



**IN THE MALAWI SUPREME COURT OF APPEAL
SITTING AT BLANTYRE**

MSCA CIVIL APPEAL NUMBER 17 OF 2020

(Being High Court of Malawi, Civil Cause No. 121 of 2014, Mzuzu Registry)

BETWEEN:

FLYWELL CHIKULUKULU BANDA.....APELLANT

AND

COUNCIL FOR THE UNIVERSITY OF MALAWI.....RESPONDENT

CORAM: HON. THE CHIEF JUSTICE R.R. MZIKAMANDA SC, JA

: HON JUSTICE L.P. CHIKOPA SC, JA

: HON. JUSTICE F.E. KAPANDA SC, JA

: HON. JUSTICE H.S.B. POTANI JA

: HON. JUSTICE J. KATSALA JA

: HON. M.C.C. MKANDAWIRE JA

: HON. JUSTICE S.A. KALEMBERA JA

: HON. JUSTICE R. MBVUNDULA JA

: HON. JUSTICE nyaKAUNDA KAMANGA JA

: Appellant present and unrepresented

: Mr Chikabvumbwa, Counsel for the Respondent

: Mr Shaibu, Judicial Research Officer

: Mr Minikwa/Miss Masiyano, Court Clerks

: Mr Mutinti/Mrs Msimuko, Court Reporters

JUDGMENT

Kalembera JA

This is the Appellant's Appeal against the decision of the High Court dismissing his Originating Summons. By an Expedited Originating Summons dated 13th June 2014, the Appellant sued the Respondent in the High Court seeking the following reliefs:-

1. A declaration that the conduct of the Respondent failing to produce all the Plaintiff's own answer sheets/marked scripts for all examinations/assignments in the final year for Clinical Pharmacy, Pharmacy practice, Pharmaceutics, and Toxicology, when there is no basis for hiding the same, is illegal and unconstitutional;
2. A declaration that withholding of the Plaintiff's answer sheets when the Plaintiff had applied to see the marked scripts so that he could add up or check marks and apply for remark thereof if necessary, means that the Respondent knew that they had acted in bad faith in awarding poor grades to the Plaintiff in Clinical Pharmacy, Pharmacy practice, Pharmaceutics, and Toxicology;
3. A declaration that failure to release the marked scripts means that the Plaintiff had passed in Clinical Pharmacy and Toxicology but the Defendant deliberately awarded him failing grades;
4. A declaration that the Defendant should release all marked scripts for all examinations in the final year within 21 days from the date of the order, and that if the Defendant fails so to do, the Plaintiff shall be deemed to have passed in Clinical Pharmacy and Toxicology; and
5. An order that the Defendant do bear costs of the action.

On 20 March, 2018, the Court below having heard the originating summons, delivered its ruling on the same day where it dismissed the Appellant's originating

Summons and declined to grant the reliefs sought by the Appellant. Aggrieved with the decision of the court below the Appellant on 28 March 2018 filed a notice of appeal and grounds of appeal against the said decision.

The Appellant filed the following grounds of appeal:

- i. The conclusion of the ruling itself was derived from the following false statement included in the said ruling, which statement the Judge assumed as being true and it is not clear from which affidavit(s) did the Lord Justice himself get/derive it: The plaintiff was provided with answer sheets for Clinical Pharmacy, Toxicology and Pharmacy Practice II, at least before 20th May, 2014;
- ii. There is no analysis in the said ruling of arguments from both parties on the issue of transparency (a fundamental principle of the constitution) on the plaintiff's disputed exam results;
- iii. The ruling in its entirety never reflects what was said by the plaintiff and counsel Mr. Ngwata for the defendant on the 20th March, 2018 during hearing that was recorded electronically by the court and it does not reflect the questions that Judge Ligowe asked the plaintiff as hearing was underway either, and so the said Judge of the lower court erred in his ruling if he did not make it after being influenced in some way;
- iv. The ruling is silent on the secondary issue of the unlawful change by the defendant/respondent of exam results for the plaintiff/appellant end August, 2013 or thereabouts during which period the plaintiff/appellant was waiting for the response from the defendant/respondent in respect of the appeal for transparency on his exam results for the 4 subjects which he made on 13th day of August, 2013;
- v. The recently appointed High Court Judge referred herein failed to recognize in his ruling that by 13th June, 2014 when the plaintiff/appellant filed an application in the High Court/lower court seeking reliefs as outlined in his originating summons defendant/respondent had released

only two answer sheets for Pharmacy practice II course and one answer sheet for Toxicology course (i.e. a total of three answer sheets) out of the required sixteen answer sheets for the following four courses whose were appealed: Clinical Pharmacy, Pharmacy Practice If, Toxicology and Pharmaceutics.

On 5 October, 2022, the Respondent filed a notice of preliminary objection under Order III rule 14 of the Supreme Court of Appeal Rules citing two grounds of objection against the hearing of the appeal:

1. That the Appeal herein is incompetent and/or otherwise a nullity the same having been filed without the leave of the Court below or this Court as prescribed by paragraph (c) of the second proviso to Section 21 of the Supreme Court of Appeal Act; and
2. The appellant's grounds of appeal do not comply with and are not consistent with the mandatory requirements of Order III Rule 2 (2) (3) (4) of the Supreme Court of Appeal Rules.

