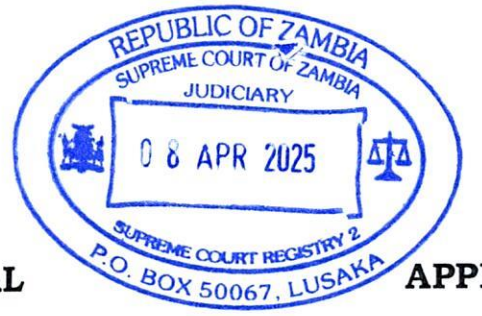
IN THE SUPREME COURT FOR ZAMBIA APPEAL NO.4 OF 2020

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

THE ATTORNEY GENERAL **APPELLANT**

AND

RAJAN MAHTHANI **RESPONDENT**

CORAM: Musonda, DCJ, Kabuka, Mutuna, JJS,

On 1st day of September, 2020 and 8th day of April, 2025

FOR THE APPELLANT: Ms. C. Mulenga, Snr. State Advocate, Attorney General's Chambers

FOR THE RESPONDENT: Mr. J. Sangwa, SC, Messrs. Simeza, Sangwa & Associates

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RULING

KABUKA, JS, delivered the Ruling of the Court

Cases referred to:

1. **Jatsek Construction Co. v Burton Scot Contractors LCC, 2012, Ohio App. Lexis 3489**
2. **Finsbury Investments Limited v Antonio Ventriglia and Manuela Ventriglia Appeal No. 2018/CAZ/126**
3. **Dean Mung'omba and Others v Peter Machungwa & Others (2003) ZR 17**
4. **Sable Hand Zambia Limited v Zambia Revenue Authority (2005) ZR109**
5. **Sithole v State Lotteries Board of Zambia (1975) ZR 106**

6. The Minister of Information and Broadcasting Services & Attorney General v Fanwell Chilembo and Others (2007) ZR 82 (SC).
7. Waterwells Limited v Wilson Samuel Jackson (1984) ZR 98
8. Shoprite Holdings Limited and Shoprite Checkers Limited v Lewis Chisanga Mosho and Lewis Nathan Advocates, Appeal No. 86/ 2013
9. CRDP Bank Tanzania Limited v TTCL and Another – Civil Appeal No. 63 of 2003 CAT at Dar-es-Salaam (unreported)
10. Africa Banking Corporation Limited v Mubende Country Lodge, Appeal No. 116/2016
11. Chibuye v Zambia Airways Corporation Limited (1985) ZR 4 (SC)
12. Kabwe Transport Limited v Press Transport (1975) Limited (1984) ZR 43
13. Bater v Bater [1950] 2 All E.R. 458
14. U-Rest Foams Limited v Puma Botswana (Pty) Limited and Another (2018) ZR Vol. 2, 141
15. Hollington v F. Hewthorn Company Limited [1943] 2 ALL E.R. 35
16. Agro-fuel Investment Limited v Energy Regulation Board, Selected Judgment No. 4 of 2019
17. Council of the Civil Service Unions and Others v The Minister for the Civil Service [1984] 3 All E.R. 935
18. Wynter Kabimba v The Attorney General and Lusaka City Council (1995-1997) ZR 152
19. Lalchand Fulchand Shah and Rambhben Lalchland Shah v Investment and Mortgages Bank Limited, Milimani HCCC No. 2533 of 1997
20. Nyampala Safaris (Z) Limited Others v Zambia Wildlife Authority (2004) ZR 49
21. B.P. Zambia Plc v Zambia Competition Commission Total Aviation and Export Limited, Total Zambia Limited (2011) ZR 222
22. Isaac Lungu v Mbewe Kalikeka, SCZ Appeal No. 114 of 2013
23. Bank of Zambia v Tembo (2002) ZR 103
24. ANZ Grindlays Bank (Z) Limited v Kaoma (1995-1997) ZR 85
25. Director of Public Prosecutions v Humphreys [1976] 2 All ER 497
26. Imperial Tobacco Ltd and Another v Attorney-General [1980] 1 All ER 866
27. Zambia Consolidated Copper Mines Limited V Patrick Mulemwa (1995-1997) ZR 99 (SC)
28. Match Corporation Limited v Development Bank of Zambia and The Attorney General (1999) ZR 13.
29. Patterson Ngoma v The People (1978) ZR 369 (SC)
30. Arthur J S Hall & Co (a firm) v Simons Barratt v Ansell and others (trading as Woolf Seddon (a firm) Harris v Scholfield Roberts & Hill (a firm) and another [2000] 3 All ER 673
31. Thames Launches Ltd v Corporation of Trinity House (Deptford Strond) [1961] 1 All ER 26

Legislation referred to:

1. **The Constitution of Zambia, Cap. 1, Article 56 (7)**
2. **The Criminal Procedure Code, Cap. 88, section 81 (1)**
3. **The Evidence Act, Cap. 43**
4. **The Supreme Court Rules Cap. 25**
5. **Rules of the Supreme Court (White Book) 1999 Edition, London, Sweet & Maxwell, Order 59/19 Rule 1B,** 1(c), 2, 13

Introduction

1. We regret the delay in delivering this ruling which was due to circumstances beyond our control.

2. The High Court delivered a judgment in favour of the respondent on the 19th of November, 2015. Unhappy with the outcome, the appellant filed an appeal to this court seeking to have the judgment reversed

3. By notice filed on the 24th of August, 2020 pursuant to **Rule 19 of the Supreme Court Rules, (White book), 1999 Edition, (RSC)** the respondent has raised a preliminary objection, to the hearing and determination of the appellant's appeal.

4. This is now our ruling on the respondent's preliminary objection.

Background

5. The history of the case is that, the respondent together with two other persons were on 26th January, 2011 jointly charged with 8

counts of forgery and uttering false documents. The charges related to share transfer forms of Zambezi Portland Cement Limited (ZPC), that were filed at the Patents and Companies Registry (PACRA).

