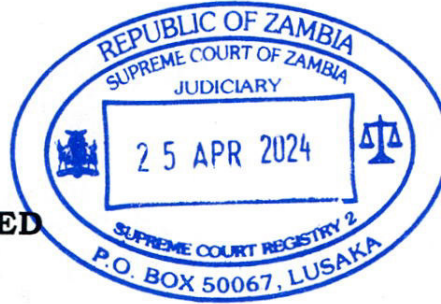


**IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**SCZ/8/26/2021**



**BETWEEN:**

**ASTRO HOLDINGS LIMITED**

**SANMUKH R. PATEL**

**FURNITURE HOLDING T/A OFFICE WORLD**

**RONAC SUPPLIERS LIMITED**

**AND**

**EDGAR HAMULELE (SUED AS RECEIVER OF  
COURTYARD HOTEL IN RECEIVERSHIP)**

**CHRISTOPHER MULENGA (SUED AS  
RECEIVER OF COURTYARD HOTEL IN  
RECEIVERSHIP)**

**AYUB MULLA (SUED AS BORROWER AND  
GUARANTOR)**

**GAZELLE LIMITED (SUED AS GUARANTOR)**

**SKYWAYS TRUCK INN LIMITED (SUED AS  
GUARANTOR)**

**ZABUNISSA ISMAIL (SUED AS GUARANTOR)**

**1<sup>ST</sup> APPLICANT**

**2<sup>ND</sup> APPLICANT**

**3<sup>RD</sup> APPLICANT**

**4<sup>TH</sup> APPLICANT**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**3<sup>RD</sup> RESPONDENT**

**4<sup>TH</sup> RESPONDENT**

**5<sup>TH</sup> RESPONDENT**

**6<sup>TH</sup> RESPONDENT**

**CORAM: Hamaundu, Mutuna and Chinyama, JJS,**  
on the 1<sup>st</sup> February, 2022 and on the 25<sup>th</sup> April, 2024

*For the Applicants: Ms. A.D.A. Theotis and Ms. J.R. Mutemi of  
Theotis Mutemi Legal Practitioners.*

*For the 1<sup>st</sup> and 2<sup>nd</sup>  
Respondents: Mr. L. Mwamba of Simeza Sangwa and  
Associates.*

*For the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>  
and 6<sup>th</sup> Respondents: Mr. B. Ngalasa of NCO Advocates.*

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## **J U D G M E N T**

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**Chinyama, JS.**, delivered the judgment of the Court.

**Cases referred to:**

1. **Minister of Home Affairs and Attorney General v Lee Habasonda (2007) Z.R. 207**
2. **Bidvest Foods and Others v CAA Import and Export Limited, Appeal No. 56 of 2017**
3. **Smith v Cosworth Casting Processes Limited [1997] 4 All E.R. 840**
4. **Hakainde Hichilema and Others v Government of the Republic of Zambia, Appeal No. 28 of 2017**
5. **Glancare Teoranta v A. N. Board Pleanala and Mayo County Council [2006] IEHC 250**
6. **Kenny Sililo v Mend-A-Bath Zambia Limited, Appeal No. 168 of 2014**
7. **Konkola Copper Mines v Mitchell Drilling International Limited and Mitchell Drilling (Z) Limited Selected Judgment No. 22 of 2015**
8. **Hermanus Philipus Steyn v Giovanni Greechi Ruscone [2013] eKLR**

**Legislation referred to:**

- i. **Rules of the Supreme Court (White Book), 1999 Edition**
- ii. **Court of Appeal Act, No. 7 of 2016**
- iii. **Supreme Court Rules, Chapter 25 of the Laws of Zambia**
- iv. **Legal Practitioners Act, Chapter 30 of the Laws of Zambia**
- v. **Legal Practitioners Practice Rules, 2002**

**Works referred to**

- a. **Halsbury's Laws of England**

## **Introduction**

1. The delay in delivering this judgment is deeply regretted. This was due to unforeseen circumstances.
2. This application came to us by way of a notice of motion arising from a ruling of a single Judge of this Court dated 24<sup>th</sup> December, 2021. The ruling dismissed the applicants' renewed application for leave to appeal and discharged the stay of execution of a Judgment of the Court of Appeal. The applicants would like us to reverse or discharge the ruling of the learned single Judge and ultimately, grant them leave to appeal against the said judgment to this Court. An attempt to rope in arguments pertaining to an alleged application to stay execution of the Court of Appeal judgment by the applicants' advocates was aborted at the hearing of the notice of motion when Counsel was reminded that the only application before us was the application for leave to appeal referred to in their motion.

