

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

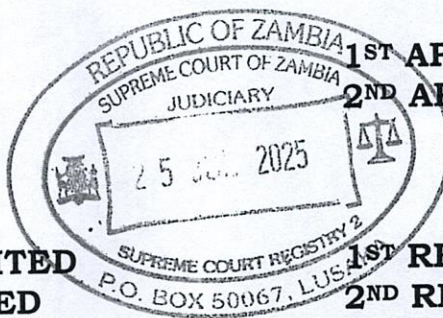
APPEAL NO. 9/2021
SCZ/8/01/2021

BETWEEN:

THE ATTORNEY GENERAL
COMMISSIONER OF LANDS

AND

METRO INVESTMENTS LIMITED
CETINA TRANSPORT LIMITED
LUSAKA CITY COUNCIL



1ST APPELLANT
2ND APPELLANT

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

Coram: Musonda, DCJ, and Wood and Mutuna, JJS
On 2nd November, 2021 and 25th July, 2025

For the 1 st and 2 nd Appellant:	Mr. C. Mulonda, Principal State Advocate, Attorney General's Chambers
For the 1 st Respondent:	Mr. C.M. Sianondo, Malambo & Co.
For the 2 nd Respondent:	Mr. S. Sikota SC, Central Chambers
For the 3 rd Respondent:	N/A

J U D G M E N T

MUSONDA, DCJ, delivered the judgment of the Court

A variety of factors conspired to delay this judgment. This we deeply regret and profusely apologise. The delay was caught up by the depletion of the original Panel following the retirement of Wood, JS thereby reducing the status of this judgment to a majority one.

Cases Referred to:

1. Bidvest Foods & Others -v- CAA Import and Export Limited: SCZ Appeal No. 56 of 2017

2. *Salomon -v- Salomon*: [1897] AC. 22
3. *Anti-Corruption Commission -v- Serioes Farms Limited*: SCZ Appeal No, 155/2009.
4. *Justin Chansa -v- Lusaka City Council*: SCZ Judgment No. 29 of 2007
5. *Boxtel -v- Kearney*: [1987] Z.R. 63
6. *Zambia Consolidated Copper Mines PLC -v- Richard Kangwa and Others*: [2000] ZR 109
7. *Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others* (2013) EKLK
8. *Re 56 Denton Road, Twickenham, Middlesex* (1953) 1 Ch 51
9. *Livingstone v Westminster Co.* (1904) KB 109
10. *Robertson v Minister of Pensions* (1949) 1 QB 227

Legislation referred to:

1. Court of Appeal Act No. 7 Of 2016

1.0 INTRODUCTION

1.1 This appeal has its genesis in a somewhat protracted dispute over a Commercial Stand known as Stand No. 22756, located along Lusaka's Lumumba road (***“the Commercial Stand” or “the Stand”***).

1.2 It is worth pointing out, upfront, that the Commercial Stand was, at various times, the subject of litigation or adjudication in the Lands Tribunal, the High Court and this Court at one time or other.

1.3 Notwithstanding the long adjudication history of disputes around the Commercial Stand, the matrix of facts and issues around which the present appeal revolves is a narrow one indeed.

2.0 **BACKGROUND**

- 2.1 The Commercial Stand had previously been secured and owned by Messrs Lusaka Water and Sewerage Co. Limited (since renamed Lusaka Water and Sanitation Co. Ltd), a private Limited Company based in Lusaka. However, on account of sustained encroachments which had rendered the Commercial Stand unsuitable for the purpose for which Lusaka Water and Sanitation Co. Limited had secured it, the Company (i.e., Lusaka Water and Sanitation Company Limited) decided to abandon its interest in it.
- 2.2 In the meantime, the 2nd Respondent, also a private Limited Company, owned a Commercial Stand adjacent to the Stand. As we momentarily noted above, unbeknown to the 2nd Respondent, Lusaka Water and Sanitation Company Limited had abandoned its interest in the Commercial Stand.
- 2.3 In its quest to expand its business operations, the 2nd Respondent decided to approach Lusaka Water and Sanitation Co. Limited for the purpose of establishing the precise circumstances of the Commercial Stand. Upon learning that it, that is, Lusaka Water and Sanitation Co. Limited, had given up its interest in the Commercial Stand, the 2nd Respondent set

about to secure the Commercial Stand for its expanding business.

- 2.4 After a series of developments affecting the Commercial Stand, including its rather surreptitious allocation to Mubila Estates Limited, a private limited company in which a prominent Cabinet Minister had a significant stake by the 2nd Appellant, the 2nd Respondent sought to assert its interest in the Commercial Stand by approaching the Lands Tribunal for appropriate relief.

3.0 **DISPUTE ENTERS THE LANDS TRIBUNAL**

- 3.1 Following the entry of the dispute in the Lands Tribunal, the same was duly considered by that quasi-judicial forum.
- 3.2 In the judgment which ensued, the Lands Tribunal established that the allocation of the Commercial Stand to Mubila Estates Limited had been irregularly managed. In consequence, the Tribunal determined and directed that the Commercial Stand should be advertised and offered to a deserving applicant, taking into consideration all relevant factors.
- 3.3 The 2nd Respondent was not happy with that determination by the Lands Tribunal and, consequently, appealed against the same to this Court.

