IN THE SUPREME COURT OF APPEAL

MSCA CIVIL APPEAL NUMBER 03 OF 2020

(Being Commercial Cause Number 159 of 2013 – High Court of Malawi, Commercial Division, Blantyre Registry)

Between

MOTA ENGIL ENGENHARIA E CONSTRUCAO (MW).....APPELLANT

And

OMEGA SECURITY SOLUTIONS (PVT) LTD.....RESPONDENT

CORAM: **HON. THE CHIEF JUSTICE A.K.C. NYIRENDA S.C.**
HON. JUSTICE R.R. MZIKAMANDA SC, JA
HON. JUSTICE L.P. CHIKOPA SC, JA
HON. JUSTICE F. E. KAPANDA SC, JA
HON. JUSTICE J. KATSALA JA
HON. JUSTICE I.C. KAMANGA JA
HON. JUSTICE M.C.C. MKANDAWIRE JA
T. Roka, of counsel for the Appellant
J. Kara, of counsel for the Respondent
Miss Masiyano, Recording Officer/Court Clerk
Mrs Msimuko and Mrs Chiusiwa, Court Reporters

JUDGMENT

Katsala JA,
My Lords and My Lady,

This is an appeal against an award of damages and interest made by Lady Justice Sikwese in her judgment delivered on 2 November, 2017 siting in the Commercial Court at Blantyre.

A brief background to the appeal is as follows. On 24 September 2013 the respondent commenced an action against the appellant in the Commercial Division at Blantyre claiming damages for breach of contract and or the sums of K19,160,706.02 and K100,422,045.15 being revenue lost following the breach, interest and costs of the action. It was the respondent's case in the court below that it is a security services provider and that by an agreement in writing dated 14 November 2012 (hereinafter "the Agreement"), they agreed to provide security services to the appellant at its premises at Zalewa in Mwanza District. Under clause 1.9 of the Agreement the parties agreed that the contract would run from 28 September 2012 until it was terminated on one month's notice from either side but in any case, no sooner than 31 August 2014. It was also a term of the agreement that the appellant would not entice and offer employment to any of the respondent's security personnel during the period of the contract and for a period of 12 months after termination of the Agreement. It was further agreed that the appellant would pay for the services monthly in advance on demand.

The respondent contended that the appellant breached the contract by defaulting on the monthly payments such that at the time of commencing the action, the respondent was owed the sum of K12,465,903.01. It was also alleged that in further breach of the agreement, the appellant terminated the contract before the expiry of the agreed term and without giving the requisite notice or paying the sum of K6,694,803.01 in lieu thereof. The respondent also claimed the sum of K100,422,045.00 being the revenue lost for the period between May 2013 when the contract was terminated to August 2014 when it could have been lawfully terminated. It was also contended that the appellant breached the contract by enticing and employing 18 of the respondent's security personnel. On this, the respondent claimed the sum of K1,998,259.95 being 25% of the annual charge for the 18 guards employed during the restricted period.

The appellant contended in the court below that it did not owe any money since it had paid all the invoices issued by the respondent. The appellant also denied wrongfully terminating the contract arguing that the termination was necessitated by the respondent's own breach in that it failed to provide the appellant with security guards.

After a full trial, the court below found for the respondent and entered judgment on all the respondent's claims including interest. The appellant is dissatisfied with the judgment especially the award of damages and interest and appeals to this Court seeking its review.

By a Notice of Appeal filed on 9 November 2017, the appellant does not dispute liability. It only disputes the awards of damages and interest. In that respect the appellant filed five grounds of appeal which are: -

1. The learned Judge erred in awarding the sum of K100,422,045.15 as this included expenses that the respondent would have incurred to earn that sum and it amounted to overcompensation.

2. The learned Judge ought to have only awarded such a sum as represented a loss of profit as this was the true measure of the respondent's loss.

3. The learned Judge erred in finding that the appellant had employed the respondent's staff after the termination of the contract as there was no direct evidence on this point.

