ROGER SCOTT MILLER v ATTORNEY-GENERAL (1980) Z.R. 126 (H.C.)

HIGH COURT
CULLINAN, J.
14TH MARCH, 1980
1975/HP/372

Flynote
Civil Procedure - Appeal - Jurisdiction - Appeal against decision of Registrar on assessment of damages - Where appeal lies.

Headnote
This was an appeal against an assessment of damages made by the Deputy Registrar after judgment in default of appearance had been entered under O. XII of the High Court Rules. The issue was whether the High Court had jurisdiction to entertain an appeal from an assessment of damages by the Deputy Registrar.

Held:
The appeal lies to the Supreme Court and not the High Court.

Cases referred to :
(1) Times Newspapers Zambia Limited v Kapwepwe (1973) Z.R. 292.
(2) United Bus Company of Zambia Limited v Shanzi (1977) Z.R. 397.
(3) Kapwepwe v Zambia Publishing Company Limited (1978) Z.R. 15.
(4) Lembe v Kearney & Company Limited (1973/HP/182) (Unreported).
(5) Mpofu v Impregilo Recchi (Zambia Limited) and Mungandi 1978/HP/123 (Unreported).
(6) Balamoan v Gaffney 1971/HP/1055 (Unreported).
(7) Agholor v Cheesebrough Pond's (Zambia) Ltd (1976) Z.R. 1.
(8) Miliangos v George Frank Limited [1975] 1 All E.R. 1076 (C.A.).
(9) Kasote v The People (1977) Z.R. 75.
(10) Cassell v Broome [1972] 1 All E.R. 801.

Legislation referred to:
High Court Act, Cap. 50, s. 10.
High Court Rules, Cap. 50, O. 30, r. 10 (1).
R.S.C., O. 54, rr. 21 and 22 A (1) and (2), O. 58, r. 2.
The High Court Proclamation, No. 1 of 1913.

For the plaintiff: A.O.R. Mitchley Esq., and A. Hamir Esq. of Counsel.
For the defendant: A.M. Kasonde Esq., Acting Principal State Advocate.

Editorial Note
The learned judge expressed the need to amend the High Court Rules as they are now at variance with the construction apparently placed by the Supreme Court upon the Supreme Court Act.

Judgment

CULLINNAN, J.:

This is an appeal against an assessment of damages made by the Deputy Registrar after judgment in default of appearance had been entered under O. XII of the High Court Rules.

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The court *ex proprio motu* has raised the question of jurisdiction. The appeal came before me by way of notice under r. 10 (1) of O.XXX of the High Court Rules. That rule reads as follows:

> "10. (1) Any person affected by any decision, order or direction of the Registrar may appeal therefrom to a Judge at chambers. Such appeal shall be by notice in writing to attend before the Judge without a fresh summons, within seven days after the decision, order or direction complained of, or such further time as may be allowed by a Judge or the Registrar. Unless otherwise ordered, there shall be at least one clear day between service of the notice of appeal and the day of hearing. An appeal from the decision, order or direction of the Registrar shall be no stay of proceedings unless so ordered by a Judge or the Registrar."

It seems to me that the words "any decision, order or direction of the Registrar" (which latter word under r. 2 of the High Court Rules, includes a Deputy Registrar and District Registrar) are exhaustive. In my research however I have observed that in the cases of *Times Newspapers Zambia Limited v Kapwepwe* (1), *United Bus Company of Zambia Limited v Shanzi* (2), and *Kapwepwe v Zambia Publishing Company Limited* (3), the Supreme Court dealt with an appeal against an assessment of damages made by the Deputy Registrar. My attention has also been drawn to two judgments by Sakala, J., delivered in February, 1979, which are as yet unreported, namely *Lembe v Kearney and Company Limited* (4) and *Mpepe v Impregilo Rechi (Zambia Limited) and Mungandi* (5). In both cases my learned brother decided that he had no jurisdiction to entertain an appeal from an assessment of damages by the Deputy Registrar. *Lembe* (4) was a case where a judge having given judgment to the plaintiff, referred the assessment of damage to the Deputy Registrar. Sakala, J., observed (at pp. 2/3):

