

IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT NDOLA  
(Civil Jurisdiction)

APPEAL NO. 177/2015



BETWEEN:

POLYTHENE PRODUCTS (Z) LIMITED

APPELLANT

AND

PETER ZIMBA

1<sup>ST</sup> RESPONDENT

JOSHUA BANDA

2<sup>ND</sup> RESPONDENT

CORAM: Hamaundu, Kaoma and Kabuka, JJS.

On: 5<sup>th</sup> June, 2018 and on 8<sup>th</sup> June, 2018.

For the Appellant: Mr. D. Libati of Abha Patel and Associates  
standing in for Mr. F Tembo of Frank  
Tembo and Partners.

For the Respondents: N/A

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## J U D G M E N T

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KAOMA, JS, delivered the Judgment of the Court.

**Cases referred to:**

1. **Workers Development Corporation v Davy Mkandawire - SCZ No. 19 of 1999**
2. **National Tobacco Company Limited and Tobacco Board of Zambia v Walter Harthoong - SCZ No. 43 of 1998**
3. **Gorinbhai Baghabai and Vallabhai Bagabhai Patel v Monile Holdings Company Limited (1993-1994) Z.R. 20**

**Statutes and other works referred to:**

1. **Subordinate Court Rules, Cap 28, Order 31 (4)**
2. **The Legal Practitioners Act, Cap 30, section 51**
3. **White Book 1999 edition, Order 5 6(2)**

The respondents are ex-employees of the appellant. They commenced this matter in the Subordinate Court of the first class for the Lusaka district by default writ of summons accompanied by an affidavit in support. They claimed a sum of K13,284.00 representing housing allowance and underpayment of lunch allowance. Service of the court process was effected upon the appellant on 23<sup>rd</sup> August, 2013. The appellant reacted by filing an affidavit in opposition deposed to by its personnel and administrative officer, refuting the claims. The respondents filed a further affidavit in which they disclosed the basis of their claims as the Minimum Wages and Employment Act, Chapter 276 of the Laws of Zambia. The appellant responded by filing an affidavit in reply.

The matter first came up for hearing on 3<sup>rd</sup> October, 2013 but both parties were not present. It was adjourned to 31<sup>st</sup> October, 2013. The matter next came up on 16<sup>th</sup> January, 2014. On that date, only the respondents were present. Upon being informed by the respondents that the appellant was aware of the date of hearing and had filed an affidavit in opposition, the court proceeded to hear the respondents' reply to the affidavit in opposition. Thereafter, the matter was adjourned to 27<sup>th</sup> February, 2014 for judgment.

In the meantime, on 10<sup>th</sup> February, 2014 Frank Tembo and Partners filed an *ex-parte* summons to arrest judgment pending hearing of the appellant's defence pursuant to **Order 35 Rule 2 of the Rules of the Supreme Court 1999**. The affidavit in support revealed that the matter was scheduled for hearing on 6<sup>th</sup> February, 2014 but it proceeded in January and the court adjourned it for judgment. The affidavit also disclosed that the failure to attend court was not deliberate but a mere miscommunication occasioned by the court registry staff; and that the appellant had a meritorious defence. The court was urged, in the interest of equity, to arrest delivery of judgment pending the hearing of the appellant's evidence so as to allow a logical conclusion of the matter. The application was made returnable in chambers on 21<sup>st</sup> March, 2014.

On 27<sup>th</sup> February, 2014, the date the judgment was supposed to be delivered, the matter was adjourned to 21<sup>st</sup> March, 2014 for the appellant's application to arrest judgment. On the return date, however, counsel for the appellant was not present. The court clerk informed the court that he had communicated to counsel. Despite the absence of an explanation for counsel's absence, the court adjourned the matter to 26<sup>th</sup> March, 2014 for the same application.

The matter came up next on 3<sup>rd</sup> April, 2014. Counsel was not present. The court clerk informed the court that counsel had said he would come. The matter was adjourned for the last time to 10<sup>th</sup> April, 2014. On the return date, counsel was again absent prompting the court to dismiss the application to arrest judgment.

In doing so, the trial magistrate condemned the failure by counsel to represent his client's interest by failing to appear in court, noting that it was the third time the matter was coming up without the appellant making appearance or filing a formal notice to adjourn despite communication with the company.

The magistrate also observed that the subordinate court rules allows a court to dismiss an action where an applicant does not appear and that the applicant was not desirous to proceed with its application, which was even made under a wrong order, an act meant to mislead the court. The matter was adjourned to 14<sup>th</sup> April, 2014 for judgment although the judgment was delivered on 15<sup>th</sup> April, 2014, in favour of the respondents.

The appellant appealed to the High Court on one ground only alleging that the court erred in law and fact by not allowing it to be heard in defence despite making several attempts to do so.

The main argument made by the appellant was that as a body corporate, it must be represented in court by counsel; that the court did not advise it to instruct counsel; and the record did not show that the court addressed its mind to this principle. Further, that when the appellant instructed counsel, after the matter was adjourned for judgment, and applied to arrest judgment, the court refused and delivered its judgment. According to counsel, it was an error by the court to deny the appellant chance to be heard especially that it had filed a defence which raised triable issues.

