

**IN THE COURT OF APPEAL OF ZAMBIA Application SP 18/2024
HOLDEN AT KABWE
(Civil Jurisdiction)**



BETWEEN:

V.S. CARGO MANAGEMENT SERVICES APPLICANT

AND:

LABADEE TRUST

RESPONDENT

CORAM: SIAVWAPA JP, CHISHIMBA AND PATEL SC, JJA

On 29th May and 19th August 2024

**FOR THE APPLICANT: MR. K. WISHIMANGA OF AMW & CO,
MR. J. KAYUNI OF MESSRS JOHN
KAYUNI & CO AND MR. M. NKUNIKA
OF MILNER & PAUL LEGAL
PRACTITIONERS**

**FOR THE RESPONDENT: MR. E.K. MWITWA OF MWENYE &
MWITWA ADVOCATES WITH MR. C.
CHUNGU OF NSAPATO & CO
ADVOCATES**

RULING

SIAVWAPA JP, delivered the Ruling of the Court

Cases referred to:

- 1. Bidvest Food Zambia Limited and four Others v CAA Import and Export Limited SCZ Appeal No 56 of 2017*
- 2. Natasha Nawa v The People Appeal No 9/2 of 2019*
- 3. Kenya Plantation and Agricultural Workers Union v Kenyan Export Floriculture and Allied Workers Union (2018) eKLR Civil Application No Sup 5 of 2017*

Statutes Referred to:

- 1. The Court of Appeal Act No. 7 of 2016*
- 2. Court of Appeal Rules Statutory Instrument No. 65 of 2016*

NB: In this Ruling, we wish to state at the outset that when we heard the appeal on 20th February, 2020, we sat with the Honourable Mrs Justice A.M. Banda-Bobo. This is because, prior to the hearing of the Appeal, the Honourable Mrs. Justice A.N. Patel, SC, to whom the Record of appeal was initially allocated, had recused herself from handling the appeal and sitting on the panel.

Subsequent to her recusal, the record was allocated to the Honourable Mr. Justice M. J. Siavwapa, J.P. Mrs Justice A.M. Banda-Bobo joined the panel while the Honourable Mrs. Justice A.N. Patel was moved to another panel.

However, when the Motion was cause-listed for hearing, we constituted the panel which included the Honourable Mrs. Justice A.N. Patel SC, on the view that since it was not a hearing on the merits of the case, she would be comfortable and she sat with us.

Unfortunately, after the hearing, the Honourable Judge expressed very strong sentiments of discomfort as a result of which she declined to sign the Ruling.

This Ruling is therefore, that of the majority of the panel that heard the Motion.

1.0 INTRODUCTION

- 1.1 The Applicant herein has moved the Court by two Notices of Motion, one for an order for leave to appeal to the Supreme Court and the other for an order to stay execution of Judgment pending determination of the motion for leave to appeal.
- 1.2 Both motions are dated 19th April 2024 and made pursuant to Order XI rule 1 (1) of the Court of Appeal Rules as read with Section 13 (1) (2) (3) (a) (c) and (d) of the Court of Appeal Act and Order 7 rule (1) of the Court of Appeal Rules, respectively.
- 1.3 The Motion for an order to stay execution of Judgment was made ex parte but we heard it simultaneously with the Motion for leave to appeal inter-partes.
- 2.0 On 12th April 2024, we delivered a Judgment on an appeal at the instance of the Applicant from the Judgment of the High Court, Commercial Division.
- 2.1 In the Court below, the Respondent claimed payment of the sum of USD 393, 792.00 plus contractual interest at 15.5% per annum against the Applicant.

2.2 The learned Judge in the Court below delivered Judgment in favour of the Respondent, an outcome that prompted the Applicant to appeal to the Court.

2.3 In the appeal the Applicant advanced nineteen grounds of appeal two of which we deemed to have been abandoned but all impugning the learned Judge's findings of fact.

2.4 We ultimately Dismissed the appeal with only two grounds succeeding

3.0 THE MOTION FOR LEAVE TO APPEAL

3.1 Based on the provisions of Section 13 (3) of the Court of Appeal Act, the Applicant has cited sub-sections (a), (c) and (d) to open the door to the Supreme Court.

3.2 The three paragraphs of sub-section 3 relied upon speak to a point of law of public importance, reasonable prospects of success and other compelling reason.

3.3 In the affidavit in support, the Applicant, through Alessandra Claudia Valenza, who deposed to the affidavit, contends as follows;

1. The Court of Appeal erred in law and fact when it found that the Appellant had abandoned grounds 11 and 19

2. The Court of Appeal erred in law and fact when it failed to consider the evidence on the effect of the Respondent taking over the cement after 25th October 2007 and selling part of it.

