IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

Appeal No. 97/2013
SCZ/8/90/2013

(Civil Jurisdiction)

BETWEEN:

SAVIOUR CHIBIYA **APPELLANT**

AND

CRYSTAL GARDEN LODGE AND RESTAURANT LTD **RESPONDENT**

Coram: **Chibomba, Muyovwe and Malila, JJS**
On 3rd November, 2015 and 24th November, 2015

For the Appellant: Mr. S. C. Mwananshiku, Messrs M & M Advocates.

For the Respondent: Mr. B. Luo, Messrs Palan and George, Advocates

---

JUDGMENT

Malila, JS, delivered the Judgment of the Court

Cases referred to:

1. *Zambia Revenue Authority v. Jayesh Shah (2001) ZR 60.*
2. *Roy Lawrence v. Chitakata Ranching Co. Limited (1980) ZR 198.*
3. *Registered Trustees of the Archdiocese of Lusaka v. Office Machines Limited (SCZ Appeal No. 18 of 2007).*

When we heard this appeal on the 3rd of November, 2015, we reserved our ruling on the appellant's application to amend the memorandum of appeal. We indicated then that we would give

our decision after a more consummate consideration of the record and the arguments of learned counsel. This is our decision.

At face value, this appeal appears to contest the order of the High Court made on the 25th of September, 2012, dismissing the matter commenced by the appellant, for want of prosecution. What becomes evident, however, is that the whole action is fraught with procedural lapses, largely attributable to the appellant and his legal advisors.

To the extent that they are relevant to the appeal, the brief facts of the case were that the appellant, who resides adjacent to the respondent's place of business, commenced an action by writ of summons, on the 17th of June 2011, claiming for an order prohibiting the respondent from playing unreasonably loud music at its business premises, and for damages for nuisance and noise pollution. He also claimed interest and costs. The respondent entered appearance and defence denying the appellant's claim in its entirety.

After the close of the pleadings, the matter came up on the 4th of June, 2011 and was scheduled for hearing on 30th June, 2012. A notice of hearing was sent by the appellant to the

respondent on 7th June, 2012 informing it of the date of hearing, afore-stated. However, on 30th June, 2012, neither the appellant nor his legal counsel appeared before court and the matter was adjourned to 25th September, 2012. On this date, again neither the appellant nor his counsel, made any appearance, prompting counsel for the respondent to apply to have the matter dismissed for want of prosecution, arguing that the appellant had on two occasions not been in attendance, despite having served the notice of hearing on the respondent. The court, upon consideration of the application, in a decision delivered during the hearing, granted the order as prayed for, and ordered costs against the appellant.

On the 22nd of November, 2012, the appellant filed an application for an order for special leave for review of the judgment dismissing the action delivered on the 25th September, 2012. In an order inscribed on the summons for leave to review, the learned High Court judge rejected the application. It is following this order that by notice of appeal filed on 26th March, 2013, the appellant registered his displeasure and recorded his desire to appeal against:

"the Order of the Honourable Justice C. B. Phiri made in the High Court in the above action on 22nd November, 2012 at Lusaka ...."

The memorandum of appeal filed on 23rd May, 2013 also reflects that it is the order of the High Court given on the 22nd November, 2012 which occasioned grievance to the appellant. He appealed fronting a sole ground structured as follows:

"The learned trial court grossly erred in both law and fact by delivering the order dated 25th September, 2012, for dismissal for want of prosecution as counsel for the appellant had reasonable cause for not attending the hearing."

The confusion that characterised this appeal is readily apparent from the notice of appeal, the memorandum of appeal and the ground of appeal. While the memorandum of appeal and the notice of appeal state that the appeal is against the order of the 22nd November, 2012, the ground of appeal refers to the order of 25th September, 2012.

The appellant's learned counsel filed heads of argument on 27th May, 2013. At the hearing, Mr. Mwananshiku indicated that he would rely on those heads of argument. He submitted that the non attendance by counsel for the appellant at the hearing of the 25th of September, 2012, was attributed to the information

relayed by a court marshal to his legal clerk, that the matter would not be heard on the date given as the dealing judge was preparing for retirement and was therefore unable to sit. Consequently, all the pending matters before the court would be re-allocated. It was further submitted that, upon counsel's effort to conduct a search on the court record to confirm the date of hearing, it came to the appellant's knowledge that the matter had actually been dismissed. It was also the appellant's submission that an application for leave to review the order dismissing the matter was made. However, the court dismissed that application without hearing the appellant. The learned counsel argued that the appellant has a meritorious claim against the respondent which has not been adjudicated upon. In keeping with the principles set out in various case authorities, the appellant sought for an opportunity to have the matter heard on its merit before final judgment was delivered. For this argument, the appellant cited and relied on the case of **Zambia Revenue Authority v. Jayesh Shah**[1].

No written submissions were filed on behalf of the respondent. However, at the hearing, Mr. Luo, learned counsel for

the respondent applied and was granted leave to make oral submissions.

When Mr. Luo began to make his submissions, our anxieties, and no doubt those of Mr. Mwananshiku, were aroused. The learned counsel pointed out that despite what is stated in the ground of appeal, the present appeal stems from the order of the lower court made on 22nd November, 2012 refusing the appellant's application to review the court's decision of 25th September, 2012, dismissing the appeal. Mr. Luo submitted that the lower court was right in rejecting that application as the application did not meet the conditions set out for such applications in the case of **Roy Lawrence v. Chitakata Ranching Co. Limited[2].** In that case, according to Mr. Luo, a review will be competent where fresh material evidence which, had it been available, would have weighed on the decision of the court. Further, it should be shown that such evidence was not available, or could not with due diligence have been found. Mr. Luo also adverted to the case of the **Registered Trustees of the Archdiocese of Lusaka v. Office Machines Limited[3]** where similar sentiments were strongly carried. The learned counsel submitted that in the present case, it is clear that the appellant

did not, before the judge in the court below, adduce sufficient reason or cause why the review should have been allowed. According to Mr. Luo, the learned judge in the court below cannot be faulted when she dismissed the application. We were urged to dismiss the appeal.

