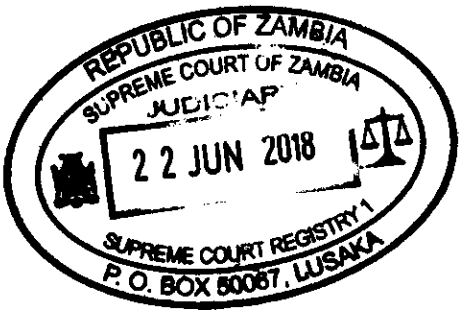
SELECTED JUDGMENT NO. 27 OF 2018

P.964

IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 222/2016**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

U-REST FOAMS LIMITED **APPELLANT**

AND

PUMA BOTSWANA (PTY) LIMITED **1ST RESPONDENT**

COLOURFAST TEXTILE PRINTERS (PVT) LIMITED **2ND RESPONDENT**

CORAM: **Hamaundu, Wood and Musonda, JJS**

on the 4th April, 2017 and 22nd June, 2018

For the Appellant: Mr. Chanda Chileshe appearing with Mr. K. Mwondela, Messrs Lloyd, Jones & Collins

For the Respondents: Mr. L. Linyama, Messrs Eric Silwamba, Linyama & Jalasi

---

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

1. **Kabwe Transport Company Limited v. Press Transport (1975) Limited: (1984) Z.R. 43**
2. **Manfred Kabanda and Kajema Construction v. Joseph Kasanga: SCZ Judgment No. 2 of 1992**
3. **Chibuye v. Zambia Airways Corporation Limited: SCZ Judgment No. 2 of 1986**

4. **Mahtani & Others v. The Attorney-General & Others (2010) Z.R. 106 Vol. II**
5. **Shoprite Holdings Limited & Another v. Lewis Chisanga Mosho & Another: SCZ Judgment No. 40/2014**
6. **Liswaniso Sitali & Others v. Mopani Copper Mines PLC (2004) Z.R. 176**
7. **Kuruma v. The Queen [1955] AC 197**
8. **Hollington v. F Hewthorn & Co. Limited [1943] 2 ALL ER. 35**

Legislation and Works referred to:

1. **The Extradition Act, Chapter 94 of the Laws of Zambia**
2. **The Mutual Legal Assistance in Criminal Matters Act, Chapter 98 of the Laws of Zambia**
3. **The High Court Act, Chapter 27 of the Laws of Zambia**
4. **The Rules of the Supreme Court (1999) Edition**
5. **The Evidence Act, CAP. 170 of the Laws of Zambia**
6. **The Evidence Act, CAP. 43 of the Laws of Zambia**

Other Works referred to:

1. ***Latin For Lawyers*, 3rd edition (Lord Sweet & Maxwell: 1960)**

This appeal is arising from a Ruling of a High Court Judge sitting at Lusaka whereby that Judge refused to allow an application by the appellant, then defendant, to produce in evidence, a court record relating to proceedings of a criminal character which had arisen in a Subordinate Court in the proceedings which were in progress before that Judge.

P.966

The history and background facts surrounding the Ruling now being assailed in this court were scarcely contested by the two sets of protagonists to this appeal.

On 18th December, 2012, the respondents, then plaintiffs, instituted an action in the Commercial List of the High Court of Zambia at Lusaka seeking to recover a liquidated sum of USD666,200.00 which was expressed in the relevant originating process as having been the outstanding balance which was due to the respondents on account of goods which had been sold and delivered to the appellant, at the latter's instance and request. The respondents also sought interest on the said sum of money.

For its part, the appellant filed a Defence to the respondents' claim in which it (the appellant) not only denied having been indebted to the respondents in the amounts claimed or at all, but counter-claimed a sum of USD69,000.00 as against the 2nd respondent which sum was expressed as having been standing to the credit of the appellant's account in the 2nd respondent's books.

Following the closure of the parties' respective pleadings in the court below, trial of the matter ensued. The record suggests

that the respondents prosecuted their matter in the usual way and closed their case. The appellant also opened its case and called its witnesses who testified on its behalf. The appellant did not, however, close its case.

While trial of the matter from which the Ruling now appealed against was still pending, extradition proceedings were instituted in the Subordinate Court of the First Class at Lusaka against a number of persons who included directors of the appellant. The extradition proceedings were instituted at the request of the Government of the Republic of Zimbabwe to the Government of the Republic of Zambia pursuant to the provisions of the Extradition Act, Chapter 94 of the Laws of Zambia and the Mutual Legal Assistance in Criminal Matters Act, Chapter 98 of the Laws of Zambia.

According to the said request by the Government of Zimbabwe, a criminal inquiry had been instituted in Harare, Zimbabwe, at the behest of a Zimbabwean company called Waverly Blankets (PVT) Limited acting by one Victor Eric Cohen, its chief executive officer. The criminal complaint was targeted against John Fitzgerald Travers, Dhirubhai Patel, Sanjiv Patel and

Animesh Praful Chandra Bhatt, the last three having been directors of the appellant.

