DHODHANI ZHOU
versus
GLOBAL MOTORS
and
D KADIRIRE

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 18 January 2005 and 16 February 2005

**Chamber Application**

MAKARAU J: This matter was placed before me in chambers as a review of the proceedings of the small claims court.

The background facts to this matter may briefly be stated as follows:

The plaintiff issued process out of the Small Claims Court claiming the sum of $12 800 00-00 for services rendered at the defendant's special instance in supplying and fitting car shades at the defendant's premises. The claim was resisted. After the hearing, which was held on 28 September 2004, the presiding officer entered judgment for the plaintiff in the sum of $11 800 000-00 together with costs. Dissatisfied with the judgment, the defendant filed a document styled "Application for Review" with the clerk of Court. This he did on 24 November 2004. The document, together with the record of proceedings before the Small Claims Court, were placed before me in chambers with a request that I review the proceedings.

In the purported application for review, the defendant avers that:

"1. The Presiding Officer erred in awarding judgment in favour of the plaintiff in the sum of $11 800 000-00 when the right to that amount had not been properly established.
2. The Presiding Officer erred in not finding that the work done was so defective that it did not serve the purpose for which it was intended.
3. The Presiding Officer erred in not taking into consideration the fact that the shades have to be removed and altered at an estimated costs of $6 000 000-00 for the nets alone.
4. The plaintiff as an expert was expected to advise us (sic) on the state of the structure before putting up the tents.
5. We are not refusing in totality the plaintiff's claim but we are prepared to pay the reasonable value for work done, which we value at $5 500 000-00."

The Small Claims Court was set up by Parliament in 1993 for the adjudication of small civil claims in an inexpensive fashion. It is not a court of record and procedure therein is largely informal. No appeal lies from its decision as s30 of the Small Claims Court Act [*Chapter 7:12*] provides:

> "**30 Finality of judgment**
> A judgment of a small claims court shall be final and no appeal shall lie from it, but any party may bring the proceedings on review, before the High Court on any grounds on which the High Court may review proceedings of judicial tribunals."

It is under the provisions of this section that the purported review was brought before me.

Two issues arise from the papers before me.

Firstly, assuming that the papers were properly before me, which they are not, as I shall detail hereunder, the issues raised in the application for review are not review matters but are an attack on the merits of the judgement of the presiding officer. It is a settled position at law that that an attack on the merits of the decision is an appeal while a review seeks to attack the manner in which the decision was arrived at. The difference between an appeal and a review was highlighted in *Muringi v Air Zimbabwe Corporation and Another* 1997 (2) ZLR 488 (S) at 490 F-G, where GUBBAY C J (as he then was), had this to say:

> "Judicial review, as the phrase implies, is concerned not with the correctness of the decision but with the decision making process."

The statement by the then Chief Justice above, was cited with approval by McNALLY JA in *Charumbira v Commissioner of Taxes and Others* 1998 (1) ZLR 584, which in turn was cited with approval in *Mundoma v BICC CAFCA P/L* SC 133/98.

While not referring to any of the above Supreme Court decisions, DEVITTIE J made the same distinction between an appeal and a review in *Kariwo and Another v Takawira and Another* HH113/98. In that case, he reminded himself of the distinction between an appeal and a review by citing the following passage from *Herbstien and Van Winsen* 4th Ed p 932:

> "The reason for bringing proceedings under review or appeal is usually the same, to have judgement set aside. Where the reason for wanting this is that the Court

> came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however the real grievance is against the method of the trial, it is proper to bring the case upon review. The first distinction, depends therefore on whether the result only, or rather the trial that is to be attacked. And naturally, the method of trial will be attacked on review only when the result of the trial is regarded as being unsatisfactory as well. Th giving of a judgement not justified by the evidence would be a matter of appeal and not a review upon this test. The essential question in review proceedings is not the correctness (of the decision) under review but its validity."

This court does not exercise an appellate jurisdiction under its review jurisdiction of inferior tribunals. (See (See *National Foods Ltd v Kare and Others 1*990 (1) ZLR 223, 232 (H); *Minister of Labour Manpower & Social Welfare & Others v Pen Transport (Pvt.) Ltd* 1989 (1) ZLR 293 (S) *and Fikilini v Attorney-General* 1990 (1) ZLR 105 (SC)).

In the papers before me, no allegation tending to attack the manner in which the judgment was arrived at has been raised. No allegation has been made that the proceedings were irregular or that the decision is invalid for want of procedure. The attack on the decision is that it was incorrect.

