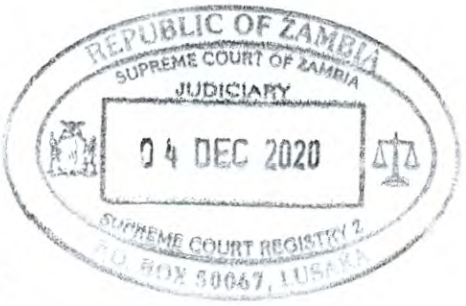
IN THE SUPREME COURT OF ZAMBIA **SCZ/09/21/2019**
HOLDEN AT NDOLA

(CIVIL JURISDICTION)



BETWEEN:

BARCLAYS BANK PLC **APPELLANT**

AND

JEREMIAH NJOVU AND 41 OTHERS **RESPONDENTS**

Coram: **Mambilima, CJ, Malila and Kaoma, JJS**
On 1st December, 2020 and 4th December, 2020

For the Applicant: Mr. M. Sakala and Mr. J. Kawana of Messrs B & M Legal Practitioners, with Mr. C. M. Sianondo of Messrs Malambo & Co.

For the Respondents: Mrs. Nellie B. Mutti and Mr. M. Chitambala of Messrs Lukona Chambers with Mr. M. Katolo of Milner & Paul Legal Practitioners.

RULING

MALILA, JS, delivered the Ruling of the Court

Cases referred to:

1. *Post Newspaper Limited v. Rupiah Bwezani Banda (2009) ZR 254.*
2. *New Horizon Printing Press Ltd v. Waterfield Estates Limited and Commissioner of Lands (Appeal No. 141/2013).*
3. *Ireen Dhliwayo and 880 Others v. Bank of Zambia (SCZ/8/222/2014).*
4. *Kayanda v. Ital Terrazo Ltd (in Receivership) (SCZ/8/273/2015).*
5. *Kennedy Kayombo Kapalu and 254 Others v. Maamba Collieries Ltd and Attorney-General (Appeal No. 167 of 2015).*
6. *Zambia Consolidated Copper Mines Limited v. Patrick Mulemwa (SCZ Judgment No. 15 of 1995).*
7. *Dora Siliya & Others v. Attorney-General (2013) HP/1159.*

8. *Nyimba Investments Ltd v. Nico Insurance (Z) Ltd (Appeal No. 130 of 2016).*
9. *Finsbury Investment Ltd v. Antonio Ventriglia (Appeal No. 11 of 2005) [2013] ZMSC 17.*
10. *Africa Banking Corporation Zambia v. Mubende Country Lodge Ltd. (Appeal No. 116/2016).*
11. *Stanley Mwambazi v. Morester Farms Ltd. (1977) ZR 108.*
12. *Waterwells Ltd v. Jackson (Judgment No. 4 of 1984).*
13. *New Plast Industries Ltd v. Commissioner of Lands and Attorney-General (SCZ Judgment No. 8 of 2011 [2001] ZMSC 19.*
14. *Dar Farms Transport Limited v. Moses Nundwe, Limba Bank (in Liquidation) Lukanga Investment Development Ltd and Mpongwe Fars Limited (appeal No. 46/2014).*
15. *Saviour Chibiya v. Crystal Gardens Lodges and Restaurant Ltd. (Appeal No. 97 of 2013).*
16. *Philip Mutanitka, Mulyata Sheal v. Kenneth Chipungu (2014) Vol. 1 ZR 352.*

Legislation referred to:

1. *Supreme Court Rules, Cap. 25 of the Laws of Zambia.*
2. *Supreme Court Act, Cap. 25 of the Laws of Zambia.*

Other works referred to:

1. *Rules of the Supreme Court of England (1999) (ed) (the White Book).*

1.0 INTRODUCTION

1.1 This ruling is on a preliminary issue raised by the respondents in a motion taken out by the applicant against a decision of a single judge of this court.

1.2 The hearing of this motion was deferred pending the outcome of the preliminary objection.

2.0 BACKGROUND FACTS

2.1 This matter has a long history. It has made its rounds in all the courts except the Local Court and the Constitutional Court. It was first commenced in the Industrial Relations Court (IR) which delivered its judgment on 23rd August 2011. The applicant appealed the judgment of the IRC to the Supreme Court. An abbreviated version of what transpired is as follows:

2.2 On 28th July 2015, this appeal, which was originally Appeal No. 107/2017, came up for hearing. It occurred that the appellant had on 20 July 2012 filed the record of appeal without the heads of argument in conformity with the amended Supreme Court Rules.

