

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

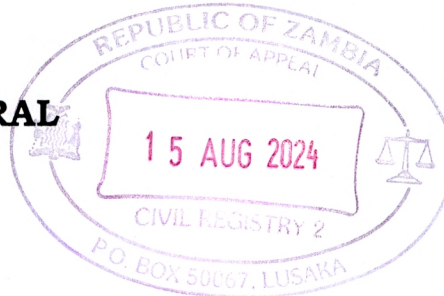
**APPEAL 138/2022**

**BETWEEN:**

**ATTORNEY GENERAL**

**AND**

**DAVID MUMBA**  
**NICHOLAS CHILESHE**



**APPELLANT**

**1<sup>ST</sup> RESPONDENT**  
**2<sup>ND</sup> RESPONDENT**

***CORAM: Kondolo, SC, Majula and Banda-Bobo, JJA***  
***On 23<sup>rd</sup> May, 2024 and 15<sup>th</sup> August, 2024.***

**For the Appellant:** N/A

**For the Respondent:** Mr. B. Mwanza and Mr. Z. M. Mubiana,  
both of Messrs Nsapato and Company  
Advocates Under LAZ Probono Program

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**RULING**

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**Banda-Bobo JA, delivered the Ruling of the Court.**

**Cases Referred to:**

1. Jason Yumba and 22 Others v. Luanshya Municipal Council (SCZ Appeal No. 005/2015)
2. NFC Africa Mining Plc v. Techno Zambia Limited (Appeal No. 22 of 2009),
3. Access Bank Zambia Limited v. Group Five/Zcon Business Park Joint Venture (SCZ/8/52/2014)
4. Twampane Mining Cooperative Society Limited v. E and M Storti Mining

- Limited (SCZ Judgment No. 20/2011)
5. Western Co-op Haulage Limited and Western Province Co-operation Union Limited (In Liquidation v. Zambia Seed Company Limited (CAZ Appeal No. 176/2021)
  6. Vengelatos v. Vangelatos v. Metro Investments Limited and Others (SCZ Appeal No. 35 of 2016)
  7. Zamguard Security Services Limited v. Darson Chitumbo and Others (CAZ Appeal No. 216 of 2020)
  8. Mwambazi v. Morester Farms Limited (1977) ZR 144

**Legislation Referred to:-**

- Court of Appeal Rules, Statutory Instrument No. 65 of 2016
- The Court of Appeal Act
- The Court of Appeal Rules

**1.0 Introduction**

1.1 On 23<sup>rd</sup> May, 2024, when we sat to hear the substantive appeal, counsel for the respondent, Mr. Chungu, rose to raise a preliminary objection on a point of law.

1.2 We guided that the same ought to have been formally applied for to enable the other party respond thereto. We were aware that a jurisdictional issue could be raised at any point in the course of proceedings, but that however, the Court of Appeal Rules require a formal application. We therefore adjourned the hearing to enable the

respondent file a formal application and the appellant to formally respond. This therefore, is a Ruling on that application.

## 2.0 **Background**

2.1 The respondents had lodged a complaint in the lower court against the appellant contending that their dismissal from employment by the appellant was wrongful and or unlawful, as they did not commit any offence.

2.2 Further that there was no resolution by the Kazungula Town Council to dismiss them. It was their further complaint that in dismissing the complainants, the appellant violated rules of natural justice as they purported to punish the complainants twice for the same offences, over which they had already been fined and punished by the Kazungula Town Council, without the Local Government Service Commission affording them an opportunity to appear before it and be heard. They sought reinstatement and or damages in addition to other claims.

2.3 In his decision, the learned trial Court found for the respondents. He declined to order reinstatement, but



ordered damages for wrongful and unlawful dismissal from employment. The learned Judge awarded the complainants 12 months salary for wrongful and unlawful dismissal.

### 3.0 **The Appeal**

3.1 Unhappy with the turn of events, the appellant filed an appeal to this Court fronting four grounds, as follows:-

#### **Ground 1**

**The Honourable Court below erred both in law and fact in failing to consider the fact that the Respondents were guilty of the offences they committed, as such the Appellant is duty bound to appropriately discipline erring officers and not to reward them for crimes committed as the lower court did. It is an injustice to punish a party for upholding the law and rewarding another party for breaking it by way of the crime of theft.**

#### **Ground 2**

**The learned Judge erred in law and fact to suggest that the Local Government Service Commission in dismissing the complainants acted ultra vires. The lower court misdirected itself when it held in its view that the Local Government Service Commission's duty**



was to simply effect and deal with the demotion of the complainants or transfer them to another Council and cause them to forfeit half salaries withheld during suspension as recommended by Kazungula Town Council. That is to simply rubber stamp the decision of a subordinate institution, which has no mandate whatsoever to deal with staff matters under division I, II and III category. The Local Authorities submit recommendations to the Local Government Service Commission for final determination and not for the Commission to merely rubber stamp the recommendation of the Council. This is because the power to discipline and terminate employment of officers is delegated to the Commission by the Constitution.

