

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

Appeal No.24/2024

BETWEEN

PETER MUTALE

APPELLANT

AND

DAVIES MUKUMBWA

RESPONDENT



CORAM: Siavwapa JP, Chishimba and Patel, JJA

On 13th January 2025 and 24th January, 2025

For the Appellant: Ms. I. Mwale of Messrs Kang'ombe & Associates

For the Respondent: Mr. K. Mweemba on behalf of Messrs M.C Hamachila Legal Practitioners

JUDGMENT

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

- 1. Chimanga Changa Limited v Stephen Chipango Ngombe SCZ judgment No 5 of 2010**
- 2. Anti-Corruption Commission v Charles Sambundu SCZ Appeal No. 054/2013**
- 3. Lazarus Ndhlovu, Clein Sitiya and Paul Sitiya v Headwoman Pwalakasa and Mary Ncube Appeal No. 111 of 2020 (CA)**
- 4. ZCCM Investments Holdings PLC v Vedanta Resources Holding Limited and Konkola Copper Mines PLC SCZ/08/13/2021 Appeal No.14 of 2021**

5. **Sun Country Limited v Charles Kearney and Another Appeal No.7 of 2017 SCJ No. 20 of 2017.**
6. **Lummus Agricultural Company Limited and Others v Gwembe Valley Development Company Limited (In Receivership) 1999 ZR 1.**
7. **Steak Ranch Limited v Steak Ranches International BV (2012) ZMHC 25**
8. **Anuj Kumar Rathi Krishnan v The People (2011) ZR 1**

LEGISLATION REFERRED TO:

1. **The Interpretation of General Provisions Act Chapter 2 of the Laws of Zambia**
2. **The High Court Rules, High Court Act Chapter 27 of the Laws of Zambia**
3. **The Authentication of Documents Act Chapter 75 of the Laws of Zambia**
4. **The Court of Appeal Rules, Statutory Instrument No. 65 of 2016**
5. **The Rules of the Supreme Court of England 1999 Edition**

1.0 INTRODUCTION

- 1.1 This appeal is against the ruling of Hon. Mr. Justice B. C. Mbewe delivered on 15th August 2023. The appellant had applied in the lower Court for an order to set aside and stay execution of the judgment on admission dated 1st June 2023, obtained in his absence. The lower Court declined to set aside the judgment on admission and dismissed the application.

2.0 BACKGROUND

- 2.1 The respondent who was the plaintiff in the Court below commenced an action by way of Writ of summons on 6th April

2023 against the appellant, who was the defendant in the Court below. The respondent claimed for the following reliefs:

- i) Refund of the sum of USD 63,500.00 being the sum paid for the purchase of the motor vehicle, namely, Toyota Land Cruiser ZX 2022 Model;**
- ii) Special damages amounting to ZMW 25,000.00 being the sum paid for the defendant's expenses while in South Africa;**
- iii) Damages for breach of contract;**
- iv) Damages for breach of trust**
- v) Interest;**
- vi) Costs; and**
- vii) Any other relief the Court deems fit.**

2.2 On 20th April 2023, the appellant entered appearance, filed a defence and counter-claim.

2.3 On 10th May 2023, the respondent applied to enter judgment on admission based on a letter by the appellant to the respondent's advocates admitting to owing the sum of USD 63,500.00. The respondent served the application to enter judgment on admission on the appellant at his known address on 17th May 2023. An affidavit of service filed on 1st June 2023.

2.4 At the hearing of the application on 1st June 2023, there was no appearance by the appellant or his advocates. The Court upon being satisfied that service of the documents was duly effected, proceeded to hear and determine the matter. Subsequently, the

Court entered judgment on admission in favour of the respondent on the said date of, 1st June 2023.

2.5 On 6th June 2023, the appellant filed an affidavit in opposition to the application to enter judgment on admission.

3.0 APPLICATION TO SET ASIDE JUDGMENT ON ADMISSION

3.1 On 12th June 2023, the appellant filed a composite application to set aside the judgment on admission and to stay execution. In the supporting affidavit, the appellant stated that he was in South Africa at the time judgment on admission was obtained. A fact known by the respondent. He deposed that the documents relied on by the respondent in obtaining judgment on admission were not under his hand or signature. The agreement in issue is unknown to him and does not bear his signature.

