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**IN THE COURT APPEAL FOR ZAMBIA** **CAZ APPEAL NO. 138/2019**

**HOLDEN AT NDOLA**

*(Appellate Jurisdiction)*

**BETWEEN:**


**SAFRICAS ZAMBIA LIMITED** **1ST APPELLANT**

**BESA MFULA** **2ND APPELLANT**

**AND**

**KAPANDWE KANSANSA DEVELOPMENT COMPANY LIMITED** **RESPONDENT**

**CORAM: CHISANGA JP, SICHNGA, NGULUBE, JJA**

**On 25th August 2020 and 3rd September 2020**

*For the Appellants : N/A*
*For the Respondent : Mr. J. Chimankhata of Messrs Simeza Sangwa & Associates*

# JUDGMENT

**CHISANGA**, JP delivered the Judgment of the Court

**Cases referred to:**

1. *Musamba vs Sipemba (1978) ZR 175*
2. *Tembo vs Hybrid Poultry Farm (Z) Limited (Judgment No. 13 of 2003)*
3. *Hatten vs Harris (1892) AC 560*
4. *Pearlman (Veneers) SA (PTY) vs Bartels (1954) 3 ALL ER 659*

**Legislation referred to:**

1. *High Court Act Chapter 27 of the Laws of Zambia*
2. *Supreme Court Practice of England (1999) Edition, (the white Book)*

## INTRODUCTION

1. This is an appeal against part of the ruling of Lombe Phiri J, in which she awarded costs to the respondent, the plaintiff in that court, after dismissing its application for entry of judgment on admission. The background to the Order complained against is that an application for Entry of judgment on Admission was made, pursuant to **Order 21 Rule 6 of the High Court Rules** by the respondent. The judge refused to enter judgment and dismissed the application. She however awarded costs of the application to the respondent, whose application she had dismissed. It is this Order that has given rise to this appeal on a sole ground couched as follows:

   **The learned Court below erred at law by awarding costs of the respondent's unsuccessful application to enter judgment on admission against the appellant to the respondent in the absence of reasons warranting a departure from the principle of costs following the event.**

2. In the heads of argument, counsel for the appellant has drawn our attention to Order 40 rule 6 of the High Court Rules which is in the following terms:

   ***"the cost of every suit or matter and of each particular proceeding therein shall be in the discretion of the Court or a Judge; and the Court of a Judge shall have full power to award and apportion costs, in any manner it or he may deem just, and, in the absence of any express direction of the Court or a Judge, costs***

***shall abide the event of the suit or proceedings. Costs in discretion of Court: Provided that the Court shall not order the successful party in a suit to pay to the unsuccessful party the costs of the whole suit; although the Court may order the successful party, notwithstanding his success in the suit, to pay the costs of any particular proceeding therein."***

3. To buttress his arguments, counsel has referred to Order 62 rule 3 of the White Book, which is in similar terms as Order 40 rule 6 HCR *supra*. Reference has been made to ***Musamba vs Sipemba[1] and Tembo vs Hybrid Poultry Farm (Z) Limited[2]*** which reiterate that a successful party should not be deprived of costs. It has been submitted that having successfully opposed the respondent's application for judgment on admission, costs ought not to have been ordered against the appellants.
4. Our attention has also been drawn to a later ruling of the court dated 21st January 2019 in which the court regrettably acknowledged its error, attributing it to wrong terminology on its part.
5. When the appeal was called for hearing, learned counsel appearing for the respondent applied to file heads of argument in court. His explanation for failing to do so in time was that they had at first thought the matter was between the court and the appellant. But they had subsequently discovered that they could oppose the appeal.
6. We allowed counsel to file the heads of argument out of time. It is conceded therein that, the manifest intention of the court was to make an order for costs against the respondent, but in error, made the order

against the appellants. It is then contended that the opposition to the appeal is procedural, in that the appeal is incompetent as it is not the appropriate way to correct a clerical error. The route the appellant should have taken was to take out an application for correction of the error made by the lower court. Learned counsel has cited **Order 20 rule 11 RSC** which provides that:

***"A clerical error in judgment or order or errors arising there from any accidental slip or omission, may at any time be corrected by the court on motion or summons".***

7. Reliance has also been placed on the English case of ***Hatten vs Harris***[3], where the court reportedly made this statement:

***"Where an error of that kind has been committed it is always within the competency of the court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce. The correction ought to be made on motion, and is not matter either for appeal or rehearing".***

8. Reliance has equally been placed on ***Pearlman (Veneers) SA (PTY) vs Bartels***[4] where the court is said to have stated that:

***"When the substantive judgment is not being altered, but only the title of the action, it is to my mind quite plain that this court has ample jurisdiction to correct any misnomer or misdiscription at any time whether before or after judgment".***

9. According to learned counsel, these authorities indicate that the appellant should have applied for correction of the clerical error through summons or motion.

**DECISION OF THE COURT**

10. We have considered the appeal as well as the arguments of the parties. The sole ground of appeal questions the award of costs to the respondent, when the respondent's application for entry of judgment on admission against the appellants had failed, in the absence of reasons warranting departure from the established principle that costs follow the event.

11. The costs order complained against was made in the ruling now appealed against. The ruling was dated 11th October 2018. Learned counsel appearing for the defendant took out an ex-parte summons for an order to clarify the date of the ruling dated 11th October 2018. The affidavit in support of the said application revealed that the application for entry of judgment on admission was heard on 6th November 2018, and ruling was reserved. The ruling was uplifted on 15th November 2018, but was surprisingly dated 11th October 2018, a date before the hearing actually took place.

12. The deponent also remarked that the court had awarded costs to the plaintiff, when it had dismissed the plaintiff's application. He also explained that the defendants could not appeal against the court's ruling on costs as the ruling was wrongly dated. In her ruling, the learned judge conceded that the ruling was wrongly dated, and ascribed the mistake to a typographical error. She went on to state that the appeal against the order on costs would have been avoided as wrong terminology was made by the court. She however stated that she could not at that point review her decision, as the review had come too late in the day. She nonetheless granted the defendants leave to appeal out of time even though the defendants had not applied for it yet. She felt they were entitled to leave to appeal, as the delay was no fault of theirs but the court's.

13. The respondent's augments suggest that after this ruling had been rendered, the appellant should have applied for correction of the slip by way of summons or motion. While it is correct to state that the error was rectifiable under the slip rule, it is misdirected to argue that an appeal against the wrong costs order was incompetent. We do not read the cited decisions as closing the door in the face of the appellant. A party may approach the court to correct a slip. In the present case, the learned judge, being alive to the slip, declined, on her own, to correct it, stating that it was too late in the day for her to do so and instead granted the appellant leave to appeal. The appellant cannot be blamed for the

for the judge's disposition. In addition to this, the costs order was made in chambers. For the appellant to appeal against it, leave of the high court was granted. There is nothing in the rules that prevents a party from appealing against an order made in error by a court. The respondent's arguments are totally unpersuasive. We thus allow the appeal, and set aside the costs order in the court below. We instead award the appellant costs for the failed application for entry of judgment against the appellant in the court below. The appellant will also have the costs of this appeal. The costs will be agreed and in default taxed.

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**F. M. CHISANGA**
**JUDGE PRESIDENT**
**COURT OF APPEAL**

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**D. L. Y SICHINGA**
**COURT OF APPEAL JUDGE**

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**P. C. M. NGULUBE**
**COURT OF APPEAL JUDGE**