The criminal allegations against the quartet were essentially that, sometime between November 2011 and September 2012, John Fitzgerald Travers, while serving as the named Zimbabwean company's salesman, connived with the three directors named above for the purpose of stealing property valued at USD96,750.00 which had been owned by the Zimbabwean company in question.

On 28th May, 2016, two of the directors in question, namely, Sanjiv Patel and his father, Dhirubhai Patel, were arrested by officers from the Zambia Police Service in connection with the extradition proceedings and the extradition request which we referred to a short while ago.

On 31st May, 2016, Sanjiv Patel and his father appeared before the Subordinate Court of the First Class at Lusaka in connection with the subject extradition proceedings. On the same day, the duo was admitted to conditional bail pending trial by that court.

P.969

On 17th June, 2016 (the Commercial List Registry stamp reflects 17th May, 2016) the appellant caused an application to be filed into the court below which was titled: ***'Summons for an order to produce Court Record pursuant to Order 5 Rule 10 of the High Court Act, Chapter 27 of the Laws of Zambia and Order 38 Rule 13 of the Rules of the Supreme Court (1999) Edition.'*** In terms of that application, the appellant sought to have the court below order the production, in the proceedings in that court, of the court record in the Subordinate Court of the First Class, Case No. SSPB/065/2016 relating to the matter of the request by the Government of the Republic of Zimbabwe to have Dhirubhai Patel and Sanjiv Patel extradited to the Republic of Zimbabwe. That application was supported by an affidavit which was sworn by Sanjiv Patel.

In his affidavit, Sanjiv Patel deposed that he was the Managing Director of the appellant and that he and his father were arrested by officers from the Zambia Police Service on 28th May, 2016 in connection with the Subordinate Court proceedings earlier mentioned and in pursuance of an extradition request by the Government of the Republic of Zimbabwe.

P.970

Sanjiv Patel further deposed that, following his release on conditional bail by the Subordinate Court which had conduct of the extradition matter, he accessed a document which was entitled *'Request by the Government of the Republic of Zimbabwe to the Government of the Republic of Zambia for Mutual Legal assistance in the extradition of Dhirubhai Patel, Sanjiv Patel and Animesh Prafulchandra Bhatt'* and that, upon examining that document, he noted that a statement which had been made by Victor Eric Cohen (one of the respondent's witnesses) to the Zimbabwean Police had formed part of that request. Sanjiv Patel also deposed that apart from Victor Cohen's statement, the extradition request by the Zimbabwean Government had been founded on two other statements which were given to the Zimbabwean Police by Lakshi Kanth Boddapati and Christopher John Anthony Robinson.

According to Sanjiv Patel, the statements which were given to the Zimbabwean Police by Victor Eric Cohen, Lakshi Kanth Boddapati and Christopher John Anthony Robinson had served to corroborate and clarify the testimony which the appellant had offered in the matter from which the Ruling now the subject of this appeal is arising. By reason of the matters which have been

adumbrated above, Sanjiv Patel invited the court below to order the production of the court record in Case Number SSPB/065/2016 which contained the statements mentioned above in the proceedings in the court below for the purpose of having that court take judicial notice of the contents of the same in the interest of justice.

Counsel for the appellant filed Skeleton Arguments to support the application which was supported by Sanjiv Patel's affidavit. The arguments essentially revolved around Section 13, Orders 3 and 5 of the High Court Act, Cap. 27 as well as Order 38, Rule 13 of the *White Book*. The gist of the arguments by Counsel for the appellant was that it was in the interest of justice to have the statements referred to above admitted in evidence in the proceedings in the court below because, in the estimation of the pursuer of the application in question, those statements had a corroborative effect in relation to the testimony which the appellant's witnesses had offered in the court below.

The appellant's application was opposed by the respondents via an affidavit which was sworn by their Counsel, Mr. Lubinda Linyama. The single and sole basis of the respondents' objection

to the application in question was that the documents or statements in the court record whose production the appellant was seeking to secure were of a criminal nature and, in the view of the respondents' Counsel, could not be received in evidence in the context of the civil proceedings which were in train in the court below.

In addition to his opposing affidavit, the respondents' Counsel filed Skeleton Arguments to buttress his opposition to the production of the court record in question. In those Skeleton Arguments, the respondents' Counsel recited the following passage from our decision in **Kabwe Transport Company Limited v. Press Transport (1975) Limited**[1]**:**

> **"There is in fact in Zambia, an Evidence Act...in which there is no provision for the calling of evidence in criminal proceedings to assist a decision in civil proceedings."**

The respondents' Counsel also made reference to our later decision in **Manfred Kabanda and Kajeema Construction v. Joseph Kasanga**[2] where Gardner, AGJS (as his Lordship then was) reinforced the position which we had adopted in **Kabwe Transport**[1] in the following words:

> **"We agree that, in accordance with our judgment in Kabwe Transport Limited[1], although there has been a change in the law in England that change does not affect the law in this country and the results of criminal cases may not be referred to in support of findings of negligence in a civil case."**

Counsel for the respondents accordingly submitted that:

