

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

**APPLICATION NO.  
SCZ/8/11/2022**

**BETWEEN:**

**FAUSTIN KABWE**

**BIMAL THAKER**

**AND**

**NDOLA TRUST SCHOOL LIMITED**

**ATTORNEY GENERAL**

**AND**

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

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

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

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

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

**APPLICATION NO.  
SCZ/8/14/2022**

**BETWEEN:**

**OCCUPATIONAL HEALTH AND  
SAFETY INSTITUTE**

**AND**

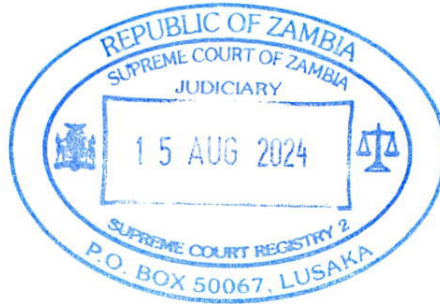
**JAMES MATALIRO**

**APPLICANT**

**RESPONDENT**

**CORAM:** Malila CJ, Hamaundu, Kaoma, Mutuna and Chisanga, JJS

On 4<sup>th</sup> June, 2024 and 15<sup>th</sup> August, 2024.



*For the Appellants: Mr. C. K. Bwalya of Messrs D.H.Kemp & Co., Mr. M. Nkunika of Messrs Simeza Sangwa and Associates and Mr. M. Mwachilenga of Messrs James and Doris Legal Practitioners.*

*For the Respondents: Mr. K. Wishimanga of Messrs AMW & Co. Legal Practitioners; Mr. M. Muchende SC, Mr. C. Mulonda and Mr. Mwiya, Attorney General's Chambers; and Mr. S.A.G. Twumasi of Messrs Kitwe Chambers.*

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## **R U L I N G**

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**Mutuna, JS**, delivered the Ruling of the Court

**Legislation Referred to:**

1. *Constitution of Zambia (Amendment) Act (No. 2 of 2016);*
2. *Court of Appeal Act No. 7 of 2016;*
3. *Court of Appeal Rules, Statutory Instrument No. 65 of 2016;*
4. *Supreme Court (Amendment) Act No. 24 of 2016;*
5. *Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia;*
6. *Industrial and Labour Relations Court Rules, Statutory Instrument No. 206 of 1974.*

**Cases Referred to:**

1. *Antonio Ventriglia and Manuela Ventriglia v. Finsbury Investments Limited, Appeal No. 2 of 2019*
2. *Zambia Telecommunications Co. Ltd v. Ireen Simate, Perine C. Zulu and Others, Appeal No. 52 of 2017.*
3. *Zambia Revenue Authority v. Professional Insurance Corporation Zambia, Appeal No. 34 of 2017.*
4. *Martin Nguvulu and 34 Others v. Marasa Holding Limited T/A Hotel Intercontinental Lusaka, Appeal No. 108 of 2016*
5. *Musonda Mutale v. African Banking Corporation Limited SCZ/08/051/2020*

## **INTRODUCTION**

1. The enactment of the amendment to the **Constitution** in 2016, introduced significant changes in the hierarchy of the court system in Zambia. One change that it brought was the re-introduction of the Court of Appeal, not as the apex court as in the past, but as a step between the High Court and Supreme Court.
2. A number of questions have arisen as a result. They include the role of our Court, as the apex court and its jurisdiction, if any, in terms of applications for leave to appeal. The latter is the question which is before us in this motion. It arises from two motions for leave to appeal which were presented before a Single Judge of this Court. From those two motions, the Applicants in this motion challenge the jurisdiction of our Court to entertain the motions for leave to appeal.
3. It is contended that the power to grant leave to appeal to the Supreme Court resides in the Court of Appeal and not this Court. As such, we have no jurisdiction to entertain motions for leave to appeal. The Respondents have countered this by

contending that our Court has jurisdiction to entertain the motions.