3. The Court of Appeal erred in law and fact when it failed to address the evidential burden of proof of entitlement to relief by the Respondent

4. The Court of Appeal erred in law and fact when it failed to and/or refused to grant interest on the repair costs incurred by the Appellant and

5. The Court of Appeal erred in law and fact when it found that the balance due to the Respondent was the sum of USD 393, 792.00 contrary to the evidence

3.4 We must state at the outset that the above statements are not facts in support of the three considerations upon which the Court may grant leave to appeal, but they are proposed grounds of appeal.

3.5 We have also looked at the skeleton arguments in support of the Notice of Motion and they equally take the form of heads of argument in support of the Appeal.

3.6 We will therefore, pay little attention to the said documents because they are improperly before us as we are only concerned with whether the Applicant has met the threshold under any or all of the considerations relied upon pursuant to Section 13 (3) of the Court of Appeal Act.

3.7 We shall preview the proposed grounds of appeal to assess whether any of the three considerations is viable enough to warrant the granting of leave to appeal.

4.0 ARGUMENTS IN OPPOSITION

4.1 The Respondent filed an affidavit in opposition to the Notice of Motion for leave to appeal and skeleton arguments in opposition on 21st May 2024.

4.2 In the affidavit in support, the deponent, Eddie Kalela Mwitwa, who is also counsel for the Respondent, asserts that the Applicant has not demonstrated that the proposed grounds of appeal raise a point of law of public importance. That no fraud or illegal conduct was established against the Respondent and that only the private rights of the parties are affected by the Judgment.

4.3 The deponent has further averred that the Applicant has only sought to attack the Court's findings of fact in its proposed grounds of appeal.

4.4 In its skeleton arguments in opposition, the Respondent cited several cases but suffice to refer to only the cases of Bidvest Food Zambia Limited and 4 others v CAA Import and Export limited¹ and Natasha Nawa v the People². The cited cases give detailed guidance on how to interpret Section 13 (3) of the Court of Appeal Act, particularly, with regard to the import of a point of law of public importance.

- 4.5 On the prospects of success, the Respondent still relied on the case of Bidvest (supra) in so far as the Supreme Court expressed its disinterest in attending to appeals based purely on findings of fact even if the same were perverse or unsupported by the evidence.
- 4.6 On other compelling reasons, the Respondent has submitted that the allegation of fraud or illegal dealings on the part of the Respondent upon which the consideration is founded were not raised in the Court below and before us.
- 4.7 The Respondent has accordingly urged us to deny the application for leave to appeal and dismiss the Motion.

5.0 OUR ANALYSIS AND DECISION

- 5.2 In our analysis, we would like to begin with the argument in support of ground one which is premised on reasonable prospects of success. In that ground, the Applicant has alleged that we erred when we deemed grounds eleven and nineteen abandoned at page 110 (J14) lines 14 and 15 of the Record of Motion.
- 5.3 According to the Applicant we committed a serious error of law when we deemed the two grounds to have been abandoned when in fact the grounds were in the heads of argument and argued. This was part of Mr Kayuni's oral submission at the hearing of the Motions.

- 5.4 In support of that assertion, the Applicant exhibited a copy of the Appellant's heads of argument filed on 16th May, 2023, appearing from page 10 to page 74 of the Record of Motion. It is noted that while ground nineteen appears at page 19 of the Record, ground eleven does not appear anywhere in that copy of the heads of argument.
- 5.5 That, already, is a mark of dishonesty on the part of the Applicant as it attributes lack of diligence on the part of the Court. It also raises the question whether the document relied upon by the Applicant in this Motion is the same as the one the Court relied on when hearing and determining the appeal.
- 5.6 Of more significance however, is the fact that our search on the four volumes of the Record of Appeal filed on 31st January 2023 reveals that only the original copy of the Heads of Argument filed with the Record of Appeal was on the Record of Appeal.
- 5.7 In the skeleton arguments in support of the Motion, the Applicant has stated that the exhibited copy of the heads of argument was filed on 16th May 2023 together with the amended memorandum of Appeal. However, a thorough check on the Record of Appeal has not revealed any amended memorandum of Appeal.
- 5.8 But even assuming that the Applicant indeed filed an amended memorandum of appeal together with the exhibited

heads of argument on 16th May 2023, the heads of argument exhibited to the Notice of Motion for an order for leave to appeal is not headed “amended” and neither is there any indication on the copy that it was filed as an amended copy.

5.9 It is therefore, clear that our decision to deem grounds eleven and nineteen abandoned was not due to lack of diligence or as a result of an error as alleged. Our decision was informed by the absence of the two grounds of appeal in the heads of argument filed together with the Record of Appeal on 31st January, 2023, which were, and still are on the Record of Appeal.