6. The following year on 30th April, 2012 the Director of Public Prosecutions (DPP) entered a *nolle prosequi* in respect of those charges as a result of which the respondent and his co-accused were discharged. The record of appeal shows the DPPs action was taken pursuant to the provisions of **section 81 of the Criminal Procedure Code Cap. 88 of the Laws of Zambia (CPC)**.

7. The record of appeal also shows that the *nolle prosequi* was apparently, stated to have been informed by considerations of public policy obtaining at the material time, and entered on the directions of the Attorney General, as provided in **Article 56 (7) of the Constitution of Zambia**.

8. Prior to entering of the *nolle prosequi,* the parties were said to have entered into negotiations that culminated in a draft Release and Compromise Agreement. This agreement was drawn up by Counsel representing the respondent and sent for comments to

the Attorney General's Office for approval. A final copy of the agreement was, thereafter, drawn up and signed by the respondent, following which it was presented to the Attorney General's Office for endorsement. It later emerged that the Attorney General did not append his signature to the draft agreement to confirm his approval.

9. Three years after the *nolle prosequi* was entered, a new government came into power and certain changes were said to have occurred regarding public policy. There were also new persons holding the Offices of the DPP and that of the Attorney General.

10. Informed by the changed public policy, the DPP sought, and was granted, fresh instructions by the Attorney General to revisit the respondent's case. The respondent was on 2nd June, 2015 re-arrested and charged on 2 counts of forgery of share transfer forms of ZPC. Those charges were premised on the same facts as the earlier ones that were the subject matter of the *nolle prosequi* entered on 30th April, 2012 alluded to earlier in paragraph 6.

11. Aggrieved with the decision to re-arrest him, the respondent commenced judicial review proceedings before the High Court.

In the main, the respondent was seeking an order of *certiorari* to remove into the High Court, for purposes of quashing, the decision of the DPP of 1st June, 2015 to reinstitute the same charges of alleged forgery of share transfer forms of Zambezi Portland Cement Limited on which he had previously been discharged. According to the respondent, that course of action was taken by the DPP, in total disregard of the Release and Compromise Agreement entered into with the Attorney General which gave him indemnity against future prosecution arising from the same facts. The relief sought by the respondent was stated as follows:

(a) a *declaration* that the institution and maintenance of his prosecution based on alleged forgery of the share transfer forms of Zambezi Portland Cement Limited was an abuse of the court process;
(b) an *order of certiorari* to remove into the High Court for the purpose of quashing the said decision; and
(c) an *order of prohibition*, prohibiting his prosecution on the allegations itemized in (a) above.

12. The judicial review proceedings were brought pursuant to **RSC Order 53,** and were premised on the following grounds:

(a) that there was ***illegality*** in that the decision to prosecute the respondent on charges founded on the share transfer forms of ZPC was in breach of the Release and Compromise Agreement; that there was abuse of power by the DPP who had acted *ultra vires* **Article 56**

(7) of the Constitution; and that the prosecution was being used to settle personal scores between the Ventriglia family and the respondent in the various legal battles that were on-going between the said parties;

(b) that there was ***procedural impropriety*** on the grounds that the appellant did not consult the respondent prior to taking the decision to prosecute him on the charges relating to the share transfer forms of ZPC as the decision would affect him; alternatively, that the respondent had a legitimate expectation that he would be consulted in this situation, in view of the Release and Compromise Agreement between the respondent and the Attorney General; that it would be unfair and contrary to public policy to prosecute him in light of the agreement;

(c) that there was ***irrationality*** based on the appellant's decision not to consult the respondent; that it had taken nine (9) years since the alleged offence was committed and three (3) years since the prosecution was terminated by the DPP on the instructions of the Attorney General for the prosecution to be reinstituted; that there was no legitimate basis for the prosecution; that the current holder of the Office of Attorney General had never revoked the direction given to the DPP by his predecessor; and that the public interest to ensure that those accused of serious crimes are prosecuted, stood in competition with the public interest to ensure that the conduct of the Attorney General and DPP do not undermine public confidence and bring the criminal justice system into disrepute.

13. In opposing the judicial review proceedings, the new holder of the Office of the DPP contended that she was not aware of any directive by the appellant's Office that no prosecution should be

undertaken against the respondent as no record of such communication existed at her Office. That upon receipt of an unsigned copy of a letter authored by the then, Attorney General, who is now a sitting Judge of this Court, she sought a policy directive from the incumbent Attorney General, pursuant to **Article 56 (7) of the Constitution,** on whether or not to proceed with the prosecution of the respondent. The directive given was that she should proceed, based on current public policy considerations, stated as follows:

"(i) that the respondent be subjected to due process of the law before a court of competent jurisdiction where the allegations made against him can be subjected to cross-examination;

(ii) that the respondent would be availed all the necessary facilities required for a fair hearing to clear his name as opposed to ending proceedings against him by way of a nolle prosequi;

(iii) that the purported Release and Compromise Agreement authored by the respondent's advocates was not signed by the appellant and, therefore, was of no legal effect and contrary to public policy;

(iv) that the appellant has no authority to grant immunity from criminal prosecution to the respondent or indeed anyone at all; and

(v) that public policy requires that each case be considered on its own particular merits and not extraneous considerations; and that the prosecution of the respondent is in furtherance of administration of justice, as no individual should be perceived as being shielded from prosecution".

14. The DPP denied that the intended prosecution of the respondent was politically motivated or had anything to do with his personal vendettas with the Ventriglia family. Further, that there was no legal duty on the part of the holder of the Office of DPP to consult the respondent before proceeding with any prosecution against him.

15. In determining the issues before it, the trial court found that as the Attorney General had given direction to the DPP, the latter had no option but to discontinue the prosecution as he did in compliance with **Article 56 (7) of the Constitution**. Thereafter, a *nolle prosequi* dated 30th April, 2012 was drawn up. The trial court also noted that **section 81 (1) of the CPC** which empowers the DPP to discontinue criminal proceedings through a *nolle prosequi* against an accused person, does not preclude the DPP from bringing subsequent proceedings against such person arising from the same facts.