#### **THE MOTION BEFORE US AND ARGUMENTS BY THE PARTIES**

4. The Applicants in this motion are Ndola Trust School Limited, the First Respondent in cause number SCZ/08/11/2022 and James Mataliro, the Respondent in cause number SCZ/8/14/2022. Mr. C. K. Bwalya represents the Applicant under cause number SCZ/08/11/2022 while Mr. Mwachilenga represents the one under cause number SCZ/08/14/2022.
5. The affidavit and arguments in support of the motion arising in cause number SCZ/08/11/2022, the Ndola Trust School motion, were filed by Mr. Bwalya on 9<sup>th</sup> May, 2023, while those relating to the James Mataliro motion were filed by Mr. Mwachilenga on 12<sup>th</sup> July, 2022, opposing the motion for leave to appeal.
6. The evidence in support of the Ndola Trust School motion was led by one Henry Mwangala Kwalombota, the chairman of the

board of directors. His evidence revealed the content of the report of the Technical Committee which was appointed by the late President Michael Chilufya Sata on 16<sup>th</sup> November, 2011, relating to the establishment of the Court of Appeal and its jurisdiction.

7. In the written arguments, Mr. Bwalya began by acknowledging the fact that both this Court and the Court of Appeal are established by the **Constitution**. He submitted that **Article 124** of the **Constitution** establishes the Supreme Court while **Article 125** sets out its jurisdiction. As for the Court of Appeal, counsel argued that it is established under **Article 130** of the **Constitution** while its jurisdiction is set out in **Article 131** of the **Constitution**.

8. According to Mr. Bwalya, **Article 131 (2)** of the **Constitution** specifically vests the jurisdiction to grant leave to appeal to the Supreme Court in the Court of Appeal and no other Court. This Article states as follows:

***“131 (2) An appeal from a decision of the Court of Appeal shall be made to the Supreme Court with leave of the Court of Appeal.”***

9. Advancing his argument, Mr. Bwalya contended that while **Section 24(b)** of the **Supreme Court Act** grants this Court jurisdiction to entertain an application for leave to appeal, there is no such jurisdiction granted in the court by its creator, the **Constitution**. Therefore, the absence of a provision in the **Constitution** granting this Court jurisdiction to entertain applications for leave to appeal means that the intention of the legislature was that this Court should not have such powers.
10. Counsel argued further that we cannot derive our jurisdiction to entertain applications for leave to appeal, from **Section 24 (b)** of the **Supreme Court Act** because it is inconsistent with **Article 131** of the **Constitution**. He concluded that all laws and rules purporting to grant us jurisdiction to consider applications for leave to appeal suffer the same fate.
11. The other limb of counsel's argument was to urge us to consider the debate of the Technical Committee charged with the responsibility of preparing the report on the amendments to the **Constitution**, in particular the genesis of **Article 131** of the **Constitution**. He also drew our attention to a number of decisions from this and other jurisdictions to the effect that

when the Constitutional Court and this Court embark on the exercise of interpreting the **Constitution**, regard should be had to matters that existed during the period of the constitutional review process. We have explained later in this judgment that our task is not to embark on the exercise of determining or interpreting the effect of **Article 131** of the **Constitution**, but rather determining our jurisdiction, if any, to consider applications for leave to appeal in light of the legal provisions which have been presented to us. Therefore, there is no need to summarise this portion of Mr. Bwalya's arguments which direct us to interpreting the effect of **Article 131** beyond our jurisdiction.

12. The concluding remarks by Mr. Bwalya in the written submissions were as follows:

12.1. The general jurisdiction of this Court is contained in **Article 125 (2) (b)** of the **Constitution**.

12.2. **Article 125 (2) (b)** cannot limit the operations of a specific provision of the Constitution in relation to leave to appeal or nullify the effect or operations of such a provision; and,