5.10 To fortify the above position, here below is shown how the grounds of appeal are set out and argued in the heads of argument we relied on. At page 2, the Applicant opens the address to the Court in the following style;

“If it may please this Honourable Court, these are the Appellant’s Heads of Argument in support of the Appeal. The Appellant has raised a total of 18 Grounds of Appeal. The grounds of Appeal shall be argued as per the various heads set out below. Some grounds shall be argued independently while others shall be argued together”

5.11 Following the above introduction, the grounds are set out as follows; Ground **one** occurs at page 2 and the arguments run from page 3 to page 15. Grounds **two** and **three** are recorded at page 15 and the arguments run from page 16 to page 26. Grounds **four, five, six, seven** and **eight** are recorded at page

27 and the arguments run from page 28 to page 39. Grounds **nine, ten** and **fourteen** are recorded at page 39 and the arguments run from page 39 to page 43. Grounds **twelve** and **thirteen** are recorded at page 43 and the arguments run from page 43 to page 45. Grounds **fifteen, sixteen, seventeen** and **eighteen** are recorded at page 46 and the arguments run from page 46 to page 49 after which there is a conclusion on the same page.

5.12 As shown in the preceding paragraph, grounds eleven and nineteen are not included in the heads of argument and in a case, where a ground of appeal included in the memorandum of appeal is not included in the heads of argument, the Court is entitled to consider it as abandoned.

5.13 Resulting from the above analysis, we want to state that we take great exception to counsel making unsubstantiated allegations against the Court. Filing a document which was not the basis of the Court's decision with intent to mislead the Court is tantamount to sharp practice by counsel which is unethical and deserving of the attention of the Law Association of Zambia.

5.14 For the above stated reasons, we find no merit in the arguments based on the reasonable prospects of success consideration under Section 13 (3) of the Court of Appeal Act and we dismiss it accordingly.

- 5.15 As regards the argument based on the consideration for other compelling reasons, based on alleged fraud, we have combed through the record of proceedings from the Court below and before us on appeal. We have not found any pleading or argument on fraud. It is therefore, preposterous for the Applicant to spring up an argument on fraud through a motion for leave to appeal. The arguments based on this consideration equally lack merit and we dismiss them accordingly,
- 5.16 The third set of arguments relates to the consideration that the intended appeal raises a point of law of public importance. In this regard, the celebrated case of Bidvest Foods (supra) is instructive. For this consideration to succeed, the starting point is that the said point of law should have been an issue subject of adjudication by this Court. The next factor is that the issue must be of general importance as opposed to being restricted to the parties to the appeal.
- 5.17 In this motion, the Applicant has contended, under proposed ground seven, that the point of law of public importance is our alleged error to deem grounds eleven and nineteen abandoned.
- 5.18 According to the Applicant, the Kenyan case of Kenya Plantation and Agricultural Workers Union v Kenyan Export Floriculture and Allied Workers Union (Kefhau)³, which the Supreme Court of Zambia cited with approval, laid down the principles upon which a matter may be held to be of general

public importance. We will not recite them as we have already alluded to them in the preceding paragraphs as held by the Supreme Court.

5.19 We however, wish to reproduce herein what the Applicant considers to be the question the Supreme Court should adjudicate upon with regard to the issue of a point of law of public importance, as set out in paragraph 32 of the skeleton arguments.

“The question to ask here is that arising from the Kenyan case cited above, what are the instances under which an appellate Court will fail to determine a matter properly before it and in what circumstance can a ground of appeal be deemed to be abandoned. These matters centre on a point of law which affects other litigants as appeals come to court almost every day. It is therefore, our contention that the rules on abandonment of grounds of appeal affect a lot of people and transcend the circumstances of the case.”

5.20 Seeing that the Applicant intends to argue point of law of public importance on the basis of our alleged wrongful deeming of the two grounds of appeal as abandoned, this consideration is moot based on our dismissal of that allegation earlier in this Ruling.


6.0 CONCLUSION

6.1 Ultimately, the Applicant has failed to satisfy any of the three circumstances upon which it relied under Section 13 (3) of the Court of Appeal Act. The Notice of Motion for leave to appeal to

the Supreme Court therefore, lacks merit and we dismiss it accordingly.

6.2 Consequent upon the dismissal of the Motion for leave to appeal, we find that the second Motion, for an order to stay execution of our Judgment dated 12th April 2024, cannot stand. We therefore, equally dismiss.

6.3 We award costs to the Respondent to be taxed in default of agreement.



J.M. SIAVWAPA
JUDGE PRESIDENT



F.M. CHISHIMBA
COURT OF APPEAL JUDGE

A.N. PATEL SC
COURT OF APPEAL JUDGE