On the other hand, the respondents argued that the appellant was aware of the proceedings in court but decided not to appear; that it was up to the appellant to instruct counsel in good time; and that the court was on firm ground when it proceeded to hear the case in the absence of Counsel for the appellant upon being satisfied that he was aware of the hearing date.

In resolving the key issue of whether the appellant was not allowed to defend its case, the learned High Court Judge, referred to the case of **Workers Development Corporation (ZCTU) Limited v Davy Mkandawire**<sup>1</sup> where this Court held that a body corporate must be represented in civil litigation by an advocate unless leave

has been previously obtained from the court in the exercise of its inherent power to regulate its own proceedings to be represented by a director or other senior person.

The Judge observed from the record, that the matter came up three times without the appellant appearing; and that it was after the third successive failure by the appellant to appear that the court adjourned the matter for judgment and the appellant applied to arrest the judgment but the application was declined.

The Judge was satisfied that the magistrate correctly applied the law as stated in **Order 31(4) of the Subordinate Court Rules**, Cap 28 of the Laws of Zambia which empowers the court to proceed to hear a matter where a defendant fails to appear or sufficiently excuse his absence, upon proof of service of the summons, and to give judgment on the evidence adduced by the plaintiff.

As regards the appellant's argument that it was not advised of the need to engage counsel, the Judge correctly took the view that this was never brought to the court's attention before the matter was adjourned for judgment and agreed with the respondents that the fact that the appellant even engaged counsel showed that they were aware of the proceedings and the need to have counsel.

Furthermore, on the appellant's argument that the magistrate did not address her mind to the fact that the appellant needed to be represented by counsel, and that she did not advise the appellant to engage counsel, the Judge properly held that a magistrate has no duty to advise parties in proceedings. The Judge dismissed the appeal with costs and granted leave to appeal.

The appellant then filed this appeal raising two grounds that:

- 1. The court below erred in law and in fact when it ruled that the magistrate has no duty to advise or inform the parties to the proceedings, in this case the appellant being a body corporate, of the legal requirements to be represented by counsel.**
- 2. The Court below erred both in law and fact when it dismissed the appellant's appeal to be heard in its defence.**

We hasten to state that the memorandum of appeal as framed includes arguments, which is not allowed by the rules of court. Ordinarily, we could have declined to hear the appeal. But since Mr. Tembo was not present, as he was reported to have been bereaved, we decided to proceed on the basis of the filed heads of argument.

In ground 1, the core contention by the appellant is still that as a limited liability company it must appear and be represented in court by advocates and that in this case there is nothing on record to show that the court ever addressed its mind to this principle.

It was submitted that the court had a duty before proceeding to hear the matter to address its mind to the fact that the appellant ought to be represented; and that when the appellant instructed counsel, the court should have given it an opportunity to be heard since the judgment had not yet been delivered or written.

As to ground 2, the contention was that this is simply the appellant's cry to be given an opportunity which it was denied by the court. The cases of **National Tobacco Company Limited and Tobacco Board of Zambia v Walter Harthoong<sup>2</sup>** and **Gorinbhai Baghabai and Vallabhai Bagabhai Patel v Monile Holdings Company Limited<sup>3</sup>** were cited, which emphasise the need for matters to be determined on merit where triable issues are raised.

We have considered the record of appeal and the arguments by the appellant. In respect of ground 1, the case of **Workers Development Corporation (ZCTU) Limited v Davy Mkandawire<sup>1</sup>** which we have quoted above is very clear that a body corporate must be represented in civil litigation by an advocate unless leave has been previously obtained from the court in the exercise of its inherent power to regulate its own proceedings to be represented by a director or other senior person.



In that case, we drew attention of the appellant to the provisions of **section 51 of The Legal Practitioners Act**, Cap 30 of the Laws of Zambia and **Order 5 6(2)** of the White Book. We take this opportunity to urge counsel and all litigants, to be conversant with provisions of the law; ignorance of the law is not a defence.

We agree with the appellant that the record does not show that the magistrate addressed her mind to the legal requirement that a body corporate must be represented in civil litigation by an advocate. However, we cannot fault the learned Judge for holding that a magistrate has no duty to advise parties to proceedings. Certainly, there is no law that places such a duty on the court.

In any case, the record shows that the appellant never appeared before the subordinate court. Even if the magistrate were, out of sympathy rather than duty, to advise that there was need for the appellant to engage counsel, we do not appreciate how that was going to be done. Ground 1 must fail for lack of merit.

Coming to ground 2, the record shows that after counsel for the appellant applied to arrest delivery of the judgment, the appellant was given chance on three occasions, to make its

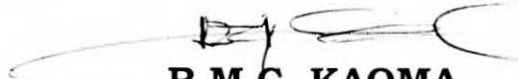
application. However, counsel for the appellant never appeared before the court or excused his absence.

As the trial magistrate rightly said, the appellant was simply not desirous to prosecute its application. Therefore, the learned Judge cannot be faulted for dismissing an appeal that was doomed to fail. Ground 2 must equally fail.

In all, the appeal is dismissed. Since the respondents did not appear, we make no order as to costs.



**E.M. HAMAUNDU**  
**SUPREME COURT JUDGE**



**R.M.C. KAOMA**  
**SUPREME COURT JUDGE**



**J.K. KABUKA**  
**SUPREME COURT JUDGE**