

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

Appeal No. 176/2021

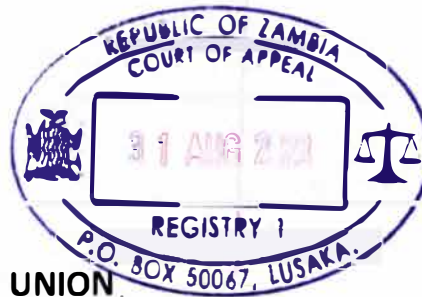
BETWEEN:

WESTERN CO-OP HAULAGE LIMITED

**WESTERN PROVINCE CO-OPERATIVE UNION
LIMITED (In Liquidation)**

AND

ZAMBIA SEED COMPANY LIMITED



1ST APPELLANT

2ND APPELLANT

RESPONDENT

Coram: Sichinga, Patel and Chembe; JJA

On 25th August 2023 and 31st August 2023

For the Appellant : Mr. M. Kasaji
Messrs. C. L. Mundia & Company.

For the Respondent : Mr. V. Brazao
Messrs D. H. Kemp & Company.

RULING

Patel, JA, delivered the Ruling of the Court.

Cases referred to:

1. Monster Energy Company v. NBA Properties Inc. – CAZ Appeal No.133/2019 (Unreported).
2. Finance Bank Limited v Africa Angle Limited, Ibrahim Yusuf, Sildky and Yvonne Phoebe Jedburgh Yusuf (1998) Z.R. 237.
3. Jason Yumba and 22 Others v Luanshya Municipal Council- SCZ Appeal No. 005/2015) (Unreported).
4. NFC Africa Mining PLC v Techro Zambia Limited (2009) Z.R. 236.
5. Access Bank Ltd v. Group Five/ZCON Business Park Joint Venture (Suing as a Firm) (SCZ /8/52/2014).
6. Laston Phiri v Tropical Diseases Research Centre- SCZ Appeal No. 005/2014.

Legislation referred to:

1. Court of Appeal Act No. 7 of 2016.
2. Court of Appeal Rules, Statutory Instrument No. 65 of 2016
3. Supreme Court Act, Chapter 25 of the Laws of Zambia

Other Works:

1. Garner, B.A., & Black, H.C. (2009). Black's Law Dictionary 9th edition

1.0 INTRODUCTION

- 1.1. This is an appeal (*the main appeal*) against a Ruling of the High Court delivered by Musona J. on 19th June 2019 wherein, the Appellant's action was dismissed. The Notice and Memorandum of Appeal are dated 18th July 2019.

- 1.2 This Ruling pertains to a preliminary objection raised by the Respondent on 19 August 2021 under **Order 13 Rule 5 (1) of the Court of Appeal Rules 2016²** on the ground that the appeal before us is irregular and incompetent and should be dismissed. (Hereinafter referred to as the *Preliminary Objection*.)
- 1.3 We have noted that the Appellant caused to be filed the Record of Appeal and its Heads of Argument on 5th August 2021 and the Respondent did, without prejudice to its preliminary objection, file its Heads of Argument on 6th September 2021.

2.0 BACKGROUND

- 2.1 The uncontroverted background facts are that this Appeal emanates out of a matter that has been in court for several years, (*29 years to be precise*), having been commenced in 1994. The Appellants, who were the Plaintiffs in the court below, commenced an action against the Respondents at the Mongu District Registry and the matter was later transferred to the Principal Registry in Lusaka in 2006. The matter has been before numerous Judges in the Court below and has been the subject of an appeal before the Supreme Court on 18th April 2018.
- 2.2 In August 2018, the matter was allocated to the High Court Task Force, on Backlog matters and allocated to Hon. Justice Mr. E. L. Musona. The learned Judge set 27th November 2018 as the date for commencement of hearing.

