A One Afraeli Siwalo was convicted on the same proceedings and on the same evidence. I am not aware that he has appealed against his conviction and sentence. In the exercise of my revisional powers under section 373 of CPA for the same reasons as for the appellant,
B Elineema Andrea, the conviction of Afraeli Siwalo is quashed and the sentence is set aside.

I make no order for retrial but the matter is open for the Director of Public Prosecution to institute fresh charges against the appellant,
C Elineema Andrea and Afraeli Siwalo.

D

MIROSLAV KATIC AND TWO OTHERS *v* IVAN MAKOBRAD

E

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(Makame, Ramadhani and Lubuva, JJ.A.)

F

CIVIL APPLICATION No. 66 OF 1998

(From Ruling of a Single Judge of the Court of Appeal of Tanzania at Dar es Salaam)

G *Civil Practice and Procedure – Application of rule 45(1) and (2) of the Court of Appeal Rules – Revisional jurisdiction of the Court of Appeal – Section 4 of the Appellate Jurisdiction (Amendment) Act Number 17 of 1993 – Objective behind the Act.*

H *Court of Appeal Rules –Revisions – Revisional jurisdiction of the Court of Appeal – Section 4 of the Appellate Jurisdiction (Amendment) Act Number 17 of 1993 – Objective behind the Act.*

I In High Court Civil Case Number 321 of 1997, initially, the respondent, Ivan Makobrad, had filed the suit against the first and second applicants, namely Miroslav Katic and

Vesra Paladin. The third applicant, Ingra, applied to be joined as one of the defendants. In granting that application on 3 July 1978 the High Court also ordered the respondent, Ivan Makobrad, who was the plaintiff in the suit, to vacate the suit premises. The respondent then filed Application Number 36 of 1998 in the Court of Appeal seeking stay of execution of the ruling and order of 3 July 1998. A single judge dismissed that application on 14 August 1998. The matter then went back to the High Court where on 30 September 1998 an eviction order was issued against the respondent. On 1 October 1998 the applicant applied for execution of the eviction order. On the same day the respondent filed an application in the High Court for vacation of the execution order of 30 September 1998 pending determination of a reference to the Court of Appeal against the decision of the single judge of 14 August 1998. The High Court granted the application and so vacated its order of execution of the order which had already been carried out.

The applicants filed this application under section 4(3) of the Appellate Jurisdiction (Amendment) Act 1993 by a Notice of Motion of Ingra to revise the decision of the High Court of 1 October 1998 in Civil Case Number 321 of 1997. A preliminary objection was raised to the effect that the application was incompetent as rule 45(1) and (2) had not been complied with. On the main application, it was submitted that the same was misconceived as the decision sought to be challenged was appealable. Leave was sought to amend the application to state grounds for application.

Held: (i) Under rule 45(1) and (2) of the Court of Appeal Rules the grounds of an application are matters of substance that go to the root of the matter and it is mandatory to state them in the Notice of Motion; failure to state the grounds in the Notice of Motion is fatal to the application.

(ii) The objective behind the enactment of the revisional powers of the court was not to provide an alternative to its Appellate Jurisdiction but to enable the court in certain circumstances, to satisfy itself as to the correctness, legality or propriety of any decision or order of the High Court.

(iii) Having regard to the peculiar circumstances of the case, the nature of the matter and the subject of the intended revision, it was felt that it was in the interests of the ends of justice that leave be granted to the applicant to amend the Notice of Motion so as to comply with the requirement of rule 45(1) of the Court of Appeal Rules 1979.

(iv) *Obiter:* In the peculiar circumstances of this case, even though the matter involved was appealable, the court's revisional powers could be invoked to rectify the situation. There was a glaring error on the part of the High Court in that its order purported to nullify that court's previous order of execution which had taken place and secondly, it also purported to overrule a previous order of the court by a Single Judge refusing to grant stay of execution. Such glaring type of error on the part of the High Court calls for urgent remedial action on the part of the court. Since the appeal process would have taken time, it was thought more appropriate and expeditious to invoke the revisional jurisdiction of the court than the appeal process, particularly in a situation such as this which appeared to border closely on a travesty of justice. Preliminary objection is overruled.