16. However, in the present case, where it was claimed that the DPP had invoked **Article 56 (7)**, the trial court found the DPP's independence was lost, and he had to defer to the direction of the Attorney General with respect to the particular matter. The

trial court further found that the clause in the Release and Compromise Agreement which gave effect to the Attorney General's direction that the criminal proceedings be discontinued, is what prompted the entering of the *nolle prosequi* by the DPP. That the action was taken on public policy considerations and to view it otherwise would be a contradiction.

17. The trial court also noted that although the general requirement for a contract to be valid is that it must be signed by all the parties involved; acting on a term of the contract by a party who has not signed it, renders the contract implicitly valid and enforceable. The case of **Jatsek Construction Co. v Burton Scot Contractors LCC[1],** was called in aid of the proposition.

18. Further, the trial court observed that public policy was not a creation or formulation of a single public official as it is grounded upon existing legislation and reflects the desires and aspirations of the general citizenry. For public policy to change, therefore, either the law must change or the Judicature must give an interpretation in accordance with such change. In the event that it does change, the new policy cannot be applied

retrospectively, to undo decisions made in the past on public policy considerations that did not exist at the time. The trial court noted that in asserting that public policy had changed, as recounted earlier in paragraph 13; the Attorney General had simply outlined the Constitutional requirements for a fair trial of an accused person and did not, in any way, enunciate new public policy as at 15th July, 2015.

19. In conclusion, the trial court determined that the decision of the appellant to prosecute the respondent on offences arising out of Zambezi Portland Cement Limited shares was ultra vires **Article 56 (7) of the Constitution**. The court also found that the respondent had no duty to consult the appellant before making the decision to prosecute the respondent, and did not act irrationally.

20. Ultimately, the application for judicial review succeeded on the ground of ***illegality*** only, but failed on the other two grounds of ***procedural impropriety*** and ***irrationality***. The decision of the DPP was, as a result, removed into the High Court and quashed for being *ultra vires* the Constitution and illegal.

Appeal to this Court

21. Dissatisfied with the decision of the High Court, the appellant launched 4 grounds of appeal in this Court faulting the trial judge as having erred in law and fact when he:

> **"1. held that the termination of the criminal proceedings against the applicant was linked to the Release and Compromise Agreement contrary to evidence on record.**
>
> **2. effectively held that the Release and Compromise Agreement was valid and carried into effect contrary to evidence on record.**
>
> **3. effectively held that the decision made by the Attorney General pursuant to Article 56 (7) cannot be revisited.**
>
> **4. failed to make a ruling on the objection raised by the appellant as regards the evidence as to the date of the letter enclosing the Release and Compromise Agreement."**

22. The parties filed their respective Heads of Argument, in support of, and in opposition to the appeal. A week prior to the date scheduled for hearing of the appeal, however, the respondent filed a Notice of Objection to the appellant's appeal being heard, founded on the two grounds as specified in paragraph 23 here below. We now proceed to consider the Preliminary Objection.

Respondent's Preliminary Objection and Arguments in support

23. The preliminary objection is stated to have been raised pursuant to **RSC Order 59 rule 19,** and is anchored on two

grounds:

> *(i) that the grounds of appeal put forth by the appellant have no bearing on the outcome of the High Court judgment; and*
>
> *(ii) that the subject matter of the planned prosecution has already been adjudicated upon by the Court of Appeal in a judgment appealed against, delivered on 31st January, 2019, in Appeal No. 117 of 2018 between: FINSBURY INVESTMENTS LIMITED V ANTONIO VENTRIGLIA AND MANUELLA VENTRIGLIA.*

24. In support of ground one of the objection, extensive arguments were advanced by Counsel for the respondent on the development of judicial review, from its genesis and its current import in our law by virtue of **RSC Order 53.** The case of **Dean Mung'omba and Others v Peter Machungwa & Others**[3] was referred to, where we held that, our High Court Rules do not provide for the institution and conduct of judicial review proceedings, and that we follow the practice and procedure for the time being observed in England in the High Court of Justice, and the **RSC**.

25. In essence, State Counsel rehashed his arguments on judicial review that were before the High Court, and contended that the decision by the DPP to prosecute the respondent was meant to assist the Ventriglia family to settle their personal scores with

the respondent. It was further intended to frustrate the winding up proceedings brought against ZPC by Finsbury Investments Limited, as well as to ruin the respondent's reputation and standing as a local and international businessman. The submission was that after hearing all the evidence and arguments by the parties, the trial court in its judgment, granted the respondent an order of *certiorari* quashing the decision of the DPP, which was the subject matter of the application for judicial review. The appellant has appealed the said judgment on four grounds, as recounted earlier in paragraph 21, three of which are on findings of fact and only one is on the law.

26. The submission on the point was that, **RSC Order 59, Rule 1 B** (I), sets out the classes of cases where leave to appeal is required. On appeal in judicial review proceedings, one is therefore, not at large, as the appeal can only relate to the relief actually granted or declined.

27. In light of **RSC Order 59 Rule 1B**, it was further argued that, the appellant should have challenged the actual grant of the order of *certiorari* by the trial court and not merely attacked the

findings of fact and law. The submission was that, none of the four grounds of appeal deployed before this Court attack or affect the grant of the order of *certiorari* quashing the decision of the DPP made by the High Court. Granted that position, even if the appellant were to succeed on the four grounds, the order of *certiorari* will not be affected, which renders the appeal a mere academic exercise.

28. On the second ground of the objection, it was contended that, even assuming the appellant was to succeed and have the order of *certiorari* set aside, it would simply mean that the DPP may go ahead with the decision to prosecute the respondent on two counts of alleged forgery of the share transfer forms of ZPC. It was submitted that, this may raise the possibility of a conflict with the civil case under Cause No. 2008/HPC/366, which is also premised on allegations of fraud. That action was commenced by the Ventriglia family against Finsbury Investments Limited, a company in which the respondent is the Executive Chairman.

29. Referring to the High Court judgment, which was the subject of appeal to the Court of Appeal, in Appeal No. 117 of 2018, State

Counsel argued to the effect that, although the issue of fraud was not considered by the High Court, on appeal the Court of Appeal, adjudicated upon it in its judgment of 31st January, 2019. The Court of Appeal noted that the allegation of fraud revolved around the handwriting expert, who in his evidence had pointed out that the signatures in question that appeared on the share transfer form, lacked the natural handwriting signature variations which show that the same were physically appended, in the same way that the electronic signatures appeared on other documents signed by the Ventriglias.