- 12.3. If the Applicants' arguments are accepted, we should proceed to dismiss the applications for leave to appeal as preliminary issues in accordance with our decisions in the cases of **Antonio Ventriglia and Manuela Ventriglia v. Finsbury Investments Limited**<sup>1</sup>.
13. We were urged to allow the motion.
14. The evidence led by James Mataliro revealed that the Court of Appeal had denied the Respondents leave to appeal under cause number SCZ/8/14/2022. As such, the matter before us is *res-judicata* because our Court has no jurisdiction to entertain a renewed application for leave to appeal from the Court of Appeal. Further, this Court will be engaging in an academic exercise if it considers the application for leave to appeal because it has no jurisdiction to hear an appeal where leave to hear such appeal has not been granted by the Court of Appeal.
15. In the skeleton arguments, Mr. Mwachilenga argued that leave to appeal to this Court can only be obtained from the Court of Appeal. There is no power vested in this Court to grant leave to appeal by the **Constitution**. Further, this Court cannot



hear an appeal in the absence of leave being granted by the Court of Appeal. In view of this, Mr. Mwachilenga contended, the provisions in the **Supreme Court (Amendment) Act No. 24 of 2016** and **Supreme Court Rules** that suggest that we have power to entertain an application for leave to appeal are *ultra-vires* **Article 131 (2)** of the **Constitution**.

16. In the verbal arguments, Mr. Mwachilenga submitted as follows:

16.1. **Article 131 (2)** of the **Constitution**, is the only provision that caters for leave to appeal to this Court and it vests power to grant such leave in the Court of Appeal;

16.2. The Article is not subject to any other Article of the **Constitution** and is thus a stand-alone article which must be interpreted and given effect in the manner it was couched by the framers of the **Constitution**;

16.3. Since this Court is a creature of the **Constitution** and its jurisdiction is contained in **Article 125 (2)**, it cannot derive its jurisdiction to grant leave to appeal from **Rule 50 (2)** of the **Supreme Court Rules** or **Section 24 (b)**

of the **Supreme Court (Amendment) Act** because these are inferior pieces of legislation and are in conflict with **Article 131 (2)** of the **Constitution**, and;

- 16.4. If the intention of the framers of the **Constitution** was that this Court should derive jurisdiction from other pieces of legislation, **Article 131 (2)** of the **Constitution** would have been subject to other provisions of the law.
17. Following a query from the Court, Mr. Mwachilenga clarified that **Article 131 (2)** and indeed other Articles of the **Constitution** do not expressly deprive this Court of jurisdiction to entertain applications for leave to appeal.
18. In opposing the motion, Mr. Wishimanga drew our attention to the affidavit evidence by the First Appellant under cause number SCZ/08/11/2022. We have not summarised this evidence because it does not address the motion which is before us.
19. The thrust of Mr. Wishimanga's written arguments was that this Court's Jurisdiction is derived from **Article 125** of the **Constitution**. This Article not only specifies that the

jurisdiction of this Court is derived from the **Constitution** but also other laws. Counsel set out the various provisions of the “other laws” and their effect by reference to two of our decisions.

20. One of the decisions which counsel referred to was **Zambia Telecommunications Co. Ltd v. Ireen C. Simate, Perine C. Zulu and Others**<sup>2</sup> and he quoted the following passage:

*“Order XI Rule 1 (2) provides that where leave to appeal is refused by the Court, an application for leave may be made to the Supreme Court. Such application being one on interlocutory point not involving the determination of the appeal lies to a single judge of the Supreme Court in terms rule 48 of the Supreme Court Rules.”*

21. The arguments presented during the hearing by Mr. Wishimanga by and large mirrored the written arguments. The only departure was as follows:

21.1 **Article 125** of the **Constitution** gives this Court very wide discretion; and,

21.2 There is no restriction on the other laws from which this Court derives its jurisdiction.

22. In augmenting Mr. Wishimanga’s arguments, Mr. Nkunika referred us to **Article (119) (1)** of the **Constitution** and stated

that it also recognises the fact that jurisdiction of this Court is not only derived from the **Constitution** but also other laws.