> "It follows in my view that a decision, order or direction made by the Deputy Registrar on a matter referred to him by a judge is made on behalf of the judge and hence it is the decision or order of the judge who referred the matter to him. While order 30 rule 10 (1) of Cap. 50 may be said to be wide, it would in my view be a contradiction that a decision made by the Deputy Registrar on behalf of a judge should be applicable to the same judge or court of same jurisdiction. While order 30 rule 10 (1) may not be of great assistance on the point, this court is in my opinion entitled to seek assistance from order 58 (2) of the 1976 edition of the White Book by virtue of section 10 of Cap. 50 which entitles the High Court to conform to the law and practice observed in the High Court of Justice in England in case of default in our law. The practice in England according to order 58 (2) of the Supreme Court rules is that an appeal from the judgment, order or decision of the Master is to the Court of Appeal. Part of the comments on order 58 at page 835 of the 1976 edition of the White Book reads as follows:

The effect of the Rule is that appeals from all judgments, orders or decisions of a Q.B. Master in all causes, matters, questions or issues tried before or referred to him under Order

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> 36, rule 9, supra, i.e. with the consent of the parties lie direct to the Court of Appeal but in all other matters including inter pleaders and garnishee proceedings, the appeal will lie in the ordinary way to the judge in chambers. The words "hearing or determination" refer to a

> proceeding which results in a final, as opposed to an interlocutory. [judgment, order or decision. On the other hand, if an order which is interlocutory] in character is made after the trial or hearing of an action or assessment of damages has begun before a Master and during the course of such trial or hearing, e.g., grant or refusal of leave to amend, it is submitted that the appeal against such order will lie to the Court of Appeal as part of an appeal against the final order or judgment, for otherwise it would be anomalous that the appeal in such circumstances against the interlocutory order should lie to the Judge in Chambers and the appeal against the final order to the Court of Appeal.' "

The words in brackets above were inadvertently omitted from the quotation in *Lembe* (4). It may be that their omission materially affects the sense of the remaining words which could be interpreted to mean that the Master's decision on assessment of damages is interlocutory and the judge's decision on liability is final, but that nonetheless it would be anomalous if the Master's decision were to be referred to other than the Court of Appeal. All that the passage says is that where the Master makes an interlocutory order during the hearing of, e.g., an assessment, the learned authors submit that an appeal against such interlocutory order should, as in the case of an appeal against the assessment itself, which they regard as a final order, also lie to the Court of Appeal.

The applicability of r. 2 of O. 58 of the Supreme Court Rules (R.S.C.) causes me some concern. Section 10 of the High Court Act, Cap. 50, reads as follows:

> "10. The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or directions of the Court as may be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice."

The only substantive amendment over the years to the above provisions, which first appeared in s. 3 (b) of The High Court Proclamation, No. 1 of 1913, was the inclusion of the reference to the Criminal Procedure Code and "any other written law". The "default procedure" was then in existence when the High Court Rules were first written. In the case of *Balamoan v Gaffney* (6) which concerned an appeal from the Deputy Registrar against an assessment of damages made on a counterclaim, I had occasion to consider the origin of the present day Rules and observed as follows (at p. 5):

> "It is important to note the distinction between the words 'the Court' and 'the Court or a Judge'. The High Court Rules were

> originally made by a Judge of the High Court under Government Notice No. 193 of 1933 and were obviously based on the Rules of the Supreme Court in England - to the extent that marginal reference were subsequently made (in Government Notice 106 of 1959 and thereafter) to the appropriate Supreme Court Order and Rule. Under Act No. 41 of 1960 the power to make rules of court was vested in the High Court Rules Committee rather than the Court itself."

and again, (at p. 6):

> "In my opinion, in view of the provisions of section 10 of the High Court Act, the practice and procedure prevailing in the High Court in England only applies in default of our High Court Rules; the new meanings ascribed to the above terms cannot therefore affect the interpretation of the High Court Rules, that is, the interpretation obviously intended by the High Court when making the Rules originally and subsequently left unchanged by the

High Court Rules Committee."