### **Common background**

3. The applicants in this matter took out originating summons supported by an affidavit in the High Court. They claimed for, among other things, payment of monies totaling the sum of USD9,294,387.00 due under equitable mortgages relating to the respondents' properties pledged as security. They also claimed for delivery up and possession, foreclosure and sale of the said mortgaged properties. The applicants further sought an order that the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents, being guarantors of Courtyard Hotel Zambia Limited, do honour their obligations in the event that the respondents failed to settle their indebtedness in full.
4. The respondents opposed the applicants' claim. They counterclaimed seeking, *inter alia*, an order to determine how much the respondents owed the applicants and that once the amount outstanding was determined, a sum of USD6,500,000.00 be deducted as having been already paid to the applicants. They also sought an order for the return of all securities along with an order for damages for breach of contract and loss of use of their investment licence.

### **Decision of the High Court**

5. The learned trial judge dismissed both the applicants' claim and the respondents' counterclaim for lack of merit. The learned Judge found that the applicants' claim was outside the scope of the pleadings and that they had failed to show, on a balance of probabilities, that they were owed the sum of USD9,294,387.00 under the investment agreements entered into with the respondents.
6. As for the respondents' counterclaim, the learned Judge found that there were no facts pleaded or evidence led in support.

### **Appeal to the Court of Appeal**

7. Dissatisfied with the judgment of the High Court, the applicants appealed to the Court of Appeal largely relating to the following issues: that the court below erred when it determined that the claim for payment of the sum of USD9,294,387.00 was outside the scope of the pleadings; that the court should not have disregarded the evidence relied on by the appellants showing the state of the account between the parties on the grounds that the documents were not dated and

did not have the currency amounts etc, when they tallied with the amounts admitted by the respondent as having been advanced by the appellant; that the judgment of the court was against the weight of the evidence and fell short of the prescribed tenets of good judgment writing.

8. The respondents opposed the appeal as it were.

### **Consideration of the appeal and decision by the Court of**

#### **Appeal**

9. In its judgment dated 12<sup>th</sup> July, 2021, the Court of Appeal, substantially found in favour of the respondents. The Court found that the learned High Court Judge contradicted himself when he found that the USD9,294,387.00 claim was outside the pleadings. In the Court's view, the applicants' claim was in fact a mortgage action for monies secured by equitable mortgages evidenced by the fact that title deeds had been exchanged. The Court of Appeal, however, found that the learned trial Judge was on firm ground when he rejected the statement of accounts for non-compliance with Order 88 of the **Rules of the Supreme Court**<sup>(i)</sup>. The Court, accordingly, dismissed the appeal on the ground that the applicants had

failed to prove their claim for payment of USD9,294,387.00. The Court consequently ordered the applicants to return all title deeds held as securities to the respondents. As regards the quality of the judgment, the Court was of the view that as far as it was concerned, the judgment was prepared within the guidance given in the case of **Minister of Home Affairs and Attorney General v Lee Habasonda**<sup>1</sup>. Having substantially failed in the majority of the grounds of appeal, the entire appeal was dismissed.

**Application to the Court of Appeal for leave to appeal to the Supreme Court**

10. The applicants applied to the Court of Appeal for leave to appeal to the Supreme Court against its judgment. They listed four intended grounds of appeal as follows-

1. **The Court of Appeal erred in law when in determining the appeal against the decision of the High Court, it exceeded its jurisdiction by granting the respondents a relief that was not pleaded or contained in the grounds of appeal or cross appealed against.**
2. **The judgment of the Court of Appeal, an appellate Court tasked with the mandate of formulating, espousing and interpreting the law falls short of the prescribed requirements to pass a judgment as the same is devoid of the reasoning of the Court on the facts as well as application of the law.**

3. **The Court of Appeal erred in holding that the appellants had failed to establish their claim contrary to the weight of the evidence and the pleadings which showed that the respondents did not dispute their indebtedness to the appellants but simply sought an order from the High Court to determine how much they were owing because they had no way of verifying the amount owing.**
4. **The Court of Appeal erred in law and fact when contrary to the mandate under section 24 of the Court of Appeal Act No. 7 of 2016, it proceeded to dismiss the appeal- instead of referring the matter back to the High Court for assessment of the sums due notwithstanding the abundance of evidence demonstrating the 1<sup>st</sup> respondent's admission of its indebtedness, as (per) requests for advances and delivery notes.**

11. It was argued in support of the application for leave to appeal, in the Court below, that the intended appeal satisfied the criteria for granting leave to appeal specified in section 13(3)(a)(c) and (d) of the **Court of Appeal Act** <sup>(iii)</sup> on the grounds that the intended appeal raised questions of public importance, had reasonable prospects of success and/or that there were compelling reasons for the appeal to be heard. The Court was not swayed. It found no merit in the application and dismissed it. Consequently, the *ex parte* order staying execution of the Court of Appeal judgment that had been granted in the interim was also discharged.



### **Renewed application for leave to appeal before a single Judge of this Court**

12. Undaunted by the refusal by the Court of Appeal to grant leave to appeal, the applicants renewed their application for leave to appeal before a single Judge of this Court based on the same grounds and arguments put up in the application before the Court of Appeal. The applicants also applied for an *ex parte* order to stay execution of the Court of Appeal judgment and the single Judge granted it.

