

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

APPEAL NO 214/2022

BETWEEN:

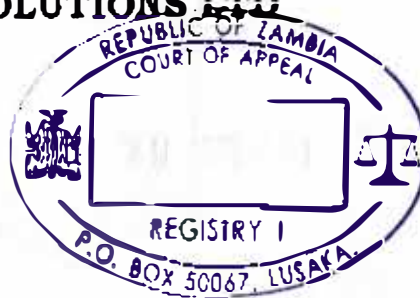
INTELLIGENT MOBILITY SOLUTIONS LTD

APPELLANT

AND

LAMISE TRADING LIMITED

RESPONDENT



CORAM: SIAVWAPA, JP, CHISHIMBA AND BANDA-BOBO, JJA

On 22nd and 29th August 2023

FOR THE APPELLANTS: MR. CHIPILI SALATI WITH MR. MATAA
NALISHUWA BOTH OF MESSRS
MULENGA MUNDASHI LEGAL
PRACTITIONERS

FOR THE RESPONDENT: MR. LINYAMA WITH MR. J. CHILESHE
BOTH OF MESSRS ERIC SILWAMBA,
JALASI AND LINYAMA LEGAL
PRACTITIONERS

J U D G M E N T

SIAVWAPA, J.P. delivered the Judgment of the Court

Cases referred to:

1. *Attorney-General v Kambwili*, SCZ 8/15/2020 [2021]
2. *Safricos Zambia Limited v Barloworld Equipment Zambia Limited and Another* 2021/HPC/0308.

3. *William Roman Buchman v Attorney-General SCZ Judgment No. 14 of 1994*
4. *Mususu Kalenga Building Ltd and Another v Richman's Money Lenders Enterprises (1999) ZR 27*
5. *Sun Country Limited v Kearney and Another Appeal No 7 of 2017 [2017] ZMSC 230*
6. *Robert Simeza, Andrews Motel v Elizabeth Mzyeche (2011) 3 ZR, 290*

Legislation referred to:

1. *The Companies Act No. 10 of 2017*
2. *The High Court Rules, Chapter 27 of the Laws of Zambia*
3. *The Rules of the Supreme Court 1999 edition*
4. *Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia*

1.0 INTRODUCTION

- 1.1 This appeal is against the Ruling of the Honourable Mr. Justice Lameck Mwale dated 24th November 2021.
- 1.2 By the said Ruling, the learned Judge granted an application by the Respondent for an order to convene a meeting of the Appellant to make resolutions pursuant to section 64(i)(b) of the Companies Act No. 10 of 2017.

2.0 BACKGROUND

- 2.1 The Respondent, together with a Company called Kapsh Trafficcom AG, incorporated the Appellant. The Respondent is the minority shareholder with 49% shares while Kapsh Trafficcom holds the majority shares of 51% in the Appellant.
- 2.2 Along the way, the Respondent observed that the Appellant was being managed in breach of the law and the shareholders'

agreement. Further to that the Respondent felt that the Appellant was sidelining it in decision making on the affairs of the Appellant.

2.3 The Respondent, through its Managing Director, Walid EL Nahas, wrote letters to the Appellant requesting for a meeting to be convened but the requests were not granted.

2.4 Being frustrated by the Appellant's failure to convene a meeting, the Respondent moved the Court by originating summons on 7th October, 2021. The Summons was filed pursuant to section 64 (i) (b) of the Companies Act No 10 of 2017 as read together with Order XXX rule IX of the High Court Rules and Order 102 rule 2 of the Rules of the Supreme Court 1999 edition.

2.5 The Respondent sought the following reliefs;

1. An order that a meeting of the Respondent Company may be convened, held and conducted in such a manner as the Court considers appropriate and if thought fit for the resolutions set forth in the scheduled hereto:
- ii. Give such ancillary or consequential directions which the Court considers expedients, including a direction that one member shall make resolutions relating to the matters for the meetings which resolutions shall be deemed to be resolutions of the Company.

iii. That costs of this application may be provided for.

