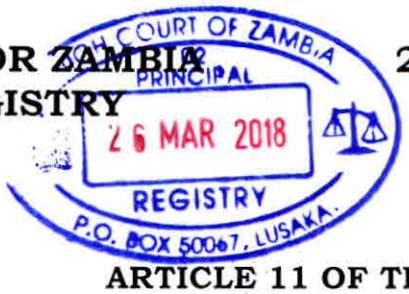

IN THE HIGH COURT FOR ZAMBIA **2017/HP/0477**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF:	**ARTICLE 11 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA**
IN THE MATTER OF:	**ARTICLE 20(1), (3) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA**
IN THE MATTER OF:	**ARTICLE 23 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA**
IN THE MATTER OF:	**ARTICLE 28 (1) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA**
IN THE MATTER OF:	**THE PROTECTION OF FUNDAMENTAL RIGHTS RULES, STATUTORY INSTRUMENT NO. 156 OF 1969**
IN THE MATTER OF:	**THE LEGAL PRACTITIONERS ACT, CHAPTER 30 VOLUME 4 OF THE LAWS OF ZAMBIA**

BETWEEN:

MAKEBI ZULU	**1ST PETITIONER**
HOBDAY KABWE	**2ND PETITIONER**
ANNA MWITWA-MWEWA	**3RD PETITIONER**

AND

LAW ASSOCIATION OF ZAMBIA	**RESPONDENT**

Before Honourable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 26th day of March, 2018

For the Petitioners:	*Mr. J. Zimba and Mr. M.C. Kanga, Messrs Makebi Zulu Advocates*
For the Respondent:	*Mrs. N. Mutti, Messrs Lukona Chambers*

RULING

Cases Referred To:

1. *Stanley Mwambazi v Morester Farms Limited (1977) ZLR 108*
2. *Water Wells Limited v Wilson Samuel Jackson (1984) ZLR 98*
3. *Leopold Walford (Zambia) Limited v Unifreight (1985) ZR 203*
4. *Access Bank Limited v ZCON and Another SCZ Judgment No. 52 of 2016*
5. *NFC Mining PLC v Tech Pro Zambia Limited (2009) ZLR 236*
6. *D. Nkhuwa v Lusaka Tyre Services (1977) ZR P43*
7. *Zambia Revenue Authority v Jayesh Shah (2001) ZR 63*
8. *Jamas Milling Company v Frex International (Pty) Limited Judgment No. 20 of 2002*

Legislation Referred To:

1. *High Court Act, Chapter 27*
2. *Rules of the Supreme Court 1999*

I was approached in this matter by simultaneous applications filed by the Respondent and Petitioners on 12th and 19th February, 2018 respectively. In the first application filed on 12th February, 2018, by Summons, the Respondent seeks leave to file an Answer to the Petition and Affidavit in Opposition out of time pursuant to Order 3 Rule 2 of the High Court Rules and Order 3 Rule 5 of the Rules of the Supreme Court. It is supported by an Affidavit. The Respondent's second application also filed by Summons on 12th February, 2018 seeks to expunge from the Court Record

paragraphs 11-23 of the Petitioners' Joint Affidavit Verifying Facts pursuant to Order 5 Rule 15 of the High Court Rules and Order 41 Rule 6 of the Rules of the Supreme Court. It is equally supported by an Affidavit.

The third application filed by the Petitioners on 19th February, 2018 by summons, seeks to set aside the Respondent's application to expunge from the Court Record paragraphs 11-23 of the Petitioners' Joint Affidavit Verifying Facts and the application for leave to file an Answer to the Petition and Affidavit in Opposition out of time dated 12th February, 2018. Their application is anchored on Order 5 Rule 21 of the High Court Rules. It is supported by an Affidavit and Skeleton Arguments filed herein.

When the matters came up for hearing on 28th February, 2018, I decided to hear the Respondent before the Petitioners even though the Petitioners' Advocates argued that their application would terminally affect the Respondent's applications. I considered that the Respondent filed its applications before the Petitioners and it deserved to be heard first.

