Selected Judgment No.2 of 2019
(P. 36)

IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 230/2013
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

IN THE MATTER OF	:	Order 53 of the Rules of the Supreme Court 1965 (White Book) of the Supreme Court Practice (1999) edition Volume 1 and Volume 2.
IN THE MATTER OF	:	An application for judicial review.
IN THE MATTER OF	:	The Rules of Natural Justice.
IN THE MATTER OF	:	A Decision of His Excellency The President of the Republic of Zambia made on the 30th day of May, 2012.
IN THE MATTER OF	:	The Constitution of Zambia, The Constitution of Zambia Act, Chapter 1, and volume 1 of the laws of Zambia.
IN THE MATTER OF	:	Article 11 of the Constitution of Zambia, The Constitution of Zambia Act, Chapter 1, and Volume 1 of The Laws of Zambia.
IN THE MATTER OF	:	Articles 18(2), 18(9) and 18(10) of the Constitution of Zambia, The Constitution of Zambia Act, Chapter 1 and Volume 1 of the Laws of Zambia, as read with the provisions of the Judicial (Code of Conduct) Act, No. 13 of 1999 as Amended.
IN THE MATTER OF	:	Articles 91 and 92 of the Constitution

of Zambia, The Constitution of Zambia Act, Chapter 1 and Volume 1 of the Laws of Zambia.

IN THE MATTER OF : The Official Oaths Act, Chapter 5 and Volume 2 of the Laws of Zambia.

IN THE MATTER OF : The Inquiries Act, Chapter 41 of the Laws of Zambia.

AND

IN THE MATTER OF : Section 12 of the State Proceedings Act, Chapter 71, and Volume 6 of the Laws of Zambia.

BETWEEN:

ATTORNEY GENERAL **APPELLANT**

AND

NIGEL MUTUNA **1ST RESPONDENT**
CHARLES KAJIMANGA **2ND RESPONDENT**

Coram: Phiri, Wanki and Hamaundu, JJS
On 18th November, 2014 and 28th February, 2019

For the appellant : Mr F. Imasiku & Mr M. Nzala, Attorney Generals Chambers
For the respondent : Mr A. Shonga, S.C., Messrs Shamwana & Co, Mr E. Silwamba, S.C, Mr J. Jalasi and Mr M. Linyama, Messrs Eric Silwamba, Jalasi & Linyama Advocates

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JUDGMENT

Hamaundu, JS delivered the Judgment of the court.

Cases referred to:

1. **Dempster v Dempster, (1990) The Times, 16 November; The Independent, 9 November, CA.**
2. **Sofroniou v Szigetti [1991] FCR, 322**
3. **Gordon v Gordon (1946) 62 TLR, 217**
4. **Mc Ilraith v Grady (1968), QB 468, 477,**
5. **Chilten District Council v Keane (1985) 2 All ER 118**
6. **Attorney General for Tuvalu v Philatelic Distribution Corporation Limited (1990) 1 WLR 926.**
7. **Buchman v Attorney General (1993/1994) ZR 131**
8. **Mususu Kalenga Building Ltd & Another v Richman's Money Lenders Enterprises (1999) ZR 27.**

Legislation referred to:

The High Court Act, Chapter 27 of the **Laws of Zambia.**

Rules of Practice referred to:

1. **The Rules of the Supreme Court (White Book), O.45. r.7**
2. **The Supreme Court Rules, Chapter 25 of the Laws of Zambia, Rule 58**

When we heard this appeal, we sat with Mr Justice Wanki. Mr Justice Wanki has since retired. This judgment is, therefore, by majority.

This appeal is on the question as to whether a party who has not endorsed a penal notice on a court's order can have recourse to an order of committal as a way of enforcement. We shall give a brief background against which this question arose.

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In May, 2013, a tribunal that had been set up by the President of Zambia to probe the conduct of the respondents set about to commence the probe. Not being happy with the manner in which the tribunal intended to conduct the probe, the respondents, on 20th May, 2013, issued summons for leave to apply for judicial review. The court granted the application by an order made on 5th June, 2013. The court also made an order in these terms:

> **"IT IS FURTHER ORDERED THAT the proceedings of the Tribunal BE AND ARE HEREBY stayed pending the determination of the matter or until further order"**

This is the order that gave rise to the question. There was no dispute that the said order was served on the tribunal and, therefore, came to the attention of the tribunal's chairperson, secretary and other members. It was also not in dispute that the copy of the order that was served on the tribunal did not have, prominently displayed on the front thereof, a warning to the chairperson, secretary and other members that disobedience to that order would be a contempt of court punishable by imprisonment, as required under **Order 45 Rule 7** *paragraph (4)* of the **Rules** of the **Supreme Court** *(White*

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Book). There was no dispute that, despite the court's order being served, the tribunal continued with its business; and even went as far as receiving testimony from some witnesses. Consequently, on 14th August, 2013, the respondents applied for leave to commence committal proceedings against Justice Lovemore Chikopa, being the chairperson of the tribunal and Chipili Katunasa-Magayane, being the secretary of the tribunal. The appellant mounted a preliminary issue against the intended committal proceedings, seeking the dismissal of the respondents' application on the ground that the order which was sought to be enforced by way of committal proceedings did not contain a penal notice; and was, therefore, not enforceable.