### **Decision of the single judge**

13. After hearing the parties, however, the learned single judge refused to grant the application for leave to appeal on the ground that the application was filed after the expiry of the 14 days allowed under Rule 48(1) **Supreme Court Rules** <sup>(iii)</sup> within which to make the application. The Judge reasoned that the applicants had applied for leave to appeal against the decision of the Court of Appeal, which application was refused by that court in a ruling date stamped 11<sup>th</sup> October, 2021. The renewed application before him was filed on 26<sup>th</sup> October, 2021. In the

learned Judge's estimation, the application for leave to appeal was filed 15 days after the decision complained of which was beyond the 14-days' time limit provided by law.

14. The Judge also found that the ruling of the Court of Appeal, though purporting to have been delivered on 11<sup>th</sup> October, 2021, was actually delivered on 4<sup>th</sup> October, 2021. He came to this conclusion after noting that the ruling had three other dates, viz: 19<sup>th</sup> January, 2021, 12<sup>th</sup> July, 2021 and 4<sup>th</sup> October, 2021. The Judge regarded the first two dates as relating to when the application was heard while the last one related to the day when the ruling was delivered. The Judge then noted the handwritten figure "1" inserted in front of the "4" to make the date appear as 14<sup>th</sup> October, 2021. From this analysis, the Judge concluded that the date of the ruling was deliberately altered to bring the applicants within the stipulated time limit and to mislead the court into granting the order being sought.
15. The Judge was of the view that counsel for the applicants, Ms. Mutemi, was aware or ought to have known about the alteration of the date and that it would have the effect of misleading the court. The Judge condemned counsel for conduct that

contravened provisions of the **Legal Practitioners Act** <sup>(iv)</sup> and the **Legal Practitioners' Practice Rules 2002** <sup>(v)</sup>. He directed that the matter be referred to the Legal Practitioners' Committee of the Law Association of Zambia (LAZ) for investigation and action.

16. Having found that the application for leave to appeal was filed outside the time allowed by law, the learned judge dismissed the application. He, however, noted that the application for leave to appeal was, in any event, doomed to fail on the merits. The *ex parte* order staying execution of the judgment of the Court of Appeal was discharged.

### **The applicants' notice of motion before this court**

17. The notice of motion is on the following grounds:

1. **The applicants' intended appeal raises points of law of public importance and has prospects of success;**
2. **There are other compelling reasons for the intended appeal to be heard;**
3. **The application for leave to appeal to the Supreme Court was filed within the time prescribed by virtue of the provisions of Rule 5 of the Supreme Court Rules of the Laws of Zambia; and**
4. **The applicants' advocate did not alter the date of the ruling of the Court of Appeal dated 11<sup>th</sup> October, 2021 and was condemned by the single Judge without being accorded a chance to be heard.**

It can be seen plainly that grounds 1 and 2 in the notice of motion relate to the issue why leave to appeal the judgment of the Court of Appeal to this Court should be granted premised on the proposed grounds of appeal (see paragraph 10 above). Grounds 3 and 4 relate simply to the reasons why the decision of the learned single Judge to dismiss the application for leave to appeal for being out of time should be varied.

18. For convenience, we will start with the arguments relating to grounds 3 and 4 in the notice of motion before us before tackling those relating to grounds 1 and 2.

### **The arguments relating to grounds 3 and 4**

#### **The applicants' case**

19. It was deposed on the applicants' part that the Court of Appeal heard the application for leave to appeal and stay of execution of Judgment on 10<sup>th</sup> August, 2021 and that the Court reserved its ruling to a later date. A notice of delivery of ruling was first issued on 27<sup>th</sup> September, 2021 returnable on 4<sup>th</sup> October, 2021 before Makungu JA. However, the ruling was not delivered as the Judge was indisposed. Another notice was issued on 7<sup>th</sup>

October, 2021 returnable on 11<sup>th</sup> October, 2021. The ruling was delivered on that date. The applicants were represented by an associate in Ms Mutemi's firm, Theotis Mutemi Legal Practitioners. Ms Mutemi herself did not attend the proceeding on that day as she was attending a course in arbitration conducted by the Chartered Institute of Arbitrators, Zambia Branch. The associate was, thereafter, handed a copy of the ruling by the Judge's marshal. Ms Mutemi was availed a scanned copy via email. The ruling already bore the handwritten figure "1" before the date "4<sup>th</sup> October, 2021" and it was exhibited as uplifted in the application for leave.