> **"...It is evident (from) the plethora of authorities referred to above that the issue of relying on criminal proceedings in a civil matter is alien to our courts of law. This ... court does not have the jurisdiction to order the production of a record that is of a criminal nature in a civil matter."**

Counsel for the appellant, Mr. Kaumbu Mwondela, reacted to the respondents' opposing affidavit to the appellant's application for the production of the court record in question via an Affidavit in Reply in which he deposed, in effect, that the respondents' Counsel had misrepresented the correct position of the law as initially laid down in the **Kabwe Transport Limited[1]** case. According to Mr. Mwondela,

> **"...the correct statement of the position of the law as it currently stands in Zambia is that a civil court is precluded from referring to criminal convictions or relying on the results of criminal proceedings in civil trials."**

Mr. Mwondela further deposed in his Affidavit in Reply that the interest of justice demanded that all relevant evidence should

be placed at the court's disposal in order to assist the court in arriving at a just and considered decision.

At the hearing of the application before the learned Judge in the court below, Counsel for the appellant told the court that the appellant was particularly interested in having the statements which were given to the Zimbabwean Police by Victor Cohen and Christopher John Anthony, who were the respondents' first and second witnesses respectively in the proceedings below, produced in that court. According to the appellant's Counsel, the statements by the two respondents' witnesses corroborated and clarified the testimony which the appellant had deployed before the court below. Counsel further argued that the court below did have the requisite jurisdiction to order the production of the statements in question. The appellant's Counsel also contended that it is the reality of Zambian law that all relevant evidence, even if the same were/is illegally obtained, is admissible in civil proceedings.

For his part, Mr. Linyama, Counsel for the respondents reiterated the arguments which he had canvassed in his Skeleton Arguments the gist of which was that the results of criminal findings cannot be referred to in civil proceedings.

P.975

In his reply, Counsel for the appellant argued that the authorities which Counsel for the respondents had cited and relied upon in his Skeleton Arguments decided that evidence of criminal convictions was inadmissible in civil cases involving negligence. Counsel further argued that no law precluded courts of law from having recourse to evidence in criminal proceedings adding that what the court was precluded from doing was the consideration of convictions or acquittals from the realm of criminal law into the sphere of civil matters. Counsel for the appellant accordingly urged the court below to call for the record in issue so as to acquaint itself with its contents and thereby establish the correct position regarding the issues which were at play before that court.

The court below considered the arguments which had been canvassed before it and noted that the key issue which fell to be determined by it was whether deposition statements which had been made in criminal proceedings could be adduced in evidence in civil proceedings for the purpose of aiding a party's case. The learned Judge concluded that her firm view was that the position of the law was well-settled, namely that, evidence from criminal proceedings cannot be called or referred to in civil proceedings. In

reaching this conclusion, the learned Judge drew inspiration from our judgment in **Chibuye v. Zambia Airways Corporation Limited**[3] where, Ngulube DCJ (as His Lordship then was) made the following observation:

> **"While we can understand the awkwardness of the position where one Judge in a criminal trial may say one thing, while another Judge in a civil matter subsequently says a different thing, it is now settled, following our decision in Kabwe Transport Limited v. Press Transport (1975) Limited[1] that the judgment in a criminal trial cannot be referred to and taken note of in a civil trial."**

The learned Judge was also inspired by the following passage which she drew from the High Court Judgment in **Mahtani & Others v. The Attorney-General & Others**[4]:

> **"The order sought was redundant because it is settled law that there is no provision under our law for the calling of evidence in criminal proceedings to assist a decision in civil proceedings, and if I may add, by extension, vice versa."**

The learned Judge accordingly refused to allow the application in question and noted that the application was untenable in that statements tendered in the criminal extradition proceedings under Subordinate Court Cause Number SSPB/065/2016 were inadmissible and could not, therefore, be referred to nor taken note of in the civil proceedings before the court below.

P.977

The appellant has now appealed to this court advancing what have been projected as 5 grounds of appeal expressed in the following terms:

> "**Ground One**
>
> **The Court erred in law when it decided that evidence from criminal proceedings cannot be referred to in civil proceedings;**
>
> **Ground Two**
>
> **The learned High Court Judge fell into error when she failed to distinguish the prohibition of reference to judgments in criminal proceedings, from reference to statements made in criminal proceedings, as applied for by the Appellant;**
>
> **Ground Three**
>
> **The Court erred at law when it elected to ignore the unequivocal guidance of Supreme Court precedential authority in preference for a merely persuasive authority of the High Court;**
>
> **Ground Four**
>
> **The learned High Court Judge erred in law when she held that there is no provision under our laws for the Court to admit evidence in civil proceedings of depositions/statements made in criminal proceedings and further to take Judicial Notice of the said statements for purposes of assisting a decision in Civil proceedings whether for corroborative purposes or for any other purpose;**
>
> **Ground Five**
>
> **The Court fell into error when it failed to find that the statements applied for were relevant to the proceedings before it and therefore admissible."**

Both counsel for the appellant and for the respondents filed their respective Heads of Argument to support the positions which they had respectively taken in the appeal.