2.6 The schedule referred to in paragraph (i) of 2.5 above is set out as follows;

- i. The Respondent Company be allowed to take all steps necessary to protect itself, the interests of its shareholders, directors, creditors and regulators.
- ii. The Respondent Company be allowed to take all or any steps required that it may think necessary such as retaining legal counsel to defend itself in court actions and to assert its legal rights; and
- iii The Respondent Company be allowed to commence action(s) to ensure compliance with the provisions of the Companies Act No. 10 of 2017.

2.7 Walid EL Nahas deposed to the affidavit in support of the originating summons. The affidavit catalogues the genesis of the Respondent's concerns about the manner the Appellant was being run and the several correspondences passing between them.

3.0 IN THE COURT BELOW

3.1 The learned Judge had scheduled to hear the matter on 1st November, 2021. The Court however, adjourned the matter and gave 23rd November, 2021 as the new date of hearing.

3.2 On 23rd November, 2021, the learned Judge expunged the copy of the affidavit in opposition filed on the same date because it was filed contrary to the law. The learned Judge also rejected the Appellant's application to file skeleton arguments in the absence of an affidavit in opposition.

3.3 The learned Judge heard arguments on behalf of the Respondent having held that there was no opposition to the originating summons. He granted all the reliefs sought by the Respondent.

4.0 THE APPEAL

4.1 The Appellant was dissatisfied with the Ruling delivered by the Court below. On 19th July, 2022, it caused to be filed a Notice and Memorandum of Appeal with four grounds of appeal set out as follows;

1. The learned trial Judge erred in law and in fact when he stated that the Appellant had not entered appearance in the action commenced by the Respondent and had not filed any valid documents.
2. The learned trial Judge erred in law and in fact when he held that on account of there being no affidavit in opposition, the Court could not consider the skeleton arguments and oral submissions on the law and as such the Respondent's application was unopposed.

3. The learned trial Judge erred in law and fact when he failed to consider the Appellant's submissions to the effect that the meeting sought by the Responded was ambiguous as it was not clear whether it was a shareholders' meeting or a board meeting of the Appellant that it sought to be convened considering the definition of meeting under the Companies' Act No 10 of 2017 and
4. That the learned trial Judge erred when he failed to consider the time frame regarding the direction within which the Appellant was to file its affidavit in opposition despite the Appellant highlighting to the Court the challenges and impracticality of it being able to file the affidavit within the directed time frame.

5.0 ARGUMENTS IN SUPPORT

- 5.1 In ground one, the Appellant argues that the learned Judge was wrong to have expunged the photocopy affidavit in opposition as the defect was in form and not in substance.
- 5.2 Further that the learned Judge erred by holding that the Respondent's application was unopposed for want of any valid documents in opposition.
- 5.3 In ground two the Appellant argues that it was erroneous for the learned Judge to have refused to consider filed skeleton

arguments and oral submissions on the basis that there was no affidavit in opposition.

5.4 In support of the argument, the Appellant referred us to two decisions one by the Supreme Court and the other by the High Court, namely; *Attorney-General v Kambwili¹* and *Safricas Zambia Limited v Barloworld Equipment Zambia Limited and Another²*. In both cases, the Courts allowed skeleton arguments and oral submissions on points of law even without affidavits in opposition.

5.5 In ground three, the Appellant criticizes the learned Judge for allowing the Respondent's application even if it did not specify the type of meeting the Respondent was asking for. This was said to be contrary to the provisions of section 3 of the Companies Act No. 10 of 2017 which sets out the types of meeting that a Company can hold.

5.6 In ground four, the Appellant laments that the learned Judge failed to give it adequate time within which to file the affidavit in opposition after it had highlighted the practical challenge faced in filling the affidavit within the given time.

6.0 ARGUMENTS IN OPPOSITION

6.1 In opposing ground one, the Respondent also touched on ground four arguing that the Appellant had ample time within

which to file its affidavit in opposition. It further argued that the learned Judge below was on firm ground to expunge the copy of the affidavit and declare the summons unopposed as the Appellant engaged in dilatory conduct.