3.2 The respondent did not serve him or his lawyers with the application, resulting in the appellant filing an affidavit in opposition to the application for entry of judgment on admission on 6th June 2023. The respondent stated that he was not given the opportunity to be heard on the application for judgment on admission.

- 3.3 In addition, that the order to enter judgment on admission was not properly obtained because the respondent did not adduce any evidence of service of the documents on him.
- 3.4 The respondent opposed the application to set aside judgment on admission in an affidavit dated on 25th June 2023. He stated that all court process was served on the appellant's last known physical address. Further, that the respondent only became aware of the appellant's advocates on 20th June 2023, when documents were served on his advocates.
- 3.5 At the hearing, counsel for the appellant referred to the case of **Chimanga Changa Limited v Stephen Chipango Ng'ombe⁽¹⁾**, in which the Court stated that where service has not been effected, it is for the affected person to raise the issue of lack of jurisdiction or apply to set aside an order or ruling based on not having been served. Counsel submitted that no leave was obtained by the respondent to issue process for service out of jurisdiction. Therefore, the proceedings were incompetently before the Court for lack of jurisdiction and that the matter ought to be dismissed on that ground.

- 3.6 In the second instance, that the appellant was not accorded an opportunity to be heard on the application to enter judgment on admission because he was not served with the application.
- 3.7 In response, counsel for the respondent submitted that the invoice exhibited by the appellant indicated his physical address which was the address where the documents were served. Learned counsel pointed out that in the affidavit dated 6th June 2023, the appellant stated that he resides at 61 Kamwala South in Lusaka. The appellant was a resident of Zambia, therefore, it negated the need to apply for leave to serve outside the jurisdiction.
- 3.8 In reply, counsel for the appellant submitted that the summons to enter judgment on admission was not acknowledged. There was no personal service of the said summons on the appellant and no evidence was brought to show service of the summons. That the appellant could not have known that the Court had moved to hear an application to enter judgment on admission for the claimed sum.
- 3.9 The Court inquired as to where the appellant signed the affidavit. Counsel for the appellant stated that the affidavit was

signed in South Africa and that a scanned copy was emailed, which was later filed into Court.

4.0 DECISION OF THE COURT BELOW

- 4.1 The learned Judge considered the applications and found no merit in the assertion by the appellant that leave was required to serve process out of jurisdiction. The Court was satisfied that the appellant is ordinarily resident in Zambia and was only in South Africa for business purposes. Therefore, he had jurisdiction to hear the matter.
- 4.2 The learned Judge observed that though the affiant stated that he was currently in South Africa, the affidavit showed that it was sworn in Lusaka. On the above ground the Court below held that **section 3 of the Authentication of Documents Act, Chapter 75 of the Laws of Zambia** (hereinafter referred to as **“The Authentication of Documents Act”**) required a document executed outside Zambia to be authenticated before it is used in Zambia. As a consequence of the above, the Court found that the affidavit was invalid and expunged it from the record.

4.3 With regard to service of documents, the Court referenced the case of **Anti-Corruption Commission v Charles Sambundu**⁽²⁾ on the purpose of service of process which is to bring the action or application to the attention of the litigant for the litigant to respond, defend or be accorded a hearing.

4.4 The Judge stated that according to the record, process was served on the appellant at House No.18, Mosi Road Lusaka on 4th and 11th April 2023. The said process was received by Fabian Saviye. Following service of the documents, the appellant entered appearance on 20th April 2023. The respondent served the appellant the application to enter judgment on admission at the same address, but this time, the recipient refused to acknowledge receipt of the documents. The Court found that process and all other documents served on the appellant at House No.18 Mosi Road, Lusaka constituted good service.

5.0 GROUND OF APPEAL

5.1 Dissatisfied with the decision of the Court below, the appellant appealed on the following grounds that:

- i) **The learned High Court Judge erred in law and in fact when he failed to follow section 47 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia as read together**

with Order 41 of the Supreme Court Practice (White Book) 1999 Edition and the Supreme Court case of SUN COUNTRY LIMITED V CHARLES KEARNEY AND ANOTHER APPEAL NO.7/2017 SELECTED JUDGMENT NO.20 OF 2017 when he discountenanced and expunged the appellant's affidavit in support of the composite ex parte summons to stay execution and setting aside of the judgment on admission dated 1st June 2023 obtained in the absence of the appellant.

