

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

Appeal No. 15/2011

BETWEEN:

PAMODZI HOTELS PLC



APPELLANT

AND

ROSEMARY NYANGU

RESPONDENT

Coram: Malila, Kaoma and Kajimanga, JJS

On 2nd November, 2021 and 2nd December, 2021

For the Appellant: Mr. J.A Wright of Wright Chambers

For the Respondent: Mr. P.C. Muya of Chalwe Kabalata Legal Practitioners

RULING

Kaoma, JS, delivered the Ruling of the Court.

Cases referred to:

1. **Director of Public Prosecution v Jack Lwenga (1983) Z.R. 37**
2. **Manal Investments Limited v Lamise Investments Limited (2001) Z.R. 24**
3. **Ruth Kumbi v Robinson Kaleb Zulu (2009) Z.R. 183**
4. **Rondel v Worsley [1969] 1 AC 191 at 227**

Legislation referred to:

1. **Supreme Court Rules, Cap 25, Rules 12, 48(5), 61 and 63(1)**
2. **Court of Appeal Act No. 7 of 2016, section 13(3)**
3. **Legal practitioners Act, Cap 30, sections 52(b), 53 and 85**

1. Introduction

1.1 This is the respondent's motion for leave to restore a cross-appeal pursuant to **Rule 48(5)** of the **Supreme Court Rules, Cap 25** of the Laws of Zambia. Jonathan Andy Wright, the respondent's counsel, deposed to the affidavit in support and gave the backdrop to the matter and the grounds for seeking to restore the cross-appeal.

1.2 Phill Chola Muya, counsel for the appellant also deposed to the affidavit in opposition to the respondent's notice of motion.

2. Background and affidavit evidence

- 2.1 The affidavit evidence reveals that on 2nd March 2010, the appellant filed a notice of appeal against the whole judgment of the Industrial Relations Court (now a division of the High Court) delivered on 4th February 2010 awarding the respondent damages equivalent to six months' salary plus allowances, for unfair and wrongful dismissal from employment. The respondent filed a notice of cross-appeal on 7th March 2011, against the part of the judgement that awarded her only six months' salary inclusive of allowances.
- 2.2 The appeal was set down for hearing on 2nd September 2014 at Ndola. However, on 1st September 2014, the appellant filed a notice of withdrawal of its appeal. Therefore, we dismissed the appeal when it was called for hearing on 2nd September 2014 pursuant to **Rule 63 (1), (2) and (3)** of the **Supreme Court Rules**.
- 2.3 According to Mr. Wright, after the Court dismissed the appellant's appeal, he mentioned that there was a cross-appeal but for reasons unclear to him, the presiding judge informed him that a fresh date would be given for the hearing of the cross-appeal. However, strange and unusually, the appellant then took out summons for assessment of damages awarded to the respondent.

2.4 Counsel deposed that under a fundamental error the respondent withdrew the cross-appeal on an albeit erroneous basis that:

- i. **The appellant had *locus standi* to take out summons for assessment of damages notwithstanding the fact that the judgment rendered by the Industrial Relations Court was against the appellant;**
- ii. **The Deputy Registrar of the Industrial Relations Court had the requisite jurisdiction to entertain the appellant's summons for assessment of damages notwithstanding the fact that the judgment by the Industrial Relations Court was rendered in favour of the respondent;**
- iii. **It was best to withdraw the respondent's cross-appeal and appear before the deputy registrar for assessment in order to avoid any prejudice to the respondent and not to disobey court summons;**
- iv. **The Deputy Registrar had jurisdiction to deal with the same issues on assessment that were meant to be canvassed on the hearing of the respondent's cross-appeal.**

2.5 Counsel asserted that during the assessment proceedings the Registrar was informed as to the propriety of the appellant issuing the summons for assessment when the judgment was not in their favour but he deemed it fit to proceed, and so, with the hearing date not forthcoming, they thought it was unnecessary to proceed with the cross-appeal, thus its withdrawal. Counsel exhibited to his affidavit, copies of the notice of cross-appeal, notice of withdrawal of cross-appeal and the summons for assessment of damages.

2.6 On his part, Mr. Muya asserted that the appellant would be prejudiced if the respondent was allowed to restore a cross-appeal withdrawn more than six years ago especially that the Court of Appeal and a single judge of this Court held that it was not strange or unusual for the appellant to apply for assessment of damages.