In the first application, Learned Counsel for the Respondent placed reliance on the Affidavit in Support sworn by **Linda Chishimba Kasonde**, President of the Law Association of Zambia. The gist of the Affidavit was that on 24th March, 2017, the Petitioners filed into Court a Petition and a Joint Affidavit Verifying Facts, which were served on the Respondent. The Respondent engaged the Petitioner into ex curia negotiations on numerous occasions. When the negotiations failed, the Respondent decided to file an Answer to Petition and Affidavit in Opposition outside the Order for directions. The deponent averred that the Respondent's failure was not deliberate because it was certain that an amicable settlement would be brokered by the parties. The deponent also averred that the Respondent has a defence on the merits and is desirous of defending itself as shown in its draft Answer and Affidavit in Opposition collectively marked as exhibits "**LCK1**" and "**LCK2**". She prayed to Court to grant the Respondents leave to file its documents out of time.

The Petitioners did not file an Affidavit in Opposition.

At the hearing, Learned Counsel for the Respondent submitted that the Rules and practice of the High Court provide that where a

litigant had a valid and excusable reason for failing to take steps such as filing an Answer and Affidavit in Opposition; the Court could exercise its discretion under Order 3 Rule 2 of the High Court Rules by allowing a defaulting party to file process out of time. Counsel stated that the discretion could be exercised whether it was asked by an applicant or not for the purposes of doing justice.

Counsel went on to submit that the law was clear on unreasonable delay, malafides and improper conduct in the prosecution of cases. However, the Respondent had shown in its Affidavit in Support that it had justifiable grounds for the delay and it believed that the parties would resolve the matter amicably. Thus, its failure to file an Answer Affidavit in Opposition as directed by the Court on 26th May, 2017, was not deliberate. She added that there was evidence on the record to show that the parties were truly engaged in ex curia negotiations and the Court encouraged them to do so.

Counsel further submitted that it was only after the *ex curia* attempts failed that the need to file an Answer and Affidavit in Opposition arose. Further, the Respondent had a good defence on

the merits and was desirous of defending itself as shown in the draft Answer and Affidavit in Opposition in the exhibits marked "**LCK1**" and "**LCK2**". Counsel contended that there had been little progress made in hearing of this matter and the Petitioners were unlikely to suffer prejudice in the event that the Respondent's application was granted.

Counsel also submitted that the 2nd Petitioner's evidence in chief was based on the Joint Affidavit Verifying Facts and he had not been cross-examined. Thus, he could be recalled to the stand in the event that the Respondent's application was granted to further give evidence in chief and to address any issues that would arise from the Answer, Affidavit in Opposition and the Petitioners' Reply. She went on to submit that the Petitioners were still at liberty to call evidence and as such, they were unlikely to suffer prejudice.

It was Counsel's submission that there are a plethora of authorities giving guidance on how defaulting parties who have merit in their defences can take further steps. She called in aid the cases of **Mwambazi v Forester Farms**[1] and **Water Wells Limited v Wilson Samuel Jackson**[2].

Counsel went on to submit that in as much as it is crucial for parties to abide with procedural rules for the orderly conduct of matters, the Supreme Court had shown accommodation for defaulting parties in the prosecution of their cases solely in the interest of justice. She added that the Supreme Court cases also demonstrated that justice could only be done when a matter is determined on the merits.

In fortifying her submission, Counsel referred me to Article 118 (2) (e) of the Constitution of Zambia, Amendment Act 2016, which requires Courts to avoid procedural technicalities in the administration of justice. She also adverted to the case of **Leopold Walford (Z) Limited v Unifreight**[3] and submitted that it was in interest of justice to allow the Respondent to file its Answer and Affidavit in Opposition because little progress had been made in the hearing of the matter. She prayed to Court to favourably consider the Respondent's application and for costs to be in the cause.

In response, Learned Counsel for the Petitioners submitted that Article 118 (2) (e) of the Constitution was no longer in doubt as both the Supreme and Constitutional Courts have elucidated the provision. He cited the case of **Access Bank Limited v ZCON and**

Another[4], where the Supreme Court stated that Article 11 (2) (e) of the Constitution was not a passport for litigants to disregard the law.

It was Counsel's submission that where the law is clear it ought to be obeyed and the Constitutional provision did not aid the Respondent's case. Counsel contended that the cases cited by the Respondents were inapplicable. They referred to default judgments and their setting aside while in the present, there was no default judgment. Further, the Court was not called upon to set aside anything and the Respondent's predicament arose from its non-compliance of the Order for directions dated 26th May, 2017.