- ii) The learned High Court Judge erred in law and in fact when he held at pages R23-R24 of the ruling that "process and other documents served on the defendant and received on his behalf constitutes good service and that the appellant was "made aware" of the proceedings and it can be interred application for judgment on admission as well to enable him defend or oppose the same" when the application for entry of judgment on admission and notice of hearing for the same application were not served on the appellant as required by Order X Rule 6 of the High Court Rules and the case of ANTI-CORRUPTION COMMISSION V CHARLES SAMBONU APPEAL NO.05412013 and consequently condemning the appellant without being heard on the application for entry of judgment on admission contrary to the Supreme Court case of PUMA ENERGY ZAMBIA LIMITED V COMPETITION AND CONSUMER PROTECTION COMMISSION APPEAL NO.172 OF 2015.

iii) **The learned High Court Judge erred in law and in fact when he held at page R26 of the ruling that he passed the judgment on admission on merit when the appellant never admitted in his defence that he was owing the respondent, did not sign the documents used to get the judgment on admission and was not accorded an opportunity to be heard on the application for judgment on admission.**

6.0 APPELLANT'S HEADS OF ARGUMENT

6.1 The appellant filed his heads of argument on 5th February 2024. In arguing the first ground of appeal, the appellant submitted that the Court below erred when it discounted and expunged the affidavit in support of the ex-parte summons to stay execution and set aside the judgment on admission dated 1st June 2023, which was obtained in the absence of the appellant. It is the position of the appellant that the Court below did not address its mind to the provisions of **section 47 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia ("Interpretation and General Provisions Act")** and **Order 42 of the Rules of the Supreme Court of England (RSC)**.

- 6.2 Counsel submitted that **section 47 of the Interpretation and General Provisions Act** provides that a prescribed form shall not be void by reason of deviation, which does not affect the substance of such instrument or document. In addition, that **Order 5 Rule 13 of the High Court Rules, Chapter 27 of the Laws of Zambia (“High Court Rules”)** allows the Court to permit an affidavit that is defective in form where the Court is satisfied it was sworn before a duly authorised person.
- 6.3 Learned Counsel also referred to the provisions of **Order 41 of the RSC** which provides that an affidavit may, with the leave of court be used in evidence notwithstanding the irregularity in its form. In this instance, the affidavit in support was signed in South Africa but commissioned in Zambia. It was argued that the Court below should have overlooked the minor irregularity of the omission to authenticate the affidavit sworn in South Africa. The omission did not go to the jurisdiction of the Court and did not prejudice the respondent. Therefore, in the circumstances, the Court below ought to have acted in the interest of justice and allowed the affidavit to stand. Ultimately, the Court below should have set aside the judgment on

admission because it was obtained in the appellant's absence. The appellant has a constitutional right to be heard, which the Court below denied him.

6.4 According to the principle of stare decisis highlighted in the cases of **Lazarus Ndhlovu, Clein Sitiya and Paul Sitiya v Headwoman Pwalakasa and Mary Ncube⁽³⁾** and **ZCCM Investments Holdings PLC v Vedanta Resources Holding Limited and Konkola Copper Mines PLC⁽⁴⁾**, the Court below was bound to follow the decision of the Supreme Court in **Sun Country Limited v Charles Kearney and Another Appeal⁽⁵⁾** where the Court held the affidavit valid, despite the defect.

7.0 RESPONDENT'S HEADS OF ARGUMENT

7.1 The respondent filed his heads of argument dated 5th March 2024. It was argued that **section 3 of the Authentication of Documents Act** requires a document that has been executed outside Zambia to be authenticated by a notary public in the country where it has been executed for it to be used in Zambia. Counsel contended that the affidavit having been executed in South Africa ought to have been authenticated in South Africa. We were referred to the cases of **Lummus Agricultural**

Company Limited and Others v Gwembe Valley Development Company Limited (In Receivership)⁽⁶⁾, Steak Ranch Limited v Steak Ranches International BV⁽⁷⁾ and Anuj Kumar Rathi Krishran v The People⁽⁸⁾ where the court held that a document executed outside Zambia needs to be authenticated for use in Zambia.

