

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

SCZ/08/11/2022

BETWEEN:

FAUSTIN KABWE

BIMAL THAKER

AND

NDOLA TRUST SCHOOL LIMITED

ATTORNEY GENERAL



1ST APPLICANT

2ND APPLICANT

1ST RESPONDENT

2ND RESPONDENT

Coram: Musonda, DCJ and Kaoma and Kabuka, JJS

On 4th February 2025 and 28th March 2025

For the Applicants : *Ms. N. Banda-Chanda and Mr. K. Banda of AMW & Co. Legal Practitioners*

For the 1st Respondent : *Mr. C.K. Bwalya of D.H. Kemp & Co.*

For the 2nd Respondent : *Mr. C. Mulonda Ag. Deputy Chief State Advocate, Attorney General's Chambers*

RULING

Kaoma, JS, delivered the Ruling of the Court.

Cases referred to:

1. **Corpus Legal Practitioners vs. Mwanandani Holdings Limited (SCZ Judgment No. 50 of 2014)**
2. **New Plast Industries vs. Commissioner of Lands and the Attorney General (2001) Z.R. 51**
3. **Hakainde Hichilema vs. Attorney General (Appeal No. 4 of 2019)**
4. **Henry Kapoko vs. The People 2016/CC/0023**
5. **Access Bank (Zambia) Limited vs. Attorney General 2018/CCZ/009**

6. **Chikuta vs. Chipata Rural Council (1974) Z.R. 241**
7. **Bidvest Food Zambia Limited and Four (4) others vs. CAA Import and Export Limited - SCZ Appeal No. 56 of 2017**
8. **Rajan Lekhraj Mahtani vs. Little Park Limited - SCZ/7/13/2024**
9. **Mutate vs. Munaile (2007) Z.R. 118**
10. **Billis Farm Limited and Another vs. Molosoni Chipabwamba and 12 Other Displaced Village owners and 6 Interested Parties - SCZ Appeal No. 11 of 2022**

Legislation referred to:

1. **Court of Appeal Act No. 7 of 2016, section 13(3)(a)(c) and (d)**
2. **Court of Appeal Rules, order XI rules 1(1) and 4**
3. **Supreme Court of Zambia Act, section 4**
4. **Supreme Court Rules, rule 48(3)**
5. **White Book 1999 Edition, order 14A and 33(3)**
6. **The Protection of Fundamental Rights Rules, 1969, rule 2**
7. **Constitution of Zambia Cap 1, Article 28**

1.0 INTRODUCTION

1.1 This is a renewed application for leave to appeal to this Court made pursuant to Order XI rules 1(1) and 4 of the Court of Appeal Rules, as read together with section 13(3) of the Court of Appeal Act 2016, section 4 of the Supreme Court of Zambia Act, and Rule 48 of the Supreme Court Rules.

1.2 The applicants desire to challenge the judgment of the Court of Appeal delivered on 28th October 2021, wherein the court dismissed the applicants' appeal on a jurisdictional point of law, holding that the matter ought to have been commenced by way of petition under Article 28 of the Constitution and not by writ of summons and statement of claim. The Court of Appeal denied the applicants leave to appeal.

2.0 BACKGROUND FACTS

2.1 The brief facts, of this matter, are that the applicants commenced an action against the respondents by writ and statement of claim in the High Court, seeking reliefs defined in the amended writ and statement of claim as follows:

- i) **An order for the delivery up of the management of Ndola Trust School.**
- ii) **An order to render account of all the monies had and received from the time the respondents took over the management and administration of the applicants' school and business, wrongfully.**
- iii) **Damages by way of compensation against the 2nd respondent for the expropriation of the property legally belonging to the applicants without just cause, and unlawfully and in violation of the rights enjoyed by the applicants under the law.**
- iv) **Any other order the court may deem fit.**
- v) **Interest on the sum claimed and found due; and**
- vi) **Costs.**

2.2 The 1st respondent filed appearance and defence which was also later amended, denying the applicants' claims. The 2nd respondent, who was joined later to the suit, filed only a memorandum of appearance without a defence. Later, the 2nd respondent followed by the 1st respondent raised preliminary issues pursuant to Order 14A and Order 33(3) of the White Book, 1999 Edition. However, the preliminary issues raised by the 2nd respondent were dismissed for non-compliance with the condition precedent of filing a defence before raising a preliminary issue under Order 14A.