### Ground 3

The learned Trial Judge erred both in law and fact for solely and singularly basing his judgment on section 16, sub section (e ) of the Service Commission Act No. 10 of 2016 which inter alia states that “hear and determine complaints and appeals from employees whose cases have been determined by the Local Authorities within the local Government service”. The question which begs an answer is that when the commission is not satisfied with the outcome of the disciplinary case from the Local authorities, what will

**be its recourse if it is denied its superintending role over staff matters more especially if subordinate institution such as a local authorities makes wrong decisions or mis-apply disciplinary codes and procedure and arrive at outcomes outside the regulations.**

**Ground 4**

**The learned Trial Judge erred both in law and fact for failing to recognize that the Service Commission Act No. 10 of 2016, sub section (j) mandates the Local Government Service Commission to perform such functions as are necessary or incidental to the regulation of human resource management in the Local Government Service. Varying the decisions of the local authorities when they are not in conformity with the principles and values of the Local Government Service is one of such functions.**

**4.0 Notice to Dismiss**

4.1 The respondents took issue with the manner the grounds of appeal were crafted. To that end, they filed, on 28<sup>th</sup> May, 2024, a Notice for an order to dismiss the appeal pursuant to Order X rule 9 (2) of the Court of Appeal Rules, Statutory Instrument No. 65 of 2016.



4.2 The respondents sought to dismiss the appellant's grounds of appeal on the premise that the grounds contained narratives, arguments, are not concise and thus do not comply with the rules of court. That as a consequence this Court is bereft of jurisdiction to hear and determine the dispute.

4.3 The Notice was accompanied by an affidavit in support sworn by counsel, Mr. Chanda Chungu. His deposition in the main was that, the grounds of appeal as crafted, were imprecise, argumentative, and not concise. He deposed that it would be in the interest of justice to dismiss the appeal in the circumstances. That the Court could not hear and determine matters based on grounds drafted in the manner done in this appeal.

#### 5.0 **Arguments in Support**

5.1 The respondents filed skeleton arguments and List of authorities in support of the Notice.

5.2 In the arguments, counsel wondered whether this appeal should be considered in the format it has been presented; as it does not comply with the Rules of this Court.

- 5.3 Our attention was brought to Order X rule 9 (2) of the Court of Appeal Act; which Order guides on how an appeal to this Court should be crafted.
- 5.4 Counsel contended that this Order is couched in mandatory terms, and that it clearly stipulates that the grounds of appeal must be concise, without argument or narration. That in *casu*, the appellants' grounds of appeal demonstrate that they fall foul of the rules.
- 5.5 To buttress, our attention was called to the case of **Jason Yumba and 22 Others v. Luanshya Municipal Council**<sup>1</sup> where the Supreme Court held that where grounds of appeal do not comply with rules, it means that the appeal will be dismissed.
- 5.6 As regards the requirement to comply with the rules of court and the importance thereof, we were referred to the following cases: **NFC Africa Mining Plc v. Techno Zambia Limited**<sup>2</sup>, **Access Bank Zambia Limited v. Group Five/Zcon Business Park Joint Venture**<sup>3</sup> and **Twampane Mining Cooperative Society Limited v. E and M Storti Mining Limited**<sup>4</sup>



5.7 Based on the above, counsel submitted that the Court of Appeal will not tolerate blatant disregard of the rules. That the Court of Appeal Rules are clear on how grounds of appeal must be crafted. That the respondent has shown good reasons for this Court to invoke its discretion to dismiss the appeal for non-compliance with the rules of the court.

5.8 Further, counsel referred us to the case of **Western Co-op Haulage Limited and Western Province Co-operative Union Limited**<sup>5</sup> where we held that:-

**“... the impugned ground of appeal is simply a narrative and does not show the points of law or facts wrongly decided and the error complained of is not apparent on its face. In light of the foregoing, and based on the authorities above, we hereby uphold the preliminary objection as the same goes to jurisdiction of this Court”** (underline supplied)

5.9 Counsel argued that the above decision shows that grounds of appeal that are not crafted in line with the rules

of court go to the jurisdiction of the Court as they offend the mandatory rules of court.