30. Premised on the decision of the Court of Appeal that there was no evidence to support the allegations of fraud against the respondent, the submission was that, the said finding is binding on the Subordinate Court and the High Court, both being inferior courts. As the issue has already been settled by the Court of Appeal, this appeal by the appellant is therefore, an abuse of court process and is liable to be dismissed. This is for the reason that, if a lower standard of proving fraud on a balance of probability in a civil suit against the appellant and ZPC could not be met, then the appellant, cannot prove fraud at a higher

standard required in a criminal matter.

31. The case of **Sablehand Zambia Limited v Zambia Revenue Authority**[4] was one of the many referred to, where we held that, a party alleging fraud must lead evidence that will clearly and distinctly prove the allegation, on a higher standard than a mere balance of probabilities. State Counsel rested his case by reiterating the submission that, the Court of Appeal has already adjudicated the subject matter of fraud on which the appellant seeks to prosecute the respondent.

Appellant's Arguments in opposition to the Preliminary Objection

32. In their arguments in opposition, learned Counsel for the appellant contended that the preliminary objection is misconceived at law and ought to be dismissed with costs, as it is an attempt to delay the hearing of the main appeal. The case of **Minister of Information and Broadcasting Services & Attorney General v Fanwell Chilembo & Others**[5] was cited in stressing the point that, words expressed in Acts ought to be interpreted or construed according to the words in the Act, as a whole, and not in piecemeal fashion. This is done using their natural meaning and ordinary sense.

33. Learned Counsel for the appellant argued that ground one of the objection is superfluous, as the appellant appealed the entire judgment of the Court of Appeal, which includes the order of *certiorari* made by the trial court. The submission on the point was that, it is misleading for the respondent to state that even if the appeal were to succeed on all the four grounds, the order of *certiorari* quashing the decision of the DPP would not be affected.

34. In response to the respondent's reliance on **RSC Order 59 Rule 1B** (1), the appellant argued that the said rule sets out the classes of cases where leave to appeal is required and is specifically, anchored on the **Supreme Court Act, 1981 (UK) section 18 (A).** The appellant submitted that, this Court has its own Act and Rules, which adequately provide for the appeal process, and they need not be substituted for English ones. The case of **Waterwells Limited v Wilson Samuel Jackson**[6] was cited as authority for the submission.

35. Our **Supreme Court Rules Cap. 25 rules 50 (2) and 58 (2)** were further referred to as providing the boundaries within which an appellant may appeal a judgment. It was pointed out that the word 'shall' as used in the rules, means it is obligatory to comply

with those boundaries. The appellant maintained that the appeal is against the entire judgment of the Court of Appeal, and that the respondent's argument the subject of ground one of the preliminary objection, that an appeal on judicial review can only be against the grant or refusal of the relief sought, was misplaced.

36. We were urged to hear the appeal on its merits, and not dismiss it on a mere technicality, canvassed in ground one of the preliminary objection, as decided in the case of **Shoprite Holdings Limited and Shoprite Checkers Limited v Lewis Chisanga Mosho and Lewis Nathan Advocates.**[7]

37. In addressing ground two of the objection, that this matter has already been heard by the Court of Appeal in a civil appeal, the appellant submitted that the Attorney General was not a party to those proceedings; and therefore, not privy to the issues raised before the civil court. The appellant relied on the case of **Africa Banking Corporation Limited v Mubende Country Lodge**[10], in which this Court held that in considering whether there has been an abuse of the court process, the court would have to consider two factors. The first, is whether the endorsements in the

originating process in the two actions and the subject matter to be determined are the same. The second, is whether the parties were in fact also the same.

38. Relying on that decision, learned Counsel for the appellant noted that the parties and the endorsements on the writ and counter-claim in the civil appeal; are substantially, different from what is contemplated for investigation and prosecution by the DPP. In any event, that the determination of a civil matter cannot supplant a criminal one as the standard of proof in criminal matters is higher. The cases of **Chibuye v Zambia Airways Corporation Limited**[11] and **Kabwe Transport Limited v Press Transport**[12] were cited as authority for the submission that, the outcome of a criminal trial cannot be referred to as proof of a fact which must be established in a civil matter. The appellant contended that the converse must also hold true, in so far as referring the result of a civil matter in a criminal case.

39. On the respondent's citing of the **Sithole**[5] case and that of **Bater v Bater**[13], the appellant pointed out that, irrespective of whether fraud is pleaded in a civil case, its higher civil standard of proof still falls far short of the standard applied in criminal matters.

Learned Counsel for the appellant submitted that, the respondent cannot simply rely on the judgment of the Court of Appeal in a civil matter to prevent criminal action being instituted against him.

40. The doctrine of *res inter alios acta as* applied in the decision of **Hollington v F. Hewthorn & Company**[15] was referred to, that a judgment obtained by A against B, cannot be used as evidence against C, as it would be unjust to bind persons who could not put forth a defence or examine witnesses. In essence, that a judgment must not be used to prejudice strangers. Counsel went on to submit that the interests of justice, required that the court should come to a decision on facts placed before it, without regard to the result of other proceedings before another tribunal.

41. Counsel concluded with the submission that, there is in fact no bar to civil and criminal proceedings involving the same parties proceeding concurrently, as was held in the case of **Shoprite Holdings Limited**[8]. In the event, if the judgment of the Court of Appeal is allowed to hold sway, a dangerous precedent would be set, that civil proceedings can be used to curtail criminal proceedings. It would also mean that a party facing criminal

charges can use an unsigned Release and Compromise Agreement to prevent their prosecution. We were urged to dismiss the preliminary objections and hear the appeal on its merits.