2.7 Counsel further averred that there was no fundamental error on which the cross-appeal was withdrawn and that the respondent misapprehended the law and facts by thinking that the Registrar had jurisdiction to deal with the same issues on assessment that were meant to be canvassed on the hearing of the cross-appeal.

3. Arguments by the respondent in support of the motion

3.1 The respondent argued two grounds in this motion, firstly, that the withdrawal of the cross-appeal was made under a fundamental error or mistake; and secondly, that the withdrawal of the cross-appeal could be a nullity.

3.2 In support of the first ground, Mr. Wright cited the cases of **Director of Public Prosecution v Jack Lwenga**¹, a High Court judgment involving a criminal matter and **Manal Investments Limited v Lamise Investments Limited**² where we restored an appeal as its discontinuance was based on the wrong assumption that the order of the single judge of this Court was valid at law.

3.3 Counsel further cited the case of **Ruth Kumbi v Robinson Kaleb Zulu**³, where this Court held that the application for restoration of the appeal could either be granted or rejected depending on the given circumstances of the case. He urged us to restore the cross-appeal in the interest of justice since it was not heard or dismissed.

3.4 The gist of counsel's argument in ground two is that whereas **Rule 61** of the **Supreme Court Rules** provides for steps to be taken by a respondent who intends to cross-appeal, there is no equivalent specific provision for withdrawal of a cross-appeal and that **Rule 63(1)** provides for withdrawal of an appeal but not a cross-appeal. Therefore, the withdrawal of the cross-appeal could be a nullity.

3.5 In the alternative, counsel submitted that the only reasonable inference is that **Rule 63(1)** equally applies to a cross-appeal with all necessary adaptations and this reasonable inference would not be prejudicial to any of the parties if the appeal is restored. That the ends of justice would be met as the respondent had not flouted any of the rules of Court worthy of denial of her right to be heard and no date was forthcoming from this Court for over three years.

3.6 At the hearing of the motion, Mr. Wright conceded that the appellant filed the summons for assessment of damages about five months after he withdrew the cross-appeal and that the factors that allegedly influenced him to withdraw the cross-appeal were not in existence. Counsel also agreed that he withdrew the cross-appeal a month and a week after we dismissed the appellant's appeal.

4. Arguments by the appellant in opposition to the motion

4.1 In answer to the first ground, Mr. Muya contended that other than stating that there was a fundamental error, the respondent has not

shown the basis on which she made the error and there was no fundamental error on, which she could have withdrawn the cross-appeal. Rather, she was within her legal rights either to wait for a date of hearing or to withdraw the cross-appeal as she did.

- 4.2 Counsel distinguished the case of **Jack Lwenga**¹ from the present matter, on the ground that it was criminal in nature and the State had demonstrated what specifically constituted the fundamental mistake, what it pertained to and how it arose. He also argued that applying the **Manal**² case to this motion would be a misconception of the law and facts as no superior court has held to be misconceived the judgments, rulings and orders of the lower courts.
- 4.3 On the **Ruth Kumbi**³ case, counsel submitted that there is no basis for this Court to exercise its discretion to restore the cross-appeal.
- 4.4 In response to the argument in ground two that the withdrawal of the cross-appeal could be a nullity, Mr. Muya reiterated that the respondent has failed to demonstrate to this Court the fundamental error or mistake on which she withdrew the cross-appeal.

5. Our consideration of the motion and decision

- 5.1 The issue in ground one of this motion is whether the respondent and or her advocates withdrew the cross-appeal under a fundamental error or mistake as alleged in paragraph 2.4 above. According to Mr. Wright, what triggered the withdrawal of the cross-

appeal was the appellant's strange and unusual step to file the summons for assessment of damages awarded to the respondent.

- 5.2 Contrary to Mr. Wright's argument, a perusal of the documents that he attached to his affidavit in support of the motion reveals that the respondent through her advocates filed the notice of withdrawal of notice of cross-appeal on 10th October 2014 while the appellant filed the summons for assessment of damages on 18th March 2015, five months later. Therefore, the filing of the summons for assessment of damages by the appellant could not, as conceded by Mr. Wright have influenced the respondent to withdraw the cross-appeal.
- 5.3 Further, the respondent submitted to the jurisdiction of the Registrar at the assessment and in fact claimed amounts beyond the six months' salary awarded by the trial court in damages that she had initially wanted to pursue by means of her cross-appeal.
- 5.4 In his judgment, the Registrar rejected and excluded the claims that the respondent had not pleaded and which, the trial court had not awarded and assessed the damages due to the respondent at K37,809.50 less the sum of K20,000 paid into court on 21st December 2012, bringing the amount awarded down to K17,809.50.
- 5.5 Aggrieved by the exclusion of her additional claims, the respondent appealed substantively to the Court of Appeal while the appellant cross-appealed against the award of some amounts to which it felt the respondent was not entitled.