5.10 It was contended that as a result, this Court lacks jurisdiction to hear this appeal. The case of **Vangelatos Vangelatos v. Metro Investments Limited and Others**<sup>6</sup> was adverted to on this issue where the Supreme Court held that:-

**“... where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decisions amounts to nothing. Jurisdiction must be acquired before judgment is given ...”**

5.11 That the failure to abide by the rules of court robs this Hon. Court the jurisdiction to hear this appeal. Counsel prayed that the appeal be dismissed accordingly.

5.12 The appellant, despite having been granted time in which to respond to the application, did not do so.

## 6.0 **Hearing**

6.1 The application was heard on 30<sup>th</sup> July, 2024. There was no representation from the appellant. It was established that they had been served with the process on 3<sup>rd</sup> June,



2024. Mr. Mubiana, counsel for the respondents told Court that they had not been served with any process in response to their application.

6.2 Mr. Mubiana, in arguing the application placed total reliance on the affidavit and skeleton arguments.

6.3 We were urged to dismiss the appeal.

## 7.0 **Analysis and Decision**

7.1 We have carefully considered the application, affidavit and skeleton arguments in support of the application.

7.2 The issue before us is whether this is a matter in which we can dismiss the appeal for non-adherence to the rules of this Court, as they appear to contain narratives, arguments, and are not concise. Further, whether this Court lacks jurisdiction to hear and determine such an appeal.

7.3 Order X rule 9 (2) CAR is clear where it provides that:-

**“A memorandum of appeal shall set forth concisely and under distinct heads, without argument and narrative, the grounds of the 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.”**

- 7.4 In the case of **Zamguard Security Services Limited v. Darson Chitumbo and Others**<sup>7</sup>, we underscored the need to avoid the inclusion of arguments and narratives in the grounds of appeal; as such inclusion posed a significant risk of the appeal being dismissed for non-compliance.
- 7.5 It is trite that rules of court have to be obeyed by litigants as they seek justice from courts of law. In the case of **Access**<sup>3</sup> the Supreme Court guided that it had in a plethora of cases held the view that it is desirable for matters to be determined on their merits and in finality rather than on technicalities and piece meal.
- 7.6 They guided that matters should as much as possible be determined on their merits rather than be disposed off on technical or procedural points. That this is what the ends of justice demands.
- 7.7 However, the apex court was quick to guide, in the same case, that courts should not, under the guise of doing justice, bend the rules and shift goal posts, for while laxity



in the application of the rules may seem to aid one side it unfairly harms the innocent party.

7.8 In the case of **NFC Mining Plc v. Techpro Zambia Limited**<sup>2</sup>, it was held thus:-

**“Rules of the court are intended to assist in the proper and orderly administration of justice and as such must be strictly followed.”**

7.9 However, in the case of **Mwambazi v. Morester Farms Limited**<sup>8</sup>, courts were urged to allow triable issues to come to trial despite procedural faults or irregularities. It was held thus:-

**“(2) It is the practice in dealing with bona fide interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties, ... but it is not in the interest of justice to deny him the right to have his case heard.”**

7.10 The above was reinforced in Article 118(2) (e) of the Constitution of Zambia, (Amendment) Act No. 2 of 2016, which provides that:-


**“In exercising judicial authority, the courts shall be guided by the following principles**

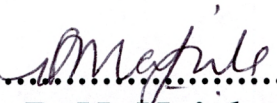
**(e) justice shall be administered without undue regard to procedural technicalities.”**


- 7.11 It is patent, from the cited authorities that cases ought to be decided on their merits, rather than to be disposed off on technicalities. This is what the ends of justice and indeed our Constitution demand.
- 7.12 We have carefully considered the grounds of appeal as formulated by the appellant. We agree with the respondent that indeed the way they are crafted does not conform to Order X rule 9 (2) CARs.
- 7.13 However, we have looked at the subject matter of the appeal. In the circumstances of this case, we are inclined to allow the appeal to proceed in the manner it is crafted, as we have not observed any prejudice that will be caused to the respondent if we allowed the appeal to proceed.
- 7.14 Further, we note that the subject matter of the appeal is important as it will guide local authorities as they deal with a similar subject in future.

7.15 Finally, we note that despite the perceived irregularities, the respondents were able to respond to the grounds of appeal as appear in the record. We consider that we still retain jurisdiction to hear the appeal in the public interest.

7.16 We find no merit in the application and it is accordingly dismissed. However, we award costs to the respondents since the appellant caused this application.

  
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**M. M. KONDOLO, SC**  
**COURT OF APPEAL JUDGE**

  
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**B. M. Majula**  
**COURT OF APPEAL JUDGE**

  
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**A. M. BANDA-BOBO**  
**COURT OF APPEAL JUDGE**