Judgment No. SC 45/09
Civil Appeal No 71/09

(1) CONSTRUCTION RESOURCES AFRICA LTD (2) DANNY MUSUKUMA (3) LINCEWESI MUSUKUMA v (1) CENTRAL AFRICA BUILDING CONSTRUCTION COMPANY (PVT) (2) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
HARARE, JULY 8 2009

L Uriri, for the applicants

P C Paul, for the respondents

CHEDA JA: In Chambers.

The applicants filed a chamber application seeking an order in the following terms.

(1) That the notice of appeal filed by the respondent in this court under case no. 71/09 is void and consequently be and is hereby struck out.

(2) That the cost of this application shall be paid by the respondent's legal practitioner *de bonis propriis*.

(3) That the respondent's legal practitioners shall refund his client all the fees her client may have paid in respect of the "appeal".

(4) That the respondent's legal practitioner be and is hereby ordered not to charge his client any fee in respect of all the work done in respect of the "appeal" and this application.

The application was opposed. Mr P C Paul filed the opposing affidavit and said he was doing so on behalf of the respondent company, that he is a Director of that company and is authorized to do so.

I do not know how the parties intend to proceed after I have determined this application. I therefore prefer to deal mainly with the defects referred to in this application and not touch on the merits concerning the original application to the High Court.

The applicant says the High Court decision was interlocutory. Mr Paul accepts that in p 9 of his opposing affidavit. It was therefore necessary to seek leave to appeal from the court that made the decision. This was not done.

The applicant says the respondent should have provided security for costs. The respondent says that this can only be done after the registrar has ascertained the costs. He is wrong. The registrar cannot ascertain the costs of a future action in advance. What is required is acceptable security for costs and not payment of the exact costs. Usually an undertaking to pay the costs is sufficient.

The applicant says the rules require that the application should set out the specific relief prayed for.

The respondent says he admits this (see paragraph 5 of his affidavit).

In addition, what he calls a provisional order sought at the High Court is infact a final order according to the way it is worded.

The applicant also says the provisions of r 12B (1) and (2) concerning the costs should be imposed on the respondent's legal practitioner.

In view of the concessions he made in his affidavit it if not clear why having admitted his errors the respondent's legal practitioner persisted in opposing this application.

His authority to institute the application and the appeal was questioned as well.

According to the documents filed it is clear that he drafted the minute in which he appointed himself as a director of the respondent on the 17 of February 2009 making himself the chairman, and on the same day authorized himself to make the court application.

The suggestion that security for costs need not be provided at the time of noting the appeal seems to go against the clear provisions of r 46(2)

Although he later suggested that he tendered security for costs this was not done in accordance with the rules.

I agree with the applicant's submissions that the respondent's legal practitioners conduct calls for an order for costs as provided by r 12 B.

I therefore order as follows.

1. The application is granted and the notice of appeal by the respondent is struck out with costs on a legal practitioner and client scale.

2. The respondents' legal practitioner should not charge his client any costs for the appeal.

Chivinge & Company, applicant's legal practitioners

Wintertons, respondents legal practitioners