

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE**
(Civil Jurisdiction)

**SCZ JUDGMENT NO. 56 OF 2014
APPEAL NO. 72/2014
SCZ/8/49/2014**

BETWEEN:

ZAMBIA REVENUE AUTHORITY

APPELLANT

AND

ARMCOR SECURITY LIMITED

RESPONDENT

CORAM: Chibomba, Hamaundu and Kaoma JJS.
On 13th August, 2014 and 30th December, 2014.

For the Appellant: Mrs. D. B. Goramota and Mrs. N.K. Katonga, in house Counsel, Zambia Revenue Authority.

For the Respondent: Mr. M.M. Mundashi, S.C., and Mr. M. Chiteba both of Mulenga Mundashi and Kasonde Legal Practitioners.

R U L I N G

Chibomba, JS, delivered the Ruling of the Court.

Cases Referred to:-

1. **Zambia Revenue Authority vs T and G Transport (2007) ZR 13**
2. **Setrec Steel and Wood Processing Limited and 2 others vs Zanaco Bank Appeal No. 39/2007**
3. **Fresh View Cinemas Limited vs Manda Hill Centre Management Limited SCZ/8/215/2013**

Legislation referred to:-

1. **The Supreme Court Act, Chapter 25 of the Laws of Zambia.**
2. **The Supreme Court (Amendment) Rules, 2012, Statutory Instrument No. 26 of 2012.**

When the Appeal in this matter was called up for hearing, the learned Counsel for the Respondent, Mr. Chiteba, informed the Court that the Respondent had filed a Notice to Raise Preliminary Issue which the Respondent wished the Court to determine before hearing the Appeal. This Ruling therefore, relates to the preliminary issue raised by the Respondent.

The Notice to Raise Preliminary Issue was filed pursuant to Rule 19 (1) and (2) of **the Supreme Court Rules (SCR), Chapter 25 of the Laws of Zambia**. Counsel for the Respondent, relied on the List of Authorities and Skeleton Arguments filed in support of the Notice to Raise Preliminary Issues which they augmented with oral submissions.

In the Skeleton Arguments, Counsel began by reciting Rules 49 (5) and 12 (1) and (2) and 48 (1) of **the SCR**. It was argued that the foregoing Rules provide that where time has lapsed, an application for extension of time must be made to a single Judge of this Court. That the Record will show that the Appeal in this matter was not filed in compliance with Rule 49 (5) and that the Appellant did not seek leave of this Court to file the notice of appeal out of time. It was submitted that in the absence of leave to appeal out of time granted by this Court, the

(2161)

Appeal in this matter is incompetent and hence, this Court does not have jurisdiction to entertain it.

In support of the above argument, the case of **Zambia Revenue Authority vs T and G Transport**¹ was cited in which we held that the requirement for leave goes to the jurisdiction of the Court and that the jurisdiction cannot be conferred by the express consent of the parties.

It was thus contended, after the expiration of the fourteen days period prescribed under Order 49(5) of **the SCR**, the Appellant ought to have obtained leave before filing its notice of appeal in order for it to have its Appeal entertained by this Court. However, that this was not done and that to this extent, this Court does not have jurisdiction to hear this Appeal.

It was further contended that although the Respondent is aware that the Appellant was granted leave to appeal by the High Court, such leave was subject to Order 49 (5) of **the SCR** which requires that an appeal should be filed within fourteen days. That this was not done thereby causing the leave to appeal granted by the High Court to lapse. We were accordingly, urged not to entertain this Appeal on the authority of the above cited case and to dismiss the Appeal with costs.

In his oral submissions, Mr. Chiteba more or less repeated the arguments in the Skeleton Arguments. It is not our intention to repeat

(2162)

these, suffice to add just one aspect of his argument whereunder, he went slightly further on the Rules of this Court and argued that the Rules of Court are broadly categorized in two sets - those that go to the jurisdiction of the Court and are therefore, deemed as fundamental and the second category of rules, that are regulatory. Counsel argued that in the current case, the Rule that was breached is a fundamental Rule which goes to the jurisdiction of this Court. Therefore, that in the absence of leave to appeal out of time, the Appeal was incompetent and should be dismissed.

On the other hand, in opposing the Preliminary Issue raised, the learned Counsel for the Appellant, Mrs. Goramota, relied on the arguments filed in Opposition to the Notice to Raise a Preliminary Issue. She also augmented the Heads of Argument with oral submissions. Counsel began the submissions by giving a brief background of this matter as follows:-

“Following the Judgment of the High court dated 30th January, 2014, wherein the Court granted the Appellant leave to appeal; the appellant filed into this Honourable court its Notice of Appeal and Memorandum of Appeal on 25th February, 2014 and served these documents on the Respondent on 26th February, 2014.”(Underlining ours for emphasis)

It was contended that the Respondent has erroneously relied on Rule 49 (5) of **the SCR** in support of this Application to have the Appeal dismissed for “being filed and served out of time and without the leave of

the Court". That however, the Rule that provides for filing of a notice of appeal is Rule 49 (2) of **the SCR**.