P.978

At the hearing of the appeal, Mr. Mwondela, counsel for the appellant, confirmed the appellant's reliance upon the filed Heads of Argument which counsel sought to orally augment. Counsel accordingly proceeded to argue the 5 grounds of appeal together.

Counsel opened the appellant's arguments with a prelude in which he recounted the background circumstances to the appeal. We confirm that that background has been appropriately highlighted early on in this judgment.

In opening the substance of the appellant's arguments, counsel for the appellant observed that, in its Ruling, the court below correctly identified the cardinal issue which had fallen for determination by that court, namely, whether or not deposition statements which had arisen in criminal proceedings could be adduced as evidence in civil proceedings for the purpose of aiding a party's case in such proceedings. The appellant's Counsel also supported the learned trial judge's restatement of the principle which was imbedded in the *obiter dicta* in the **Kabwe Transport Limited**[1] case and which, according to counsel, was to the effect that there is no provision [in the Zambian Evidence Act, CAP. 170]

for convictions in criminal trials to be referred to or taken note of in a civil trial.

According to counsel for the appellant, the **Kabwe Transport**[1] case principle was restated by this Court in **Chibuye**[3] but added that although the law as expounded in **Kabwe Transport**[1] still represented good law as we confirmed in **Manfred Kabanda**[2], in the latter case we accepted evidence which had been tendered in criminal proceedings when we said:

> **"Mr. Akalutu then argued that reference to the outcome of the criminal case against the first appellant should not have been used to support the finding of negligence. We agree that, in accordance with our judgment in Kabwe Transport Limited v. Press Transport (1975) Limited (4), although there has been a change in the law in England, that change does not affect the law in this country and the results of criminal cases may not be referred to in support of findings of negligence in a civil case. However, in this particular case, as we have indicated, the evidence of the respondent and of the police officer was that, at the time when the first appellant was interviewed by the police in the first instance, the first appellant had admitted that he had run into the back of the vehicle in front of him because he had not seen it until he was too close, and when the first appellant was charged with a criminal offence by the police he admitted the charge of dangerous driving. That evidence was admissible although it related to a criminal case, and the learned trial judge's finding based on that evidence cannot be disturbed."**

P.980

On the strength of what we said in **Manfred Kabanda**[2], as we have recited above, counsel for the appellant contended that the lower court fell into error when it extended the **Kabwe Transport**[1] principle as expressed in the cases which we momentarily referred to, to a wholesale outlawing of the production of **statements** (as opposed to **convictions**) (counsel's emphasis) tendered in criminal proceedings as evidence in civil proceedings.

The appellant's counsel further contended that proceedings in a criminal trial would only be inadmissible if a specific ring-fencing order had been made. To support this contention, counsel referred us to our decision in the case of **Shoprite Holdings Limited & Another v. Lewis Chisanga Mosho & Another**[5], in which this court pronounced an order to the effect that none of the evidence which had been adduced by the defendants in civil proceedings, could be used against the 1st defendant in criminal proceedings nor could any of the documents which the 1st defendant had disclosed in such civil proceedings be used in criminal proceedings unless the 1st defendant consented or the dealing court ordered otherwise.

P.981

According to the appellant's counsel, the **Shoprite case**[5] clearly demonstrated that evidence tendered in civil proceedings is admissible in criminal proceedings unless the court orders otherwise.

On the basis of the above reasoning, counsel for the appellant opined that the **Mahtani case**[4] which the court below had relied upon in rendering its Ruling was decided *per incuriam* in so far as the calling of evidence in civil and criminal proceedings is concerned.

Having canvassed the specific subject of the admissibility of evidence arising in criminal proceedings in the context of civil proceedings, learned counsel for the appellant then turned to the general evidential rules governing the admissibility and exclusion of evidence. According to counsel, a court retains a wide discretion to accept or refuse evidence. He further contended that, unlike in criminal matters, the general exclusionary discretion is not available in the civil sphere. This, according to counsel, entails that, in a civil case, a judge has no discretion to exclude evidence even where it is illegally or unfairly obtained.

P.982

With regard to admissibility, counsel argued that this subject was authoritatively pronounced upon by this court in **Liswaniso Sitali & Others v. Mopani Copper Mines PLC**[6] in which we adopted the following passage from the judgment of Lord Goddard in **Kuruma v. The Queen**[7]:

> **"In their Lordship's opinion, the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case, there are decisions which support it, and in their Lordships' opinion, it is plainly right in principle."**

Counsel then proceeded to recite the following holdings from ***Liswaniso Sitali***[6]:

> **"1. The rule governing the admissibility of illegally or unfairly obtained evidence in civil cases is the same as that in criminal cases, namely, that relevant evidence is admissible regardless of the manner in which it is obtained.**
>
> **2. In terms of admissibility of evidence, there is no difference in principle between a civil and a criminal case. In a criminal case, the judge always has a discretion to disallow evidence, if the strict rules of admissibility would operate unfairly against an accused."**

Counsel further contended that the restriction which is placed on the admissibility of evidence of criminal convictions in

civil proceedings is premised upon the public policy consideration that it is undesirable to re-litigate, in a civil court, a matter which would have been determined before a criminal court.