2.3 We allowed the application by the appellant to withdraw the record of appeal so as to comply with Rule 58(5) of the Supreme Court Rules.

2.4 Without seeking leave to properly file the record out of time, the appellant refiled its record and heads of argument out of time.

2.5 When the appeal came up before the Supreme Court on 15th May 2018 a preliminary objection was raised pursuant to Rule 19(1) and Rules 48(1), 54 and 55 of the Supreme Court Rules, chapter 25 of the Laws of Zambia. The objection was chiefly whether the filing of the record of appeal without leave on 14 September 2015 was legally proper.

2.6 In a ruling we delivered on the 21st June 2015, we agreed with counsel for the respondent that the appellant, having been out of time to file (by way of refiling) the record of appeal, accompanied by heads of argument, should have applied for leave to file out of time. Failure to obtain leave meant that the preliminary objection succeeded and the appeal collapsed accordingly.

2.7 The appeal having been dismissed on a technicality the applicant then decided to relaunch it, beginning with an application for leave to file appeal out of time in the court that delivered the judgment.

2.8 Two key developments had occurred in the meantime. First, the IRC, which had delivered the judgment at first instance, had now become a division of the High Court. Second, the

Court of Appeal had been established as an intermediate court between the High Court and the Supreme Court.

2.9 And so it was that the appellant went to seek leave to appeal out of time before a judge of the High Court (Industrial and Labour Division). That application was rejected. This prompted the appellant to renew the application before a single judge of the Court of Appeal. The renewed application was equally rejected.

2.10 The appellant then approached the full Court of Appeal to grant leave. The Court of Appeal equally rejected the application, giving as the reason for the rejection, the fact that the matter having been dismissed by the Supreme Court, the Court of Appeal lacked jurisdiction. An application for leave to appeal against the ruling of that court was equally refused.

2.11 The appellant then approached a single judge of this court for leave to appeal. The single judge, by ruling dated 19th June 2020 declined the application, stating among other things, that the appeal lacked prospects of success. Aggrieved by the ruling, the appellant, some four months

later, on the 7th October 2020 filled an *Ex parte* summons for an order for extension of time within which to file a motion against the decision of the single judge.

2.12 The single judge declined that application, stating that the reasons for the rejection are set out in his ruling of the 19th June 2020. The single judge's order, endorsed on the summons, was made on the 8th October 2020.

2.13 Unhappy with the judge's order the applicant took out the current motion on the 15th October 2020 to persuade the full court to vary or discharge the single judge's ruling of 8th October 2020. The motion documents run into 474 folios

2.14 The motion is supported by an affidavit sworn by Mwape Mondoloka, the Company Secretary of the applicant. In it, the reasons for seeking the order to vary or discharge the single judge's order of the 8th of October 2020 are set out. In paraphrase, the reasons given are that the appellant failed to file the application for extension of time within which to file the notice of motion against the single judge's ruling of 16th September 2020 because the transcript of proceedings was not forthcoming from the Supreme Court Registry until

well after 14 days after the ruling of the 16th September 2020.

2.15 According to the applicant, in the circumstances narrated in the foregoing paragraph, the single judge of this court should not have declined the application by endorsing his refusal on the application on 8th October 2020 without considering the merits of the application for extension of time.

2.16 the respondents opposed the motion and filled an affidavit in opposition sworn by Raphael Chisupa. Essentially the respondents assert that the single judge was right to decline to consider the application of the applicant as in doing so he had detailed affidavits before him which informed the exercise of his discretion against the applicant.

2.17 The deponent also averred that there is no record and/or evidence produced by the applicant's purported engagement with Supreme Court Registry staff as alleged which culminated in the delay in preparing the record of proceedings. In the circumstances as they presented themselves, the affiant of the affidavit believed that it was

unnecessary for the applicant to be heard in respect of all the applications before the single judge.

2.18 The motion was also opposed on grounds that the application which the single judge declined to entertain was filed later than the 14 days prescribed in the rules and there was no application made for extension of time. According to the respondent, the right of applicant to challenge the single judge's ruling as of right expired when the 14 days within which to do so ended.