23. We were urged to dismiss the motion.
24. In opening the arguments for the Second Respondent under cause number SCZ/8/11/2022, the Learned Solicitor General, Mr. M. Muchende, SC referred us to the skeleton arguments filed on 27<sup>th</sup> May, 2024. The arguments were substantially similar to those advanced by Mr. Wishimanga as he also referred to **Article 125** of the **Constitution**, **Order 11 Rule 1 (4)** of the **Court of Appeal Rules** and **Section 24** of the **Supreme Court (Amendment) Act**.
25. Arguing before us, Mr. M. Muchende, SC, posed the question, whether this Court has jurisdiction to consider a renewed application for leave to appeal to itself. He answered it in the affirmative for the following reasons:
  - 25.1 **Section 3** of the **Interpretation and General Provisions Act** defines written law to mean an Act, an Applied Act, an Ordinance and a Statutory Instrument;
  - 25.2 The written law from which this Court derives jurisdiction to hear application for leave to appeal are

the **Supreme Court (Amendment) Act**, which is an Act governing our affairs from a subsidiary legislation point of view apart from the **Constitution**;

25.3 The other written law is **Order II Rule (1)** as read with **Rule (4)** of the **Court of Appeal Act**. This is by way of a Statutory Instrument promulgated in 2016; and,

25.4 The jurisdiction conferred on this Court by **Article 125 (2) (a)** and **(b)** of the **Constitution** is general in nature.

The other jurisdiction that this Court enjoys is in the written law referred to which has not been adjudged by the Constitutional Court to be in conflict with the **Constitution**.

We were urged to dismiss the motion

26. In opposing the motion, Mr. Twumasi relied on the affidavit of one Bupe Katebe and the skeleton arguments filed on 25<sup>th</sup> July, 2022. The evidence of Bupe Katebe stated that this Court has jurisdiction to hear an application for leave to appeal after denial of such application by the Court of Appeal. It stated further that, we derive the jurisdiction to entertain such applications from the other laws which are not *ultra vires* the **Constitution**.

27. The written text of Mr. Twumasi's arguments was similar to the arguments advanced by counsel opposing the motion. For this reason, it is not necessary for us to summarise these arguments. Suffice to say that in his concluding remarks, Mr. Twumasi submitted that the motion lacks merit.
28. Augmenting the written submissions, Mr. Twumasi argued that we derive our jurisdiction from **Article 125** of the **Constitution** and that the framers of the **Constitution** gave this Court jurisdiction to entertain applications for leave to appeal because of the importance of such applications. He said it would be a travesty of justice to deny the apex Court the power to determine what matter should come before it.
29. We were urged to dismiss the motion.
30. In his reply, Mr. Bwalya agreed that **Article 125** of the **Constitution** does indeed define the general jurisdiction of this Court. However, he insisted that the power to determine applications for leave to appeal rests with the Court of Appeal in accordance with **Article 131**. He also argued that the pieces of legislation referred to by counsel opposing the motion as vesting power in this Court cannot extend the jurisdiction of this Court

to applications for leave to appeal as contained in **Article 131** of the **Constitution**.

31. Mr. Mwachilenga on the other hand argued that we have stated in the past that there can be no implied amendment to the **Constitution**. Here, Mr. Mwachilenga was suggesting that the contention that this Court has jurisdiction in matters concerning leave to appeal, by virtue of the other laws, amounts to an amendment of the **Constitution**.

#### **OUR CONSIDERATION AND DECISION**

32. We begin our consideration of this motion by thanking counsel for the industry deployed in the presentation and argument of this motion. As a starting point, there is need to restate our role in the determination of this motion.
33. The motion presented before us challenges our jurisdiction to entertain applications for leave to appeal. The contention is that by virtue of **Article 131** of the **Constitution**, the jurisdiction to consider applications for leave to appeal is vested in the Court of Appeal. This jurisdiction is limited to the Court of Appeal and does not extend to us.

