

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

CAZ/08/266/2022

BETWEEN:

GOLDEN LOTUS INSURANCE COMPANY LTD **APPELLANT**

AND

ZESCO LIMITED **1ST RESPONDENT**

**LIAONING EFACEC ELECTRICAL
EQUIPMENT COMPANY LIMITED AND
ELECTRIC DESIGN AND RESEARCH
INSTITUTE AND CHINA NATIONAL
ELECTRIC ENGINEERING COMPANY
LIMITED (LEEC-CNEEC JOINT VENTURE)** **2ND RESPONDENT**



CORAM: MAJULA, NGULUBE AND BANDA-BOBO, JJA.
On 31st July, 2023 and 30th October, 2023

For the Appellant: Ms. E. S. Lilanda & Ms. O. Hasalama – Messrs. Mulenga
Mundashi Legal Practitioners

For the 1st Respondent: Mrs. M. S. Kambobe – Chief Legal Officer
Mrs. J. N. Kunda – Principial Legal Officer
Mrs. B. Mapani – Legal Officer

For the 2nd Respondent: No appearance

R U L I N G

NGULUBE JA, delivered the Ruling of the Court.

Cases referred to:

1. *Barclays Bank Plc vs Jeremiah Njovu & 41 Others* – SCZ/08/21/2019
2. *Zambia Revenue Authority vs T and G Transport* – SCZ No. 2 of 2007
3. *Vangelatos & Vangelatos vs Metro Investments Limited & Others* – Selected Judgment No. 35 of 2016
4. *JCN Holdings Limited vs Development Bank of Zambia (2013) Vol. 3 Z.R. 299*
5. *Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Limited (1989) KLR 1*
6. *Twampane Mining Co-operative Society Limited vs E and M Storti Mining Limited* – SCZ Judgment No. 20 of 2011
7. *Tata Zambia Limited vs Shilling Zinka (1986) Z.R. 51 (SC)*
8. *Nalsa & Team Associates Limited vs NNPC (1991) 8 NWLR (pt. 212) 652*
9. *Chainama Hills Golf Club vs Golf Consultancy and Tourism Limited* – CAZ/08/2022
10. *Robert Ijegalú Okwa Ozwoko vs The Attorney General No. 1 (1985) Z.R. 163 (SC)*
11. *Eric Mwanza & 2 Others vs Sebastian Saizi Zulu* – CAZ/08/386/2019
12. *First National Bank Zambia Limited vs Diana Chintu & Others* – 2016/HK/0397
13. *Livingstone City Council vs Geoffrey Sinywibulula* – SCZ/8/287/2007
14. *Aristogerasimos Vangelatos & Vasiliko Vangelatos vs Metro Investments Limited & Others* – SCZ/8/122/2012

Legislation referred to:

1. *The Court of Appeal Rules, Statutory Instrument No. 65 of 2016*
2. *The Court of Appeal Act No. 7 of 2016*
3. *The Supreme Court Act, Chapter 25 of the Laws of Zambia*
4. *The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia*

1.0 INTRODUCTION

1.1 This is a ruling on the appellant's notice of motion to raise preliminary objection on a point of law. It is made pursuant to ***Order XIII Rule 5(1) of the Court of Appeal Rules.***¹

2.0 BACKGROUND

2.1 The appellant filed into Court a notice of appeal dated 8th July 2022. The 1st respondent raised a preliminary objection to the appeal based on the following two grounds:

- 1. Whether or not the appellant's appeal is properly before this Court in the absence of leave to appeal being granted by the lower Court; and***
- 2. Arising from (1) above, whether this Court has jurisdiction to hear the appellant's appeal.***

2.2 The preliminary objection is supported by an affidavit deposed by Taulino Banda, the Principal Procurement Officer in the employ of the 1st respondent. He deposed that the lower Court delivered a judgment in favour of the 1st respondent for the payment of the sum of USD2,083,835.10, for the procurement of transmission over head lines, substation and switching stations.

2.3 It was deposed that the appellant appealed against the judgment of the lower Court and applied for stay of execution of judgment which was denied by the lower Court. That following the refusal by the lower Court, the appellant renewed the application for stay before this Court. He deposed that the lower Court's judgment did not grant leave to appeal and so the 1st respondent conducted a search which showed that the appellant did not obtain leave to appeal to this Court. That therefore the requirement to obtain leave to appeal affects the jurisdiction of this Court to determine the appeal.