7.2 That the appellant's affidavit could not be relied on in the Court below because it was void ab initio for lack of authentication in accordance with the provisions of **section 3 of the Authentication of Documents Act.**

8.0 AT THE HEARING

8.1 We brought to the attention of the Appellant grounds one and two which offend the provisions of **Order 9(2) CAR**, which we shall address hereunder.

9.0 ANALYSIS AND DECISION OF THE COURT

9.1 We have considered the appeal, the authorities cited and the arguments advanced by the learned counsel. We note that the memorandum of appeal states that the appellant seeks to appeal against the judgment delivered by Honourable Justice Bonaventure Mbewe under cause no. 2023/HPC/0255 dated

the 11th day of January 2019. However, the grievance by the Appellant stems from a Ruling by Honourable Justice Bonaventure Mbeve delivered on 15th August 2023. Counsel for the appellant stated the appeal against the ruling dated 15th August, 2023, as per notice of appeal. The referenced ruling in the memorandum of appeal was a typo error. Pursuant to **Order 10 Rule 17(1) of the CAR**, we allowed the amendment of the memorandum of the appeal to reflect the correct date of the ruling subject of appeal as no prejudice would be occasioned to the Respondent. We take this opportunity to remind Counsel to exercise diligence when preparing the Record of Appeal and to correctly state the Judgment/ Ruling subject of appeal.

9.2 We have deliberately not reproduced the the appellant's and respondent's heads of argument relating to grounds one and two for the reasons outlined hereunder. The record will show that the appellant raised three grounds of appeal. A perusal of grounds two and three reveals that they are argumentative and narrative. They offend the provisions of **Order 10 Rule 9 (2) of the Court of Appeal Rules, Statutory Instrument No. 65 of 2016 (CAR)** which states that:

“A memorandum of appeal shall set forth concisely and under distinct heads, without argument or 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.”

- 9.3 **Order 10 Rule 9 (2) CAR** uses the word “shall” in setting forth in a concise manner the grounds of appeal in the memorandum of appeal prepared by an appellant. It therefore connotes that it is a mandatory provision which must be adhered to. As already stated, grounds one and two are couched in an argumentative and narrative manner. Therefore, the appellant is in breach of **Order 10 Rule 9 (2) CAR** as the grounds of appeal do not comply with the provisions of the law.
- 9.4 In our decision of **Morgan Naik and Amadeus International**⁽⁹⁾, we dismissed the appeal on the basis that the grounds of appeal offended the provisions of **Order 10 Rule 9 (2) CAR**. Similarly, grounds one and two are irregular and incompetent, therefore they will not be considered save for the points of law raised. On several occasions, we have cautioned parties to comply with the rules of the Court and the effects of failing to do so. Litigants have a duty to abide by the rules of the Court which serve to

make the process of adjudication or administration of justice, fair and certain.

9.5 Given the position stated above, the appeal therefore hinges on ground one only. The appellant's contention in ground one is that the Court below erred by expunging his affidavit on the grounds that it was signed in South Africa and not authenticated for use in the proceedings below. The appellant submits that the omission to authenticate was minor and did not warrant the nullification of the affidavit. The respondent on the other hand argues that any document executed outside Zambia needs to be authenticated for use in Zambia by a notary public of that country as provided for under **section 3 of the Authentication of Documents Act**. Counsel contended that the failure to authenticate the affidavit rendered it null and void ab initio.

9.6 The issue for determination is whether an affidavit sworn outside Zambia, in this instance South Africa, can validly stand as evidence in Zambia without being authenticated in South Africa. The starting point is whether the provisions of the **Authentication of Documents Act** are applicable in the

circumstances. **Section 2 of the Authentication of Documents Act** defines a document as:

"document" means any deed, contract, power of attorney, affidavit, or other writing, but does not include an affidavit sworn before a Commissioner of the High Court.

9.7 In *casu*, it is not in dispute that the affidavit was signed by the appellant in South Africa. Although the affidavit stated it was sworn in Lusaka before Mambwe Dickens Lungu, a Commissioner for Oaths, this was not the case. Counsel for the appellant stated that the affidavit filed into Court was an electronically scanned copy, which was signed by the appellant in South Africa. The affidavit was not authenticated as required by the law. It falls into the category of documents under **section 2 of the Authentication of Documents Act** and is thereby subject to its provisions.