2.3 The preliminary issues raised by the 1st respondent sought dismissal of the action, on the ground that the action was incompetent, an abuse of court process, and/or it did not disclose any reasonable cause of action against the 1st respondent. The particulars were couched as follows:

- i. **The action constituted an attempt to circumvent the Gazette Notice issued pursuant to the Anti-Corruption Commission (Disposal of Recovered Property) Regulations 2004 by the Director General of the Anti-Corruption Commission dated 30th October 2006, which was addressed to the chairman, Board of Governors of Ndola Trust School, whose particulars were, among other things, that recovered property, namely Property No. NDO/578/C, Ndola Trust School and all its movable and immovable assets, had been subject of and were recovered during the course of an investigation into an offence alleged or suspected to have been committed under Act No. 42 of 1996, were to be forfeited to the State, if they were not claimed within three months from the date of publication of that notice;**
- ii. **The action was entirely, materially and/or substantially founded on the inadmissible judgment of the High Court sitting as an appellate court in its criminal jurisdiction dated 26th May 2016 in which the 1st applicant and another person were acquitted of one count of conspiracy to defraud contrary to section 313 of the Penal Code and to which the respondents were and are strangers.**
- iii. **The action which was commenced by writ sought, as a central claim, to enforce the applicants' alleged rights under Part III of the Constitution, was instituted contrary to Article 28 of the Constitution and Rule 2 of the Protection of Fundamental Rights Rules of 1969.**

2.4 As regards the first preliminary issue, the learned trial judge found that it could only be determined after evidence was led; and that it could not be concluded at that stage, that the applicants were trying to circumvent the Gazette Notice.

- 2.5 With respect to the second preliminary point, the learned judge took the view that the applicants as could be seen in paragraphs 13 and 17(a) of the statement of claim, relied on the outcome of the criminal proceedings in establishing a cause of action, which was not tenable.
- 2.6 Nonetheless, the judge went on to say that a full perusal of the statement of claim showed that the applicants also claimed ownership of the property on the basis of the contract with ZCCM for purchase of the property. Thus, the success of the issue would not fully and finally decide the matter as an order for the amendment of the pleadings could be made.
- 2.7 On the third issue, which was the crux of the matter, the learned judge found that if it succeeded, it would determine the action, subject only to an appeal as it related to the jurisdiction of the court to hear the matter despite there being issues in contention between the parties concerning ownership of the property as seen from the pleadings.
- 2.8 In this regard, the judge found that the reliefs the applicants sought centred around the compulsory acquisition of the property and ultimately the deprivation of the property in

breach of the rights under Part III of the Constitution and that there were no other distinct reliefs sought.

2.9 The learned judge distinguished the case from **Corpus Legal Practitioners vs. Mwanandani Holdings Limited**¹ and held that the matter should have been commenced by way of petition, in line with Rule 2 of The Protection of Fundamental Rights Rules of 1969. Quoting the case of **New Plast Industries vs. Commissioner of Lands and Attorney General**², the judge concluded that she had no jurisdiction to hear the matter and dismissed it with costs.

2.10 On appeal to the Court of Appeal, it was alleged, inter alia, that the High Court judge erred in law and fact by holding that the matter ought to have been commenced by way of petition, contrary to the evidence on record and the applicable law; by dismissing the action under Order 14A without satisfying the necessary conditions precedent; and by awarding costs to the respondents.

2.11 The Court of Appeal first dealt with the question of jurisdiction, saying it was crucial as its determination had the potential of disposing of the matter efficiently. It opined that the main issue the High Court ought to have determined

was whether the originating process was correct; whether or not Order 14A was properly invoked was inconsequential.

2.12 In determining that question, the Court referred to paragraphs 11 and 12 of the statement of claim. In paragraph 11, the applicants averred that the 1st defendant (now 1st respondent) which is beneficially owned by the Government of the Republic of Zambia, under the guidance and express direction of the 2nd defendant (now 2nd respondent), took compulsory possession of and charge of running the school to the exclusion of the plaintiffs (now applicants).

2.13 In paragraph 12 it was averred that the actions of the 2nd respondent, as set out in paragraph 11, were taken without any legal basis and in direct violation of the applicants' moral and legal rights as enshrined under Part III of the Constitution and also under the Lands Acquisition Act.

2.14 From these assertions, the Court was convinced that the applicants were alleging breach of their preserved rights under Part III of the Constitution. Alluding to **Hakainde Hichilema vs. The Attorney General**³, Article 28(1) of the Constitution and Rule 2 of the Protection of Fundamental Rights Rules, the Court upheld the High Court decision.

2.15 The Court also confirmed that since there were no other distinct reliefs sought, the case was distinguishable from **Corpus Legal Practitioners**¹. It accepted that in line with **New Plast Industries**², the High Court was on firm ground when it found that it had no jurisdiction to hear the matter and accordingly dismissed it.