Counsel also argued, citing Section 13 of the High Court Act, CAP. 27, that by refusing to allow the appellant to produce the court record relating to the proceedings before the subordinate court, the judge below had abdicated one of her responsibilities, namely, to ensure that matters are dealt with in finality.

In closing his arguments, learned counsel for the appellant invited us to use the opportunity which had been presented by this appeal to clarify the following questions:

> Firstly, whether the prohibition in **Kabwe Transport**[1] against making reference to criminal convictions in civil proceedings is limited to cases of negligence or is a general one; and secondly, whether or not the restriction in **Kabwe Transport**[1] with respect to making reference to evidence of criminal convictions is limited or extends to reference to any evidence in criminal proceedings.

In his oral augmentation, learned counsel for the appellant submitted that, what lay at the heart of this appeal was the

admissibility of evidence drawn or arising from criminal proceedings in civil proceedings.

Mr. Mwondela reminded us that the seminal authority on the subject is the **Kabwe Transport**[1] case which, according to him, correctly decided that criminal convictions may not be introduced as evidence in civil proceedings. Counsel observed that the court below was spot-on when it made the above pronouncement. The Appellant's counsel, however, criticized the court below for having extended the meaning of **Kabwe Transport**[1] in the sense of that decision having wholly outlawed the introduction of depositions arising in criminal proceedings in civil proceedings. To drive his point home, counsel drew our attention, yet again, to the case of **Manfred Kabanda & Kajeema**[2]. In the view of learned counsel, both **Kabwe Transport**[1] and **Manfred Kabanda & Kajeema**[2] had proscribed the introduction, in evidence, of the conclusion in criminal proceedings in the context of civil proceedings but not the process. Counsel, however, insisted that the appellant was not seeking to have **Kabwe Transport**[1] overruled but to simply delineate it.

Counsel for the appellant finally submitted that, in his view, there is no blanket prohibition under Zambian law against reference to evidence in criminal proceedings in the context of civil proceedings. Accordingly, we were urged to allow this appeal and order that the appellant be allowed to produce and tender in evidence the request contained in the extradition proceedings under Cause SSPB/065/2016 in Cause 2012/HPC/690. Counsel also urged us to grant the appellant costs in this court as well as the court below in respect of this appeal.

For his part, Mr. Linyama, counsel for the respondents also confirmed having filed Heads of Argument upon which he relied. He further informed us that although he was entirely relying upon the filed Heads of Argument, he wished to emphasise that ground 3 had fallen away.

The respondents' filed Heads of Argument were in two parts: the first part highlighted some alleged irregularities with regard to the manner in which the record of appeal had been prepared while the second part addressed the respondents' Heads of Argument.

P.986

The irregularities which counsel for the appellant complained about related to:

(a) The suggestion in the appellant's Heads of Argument that the Record of Appeal was in two volumes when, in fact, it was just a single volume; and

(b) The mismatch between numberings and referencing in the appellant's Heads of Argument and the Record of Appeal.

According to the respondents' counsel, the inconsistencies in the numbering or pagination between the Record of Appeal and the Heads of Argument were so misleading that they rendered the record of appeal irregular and the appeal incompetent. To support his argument, counsel referred us to various Rules of this court as well as a number of our decisions in which we dismissed appeals on account of failure on the part of an appellant to prepare the record of appeal in a manner which was compliant with the Rules of this Court.

We pause here to observe that, quite apart from the fact that the respondents shied away from mounting a formal objection to the appeal, we are of the view that the alleged irregularities were themselves so trifling in character that they were truly caught by

the *de minimis* principle. Not surprisingly, and much to his credit, counsel for the respondents was demonstrably lackadaisical towards the very mild objection in question. In truth, we are in no difficulty to discount the respondents' objection and, accordingly, decline to uphold the same.

Having discounted the respondents' mild objection, we now turn to examine the respondents' Heads of Argument so far as they relate to the grounds which had excited this appeal.

In opening the respondents' arguments, counsel for the respondents proposed to argue grounds 1, 2, 4 and 5 together. In this regard, learned counsel opined that the third ground had fallen away by reason of counsel for the appellant's alleged failure to cite any authority to support the ground.

We pause here again to observe, in agreeing with counsel for the respondents, that we, indeed, could not encounter the sting of ground three as we examined the appellant's Heads of Argument. Accordingly, we would treat this ground as having been abandoned.

P.988

In his main arguments, counsel for the respondents contended that it is trite law that the High Court of Zambia is precluded from receiving matters of a criminal nature in civil proceedings. In this regard, learned counsel argued that the subject matter of the appellant's application in the court below was extradition proceedings which were criminal in nature and which, consequently, the court below was not entitled to receive in the context of the civil proceedings which were in progress before that court. Learned counsel immediately referred us to the **Kabwe Transport**[1] case and submitted that the reasoning in this *'celebrated case'* (to borrow counsel's description of **Kabwe Transport**[1]) was, according to counsel, "*repeated with aplomb*" in the case of **Manfred Kabanda and Kajeema Construction v. Joseph Kasanga**[2]**.**

Counsel proceeded to make further references to a few other cases which we have deemed unnecessary to cite for reasons which will become apparent later in this judgment.