The present r. 10 of O. XXX was introduced under Government Notice No 218 of 1944 (it was then r. 10 of O. XXVII). It then read:

> "10. Any person affected by any order or direction of the Registrar may appeal therefrom to a Judge at Chambers. Such appeal shall be by notice in writing to attend before the Judge without a fresh summons, within five days after the decision complained of, or such further time as may be allowed by a Judge or the Registrar. Unless otherwise ordered there shall be at least one clear day between service of the notice of appeal and the day of hearing. An appeal from the decision of the Registrar shall be no stay of proceedings unless so ordered by a Judge or the Registrar."

It will be seen that apart from the enlargement of the time involved, the rule has been expanded in scope by the introduction of the word "decision" so that it now refers to:

> ". . . any decision, order, or direction of the Registrar . . ."

The rule when introduced in 1944 was obviously based on the content of r. 21 of O. 54, Rules of the Supreme Court (RSC) which then read (*see The Annual Practice for* 1943):

> "21. Any person affected by any order or decision of a master may [except in the cases provided for in rule 22 A] appeal therefrom to a judge at chambers. Such appeal shall be by notice in writing to attend before the judge without a fresh summons, within five days after the decision complained of, or such further time as may be allowed by a judge or master. Unless otherwise ordered there shall be at least one clear day between service of the notice of appeal and the day of hearing. An appeal from the decision of a master shall be no stay of proceedings unless so ordered by a judge or master."

It will be seen that the words in brackets above (as they appeared in r. 21) were not repeated by the judges of the High Court in 1944. Rule 22A (1) and (2) of O. 54 RSC then read as follows:

> "22 A (1) There shall be a right of appeal from any finding decision

> order or judgement arrived at made given directed or entered by any master of the King's Bench Division on the hearing or determination by him of
>
> > (a) Any trial or reference of any action cause issue or matter (including trials directed under Order XIV., Rule 7) (but excluding any application under sec. 17 of the Married Women's Property Act, 1882), or any assessment of damages and whether by consent) or otherwise, or
> >
> > (b) Any interpleader or garnishee matter or issue whether by way of summary decision or adjournment of the interpleaded or garnishee summons or order nisi or on an issue directed or otherwise and whether by consent or otherwise.
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> (2) Such appeal shall be to a Divisional Court by notice of motion. The notice shall be in writing and shall state whether the whole or any and if so what part only of the finding decision order or judgment is appealed from and shall state concisely the grounds of the appeal."

The above rule is now repeated to some extent in r. 2 of O. 58 R.S.C., with the exception that appeal now lies not to a Divisional Court but to the Court of Appeal. What is important to note however is that the judges of the High Court decided not to adopt the existing provisions of r. 22A

in 1944 and as a consequential measure deleted the reference thereto in adopting the contents of r. 21. It was surely the intention therefore that appeals from the Registrar in all matters would lie to a judge at chambers.It may well be that Law, C.J., and Robinson, J., who originally made r. 10 (1), considered that appear to a Divisional Court was inappropriate as there was no provision for a Divisional Court as such, in the High Court act. The fact of course that the old r. 22A of O. 54 R.S.C. was subsequently amended to provide a machinery of appeal which proved to be more in keeping with that in Zambia, namely an appeal to the Court of Appeal, did not have the effect of making the rule applicable to Zambia. The Rules of the Supreme Court only apply in default. I do not see that it can be said that our r. 10 (1) is silent on the matter of appeals from the Registrar on assessment of damages: the rule refers to "*any* decision, order or direction of the Registrar", which wording as I have already said, seems to me to be exhaustive, a fact which was exemplified by the very exception specified in the old r. 21 of O. 54 R.S.C. and indeed in r. 1 of O. 58 R.S.C. today. As I see it, the wording of r. 10 (1) as it stands, not to mention the underlying intention as traced above, leaves no room for the application of r. 2 of O. 58 R.S.C.