What followed was that the appeal took a completely different trajectory. When we asked Mr. Mwananshiku to clarify what the appeal was against in view of the confusion regarding which judgment or order was being appealed against, as we have alluded to, Mr. Mwananshiku's efforts to explain were anything but satisfactory. This prompted the learned counsel to orally seek the leave of court to amend the memorandum of appeal. He argued that if the application to amend were granted, the amendment would not prejudice the respondent since it will have the opportunity to respond fully to the amended memorandum of appeal and, we suppose, the ground(s) of appeal and by logical and necessary implication, to the new heads of argument.

Mr. Luo stoutly opposed the application, arguing that the application was coming too late in the day and was likely to prejudice the respondent. The appellant had the duty to

prosecute its appeal diligently by setting out clearly the issues that the court was invited to determine.

We must state again that a perusal of the notice of appeal filed on the 26th March, 2013 shows that the appeal is against the order of the lower court given on the 22nd November, 2012. As we have pointed out already, the only order of that date made by the lower court was the one inscribed on the draft order by the judge, declining the application to review. The memorandum of appeal, which was filed on the 23rd May, 2013, still refers to the order of the lower court given on 22nd November, 2012. The sole ground of appeal set out in the memorandum is that:

> **"the order to dismiss the matter for want of prosecution should not have been made as counsel for the appellant had reasonable cause for missing the hearing."**

The heads of argument upon which Mr. Mwananshiku relied, spoke, as we have shown, to the order dated 25th September, 2012 and not the order refusing the review given on the 22nd November, 2012.

Order 58(2) of the Rules of the Supreme Court, chapter 25 of the Law of Zambia provides as follows:

> **"The memorandum of appeal shall be substantially in Form CIV/3 of the Third Schedule and shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively."**

Here, as we have already pointed out, the appeal is against the order refusing to review the earlier decision to dismiss the action. It was not against the order dismissing the action. Yet, the sole ground as formulated clearly attacks the earlier order not appealed against. This is anomalous. The present memorandum of appeal is a classic repudiation of Rule 58(2) of the Rules of the Supreme Court. We think with utmost respect to Mr. Mwananshiku that this kind of clumsiness only serves to obfuscate the issues contested in the appeal and could have been averted had a little more diligence been employed.

As regards the entitlement to amend the memorandum of appeal itself, Rule 58(3) provides that:

> **"The appellant shall not thereafter without the leave of the court put forward any grounds of objection other than those set out in the memorandum of appeal, but the court in deciding the appeal shall not be confined to the grounds put forward by the appellant:**

Provided that the court shall not allow an appeal on any ground not stated in the memorandum of appeal unless the respondent, including any person who in relation to such ground should have been made a respondent, has had sufficient opportunity of contesting the appeal on that ground."

It is this provision that we believe, motivated Mr. Mwananshiku to make the application that he made. Mr. Luo for his part, put up a dignified protest to the application to amend principally because of the fear of prejudice to the respondent's position. Yet there is no doubt in our mind that for Mr. Mwananshiku, the application to amend the memorandum of appeal came as an afterthought. Had the learned counsel prepared sufficiently for this appeal, he no doubt would have discovered the disconnect between the ground of appeal on one hand, and the notice of appeal and memorandum of appeal on the other. In that way, the learned counsel could easily have made a proper application to cure the defect prior to the hearing of the appeal, with the necessary supporting documents indicating the nature of the amendments sought to be made. That in our view, would have been a more honourable course to take. To come before this court and to argue the appeal based on an erroneous ground, and to apply to amend the memorandum of

appeal only after the learned counsel for the respondent had given his arguments in rebuttal, is to us demonstrably a wrong approach; it is, as it were, to lock the stable door after the horse has bolted. The learned counsel for the appellant, we grieve to say, did not have his tackle in order.

We have no hesitation in stating that the ground of appeal in this case should have been drafted more elegantly with greater precision and alertness, having regard to the guiding principle that an appeal can only relate to the portion of the decision being impugned. The appellant, through his learned counsel contributed to the present mischance. Through his learned counsel, the appellant authored and filed in court a non conforming ground of appeal. He is, therefore, literally the author of his own misfortune.

We agree with Mr. Luo that the appellant bore the obligation to set out clearly the questions or issues that this court was being called upon to determined. In doing so, it behoves an intended appellant to comply strictly with the rules of this court. It is time counsel practicing in this court went back to the basics and reacquainted themselves with the rule regarding the document

necessary for mounting an appeal and what to do when an amendment becomes imperative. We would be shirking in our responsibility as the last court of the land if we fail to stop parties who appear before us from using their own lapses and inefficiencies to contradict the spirit of expedition in the fair and just conclusion of appeals which is a core value of our justice system.

It is for these reasons that we decline Mr. Mwananshiku's application for leave to amend the memorandum of appeal. The effect of our refusal to allow the amendment suggested at this late stage is that the appeal before us, which was argued on an erroneous ground of appeal, is incompetent. It is dismissed with costs to be taxed in default or agreement.

.....

H. CHIBOMBA
SUPRME COURT JUDGE

.....

E. N. C. MUYOVWE
SUPREME COURT JUDGE

.....

M. MALILA, SC
SUPREME COURT JUDGE