- 2.3 On 27th November 2018, the matter did not take off as the Respondents requested for an adjournment on account of being served with the Amended Writ and Statement of Claim the previous day and not having had sufficient time to proceed, the matter was adjourned to the 13th March 2019.
- 2.4 On 13th March 2019, the matter did not proceed as State Counsel C.L. Mundia acting for the Appellants, had a bereavement and was unable to attend the hearing. In its Ruling, the Court struck the matter off the cause list with liberty to restore on account of default by the Appellants.
- 2.5 The Appellants thereafter made an application to restore the matter to the active cause list, which was granted and a date for commencement of trial was set for 19th June 2019.
- 2.6 On 19th June 2019, Counsel for the Respondent expressed to the Court below that he was not ready to proceed on account that he had not been notified that the action had been restored to the active cause list and had only been made aware of the hearing the very day.
- 2.7 Due to the short notice of the hearing, Counsel for the Respondent requested the Court to stand down the matter for an hour to enable him to peruse the pleadings or alternatively requested the Court to adjourn the matter to a different date to sufficiently prepare for their defence.

2.8 The Learned Trial Judge in his Ruling, dismissed the matter.

2.9 On 18th July 2019, the Appellant filed its Notice of Appeal and Memorandum of Appeal.

3.0 THE PRELIMINARY OBJECTION

3.1 The application to raise a preliminary objection was mounted by the Respondent on 19th August 2019 under **Order 13 Rule 5 (1) of the Court of Appeal Rules²**. It is supported by an Affidavit and Skeleton Arguments of the same date.

3.2 The Respondent has argued one ground in its preliminary objection being that the ground of appeal in the Memorandum of Appeal does not comply with **Order 10 Rule 9 (2) of the Court of Appeal Rules²** as it contains narrative and or arguments and is not concise. The Respondent contends the appeal is wholly incompetent and seeks dismissal of the appeal with costs.

3.3 We have considered the arguments tendered by the Respondent and the authorities relied upon and to which we shall make reference in our decision below. We have also fully considered the arguments tendered, at the hearing, by the Appellant, in opposing the preliminary objection on points of law. It was Counsel Kasaji's submission that a perusal of the ground of appeal as phrased, did not offend **Order 10 Rule 9 (2) of the**

Court of Appeal Rules.¹ He submitted that the ground of appeal narrowed down the exact issues which the Lower Court referred to in arriving at the wrong decision. In his opposition, he maintained that the ground of appeal did not fall within the authorities cited and could be distinguished from them and prayed that the objection be dismissed.

3.4 Counsel Brazao, by way of response, referred the Court to **Black's Law Dictionary**¹ and invited the Court to consider the definitions of the word "Argument" and "Narrative" in support of the Respondent's preliminary objection.

4. **OUR DECISION**

4.1 **Order X Rule 9 (2) of the Court of Appeal Rules**² provides as follows:

"A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of 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."

4.2 Counsel for the Respondent has called in aid the provisions of **section 12 (1) of the Court of Appeal Act**¹ which provides that an appeal shall lie to this Court in accordance with the Rules of this Court. It is their single argument that litigants who wish to appeal to this Court ought to comply with the rules of the Court. It was their submission that the law, the Supreme Court and this Court have pronounced themselves on failure to comply with the

rules of the Court as it relates to how a Memorandum of Appeal and the grounds of appeal must be set out.

- 4.3 Our attention has been drawn to the cases of **Monster Energy Company v. NBA Properties Inc¹**, **Finance Bank Limited v Africa Angle Limited, Ibrahim Yusuf, Sildky and Yvonne Phoebe Jedburgh Yusuf²**, **Jason Yumba and 22 Others v Luanshya Municipal Council³** and **NFC Africa Mining PLC v. Techro Zambia Limited⁴** all of which have been duly considered and will be referred to where appropriate.
- 4.4 It was the Respondent's submission that the requirement to adhere to rules of Court, cannot be overemphasized and contend that the appeal is wholly incompetent.
- 4.5 We have considered the holding of the Supreme Court in the cited case of **Finance Bank Limited vs Africa Angle Limited and others²** on the issue of content of **Rule 58 (2) of the Supreme Court Rules³**. It is noted that the said Rule in the Supreme Court is comparable to **Order X Rule 9(2) of the Court of Appeal Rules²**. In the cited case, the Supreme Court in reciting **Rule 58 (2)** noted that the memorandum of appeal did not comply with the rules in that it contains arguments. The Supreme Court pronounced in no uncertain terms: ***"This Practice must stop."***