20. Based on the facts outlined in the preceding paragraph, it was submitted that the applicants' advocates filed the application for leave to appeal and to stay execution of Judgment before the single Judge of this Court on 26<sup>th</sup> October, 2021 because 25<sup>th</sup> October, 2021, the deadline for filing, was a holiday being the day after Independence Day, which fell on Sunday, 24<sup>th</sup> October, 2021.
21. Referring to rule 5 of the **Supreme Court Rules** <sup>(iii)</sup> on how days are to be reckoned, it was submitted that the applicants'

application was filed within time on 26<sup>th</sup> October, 2021; that the 25<sup>th</sup> October, 2021 was a public holiday being the day following Independence Day, 24<sup>th</sup> October, 2021 which fell on a Sunday (time having started to run on 12<sup>th</sup> October, 2021 following the delivery of the ruling by the Court of Appeal on 11<sup>th</sup> October, 2021).

22. It was pointed out that both the applicants' affidavit in support of the application for leave to appeal and the respondents' affidavit in opposition indicated that the ruling of the Court was delivered on 11<sup>th</sup> October, 2021. She submitted that it was unfortunate that the applicants ended up with a ruling bearing wrong dates but their comfort abided in the fact that the registry stamp bore the correct date, which was 11<sup>th</sup> October, 2021.
23. As regards the condemnation of Ms Mutemi for the alleged misconduct, it was submitted that the learned single Judge should have summoned the parties to address the court prior to delivering the ruling and that as things stood, Ms. Mutemi was condemned without being heard. Further, that the applicants were represented by three law firms. Therefore, it was unclear why Ms. Mutemi was singled out.

### **The respondents' case**

24. The respondents did not oppose the applicants' factual averments relating to what transpired leading to the ruling by our brother, the single Judge of the Court. Counsel confirmed that the ruling was delivered on 11<sup>th</sup> October, 2021. He concurred with Counsel for the applicants that if the single Judge felt strongly that the application was out of time, he ought to have invited the parties to address the Court on the issue. He, therefore, elected to leave the matter for the Court to decide.

### **The arguments relating to grounds 1 and 2**

#### **The applicants' case**

25. Turning to the merits of the application for leave to appeal, it was submitted, in sum, on behalf of the applicants that the threshold for granting leave to appeal as laid down in section 13 (3) of the **Court of Appeal Act** <sup>(iii)</sup> had been met. The provision states in the relevant parts that:

(3) The Court may grant leave to appeal where it considers that -

- a. the appeal raises a point of law of public importance;
- b. ...;
- c. the appeal would have reasonable prospects of success; or
- d. there is some other compelling reason for the appeal to be heard.

26. It was Counsel's submission, referring to the case of **Bidvest Foods and Others v CAA Import and Export Limited**<sup>2</sup> among other cases, that all four proposed grounds of appeal (see paragraph 10 above) raise points of law of public importance; have prospects of success; and otherwise demonstrate compelling reasons for the appeal to be heard.
27. In respect of the proposed ground one in the intended appeal, it was submitted that it reveals a question of law of public importance and has prospects of success whether the Court of Appeal has jurisdiction to grant a relief on appeal that was neither appealed nor cross appealed, without according the parties an opportunity to address the Court. That this was a novel question in our jurisdiction with potential ramifications for procedural law transcending beyond the litigation interests of the parties in the present case. Therefore, this was a matter that would be beneficial for the public at large and would



contribute to the development of Zambian jurisprudence. Several cases were cited to stress the point that jurisdiction is everything and without it anything done by a court or pronouncement issued by it amounts to nothing or is of no consequence. In this regard, Counsel urged us to pronounce ourselves on the circumstances under which powers conferred by section 24 (1)(a) of the **Court of Appeal Act** <sup>(ii)</sup> can be exercised and whether the said power can be exercised *suo moto*, that is to say, of the court's own accord. The provision states-

**24. (1) The Court may, on the hearing of an appeal in a civil matter-**

**(a) confirm, vary, amend, or set aside the judgment appealed against or give judgment as the case may require.**

28. Apparently stemming from the same ground one and probably ground three as well, of the intended appeal, it was also submitted that both the High Court and the Court of Appeal promoted unjust enrichment when they granted a relief that was not appealed or cross-appealed and especially that the respondents did not dispute their indebtedness but simply sought an order to determine the quantum. It was submitted that the issue is novel as the law on unjust enrichment in our

jurisdiction is not well developed; that it is limited largely to employment cases; otherwise, reliance is often placed on English authorities to resolve issues pertaining to it. This was, therefore, an opportunity to clarify the law when the concept can be applied.

29. In apparent reference to ground two of the intended appeal, it was submitted that an opportunity is presented to this Court to pronounce itself on whether an appellate Court is exempt from guidance it had previously given to lower Courts on judgment writing.
30. There was, however, no clear elaboration how grounds three and four in the intended grounds of appeal raise points of law of public importance save what was said regarding the alleged need for us to clarify the circumstances in which section 24 of the **Court of Appeal Act** <sup>(ii)</sup> applies.
31. Counsel went on to submit that all four grounds of the intended appeal demonstrate reasonable prospects of success. Counsel cited Order 59 of the **Rules of the Supreme Court** <sup>(i)</sup> and the English case of **Smith v Cosworth Casting Processes Limited**<sup>3</sup> which explain that leave can only be refused if the court was

satisfied that the appeal had no realistic prospects of success. It is the applicants' obvious position that the Court of Appeal exceeded its jurisdiction by granting a relief that was not pleaded in the appeal and made findings not supported by the evidence. Therefore, the prospect of the appeal succeeding on that account were enhanced.