Counsel contended that Rule 49 (5) of **the SCR** relates to service of a notice of appeal on the other parties. And that the Rule does not say "within a period of fourteen days of the judgment" as it would be impracticable to file a notice of appeal within thirty days of the Judgment and at the same time, serve it within fourteen days of the Judgment. It was argued that this was not the intention of the law. Further, that in **Setrec Steel and Wood Processing Limited and 2 others vs Zanaco Bank**², this Court held that an amendment cannot depart from the principal provision. It was therefore, submitted that Rule 49 (2) specifically refers to Rule 49 (5) as a provision which deals with service and that the intention of the amendment to Rule 49 (5) was clearly to reduce the time for service from thirty days to fourteen days. And that if the intention was as the Respondent understood it to be, Rule 49 (2) would have been amended.

Counsel also referred to Rule 50 (1) which provides as follows:-

- "(1) Leave to appeal to the Court may be granted or refused by the High Court without formal application at the time when judgment is given, and in such event the judgment shall record that leave has been granted or refused accordingly. If leave is granted, the appellant shall proceed to give notice of appeal in accordance with the provision of Rule 49."**

It was, therefore, submitted that the Appellant filed its notice of appeal within the prescribed time under rule 49 (2) and that is within thirty days of delivery of the Judgment appealed against. And that the High Court granted such leave in the Judgment appealed against. Therefore, the Appellant truly complied with the provision of Rule 49. And that the intention of Rule 49 is clear that a notice of appeal must be filed within thirty days of the Judgment and thereafter, it must be served on all affected parties within a period of fourteen days.

It was further submitted that the submission that the Appellant ought to have sought the leave of the Court before filing the Notice of Appeal is highly erroneous and misleading. And that the decision in the case of Fresh View Cinemas Limited vs Manda Hill Centre Management Limited³ applies to the current case. In that case, the learned single Judge of this Court held as follows: -

Rule 49 (2) provides for filing to be done within thirty days from the date of judgment/ruling. However, Rule 49 (5) provides that service on all affected parties should be done within fourteen days from the date of filing into Court. There being no amendment to Rule 49 (2) and there being no derogation clause to the said rule, I agree with Appellant Counsel's argument that Rule 49 (2) being the principal provision is still applicable. In my view, there is no need to go into rules of interpretation as the Rules are clear. I therefore, find that the argument by the Respondent is misplaced and a misinterpretation of Rule 49."

In augmenting the written Submissions, Mrs. Goramota more or less repeated the contents of the written submissions. We do not therefore, find it necessary to repeat these, suffice to say that we have read them.

In reply, Mr. Mundashi, S.C., submitted that this Court will observe that before **the Supreme Court (Amendment) Rules, 2012**, Rule 49 (5) was consistent with Rule 49 (2) which provides for filing of the notice of appeal within thirty days while Rule 49 (5) provided for service of a notice of appeal also within thirty days. However, that, there is a point of departure under **the Supreme Court (Amendment) Rules, 2012** which, State Counsel submitted, was intended to abridge the time from thirty days to fourteen days for service of a notice of appeal. That before the amendment, Rule 49 (5) specifically related to service whilst Rule 49 (2) related to filing. That however, after **the Supreme Court (Amendment) Rules, 2012**, Rule 49 (5) extends and brings in the memorandum of appeal which is now required to be filed and served together with a notice of appeal.

State Counsel Mundashi, however, conceded that Counsel for the Appellant had a point as there is a grey area between the provisions of the two sub-rules which require aligning and synchronizing. Hence, it

(2166)

was critical for this Court to give guidance, though the intention was clearly to abridge the time of service to fourteen days from thirty days.

State Counsel submitted that it appears Rule 49 (2) does not stick together with the new Rule 49 (5).

We have seriously considered this application together with the Skeleton Arguments filed by the parties and the authorities cited. We have also considered the oral submissions by the learned Counsel for the parties. It is our considered view that the question raised in the Notice to Raise a Preliminary Issue is whether the Appeal before us is incompetent on ground that it was “filed out of time and without leave of this Court”.

In support of the Respondent’s argument that the notice of appeal and the memorandum of appeal were filed out of time, Rule 49 (5) of the **SCR** was cited, which provides that a notice of appeal together with the memorandum of appeal shall be lodged and served within fourteen days on all affected parties. It was contended that failure to lodge the above documents within the stipulated time requires leave of Court under Rule 12 of the **SCR**. That however, in the current case, no leave was sought or obtained before the Appellant filed the notice of appeal. Hence, this

(2167)

Appeal is incompetent and as such, this Court has no jurisdiction to hear the Appeal in this matter.