2.19 The respondents also filed copious heads of arguments in opposition to the motion. More pertinently perhaps the respondent filed a notice for determination of preliminary questions of law and/or construction.

2.20 Taking full cognizance of the fact that a preliminary issue especially one taken on a point of law, has the potential to decisively conclude the claim, or a substantial part of the claim, and bearing in mind the observation made in **Post Newspaper Limited v. Rupiah Bwezani Banda** that as a matter of procedure, and because the outcome might affect the substantive grievance, a preliminary issue ought to be

disposed of first, we decided to deal with the preliminary issues first.

3.0 THE PRELIMINARY ISSUES

3.1 The respondents filed a notice for the determination of questions of law and/or construction pursuant to Order 14A rule 1 (1) and (2) of the Rules of the Supreme Court of England (1999 ed)(the White Book) as read together with rule 12(4) of the Supreme Court Rules.

3.2 Counsel for the respondents framed the following questions on points of law for the determination of this court:

3.2.1 Whether the notice of motion filed by the applicant seeking to discharge, vary or set aside the ruling of the single judge and dated 16th September 2020 was competently before the court.

3.2.1 Whether the said notice of motion was properly before the court in view of the decision of the full court dismissing the appellant's appeal No. 140 of 2015.

4.0 THE RESPONDENTS ARGUMENTS IN SUPPORT OF THE PRELIMINARY ISSUE

4.1 Counsel for the respondent quoted Order 14A Rule 1 of the Rules of the Supreme Court of England regarding the source and extent of the power of this court to determine the preliminary issue. Counsel also quoted numerous other authorities including our decision in **New Horizon Printing Press Ltd v. Water field Estates Limited and Commissioner of Lands**[2] and **Ireen Dhliwayo and 880 Others v. Bank of Zambia**[3] in which we explained how and why Order 14A of the Rules of the Supreme Court of England applies in this jurisdiction.

4.2 As regards the first question counsel contended that the notice of motion and affidavit in support before us shows that it was made pursuant to section 4(b) of the **Supreme Court Act** and Rule 48(4) of the Supreme Court Rules, chapter 25 of the Laws of Zambia. After quoting section 4(b)(defining the power of a single judge of this court) and rule 48(1) and (4) prescribing the procedure to be followed when moving the court in interlocutory matter, counsel drew our attention to the interpretation we placed on those provisions.

4.3 In particular Rule 48(4) of the Supreme Court Rules which applies to applications to the full court from decisions of a single judge provides that:

> **Any person aggrieved by any decision of a single judge who desires to have such decisions varied, discharged or reversed by the Court under paragraph (b) of section four of the Act, shall in like manner file before the hearing by the court six extra copies of the proceedings, including copies of any other party prior to the single judge's decision for use by the court.**

4.4 counsel submitted that the words "in like manner" as used in Rule 48(4) and (5) of the Supreme Court Rules imply that any application under those sub-rules ought to be made within fourteen days of the decision complained of as is the case in regard to applications made under rule 48(1). To this end, our attention was drawn to the case of **Lenard Kayanda v. Ital Terrazo Ltd (in Receivership)**[4] in which we stated at para 5.5 (pageJ6) as follows:

> **Rule 48(1), which we have set out in paragraph 5.3, is couched in mandatory terms in relation to the period within which to make an application to a single judge, that is within fourteen days of the decision complained of. It is no longer open ended as it was before the amendment of 2012.**

Furthermore, because of the use of the phrase "shall in like manner" in sub-rule (4), any application made under that sub-rule challenging the decision of a single judge should be made within fourteen days as provided in sub- rule(1). The same applies to an application involving the decision of an appeal under rule 48(5).

4.5 Counsel also called our attention to the case of **Kennedy Kayombo and 254 Others v. Maamba Ltd and Attorney-General**[5] where our holding was to the same effect.

4.6 It was submitted on behalf of the respondent that once time within which the application under Rule 48(4) of the Supreme Court Rules ought to be filed has elapsed, no motion can competently be filed without an order for leave to file the motion out of time is made in terms of rule 12 of the Supreme Court Rules. In counsel's view, an order for extension of time operates prospectively, bearing in mind that in **Ireen Dhliwayo and 880 Others v. Bank of Zambia**[3] we guided that computation of time excluded the day on which the event happens or the act or thing done.