According to counsel for the respondent, the case law to which he had earlier adverted suggested that the issue of relying on criminal proceedings in a civil matter was 'alien' to our courts

of law. Counsel also reiterated his earlier contention that the High Court for Zambia did not have jurisdiction to order the production of a record of a criminal nature in a civil matter adding that what the appellant was attempting to do was to illegally adduce evidence which was inadmissible.

The respondents' counsel closed his arguments by submitting that the material which the court below was asked to admit in evidence were statements which had been made in contemplation of criminal proceedings the veracity of which could not even be tested. Counsel accordingly invited us to agree with the court below and dismiss this appeal with costs.

In his brief reply, Mr. Chanda Chileshe, the appellant's lead counsel, reiterated that criminal convictions cannot be introduced in evidence in civil proceedings. He contended, however, that in the context of the civil proceedings which were in train in the court below, the statements which the appellant had sought from the subordinate court proceedings had arisen *ex-post facto*.

We have seriously and patiently considered the arguments which counsel for the two sides in this appeal canvassed around

the grounds which had excited this appeal. We have also carefully and intensely related the two sets of arguments to the ruling now being assailed by the appellant and have noted that there is neither any doubt nor ambiguity as to the issue or issues that fall to be determined in this appeal, not least because they were clearly identified by counsel for the appellant.

We must, even as we begin our own reflections over this matter, start by observing that we are aware that routine and even passionate objections have frequently been mounted in both our country's trial and appellate courts for the purpose of resisting the reception or admission, in civil proceedings, of any evidence which might have arisen in criminal proceedings. Invariably, such objections have been touted as having been inspired by what counsel for the respondents chose to describe as "*the celebrated*" **Kabwe Transport**[1] judgment.

The central questions which confront us in this appeal and which counsel for the appellant aptly identified are: What, so far as is relevant to the issues at play in this judgment, did the **Kabwe Transport**[1] judgment decide? Did the judgment outrightly outlaw or banish the admission or reception, in civil proceedings, of all

evidence arising from criminal proceedings or was the caveat which was pronounced in that judgment limited to ***the outcome*** in the criminal proceedings in question as counsel for the appellant fervently argued?

Having regard to the fact that the **Kabwe Transport**[1] judgment has been 'celebrated' much more for the same reasons which had inspired this appeal, namely, the apparent or avowed caveat which the judgment allegedly pronounced against the reception and admission of evidence of a criminal nature into civil proceedings than even the *ratio decidendi* of that judgment, it is fitting and appropriate that we set out the core factual matrix of the case and the actual issues which this court had definitively pronounced itself upon in that judgment.

The facts in **Kabwe Transport**[1] were that the appellant's driver was driving an articulated truck consisting of a mechanical horse and three trailers on the Lusaka/Kabwe road. In the opposite direction was the respondent's driver who was driving a truck which had a trailer behind it. A collision involving the two trucks occurred which resulted in two persons in the appellant's

vehicle being killed. However, the two persons who were in the respondent's vehicle survived.

The appellant instituted an action against the respondent for damages arising from the negligent driving of the respondent's driver. Following the trial of the matter, the trial judge reached the conclusion that there was no sufficient evidence for him to decide which one of the two drivers was to blame. Accordingly, the judge concluded that the two drivers who had been involved in the accident in question were equally to blame for the accident. Consequently, the judge awarded 50% damages on either side while the appellant's subsequent appeal in that matter to this Court was dismissed.

In the course of delivering the Court's judgment, Gardner J.S made the following ***obiter dicta*** remarks:

> **'A further point on a matter of law has been raised by Mr. Jearey, that is whether it is improper in the courts of this country for evidence of previous criminal convictions to be produced. Mr. Jearey has referred us to the case of *Hollington v F. Hewthorn & Company Limited* (3), in which it was held that a certificate of a conviction cannot be tendered in evidence in civil proceedings. The ratio decidendi of that case was that the criminal proceedings were not relevant and that they were *"res alios inter acta"*. The**

case of *Siwingwa v Phiri* (4), which was decided in this country by a High Court judge resulted in a ruling that the Civil Evidence Act 1968 applied in this country by virtue of section 10 of the High Court Act, which provides that the practice and procedure at present prevailing in the courts of England and Wales shall apply in this country. Mr. Jearey argued that that provision can be called in aid in default of any legislation in Zambia. There is, in fact, in Zambia an Evidence Act, Cap. 170, in which there is no provision for the calling of evidence in criminal proceedings to assist a decision in civil proceedings. This Court has been asked to decide whether the provisions of section 10 of the High Court Act enable courts in this country to decide that there is an absence of legislation when, in this specific instance, there is a definite Act dealing with evidence. We have no hesitation in finding that, where there is a specific Act dealing with a matter of law, such as evidence, in this country, there is no default of legislation as envisaged by section 10 of the High Court Act. The result, therefore, is that there is no provision for convictions in a criminal trial to be referred to and taken note of in a civil trial. For this reason, therefore albeit that our remarks are *obiter dicta*, the decision in the case of *Siwingwa v Phiri* (4), must incur the disapproval of this court."