Order accordingly

Cases referred to:

(1) *Giafar Mohamed Bedder and another v. Ital African Transport Ltd* CAT, Civil Application Number 4 of 1994 (unreported)

(2) *Atlantic Electric Ltd v. Morogoro Region Co-operative Union (1984) Limited,* [1993] T.L.R. 12

(3) *VIP Engineering andMarketing Ltd v. Said Salum Bakhresa Ltd.*, CAT Civil Application Number 47 of 1996 (unreported)

(4) *Transport Equipment Ltd v. Devram P. Valambia,* Civil Application Number 46 of 1994 (unreported)

(5) *Halais Pro-Chemie Industries Ltd. v. Wella A.G.,* [1996] T.L.R. 269

Mr Kesaria, for the Applicant

Mr Mselem, for the Respondent

RULING

(Dated 16 December 1998)

LUBUVA, J.A.: This application is filled under section 4(3) of the Appellate Jurisdiction Act 1979, as amended by Act Number 17 of 1993.

By Notice of Motion filed by Ingra, the applicant is moving the court to revise the decision of the High Court (Mackanja, J.) in Civil Case Number 321 of 1997 dated 1 October 1998. The application is supported by an affidavit sworn by Dilip Kesaria, learned counsel for the applicant. As stated in the Notice of Motion, the purpose of seeking revision in this application is to declare the *ex parte* order of 1 October 1998 by Mackanja, J. illegal and improper. In part, it is stated in the affidavit that the order is illegal and improper because:

> That the said order of the learned judge of 1 October 1998 overrules an earlier order of the Court of Appeal (Mfalila, J.A. of 14 August 1998 – Civil Application Number 36 of 1998.

The facts giving rise to the case are simple and generally not disputed. In High Court Civil Case Number 321 of 1997, initially, the respondent had filed a suit against the first and second applicants. The third applicant, Ingra, applied to be joined as a defendant. Granting the application on 3 July 1998, the High Court also ordered the respondent to vacate the suit premises at Plot Number 30 Kurasini Road in Dar es Salaam. Following this order, the respondent filed in this Court Application Number 36 of 1998 seeking to stay the execution of the ruling and order of 3 July 1998. On 14 August 1998, a single judge of this court (Mfalila, J.A.) dismissed Application Number 36 of 1998. Then the matter went back to the High Court where, on 30 September 1998 an eviction order was issued against the respondent. On 1 October 1998 the applicants lodged an application for the execution of the eviction order of 3 July 1998. On the same day (1 October 1998) the respondent through the services of Mr Mselem, learned counsel, applied for the order of execution of 30 September 1998, to be vacated pending the determination of the reference preferred to this court against the decision of the single judge. Granting the application for vacating the order of 1 October 1998, the High Court (Mackanja, J.) issued the order in the following terms.

> Accordingly, it is decided that the order allowing execution of the order in respect of which an appeal is pending before the Court

of Appeal is hereby vacated. If the order for execution has already been executed, that said execution is hereby nullified.

This is the order which is complained against by the applicants, before the application came on for hearing, the respondent had filed a notice of preliminary objection. As indicated in the notice of preliminary objection, the ground upon which the objection is based is that:

> The application is incompetent and not properly before the court for failure to state the grounds thereof in the Notice of Motion.

At the commencement of the hearing of this application Mr Mselem, learned counsel for the respondent, made submissions in support of the preliminary objection. In the first place, he firmly contended that the application before the court was incompetent because it did not state the grounds of the application. Elaborating on this, it was his further submission that the omission to state the grounds in the Notice of Motion is fatal to the application as this is a mandatory requirement under rule 45(2) of the Court's Rules. For this submission, Mr Mselem relied on the decision of this court in the following cases which are not yet reported: *Giafar Mohamed Bedde and another v. Ital African Transport Ltd.* (1), *Atlantic Electric, Limited v. Morogoro Region Cooperative Union (1984) Limited,* (2), *VIP Engineering and Marketing Ltd. v. Said Salum Bakhresa Ltd.* (3).