Respondent's Arguments in Reply

42. On the appellant's contention that the appeal is against the whole judgment, which includes the grant of the order of *certiorari,* the respondent argued that **rule 49 of our Supreme Court Rules Cap. 25** does not provide for appeals against a decision of the High Court when moved pursuant to **RSC Order 53**. The respondent maintained that the appellant ought to have appealed against the final grant of the order of *certiorari* by the High Court and that the appeal in its current form does not comply with the provisions of **RSC Order 59 rule 1B** (1) (c). The respondent acknowledged that **Order 59 rule 1B** (1) is anchored on section **18 (1A) of the Supreme Court Act (UK)** whose application does not extend to Zambia. The said position notwithstanding, it was submitted that **Order 59 rule 1B** can still be relied upon.

43. The case of **Agro-fuel Investment Limited v Energy Regulation Board**[16], was cited in support of the proposition that, since there is no statute governing judicial review proceedings in our jurisdiction, we rely entirely on **RSC Order 53**; and that in so doing, we are not affected by statutes in England and Wales post 1911. The respondent argued that the position is, however, different when it comes to rules. In the event of a gap in our rules, the practice and procedures contained in the **RSC** are applicable up to 1999.

44. In reply to ground two, it was submitted that the arguments by the appellant that the Attorney General was not a party to the proceedings is flawed, on account of the difference between judicial review proceedings and ordinary civil proceedings. It was pointed out that, the former has no parties, and what is interrogated is the decision of the decision maker; while the latter, being ordinary civil proceedings, there are parties to the suit. The cases of **Council of the Civil Service Unions and Others v The Minister for the Civil Service**[17] and **Wynter Kabimba v The Attorney General and Lusaka City Council**[18] were cited in support of the submission. The respondent

asserted that the issue of uttering a false document has never been in contention and does not arise. The issue was introduced by the appellant in its arguments, claiming that the Director of Public Prosecutions had decided to prosecute the respondent on alleged charges of forgery.

45. On the different standard of proof in criminal and civil matters, the submission was simply that, since the Court of Appeal had already determined that there was no evidence with respect to the allegation relating to forgery, then the intended prosecution of the respondent was not justified. Further, that the appellant's reliance on the case of **Chibuye**[11] which followed the decision in **Kabwe Transport Limited**[12] is misplaced, as the law in both cases is that, the result of a criminal trial cannot be relied upon as proof of a fact which must be established in a civil case. This applies whether the criminal case resulted in a conviction or an acquittal, and that the converse should also be true is not sound. According to the respondent, in taking that position, the appellant has ignored the real issue in question, being that this appeal is an abuse of the court process and ought to be dismissed, as the subject matter of the planned prosecution of

the respondent has already been adjudicated upon by the Court of Appeal. If this Court hears and upholds the appeal, the door for the Subordinate Court and the High Court will be opened to revisit the decision of the Court of Appeal.

46. The respondent cited a Kenyan case, in **Lalchand Fulchand Shah and Rambhben Lalchland Shah v Investment and Mortgages Bank Limited**[19] where, according to Counsel, it was decided that allowing criminal investigations to go on would in effect be prying into an issue already decided by a competent civil court, which is what the appellant in this instance is seeking to do. Counsel submitted that the judgment of the Court of Appeal stands and is binding on both the Subordinate Court and the High Court, as the principle of *stare decisis* is still part of our law and essential to the hierarchical system of courts.

47. In response to the appellant's reliance on the doctrine of *res inter alios acta,* and the case of **U-Rest Foam Limited**[14] the respondent contended that the same have been misapplied as the issue in the said case was whether, it was permissible to produce in evidence a record relating to proceedings of a criminal character which had arisen in a subordinate court in

proceedings which were before the judge. Despite this Court having entertained the application, it nonetheless, went on to hold that the outcome of criminal proceedings could not be used or produced in evidence in a civil matter. The respondent reiterated the argument, that the issue in the case *in casu* is not about producing the record of proceedings from criminal proceedings in a civil matter. It is rather, about the appellant seeking to criminally prosecute the respondent on a matter that has already been pronounced on in civil proceedings. The argument that the law recognizes that civil proceedings and criminal proceedings can run concurrently, is therefore not relevant to the issues raised in the preliminary objection.

Consideration of the preliminary objection and Decision

48. We have considered the respective parties' affidavits and arguments relating to the objection to hearing of the appeal, anchored on **RSC Order 59 rule 19.** In the first ground of objection, as earlier recounted in paragraph 23, the respondent questions the procedural avenue taken by the appellant in launching in this Court, an appeal arising from a High Court decision in judicial review proceedings.

49. The fact that we do not have legal provisions relating to judicial review is one that cannot be subject of any contention. Nonetheless, **section 10 of the High Court Act, Cap. 27** (as amended by **Act No. 7 of 2011**) enjoins us to rely on the **RSC**, where there is a default or lacuna in our own laws. We affirmed that position in the case of **Dean Mung'omba and Others[3],** cited by the respondent. The respondent argues that due to the lacuna in our law on judicial review proceedings, we are bound to follow the law and practice as set out in the **RSC.** The respondent has however, gone on to submit that, when a party is aggrieved with a decision of the High Court, specifically in judicial review proceedings, such party can only appeal the decision of the trial court with leave of the Court, pursuant to **Order 59, rule 1B** (1) (c) that reads as follows:

> *"The classes of cases prescribed for the purposes of* ***section 18 (1A) of the Act (Supreme Court Act 1981)*** *(Appeals subject to leave) are the following –*
>
> *(c) an order granting or refusing any relief made at the hearing of an application for judicial review."*

50. It seems to us from the respondent's argument that firstly, notwithstanding the fact that he acknowledges the English **Supreme Court Act of 1981** is inapplicable in our jurisdiction,

he still seeks to rely on the rules predicated on the same Act. We say so, as the order pursuant to which the objection has been raised, **RSC Order 59**, is headed: "*Appeals to the Court of Appeal*". In the Editorial Introduction notes, it goes further to state that: *"The Constitution, jurisdiction and powers of the Court of Appeal are governed by the Supreme Court Act (1981, ss. 1-3, 15-17, and 53- 58..."*

51. In our view, reference to the English **Supreme Court Act of 1981 (UK)** on the one hand, takes the issue beyond the scope of our reliance on **Order 53** in relation to applications for judicial review. On the other hand, **Order 59** as already noted, states that it applies to *Appeals to the Court of Appeal* from lower courts in England, and not in our jurisdiction. We have our own rules that apply to appeals from the High Court to this Court as set out in the **Supreme Court of Zambia Act, Cap. 25**, more particularly **Order 49 (4)** that was wholly in force at the material time. In the event, reliance on **Order 59** would clearly result in supplanting the English Rules of procedure on appeals relating to judicial review over our own, when no lacuna exists in our

laws in relation to procedures for launching of appeals to the Supreme Court of Zambia.

