

ZAMBIA NATIONAL COMMERCIAL BANK PLC  
v  
ROSEMARY BWALYA (T/A LYNETTE GUEST HOUSE)

SUPREME COURT  
MAMBILIMA, D.C.J., CHIRWA, AND CHIBOMBA, (JJS).,  
11th FEBRUARY, 2010 and 22ND DECEMBER, 2011  
(S.C.Z. Judgment No. 25 of 2011)

[1] Civil procedure - Taxation - Taxing Master - Dissatisfied with the decision of Taxing Master -  
Whether appeal lies to a judge in Chambers

The appellant appealed against the Ruling of the High Court at Lusaka, in which the trial judge granted a stay of the sale of the respondents goods that were seized by the Sherrif of Zambia, pending the disposal of the appeal by the High Court.

Held:

1. In terms of Order 40/3, 40/4/1, and 40/5/1 of the High Court Rules, a party who is dissatisfied with the decision of the Taxing Master, must apply to the same Taxing Master for review, and failing that review, such party must apply to a High Court judge in chambers for review.

2. An appeal was not a proper mode for the respondent to employ upon being dissatisfied with the decision of the Taxing Master because the appropriate mode is a review application.

3. Consequently, the order staying the sale of the seized goods was wrong since the application was anchored on an appeal to a judge in chambers.

Case referred to:

1. Szeftel v Szeftel (1963-1964) Z and N.R.L. 9

Legislation referred to:

1. High Court Act, cap 27 Orders 40/3; 40/4/1; 40/5/1 and 40/6.

For the appellant: No appearance  
respondent: Present in person

CHIBOMBA, J.S.: delivered the judgment of the Court. The appellant appeals against the Ruling of the High Court at Lusaka, in which the learned judge granted a stay of the sale of the respondent's goods that were seized by the Sherriff of Zambia, pending the disposal of the appeal by the High Court.

Three grounds of appeal have been filed and these are that:

“1. The Court below erred in law by ignoring the provisions relating to taxation of costs under Order 40 of the High Court Rules, chapter 27 of the laws of Zambia. The respondent having been dissatisfied with the decision of the Taxing Master ought to have filed an application to review before a judge of the High Court as provided by Order 40\5 of the High Court Rules instead of filing an appeal;

2. The Court below erred by failing to find that the respondent's purported appeal was improperly before the Court in consequence of which it ought not to have entertained any collateral interlocutory application anchored upon an application that was wrongly before it. Therefore, the entertainment of the stay of execution pending the purported appeal from the learned Deputy Registrar was erroneous; and

3. The Court below erred in law in condemning the plaintiff in costs as there was no basis upon which to do so.”

The appellant did not attend the hearing. However, heads of arguments were filed in support of the three grounds of appeal filed.

On the first ground, it was contended that Order 40 of the High Court Rules gives a party who is aggrieved by the decision of a Taxing Master two options of either applying for review before the Taxing Master under Order 40/3/1, or if still dissatisfied with the review by the Taxing Master, applying for review to a judge in Chambers. Therefore, that such party should not appeal against such decision to the High Court.

Order 40/3/1 of the High Court Rules provides that:-

“3.(1) Any party to any taxation proceedings who is dissatisfied with the allowance or disallowance in whole or in part of any item by a taxing officer, or which the amount allowed by a taxing officer in respect of any item, May, apply to the taxing officer to review his decision in respect of that item.”

It was contended that the case of *Szeftel v Szeftel* (1), fortifies this position as it illustrates the procedure to be followed by a party who is dissatisfied with the decision of the Taxing Master.

It was argued that the respondent's application to set aside the Certificate of Taxation, which the Taxing Master refused to grant, amounted to a review as envisaged by Order 40/3/1 of the High Court Rules. And that the respondent should have applied for review before the High Court under Order 40/5, instead of appealing, and that the Court below, therefore, fell into grave error by ignoring the provisions of Order 40, and that on this ground alone, this appeal should be allowed.

Order 40/5/1 provides that:-

“5. (1) Any party who is dissatisfied with the decision of a Taxing Master to allow or disallow any item in whole or in part on review under the two last foregoing rules, or with the amount allowed in

respect of any item by a Taxing Master on any such review, May, apply to a judge for an order to review the taxation as to that item, or a part of an item.”

In support of the second ground of appeal, it was submitted that in view of the above, the respondent's appeal to a judge in chambers was improperly before the Court, and that as such, the learned judge should not have entertained the application for stay of execution as it was anchored on a wrong application. And that the application for stay was not only flawed, but was also erroneous, and without jurisdiction.

On the third ground of appeal, it was contended that although costs are in the discretion of the Court, the discretion must be exercised judiciously and for reasonable grounds. That, however, in the current case, there was no basis for awarding the costs to the respondent as the appellant was not guilty of any misconduct.

Order 40/6 provides that:-

“6. The cost of every suit or matter and of each particular proceeding therein shall be in the discretion of the Court, or a judge; and the Court or a judge shall have full power to award and apportion costs, in any manner it or he May, deem just, and, in the absence of any express direction by the Court or a judge, costs shall abide the event of the suit or proceeding.”

The respondent did not file any heads of arguments. She however made oral submissions. She submitted, inter alia that in awarding costs to the respondent, the Court looked at the circumstances upon which it awarded the costs. These circumstances were that the appellant had proceeded with the taxation of costs in the respondent's absence as she was before the Supreme Court, and that pursuant to that taxation, the respondent's goods were seized. However, that the goods were later released and that the only issue, therefore, is the issue of costs which the Court below awarded to the respondent.

We have seriously considered this appeal together with the Ruling by the learned judge in the Court below. We have also considered the heads of arguments filed on behalf of the appellant, and the oral submissions by the respondent. The major question raised in this appeal is whether it is proper for a party who is dissatisfied with the decision of the Taxing Master to appeal to a High Court judge in chambers against such taxation. In resolving this appeal, we intend to consider grounds 1 and 2 together as the issues raised therein are more or less interrelated.

The appellant has argued that it was not proper for the respondent to appeal to a judge in chambers against the decision of the Taxing Master as the proper procedure was to apply before the same Taxing Master for review. And that failing that review, then the respondent should have applied for review to a High Court judge in chambers as provided under Order 40 of the High Court Rules. And that consequently, the learned judge had no jurisdiction to entertain the application for stay which was anchored on a wrong application.

We have considered the above arguments. We entirely agree with the appellant's submission that in terms of Order 40/3, 40/4/1, and 40/5/1 of the High Court Rules, a party who is dissatisfied with the decision of the Taxing Master, must apply to the same Taxing Master for review and failing that

review, such party must apply to a High Court judge in chambers for review. Therefore, an appeal was not a proper mode for the respondent to employ upon being dissatisfied with the decision of the Taxing Master as the appropriate mode is a review application. Therefore, as a consequence, the order staying the sale of the seized goods was wrong as the application for a stay was anchored on an appeal to a judge in chambers which was a wrong mode.

We find that grounds one and two have merit and we uphold them. Therefore, the order granted to the respondent staying the sale of the seized goods is discharged forthwith.

With respect to the third ground of appeal, since the costs awarded were premised on the wrong application, the order for costs cannot be sustained as there was no basis for awarding the costs to the respondent. As a consequence, the order for costs which the learned judge awarded to the respondent is set aside. The third ground of appeal also succeeds.

The sum total is that all the three grounds of appeal have succeeded. This appeal is, accordingly, upheld with costs to the appellant to be taxed in default of agreement.

Appeal allowed.