4.7 In the present case no order for extension of time had been obtained by the applicant prior to filing the notice of motion and supporting affidavit. Since the ruling intended to be impugned in the motion was delivered on the 16th September

2020, any motion seeking to discharge, vary or set it aside ought to have been filed by 30th September 2020. Alternatively the applicant should have obtained an order for extension of time prior to filing the said notice of motion.

Counsel thus submitted that the notice of motion was thus incompetent.

4.8 Counsel for the respondent submitted that when out of time, the existence of an order for extension of time is a precondition to filing a competent motion under Rule 48(4) of the Supreme Court Rules. Leave to file the motion goes to the root of the jurisdiction of the court.

4.9 Turning to the second question whether the notice of motion was properly before the court, granted that the full court dismissed the appellant's appeal in Appeal No. 140 of 2015, counsel submitted that it was not, because following the judgment of the IRC dated 23rd August, 2011the applicant thus exercised its only right to appeal to the Supreme Court.

4.10 The thrust of the respondent's argument in support of its position on the second point if law is centered around finality of our decision when we dismissed the appellant's Appeal

No. 140 of 2015. Besides citing Article 125(3) of the constitution which speaks to the binding nature on the Supreme Court its decision, counsel cited a multitude of case authority on the finality of Supreme Court judgments.

These include **Zambia Consolidated Copper Mines Limited v. Patrick Mulemwa** and **Dora Siliya & Others v. Attorney-General[7].**

4.11 Counsel also approvingly quoted a passage from our judgment in **Nyimba Investments Ltd v. Nico Insurance (Z) Ltd[8]** where we stated in relation to an application under the slip rule (rule 78 of the Supreme Court Rules) as follows:

> **This court has consistently refused to be dragged into this pitfall. The position is that once the Supreme Court has entered judgment in a case, that decision is final and will remain so forever unless the conditions for its re-opening as we set them out in Finsbury Investments Ltd v. Antonio Ventriglia are satisfied. Our judgments are final not because we are infallible but order to avoid the spectre of repeated efforts at relitigation.**

4.12 The statutory exception to the doctrine of finality of appeals dismissed by the Supreme court is to be found, according to counsel, in Rule 71(1)(a) and (c) of the Rules of the Supreme Court, which, together with Order 71(2) of the Supreme

Court Rules as Amended by SI No. 28 of 2012, the learned counsel reproduced.

4.13 The learned counsel went to great lengths citing numerous case and statutory authorities that speak to finality of Supreme Court judgment as well as to the desirability of finality of litigation. Counsel also cited authorities in which we have castigated counsel where they have approached litigation casually leading to dismissal of appeals.

4.14 We do not consider that there is much point in restating all the authorities cited. All we can say is that we have duly noted the point that counsel makes which is not made any stronger by citing all the authorities on it.

5.0 THE APPLICANT'S OPPOSITION TO THE PRELIMINARY ISSUES

5.1 At the hearing of the appeal, the applicant applied for and was granted leave to file heads of argument in opposition to the respondent's notice to raise preliminary questions of law or construction.

5.2 The preliminary issues were opposed on many fronts. First, it was submitted on behalf of the applicant that Order 14A of the Supreme Court Practice Rules 1999 edition (White

Book) which the respondent relies upon, do not apply to matters in the Supreme Court. Counsel made this submission while agreeing that the procedure in the White Book applies where there is no provision in the Supreme Court Rules, chapter 25 of the Laws of Zambia.

5.3 To buttress the submission counsel made regarding the non-applicability of Order 14A of the Supreme Court Practice Rules, they referred us to Order 1 Rule 4(2) of the White Book which defines *'the court'* as the High Court or any one or more judges thereof. Counsel also referred to the explanatory note to Order 1/4/7 of the White Book regarding reference to the word *'court'* which excludes the Court of Appeal unless the context otherwise requires.

5.4 Counsel drew our attention to section 8 of the Supreme Court Act, chapter 25 of the Laws of Zambia, which provides that practice and procedure in the Supreme Court shall be as nearly as may be to practice as observed in the Court of Appeal in England. As Order 14A of the white Book does not apply to the Court of Appeal in England, counsel submitted that it follows that is does not apply to the Supreme Court of Zambia either.

5.5 It was also submitted that one of the requirements for a party seeking to invoke Order 14A of the White Book is that the party should have filed a notice of intention to defend, which has been interpreted to be a memorandum of appearance and defence in the Zambian context. The case of **African Banking Corporation Zambia v. Mubende Country Lodge Ltd**[10] was cited as authority for that submission.