In the second place, Mr Mselem submitted that in terms of the Appellate Jurisdiction Act 1979 as amended by the Appellate Jurisdiction (Amendment) Act Number 17 of 1993, (hereinafter referred to as the Act) the application is misconceived. This is so, he contended, because section 4(3) of the Act cannot be invoked in situations where the matter involved is appeallable. In this case, Mr Mselem maintained, if the applicant was dissatisfied with the order of the High Court of 1 October 1998, an appeal could with leave be preferred on grounds of it being illegal and improper. That is, he went on in his submission, the situation of the case is such that it could not be said that the matter is not appeallable or that the appellate process has been blocked by judicial process. Among other cases, Mr Mselem referred the

court to *Transport Equipment Ltd. v. Devram P. Valambhia,* (4) (not yet reported) and *Halais Pro-Chemic Industries Ltd.,* (5). A

Countering the submission on the first point that the Notice of Motion was defective for failure to state the grounds of appeal Mr Kesaria took the opposite view. Because the grounds for the application are set out in the affidavit accompanying the Notice of Motion, the application was competent, he further insisted. At any rate, Mr Kesaria went on in his submission, the court has not been consistent in its decisions by single judges of this court on whether it is mandatory to state the ground for the application in the notice of motion. However, Mr Kesaria prayed from the bar, should the court find that it is mandatory to state the grounds in the Notice of Motion, then the applicant should be granted leave to amend the Notice of Motion by stating the grounds therein. B C D

Then Mr Kesaria dealt with the argument that the application is incompetence on account of the fact that it concerns a matter which is appellable. While conceding that the powers of revision vested in the court were not meant to be invoked as an alternative to the appeal process, Mr Kesaria boldly contended that in a situation such as the case here, where the High court instead of invoking proper jurisdiction and due process of law, blatantly went far widely out of jurisdiction, the exercise of the powers of revision was warranted. That is, in order to ensure speedy corrective measures over a glaring mistake by the High Court, it was more appropriate to invoke the court's revisional powers than the appeal process, he concluded. E F G

We propose to deal first with the complaint that the Notice of Motion does not state the grounds for the application. Failure to disclose the grounds in the Notice of Motion, Mr Mselem strongly contends, is fatal to the application. The issue therefore is whether it is a mandatory requirement under rule 45(1) and Form A in the First Schedule to the rules to state the grounds. In addressing the issue, it is imperative to have a close look at the provisions of rule 45(1) which provides: H I

A Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, all applications to the court shall be by motion, which shall state the grounds of the application. [emphasis supplied]

B (2) a Notice of Motion shall be substantially in the Form A in the First Schedule to these rules ... [emphasis supplied]

With regard to the Notice of Motion, in part, Form A provides:

... Advocate for the above named applicant, will move the court/a judge
C of the court for an order that ... on the grounds that ...

From these provisions, our understanding of rule 45(1) and (2) in that the grounds of the application are matters of substance, they go to the very root of the matter. For that reason and as the wording
D of sub-section (1) of rule 45 indicates, it is a mandatory requirement to state the grounds in the Notice of Motion substantially in the manner indicated in Form A. It being a mandatory requirement under this rule, it goes without saying that failure to state the grounds in
E the Notice of Motion is, as contended by Mr Mselem, fatal to the application. In the case of *VIP Engineering and Marketing Ltd. v. Said Salim Bakhressa Ltd.*, (3) the learned single judge of this court (Samatta, J.A.) restated this position of the law. There, in an application
F for extension of time to file an application for review of the judgment of the court, a preliminary objection was raised. Among others, it was contended that the Notice of Motion was incompetent because the grounds for the application were not stated in it. It was held
G *inter alia*, that rule (1) provides for a mandatory requirement which cannot be breached.

However, the preliminary objection was nonetheless not sustained for a different reason. That is that the respondent had not been prejudiced
H by the applicant's failure to state the grounds in the Notice of Motion. The applicant was granted leave to amend the Notice of Motion. From this decision, despite the fact that the preliminary objection was not sustained, we think the grave men of the decision is that
I rule 45(1) in mandatory in its requirement to state the grounds of the application in the Notice of Motion. A similar view was held by

this court in the case of *Giafar* (1). In that case a stay of execution was sought. The single judge dismissed the application on the ground *inter alia*, that the Notice of Motion did not state the grounds of the application as required under rule 45(1). The case of the *Atlantic* (2) was also cited by Mr Mselem.