34. We are also compelled to explain how we will proceed to discharge our role. A Court faced with a jurisdictional issue looks to the enabling pieces of legislation to determine its jurisdiction. All superior courts in Zambia are established by the **Constitution**, therefore, it is the first point of call. However, in determining the provisions of the **Constitution** arising from motions such as this one, we are restricted to looking at the relevant Articles and determining what our jurisdiction is. For this reason, we have not addressed our minds to all the arguments and evidence (in particular, the evidence by Mr. Kwalombota) which direct us to interpreting the meaning and effect of certain provisions of the **Constitution** or indeed their genesis and rationale. This is the preserve of the Constitutional Court.

35. The Applicants in this motion have anchored their position on **Article 131 (2)** of the **Constitution** which sets out the recourse against decisions of the Court of Appeal being this Court with leave of that Court. According to the Applicants, this provision of the **Constitution** vests the jurisdiction to entertain applications for leave to appeal to this Court in the Court of Appeal only.



36. The position we have taken is that the Applicants have adopted a very narrow view of interpreting our jurisdiction in such matters. To begin with, **Article 131** of the **Constitution** is titled “jurisdiction of the Court of Appeal.” It then, in the early part, sets out the jurisdiction of that Court as follows:

*“(1) The Court of Appeal has jurisdiction to hear appeals from –  
(a) the High Court;  
(b) other courts, except for matters under the exclusive jurisdiction of the Constitutional Court; and,  
(c) quasi-judicial bodies, ...”*

The Article ends by setting out the provisions regarding leave to appeal to this Court which we have set out in the preceding paragraph.

37. The conclusion we have come to regarding **Article 131** is that it is an article which defines the jurisdiction of the Court of Appeal in respect of the decisions which are challenged in that Court and the Court to which recourse to its decisions lies. It is, therefore, relevant in the determination of the jurisdiction (as its definition states) of the Court of Appeal not our Court.

38. There is no dispute by the parties to this motion that **Article 125** of the **Constitution** is what defines our jurisdiction. The only

dispute is to what extent or if indeed, we can consider other laws in determining our jurisdiction. The Article states as follows, in the portion relevant to the motion before us:

***“(1) Subject to Article 128, the Supreme Court is the final court of appeal.***

***(2) The Supreme Court has—***

***(a) appellate jurisdiction to hear appeals from the Court of Appeal; and***

***(b) jurisdiction conferred on it by other laws ...”***

There are three things to note from the Article which are that: our jurisdiction is only subject to or limited by **Article 128** of the **Constitution**, which sets out the jurisdiction of the Constitutional Court; our jurisdiction is not subject to, limited or defined by **Article 131 (2)** of the **Constitution**; and, in the determination of our jurisdiction, we must not only look at the provisions of the **Constitution**, but also provisions of other laws.

39. This latter proposition is supported by **Article 119(1)** of the **Constitution**. This Article is specific in regard to the sources of our jurisdiction when it legislates as follows:

***“Judicial authority vests in the courts and shall be exercised by the courts in accordance with this Constitution and other laws.”***

The underlining is ours for emphasis only.

40. The arguments advanced by the Applicants is that we cannot look to these other laws because they are in conflict with **Article 131 (2)** of the **Constitution** and since these other laws are subordinate to the **Constitution**, the **Constitution** should prevail. They have also argued that a consideration of the other laws amounts to amendment of **Article 131 (2)** of the **Constitution**. Lastly, it has been argued that this Court being an apex Court and established by the **Constitution**, can only look to constitutional provisions and not subsidiary legislation in determining its jurisdiction.

41. We have not been persuaded by the arguments of the Applicants for a number of reasons. Firstly, it is not our place to decide whether the other laws are in conflict with **Article 131 (2)** of the **Constitution**. In his arguments in Court, the Learned Solicitor General stated that there is no decision by the Constitutional Court which has declared these other laws to be in conflict with **Article 131 (2)** of the **Constitution**. We agree entirely with this argument and restate our earlier position that in so far as the

motion before us deals with the determination of our jurisdiction, the relevant Article is 125 and not 131 of the **Constitution**.