It cannot be said that the High Court Rules are "in default" if they are not as extensive as the Rules of the Supreme Court. They are only "in default" where they are incomplete, that is, where the operation of the Rules as they stand creates problems or raises queries the answer to which is not to be found in the Rules themselves. For example, r. 10 (1) provides for a machinery of appeal to a judge at chambers but is silent as to the procedure to be followed on the hearing of such appeal, in which case reference is then made to the procedure in England, which is by way

of re-hearing - see para. 58/1/2 of the Supreme Court Practice, 1979. It cannot be said however that the High Court Rules are "in default" simply because specific provision is not made for an appeal from a decision of the Registrar in the exercise of a particular function, for example, an assessment of damages, when a general provision exists which, when given its ordinary and natural meaning, covers any appeal from the Registrar.

Sakala, J., was of the opinion in *Lembe* (4) that an anomaly arose where an appeal lay to a judge in chambers on an assessment of damages by the Registrar when such assessment had initially been referred to the Registrar by the same or a brother judge: my learned brother was of the opinion that the Registrar in the circumstances of such reference acted on behalf of the judge in assessing damages. The case of *Mpofu* (5) however concerned an assessment of damages by the Deputy Registrar after an interlocutory judgment. Sakala, J., nonetheless observed in that case (at p.2) that "the substance of the two cases is in my view the same".

I do not see that the Registrar necessarily acts on behalf of a judge when an assessment of damages is referred to him and in any event I do not see that such aspect is the criterion. The Registrar is possessed of his own discretion, his own jurisdiction, peculiar to that of the Registrar. In any appeal from the latter a judge is not obliged to conform to the exercise of the Registrar's discretion in any aspect and indeed such appeal proceeds by way of a complete rehearing. A judge, after *decree nisi* in a matrimonial cause may refer the matter of maintenance, which is before him in the petition, to the Registrar: nonetheless an appeal lies from the decision of the Registrar to a judge, preferably the same judge, at chambers. Under the limited powers of reference, on a point of fact, under O. XXIII to a referee, the latter may be said to act on behalf of a judge but his decision may nonetheless be remitted for reconsideration and (as distinct from the provisions of r. 5 of O. 58 R.S.C.) is subject to the High Court's "ultimate judgment". Again, a reference to an arbitrator for his final decision" under O. XLV is subject to subsequent modification and correction of such decision by a judge the decision may also be remitted for reconsideration: further, it may be set aside by the High Court.

Quite obviously it is generally desirable that all relevant issues before a trial judge should be tried and decided in open court. The assessment of damages is of as much importance as the fixing of liabilities: in many cases indeed the former is a far more complicated and difficult task. There may be cases of course where a judge can only state the general principles applicable to an award of

damages and adjourn to chambers, before himself, for the calculation of damages, for example in a case of wrongful dismissal where there is insufficient evidence before the court of ancillary benefits and deductions from salary, which are generally the subject of agreement between the parties - *see* the case of *Agholor v Cheesebrough Pond's (Zambia) Ltd* (7) at p. 10, lines 1/13. When an assessment of damages is referred to the Registrar, it is to be presumed that there is little or no evidence of quantum before the judge. I cannot see that any anomaly would thereafter arise in such circumstances, were

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an appeal to be made to a judge at chambers-*a fortiori* if the reference to the Registrar is based merely on the need to conveniently resolve complexities of calculation.

It might be said that an anomaly exists in the situation where appeal against judgment on liability lies to the Supreme Court whereas appeal against quantum of damages lies to the High Court. That observation however ignores the fact that appeal in respect of the latter aspect also lies ultimately, from the judge's decision, to the Supreme Court. In any event, where a judge after trial had referred the assessment of damages to the Registrar the latter would no doubt allow the time for appeal to the Supreme Court to run before proceeding with the assessment, adjourning the hearing where such appeal had in fact been initiated.