- 5.6 On 21st September 2020, the Court of Appeal upheld the Registrar's decision, dismissed the respondent's appeal and allowed the cross-appeal, and on 30th March 2021, declined to grant the respondent leave to appeal to this Court. On 30th June 2021, a single judge of this Court who heard the respondent's renewed application for leave to appeal equally dismissed the application for failure to meet the threshold in **section 13(3)** of the **Court of Appeal Act 2016**.
- 5.7 On 13th July 2021, the respondent filed the motion to vary, discharge or set aside the ruling of the single judge declining leave to appeal and the full Court heard the motion on 7th September 2021. Two days later, on 9th September 2021, the respondent filed this motion seeking to restore the cross-appeal challenging the adequacy of the six months' salary awarded in damages to the active cause list for hearing alleging that it was withdrawn by error.
- 5.8 Later, on 22nd September 2021, the full Court dismissed the motion to vary, discharge or set aside the ruling of the single judge for being incompetent in the manner it was presented as an appeal.
- 5.9 At the hearing of this motion both learned counsel lamented that they had not received the ruling of this Court and had only learnt about it in court. We hasten to say that this is most unfortunate but as we have already said, this Court delivered the ruling on 22nd September 2021 and the fact that the parties had not yet received the ruling does not affect our decision in that matter.

5.10 Moreover, in her cross-appeal, the respondent was dissatisfied with the portion of the judgment that had awarded her only six months' salary plus allowances that she considered so low, as not to have reflected the requirement of the trial court to do substantial justice. There was no nexus between the sole ground of appeal and the alleged fundamental error. As rightly put by Mr. Muya, the respondent exercised her right to withdraw the cross-appeal and she has failed to show that she did so under a fundamental error.

5.11 In these circumstances, it is improper for Mr. Wright to come back to this Court under the guise of this motion to seek to restore the cross-appeal for the respondent to relitigate the same issue of her entitlement, which the Registrar of the Industrial Relations Court and the Court of Appeal ably dealt with. We are convinced that this was clear abuse of court process by counsel for the respondent. In fact, the ends or interest of justice demands that we do not restore the cross-appeal for hearing. There must be an end to litigation.

5.12 Furthermore, whilst Mr. Wright alleged that no date of hearing of the cross-appeal was forthcoming from this Court for three years, he conceded at the hearing that he withdrew the cross-appeal barely a month and a week after dismissal of the appellant's appeal.

5.13 In any case, the respondent filed this motion pursuant to **Rule 48(5)** of the **Supreme Court Rules**, which requires that an application, involving the decision of an appeal should be made to

the Court within fourteen days of the decision complained of. We are at a loss as to what decision the respondent is aggrieved with, on which she based this motion, particularly that the cross-appeal was withdrawn in 2014. The alleged fundamental error or mistake having fallen through, we find no merit in ground one.

- 5.14 As to ground two, the respondent's argument is that the withdrawal of the cross-appeal could be a nullity as there is no specific rule in our Court Rules for withdrawal of a cross-appeal. Surely, as admitted by Mr. Wright, a cross-appeal is an appeal in its own right. Therefore, **Rule 63** of the **Supreme Court Rules** that deals with the withdrawal of an appeal, equally applies to the withdrawal of a cross-appeal just as Mr. Wright stated in the alternative. Therefore, the withdrawal of the cross-appeal by the respondent could not be a nullity. This ground of motion fails on its own inanity.
- 5.15 Perhaps, the secondary question is what was the status of the cross-appeal following its withdrawal? In terms of Rule **63(3)** of the **Supreme Court Rules**, if the parties to an appeal do not consent to the withdrawal of the appeal, the appeal shall remain on the list. The appeal shall come on for the hearing of any issue as to costs or otherwise remaining outstanding between the parties, and for the making of an order as to the disposal of any sum lodged in Court as security for the costs of the appeal.