52. **Part III of our Supreme Court Rules, Rule 49** provides for the manner in which appeals to this Court are generally, to be launched or couched. In particular, sub-rule (4) specifically provides that:

> "**49. (4) Any appellant may appeal from the whole or any part of a decision and the notice of appeal shall state whether the whole or part only, and what part, of the decision is complained of**". (underlining for emphasis only)

Needless to state that how an appeal is couched and if it falls short of the required standard, will be determined by the Court with reference to applicable laws and rules.

53. It is worthy of note, that **RSC Order 59/1B/13** and **59/1B** (I) (a)-(i) that the respondent seeks to rely on which provides for: "*Classes of cases where leave to appeal is required,* in sub rule (I) (c), states that leave to appeal is required against *"an order granting or refusing any relief made at the hearing of an application for judicial review."* Even assuming we accepted that it applies to our jurisdiction, which we do not, this provision makes it clear that the rule simply lists the classes of cases in which a litigant must obtain leave to appeal, which is not in issue

here.

54. Further, even if we were to accept the respondent's argument, as already demonstrated in paragraph 53, the same **Order 59/1B** in sub-rule (2) goes on to define the word *"order"* to include a *judgment, decree, decision or direction,* which is the contention of the appellant, that the appeal is against the whole judgment.

55. In our past decisions in **B.P. Zambia Plc v Zambia Competition Commission, Total Aviation and Export Limited, Total Zambia Limited**[21] and **Isaac Lungu v Mbewe Kalikeka**[22], we did hold that, our courts shall only resort to English practice and procedure where there is a lacuna in our laws. It is for the reasons given that we reject the submission by State Counsel for the respondent, relating to the applicability of **RSC Order 59 rule IB** (1) (C) that is predicated on the **Supreme Court Act of 1981 (UK)**, that an appeal in judicial review proceedings, can only be directed against the relief granted. As already pointed out, **rule 49** of our own rules sufficiently provides for the manner in which appeals generally, are to be launched, deployed or couched, and we find that the appellant, in that regard,

sufficiently complied with our rules in launching this appeal. Ground one of the

objection fails for those reasons.

56. Coming to the second ground of the respondent's preliminary objection, that the subject matter of the planned prosecution of the respondent has already been adjudicated upon by the Court of Appeal in the **Finsbury Investments Limited**[2] civil matter; and that, as such, it cannot be the subject of fresh criminal proceedings. In essence, the respondent is claiming that this matter is *res judicata* as it has already been determined by the Court of Appeal.

57. The respondent further contends that the plaintiffs' (i. e. *Antonio and Manuella Ventrigllia*) defence to the counter-claim in that civil matter before the High Court, was founded on fraud. It was alleged that the defendant therein (*Finsbury Investments Limited*), did not make any payment for 58% of the shares in ZPC procured by it. What the defendant did, was to fraudulently engage Professional Services Limited (PSL), a related entity, through the respondent, a majority shareholder, to alter the share register of members for ZPC.

58. On appeal, the Court of Appeal dealt with the issue of fraud and took into account the evidence of the plaintiffs. In particular, the handwriting expert whose evidence was that, the signatures on the share transfer form lacked the natural handwriting signature variations which show that a signature was physically appended. It was, on the said evidence, concluded that the signatures on the form were either mechanically or electronically affixed to the forms.

59. The Court of Appeal considered that evidence against the respondent's evidence, that it was common practice for the Ventriglias and their children to electronically append their signatures on headed paper, letters and like documents. The signatures on the letters were compared with those appearing on the share transfer forms and were found to be similar. Premised on that evidence, the Court of Appeal concluded, considering the fact that the share transfer forms filed with PACRA had electronic signatures affixed, and that the plaintiffs were desperate to see ZPC swing into production amidst their financial difficulties; the most probable position was that, it was an accepted practice in business transactions for the parties to use

electronic signatures as a matter of convenience.

60. The respondent contended that those findings of the Court of Appeal reveal there was no evidence of fraud on his part, and that the said findings are binding on both the Subordinate Court and the High Court. As the Court of Appeal has already adjudicated on the issue of fraud, it is *res judicata* and that for the appellant to pursue its intent to prosecute the respondent on fraud relating to the share certificates would amount to an abuse of the court process. We were urged to dismiss the appeal on ground two of the objection solely on the basis of *res judicata.*

61. According to **Strouds Judicial Dictionary of Words and Phrases Legally Defined, Volume 3, Seventh Edition, London, Thomson; Sweet and Maxwell, [2006] p. 2379;**

> "The phrase *res judicata* is used to include two separate state of things. One is where **a judgment has been pronounced between parties and findings of fact are involved as a basis of that judgment. All the parties affected by the judgment are then precluded from disputing those facts, as facts in any subsequent litigation between them.** The other aspect of the term arises when a party seeks to set up facts, which if they had been set up in the first suit, would or might have affected the decision. This is not strictly raising any issue which has already been adjudicated, but it is convenient to use the phrase *res judicata* as relating to that position (Robinson v Robinson (14) at 44 Per Henn Collins, J)". (boldfacing and underlining for emphasis only)

62. In the case of **Bank of Zambia v Tembo**[23], our decision was that;

> **"A plea of *res judicata* must show either an actual merger or that the same point had been actually decided *between the same parties*."**

In addressing the same issue in an earlier case of **ANZ Grindlay's Bank (Z) Limited v Kaoma**[24], we did hold that, in order for the defence of *res judicata* to succeed, it is necessary to show not only that the cause of action was the same; but also that the plaintiff has had no opportunity of recovering in the first action that which he hopes to recover in the second one.