I can see that difficulties may arise where the trial judge has made findings of credibility, on the issue of liability, which may or may not have some bearing on the Registrar's findings in assessing quantum. It seems to me however that any such difficulties stem from the fact that matters were referred to the Registrar which were best decided by the trial judge. Our O. XXXVI provides that "the decision or judgment in any suit shall be delivered in open court unless the Court otherwise directs". There is no direct provision in the Order for any reference to the Registrar and the whole tenor of the Order as I see it indicates otherwise. There is no specific provision in our Rules, such as that of r. 1 of O. 37 R.S.C. introduced in 1957, to cover the reference to the Registrar of an assessment of damages after judgment in open court. The incidence of such practice in the High Court is of relatively recent origin. I do not see that any question of "default" arises by which the Supreme Court Rules are applicable. The old r. 57 of O. XXXVI R.S.C. (*see* the *yearly Practice of the Supreme Court for* 1940), replaced by what is now O. 37 R.S.C., obviated the necessity for the procedure by way of the writ of enquiry (see r. 1 (3) and (4) O. XII High Court Rules) and provided for reference of an assessment of damages to "an officer of the Court", but only where it appeared to the court or a judge (including the Registrar) that

> "the amount of damages sought to be recovered is substantially a matter of calculation".

The note to r. 57 indicated further that "the procedure provided in this rule is now the means usually resorted to for the assessment of damages after an interlocutory judgment". Rule 57 of O. XXXVI R.S.C., if it can be said to apply to an assessment of damages after judgment in open court, was never repeated in our Rules. Rule 1 (3) and (4) of our O. XII provides for assessment "in any way the Court or Judge (which again includes the Registrar) may direct", but that rule refers only to the manner in which an assessment shall be held after interlocutory judgment in default of appearance. It seeing to me therefore that the authority under our Rules for the reference of an assessment of damages to a Registrar, after a full trial and judgment in open court, must remain a matter of some doubt. Further, I am compelled

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to respectfully suggest that within the limitation of the actual number of Deputy Registrars and District Registrars available to staffs the Registries of the High Court, as compared with the situation in England, the practice of such reference is perhaps inadvisable.

In any event, the present case can in my view be distinguished: the assessment was not referred by a judge to the Deputy Registrar but was decided by the latter after interlocutory judgment in default of appearance under O. XII. On the face of our High Court Rules I am of the opinion that appeal therefrom clearly lies to a judge at chambers.

I also consider that the same holds good for an assessment following upon interlocutory judgment in default of defence under O. XX. There is however the matter of the three Supreme Court cases earlier quoted, the cases of *Times Newspapers (Zambia) Limited v Kapwepwe* (1), *United Bus Company of Zambia Limited v Shanzi* (2) and *Kapwepwe v Zambia Publishing Company Limited* (3). All three cases concern appeals from an assessment of damages made by the Deputy Registrar after interlocutory judgment.

Section 23 of the Supreme Court of Zambia Act reads as follows:

> "23. Subject to the exceptions and restrictions contained in section twenty-four, an appeal in any civil cause or matter shall lie to the Court from any judgment of the High Court."

Section 24 of the Act specifies the particular exceptions to and the restrictions on the above provisions. It seems to me that these exceptions and restrictions indicate that they are concerned with the decisions of a judge of the High Court. Section 24 (1) (*e*) provides for example that no appeal shall lie

> "from an order made in chambers by a Judge of the High Court . . . without leave of the Judge . . ."

except in particular cases. In the case of *Balamoan* (5) in considering the meaning of the words "the Court or a Judge" I observed as follows:

> "In the Annual Practice 1963, Vol. II at p. 2002 the following note appears:
>
> 'The Court or a Judge'.
>
> 'The Court' - The words 'the Court' mean the court sitting *in banco* that is a Judge or Judges in open court; they do not include a Judge at Chambers (Baker v Oakes 1877 2 Q.B. D. 171; (Re Davidson 1899 & Q.B. 103); of further, (Grover v Adams 1881 6 Q.B. D. 622). In (Cooke v The New castle etc. Co 1883 10 Q.B. D.332) 'Court' was held to mean a Divisional Court.
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> The word 'Court' includes the Judges thereof, *see* (Dallow v Garrold 1885, 14 Q.B. D. 543) and of J.A.; 1925 as 61, 69 and (nn).
>
> A 'Judge' means a Judge sitting In Chambers (per Kay, L.J.Re B. 1892 W.R. 138); (Dallow v Garrold 1885 14 Q.B. D. p. 546)'

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There is no provision under the Supreme Court Act whereby the word "Judge" can be given the extended meaning which it bears under the High Court Rules, namely, as including the Registrar in chambers.