2.4 Counsel for the appellant filed Skeleton Arguments in support of the preliminary objection. He submitted that the appeal is not properly before this Court because **Order X Rule 4 of the Court of Appeal Rules** makes it a prerequisite to be granted leave to appeal before an appeal is lodged. That failure to obtain leave is fatal and goes to the core of the appeal. To buttress this argument, we were referred to the cases of **Barclays Bank Plc vs Jeremiah Njovu & 41 Others**¹ and **Zambia Revenue Authority vs T and G Transport**.² In the latter case, the Supreme Court of Zambia held that leave to appeal goes to jurisdiction and it cannot be

conferred by express consent of all parties. Our attention was further drawn to the case of **Vangelatos and Vangelatos vs Metro Investments Limited and Others**³ where the Supreme Court of Zambia held that where a Court exercises a jurisdiction it does not possess, the decision amounts to nothing because jurisdiction must be acquired before judgment is given.

2.5 The case of **JCN Holdings Limited vs Development Bank of Zambia**⁴ where the Supreme Court held that a Court without jurisdiction cannot make any lawful orders or grant remedies was also relied upon. In relying on the case of **Zambia Revenue Authority v T.G. Transport (supra)**, it was argued that the said leave cannot be granted retrospectively.

2.6 We were also referred to the case of **Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Limited**⁵ where the Kenyan Court of Appeal held that the question of jurisdiction must be raised at the earliest opportunity and should be decided right away.

2.7 In stressing the consequences of not adhering to Court rules, we were referred to the case of **Twampane Mining Co-operative Society Limited vs E and M Storti Mining Limited**.⁶ We were

also referred to Justice Matibini's book "**Zambian Civil Procedure: Commentary and Cases**" page 1504 where he states that-

"Generally, permission to appeal may be sought either from the lower Court at the hearing at which the decision to appeal was made or from the appeal court...the aim of leave to appeal is to avoid the waste of valuable court resources by weeding out hopeless appeals and focusing appellate attention on matters of real significance to the parties."

2.8 It was accordingly submitted that the appeal is incompetently before this Court and should be dismissed.

3.0 APPELLANT'S ARGUMENTS

3.1 The appellant opposed the preliminary objection and filed an affidavit in opposition deposed by Arnold Ngowani, the appellant's Marketing Manager. He deposed that the appellant filed the notice of appeal before this Court on 8th July, 2022 and renewed its application for stay of execution on 3rd August, 2022. That when the application for stay came up for hearing on 11th August, 2022 the appellant requested for an adjournment, which the 1st

respondent did not oppose with a view to filing a further affidavit in opposition.

3.2 It was deposed that on 25th August, 2022, the appellant filed a notice of motion to raise preliminary issue which was withdrawn on 23rd September, 2022. That further on 27th September, 2022 the appellant filed the same notice to raise a preliminary issue as the one which was earlier withdrawn.

3.3 It was deposed further that the notice to raise an objection is irregular and not properly before this Court as it has not complied with the prescribed form in the relevant rules. He deposed that in any event, the appellant having withdrawn the application, should have paid costs before filing the subsequent application. That this Court should therefore not consider the preliminary objection as it is improperly before this Court. The deponent believes that the appellant does not need leave to appeal to this Court against an open Court judgment.

3.4 The appellant filed into Court Skeleton Arguments and List of Authorities in support of the affidavit in opposition which were relied on at the hearing. Counsel for the appellant submitted that this Court should first consider whether the notice to raise the

preliminary objection is properly before this Court because the appellant did not pay costs for the notice of motion withdrawn earlier. It was submitted that while a litigant is not proscribed from filing a fresh summons similar to the one withdrawn, the litigant is bound to pay costs. To support this argument, we were referred to the case of **Tata Zambia Limited vs Shilling Zinka**⁷ where the Supreme Court Zambia held as follows-

“There is no rule of procedure which provides that a party may not withdraw a summons, and later take out fresh summons in exactly the same terms. In the event of such occurrence, the party duplicating the summons can always be penalized in costs.”

3.5 Counsel accordingly submitted that the 1st respondent’s objection can only be heard upon payment of costs for the withdrawn application. In relying on the case of **Nalsa & Team Associates Limited vs NNPC**,⁸ Counsel submitted that the notice of motion which was withdrawn was interlocutory in nature and ought to have complied with Forms III and IV in the first schedule of the rules as provided for in Order VII Rule 1(1).