63. Granted the import of the term as recounted in paragraphs 61 and 62, it is clear that the plea of *res judicata* is unsustainable on the particular facts. This is for the reason that, in as much as the facts might be the same, the cause of action cannot be. One is clearly arising in the civil sphere on a claim for damages; whilst the other is grounded in criminal law, for the offences of forgery and uttering a false document that were allegedly, committed by the respondent. That position is further compounded by the fact that, the parties are not the same. In the civil matter, the appellants were individual citizens, (the Ventriglias) whilst in the envisaged prosecution, it is the State, representing the People of

Zambia, through the DPP. It also cannot be said that the respondent in this appeal and a company *Finsbury Investments Limited,* are one and the same person. In the event, the respondent is inviting us to consider a civil claim as being *res judicata* between two parties (the Ventriglias) and *Finsbury Investment Limited,* that are not parties to this appeal.

64. We also note that, the respondent appears to be tacitly raising the doctrine of 'issue estoppel', in that the question of fraud has already been determined by the Court of Appeal. The doctrine fell for consideration in the case of **Director of Public Prosecutions v Humphreys**[25] and the House of Lords (Supreme Court of England and Wales) opined as follows:

> "R v Hogan was a case in which Lawson, J, decided that the doctrine of issue estoppel applies in criminal as well as civil proceedings, and that it is available to the prosecution no less than the defence... I think I should begin by saying that the second proposition is, in my view, entirely erroneous, whatever the merits of the first. **The fallacy of the whole argument appears to me to reside in the supposition that the Crown and the accused are, in criminal proceedings, in the same analogous position as any two litigants in civil proceedings... In civil proceedings the litigants are on an equal footing and the rules of public policy applying to each are the same in principle.** In criminal proceedings this is not the case. The subject requires to be protected against oppression by the executive, and in particular by the maxim, nemo debet bis vexari pro una et eadem causa... **By contrast again, in criminal proceedings the Crown is charged with the duty of protecting the innocent citizens against crime, and vindicating public justice as such. It therefore has interests and duties which are not simply those of a civil litigant. The application of artificial rules, like those of estoppel, to the criminal process must be seen in the light of**

> **these considerations which both as regards defence and prosecution are not applicable to civil proceedings.**" boldfacing and underling for emphasis supplied)

The decision, as quoted above, makes it clear that there is greater public interest in allowing the state to prosecute individuals who commit crime, for their wrongs, as a result of which the general citizenry is protected.

65. On the respondent's argument to the effect that as the Court of Appeal has already decided on the issue of fraud arising from the same facts in a civil matter involving different parties; the appellant, through the Office of the DPP, is precluded from prosecuting the respondent criminally over the same issue. When the question arose in the case of **Imperial Tobacco Ltd and Another v Attorney-General**[26], the House of Lords held that:

> *"Where there are concurrent proceedings in different courts between parties who for practical purposes are the same in each, and the same issue will have to be determined in each, the court has jurisdiction to stay one set of the proceedings if it is just and convenient to do so or if the circumstances are such that one set of the proceedings is vexatious and an abuse of the process of the court.* ***Where... criminal proceedings have been properly instituted and are not vexatious or an abuse of the process of the court it is not a proper exercise of the court's discretion to grant to the defendant in those proceedings a declaration that the facts to be alleged by the prosecution do not in law prove the offence charged".*** *(Boldfacing and underlining supplied for emphasis only).*

66. We do note, in that regard, as demonstrated earlier in

paragraphs 62 and 63, that in the intended indictment, the parties most certainly will not be the same. The DPP has no association with the personal civil action brought by the Ventriglias, against *Finsbury Investments Limited,* and not the respondent. The possibility of any abuse of court process or vexatious proceedings in those circumstances, does not arise.

67. The respondent has further invoked the principle of *stare decisis,* which requires that courts abide by their past decisions and not depart from them; unless and sparingly so, there is a sufficiently strong reason why a decision should be overruled; and that lower courts are bound by the decisions of higher courts. This Court had occasion to pronounce itself on that principle in the cases of **Zambia Consolidated Copper Mines Limited V Patrick Mulemwa**[27] and **Match Corporation Limited v Development Bank of Zambia and The Attorney General**[28].

68. We accept the reasoning by learned Counsel for the respondent on the principle of *stare decisis.* Nonetheless, we are, still mindful that the decision in question arises from a civil claim, whilst the appellant seeks to have the respondent prosecuted on criminal charges being: (i) forgery contrary to **section 347 of the**

Penal Code, with intent to deceive and defraud by the signing of a share transfer form; and (ii) uttering a false document by knowingly and fraudulently uttering a form of transfer of allegedly fully paid shares to the Registrar of Companies, contrary to **section 352**. The respondent argues that uttering a false document is not one of the charges to be brought against him.

69. Suffice to restate the legal position that, the prerogative as to what charges to bring against the respondent remains with the DPP, who is not bound to the previous charge sheet, as other charges arising from the same facts, may be included or excluded as may be deemed fit. This is the import of **section 81 (1) of the CPC** pursuant to which the *nolle prosequi* was entered against the respondent which provides that:

> **"81. (1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Director of Public Prosecutions may enter a *nolle prosequi*, either by stating in court or by informing the court in writing, that the people intend that the proceedings shall not continue, and, thereupon, the accused shall stand discharged in respect of the charge for which the *nolle prosequi* was entered, and if he has been committed to prison shall be released, or, if he is on bail, his recognizance shall be treated as being discharged; but such discharge of any accused person shall not operate as a bar to any, subsequent proceedings against him on account of the same facts."**
> (underlining for emphasis only)

70. We hasten to add that, the above position is distinguishable from one where the State offers no evidence on the basis of which an accused is then, acquitted; as in such an event, those charges cannot thereafter be resurrected, nor can an accused be subjected to fresh charges arising from the same facts, on the principle of *autrefois acquit.* As to whether, a *nolle prosequi* entered pursuant to **section 81 (1)** in circumstances suggesting the DPP may have invoked **Article 56 (7) of the Constitution,** and acted on the directives given by the Office of the Attorney-General; can have the same effect of *autrefois acquit,* is an issue to be determined in the main appeal.