4.6 In the case of **Jason Yumba and 22 others vs Luanshya Municipal Council**³ our attention has been drawn to the decision of the Supreme Court when it stated as follows:

“There can be no doubt that contrary to the mandatory requirements of rule 58 (2) the grounds of appeal as couched contain arguments and are in narrative form, a fact conceded by learned counsel for the appellant at the hearing of this appeal.. Similarly in the present case, we conclude that failure by the appellant to comply with rule 58 (2) of the Supreme Court is fatal to this appeal. The appeal is, therefore, incompetent and we accordingly dismiss it.....”

4.7 The Respondent has also called in aid the decision of the Supreme Court in the case of **NFC Africa Mining Plc vs Techro Zambia Limited**⁴, cited with approval in the recent decision by the Apex Court in the case of **Access Bank (Zambia) Limited vs Group Five/ZCON Business Park Joint Venture (suing as a Firm)**⁵ where the Court guided litigants in the following terms:

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

4.8 There is no doubt in our mind and with reference to the decisions above, that there can be simply no laxity in strict compliance with the rules of Court. The Supreme Court has noted in the **Jason Yumba**³ matter, with which we can only concur:

"Time without number, we have emphasized in our various decisions the inescapable requirement by parties to comply with the rules of this court and the attendant consequences of failure to do so."

- 4.9 We reiterate the duty of litigants to comply with rules of court and the duty of Courts to deliver justice expeditiously. We also rely on the decision of **Access Bank Ltd v. Group Five/ZCON Business Park Joint Venture (Suing as a Firm)**⁵ at page 24 to 33 where the Supreme Court cautioned in the following words:

"...that although matters should, as much as possible, be determined on their merits rather than be disposed of on technical or procedural points, the ends of justice also require that this court, indeed all courts, must never provide succor to litigants and their counsel who exhibit scant respect for rules of procedure as rules of procedure and timeliness serve to make the process of adjudication fair, just, certain and even-handed".

- 4.10 In our decision, rendered on a similar preliminary application, as the one in *casu*, in the case of **Monster Energy Company vs NBA Properties Inc**¹, we equally dismissed the appeal for irregularity and incompetence.

- 4.11 In the case at hand, and for good record, the offending ground of appeal is couched in the following terms:

“The Court below erred in law and in fact by dismissing the Appellant’s case for want of prosecution as the Appellant’s have not lost interest in prosecuting the matter and the Appellant’s actions at all times where done for purposes of insuring that the matter is duly and properly prosecuted.”

- 4.12 We note that the ground of appeal is not concise, contains legal argument and narrative and does not specify the points of law appealed against. We also note that part of the ground of appeal that reads:

“...the Appellants actions at all times where done for purposes of insuring that the matter is duly and properly prosecuted” is argumentative and fits within the definition offered by **Blacks Law Dictionary**¹, in that it is a statement that attempts to persuade. The ground of appeal goes further and is clearly a narrative and offends the mandatory nature of **Order X rule 9(2) of the Court of Appeal Rules**².


- 4.13 We are further guided by the case of **Laston Phiri v Tropical Diseases Research Center**⁶ where the Supreme Court, (though it considered that appeal on its merits), took time to caution and guide litigants as follows:

“...grounds of appeal should be concisely drafted and straight to the point, so that the error complained of, be it of fact or law, is apparent on its face.”

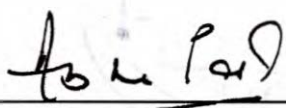
4.14 In *casu*, the impugned ground of appeal is simply a narrative and does not show the points of law or facts wrongly decided and the error complained of is not apparent on its face.

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.

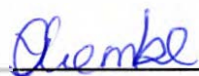
The appeal is dismissed with costs to the Respondent. Same to be taxed in default of agreement.



D.L.Y. SICHINGA, SC.
COURT OF APPEAL JUDGE



A.N. PATEL, SC.
COURT OF APPEAL JUDGE



Y. CHEMBE
COURT OF APPEAL JUDGE