA**[4] in which the Supreme Court made the following observation:

> **"It is trite law that the costs are awarded in the discretion of the Court, such discretion is however to be exercised judicially. Costs usually follow the event."**

He further relied on an article titled **"Writing a Judgment"** published in the South African Law Journal (1995) Volume 115, at page 116 in which the former Chief Justice of the Supreme Court of South Africa stated that **"similarly careful consideration must be given to the question of costs and whether there should be any deviation from the rule that normally costs follow the event."**

Appellant's Counsel finally submitted that the trial court neither exercised its discretion to award costs judicially nor did he consider the

question of costs with regard to the respondent's conduct of absenting himself from court.

In conclusion, he urged this Court to revisit the ruling appealed against by the court below and to set it aside. He also prayed that this Court orders the re-hearing of the matter on its merits and substance and that the costs and those incidental to this appeal be awarded to the appellant, and that in default of agreement, same to be taxed.

The respondent's Counsel, Mr. Friday Besa on 17th August, 2017 had filed into court respondent's Notice of Cross Appeal and Memorandum of Cross-Appeal. By the said Notice the respondent communicated his dissatisfaction with the ruling of the court below and his intention to cross-appeal against the said ruling.

In the Memorandum of Cross Appeal, the respondent advanced three grounds of appeal which are set out as follows:

GROUND ONE

The learned trial Judge erred in law and in fact when he ruled that the parties are not desirous of prosecuting this matter expeditiously in the face of evidence to the effect that Counsel for the respondent was ready to proceed but was requested for an adjournment by

Counsel for the appellant on the ground that Counsel for the appellant was attending a funeral, whereupon Counsel for the respondent extended courtesy to his colleague and agreed.

GROUND TWO

The learned trial Judge erred in both law and fact when he dismissed the matter and gave a specific order that no application for review or restoration shall be entertained in the face of evidence showing that the appellant had complied with the Order for Directions and the matter was coming up for trial for the very first time.

GROUND THREE

The learned trial Judge erred in both law and fact in dismissing the matter for want of prosecution in that, even assuming the Judge was correctly entitled to refuse the application for an adjournment, he should have rather **"struck the matter off the active cause list with liberty to restore"** as opposed to completely dismissing it.

Respondent's Counsel did not file any heads of argument in support of the cross-appeal as he intimated to appellant's Counsel that the respondent's Notice of Cross Appeal and Memorandum of Appeal are substantially in

conformity with the appellant's Notice of Appeal and Memorandum of Appeal and that as such the respondent did not oppose the appeal.

We considered the appellant's grounds of appeal and arguments advanced, the respondent's grounds in the cross-appeal and arguments advanced, the authorities and ruling appealed against.

We must state at the onset that the appellant's grounds of appeal and the grounds of the cross-appeal are more or less the same as they attack the learned trial Judge's decision of dismissing the matter for want of prosecution as opposed to having it struck off the active cause list with liberty to restore.

Since Counsel ably referred this Court to the provisions of the High Court Rules that are instructive on how the court ought to proceed in cases of non-attendance of parties or a party at the trial of an action, we wish to include one more provision that further guides the court. Order 35, Rule 1 of the Rules of the Supreme Court, 1999 Edition provides as follows:

> "**1 (1) If, when the trial of an action is called on, neither party appears, the action may be struck out of the list, without prejudice, however, to the restoration thereof, on the direction of a Judge.**
>
> **(2) If, when the trial of an action is called on, one**

> **party does not appear, the Judge may proceed with the trial of the action or any counter-claim in the absence of that party."**

It is, therefore, evident from the foregoing provisions, particularly Rule 1(2) that even if the plaintiff or defendant does not appear, the Judge may proceed with the trial by hearing the action or counter-claim on the merit, as the burden of proof lies on the party that alleges or counter-claims.

The general principle of law is that cases have to be heard on the merits and the Supreme Court decision in the case of **KHALID MOHAMED v THE ATTORNEY GENERAL**[6] is instructive on this position of the law. We, therefore, agree with Counsel's arguments in support of grounds one and two of the appellant's appeal that by prematurely dismissing the action and failing to determine all matters in controversy, the learned trial Judge erred in law and fact and misdirected himself.

In our considered view this was a grave misdirection on the part of the learned Judge more especially since the matter had come up for trial for the first time and the appellant had complied with the Order for Direction.

He ought to have struck out the matter with liberty to restore, if he was aggrieved with the other party's absence as opposed to dismissing the matter.

In **HALSBURY'S LAWS OF ENGLAND, Fourth Edition, Volume 37, page 336 and paragraph 448,** the learned authors state that the court has inherent jurisdiction to dismiss an action for want of prosecution where there has been prolonged or inordinate and inexcusable delay in the prosecution of the action causing or likely to cause serious prejudice to the defendant or giving rise to a substantial risk that a fair trial would not be possible.

However, in the present case, from Counsel's arguments and the grounds of appeal and cross-appeal advanced, and upon our perusal of the record of proceedings, there is no evidence of any prolonged or inordinate and inexcusable delay in the prosecution of the action that could have prompted the court below to exercise the court's inherent jurisdiction to dismiss the matter for want of prosecution. We, therefore, find the decision to do so to have been rather harsh in the circumstances of the case.

We, accordingly, allow grounds one and two of the appeal; and grounds one, two and three of the cross-appeal.

We finally turn to ground three of the appeal wherein the appellant attacks the learned trial Judge's decision of awarding costs to the respondent. We accept Mr. Nhari's arguments and the cases relied on and agree that whilst it is trite law that costs are awarded at the court's discretion, such discretion has to be exercised judicially, taking into consideration the prevailing circumstances of the case.

In this case, where costs were awarded to the respondent, according to the record of proceedings, the respondent was not even in attendance in court for him to have incurred any costs by the appellant's application to adjourn the matter. As argued by the appellant's Counsel and in line with the decisions in the authorities cited and relied on, costs usually follow the event and authorities on this rule or principle abound.

This ground also succeeds but only to the extent that costs should not have been awarded to the respondent. Therefore, based on the success of all the grounds of appeal, the net result is that the appeal and the cross-appeal succeed.

The ruling appealed against is accordingly set aside and the matter is sent back for trial on the merits.

On the issue of costs, however, we are of the considered view that it would not be in the interest of justice to award costs to the appellant when the adjournment that was sought was at its instance as contained in ground one of the respondent's cross-appeal. Therefore, costs in the court below and in this appeal to be in the cause.

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C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT

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J. Z. Mulongoti
COURT OF APPEAL JUDGE

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F. M. Lengalenga
COURT OF APPEAL JUDGE