In response, the Appellant's position was that the Appeal was competent as both the notice of appeal and the memorandum of appeal were filed and served on the Respondent within the time stipulated by the Rules of this Court. And that Rule 49 (2) of **the SCR** clearly states that a notice of appeal shall be filed within thirty days of the judgment appealed against while Rule 49 (5) relied upon by the Respondent to support their claim that the Appeal is incompetent, provides for service of the notice of appeal within fourteen days together with the memorandum of appeal. That the Appellant in this case, served the notice of appeal and the memorandum of appeal a day after it was filed into Court. This, therefore, was within the fourteen days period prescribed by Rule 49 (5).

We have considered the above arguments. For ease of reference, we hereunder recast Rule 49 (2) and (5) of **the SCR** as follows: -

- “(2) The notice of appeal shall be intituled in the proceedings from which it is intended to appeal and shall be filed therewith in duplicate with the Registrar of the High Court, and shall be so filed within thirty days after the judgment complained of. The Registrar of the High Court shall forward one copy of the notice**

(2168)

to the Master. One copy of the notice of appeal for each party directly affected by the appeal shall at the same time be submitted by the Registrar of the High Court to the Master for sealing and return to the Appellant or his practitioner for service in accordance with sub-rule (5).

- (5) A notice of appeal together with the memorandum of appeal shall be lodged and served, within a period of fourteen days, on all parties directly affected by the appeal or on their practitioner." (underlining ours for emphasis).

At a glance, it is clear that there is an inconsistency between sub-rules (2) and (5) of Rule 49 of the SCR with regard to the time stipulated for filing of a notice of appeal. Before the amendment of 2012, sub-rule (5) was restricted to service of the notice of appeal which had to be done within thirty days. Whereas sub-rule (2) has remained unchanged and requires the notice of appeal to be filed within thirty days of delivery of the judgment complained of, sub-rule (5) as amended in 2012 now requires the notice of appeal together with the memorandum of appeal to be lodged and served on all affected parties within fourteen days. To this extent, it is conceded that the inconsistency between the two sub-rules has created an absurdity as under sub-rule (2), the time stipulated for filing of a notice of appeal still stands at thirty days while under the amended sub-rule (5), fourteen days is stipulated for lodging and service of a notice of appeal and the memorandum of appeal. Certainly, the draftsman of the **Supreme Court (Amendment) Rules, 2012**, could not

have intended this absurdity. This therefore, calls for our interpretation of what was intended.

To ably decipher the intention of **the Supreme Court (Amendment) Rules, 2012**, in so far as they relate to filing and service of a notice of appeal and the memorandum of appeal, it is important to see how the provisions of sub-rules (2) and (5) were before the amendment in question. Previously, an appellant only filed a notice of appeal which itself did not contain the grounds of appeal. An appellant, was thereafter required to file the record of appeal which contained the memorandum of appeal and grounds of appeal.

Obviously, from that setup, it meant that a respondent who had been served with a notice of appeal would not know the grounds of appeal or the points of the appellant's dissatisfaction with the judgment complained of until after the record of appeal is filed and served on him/her. Our considered view is that the amendment to Rule 49 (5) was therefore, intended to address that situation such that sub-rule (5) now stipulates that at the time the appellant files a notice of appeal, he/she is required to also lodge the memorandum of appeal which contains the grounds of appeal/dissatisfaction with the judgment complained of. This means that as soon as a notice of appeal together with the

memorandum of appeal are served on the affected party, that party gets to know the grounds of dissatisfaction. This is meant to enable the affected party to start preparing his/her own case in response instead of waiting until the record of appeal is served on him/her.

Coming back to the matter at hand, the Appellant, having filed the notice of appeal and memorandum of appeal on 25th February, 2014 and having served the two documents on 26th February, 2014, the Appeal in this matter cannot be said to be incompetently before us as both the filing and the service of the notice of appeal and the memorandum of appeal were done within the time stipulated in sub-rules (2) and (5) of Rule 49 of **the SCR** as amended. Therefore, this Court has jurisdiction to hear and determine this Appeal.

To sum up, the amendment to sub-rule (5) did not only abridge the time for service of a notice of appeal but also brought in the requirement to file and serve the notice of appeal together with the memorandum of appeal.

In the circumstances of this case, it is only just and fair to order each party to bear its own costs as the issue raised is of common interest and concern not only to the parties in this matter, but to all other litigants and lawyers before this Court.

(2171)

Additionally, a copy of this Ruling will be referred to the Rules Committee for alignment of the two sub-rules.

The Appeal will be heard during the March, 2015 Session at Ndola.

.....
H. C. Chibomba
SUPREME COURT JUDGE

.....
E. M. Hamaundu
SUPREME COURT JUDGE

.....
R. M. C. Kaoma
SUPREME COURT JUDGE