On the basis of the foregoing, even assuming that I could review the matter on the basis of the papers before me, the review would not have succeeded. It is essentially an appeal brought under the guise of a review and will have the effect of bypassing the provisions of s 30 cited above.

Secondly and more importantly in my view, the purported review brought by the defendant is improperly before this court.

It is specifically provided in the rules of this court that save where any other law provides otherwise, reviews to this court are to be brought by way of court application on notice to the other side and to the authority or body whose decision is to be reviewed.[1]

The Small Claims Court Act does not provide for the procedure to be adopted when an aggrieved party wishes to bring on review the decision of a presiding officer in favour of any of the parties appearing before that court. Instead, it specifically provides in s33 for the reviews of a decision of a presiding officer imposing a penalty on any

[1] Order 33 Rule 256 of the High Court Rules, 1971.

person for contempt of the small claims court. These are to be on statement from the presiding officer. In my view, it is worth noting that the legislature specifically provided for an informal procedure for the review of the decision of a presiding officer imposing a penalty for contempt of court. In making this special provision which imports the informality of the procedures before the small claims court into the High Court procedures, the legislature must be presumed to have been aware of the provisions of the High Court Rules I have referred to above. In my view, one can easily understand the jurisprudential basis for making this special provision as contempt proceedings have the effect of depriving the convicted party of his or her liberty and the power of the presiding officer to do so has to be checked to avoid abuse.

Further, it is my view that by making specific provision for the informal review of the decision of a presiding officer imposing a penalty for contempt of court and not making similar provisions for the review of any other decision of the presiding officer, the legislator must be taken to have intended to exclude general reviews from the informal procedure. In arriving at this finding, I am relying on the *expressio unius est exclusio alterius* maxim. It is part of this court's approach in constructing statutes to be guided by this maxim whose meaning is effectively that the mention of one or more things of a particular class may be regarded as by implication, excluding all other members of the class.[2]

While it is part of this court's approach to make the *exprssio unius est exclusio* maxim yield if its invocation will lead to an absurdity, it is my view that that no absurdity will result in the matter before me by invoking the maxim. To the contrary, the invoking of the maxim appears to me to fulfil the purpose of the Small Claims Court Act. As indicated above, it was the intention of the legislature to set up an inexpensive and expeditious vehicle for the settlement of small claims. It further appears to me that it was not the intention of the legislature that the resolution of such claims be prolonged by the noting of appeals to the formal courts hence the provisions of s30 of the Act. The spirit behind s30 of the Act was, in my view, to contain the duration of litigation over small claims. Limiting the matters that filter to the High Court to reviews only is in keeping

[2] See: Cross Statutory Interpretation 2nd Ed p 138.

with the spirit of the Act and this spirit is further kept by subjecting such reviews to the formality normally associated with the High Court. It is my view that any informality on the part of the High Court may open floodgates of appeals labeled "reviews", a mischief that the legislature intended to curb.

I have considered and rejected the possible argument that since small claims are informally dealt with at first instance, it is not in the interests of justice to subject litigants over such claims to the formal procedures of the High Court. This may even entail having to engage counsel at the prevailing high costs. I have rejected this possible argument on the basis that this court does not proceed on the basis of the rules of the tribunal whose decision is under review save where this has been specifically provided for in the legislation setting up the tribunal. It is trite that reviews of the decisions of most inferior tribunals of whatever nature, be they lower courts, quasi-judicial bodies, military or labour related tribunals, are dealt with in terms of the standard review procedures of this court as laid out in Order 33 of the High Court Rules. This court enjoys its review powers by virtue of ss26 and 27 of the High Court Act [*Chapter 7:06*]. As stated above, unless any other law provides to the contrary, civil reviews to this court are to be brought in terms of the provisions of Order 33 of the Rules.

On the basis of the foregoing, it is my view that reviews to this court seeking to set aside the decisions of the small claims court are to be filed in accordance with the provisions of order 33 of the High Court rules 1971 and are not to be entertained on statement from the aggrieved party.

As indicated above, in the matter before me, a single document purporting to be an application for review has been placed before me in chambers. The grounds upon which the defendant seeks to have the decision of the small claims court set aside go to the merits of the decision and are not the grounds upon which this court reviews the decisions of inferior tribunals. The application was not served on the plaintiff. Due to this unsatisfactory features, the application by the defendant does not comply with the rules of this court and is therefore improperly before me.

As this is a matter involving the procedure of this court, I have discussed this judgement with the Judge President who shares my views.

In the result, the application is dismissed.