32. It appears to be the appellants' further position that based on the issues raised in the proposed appeal, there is a compelling reason for the appeal to be heard particularly that the case arises out of a lender/borrower relationship in which, according to Counsel, the respondents did not deny owing the applicants but merely sought the ascertainment of the amounts due and the properties in issue were pledged as securities for the debt. It was further pointed out that the Court of Appeal judgment was contradictory as to whether or not the properties were properly pledged as securities at all. According to counsel, this Court must resolve this discrepancy in the Judgment.

### **The respondents' case**

33. The respondents' position is that the application for leave to appeal does not satisfy section 13(3) of the **Court of Appeal**

**Act<sup>(iii)</sup>**. It was submitted that all the four grounds of the intended appeal do not raise any point of law of public importance or have prospects of success or raise a compelling reason for the appeal to be heard.

34. Counsel submitted that the first ground of the intended appeal did not arouse public interest. He posited that this Court has, in a plethora of cases among them **Hakaide Hichilema v the Government of the Republic of Zambia** <sup>(4)</sup>, settled the issue of whether a court can grant relief not prayed for. Counsel added that at any rate there was no uncertainty in the law to justify an appeal. Reliance was placed on an Irish authority, **Glancare Teoranta v AN Bord Pleanala and Mayo County Council** <sup>(5)</sup> where the High Court of Ireland held that the point of law in question should stand in a state of uncertainty.
35. Counsel reiterated that ground one did not raise any point of law of public importance and that in the unlikely event this Court found that it did, then leave should only be granted on the first ground of the appeal.
36. Counsel submitted that grounds two, three and four were equally hopeless. According to Counsel, ground two was unfair criticism

by stating that the judgment of the Court of Appeal had no legal reasoning while grounds three and four merely sought to assail findings of fact, which were peculiar to the case at hand.

37. Commenting on the applicants' argument that the Court of Appeal had no mandate to order the return of the certificates of title, counsel submitted that the argument was unmeritorious and flew in the teeth of section 24 of the **Court of Appeal Act<sup>(iii)</sup>**, which empowers that Court to vary the judgment of the court below or give such judgment as the case may require.
38. Counsel submitted that the Court of Appeal having found that the applicants had failed to prove their claims, the inevitable consequence, as we understood the argument, was for the Court to order the return of the certificates of title. It was further submitted that even if the Court of Appeal did not make an order for the restoration of the title deeds, the applicants were still under an obligation to return the title deeds to the respondents.
39. Counsel reiterated that under the current constitutional set up, the Supreme Court should not be burdened with trivial issues. It was submitted that the role of this Court as currently constituted was not to correct errors in terms of settled law and

that in this case, the issue of whether or not the court can grant a relief not prayed for was settled law.

40. As regards the arguments on the respondents' indebtedness, Counsel submitted that the money advanced was paid back in excess and, thus, the respondents were not owing any money. As for the arguments on unjust enrichment, Counsel submitted that the issue was never raised in the court below and, therefore, cannot be raised now. In support, the case of **Kenny Sililo v Mend-A-Bath Zambia Limited and Another** <sup>(6)</sup> was cited. Counsel added that in any case, there was nothing novel about the principle of unjust enrichment. He called in aid the case of **Konkola Copper Mines v Mitchell Drilling International Limited and Mitchell Drilling (Z) Limited** <sup>(7)</sup>.
41. Mr. Mwamba submitted further that the Court of Appeal having found that the applicants had failed to prove their claim, could not have referred the parties back to the High Court for assessment.
42. Counsel urged us to dismiss the notice of motion with costs.

### **Consideration of the appeal and our decision**

43. We have given anxious thought to the notice of motion together with the ruling of the single Judge of this Court as well as the submissions or arguments in support of and against the Motion. In spite of the lengthy submissions from both parties, the primary issue for determination is, as we see it, straight forward. It is whether the applicants have demonstrated that leave to appeal to this court ought to be granted based on the grounds that the proposed grounds of appeal (set out in paragraph 10 above) satisfy the criteria in section 13 (3) (a), (c) and (d) of the Court of Appeal Act.
44. The secondary issue relates to the decision of the single Judge to terminate the application for leave to appeal on the ground that it was filed late and that counsel for the applicants, Ms. Mutemi, should be referred to the LAZ Legal Practitioner's Committee for investigation for possible misconduct.
45. We shall start with the secondary issue. Counsel for the applicants has asked us in grounds three and four of this notice of motion to vary the decision of the single judge with respect to his finding that the applicants had delayed to file the application

for leave to appeal, and that Counsel had allegedly altered the dates on the ruling of the Court of Appeal in order to bring their application for leave before the single Judge within time. Counsel relied on rule 48 sub-rule (4) of the **Supreme Court Rules** <sup>(i)</sup> and urged us to vary the order dismissing the application for leave to appeal as the single Judge made this finding unjustly and condemned counsel without first giving the parties an opportunity to address the court on the issue - a position which was shared by Counsel for the respondents.