4. Consequently, the learned Judge erred to award the sum of K1,998,259.95 damages under this head; and

5. The learned Judge erred in awarding interest under all heads of claim and without limiting the award to the debt figure of K12,465,903.01 only.

The preliminary question at this stage is whether the grounds of appeal as couched conform to the requirements of the law as provided under Order III, rule 2 of the Supreme Court of Appeal Rules (hereinafter "the Rules"). If they do not conform, then it means that they cannot stand. In effect, there would be no appeal to be determined. Thus, counsel were invited to address the Court on whether the grounds of appeal herein comply with the aforesaid Rule and also if they pass the test laid down in *Dzinyemba t/a Tirza Enterprise v Total (Mw) Ltd* MSCA Civil Appeal No. 6 of 2013 (unreported) and reinforced in *Mutharika and Electoral Commission v Chilima and Chakwera* MSCA Constitutional Appeal No. 1 of 2020 (unreported).

Counsel for the appellant admitted that the Notice of Appeal herein does not strictly comply with Order III, rule 2. But there is partial compliance. In his words, the grounds of appeal do specify what is being appealed

against and the reliefs sought. The defects in the Notice of Appeal have not prejudiced the respondent in any way – and that is why the respondent was able to competently argue the appeal. Otherwise, the respondent would have raised the issue as a preliminary objection. Counsel implored on the Court to consider section 22 (1)(d) of the Supreme Court of Appeal Act which spells out the powers of the Court in civil appeals including the power to make orders as the interests of justice require. This section overrides Order III of the Rules. The question which the Court needs to ask is whether the defects in the Notice of Appeal are curable? In his submission, they are curable especially since the respondent has not in any way been prejudiced by the defects.

On the other hand, counsel for the respondent argued that the grounds of appeal foul Order III, rule 2 because they are vague and lack particularity. He conceded that he has not read the cases of *Dzinyemba* and *Mutharika and Electoral Commission* but referred the Court to the case of *Khoromana v Malifati Jumbe* (HC) Civil Appeal Number 6 of 2013 (unreported) where it was held by Mwaungulu J (as he then was) that procedural rules must be followed.

Order III, rule 2 of the Rules states as follows: -

> "(2) If the grounds of appeal allege misdirection or error in law the particulars and the nature of the misdirection or error shall be clearly stated.
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> (3) The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively.
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> (4) No ground which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted, save the general ground that the judgment is against the weight of the evidence, and any ground of appeal or any part thereof which is not permitted under this rule may be struck out by the Court of its own motion or on application by the respondent."

In the *Mutharika and Electoral (supra*) commenting on the need for grounds of appeal to comply with Order III, rule 2 of the Rules, this Court stated as follows:

> "In *Dzinyemba t/a Tirza Enterprise v Total (Mw) Ltd* MSCA Civil Appeal No. 6 of 2013 (unreported), this Court emphasized that grounds of appeal must conform to the requirements of Order III rule 2 of the Supreme Court of Appeal Rules. The Rules require that the

grounds of appeal must be precise and concise; they must not be argumentative; and that the grounds of appeal must state clearly whether they are based on law or fact, so that this Court and the other party (or parties) to the proceedings are able to appreciate precisely what the appellant is appealing against. This Court also emphasised that the grounds of appeal that do not comply with Order III rule 2 of the Supreme Court of Appeal Rules may be struck out by the Court on its own motion or on application by a respondent in the proceedings."

We must reconfirm our position that the rules governing the procedure in this Court must be fully complied with. It is no excuse to say that the rules have been partially complied with because, in our view, partial compliance is no compliance. We would reiterate that procedural justice is part and parcel of substantive justice. Rules of procedure are not there just to fill up the books. They are there to ensure fair play and justice in the litigation process. They are the rules of the game. As such, they must be complied with. There would be no justice if one party is allowed to ignore the rules whilst the other complies with the rules.