2.16 There was an alternative argument by the applicants, based on Article 118(2)(e) of the Constitution and **Henry Kapoko vs. The People**⁴ that the trial court should not have dismissed the entire action on a technicality as some issues were left unresolved. Citing a number of cases, including **Access Bank (Zambia) Limited vs. Attorney General**⁵ and **Chikuta vs. Chipata Rural Council**⁶, the Court of Appeal held that since the duty to decide the matter on its merits remained unperformed, there was nothing that barred the applicants from going back to the High Court and commencing a fresh action using the proper procedure.

2.17 The Court found no merit in grounds 1 to 4 but allowed ground 5, holding that the High Court improperly exercised its discretion in awarding costs to the 2nd respondent when its preliminary issues had failed entirely.

2.18 Unhappy with the outcome, the applicants sought leave to appeal to this Court, citing the following grounds:

1. The intended appeal raises a point of public importance, on the ground that the Court of Appeal limited the avenues available to the applicants whose fundamental rights have been infringed contrary to Article 28 which does not restrict a party's rights to any other action before court with respect to the same matter which is lawfully available.
2. The intended appeal has reasonable prospects of success, for the following reasons:
 - i. The Court of Appeal erred in law and fact when it held that the matter should have been commenced by way of petition in light of the reliefs sought and the pleadings when in fact the claims sought stem from the respondent's breach of the Anti-Corruption Commission (Disposal of Recovered Property) Regulations of 2004, which do not prescribe the mode of commencement.
 - ii. The Court erred in law and fact when it overlooked the fact that the lower court was moved by way of Order 14A of the Rules of the Supreme Court of England, which does not permit a court to make a final determination if the questions raised do not fully and finally determine a matter on the merits.
 - iii. The Court erred in law and fact when it held that there were no other distinct reliefs sought when in fact the reliefs sought against the 1st respondent were distinct and not made pursuant to the constitution.
 - iv. The Court erred in law and fact when it held that the High Court had no jurisdiction to determine the matter when the original writ of summons and statement of claim was issued against the 1st respondent, a private limited company, the State as represented by the 2nd respondent being added way after the matter had been commenced.
 - v. Consequently, the court erred in law and fact when it awarded costs to the respondents.
3. There is a compelling reason for this matter to be heard, which is that the Court of Appeal misapplied/misinterpreted the law and limited the avenues available to the litigant/ any party whose fundamental rights have been infringed, contrary to Article 28 of the Constitution which does not restrict a party's rights to commence any other action before court with respect to the same matter which is lawfully available.

2.19 In respect of a point of law of public importance, the Court of Appeal held that the proposed grounds of appeal were not of public importance as they did not transcend the private or personal interests of the parties as judicial precedent provides adequate guidance on the mode of commencement as regards matters relating to Part III of the Constitution.

2.20 The Court also found that the applicants had not demonstrated that the intended appeal had prospects of success or that there were compelling reasons for the appeal to be heard by this Court as the claims were centred on the applicants' right to the property they claimed was illegally seized. Further, the Court said the right to property is fundamentally protected under the Constitution and that the reliefs were not severable, thus necessitating an invocation of Article 28 and mode of commencement by petition.

2.21 The applicants renewed the application before a single judge of this Court who, by order dated 25th November 2024, adjourned the matter to the Court for consideration under Rule 48(3) of the Supreme Court Rules. Consequently, on 30th December 2024, the applicants filed the record of extra copies of the documents that were before the single judge.

3 ARGUMENTS BY THE PARTIES

- 3.1 The applicants have combined their arguments relating to a point of law of public importance and compelling reason for the appeal to be heard and they quote **Bidvest Food Zambia Limited and Others vs. CAA Import and Export Limited**⁷ to support their arguments.
- 3.2 They argue, in brief, that the lower courts limited the avenues available to a party whose fundamental rights have been infringed contrary to Article 28 of the Constitution by concluding that any reference to the infringement of human rights entails that a litigant can only seek redress by way of a petition. If permission to appeal is granted, they would want us to determine whether the High Court is deprived of jurisdiction simply because reference is made to the infringement of one's constitutional rights.
- 3.3 They contend that Article 28(1) contains a caveat which raises unsettled legal questions whose answers, if provided by this Court, would engage broader public interest and go beyond the private interests of the parties. It is argued that courts in our jurisdiction have not had occasion to interpret and or give effect to the caveat contained in Article 28(1).