46. In dealing with this prayer, we wish to state, as we did at the hearing, that the Notice of Motion is a renewed application before the full bench of the Supreme Court and the application is not designed to review the decision of a single Judge. However, having scrutinised the record of Motion, we are satisfied that it will serve the interests of justice to address the issues raised by Counsel. Further rule 48 subrule 4 of the **Supreme Court Rules** <sup>(i)</sup> does allow this Court to reverse, vary or discharge a single Judge in deserving applications.

47. In this regard, the question for determination under grounds three and four is whether the applicants filed their application



for leave to appeal to this Court outside the stipulated period and whether the ruling of the Court of Appeal was in fact altered to bring the applicants within time to file the application for leave to appeal.

48. To begin with, and as correctly observed by the learned single Judge, Section 13 (3) of the **Court of Appeal Act** <sup>(2)</sup>, insofar as it relates to leave to appeal to this Court, is instructive. It provides that an appeal from a decision of the Court of Appeal lies to this Court and that an application for leave to appeal to this Court must be made within 14 days of the judgment complained of. As regards the reckoning or calculation of time for doing an act, Rule 5 of the **Supreme Court Rules** <sup>(1)</sup> provides that:

**“Any act required to be done by a person on a date which falls on a Saturday or on a Sunday or a public holiday shall be valid and effective if done on the next following day not being a Saturday or a Sunday or a public holiday.”**

49. The history of this Notice of Motion is not in dispute. From the record, the Court of Appeal dismissed the applicants’ appeal on 12<sup>th</sup> July, 2021. The applicants applied for leave before the full bench of the Court of Appeal to appeal to the Supreme Court,

which application was refused. The applicants renewed their application for leave to appeal before a single Judge of this Court. The single Judge found that the applicants were out of time because the application for leave to appeal was filed on 26<sup>th</sup> October, 2021, yet the decision of the Court of Appeal refusing leave to appeal (from which the 14 days began to count) was, according to the learned judge, delivered on 4<sup>th</sup> October, 2021. The Judge took the view that the date of the ruling was deliberately altered to read 14<sup>th</sup> October, 2021, to bring the applicants within the 14 days' time limit provided in section 13 (2) of the **Court of Appeal Act** <sup>(ii)</sup>.

50. The applicants submitted that the ruling of the Court of Appeal was initially supposed to be delivered on 4<sup>th</sup> October, 2021 but was rescheduled to 11<sup>th</sup> October, 2021 because the presiding Judge was indisposed. The ruling was thus delivered on the latter date. This position was supported by Counsel for the respondents.
51. Our practice, and we believe it is the same for the Court of Appeal, is to state or list the dates when the case came up before the Court. The last date indicated will ordinarily be the date

when judgment or ruling was delivered. Of course, where only one date is indicated it means that the matter was heard and judgment or the ruling was delivered the same day. It is, therefore, not surprising that the learned single judge assumed that the 4<sup>th</sup> October, 2021 being the last date indicated on the ruling, barring the enlightenment to which we have now been exposed, is the date when the ruling was delivered.

52. We have, however, examined the ruling in question at page 26 of the record of Motion. The ruling appears to show that a handwritten figure “1” was inserted in pen before the typed date “4<sup>th</sup> October, 2021”. This could, indeed, create the impression that the ruling was delivered on 14<sup>th</sup> October, 2021. It is, however, unclear why and by whom this insertion was made and we fully appreciate the learned single Judge’s concern that the intention could have been to mislead the Court. If the ruling was delivered on 4<sup>th</sup> October, 2021, the alteration to 14<sup>th</sup> October would have brought the applicants within time by two clear days. An alteration of this kind in a Court document without leave is gross misconduct especially if done by Counsel with the intention to mislead the court or to aid a party to obtain

a favourable outcome. In the case at hand, however, the explanation by Ms Mutemi which was supported by Counsel for the respondents is that the ruling was delivered on 11<sup>th</sup> October, 2021. On the evidence on record, there was no reason for the learned Judge to disregard that date and insist on the 14<sup>th</sup> October, 2021 as the date when the ruling was delivered. In our view, the insertion of the figure “1” before the “4” is inconsequential because the court’s date stamp clearly shows that the ruling was delivered on 11<sup>th</sup> October, 2021 and the parties are agreed that the ruling was delivered on that date.