The question of whether the failure to comply with the rules has prejudiced the other party should never be the focus of the court's task. Rather, the question should be whether the court should proceed to determine the matter substantively (on the merits) when there is non-compliance with the rules of procedure. In our view, the court should never shy away from determining a matter purely on procedure (technicality). This will not mean that there is no substantive justice. As already stated, procedural justice is part and parcel of substantive justice.

It follows that failure to comply with the procedural requirements is, in a way, an abuse of the court. A party who fails to comply with the rules of procedure but stills wants his/her matter to be determined, is in fact, abusing the court process. We should not condone abuse of court process in the name of seeking to determine matters on the merits and not on technicalities. In as far as we can see, the statutory principle found in section 3 of the Criminal Procedure and Evidence Code (CPEC) that substantial justice should be done without undue regard for technicality should be restricted to criminal matters to which the CPEC itself applies. It has no application in civil matters.

In our view, in civil matters procedural prescriptions feed into the determination of the merits of a matter. For us to get to the merits we need to pass through the procedural requirements. Consequently, we cannot

ignore the rules of procedure and hope to achieve substantial justice (justice on the merits). See *Khoromana v Malifati Jumbe* (supra) and *Ngwira and Chiumia v Ngwira* MSCA Civil Appeal No. 16 of 2020 (unreported).

The appellant concede that the Notice of Appeal does not fully comply with Order III, rule 2 of the Rules. But they argue that the defect is curable under section 22 of the Supreme Court of Appeal Act (hereinafter "the Act") which overrides Order III. This section prescribes the powers of this Court on an appeal in civil matters.

It must be said that section 22 must be understood in its full context. It must be read in the context of the scheme under the Act. The section proceeds on the basis that there is an appeal before the Court. And an appeal to this Court is brought by a Notice of Appeal filed under section 23 (1) of the Act. Now the question is whether if the Notice of Appeal (which includes the grounds of appeal) is defective, in the sense that it does not comply with the Rules, it can be said that there is an appeal before this Court. In other words, can a competent appeal be brought by a Notice of Appeal which does not comply with the Rules?

In our view, that is not possible. The grounds of appeal are the very foundation of an appeal and if they are not in order, then it means that there is no competent appeal. If the Notice of Appeal is defective effectively there is no appeal before the Court.

The position in this Court must be distinguished with the position in the court below where the rules governing its practice and procedure specifically provide the effect of failure to comply with rules. See Order 2 of the Courts (High Court) (Civil Procedure) Rules (the CPR). In the court below, failure to comply with the rules is an irregularity which does not render the proceeding, document, order or step taken a nullity. Order 2, rule 3 of the CPR specifically provides for the powers of the court when dealing with an irregularity resulting from non-compliance with the rules of procedure.

In this Court, Order V, rule 1 of the Rules deals with waiver of non-compliance with the Rules. It provides: -

> "Non-compliance on the part of an appellant with these Rules or with any rule of practice for the time being in force shall not prevent the further prosecution of the appeal if the Court considers that it is in the interests of justice that non-compliance be waived or the appellant given a further opportunity to comply with the Rules...."

This rule should be interpreted correctly. There are three parts to it. First, it means that failure by an appellant to comply with the Rules prevents the prosecution of the appeal. This is the default position. Secondly, the Court has the discretion to waive the non-compliance and hear the appeal or to give the appellant another chance to comply with the Rules. Thirdly, the Court will only waive the non-compliance if it considers such action to be in the interests of justice.

In the *Mutharika and Electoral Commission* case (supra) despite the appellants' failure to comply with the Rules and that the grounds of appeal did not pass the test in *Dzinyemba* case, this Court still proceeded to hear and determine the appeal because, in its view, the appeal presented the Court with the opportunity to express its opinion on crucial and important constitutional issues. This is how the Court put it: -

> "Furthermore, this Court has to strike out grounds which do not comply with the Rules and the test set out in *Dzinyemba t/a Tirza Enterprise v Total (Mw) Ltd* (supra), we have resisted taking that route principally because it would have technically terminated the second appellant's appeal. That in turn would have deprived this Court the opportunity to consider and determine crucial and important constitutional issues in the matter before us. We thought it imperative that the far-reaching issues in this case can be disposed of on merits rather than on technicality."