I do not see therefore that a decision of the Registrar is embraced under even the restrictions on the provisions of s. 23. The question arises however as to whether a decision of the Registrar made on an assessment of damages constitutes a "judgment of the High Court". The word 'judgment, under s. 2 of the Supreme Court Act "includes decree, order... and decision". The words "High Court" can only mean a judge or the judges of that Court. The provisions of s. 24 seem to confirm that view. I do not see that the words "High Court" can be extended in any way to include an officer of that Court and under the provisions of Part III of the High Court Act, the Registrar and indeed the Deputy Registrar and District Registrars are officers of the High Court. Different considerations may arise for example under s. 97 (1) of the Bankruptcy Act, but there is therein specifically prescribed a jurisdiction outside the scope of the High Court Act and Rules

made thereunder, namely that any order or act done by the registrars of the High Court shall be *deemed* the order or act of that court.

It can be said that the decision of the Registrar on an assessment of damages, following upon interlocutory judgment or judgment in open court, becomes then in effect a final decision. The final decision of an arbitrator however only takes effect as a judgment of the Court under r. 14 of O. XLV after it has been exposed to the jurisdiction of a judge. Final judgment entered in default of appearance under O. XII or in default of defence under O. XX may be set aside by the Registrar himself, much less a judge, and the Registrar's decision on an application to set aside is the subject of an appeal to a judge. Again, appeal lies from the Registrar's decision on an application under O. XIII for leave to enter final judgment, to a judge. The same holds good for interlocutory judgments under O. XII and O. XX. It is conceivable indeed that after a particularly expeditious assessment by the Registrar under those Orders, application could be made to a judge (rather than the Registrar in view of the decision on assessment) to set aside the interlocutory judgment itself. I see no reason why a judge could not entertain jurisdiction in such a case, under r. 2 of O. XII and r. 15 of O. XX, and set aside the judgment and consequently the assessment contingent thereon. In brief, whether or not the Registrar's decision on an assessment of damages is final, I consider it is not a decision of the High Court as such and is subject to the jurisdiction of a judge of that Court.

The Supreme Court judgments cited above are the only examples I can find of an appeal from an assessment of damages by the Registrar direct to the Supreme Court. Prior to that the practice had always been that appeal lay to a judge a chambers: Practice Direction No. 1 of 1979 which directs to the contrary, possibly serves to emphasise the change in practice. The Supreme Court judgments make no reference to the aspects which I have raised, nonetheless I am not entitled to assume that those aspects were overlooked. Indeed to quote the words of Lord Denning,

M.R., in *Miliangos v George Frank Limited* (8) at p. 1084 quoted by Baron, D.G.J., in delivering the judgment of the Supreme Court in *Kasote v The People* (9) at p. 81:

> "The court does its own researches itself and consults authorities; and these may never receive mention in the judgments".

As Lord Diplock said in *Cassell v Broome* (10) at p. 874 quoted again by Baron, D.C.J., in *Kasote* (9) at p. 79.

> ". . . the judicial system only works if someone is allowed to have the last word and if that last word once spoken, is loyally accepted."

The Supreme Court decisions, establishing as they do by implication the procedure to be followed in the matter, indicate that appeal lies from an assessment of damages made by the Registrar to the Supreme Court.

Those decisions are binding upon me. Nonetheless I must respectfully observe that the provisions of the Supreme Court Act are not altogether clear on the point. It may or may not be considered desirable to adhere to the practice in England. Whether or not this is so, it seems to me that the High Court Rules are now at variance with the construction apparently placed by the Supreme Court upon the Supreme Court Act and I would respectfully suggest that those Rules now require amendment. I rule that I have no jurisdiction to entertain this present appeal.

Appeal not entertained for lack of jurisdiction