5.6 Counsel concluded his submission on that point by reiterating that since the respondent's preliminary issue is predicted on Order 14A of the White Book which does not apply, the preliminary issue must be dismissed for incompetence.

5.7 Counsel for the applicant took the matter further in their opposition to the preliminary questions. They submitted that the preliminary questions of law were raised rather prematurely by the respondent as there is only one notice of motion pending before the court, namely one to reverse or vary the Order of the single judge of this court given on the 8th October 2020. The notice of motion in which the applicant seeks leave to file a motion out of time against the

decision of the single judge of 16th September 2020, was merely exhibited. The applicant could not have filed the motion for extension of time to review, vary or discharge the single judge's decision without leave.

5.8 It was thus contended that it was erroneous for the movant of the preliminary issue to argue that there were two motions before the court. The preliminary question of law raised in respect of the notice of motion relating to the decision of the single judge of 16th September 2020 can only properly be raised once leave is sought by the applicant and granted by the court. The preliminary issue raised in that respect ought thus to be dismissed.

5.9 Counsel for the applicant also submitted that the dismissal of Appeal No. 140 of 2015 has nothing to do with the notice of motion now pending before the court. The decision of the court dismissing that appeal was accepted by the applicant who has made no attempt to reopen that particular appeal. What is not in dispute, according to counsel for the applicant, is that applicant's grievances arising from the

High Court judgment of 22nd August 2011 have never been adjudicated upon by any appellate court.

5.10 The learned counsel for the applicant contended that the applicant is entitled to have its grievances regarding the High Court judgment of 22nd August 2011 determined by the appellate court. Referring to the decision of the single judge, counsel submitted that the right of the applicant to have its appeal relaunched so that it is determined on the merits, was properly recognized by the single judge.

5.11 Citing the cases of **Stainley Mwambazi v. Morester Farms Ltd**[11] and **Waterwells Ltd v. Jackson**[12] counsel submitted that it is a settled position of the law that matters ought to be determined on the merits rather that on technicalities so that disputes are conclusively resolved. Counsel also referred to Article 118(2) (e) of the Constitution in aid of the same submission.

5.12 The final point made by counsel in opposition the preliminary questions is that the respondents appear agreed that matter ought to be determined on the merits and yet there is no legal basis for the respondents' proposition that

a matter which is dismissed on a technicality can only be recommenced if the court directs so. Counsel quoted our statement in **New Plat Industries Ltd v Commissioner of Lands and Attorney-General**[13] that:

> **The appellant is however at liberty to commence proceedings afresh following the correct procedure by law.**

According to counsel, that statement was declaration of the affected party's rights to recommence the action using the correct procedure even without the court's statement.

5.13 The applicant's counsel made other arguments which go to the main motion before us.

5.14 At the hearing of the motion Mr. Sakala reiterated the contents of the heads of arguments.

6.0 ANALYSIS AND DECISION

6.1 The respondents have raised two fairly important questions of law. As far as we can ascertain, they effectively question the jurisdiction of this court to deal with an appeal arising from the same set of facts.

6.2 Although the movement of the preliminary questions has made long-winded submissions covering a wide array of issues, the real question determinative of the preliminary objection is simply whether this court, having dismissed the appellant's appeal under Appeal No. 140 of 2015 arising from the judgment of 23 August 2011 can determine another appeal arising from the same judgment.

6.3 Our understanding of the applicant's position is that such an appeal can indeed be relaunched. All actions of an interlocutory nature which have been undertaken by the applicant leading up to the present impasse, are predicated on that one position which the applicant habours.

6.4 The basis of the applicant's position is simply that the dismissed appeal was not heard on its merits – the dismissal having been on account of technicality. If that technicality is attended to, then in the view of the applicant, nothing should stand in the way of the applicant to have its appeal considered on its merit.

6.5 The applicant has drawn a reasonably fair parallel between a wrong mode of commencement as was the case in **New Plast Industries Ltd**[13] where we stated that the appellant was at liberty to commence the process of appeal afresh, and the current case.