- 3.6 That further, the notice of motion has no provision for the Master of the Court of Appeal to sign the document and that the notice has no grounds upon which relief is sought.
- 3.7 With regard to the merits of the objection, Counsel submitted that the appellant did not require leave to appeal against an open Court judgment in accordance with Section 22 of the Court of Appeal Act as it has an automatic right of appeal, except as provided for in Section 23 of the said Act.
- 3.8 To support this argument, we were referred to the cases of ***Chainama Hills Golf Club Limited vs Golf Consultancy and Tourism Limited***,⁹ ***Herbert Ijegalú Okwa Ozwoko vs The Attorney General No. 1***,¹⁰ ***Eric Mwanza & 2 Others vs Sebastian Saizi Zulu***¹¹ and the High Court case of ***First National Bank Zambia Limited vs Diana Chintu & Others***.¹²

4.0 DECISION

- 4.1 We have considered the submissions by Counsel, the affidavits and the parties' Skeleton Arguments. Before we determine the preliminary objection raised by the 1st respondent, we will first

deal with the objections raised by the appellant, which are as follows-

- i. Whether the 1st respondent should make payment for costs for the notice of motion withdrawn on 23rd September, 2022.***
- ii. Whether the preliminary objection is defective in form and manner for failure to comply with the prescribed form in Order VII Rule 1(1) of the Court of Appeal Rules.***

4.2 With regard to the first objection, it is not in dispute that by notice to withdraw the notice of motion dated 23rd September, 2022, the 1st respondent withdrew the notice to raise a preliminary objection filed into Court on 25th August, 2022. The issue is whether the 1st respondent should make payment for costs before the preliminary objection is heard.

4.3 Even though a party who duplicates summons may always be penalized in costs, the same are in the discretion of the Court and a party cannot pay costs in the absence of an order for costs. In the present case, there was no order made for costs as the 1st respondent withdrew the application before it was heard. Therefore, it would have been proper for the appellant to make the application for costs of the withdrawn notice of motion so that the

Court can determine whether to make an order for costs or not, as opposed to raising it as an objection.

4.4 With regard to the manner and form in which the notice to raise the preliminary objection has been presented, it has been argued that it falls short of the prescribed form in the first schedule of the Court of Appeal Rules. We have perused the notice and as submitted by the appellant, it falls short of the prescribed form as it does not appear to move the Court, it does not show the order which is being sought and does not have a provision for the Master of the Court of appeal to sign. The question is whether the 1st respondent should be penalized for this shortfall.

4.5 In our view, **Section 47 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia** sheds some light on the consequences of defects in form on the one hand and in substance on the other. It provides that-

“Save as is otherwise expressly provided, whenever any form is prescribed by any written law, an instrument or document, which purports to be in such form, shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or document, or which is not calculated to mislead.”

4.6 The significance of the above section is that if the defect in an instrument or document is in form, it is not a fundamental defect or irregularity and it is curable. It is our considered view that the defect in the notice in question is not in substance but in form as it clearly shows the grounds upon which the preliminary objection is anchored. We therefore do not find merit in the objections raised by the appellant.

4.7 Reverting to the issues on which the 1st respondent's preliminary objection is anchored, it is clear from the record that the appellants did not apply for leave to appeal. According to the appellant, there was no leave required since the appeal is against an open Court judgment of the Court below. To support this position, Counsel has relied on the case of **Chainama Hills Golf Club Limited vs Golf Consultancy and Tourism Limited** (*supra*) where a single Judge of this Court held that-

“The starting point is that Section 22 of the Court of Appeal Act provides for an automatic right of appeal in civil matters. The exceptions to the automatic right of appeal are set out in Section 23 of the Act.”

4.8 **Section 22 of the Court of Appeal Act, No. 7 of 2016** provides that-

“Subject to section twenty-three, an appeal in a civil matter shall lie to the Court from a judgment of the High Court or a quasi-judicial body.”

4.9 Further Section 23 of the Act places restrictions on civil appeals and Section 23 (1) (e) provides as follows-

“1. An appeal shall not lie-

(e) from an order made in chambers by a judge of the High Court or by a quasi-judicial body or from an interlocutory order or interlocutory judgment made or given by a judge of the High Court or by a quasi-judicial body, without the leave of that judge or quasi-judicial body or, if that has been refused, without the leave of a judge of the Court except in the following cases:

(i) where the liberty of the subject or the custody of infants is concerned;

(ii) where an injunction or the appointment of a receiver is granted or refused;

(iii) in the case of a decision determining the claim of a creditor or the liability of any contributory, director or other officer under the Companies Act;

(iv) in the case of a decree nisi in a matrimonial cause, judgment or order in an Admiralty action determining liability; or

(v) in the case of an order on a special case stated under any law relating to arbitration;”

4.10 Section 22 of the Act which has been cited above gives every litigant who is aggrieved by a judgment of the High Court, the right to appeal to this Court. This right of appeal has however been made subject to Section 23.