71. Proceeding with the respondent's assertion that in a civil claim, proving fraud is at a higher standard than on a balance of probabilities, the fact still remains that, the said higher civil standard, is still lower than the criminal standard of proof which requires that an allegation be proved beyond a reasonable doubt. In an often-quoted English case in our jurisdiction, **Bater v Bater**[13], Denning, L.J., had this to say:

> **"It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In**

criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard."

72. In light of that position, we note that, whereas the Court of Appeal may have addressed its mind to the issue of fraud in the civil sense, it could not and did not in any way, allow for interrogation of the issues, with witnesses, as would be required in a criminal trial. In that regard, as alluded to earlier in paragraph 29, there was a lot of speculation on the electronic signatures in the civil appeal, which was not necessarily supported by the evidence on record.

73. Even if we were to accept that the Court of Appeal had sufficiently addressed the allegation of fraud, the same cannot be said for the charge of uttering a false document, contrary to **section 352 of the Penal Code** which is a different offence that the appellant may, or may not, wish to bring against the respondent and could not have been dealt with in a civil claim, as it is purely criminal in nature. We say so, as in the normal course of action, where a discharge is procured by an accused person pursuant to the provisions of **section 81 of the CPC;** the DPP retains absolute liberty to resurrect those charges, or indeed to bring fresh charges arising from the same facts that informed

the original charges.

74. In the case of **Patterson Ngoma v The People**[29], this is what we had to say on the offence of uttering a false document:

> **"It is of course correct that the mere possession of a document proved to be a forgery does not necessarily lead to the inference that the person in possession of it forged it. It is however perfectly valid for a court to draw the inference, as the only reasonable inference from all the facts in a case, *that the person in possession of a forged document and who actually utters it either forged it or was privy to the forgery, and in that event a conviction on a count of forgery is proper*."** (Underlining for emphasis only).

75. The holding as quoted above, clarifies the fact that, the two offences of forgery and uttering a false document, although related, are different and the elements of each differs from the other. That being the case, they are each required to be separately proved. The standard of proof must be beyond reasonable doubt, as opposed to a mere balance of probabilities required in civil matters.

76. The respondent's argument also appears to invite us to consider whether a judgment or decision in a civil case can be relied upon, or inform the outcome of a criminal case. Currently, in our jurisdiction, the most recent and binding decision on the issue is, **U- Rest Foam Limited**[14] which qualified the *obiter dicta* remarks made in the case of **Kabwe Transport Company**

Limited[12], that the outcome of criminal trial cannot be referred to or taken note of in civil proceedings. It was noted in the **U-Rest Foam Limited**[14] case that those remarks were anchored on the *res inter alios acta doctrine.* The prohibition which this doctrine embodies is restricted to: making reference or introducing evidence of *criminal convictions* or *outcomes* in civil proceedings; it applies to all civil proceedings; but does not extend to the 'process or evidential material leading to such *outcomes*'.

77. We, in the same case, underscored the legal position that "the principle which bars the admission of evidence of a criminal (and even civil) character in the shape of convictions, outcomes or judgments, in civil proceedings is founded on the *res inter alios acta doctrine*, and not on a statute (such as the Evidence Act, Cap. 43). According to one of the definitions of the doctrine referred to in **U- Rest Foam Limited**[14], the maxim *res inter alios acta alteri nocere non debet,* means:

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

78. In terms of the definition of the *res inter alios acta doctrine,* as

quoted above, it is only the reliance on the *outcome* in one trial, that cannot be used in another trial, involving different parties, for the purpose of establishing or proving a fact. The general rule is settled, that re-litigating the same facts is seen as an abuse of the court process. There are, however, exceptions. In the English case of **Arthur J S Hall & Co (a firm) v Simons Barratt v Ansell and others (trading as Woolf Seddon (a firm)) Harris v Scholfield Roberts & Hill (a firm) and Another**[30], it was held that:

> ***"Criminal proceedings are .... in a special category because although they are technically litigation between the Crown and the defendant, the Crown prosecutes on behalf of society as a whole. In the United States, the prosecutor is designated 'The People'. So a conviction has some of the quality of a judgment in rem, which should be binding in favour of everyone".***

79. Similarly, in the case of **Thames Launches, Ltd v Corporation of Trinity House (Deptford Strond)**[31], **Buckley, J,** had this to say:

> **"Jurisdiction of that kind, in my judgment, is very clearly a jurisdiction which must be exercised with the greatest care; and this court, I think, would be very slow to interfere with the course of criminal proceedings unless it was clear that the issues in the civil proceedings and the criminal proceedings really raised in substance the same issue and that if the civil proceedings succeeded the criminal proceedings must necessarily fail ... In other words, the court must be satisfied that to allow the criminal proceedings to be proceeded with pending the decision of the civil proceedings would really be vexatious"**. (underlining for emphasis only)

80. The cited decisions in paragraphs 78 and 79 speak to the fact that civil proceedings being in a different category, with a lower standard of proof than a criminal matter; it would logically follow that failure to establish an issue in a civil claim, must necessarily entail that the same issue is unlikely to be established in a criminal matter which requires a higher standard of proof. Criminal prosecution being in the greater public interest, it is acceptable for a prosecution to proceed, despite there already being a judgment on the same facts in a civil claim.

81. In the matter subject of the present appeal however, it cannot be said that the issues that were subject of the civil matter, are substantially, the same issues as are intended to be raised in the criminal matter. As earlier in paragraph 73, alluded to, one of the charges intended to be proffered against the respondent by the DPP relates to uttering of a false document, which is purely criminal in nature and could not have been considered in the civil matter. Ground two of the objection fails for those reasons.

82. As both grounds of the preliminary objection have been unsuccessful, the objection is dismissed for lack of merit.

83. Costs will abide the outcome of the main appeal.

M. MUSONDA
DEPUTY CHIEF JUSTICE

J. K. KABUKA
SUPREME COURT JUDGE

N. K. MUTUNA
SUPREME COURT JUDGE