5.16 In the current motion, both parties did not consent to the withdrawal of the cross-appeal. Therefore, it remained on the list and should have come on for the hearing of any issue as to costs or otherwise remaining outstanding between the parties. We also agree that there is nothing on the record before us to show that the cross-appeal came on or was dismissed after it was withdrawn.

5.17 However, there are no circumstances, in this case, on which we could possibly restore an appeal withdrawn over seven years ago, when the purported fundamental error or mistake and nullity are fictional and the issue of the respondent's entitlement has been decided upon substantively up to the Court of Appeal. The fact that we never heard nor dismissed the cross-appeal is irrelevant.

5.18 Because of the history of this motion, which we have clearly explained, we were compelled at the hearing of the motion to invite Mr. Wright, to show cause why he should not personally be condemned in costs. Counsel's response was that he had not done anything wrong and that he acted all along on his client's instructions and in her best interests.

5.19 Certainly, legal practitioners must act in the best interests of their client and must follow the lawful, proper and competent instructions of a client. However, under **section 85** of the **Legal practitioners Act, Cap 30**, lawyers are officers of the Court and are subject to the jurisdiction of the Court. Therefore, their duty to the

court and administration of justice is paramount to the duty to the client to the extent of any inconsistency with any other duty.

5.20 In **Rondel v Worsley**⁴, the court re-enforced the undesirability of relitigating issues already decided. As regards the duty owed by counsel to their client and to the court, Lord Reid observed:

“Every counsel has a duty to his client fearlessly to raise every issue, advance every argument and ask every question however distasteful, which he thinks will help his client’s case. But as an officer of the court concerned in the administration of justice he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client’s wishes or with what the client thinks are his personal interests.”

5.21 It must be understood that in situations where acting in the personal interests of a client conflicts with a legal practitioner’s duty to the court or administration of justice, counsel must act in ways that will uphold the duty to the court and administration of justice because as officers of the Court, the duty to the Court is overriding.

5.22 In addition, as officers of the court, counsel must be free from personal bias, must be frank in their responses and disclosures to the court, and must act with competence, honesty, and courtesy towards the court, opposing counsel and parties. Importantly, in terms of **section 52(b) Legal Practitioners Act** counsel should not mislead or allow any court to be misled, so that such court makes an order, which such practitioner knows to be wrong or improper.

5.23 In the present motion, as an officer of the court, Mr. Wright’s duty to this Court was paramount even if his client gave contrary

instructions. His role was not merely to push the personal interests of the respondent. Rather, counsel should have provided clear and proper advice to his client to avoid any compromise to his integrity and professional independence.

5.24 Therefore, counsel should not have brought to court a motion that is devoid of any merit simply because his client instructed him to do so. It is plain that the respondent's personal wishes and her desire to relitigate issues that the lower courts have already decided on, or to have a second bite at the cherry drove counsel to file this motion.

5.25 It is also evident that counsel deposed to untrue statements in his affidavit in support of the motion since the appellant had not yet filed the application for assessment of damages, which allegedly influenced him to withdraw the cross-appeal. Counsel even claimed that the court had not given a date of hearing for three years when he had in fact withdrawn the cross-appeal. We cannot accept that these were simple mistakes on his part. Counsel was purely misleading the Court and this conduct amounts to professional misconduct under section **53** of the **Legal Practitioners Act**.

5.26 We are convinced although Mr. Wright denied it that the hearing of the motion to vary, discharge or set aside the ruling of the single judge dismissing the renewed application for leave to appeal on 7th September 2021, provoked him to file this motion on 9th September 2021 when he had no good or reasonable grounds for doing so.

5.27 It is for the foregoing reasons that we have decided to award the costs of this motion to the appellant despite that the matter originated from the Industrial Relations Court and to condemn counsel for the respondent personally to bear the costs.

6. Conclusion

- 6.1 Having determined that there was no fundamental error or mistake in the withdrawal of the cross-appeal and that the withdrawal could not be a nullity, we dismiss the motion for lack of merit.
- 6.2 Counsel for the respondent shall personally bear the costs of the failed motion. The costs shall be taxed if not agreed.



M. MALILA
SUPREME COURT JUDGE



R.M.C. KAOMA
SUPREME COURT JUDGE



C. KAJIMANGA
SUPREME COURT JUDGE