

BARCLAYS BANK PLC (APPELLANT)  
V  
JEREMIAH NJOVU AND 41 OTHERS (RESPONDENTS)

SCZ/09/21/2019

SUPREME COURT

Mambilima, CJ, Malila and Kaoma, JJS

1 December 2020 and 4 December 2020

**Flynote**

*Civil Procedure – Appeals – Absence of leave to appeal vitiates an appellate court’s jurisdiction to determine an appeal*

*Civil Procedure – Appeals – Appeal dismissed on a technicality – Whether such an appeal can be restored*

**Headnote**

This matter was first commenced in the Industrial Relations Court (IRC) which delivered its judgment on 23 August 2011. The Appellant appealed the judgment of the IRC to the Supreme Court. On 28 July 2015, the appeal came up for hearing. It occurred that the Appellant had on 20 July 2012 filed the record of appeal without the heads of argument in conformity with the amended Supreme Court Rules. The Court allowed an application by the Appellant to withdraw the record of appeal so as to comply with Rule 58 (5) of the Supreme Court Rules. Without seeking leave to properly file the record out of time, the Appellant refiled its record and heads of argument out of time.

When the appeal came up before the Court on 15 May 2018, a preliminary objection was raised by the Respondent as to whether the filing of the record of appeal without leave was legally proper. In a ruling delivered on 21 June 2015, the Court found that the Appellant having been out of time to refile the record of appeal accompanied by heads of argument, should have applied for leave to file out of time. The appeal was accordingly dismissed. The appeal having been dismissed on a technicality, the Appellant then decided to relaunch it, beginning with an application for leave to appeal out of time in the court that delivered the judgment. In the meantime, the IRC, which had delivered the judgment at first instance had become a division of the High Court. Further, the Court of Appeal had been established as an intermediate court between the High Court and the

Supreme Court. The Appellant thus went to seek leave to appeal out of time before the High Court which application was rejected. The Appellant then renewed the application before a single judge of the Court of Appeal and was not successful, prompting the Appellant to approach the full Court of Appeal. The Court of Appeal equally rejected the application on the ground that the matter having been dismissed by the Supreme Court, the Court of Appeal lacked jurisdiction.

The Appellant then approached a single judge of the Supreme Court for leave to appeal and that application was declined. Aggrieved by this ruling, the Appellant four months later filed an ex parte summons for an order for extension of time within which to file a motion against the decision of the single judge. On 8 October 2020, the single judge again rejected that application. The Appellant then took out a motion to persuade the full court to vary or discharge the single judge's ruling of 8 October 2020. The Respondents then filed a notice for the determination of questions of law. The points of law for the determination of the Court were:

- i. whether the notice of motion filed by the Appellant seeking to discharge, vary or set aside the ruling of the single judge was competently before the Court; and
- ii. whether the said notice of motion was properly before the Court in view of the decision of the full Court dismissing the Appellant's appeal.

### **Held**

1. The absence of leave to appeal goes to the very core of the appellate court to deal with the appeal. Put nakedly, where leave has not been granted, the appellate court has no jurisdiction to entertain the appeal.
2. The Court reaffirmed its decision in the case of *Dar Farms Transport Limited v Moses Nundwe Appeal No 46 of 2014* wherein it was held that an appeal dismissed on a technicality cannot see the light of day again. Such an appeal cannot be restored to the active cause list. The Court becomes functus officio after the appeal is dismissed.
3. The appeal in this matter was dismissed on account of failure by the Appellant to obtain leave. A litigant who suffers any prejudice arising from the incompetence or negligence of his/her counsel in having an appeal dismissed, should have recourse to his/her legal counsel (*Saviour Chibiya v Crystal Gardens Lodges and Restaurant Ltd Appeal No 97 of 2013* and *Philip Mutantika v Kenneth Chipunga (2014) Vol 1 ZR 352* followed).
4. Preliminary issues raised by the Respondents are upheld and the motion is dismissed.