The conclusions which we have drawn from the ***obiter dicta*** remarks embodied in the above passage from **Kabwe Transport**[1] which are germane to the issues at play in this appeal are the following:

(1) A certificate relating to a criminal conviction cannot be tendered in evidence in civil proceedings; and

(2) There is no provision in the Zambian Evidence Act, (now CAP. 43) for convictions in a criminal trial to be referred to and taken note of in a civil trial.

Before we proceed to interrogate the first issue in any greater detail, we propose to say a word or so around the second issue.

As worded or presented, the second issue suggests an expectation that the Evidence Act, CAP. 43, would contain a provision which would provide for convictions in a criminal trial to be referred to and taken note of in a civil trial.

We do not propose to engage in any debate around the second issue suffice it to observe that, as the ***ratio decidendi*** in **Hollington v. F Hewthorn & Co. Limited**[8] established, the basis of the caveat against the reception and admission of evidence of a criminal character in the form of a ***conviction*** **or** ***a judgment*** or *the* ***outcome*** in civil proceedings is the doctrine known, by its Latin expression, as *res inter alios acta.* As we shall demonstrate shortly, the operation of the doctrine of *res inter alios acta* is not necessarily restricted to the reception and admission of evidence in criminal proceedings in the shape of *an outcome* or *a conviction* or *a judgment* in civil proceedings. In fact, and as the narrative in

P.995

Hollington v. F Hewthorn & Co. Limited[8] established, in its proper meaning, even an outcome or a judgment in civil proceedings cannot be used or relied upon for the purpose of establishing or proving a fact in other civil proceedings involving different parties. We do not, however, propose to digress into this subject beyond making the foregoing observation.

According to the holding in **Hollington**[8],

> **"A certificate of a conviction cannot be tendered in evidence in civil proceedings."**

The reason for the rejection of the criminal conviction was that it was *res inter alios acta*. *Black's Law Dictionary* defines this Latin maxim as *"a thing done between others"*, while the little text, ***Latin For Lawyers***, posits that the maxim *'res inter alios acta alteri nocere non debet*, (to use its fuller expression) means:

> **"One person ought not to be injured by the acts of others to which he is a stranger. The above rule operates to exclude all the acts, declarations or conduct of others as evidence to bind a party, either directly or by inference".**

The *res inter alios acta* rule was explained by Goddard L.J (as His Lordship then was) in ***Hollington***[8] in the following terms:

P.996

"The trial judge rejected the conviction on the ground that it was *res inter alios acta*, which is the reason generally given for not admitting that class of evidence. No doubt it is difficult for a layman to understand why it is that if A prosecutes B, say, for doing him grievous bodily harm, and subsequently brings an action against him for damages for assault, this doctrine should apply so that he cannot use the *conviction* as proof that B did assault him... It is for this reason that we stressed the question of relevancy; and indeed, it is relevancy that lies at the root of the objection to the admissibility of the evidence...

A judgment obtained by A against B ought not to be evidence against C; for, in the words of Sir William De Grey C.J...

> ***"...it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment that he might think erroneous, therefore ... the judgment of the court upon facts found, although evidence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers."***

Goddard L.J continued:

> **"This is true not only of convictions, but also of judgments in civil actions; if given between the same parties they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of a fact which must have been found, owing mainly to the impossibility of determining what weight should be given to it without retrying the former case."**

P.997

Goddard L.J. concluded his judgment with the following words:

> **"However convenient the other course may be, it is, in our opinion, safer in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it, without regard to the result of other proceedings before another tribunal."**

We have taken the liberty to quote liberally from the **Hollington**[8] judgment because, not only was it the only legitimate source of the doctrine of *res inter alios acta* as used in **Kabwe Transport**[8] but, as earlier noted, the judgment throws light on other broader issues including, for the removal of any doubt, the fact that the *res inter alios acta* doctrine is not confined to the reception/admissibility of evidence touching upon criminal convictions or outcomes in criminal proceedings in relation to subsequent civil proceedings.

Having regard to what we have canvassed above, and, in the interest of maintaining certainty in the area of the law under consideration, it is only fitting and appropriate that we clarify a few issues around our *obiter dicta* remarks in our **Kabwe Transport**[1] judgment to the extent that that judgment has been used or relied

upon to espouse or support one view or other *vis-a-vis* the use or reception/admissibility of evidence (or, at any rate, some aspect of the same) of a criminal character or, from the criminal sphere, in the context of civil proceedings.