9.8 **Section 3 of the Authentication of Documents Act** provides as follows:

"Any document executed outside Zambia shall be deemed to be sufficiently authenticated for the purpose of use in Zambia if-
(a) in the case of a document executed in Great Britain or Ireland it be duly authenticated by a notary public under his signature and seal of office;

(b) in the case of a document executed in any part of Her Britannic Majesty's dominions outside the United Kingdom it be duly authenticated by the signature and seal of office of the mayor of any town or of a notary public or of the permanent head of any Government Department in any such part of Her Britannic Majesty's dominions;

(c) in the case of document executed in any of Her Britannic Majesty's territories or protectorates in Africa it be duly authenticated by the signature and seal of office of any notary, magistrate, permanent head of a Government Department, Resident Commissioner or Assistant Commissioner in or of any such territory or protectorate;

(d) in the case of a document executed in any place outside Her Britannic Majesty's dominions (hereinafter referred to as a "foreign place") it be duly authenticated by the signature and seal of office -

(i) of a British Consul-General, Consul or Vice-Consul in such foreign place; or

(ii) of any Secretary of State, Under-Secretary of State, Governor, Colonial Secretary, or of any other person in such foreign place who shall be shown by the certificate of a Consul or Vice-Consul of such foreign place in Zambia to be duly authorised under the law of such foreign place to authenticate such document."

9.9 In **Lummus Agricultural Company Limited and Others v Gwembe Valley Development Company Limited (In Receivership)**, the Supreme Court held as follows with regard to **section 3 of the Authentication of Documents Act:**

“It is quite clear from Section 3 that if a document executed outside Zambia is authenticated as provided then it shall be deemed or presumed to be valid for use in this country and if it is not authenticated then the converse is true that it is deemed not valid and cannot be used in this country.”

9.10 It is not in dispute that the affidavit sworn by the appellant was not authenticated. The appellant argues that the omission to have the affidavit authenticated was an irregularity which the Court below ought to have overlooked and thereby admitted as evidence. The appellant placed reliance on the case of **Sun Country Limited v Charles Kearney and Another**⁽⁵⁾ for this argument. We have read the preceding judgment and the circumstances therein. In that case, the affidavit did not indicate the date when the deponent signed the affidavit. In this case, the issue is whether an affidavit not duly authenticated can still be used in Court. The Court in the cited case held that a defect in the form was not fundamental and could be cured. The Court cited the provisions of **Order 5 Rule 13 of the High Court Rules** which the appellant has also relied on that states as follows:

“The court or a judge may permit an affidavit to be used notwithstanding it is defective in form according to the Rules, if

the court or judge is satisfied that it has been sworn before a person duly authorized.”

9.11 **Order 5 Rule 13 of the High Court Rules** gives a proviso of when a court may permit a defective affidavit in form, if the Court is satisfied it was sworn before a person duly authorised. In this case, the affidavit was not sworn before anyone nor authenticated as the appellant signed the affidavit in South Africa and merely sent a scanned copy to his advocates for filing.

9.12 We hold the view that the affidavit was fundamentally defective for lack of authentication by a Notary Public in South Africa before its use as evidence in the proceedings below. In the case of **Sun Country Limited v Charles Kearney and Another Appeal**⁽⁵⁾ case relied upon by the appellant, the Court explained the rationale for having a date and place indicated in the affidavit as:

“The rationale for having the place and date indicated in the affidavit is to ensure that affidavits signed outside jurisdiction are restricted from being sworn in Zambia; that the affiant is not also the client of the Commissioner for Oaths; that the affidavit was actually signed before such Commissioner for Oaths etc. In a nutshell, that the affidavit was properly taken by a qualified person at the place and date indicated.”

9.13 As outlined in the holding above, it is important that an affidavit is properly taken by a qualified person at the place and date indicated. We cannot fault the Court below for expunging the affidavit for being incompetently before him.

9.14 We accordingly uphold the decision of the Court below.

10.0 CONCLUSION

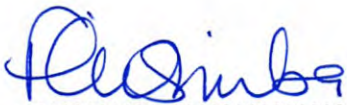
The appeal is dismissed with costs to the respondent, to be taxed in default of agreement.



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M. J. Siavwapa

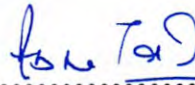
JUDGE PRESIDENT



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F. M. Chishimba

COURT OF APPEAL JUDGE



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A. N. Patel S.C

COURT OF APPEAL JUDGE