It is prudent at this stage that we deal with the preliminary objections first since if we agree with the same this matter ends here.

In the first preliminary objection the Respondent contends that the Appeal herein is incompetent and/or otherwise a nullity the same having been filed without the leave of the Court below or this Court as prescribed by paragraph (c) of the second proviso to Section 21 of the Supreme Court of Appeal Act; and

In the case of *NBS Bank PLC v Dean Lungu*, MSCA Civil Appeal No. 31 of 2020 held:

“Having heard the parties on the preliminary objection and having heard all arguments, we observe that there was no leave to appeal, although the purported appeal is against an interlocutory order made in chambers.

It is therefore, our view, that there is no appeal before us. The attention of the parties is drawn to section 21 of the Supreme Court

of Appeal Act and section 23 of the Supreme Court of Appeal Act. The parties may wish to proceed on the basis of sections mentioned.” (Emphasis supplied)

In terms of section 21 of the Supreme Court of Appeal Act, as read with section 23 of the Supreme Court of Appeal Act; it provides for what judgments are appealable to this Court. Strictly, in terms of the law all judgments are appealable except for those provided in the first proviso under section 21 as follows:

21. Civil appeals

24 of 1968 An appeal shall lie to the Court from any judgment of the High Court or any judge thereof in any civil cause or matter:

Provided that no appeal shall lie where the judgment (not being a judgment to which section 68 (1) of the Constitution applies) is—

(a) *an order allowing an extension of time for appealing from a judgment;*

(b) *an order giving unconditional leave to defend an action;*

(c) *a judgment which is stated by any written law to be final;*

(d) *an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and*

opportunity to appeal from the decree nisi on which the order was founded has not appealed from that decree:

And the said section 23 provides time for appealing as follows:

“s. 23 (1) If a person desires to appeal under this Part from the High Court to the Court, he shall, in such manner as may be prescribed by the rules of court, give notice to the Registrar of the High Court of his intention to appeal –

(a) Within 14 days of the judgment from which he wishes to appeal if such judgment is an interlocutory order;

(b) Within six weeks of the judgment from which he wishes to appeal in any other case.

(2) the Court may extend time for giving notice of intention to appeal under this Part, notwithstanding that the time for giving such notice has expired.”

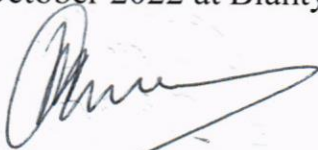
The provisions under sections 21 and 23 of the Supreme Court of Appeal Act are very clear and straight forward. This is a matter which under the said section 21 required leave of the Court in order for the Appellant to properly bring an appeal before this Court. The Appellant wrongly believed that he required no leave to bring his appeal before this Court. The law is very clear that leave was required in this matter. There being no leave to appeal, there is consequently no appeal before this Court and the matter is dismissed on that basis with costs for the Respondent.

Having thus dismissed the matter, there is no need to deal with the second preliminary objection.

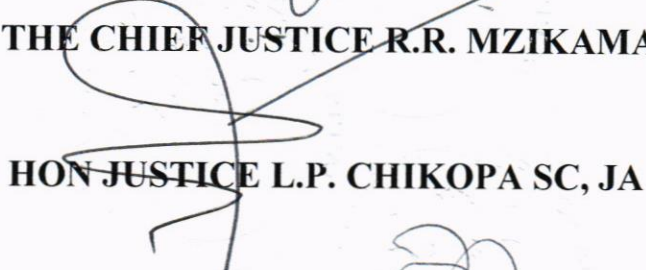
We must state, however, that we do appreciate that for whatever reason, the Appellant, who was initially represented by Counsel, decided to represent himself. The Rules of this Court are what they are. There are no Rules for unrepresented Appellants and for represented Appellants. If an Appellant decides to represent himself he must nevertheless abide by the said Rules. The Court might sympathize with an unrepresented Appellant but not to the detriment of the Respondent.

All in all, this matter is dismissed on the reasoning herein with costs for the Respondent.


MADE this 11th day of October 2022 at Blantyre



HON. THE CHIEF JUSTICE R.R. MZIKAMANDA SC, JA



HON JUSTICE L.P. CHIKOPA SC, JA



HON. JUSTICE F.E. KAPANDA SC, JA



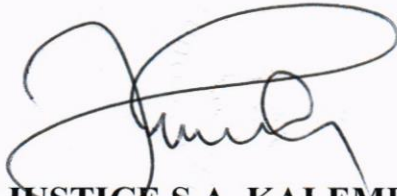
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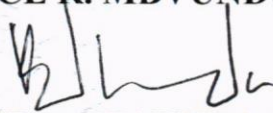
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HON. JUSTICE NYAKAUNDA KAMANGA JA