- 3.4 The applicants submit further that Rule 2 of The Protection of Fundamental Rights Rules, cannot override the Constitution, given the constitutional supremacy enshrined in Article 1, particularly that Article 28(1) does not restrict the right to commence any other action regarding the same matter which is lawfully available.
- 3.5 To close, on this subject, it is contended that Article 28 was never intended to be a bar or prohibition on other methods of enforcement of one's rights and that this is a compelling reason for the applicants to be granted leave to appeal.
- 3.6 On reasonable prospects of success, the applicants insist that their claims were multiple and distinct; were made against the respondents distinctively; and none raised any constitutional issue concerning the 1st respondent. Counsel contends that recovery of property against a private entity, and not the State, would not require a petition. As authority, they quote **Corpus Legal Practitioners**¹ and Order VI of the High Court Rules and reiterate their arguments on Article 28.
- 3.7 The applicants maintain that the Anti-Corruption Commission (Disposal of Recovered Property) Regulations and the Anti-Corruption Commission Act, do not specify that

an aggrieved party must bring a claim by petition. They quote **Mutale vs. Munaile⁸** and **Henry Kapoko vs. The People⁴**.

3.8 They also contend that the Court of Appeal should not have dismissed the High Court decision, which hastily dismissed the case on procedural grounds, without determining the merits, and despite the failure by the 1st respondent to meet the conditions precedent under Order 14A. This, they argue, underscores the need for our intervention.

3.9 Lastly, the applicants submit that given the unresolved factual and substantial legal issues, costs should not have been awarded against them.

3.10 The 1st respondent opposes the application for leave to appeal, contending that the applicants have failed to meet the threshold under section 13(3) of the Court of Appeal Act. It is argued, in short, that the Court of Appeal merely applied settled legal principles, which require claims involving breaches of Part III rights to be begun by petition. They cite **Hakainde Hichilema vs. Attorney General³**, submitting that the attempt by the applicants to frame the proposed appeal as raising a novel question of law is unfounded.

3.11 Counsel avers that the High Court judge was correct in dismissing the action for lack of jurisdiction because mode of commencement goes to jurisdiction. Therefore, the proposed appeal lacks reasonable prospects of success. It is also submitted that Order 14A permits summary determination of legal issues where a final resolution is possible without a full trial. Since the applicants' claim was primarily based on constitutional enforcement, the Court was correct in holding that the action was wrongly commenced.

3.12 The 1st respondent disagrees that there is a compelling reason for us to intervene, given that the procedure for enforcing constitutional rights has been settled since 1969.

3.13 Counsel insists that the impugned decision involved no procedural errors; and the applicants had alternative legal remedies, including the option to correctly begin the action by petition. Counsel also asserts that the award of costs was correct, as costs follow the event, and the applicants have not shown any legal basis for upsetting the costs order.

3.14 The 2nd respondent, supports the position taken by the 1st respondent. In brief, they affirm that the issue of jurisdiction was fully litigated before the lower courts, and that the

dismissal of the action was based on well settled procedural law. It is also argued that because the matter did not present novel, substantial or conflicting legal issues, there is no justifiable basis for this Court to review the decision.

3.15 In reply to the arguments by the respondents, the applicants reiterate their main submissions. They maintain that this Court's guidance is necessary to clarify whether alternative procedural routes exist for enforcing constitutional rights because the decision of the Court of Appeal has the potential to unduly limit access to justice.

4.0 CONSIDERATION OF THE MATTER AND DECISION

6.1 The central issue for determination in this application, is whether the applicants have met the threshold outlined in section 13(3) of the Court of Appeal Act for the grant of leave to appeal.

6.2 The applicants argue that the proposed appeal raises a serious question regarding the scope and application of Article 28(1) of the Constitution. Specifically, whether the requirement to commence proceedings by petition limits litigants' rights to seek alternative remedies for alleged constitutional violations.

6.3 The interpretation of a constitutional provision would normally qualify to raise a point of law of public importance, as we said in the **Bidvest⁷ Case**. However, the applicants must demonstrate that the point of law they have framed transcends the private rights of the parties to this matter and has broader societal implications.

6.4 We agree with the respondents that a plethora of authorities, including **Hakainde Hichilema vs. Attorney General³** underline the established procedure for enforcing preserved rights under Part III of the Constitution. Proceedings must be initiated by petition under Article 28(1) and Rule 2 of the Protection of Fundamental Rights Rules, 1969.