This case however, does not in our view, have a direct bearing on the need for the grounds of the application being stated in the Notice of Motion. The issue involved was whether there was substantial compliance with Form D in the First Schedule to the rules. The Notice of Appeal was struck out and the preliminary objection upheld on the ground that failure to comply substantially with Form D is a fatal irregularity. From these cases, apart from the differences in the particular nature of the points at issue, we can see no inconsistency in the court's decision with regard to failure to state the grounds of the application in the Notice of Motion as claimed by Mr Kesaria. In our understanding, the court in its decisions in these cases has consistently held the view that the irregularities and omissions involved in these cases were not merely procedural, they were of fundamental nature going to the root of the matter. In that situation the court has further held, the non-conformity with rule 45(1) would be a breach of a mandatory requirement.

At this juncture, we pause to consider the effect of such non-compliance under rule 45(1) of the Rules in this case. Mr Mselem was quick in urging us to strike out the application. As already indicated, the other reason he advanced for striking out the application was that the matter was appeallable. Mr Kesaria for the applicant had, we think rightly, conceded that this application involves a matter which in appellable to this court. In such a situation, ordinarily, the court would not invoke its powers of revision because that would amount to making use of the revisional powers as an alternative to the Appellate Jurisdiction of the court.

On this, we are settled in our minds that the objective behind the enactment of the amendment effected by Act Number 12 of 1993 to the Appellate Jurisdiction Act 1979 was not to provide an alterative

to the Appellate Jurisdiction. It is common ground that the court was vested with revisional powers in order that in certain circumstances, the court can satisfy itself as to the correctness, legality or propriety of any decision or order of the High Court. In this case, we are increasingly convinced that the peculiar circumstances of the case are such that even though, as urged by Mr Mselem, the matter involved is appeallable, the court's revisional powers could appropriately and promptly be invoked to rectify the situation. In our considered opinion the special circumstance of this case is that the matter was dealt with by the High Court in such a way that it appears that the order of 1 October 1998, is problematic for two reasons:

First, it purports to nullify the High Court's previous order if execution had taken place and secondly, it also purports to overrule a previous order of this court by a single judge refusing to grant stay of execution. Such glaring type of error on the part of the High Court we think calls for urgent remedial action on the part of the court. In order to achieve this, it is our view that it is more appropriate and expeditious to invoke the revisional jurisdiction of the court than the appeal process which would take time. In a situation such as this which, it appears to us borders closely on travesty of justice, for prompt corrective action, the court could appropriately invoke its powers of revision.

Furthermore, as regards the mandatory requirement under rule 45(1) to state the grounds of the application in the Notice of Motion we have restated the legal position in general. In the instant case, while it is undisputed that the grounds were not stated in the Notice of Motion such grounds can be gleaned from the accompanying affidavit sworn by Mr D. Kesaria, counsel for the applicant. In that case, we are inclined to the view that though the grounds were not stated in the manner required under rule 45(1) such were made known to the respondent through the affidavit. Consequently, we think the respondent cannot be said to have been prejudiced by the applicant's failure to state the grounds in the Notice of Motion. And, so, if the respondent was not prejudiced by the applicant's non-disclosure of the grounds

in the Notice of Motion, we are not persuaded by Mr Mselem's forceful submission to have the application struck out. Rather, having regard to the peculiar circumstances of the case, the nature of the matter, the subject of the intended revision, we think that the ends of justice of the case would be met by granting leave to the applicant to amend the Notice of Motion so as to comply with the requirement of rule 45(1) of the Court's Rules 1979.

In the event, and for the foregoing reasons, the preliminary objection is overruled. The application for leave to amend the Notice of Motion by stating the grounds of the application is granted within two weeks from the date of this ruling. Each party to bear its costs.

SEBASTIAN RUKIZA KINYONDO *v.* DR MEDARD MUTALEMWA MUTUNGI

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Mfalila, Lubuva and Samatta, JJ.A.)

CIVIL APPEAL No. 83 OF 1998

(From the Judgment and Decree of the High Court of Tanzania at Bukoba, Lugakingira, J., dated 27 May 1998 in Miscellaneous Civil Cause No. 12 of 1995)

Civil Practice and Procedure – Appeals – Notice of Appeal – Respondent alleges Notice of Appeal was not served in time – Rule 77(1) of the Court of Appeal Rules 1979 – Who carries the evidential burden to prove service of the copy of the Notice of Appeal.

Civil Practice and Procedure – Limitation – Question of limitation and jurisdiction of the High Court not raised at the trial and the court of first instance did