So, the fact that the appeal presented an opportunity for the Court to determine crucial and important constitutional issues (which were of national importance at the material time) persuaded the Court to exercise its discretion not to strike out the grounds of appeal and dismiss the appeal. It waived the non-compliance and proceeded to hear and determine the appeal.

It must be mentioned that the Court's discretion to waive non-compliance will not be exercised as a matter of course. It is entirely a matter for the Court to decide depending on the circumstances of each case. Clearly, it is a question of fact which may vary from case to case. As it comes out clear in the *Dzinyemba* and *Mutharika and Electoral Commission* cases, the Court will not hesitate to strike out grounds of appeal which do not comply with the requirements of Order III, rule 2 of the Rules. That is the standard operating practice. However, where the interests of justice justify it, the Court may exercise its discretion to waive the non-compliance. The waiver of non-compliance is an exception and not the norm. The *Mutharika and Electoral Commission* case is an example of where the Court deemed it to

be in the interests of justice to waive the non-compliance and proceed to determine the appeal.

We are fortified in this view by the provisions of Order III, rule 17 (3) which states that: -

> "If the respondent alleges that the appellant has failed to comply with a part of the requirements of rule 2 or 12 of this Order, the Court, if satisfied that the appellant has so failed, may dismiss the appeal for want of due prosecution or make such other order as the justice of the case may require."

The Court is empowered to dismiss an appeal for want of prosecution if there is failure to comply with the requirements of Order III, rule 2 – dealing with Notice and grounds of appeal. So, the position under the Rules is that failure to comply with Order III, rule 2, constitutes want of due prosecution of an appeal which warrants a dismissal of the appeal. And that is why we are saying that a defective notice of appeal or grounds of appeal cannot anchor a competent appeal before this Court.

Although Order III, rule 17 (3) also empowers the Court to make such other order as the justice of the case may require, it does not mean that strict compliance with the requirements of Order III, rule 2 should never be insisted upon. This subrule only seeks to maintain the Court's discretion in the management of cases just as Order V, rule 1 of the Rules entails. In no way does it falter the need to strictly comply with the prescriptions of rule 2 of the Order. All the observations we have made above on Order V rule 1 equally apply to this rule as well.

Therefore, we would urge all parties coming to this Court to ensure that they strictly comply with the requirements of Order III, rule 2 of the Rules including the Practice Directions issued over the years. As clearly shown, non-compliance with the Rules constitutes want of due prosecution of an appeal warranting dismissal of the appeal. No one should come to this Court counting on the Court's benevolence on discretion. There is no guarantee that it will be exercised or indeed, exercised in their favour.

It is our view that the grounds of appeal in the present case do not meet the requirements in Order III, rule 2 of the Rules. The grounds of appeal are argumentative. They are not precise. They do not state whether they are based on law or fact. They are ambiguous. The appellant is leaving it to the Court to decipher whether the errors complained of are of law or fact. That is a fishing expedition. It cannot be accepted.

We would, for the sake of emphasis and clarity, once again, reiterate what this Court stated in the *Dzinyemba* case.

> "To begin with, as we notice, Order III rule 2(2) requires that if the grounds of appeal allege a misdirection or an error in law, the particulars and nature of such misdirection or error should be clearly stated.
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> In relation to this sub-rule, it is our observation that in grounds 1, 2, 4, and 6 the appellant prefixed his appeal grievances with the uniform phrase "the lower Court erred in holding...". This style of phrasing grounds of appeal obscures the question whether the Appellant is appealing on a point of law or on a point of fact. It at the same time gives the Appellant latitude to, at his convenience, opt whether to project such ground of appeal as based on law or on fact, depending on whether or not he gets cornered about it ... As can be seen, in none of these grounds does he classify any of the alleged errors as being errors of law or errors of fact ...
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> It therefore does not come to us with any sense of surprise that, with ambiguity so deeply embedded in all the nine grounds of appeal, when it came to giving or attempting to give particulars in relation to these grounds of appeal, the Appellant found himself free enough to meander about with great ease."