6.5 Article 28(1) of the Constitution states that:

“...if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being, or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court...” (underlining is ours for emphasis only)

6.6 In **Hakainde Hichilema vs. Attorney General³**, which the respondents have heavily relied on, we stated, as follows at paragraph 15.35, at page J79:

“The clear and natural import of the words used Article 28 as can be discerned from the language of the latter part of Article 28(1) is that it provides an avenue for the enforcement of rights contained in the Bill of Rights. The

High Court, in this respect, has to be moved by an aggrieved person; or one who fears or is apprehensive that his or her rights under the Bill of Rights may be infringed in relation to him or her. Such a person may apply for redress under Article 28(1) of the Constitution. ... The High Court can only be moved under Article 28 for the purpose of enforcing or securing the enforcement of the provisions of the Bill of Rights. This means that the High Court can only interpret the rights in the context of what is alleged to be contravened or likely to be contravened in an application for redress under Article 28(1); and this is without prejudice 'to any other action with respect to the same matter which is lawfully available.' (underlining is ours for emphasis only)

- 6.7 In the present case, we wish to restate that the applicants did not move the High Court under Article 28(1) of the Constitution. They commenced the action by writ of summons and statement of claim, seeking the claims that we have set out above in paragraph 2.1.
- 6.8 Article 28(1), and in particular the words we have underlined in both this provision and in **Hakainde Hichilema vs. Attorney General**³ would seem to support the proposition by the applicants that Article 28(1) was never intended to restrict the available legal avenues for redress, but rather to provide an additional procedural mechanism.
- 6.9 We have also perused **Billis Farm Limited and Another vs. Molosoni Chipabwamba and 12 Other Displaced Village owners and 6 Interested Parties**⁹ delivered by this Court on 23rd July 2024. In that case the respondents moved the High

Court by way of petition, challenging their forced eviction from an area called Luombwa area and they made several claims. The main issue was whether the Court of Appeal had jurisdiction to hear and determine the appeal from a decision of the High Court under Article 28.

6.10 However, in the course of argument, the Solicitor General, Mr. Marshal Muchende, SC stated that the question of jurisdiction stemmed from as far back as the mode of commencement adopted by the respondents in the High Court. He urged this Court to examine the reliefs the respondents initially sought from the High Court, which showed that the claims went beyond the scope of Article 28 to warrant the High Court being moved by way of petition.

6.11 Whilst we agreed with State Counsel Muchende's observations, we chose not to delve into the authorities on the mode of commencement of actions which we said were in any case quite clear.

6.12 In the present matter, if permission to appeal is granted to the applicants, we would have to consider whether the claims made by the applicants fell squarely under Article 28 and

whether the applicants had no alternative but to commence the action by way of petition under Article 28 (1).

6.13 Looking at the applicants' claims and the 'caveat' in Article 28(1), the view we take, is that the proposed appeal raises an important point of law of public importance, or unsettled questions on the application of Article 28(1) which transcends the particular interests of the parties to this matter and warrants clarification by this Court.

6.14 As to whether the appeal has reasonable prospects of success, the applicants' contentions hinge on misapplication of the law by the Court of Appeal, and the interpretation of Article 28 (1) which they say unfairly restricted their right to seek alternative remedies.

6.15 As we said in the **Bidvest**⁷ case, and lately in **Rajan Lekhraj Mahtani vs. Little Park Limited**⁸, there must be a realistic, as opposed to fanciful, prospect of success, that is, a chance of altering the lower court's decision, ensuring appellate review is reserved for substantive and meritorious cases.

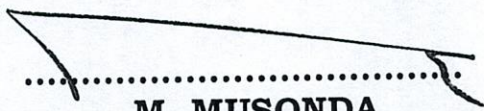
6.16 We are also alive to the applicants' contention that the Anti-Corruption Commission (Disposal of Recovered Property) Regulations, pursuant to which the Gazette Notice was

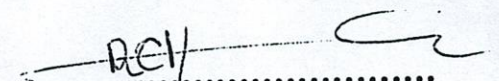
issued to the Chairman, Board of Governors of Ndola Trust School, and the Anti-Corruption Act under which the 1st applicant was arraigned, do not prescribe the mode of challenge of a Gazette Notice as by way of petition.


6.17 On the basis of all the foregoing, we find that the questions raised by the proposed appeal relate to valid concerns about access to justice, and point to real prospects of success, and compelling reason for us to intervene and provide guidance to the lower courts, in relation to Article 28(1) of the Constitution and Order VI of the High Court Rules.

7 CONCLUSION

7.1 In the event, we are satisfied that the applicants have met the criteria set out under section 13(3) of the Court of Appeal Act and we accordingly grant them leave to appeal. Costs shall abide the outcome of the proposed appeal.


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M. MUSONDA
DEPUTY CHIEF JUSTICE


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R.M.C. KAOMA
SUPREME COURT JUDGE


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J. K. KABUKA
SUPREME COURT JUDGE