On the issue of prejudice, Counsel submitted that the Respondent's objections by way of an Answer and Affidavit in Opposition ought to have been made timely. Thus, its excuse of pursuing an ex curia settlement was insufficient. Counsel contended that the Respondent's reference to Order 3 Rule 2 of the High Court Rules was misconstrued at law because the Respondent was attempting to vary an Order for directions, which is subject to among others, Order 19 Rule 2 of the High Court Rules. He submitted that the Court could not therefore be called to exercise

its discretion under Order 3 Rule 2 of the High Court Rules. Counsel referred me to the case of **NFC Mining PLC v Tech Pro Zambia Limited**[5], which gives guidance on what ought to be done in the Respondent's circumstances.

Counsel went on to state that only the Respondent sought adjustments in this matter and it was condemned to costs on more than one occasion. Thus, its delay in filing an Answer and Affidavit in Opposition was inexcusable. It was Counsel's further submission that Order 5 Rule 21 of the High Court Rules was clear on the taking of Affidavits and when objections could be made. He argued that the draft Affidavit in Opposition marked "**LCK2**" was an objection, which should have been timely tendered but the Respondent failed to oblige. He stated that there were consequences for a party that decided to go to sleep and it did so at its own peril. He cited the case of **D. Nkhuwa v Lusaka Tyre Services**[6], where the Supreme Court stated that any lawyer who decides not to adhere to the Rules of the Court does so at his own peril.

It was Counsel's submission that the Respondent's application was ill-timed and it would not be in the interest of justice to grant it because of the prejudice that would be occasioned to the

Petitioners. They would be denied an expeditious hearing. He prayed to Court to dismiss the application and for costs.

In rejoinder, Counsel submitted that there was nothing before Court to show that the Respondent disregarded the law. She urged me to favourably consider the peculiar circumstances of this case. Counsel conceded that the Petition had nothing to do with default judgments and their setting aside. However, the cases cited demonstrated the accommodation given to defaulting parties in taking further steps.

Counsel stated that the Respondent was not the only party pursuing an amicable settlement and both parties were engaged. Further, the Order for directions had a clause on liberty to apply. She conceded that Order 3 Rule 2 was subordinate to Order 19 Rule 2 of the High Court Rules. However, it could be used by the Court to enlarge time for filing documents. Moreover, there was evidence before Court to show the Petitioners were unlikely to suffer any prejudice if the Respondent's application was granted. She reiterated her earlier prayer to Court.

In the second application, Counsel for the Respondent relied on the Affidavit in Support, sworn by **Linda Chishimba Kasonde**, President of the Law Association of Zambia. She states that the Petitioners' Joint Affidavit Verifying Facts contains extraneous matters by way of legal arguments and opinions and not facts in paragraphs 11 to 23.

Counsel went on to submit and reiterate that the contents of the Petitioners' Affidavit in were drafted in defiance of the Rules of the Court. She prayed to Court to expunge the paragraphs from the Affidavit and for costs to be in the cause.

The Petitioners did not file an Affidavit in Opposition but challenged the application on points of law. Counsel submitted that the Respondent's application to expunge paragraphs 11-23 of the Affidavit had inordinately come late to Court. He adverted to Order 5 Rule 21 of the High Court Rules, which provides a mandatory obligation for a party affected by evidence tendered to make an objection at the time that it is offered into Court.

Counsel stated that the 2nd Petitioner gave his evidence in chief and was awaiting cross-examination. In any event, the

Respondent was present in Court when the evidence was given and it should have raised an objection but failed to do so. He prayed to Court to dismiss the application with costs to the Petitioners.

In response, Counsel for the Respondent urged the Court to consider the circumstances of this case and the reasons that were advanced in the Affidavit in Support. She submitted that the Petitioners would not suffer any prejudice if the paragraphs in their Affidavit were expunged because only the facts would survive. She reiterated her prayer and stated that the Respondent's application was not opposed by an Affidavit.

In the third application, the Petitioners summoned Court for an order to set aside the Respondent's application to expunge from the Court Record paragraphs 11 to 23 of the Petitioners' Joint Affidavit Verifying Facts and the application for leave to file Answer to Petition and Affidavit in Opposition out of time. Counsel placed reliance on the Affidavit and Skeleton Arguments filed in Support of the application.