53. Having said that, filing the application for leave to appeal on 26<sup>th</sup> October, 2021 was, in our view, valid and effectively within time. This is because as argued on behalf of the applicants, the 24<sup>th</sup> October, on which the 14<sup>th</sup> day fell was a Sunday and was the Independence Day. Consequently, Independence Day was celebrated on 25<sup>th</sup> October, which was declared a public holiday. Inevitably, the 14<sup>th</sup> day on which the notice of motion could lawfully be filed moved to 26<sup>th</sup> October in accordance with rule 5 of the Supreme Court Rules.

54. As stated in paragraph 52, it is unclear why and by whom the alteration of the date of delivery of the ruling was made. The fact is that the ruling was initially supposed to be delivered on 4<sup>th</sup> October, 2021 but was rescheduled to 11<sup>th</sup> October, 2021 because the presiding Judge was indisposed. We suppose that someone may have attempted to correct the date from 4<sup>th</sup> October, 2021 to 11<sup>th</sup> October, 2021 but did not complete the alteration.
55. Whatever is the case, our view is that Ms Mutemi, ably exonerated herself from blame for the alteration on the ruling. As she stated in her affidavit, she was not present when the ruling was delivered, uplifted and distributed. Had counsel been given an opportunity to address the Court before the ruling of the learned single Judge, the apparent mix-up over the date of the Court of Appeal ruling could have easily been explained and the matter resolved. In the premises, we hold that the learned single judge misdirected himself when he placed the blame on Ms Mutemi for the alleged alteration and directed that action be taken against her for the perceived misconduct. She was clearly unjustly condemned. For reasons we have given above, we find

that grounds 3 and 4 of the notice of motion have merit. We, accordingly, set aside the order dismissing the application for leave to appeal on the ground that it was filed out of time. We also set aside the order referring Ms. Mutemi, to the Legal Practitioners Committee of the Law Association of Zambia (LAZ) for possible disciplinary process for misconduct.

56. We now move to the main issue in grounds 1 and 2 of the notice of motion. The question as stated earlier is whether the applicants' proposed grounds of the intended appeal satisfy the threshold as set out in section 13 (3) of the **Court of Appeal Act**<sup>(ii)</sup>.

57. In every application for leave to appeal to this Court from a judgment or decision of the Court of Appeal, the starting point is section 13(3) of the **Court of Appeal Act** <sup>(ii)</sup>, which is recited in the relevant parts in paragraph 25 above. That is the position we gave in our decision in the case of **Bidvest Foods and Others v CAA Import and Export Limited**<sup>2</sup>. In other words, the applicants must show or demonstrate how each proposed ground in the intended appeal satisfies any of the criteria listed in section 13 (3) of the **Court of Appeal Act** <sup>(ii)</sup>. Therefore, it is

not enough to merely allege that ground so and so meets one, two or all of the criteria without explaining how this comes about. Indeed, as submitted by Mr Mwamba, the viability of each proposed ground in relation to each criterion must be addressed separately and in a satisfactory manner.

58. In this vein, Ms. Mutemi contended that the proposed ground one of the intended appeals reveals a question of law of public importance as it questions the jurisdiction of the Court of Appeal to grant relief that has neither been appealed or cross-appealed. She further asserts that the question of jurisdiction, in this regard, is novel, presenting this Court with an opportunity to make a pronouncement on section 24 of the **Court of Appeal Act** <sup>(iii)</sup>. Mr. Mwamba, on the other hand, submitted that ground one of the intended appeals does not arouse public interest. Further that granting of relief not prayed for was settled law and that there was no uncertainty in the law to justify clarification from this Court.

59. We have examined the proposed ground one of the intended appeal, which has been reproduced in paragraph 10. From our reading of this case, the issue revolves around the decision of

the Court of Appeal to order the return of the title deeds to the respondents upon a finding that the applicants had failed to prove their claim. However, we are not convinced that the circumstances of this case, transcend beyond the litigation interests of the parties involved in the matter to the extent of becoming a matter of public concern. Besides, this Court has time without number pronounced itself on granting relief not prayed for. The case of **Hakainde Hichilema v the Government of the Republic of Zambia** <sup>(4)</sup>, cited by Counsel, where we re-stated that the court has no jurisdiction to volunteer relief not prayed for is but one of the authorities. In short, we find that there is no novel issue or point of law of public interest that warrants this Court to clarify in the proposed ground one of the intended appeal.

60. Counsel for the applicants, in her further arguments, contended that by virtue of the issue of public importance raised, the proposed ground one of the intended appeal had reasonable prospects of success and a compelling reason for the appeal to be heard. It was submitted that the High Court and the Court of Appeal promoted unjust enrichment, an area of law that,



Counsel submitted, was not well developed with heavy reliance placed on English authorities mainly in employment matters.

We do not think so.