- 6.2 On the argument that a defective affidavit may be permitted by the Court, the Respondent has submitted that the provision to that effect under Order V rule 13 of the High Rules is discretionary.
- 6.3 With regard to the second ground of appeal, the argument is that in the absence of an appearance, the skeleton arguments could not stand and the Respondent's application stood unopposed.
- 6.4 In ground three, the Respondent rejected the Appellant's argument that the application did not specify the nature of the meeting sought and as such the application fell short of section 64 of the Companies Act No. 10 of 2017.
- 6.5 The Respondent argues that the reliefs sought are clear as well as the affidavit in support of the originating summons both of which speak to a board meeting.
- 6.6 Alternatively, the Respondent has argued that if the pleadings were not clear, the Appellant should have asked for further

and better particulars. Further still, the Respondent has argued that the issue of the pleadings being ambiguous was not raised in the Court below and as such, it was incompetent.

6.7 In support of incompetence of the issue, the Respondent referred us to the cases of *William Roman Buchman v Attorney-General*³ and *Mususu Kalenga Building Ltd and Another v Richman's Money Lenders Enterprises*⁴.

6.8 In responding to ground four, the Respondent argues that the Appellant had one month within which to file its affidavit in opposition but failed.

6.9 The Respondent goes on to state that within the one month it had, the Appellant made some applications to raise preliminary issues and for leave to file affidavit in opposition which it did not do.

6.10 In the view of the Respondent, the Appellant was just buying time to have the winding up petition determined before the Respondent's application could be determined.

6.11 The Respondent prayed that we dismiss the appeal for want of merit with costs.

7.0 OUR ANALYSIS AND DECISION

- 7.1 We propose to consider grounds one and two together because they both speak to the effect that the Respondent failed to enter appearance and file an affidavit in opposition to the originating summons.
- 7.2 It is not in dispute that the Appellant did not file an affidavit in opposition to the originating summons despite applying for and the Court below granting it leave to do so.
- 7.3 The contention is that the Court below ought to have allowed the copy of the affidavit in opposition which was filed on the date of hearing.
- 7.4 The learned Judge below expunged the copy of the affidavit in opposition for none compliance with Order XI rule 22 of the High Court Rules which states as follows;
- "The Parties served with an originating summons shall, save as otherwise provided, before they are heard, enter appearances, and give notice thereof. A party so served may appear at any time before the hearing of the summons. If he appears at any time after the time limited by the summons for appearance he shall not, unless the Court or Judge shall otherwise order be entitled to any further time for any purpose, than if he had appeared according to the summons."*
- 7.5 There is no doubt that the Order cited above makes it mandatory for a party served with an originating summons to enter appearance before the date of hearing unless provided

otherwise. It also seems that unless the Court orders otherwise, no extension of time is permissible under the order.

7.6 In this case the originating summons was filed on 7th October 2021 and set for hearing on 1st November 2021. However, the same was served on the Appellants on 22nd October 2021.

7.7 In terms of Order XI rule 22 of the High Court Rules; the Appellant had nine days within which to enter appearance for the hearing on 1st November, 2021.

7.8 On 1st November, 2021, the learned Judge was not available and he caused a Notice of hearing to be issued for the 17th November, 2021. This date was brought forward to the 12th November, 2021 upon application by the Respondent via an ex-parte order dated 4th November 2021.

7.9 Thereafter, the Appellants filed some interlocutory applications and the hearing of the originating summons only took off on 23rd November, 2021. This meant that the Appellant had in excess of thirty days to enter appearance from the date of service of the originating summons to the final date of hearing.

7.10 However, on 17th November, 2021, after hearing and dismissing an application by the Appellant, the learned Judge

granted the Appellant a seven day extension of time to file its affidavit in opposition to the originating summons.

7.11 On the said date of hearing, the Appellant filed a copy of the affidavit in opposition together with an affidavit verifying facts and skeleton arguments.