The court below applied **Order 45, rule 7 (6),** as interpreted by cases such as **Dempster v Dempster**[1], and the Australian case of **Sofroniou v Szigetti**[2], in order to exercise its discretion to dispense with the failure to incorporate the penal notice in the order. The court then warned itself of the need to exercise its discretion judiciously

and with caution. Proceeding in that fashion, the court took into account the following points:

(i) that to dispense with the requirement for the penal notice to be endorsed on the order, the court must be satisfied that leaving the contempt unpunished would give rise to greater harm than dispensing with the penal notice;

(ii) that it was of extreme importance that the administration of justice was not allowed to suffer a fatal blow in the eyes of the public in order to give effect to the procedural requirements of the law;

(iii) that, if a contempt of court had been committed, the duty to uphold the fair and proper administration of justice would certainly outweigh the need to preserve an individual's right to be warned of the inevitable consequences of their disobedience of a court order;

(iv) that, if the court did not exercise the discretion to dispense with the requirement for a penal notice, the respondents would be subjected to the tribunal's processes in flagrant disregard to their legal rights; and contrary to the rules of

natural justice, with the ultimate result that the respondents' applications before the court, and the outcomes thereof, would be rendered academic, and;

(v) that, in the end, the collateral damage that would be caused was that the public would lose confidence in the justice delivery system; which would, ultimately, have negative economic and social effects on the country.

For the above reasons, the court below dismissed the appellant's preliminary application.

The appellant appealed and filed three grounds of appeal. The grounds read as follows:

> **"(1) The learned trial judge in the court below erred in law and in fact when he found that there was no mandatory requirement for the endorsement on the order of a formal penal notice where a party seeks to commence committal proceedings in order to enforce an alleged breach of a court order.**
>
> **(2) The learned trial judge in the court below erred in law and in fact when he decided to exercise his judicial discretion to dispense with the requirements of the**

endorsement of the penal notice on the order retrospectively.

(3) The learned trial judge in the court below erred in law and in fact when he delved into the substantive issues regarding contempt, which issues were clearly not for determination before him at that stage.

The argument on behalf of the appellant in this court was the same as it was in the court below. The argument was that the provisions of **Order 45 rule 7** *paragraph (4)* which require that a penal notice must be prominently displayed on the copy of the order which is to be served on the other party are mandatory and must be strictly complied with. It was the appellant's argument that, where a penal notice is not endorsed on the order, then that order cannot be enforced by way of committal to prison. According to the appellant, the rationale behind the provisions is simply that the court should be satisfied that the alleged contemnor was at all material times aware of not just the precise terms of the order but also of the consequences of disobeying such order. We were referred to some cases which, according to the appellant, underscored the point that

the appellant is making in this argument. The cases were **Gordon v Gordon**[3], **M^C Ilraith v Grady**[4], **Chilten District Council v Keane**[5] and **Attorney General for Tuvalu v Philatelic Distribution Corporation Limited**[6].

Whilst on the same ground of appeal, the appellant advanced alternative arguments in which the appellant was pointing out that the court below exercised its discretion wrongly. The respondents raised an objection to these arguments, pointing out that the said arguments were not in tandem with the first ground of appeal; or indeed any other ground in the memorandum of appeal, and that the said arguments should have been the subject of a separate ground of appeal, altogether. We were referred to **Rule 58** of the **Supreme Court Rules Chapter 25** of the **Laws of Zambia** and to some cases in which, according to the respondents, we have declined to entertain arguments which were not covered by any ground in the memorandum of appeal.

We wish to deal with this objection right away. Indeed, listening to the alternative arguments, it is clear that they are not in tandem with the first ground of appeal under which they have been advanced.

Furthermore, they are not in tandem with any other ground in the memorandum of appeal. The arguments clearly show that they should have been argued under a distinct ground that faults the court below with regard to the reasons that it gave for exercising its discretion. Clearly, that ground does not appear in the memorandum of appeal, and no attempt was made by the appellant to amend the memorandum of appeal so as to include it.

Rule 58 of the **Supreme Court Rules** provides:

> **"(2) The memorandum of appeal shall be substantially in Form CIV/3 of the Third Schedule and 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.**
>
> **(3) The appellant shall not thereafter without the leave of the court put forward any grounds of objection other than those set out in the memorandum of appeal, but the court in deciding the appeal shall not be confined to the grounds put forward by the appellant.**
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> **Provided that the court shall not allow an appeal on any ground not stated in the memorandum of appeal unless the respondent, including any person who in relation to such ground should**

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have been made a respondent, has had sufficient opportunity of contesting the appeal on that ground."