6.6 Quite understandably the applicant may well have been emboldened in its position by a statement made by the sing judge when in his ruling of 16th September 2020 he stated as follows:

> **8. In my ruling, I dismissed the argument on jurisdiction advanced by the learned counsel for the respondent who had contended that as the original appeal was dismissed by the Supreme court in a final and binding judgment, I sitting as a single judge, had no power to do anything that would have the effect of undermining that final judgment of the full court.**
>
> **9 In declining that argument, I made a distinction between reopening a dismissed appeal and restarting the process of appeal, holding in effect that as the appellant's appeal was dismissed on a technically, the window to restore the appeal process after attending to the technicality that led to the dismissal of the appeal was not closed.**

6.7 The single judge was by that holding, of court, ventilating an individual position as best as he understood the legal position. That view does not represent the position of the Supreme Court as a collegiate and was liable to be upheld or varied and reversed by the full court on motion.

6.8 Since the ruling of the single judge was given on the 16th September 2020, the full court has had occasion to consider a similar question in **Dar Farms Transport Limited v. Moses Nundwe, Lima Bank (in Liquidation) Lukanga Investment Development Ltd and Mpongwe Farms Limited**[14].

6.9 In the **Dar Farms**[14] case, as in the present, an appeal was dismissed on a technicality, namely that the record of appeal did not contain a copy of the leave to appeal from the court below. At the hearing of the appeal, it was erroneous conclusion of all the parties that leave was probably not obtained. We proceeded to dismiss the appeal as it is too well settled a position to admit of argument that absence of leave to appeal goes to the very core of the appellate court to deal with the appeal – jurisdiction. Put nakedly, where leave has not been granted, the appellate court has no jurisdiction to entertain the appeal.

6.10 Following the dismissal of the appeal, counsel for the applicant discovered that leave had after all been obtained and it was available on a separate file. He thus moved this court by motion to set aside the order of the court dismissing the appeal and to restore and hear the appeal on its merits.

6.11 In dismissing the motion we stated, inter alia, the following [at J11 para. 18]:

> **Needless to state, the appeal was incompetent and properly dismissed because it offended the mandatory requirements of Rule 50(2) of the Supreme Court Rules. In our view, an appeal dismissed under these circumstances cannot see the light of day again. Stated differently such an appeal cannot be restored to the active cause list. As aptly argued by Mrs. Kabalata, this court became functus official after the appeal was dismissed.**

6.12 Elsewhere in the same judgment, we observed and stated as follows:

> **[19] Regarding Mr. Sianondo's contention that this court had inherent jurisdiction to reconsider the order it made earlier to avoid real injustice where the circumstances are exceptional, we posit that the exercise of such jurisdiction is not to be done willy nilly but must be within the law. Our inherent jurisdiction will never be exercised where the default arises from counsel's ineptitude as was the case in this matter where counsel neglected to include the order granting leave in the record of appeal in violation of**

> **the mandatory requirements of Rule 50(2) of the Supreme Court Rules. The assertion by Mr. Sianondo that the circumstances of this case are exceptional does not find favour with us because we see none. The circumstances merely reveal a cavalier attitude on the part of counsel which this court cannot condone.**

6.11 It will be recalled that the appeal in this matter was dismissed on account of failure by the appellant to obtain leave. The learned counsel for the respondent have, in their submissions before us, quite appropriately quoted from our judgment in **Saviour Chibiya v Crystal Gardens Lodges and Restaurant Ltd**[15] where we stated that:

> **The appellant through his learned counsel contributed to the present mischance. Through his learned counsel, the appellant authored and filed in court a non-conforming ground of appeal. He is, therefore, literally the author of his own misfortune**.

6.12 We have in cases such as Philip **Mutantika, Malyata Sheal v. Kenneth Chipungu**[16] stated that a litigant who suffers any prejudice arising from the incompetence or negligence of his/her counsel in having an appeal dismissed, should have recourse to this/her legal counsel.

6.13 Our holding in the **Dar Farms**[14] case which disavows the opinion of the single judge given in his ruling of 16th September 2020 clearly represents a remarkable reversal of any perceived fortunes on the part of the applicant. It is thus reasonably clear to see that on the law as it presently stands, the appellant has no case worth pursuing.

6.14 It is for the foregoing reasons that we uphold the preliminary issues raised by the respondent and dismiss the motion.

6.15 The respondent shall have their costs to be taxed if not agreed.

I C. MAMBILIMA
CHIEF JUSTICE

M. MALILA
SUPREME COURT JUDGE

R. M. C. KAOMA
SUPREME COURT JUDGE