42. Secondly, we are compelled to look at the other laws in so far as they relate to our jurisdiction because **Articles 125 (2) (b) and 119 (1)** of the **Constitution** compel us to do so. The reason for this is that **Article 125 (1) (a)** of the **Constitution**, sets out the general jurisdiction of this Court, while the other laws specifically speak to our jurisdiction in respect of applications for leave to appeal. There is, therefore, no implied amendment to the **Constitution**.

43. Lastly, we will of course look at the **Constitution** for purposes of determining our jurisdiction which **Constitution**, as we have said earlier, compels us to look at other laws. This is in line with the majority decision of this Court in the case of **Zambia Revenue Authority v. Professional Insurance Corporation Zambia**<sup>3</sup>, where we confirmed that we can look to other laws in determining our jurisdiction. These other laws are the **Supreme Court (Amendment) Act, Section 24 (b)** and the **Supreme Court Rules, Rule 50**. Both these provisions confer jurisdiction upon us to consider applications for leave to appeal.

44. The inevitable conclusion we must reach following our determination in the preceding paragraphs is that this motion has no merit.

## **COSTS**

45. The Applicants have prayed for costs in the event of success and in the event of loss, the costs to lie where they fall. The Respondents have also prayed for costs in the event that we dismiss the motions and like the Applicants, costs to lie where they fall in the event of success of the motion. The Applicant under cause under SCZ/8/14/2022 has taken it a step further and argued that he should not be condemned to costs in whatever event because his matter is one emanating from the Industrial Relations Court Division (IRD) of the High Court.

46. The settled principle that governs the award of costs in Zambia is that where the Court is inclined to award costs, they will follow the event, unless there are circumstances that warrant a departure from this general principle. This is in line with **Order 62 Rule 3** of the **Rules of the Supreme Court 1965 (White Book)** and a plethora of our decisions. As for matters in the IRD,

**Rule 44** of the **Industrial Relations Court Rules** states in the relevant portion as follows:

*“Where it appears to the Court that any person has been guilty of unreasonable delay, or of taking improper, vexation or unnecessary steps in any proceedings, or of other unreasonable conduct, the Court may make an order for costs or expenses against him...”*

This order is a departure from the general principle we have set out above because it curtails the power of the IRD to grant costs. The power is limited to instances where a party is guilty of unreasonable delay and conduct in the proceedings.

47. The rationale for this lies in the origin of the IRD which is that it was set up as a tribunal and forum in which an employee or ex-employee would seek redress without having to be exposed to unnecessary costs. We have consistently held that courts adjudicating over IRD matters, even at appellate level, should abide by the provisions of **Rule 44** of the **Industrial Relations Court Rules**, as reflected in our decision in the case of **Martin Nguvulu and 34 Others v. Marasa Holdings Limited (T/A Hotel Inter-Continental Lusaka)**<sup>4</sup>.

48. The nature of the motion before us is novel and raises a very important issue. We are, therefore, not inclined to exercise our discretion to award costs. Further, none of the parties in the motion arising from the IRD matter have conducted themselves in a manner warranting condemnation to costs. We, accordingly direct that the parties will bear their respective costs.

### **CONCLUSION**

50. By way of conclusion, having held that the motion lacks merit, we dismiss it. The parties will bear their respective costs as directed in the preceding paragraph. We also direct that the applications for leave to appeal which were before the Single Judge of this Court, but halted by this motion, proceed to be heard.



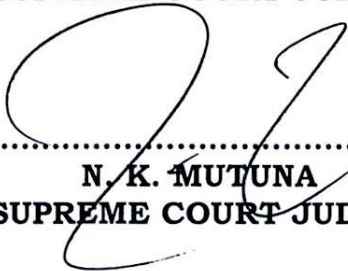
.....  
**MUMBA MALILA**  
**CHIEF JUSTICE**



.....  
**E. M. HAMAUNDU**  
**SUPREME COURT JUDGE**



.....  
**R. M. C. KAOMA**  
**SUPREME COURT JUDGE**



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**N. K. MUTUNA**  
**SUPREME COURT JUDGE**



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**F. M. CHISANGA**  
**SUPREME COURT JUDGE**