61. Without delving in to the merits of the intended appeal, our view is that the Court of Appeal is clothed with authority under section 24 of the **Court of Appeal Act** <sup>(ii)</sup> to make orders as the justice of a case demands in order to bring finality to litigation.
62. We find it necessary to point out that the power of the Court of Appeal under the stated section is broad. The only restriction is that the power must be exercised judiciously, informed by the evidence available in the record to the appellate court and bearing in mind the adjunct that an appeal is a re-hearing on the record. The learned authors of **Halsbury's Laws of England**

<sup>(a)</sup> state at paragraphs 1529, 1530 and 1531 that:

**“In relation to an appeal, the appeal court has all the powers of the lower Court. The appeal court has power to:**

**(1) affirm, set aside or vary any order or judgment made or given by the lower court...**

**...An appeal is generally limited to a review of the decision of the lower court... The appeal court may draw any inference of facts which it considers justified on the evidence.**

**...Where there is a re-hearing, the appeal court forms its own judgment on the issues rather than simply reviewing the decision of the lower court.”**

63. From the foregoing, the view we take is that the applicants having failed to prove their claim, an order to return of title deeds to the mortgagee was a natural consequence. After all, this was the prayer of the respondents in the counterclaim.
64. Consequently, we do not find that the principle of unjust enrichment requires any more clarification. More so, in a case, such as the one before us, which relates to a strictly lender/borrower relationship. We are fortified in this legal position in the Kenyan case of **Hermanus Philipus Steyn v Giovanni Greechi Ruscone**<sup>8</sup> which we cited with approval in the **Bidvest Foods**<sup>2</sup> case. it was stated therein that:

**“Where the matter involves a point of law, the appellant demonstrates that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable courts to administer the law, not only in the case at hand but other cases in the future.”**

65. Therefore, having found that there is no point or issue of law of public importance, it follows also that the proposed ground one of the intended appeal has no prospects of success nor a compelling reason for the appeal to be heard.
66. Coming to the proposed ground two of the intended appeal, Counsel submitted on behalf of the applicants that the

impugned judgment of the Court of Appeal fell short of the prescribed requirements and was devoid of reasoning. It was Counsel's position that this Court must pronounce itself on whether the Appellate Court is exempt from the guidance on judgment writing. In addition, it was submitted that the proposed ground of appeal had a compelling reason to be heard as the judgment was contradictory. In response, Counsel for the respondent described the proposed ground two as unfair criticism of the Court of Appeal.

67. In our considered view, this Court has given adequate guidance in terms of judgment writing which applies to all court. For this Court to make further pronouncement, there has to be something more than mere dissatisfaction with a Judgment of the Court of Appeal or that it is contradictory. We, therefore, find that the proposed ground two of the intended appeal does not raise any issue or point of law of public importance. Neither does the said proposed ground have reasonable prospects of success or some other compelling reason to be heard on appeal.
68. We move to the proposed ground three of the intended appeal which is to the effect that the decision of the Court of Appeal to

dismiss the applicants' appeal was contrary to the weight of evidence and pleadings in that the respondents did not dispute their indebtedness to the applicants. Counsel for the respondents, in reply, submitted that the proposed ground three sought to assail findings of fact which are peculiar to the case at hand. That in any case, the sum of money advanced was paid back.

69. As we observed on paragraph **30**, there was no clear elaboration on the part of the applicants how the proposed ground of appeal raised a point or points of law of public importance, had reasonable prospects of success or a compelling reason for the intended appeal to be heard save for the need for this Court to clarify the import of section 24 of the **Court of Appeal Act** <sup>(ii)</sup>, which we have already dealt with in the preceding paragraphs. The proposed ground three of the intended appeal does not meet the prescribed criteria.

70. As for the proposed ground four of the intended appeal, Counsel for the applicants contended that the Court of Appeal proceeded to dismiss the appeal instead of referring the matter back to the High Court for assessment of the admitted debt. In rebuttal,

Counsel for the respondents submitted that the proposed ground four equally sought to assail findings of fact. In addition, that the applicants had failed to prove their claim and as such the Court could not have referred the parties back to the High Court for assessment.

71. We note here, too, that Counsel did not elaborate how the proposed ground of appeal raised a point or points of law of public importance, had reasonable prospects of success or a compelling reason for the intended appeal to be heard. Besides, as ably articulated by counsel for the respondents, the Court found that the applicants had failed to prove their claim and therefore there was no basis to refer the parties back to the High Court for assessment. On that basis, the proposed ground four of the intended appeal does not satisfy the prescribed criteria to be heard on appeal by this Court.
72. On the totality, we find no merit in grounds one and two of the notice of motion.
73. This notice of motion fails except to the extent that we have highlighted in the judgment. We accordingly dismiss the

application for leave to appeal. Given the circumstances of the case, the parties will bear their respective costs.




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E. M. Hamaundu  
**SUPREME COURT JUDGE**



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N. K. Mutuna  
**SUPREME COURT JUDGE**



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J. Chinyama  
**SUPREME COURT JUDGE**