7.12 In expunging the filed copy of the affidavit in opposition, the learned Judge relied on Order V rule 11 of the High Court Rules which provides as follows;

"Before an affidavit is used in any proceeding for any purpose, the original shall be filed in the Court, and the original or an office copy shall alone be recognized for any purpose by the Court or Judge".

7.13 In light of the rule cited above, we find no reason to fault the learned Judge below for expunging the copy of the affidavit in opposition from the Record as only the original or office copy is allowed for use by the court. Filing a copy clearly offends against the rule.

7.14 We also take note of the arguments and several authorities relied upon by the Appellant that it needed more time for the original affidavit to be couriered from South Africa to Zambia and the authorities to the effect that a defective affidavit can be rectified.

7.15 To start with, we do not find merit in the argument that the Appellant needed more time to courier the original affidavit in opposition from South Africa. We also do not accept the idea that time started running from 17th November, 2021 when the Appellant applied for time to file an affidavit in opposition as seemingly, suggested by the Appellant.

7.16 Time within which to file the affidavit in opposition started to run on 22nd October, 2021 when the originating summons and the attendant affidavit were served on the Appellant.

7.17 There is no support for the thought that the several applications and adjournment that attended the cause stopped the time from running until the application of 17th November, 2021 was made.

7.19 If the Appellant chose not to compose an affidavit in opposition soon after being served with process, it did so at its own peril.

7.20 As regards the treatment of defective affidavits as espoused by the several authorities relied upon, we will advert to the case of Sun Country Limited v Kearney and Another⁵ in which the Supreme Court of Zambia stated as follows;

**....if the defect in an instrument or document is in form, it is not a fundamental defect or irregularity and is thus curable. An affidavit afflicted by such a defect is receivable in proceeding under Order 5 rule 13 of the High Court Rules which counsel for the Appellant has*

quoted. That rule authorizes Courts to receive affidavits despite irregularities in form...."

7.21 We also consider Order 5 rule 14 of the High Court Rules which provides as follows;

"....a defective or erroneous affidavit may be amended or re-sworn by leave of the Court or a Judge on such terms as to time, costs or otherwise as may seem reasonable."

7.22 The two above cited quotations and many other authorities are clear on the curability of defective instruments.

7.23 We however, need to also bring into the picture section 47 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia which enacts as follows;

"Save as is otherwise expressly provided, whenever, any form is prescribed by any written law, an instrument or document, which purports to be in such form, shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or document or which is not calculated to mislead."

7.24 Based on the above cited authorities, the question that arises is what is meant by "FORM"? This question is important because for an instrument to be curable, it must be defective only in form and not in substance.

7.25 Although the authorities cited do not define the word form, Order V rule 14 provides a clue to what a defect in form is to the extent that it envisages an amendment or a re-swearing of an affidavit defective in form as the cures to the defect. For

instance, if the jurat is placed in the wrong place, it can be cured by amending or re-swearing the affidavit. In other words, defect in form refers to an instrument containing errors or mistakes which are capable of being corrected without prejudicing the other party.

7.26 In the case at hand, the Appellant caused to be filed into Court a copy of the affidavit which is expressly prohibited by Order V rule 11. This can not be said to be a defect in form in the document. It is simply the wrong format of the document

7.27 The point we make is that the relevant rule does not prescribe the form of the affidavit but expressly prohibits the filing of a copy. It goes further to provide that only original or office copies shall be recognized by the Court for any purpose.

7.28 The Court is therefore, expressly prohibited from recognizing a copy of an affidavit in any Court proceedings.

7.29 We take the view that section 47 of the Interpretation and General Provisions Act aids rather than contradict Order V rule 11 of the High Court Rules in so far as it starts with the phrase *“save as is otherwise expressly provided...”*

7.30 Having upheld the learned Judge below on expunging the copy of the affidavit in opposition, the next issue is whether the

learned Judge should have considered the skeleton arguments and allowed oral submissions on the law.