What the *proviso* to *sub-rule (3)* means is that, while this court may decide an appeal even on grounds that have not been put forward by an appellant, if the court is of the view that the appeal turns on any of such other grounds, it will afford the respondent sufficient opportunity to contest the appeal on such ground. The *proviso*, therefore, does not mean that an appellant is at liberty to introduce grounds that are not in the memorandum of appeal as long as the respondent has opportunity to respond to them. An appellant's position is as expressed in *sub-rule (3)*, which is that he will not, without leave of the court, be permitted to put forward grounds of objection which are not set out in the memorandum of appeal.

In this case, the alternative arguments constitute a ground of appeal that is not in the memorandum of appeal; the appellant sought no leave of the court to include that ground; and, we do not think that this appeal turns on that ground. For these reasons, the

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appellant's alternative arguments in the first ground of appeal are incompetent. We shall therefore not consider them.

Coming back to the first ground of appeal, the respondents counter-argued that, from the way the first ground of appeal is couched, it is clear that the appellant misunderstood the issue that was before the court below. According to the respondents, the question was whether the court below had any power or discretion to dispense with the penal notice, and not whether or not the order sought to be enforced should contain a penal notice. The respondents submitted that the commentary note by the authors of the *White Book* clearly states that the court has a discretion to dispense with the failure to incorporate a penal notice in a judgment or order requiring a person to abstain from doing an act. The respondents, lastly, argued that the cases which the appellant has cited as underscoring its argument do not, in fact, aid the appellant at all because in none of them was the court called upon to exercise its discretion to dispense with the penal notice.

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We begin by saying that we have read the cases of **Gordon v Gordon**[3], **M^c Ilraith v Grady**[4], **Chiltern District Council v Keane**[5] and **Attorney General for Tuvalu v Philatelic Distribution Corporation Limited**[6]. We agree with the submission by the respondents that in none of these cases did the issue ever arise as to whether or not the court had a discretion to dispense with the endorsement of a penal notice on the order.

In its arguments, the appellant totally ignores the last paragraph of **0.45/7/7** which states:

> **"The Court has a discretion under o.45, r.7(6) to dispense with the failure to incorporate a penal notice in a judgment or order requiring a person to abstain from doing an act but has no such discretion to dispense with the penal notice where the judgment or order requires the person to do an act** *(Dempster v Dempster (1990) The Independent, November 9, CA)*."

The paragraph is a commentary note by the editors of the *White Book*. Obviously, the note was inserted therein because the editors noted that the practice of the courts in England was to exercise the discretion if the order was one which required a person to abstain

from doing an act. In our view, therefore, the arguments by the appellant ignore the rule that courts in Zambia follow, namely that English decisions and those of courts in the Commonwealth are of great persuasive value. Most importantly, though, is the fact that the appellant's arguments also ignore the provisions of **Section 10** of the **High Court Act, Chapter 27** of the **Laws of Zambia**. **Section 10(1)** states:

> **"The jurisdiction vested in the court shall, as regards practice and procedure, be exercised in the manner provided by this Act the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or any other written law, or by such rules, orders or directions of the Court as may be made under this Act, the Criminal Procedure Code, the Matrimonial causes Act, 2007, or such written law, and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of England and subject to subsection 2, the law and practice applicable in England in the High Court of Justice up to 31st December, 1999"**

The commentary note reflects the practice applicable in England, at least prior to 31st December, 1999. Therefore, the court below was not wrong when it decided to adopt that practice and

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exercise its discretion. For these reasons, we find no merit in the first ground of appeal.

The second ground states:

> **"the learned trial judge in the court below erred in law and in fact when he decided to exercise his judicial discretion to dispense with the requirement of the endorsement of penal notice on the order retrospectively"**

The respondents raised objection to this ground, citing the reason that it raises an issue that was not raised in the court below. In support of that objection, the respondents referred to our decisions in **Buchman v Attorney General**[7] and **Mususu Kalenga Building Ltd & Another v Richman's Money Lenders Enterprises**[8].

Going through the arguments that the parties advanced before the court below, we cannot see any argument by the appellant urging the court below not to exercise the discretion on the ground that the opportunity had already passed. Therefore, we agree with the respondents that that issue is being raised for the first time before us. We held in **Buchman v The Attorney General** that a matter which was not raised in a lower court cannot be raised in a higher

court as a ground of appeal. For this reason, we dismiss the second ground of appeal.

The third ground states:

> **"The learned trial judge in the court below erred in law and in fact when he delved into the substantive issues regarding contempt, which issues were clearly not for determination before him at that stage"**

In its arguments, the appellant went on to fault the court below for the statements it made when giving reasons for exercising its discretion. Clearly, the appellant, in this ground, raises issues which would only be relevant if they were argued under a ground that faults the court below for the manner in which it exercised its discretion. We have already found that no such ground is contained in the memorandum of appeal. Otherwise, the ground as it is has no relevance to the issue that was in this appeal; that is whether the court below had discretion to dispense with the endorsement of a penal notice on the order. We dismiss the third ground of appeal as well.

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In all, the appeal has no merit. We dismiss it, with costs to the respondents.

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G. S. Phiri

SUPREME COURT JUDGE

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E. M. Hamaundu

SUPREME COURT JUDGE