This is the Supreme Court of Appeal. It is the apex court in the land. Litigants must know that we do not have the luxury of time to waste. The Rules clearly demand that the grounds of appeal must be concise and precise. Therefore, there is no room for ambiguity. The nature of the grievance must be clear. Everyone must be clear on what is being complained of. There is no question of 'casting the net wide'. Everything must be well targeted. It must be specific. In the same way, so too the parties' arguments must be fashioned. There is no room for meandering, verbosity or pedantry.

This calls for litigants coming to this Court to be a little more serious than what we are seeing here and in many other cases that come before us these days. It is becoming clear to us that the majority of the litigants coming to this Court do not take time off to consult the applicable legislation, the Rules, Practice Directions and the decisions of this Court offering guidance on various procedural aspects in this Court before they do the paper work. No wonder they are always taken by surprise when the prescriptions in the Rules and the decisions of this Court are brought to their attention. We end

up wasting time on issues we should not spend time on because they have been articulated upon by this Court many times before and are settled.

In the *Dzinyemba* case, this Court having found that the grounds of appeal fouled Order III, rule 2 struck them out and proceeded to dismiss the appeal. This is the approach that we are taking in the present matter.

Inasmuch as we would have wanted to discuss the merits of the "appeal" as we feel the judgment appealed against does not reflect a correct view of the law on some issues that were before the Court, sadly, we are unable to do so. As already stated, all the five grounds of appeal do not comply with the requirements of Order III, rule 2. They do not amount to reasonable grounds of appeal. We do not find any factors that would warrant our exercise of the discretion to waive the non-compliance and proceed to determine the substantive issues. We do not think it can fall into the exception under Order V, rule 1 of the Rules for we do not reason that there are any interests of justice that would compel us to do so.

The matter arises from a simple commercial relationship that went sour. The appellant being dissatisfied with the judgment of the court below decided to appeal to this Court but failed to comply with the prescription of the Rules of this Court. Surely, the appellant must face the blunt.

In the circumstances, there is no competent appeal before this Court. Consequently, we cannot proceed to discuss the matter further since the very foundation of the appeal has collapsed. Therefore, we dismiss the appeal with costs.

Pronounced at Blantyre this 20th day of December 2022.

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HON. CHIEF JUSTICE A. K. C. NYIRENDA SC

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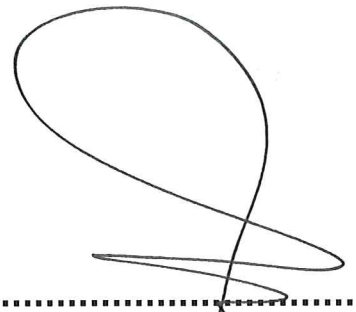
HON. JUSTICE R.R. MZIKAMANDA SC, JA



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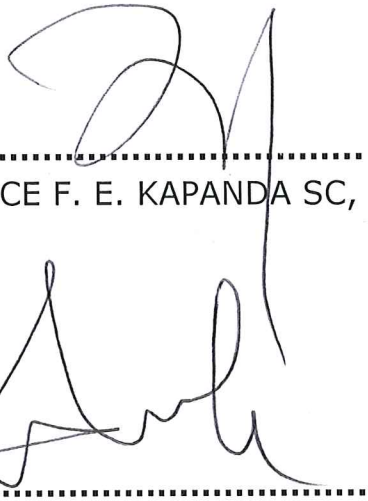
HON. JUSTICE L.P. CHIKOPA SC, JA



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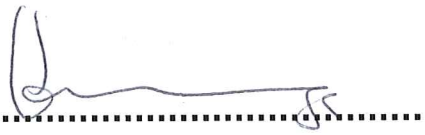

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HON. JUSTICE I.C. KAMANGA JA

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HON. JUSTICE M.C.C. MKANDAWIRE JA