7.31 The learned Judge relied on the case of *Robert Simeza, Andrews Motel v Elizabeth Mzyeche*⁶ in support of his decision to hear the originating summons in the absence of an affidavit in opposition. In that case, the Supreme Court of Zambia held that; “*No procedural injustice is occasioned when a party who is aware of the proceedings does not turn up.*”

7.32 Having expunged the copy of the affidavit in opposition, the learned Judge opined that it would be irregular to consider skeleton arguments when there was no affidavit in opposition. He accordingly disallowed the skeleton arguments and barred the Appellant from making oral submissions on points of law.

7.33 In the *Simeza v Mzyeche* case (Supra) the Appellant did not only fail to file an affidavit in opposition but did not also attend on the hearing date, which he was aware of and did not give any excuse. The principle is that the Court is entitled to hear the Plaintiff/Appellant in the absence of a Respondent who is fully aware of the date of hearing.

7.34 The said case is of no value to the resolution of the question whether the Court should not accept and consider arguments

on the law from a party that has not filed an affidavit in opposition.

7.35 According to the Ulster University Website; ulster.ac.uk, skeleton arguments are a written summary of one's case and main arguments of the case. The skeleton arguments outline relevant background facts of the case and a brief reference to the law to be relied on (paraphrased).

7.36 The same source defines "affidavit" as "*a written document that gives a truthful version of the facts or events which is sworn under oath.*"

7.37 What is discernible from the two definitions is that whereas the affidavit is purely factual, skeleton arguments are a combination of fact and law.

7.38 Since it is not permissible for Counsel to give facts from the bar, it follows that it is not permissible for Counsel to file a document containing a mixture of facts and law if there is no affidavit before Court deposing to the facts of the case.

7.39 The above view is based on the fact that once a competent person has deposed to the facts within their knowledge, and such affidavit is filed into Court, the facts the skeleton

arguments will be speaking to will be as deposed to in the affidavit.

7.40 Allowing skeleton arguments not backed by an affidavit in opposition would expose Counsel to giving evidence at the bar and that is reason enough to reject or expunge the skeleton arguments from the record.

7.41 In the premise, we would not fault the learned Judge for refusing to consider skeleton arguments following his order expunging the copy of the affidavit in opposition.

7.42 In ground three the Appellant complains that the Respondent did not specify the type of meeting it was requesting for and therefore, the learned Judge was at fault to allow an ambiguous pleading.

7.43 It is noted that the Respondent commenced the action in the Court below as shareholder in the Appellant. It is also noted that the circumstances under which the Respondent requested for a meeting of the Company would not fit into an annual general meeting or a class meeting under section 56 of the Companies Act No. 10 of 2017. That leaves us with only one option, an extra-ordinary general meeting.

7.44 The Appellant has not cited any legal provision that requires the specifying of the type of meeting to be called. In any case, the Appellant has not pleaded that it failed to call for the meeting because of the alleged ambiguity and neither has it argued that it failed to file its affidavit in opposition for the same reason.

7.45 We also accept the argument by the Respondent that if ambiguity was the reason for the Appellant's default in either calling for the meeting or filing the affidavit in opposition, it had the option of applying for an order for further and better particulars.

7.46 The issue raised in ground four in which the Appellant laments the inadequacy of the time allocated by the Court for the filing of the affidavit in opposition has already been dealt with when considering grounds one and two earlier in this Judgment.


8.0 CONCLUSION

8.1 Having dealt with all the grounds of appeal comprehensively, upon the expressed views, it is our considered view that they are all devoid of merit.

8.2 Ultimately, the entire appeal is bereft of merit deserving of dismissal. We dismiss it accordingly with costs to the Respondent to be taxed in default of agreement.


.....

M.J. SIAVWAPA
JUDGE PRESIDENT


.....

F.M. CHISHIMBA
COURT OF APPEAL JUDGE


.....

A.M. BANDA-BOBO
COURT OF APPEAL JUDGE