The Affidavit in Support sworn by **Jonas Zimba** discloses that the Respondent's applications have come too late to Court and the

Petitioners have given their evidence. The Petitioners' witness is awaiting cross-examination and if the Respondent's applications are granted, the Petitioners will be prejudiced in that their matter will be inordinately delayed.

In the Skeleton Arguments, Learned Counsel submitted that the Petitioners had given their evidence and it was undesirable for the Respondent to challenge their Affidavit at this late stage. Counsel submitted that the Respondents were precluded by Order 5 Rule 2 of the High Court Rules from filing an Answer to Petition and Affidavit in Opposition. Counsel went on to state that it is mandatory for a party affected by the evidence given to make an objection at the time it is offered. He added that the word "**shall**" in Order 5 Rule 21 of the High Court Rules was couched in mandatory terms and it was not possible to deviate from the Rule. Counsel further submitted that the Respondent did not raise an objection at the time the Petitioners' evidence was tendered. The matter was at cross-examination stage and the Respondent's application was clearly out of time in terms of the Order.

Counsel referred me to the case of **NFC Mining Plc v Techpro Zambia Limited**[5], where the Supreme Court inter alia stated that:

"Rules of the Court are intended to assist in the proper and orderly administration of justice and as such must be strictly followed."

He further adverted to the case of **Access Bank (Zambia) Limited v Group Five ZCON Business Park Joint Venture**[4]. Counsel prayed to Court to set aside the applications as they were in breach of the Rules of Court and for costs.

In response, Counsel for the Respondent argued that the Petitioners' application was incompetent because it did not state the breach or basis upon which it was made. She contended that the Petitioners should have filed Affidavits in Opposition to the Respondent's applications rather than filing their subsequent application. She added that Order 5 Rule 21 of the High Court Rules did not prescribe the procedure or manner on applications for setting aside. She went on to adopt her earlier arguments on the Respondent's applications and the Affidavits filed in Support. She prayed to Court to dismiss the Petitioners' application and for costs to be in the cause.

In reply, Counsel for the Petitioners insisted that their Affidavit in Support addressed the Respondent's breach in paragraphs 7 and 8. He also insisted that Order 5 Rule 21 of the High Court Rules

was correctly invoked by the Petitioners. The fact that the Rule does not prescribe a procedure for setting aside did not preclude them from using it. He concluded by reiterating his earlier submissions and prayer.

I have anxiously considered all the applications, the Affidavits filed herein and the parties submissions. I will therefore, deal with them in the manner that they were brought to Court.

In the first application the issue raised is whether the Respondent can file its Answer to Petition and Affidavit in Opposition out of time? The reasons canvassed by the Respondent are that the parties were pursuing an ex curia settlement. It is only when the negotiations failed almost nine months after the Order for directions dated 26th May, 2017, that it realized the need for it to file an Answer to Petition and Affidavit in Opposition. On the other hand, the Petitioners argued that the Respondent's application was inordinately out of time and the Petitioners would be denied the opportunity of having their matter timely disposed of.

In the case of **Zambia Revenue Authority v Jayesh Shah**[7], the Supreme Court held *inter alia* that all matters should be

decided on the merits unless the defect affects the validity of the process.

The effect of fatal process was discussed by the Supreme Court in the case of **Leopold Walford (Zambia) Limited v Unifreight**[3], when it held that a breach of a regulatory rule, which is curable is not fatal to Court process.

It was contended by the Respondent that its application could be entertained under Order 3 Rule 2 of the High Court Rules because the default was curable.

I wish to remark that the High Court Rules are drafted with precision and when an issue tends to an order for directions, Order 19 Rules (1) and (2) of the High Court Rules are instuctive. They read:

> **"19. (1) The Court or trial Judge shall not later than twenty-one days after appearance and defence have been filed give directions with respect to the following matters:**
> **(a) reply and defence to counter-claim, if any;**
> **(b) discovery of documents;**
> **(c) inspection of documents;**
> **(d) admissions;**
> **(e) Interrogatories; and**
> **(f) place and mode of trial;**
> **Provided that the period for doing any of these acts shall not exceed fourteen days.**
> **(2) Notwithstanding Rule 1, the Court may, for sufficient reason, extend the period within which to do any of the acts specified in Rule 1."**

According to Order 19 Rules (1) and (2) a party is required to comply with a Court's directions in prosecuting a case. From the evidence, I find that the Respondent did not comply with the Order for directions. The fact that it was pursuing *ex curia* negotiations with the Petitioners did not prevent it from taking further steps. *Ex curia* negotiations cannot be the basis for impinging Court Orders. I am mindful that the Respondent sought refuge in Order 3 Rule 2 of the High Court Rules which reads:

> **"2. Subject to any particular rules, the Court or a Judge may in all causes and matters make any interlocutory order, which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."**

As much as Order 3 Rule 2 of the High Court Rules empowers me to grant any interlocutory relief, it does afford rights to a party that has gone to sleep. The reality of this case, is that the Petitioners' witness has been awaiting cross-examination for over nine months. Therefore, the justice of this case demands that this matter should be disposed of. I am fortified by the **Access Bank**[4] case, where the Supreme Court reiterated that:

> **"We have in many cases consistently held the view that it is desirable for matters to be determined on their merits and in finality rather than on technicalities and piecemeal. The cases of**

> **Stanley Mwambazi v Morester Farms Limited and Waterwells Limited v Jackson are authority for this position. Matters should as much as possible, be determined on their merits rather than be disposed of on technical or procedural points ....Justice also requires that this Court, indeed all Courts, must never provide succor to litigants and their Counsel who exhibits cant have respect for rules of procedure and timeliness serve to make the process of adjudication fair, just, certain and even handed. Under the guise of doing justice through hearing matters on merit, Courts cannot aid in the bending or circumventing of these rules and shifting goal posts, for while laxity in application of the rules may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.... In our considered view, it is in the even handed and dispassionate application of the rules that Courts can give assurance that there is clear method in which things should be done so that outcomes can be anticipated with a measure of confidence, certainty and clarity. This is regardless of the significance of the issues involved or questions to be tried."**

This principle of law is reinforced in the case of **Jamas Milling Company v Frex International (Pty) Limited**[8] stressed that:

> **"While we agree that rules of procedure are meant to facilitate proper administration of justice, we do not accept that in all cases rules cannot be made mandatory, and that their breach cannot be visited by unpleasant sanctions against a party who breaches them...It is not in the interest of justice that parties by their shortcomings should delay the quick disposal of cases and cause prejudice and inconvenience to other parties."**

The cited authorities emphasise the need for Courts to timely dispose of cases. There is also a responsibility on Courts to guard against litigants who try to bend or circumvent Court process to the detriment of innocent parties. The Respondent's action of not having timely filed an Answer and Affidavit in Opposition confirm

its transgressions in the late disposal of this case. Its failure to comply with the Order for directions is therefore, fatal. The application is dismissed.

In the second instance, the Respondent applied to expunge paragraphs 11-23 of the Petitioners' Affidavit Verifying Facts. The Petitioners challenged the application on the basis of Order 5 Rule 21 of the High Court Rules. Order 5 Rule 21 of the High Court Rules, which reads:

> **"In every case at every stage thereof any objection to the reception of evidence by a party affected thereby shall be made at the time the evidence is offered. Provided that the Court may, in its discretion, on appeal, entertain any objection to evidence received in a subordinate Court though not objected to at the time it was offered."**

After evaluating the contested arguments, I find that the Respondent did not object to the reception of evidence at the time it was tendered into Court. The Respondent did not file an Answer or Affidavit in Opposition to compound its situation. Moreover, its Counsel was present when the Petitioners' witness tendered his evidence in Court and did not raise any objection. I therefore,

decline to expunge the Affidavit and find no merit in this application. It is equally dismissed.

In the third application, the Petitioners sought to set aside the Respondent's applications. Counsel relied on Order 5 Rule 21 of the High Court Rules and the case authorities referred to in the *viva voce* submissions. In response, Counsel for the Respondent contended that the application had no basis and the Petitioners should have filed Affidavits in Opposition.

Order 5 Rule 21 of the High Court Rules discussed above, relates to the reception of evidence and the objections that can be made thereto. It does not refer to the setting aside of process as contended by the Petitioners. In my view, the Petitioners should have filed Affidavits in Opposition because what is canvassed in this application amounts to opposition of the Respondent's applications. Therefore, I find no merit in this application. It is also dismissed.

The Petitioners have succeeded in the Respondent's applications and I accordingly award them costs to be taxed in default of agreement.

I shall hear this matter on 18th May, 2018 at 10.00 hours.

Dated this 26th day of March, 2018

M. Mapani-Kawimbe
HIGH COURT JUDGE