SCZ NO. 2 OF 2007
APPEAL NO. 183A/2003

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

ZAMBIA REVENUE AUTHORITY	**APPELLANT**
AND	
T AND G TRANSPORT	**RESPONDENT**

Coram: Sakala, CJ., Chibesakunda and Chitengi, JJS
on 30th June 2005 and 23rd February 2007

For the Appellant: Mr. G. Locha, Legal Counsel
For the Respondent: Mrs. N. B. K. Mutti of Messrs. Lukona Chambers

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RULING

Chibesakunda, JS, delivered the Ruling of the Court

Case referred to:

1. **White V Brunton 2AER [1984] P.606**

Laws referred to:

2. **Order 48 of the Supreme Court Rules Cap 25**
3. **Orders 50 (1)(2)(3) of the Supreme Court Rules Cap 25**
4. **Order 55 of the Rules of the Supreme Court Cap 25**
5. **Sections 23 and 24 (1)(e) of the Supreme Court Act, Cap 25**

This is an appeal against the Judgment of the learned Deputy Registrar dated 29th July 2003 on assessment of damages which the High Court in its judgment of the 16th of May 2003 awarded to the Respondents who were the Plaintiffs before the High Court.

R2

The claim, by the Respondents before the High Court, was for:

1) An order for the return of the Plaintiffs motor vehicle namely Truck Number JLX 702 GP wrongly detained by the Defendant or US $30,000.00 its value.
2) Damages for its detention and loss of use.
3) Costs.
4) Any other relief the Court may deem just and appropriate.

The case for the Respondent before the High Court in brief was that the Respondent, which is a transport company, owned a truck, registration number JLX 702 GP that used to transport goods from South Africa to the Democratic Republic of Congo routinely. This truck, in August 1999, made a trip from South Africa to the Democratic Republic of Congo – Lubumbashi. On 31st August, 1999 on its way back, it came back through the Chirundu border.

The evidence before the High Court is that the truck went through all the Immigration and Customs Excise requirements in Zambia. Before exiting Zambia, it got impounded at Chirundu by the Appellants. According to the Respondent, all the goods imported from South Africa, that is Cooking Oil, etc as declared, were delivered to ETS Kapata Gros, a company in Lubumbashi as a final destination.

The Appellants' case was that the Respondent's truck, contrary to the declaration, off-loaded goods within Zambia, and these goods were sold, infringing Customs and Excise Regulations of Zambia. The court accepted the evidence of the Respondent and ruled in favour of the Respondent. The court hence awarded damages as claimed by the Respondent.

Before the learned Deputy Registrar, in assessing damages, the Respondent gave evidence. On the other hand, the Appellants gave no evidence. The learned Deputy Registrar delivered his judgment on 6th May, 2002.

R3

This is the judgment, which is the subject of this appeal.

At the time we were to hear the appeal, Mrs. Mutti, counsel for the Respondents, raised a preliminary point. The preliminary point was:

1. That the Notice of Appeal filed herein was filed without the leave of either the High Court or the Supreme Court contrary to Rule 50(1) of the Supreme Court Rules.
2. That in accordance with Rule 55 of the Supreme Court Rules failure to obtain leave before filing a Notice of Appeal is a default in lodging appeal and merits a dismissal.
3. That the appeal is not properly before this Honourable Court since no order granting leave to appeal has been filed herein.

Mrs. Mutti argued therefore that the appeal was misconceived as the Appellants did not seek leave of the High Court nor that of the Supreme Court to file a notice of appeal pursuant to **Rule 50 (1) of the Supreme Court Rules** (1).

Mr. Locha conceded to that point but appealed to this court to use its discretion to grant leave to the Appellants even at this late stage.

It is common ground that the Appellants did not seek leave of the High Court nor the Supreme Court to file a notice of appeal pursuant to **Rule 50(1) of the Supreme Court Rules** (1). The Appellants did not obtain leave from the learned Deputy Registrar nor from this court.

We have considered the arguments advanced by counsel on both sides. We hold that the arguments raised by Mrs. Mutti have merit. Order 49 of our own rules provides that any person desiring to appeal to this court, shall give notice of

appeal. But before giving notice of appeal, **Order 50 (1)** of our own rules (3) lays down what the aggrieved party, wishing to appeal to this court, has to do:-

> ***"Leave to appeal to the Court may be granted or refused by the High Court without formal application at the time when judgment is given, and in such event the judgment shall record that leave has been granted or refused accordingly. If leave is granted, the appellant shall proceed to give notice of appeal in accordance with the provision of rule 49."***

According to the record, the learned Deputy Registrar heard evidence from one side before he delivered this judgment. So leave should have been obtained from the learned Deputy Registrar at the time he delivered the judgment.

According to this Order 50 (1), if the learned Deputy Registrar refused to grant leave that should have been recorded and an application to this court should have been made for leave to be granted because Order 50 (2) says:

> ***"In all other cases application to the High Court for leave to appeal to the Court shall be by motion or summons, which shall state the grounds of the application, and shall, if necessary, be supported by affidavit. Such application shall be instituted and filed in the proceedings from which it is intended to appeal, and all necessary parties shall be served. If leave is granted, the order giving leave shall be included in the record of appeal. If leave is refused, the order refusing leave shall be produced on any application for leave to appeal made subsequently to the Court."***

The Appellants, as provided in this order, ought to have applied for leave to appeal to this court, to the Deputy Registrar at the time the learned Deputy Registrar delivered his judgment, the judgment which is the subject of this appeal. The Respondent ought to have made that application in accordance with **Order 48 (1)**, which we have already quoted **supra**.

R5

As already stated, there was no dispute that the Appellants never sought leave from the learned Deputy Registrar. The learned Deputy Registrar never granted leave for the Appellant to appeal to this court. Also, since all appeals from the learned Deputy Registrar's orders on assessment of damages lie to this court, if the learned Deputy Registrar had rejected the application for leave, then the Appellants should have applied to this court for leave. This was not done.

Mr. Locha has argued that this court should use its discretion to grant leave even at this late stage. In our view, this is not tenable, as he ought to have made an application in compliance with **Order 50 (3)**. What is even more to the point, in our view, is that, according to the English case of **White V Brunton** (1) a persuasive authority, ***"the requirement of leave to appeal goes to the jurisdiction of the court of appeal. Therefore since the jurisdiction cannot be conferred by the express consent of all parties – a fortiori, it cannot be conferred in consequence of an applied waiver by one party."***

In view of the foregoing reasons, the appeal is therefore misconceived and we decline to entertain it. The Appellant is condemned in costs.

E L Sakala
CHIEF JUSTICE

L P Chibesakunda
SUPREME COURT JUDGE

P. Chitengi
SUPREME COURT JUDGE