First and, most importantly, the remarks which we made in **Kabwe Transport**[1] by way of reacting to the points of law which late Mr. John Jearey, counsel for the respondent in the matter had raised and which are not only the subject of the present appeal but have been the subject of several subsequent court judgments and rulings, including the ones which were referred to early on in this judgment were made *obiter dicta* and, consequently, were not essential to the decision which we reached in that judgment. Notwithstanding the aforestated observation and, subject to the observations and qualifications which we shall be adverting to shortly, those *obiter dicta* remarks were only of persuasive value in relation to subsequent judgments and rulings.

Secondly, unlike in the **Kabwe Transport**[1] judgment where the remarks in question were made *obiter,* in the context of this judgment, its very *ratio decidendi* necessarily revolves around and is anchored upon the meaning which we have distilled from those

obiter remarks, which we have clarified and repackaged for the purpose of meeting or satisfying their *ratio decidendi* status in the context of this judgment.

Thirdly, having had the benefit of mature and more complete and focused argument on the point, coupled with the additional benefit of more than superficial research around the subject matter in question, we are satisfied that the principle which bars the reception or admission of evidence of a criminal (and even civil) character in the shape of *outcomes* or *judgments* or *convictions* in civil proceedings is not founded on a statute (such as the Evidence Act) but is, in fact, founded on the *res inter alios acta* doctrine, as earlier noted.

Having regard to what we have canvassed above, we would answer the two questions which learned counsel for the appellant posed to us, as earlier noted, in the following terms:

(1) The evidential prohibition in *Kabwe Transport*[1] against making reference to or introducing evidence of criminal convictions or outcomes in civil proceedings is not limited to cases of negligence but applies to all civil proceedings; and

(2) The prohibition referred to in (1) above is restricted to *outcomes* as opposed to the process or evidential material leading to such *outcomes.*

Accordingly, and subject to the clarification which we momentarily made above, we agree with and accept learned counsel for the appellant's exposition as to the correct meaning and effect of the *obiter dicta* remarks which were embedded in the passage which we drew from **Kabwe Transport**[1] and recited early on in this judgment.

Having regard to what we have articulated above, we are satisfied that, in the context of this appeal, the learned judge in the court below had misapprehended the real sting of the passage we earlier recited from **Kabwe Transport**[1] and the subsequent decisions of this court which had drawn inspiration from that case such as **Manfred Kabanda & Kajeema Construction**[2] and **Chibuye v. Zambia Airways Corporation Limited**[3]. Indeed, in both **Manfred Kabanda and Kajeema**[2] as well as **Chibuye v. Zambia Airways Corporation Limited**[3], we clearly discussed the prohibition earlier discussed in relation to *"the results of criminal proceedings"*.

It follows from what we have discussed above that the trial judge in this matter clearly erred and misapprehended the correct position of the law particularly in the light of the fact that, in spite of the apparent ambiguity which had characterized the manner in which our *obiter dicta* remarks in **Kabwe Transport**[1] had been packaged, the material and concluding aspect of our judgment in **Kabwe Transport**[1] was couched in the following terms:

> **"The result, therefore, is that there is no provision for *CONVICTIONS* in a criminal trial to be referred to and be taken note of in a civil trial." (at p. 46, emphasis ours).**

Not only was the above conclusion consistent with the issue which counsel in that matter (Mr. John Jearey) had raised and which had specifically referred to "*criminal convictions*", it, that is, the conclusion in question did, subject to our earlier clarification, appropriately mirror the operation of the doctrine of *res inter alios acta.*

In sum, this appeal has succeeded in respect of the central and decisive issues which it had raised. For this reason, we find it both superfluous and unprofitable to pronounce ourselves on each one of the individual grounds of appeal earlier highlighted. The

appellant will have its costs here together with such costs in the court below as related to the application which was escalated to this court.

The meaning and effect of the conclusion we have reached in this judgment is that it opens the way for the court below to proceed with the application whose outcome before the lower court became the subject of this appeal to the end that the same may be determined on its merits. In offering this guidance, we have taken full cognisance of the fact that the appellant will not produce or endeavour to produce any *judgment* or *certificate of conviction* or, indeed, any *outcome* of whatsoever kind in cause SSPB/065/2016 currently pending before the subordinate court of the first class at Lusaka for the purpose of using the same (in the case of the judgment, its conclusion or outcome) in the civil proceedings which have been pending in the court below.

Before we conclude, we feel tempted to mention an issue which arose away from the conclusions which we reached in this judgment, as we interrogated developments in other jurisdictions around the *res inter alios acta* principle following the ***Hollington***[8] outcome.

P.1003

What we learnt from those interrogations is that, in a number of jurisdictions, statutory interventions have modified or totally paralysed the operation of the *res inter alios acta* principle to the extent that, in appropriate cases, criminal convictions or outcomes in criminal proceedings are embraced for the purpose of determining issues falling for determination in subsequent civil proceedings. For obvious reasons, we will say no more about this subject and leave it to those who are more qualified to deal with it than ourselves to do whatever they may consider appropriate.

.....

E. M. HAMAUNDU
SUPREME COURT JUDGE

.....

A. M. WOOD
SUPREME COURT JUDGE

.....

M. MUSONDA, SC
SUPREME COURT JUDGE