4.11 The Supreme Court in the case of ***Livingstone City Council vs Geoffrey Sinywibulula***¹³ interpreted similar provisions in Sections 23 and 24 (1) (e) of the Supreme Court Act, Chapter 25 of the Laws of Zambia. The Supreme Court guided as follows with regard to leave to appeal from the High Court to the Supreme Court-

“Mr. Sakala in our view misunderstood completely these provisions in Section 23, every litigant in Zambia, aggrieved by any High Court Judgment, delivered in open Court, has a right to appeal to this Court subject only to the restrictions stated in Section 24 which are not applicable in this case. As this High Court Judgment was delivered in open Court, the Appellants have a right to appeal to this Court without obtaining leave.”

4.12 We are bound by the decision of the apex Court which clearly demonstrates that a party does not need leave to appeal against a Judgment delivered in open Court. The matter before us is not caught up by the restrictions in Section 23 of the Court of Appeal Act. The only question that remains therefore is whether the Judgment of the lower Court, which has been appealed against in this matter can be regarded as an open Court Judgment, rendering it unnecessary for the appellant to obtain leave to appeal. The circumstances under which the Judgment of the lower Court was delivered are not clear. However, what is clear is that it was a final Judgment in a matter that was commenced by writ of summons.

4.13 In the case of ***Aristogerasimos Vangelatos & Vasiliko Vangelatos vs Metro Investments Limited & Others***,¹⁴ the Supreme Court had occasion to determine whether a Judgment delivered in chambers can be regarded as an open Court Judgment. The Court stated as follows-

“We do not accept the submission by Mr. Linyama that this was a chamber matter, just because the proceedings were conducted in chambers and the judgment delivered in chambers. We would add that the

other claims that were added by the plaintiffs rendered the matter contentious. These include a declaration and damages... it is the Rules of procedure, and not the venue of deliberations, that determines whether a matter is an open Court one or a chamber one. Rules of procedure state that a contentious matter, pleaded in a statement of claim and supported by viva voce evidence, such as this, is an open Court matter and it should be dealt with as such.

4.13 The foregoing authority clearly guides that a matter pleaded in the statement of claim is an open Court matter. Therefore, regardless of whether the lower Court's judgment was delivered in chambers, its Judgment remains an open Court Judgment since the matter was commenced by Writ of Summons and Statement of Claim. It follows that it was not necessary for the appellant to obtain leave to appeal to this Court.

4.14 It was argued by the 1st respondent that Order ***X Rule 4 of the Court of Appeal Rules*** makes it mandatory to obtain leave because it provides that the Judge of the High Court may without formal application, at the time judgment is given, record that leave has been granted or refused accordingly. This provision appears to be inconsistent with the provisions of Section 23 of the Act

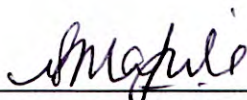
which provides for the circumstances under which leave may be sought. In applying the purposive rule of statutory interpretation, it requires Courts to interpret a statute in a way that gives effect to the legislature's intended purpose. The provisions of the Act do not seem to suggest that leave should be sought in every matter where a litigant intends to appeal to this Court. Section 23 narrows down the circumstances under which leave should be sought implying that one does not require leave to appeal where a matter is not caught up by the provisions of Section 23. In our view, this was the intention of the legislature.

4.15 In any event, **Section 20(4) of the Interpretation and General Provisions Act** provides that any provision of a Statutory Instrument which is inconsistent with any provision of an Act, shall be void to the extent of the inconsistency. The Court of Appeal Act should therefore take precedence over the Court of Appeal Rules in interpreting the requirement whether to seek leave to appeal or not.

5.0 CONCLUSION

5.1 In view of the foregoing, the preliminary objection raised by the 1st respondent has no merit and is accordingly dismissed.

5.2 Costs shall be for the appellant to be taxed in default of agreement.



B. M. MAJULA
COURT OF APPEAL JUDGE



P. C. M. NGULUBE
COURT OF APPEAL JUDGE



A. M. BANDA-BOBO
COURT OF APPEAL JUDGE