4.0 **DISPUTE ENTERS SUPREME COURT (*FIRST TIME*)**

4.1 Once the dispute was before us, a jurisdictional challenge around the competence of the Lands Tribunal to have entertained the same was successfully mounted on account of the fact that the Commercial Stand had been the subject of a certificate of title. As the law stood at the time, the Lands Tribunal was not competent to pronounce any relief in relation to any matters before it if such relief affected titled land.

4.2 Having regard to the matters in 4.1 above, this Court reasoned that the proper forum to make determinations upon all the issues which had been raised in the Lands Tribunal was the High Court of Zambia. Accordingly, we allowed the appeal and remitted the matter to the High Court for the purpose of having that court make appropriate determinations upon the issues which had been purportedly raised in the Lands Tribunal.

4.3 Following our judgment as adverted to above, the 2nd Appellant decided, administratively, to cancel the certificate of title in respect of the Commercial Stand which had been issued in favour of the 1st Respondent. Thereafter, the 3rd Respondent proceeded to place an advertisement in the “***Times of Zambia***” inviting “***interested individuals or organisations***

capable of developing Stand No. 22756, Lumumba Road, Lusaka” to apply. In this regard, interested parties were invited to obtain Application Forms from the 3rd Respondent’s offices for the purpose we momentarily adverted to.

- 4.4 It is worthy of note that the 1st and 2nd Respondents were separately written to and specifically invited to attend the interviews for the Stand in question. In their reaction to the invitation, the 1st Respondent’s advocates informed the 2nd Appellant that, on account of having travelled overseas, the Managing Director of the 1st Respondent could not be available to attend the interviews on the date which the 3rd Respondent had appointed. For completeness, the 1st Respondent’s Advocate was also not going to be available on the date that had been appointed for the interviews in question on account of a prior Court engagement.
- 4.5 Having regard to the issue adverted to in 4.4 above, the 1st Respondent’s advocates sought to have the 3rd Respondent put off the interviews alluded to in the preceding paragraph until after the return of the 1st Respondent’s Managing Director from overseas.

4.6 The 3rd Respondent could not, however, accede to the 1st Respondent's request and decided against postponing the interviews alluded to in 4.4 above.

4.7 Subsequently, (that is, upon being prompted) the 3rd Respondent informed the 1st Respondent's advocates about the interviews having proceeded on the date which had been originally appointed for the purpose. Those interviews culminated in having the Commercial Stand offered to the 2nd Respondent.

5.0 **DISPUTE PERSISTS, ENTERS HIGH COURT**

5.1 The development in 4.7 did not sit well with the 1st Respondent who, in consequence, decided to launch an action in the High Court seeking the following substantive relief:

5.1.1 ***“(a) an order that the allocation of the property in dispute by the Commissioner of Lands (2nd Appellant) to the [2nd Respondent] be declared null and void and that the [1st Respondent] is entitled to be offered the same property***

5.1.2 ***(b) An order that the 2nd Appellant should invite [the 1st Respondent] for interviews on the proposed investment on the property and the development already existing on the property”.***

6.0 **DECISION OF THE HIGH COURT**

6.1 Following the hearing of the matter, the dealing High Court Judge (Musona, J) declined to grant the relief which the 1st Respondent had sought essentially reasoning that the fact of the 1st Respondent's Managing Director having been away had not totally incapacitated the 1st Respondent given that it was a Limited Company that enjoyed separate legal existence from its shareholders and directors and that the 1st Respondent could have nominated another representative to attend the interviews on its behalf.

7.0 **1ST RESPONDENT APPEALS TO COURT OF APPEAL**

7.1 The 1st Respondent was not satisfied with the outcome before Musona, J and decided to escalate matters to the Court of Appeal.

7.2 The Court of Appeal readily accepted the 1st Respondent's position and totally discounted the reasoning of Musona, J as regards the legal distinctness of the 1st Respondent from its shareholders and directors. The Court of Appeal further reasoned that:

"You cannot force a party to send alternative people when they knew and understood on their part who was best suited to attend to the matter".

7.3 The Court of Appeal questioned the 3rd Respondent's wisdom in refusing to accommodate the 1st Respondent's request to postpone the interviews earlier referred to in this judgment.

7.4 According to the Court Appeal,

“[T]he failure to afford the [1st Respondent] an interview was improper and irregular and gave the 2nd Respondent an undue and unfair advantage....”

7.5 According to the further reasoning of the Court of Appeal, Musona, J had misapprehended facts and made findings which were perverse.

7.6 The Court of Appeal accordingly allowed the appeal and ordered that fresh interviews for the purpose of determining which entity the Commercial Stand should be offered to be arranged by the 2nd Appellant and that only the 1st and the 2nd Respondents should be interviewed for the Stand by a different Panel.

8.0 APPEAL TO THIS COURT

8.1 The Appellants were dissatisfied with the judgment of the Court of Appeal and have now appealed to this Court on 3 grounds which have been couched in the following terms:

8.1.1 *The Court below erred both in law and fact when it held that the failure to afford the 1st Respondent an interview*

was improper and irregular and gave the 2nd Respondent on undue and unfair advantage.

8.1.2 *The Court below erred in both law and fact when it [Ordered] that the 1st Respondent and the 2nd Respondent and not anyone else be interviewed by a different panel on a date to be agreed by the parties through their respective advocates.*

8.1.3 *The Court below erred in both law and fact when it held that the 2nd Appellant should bear the costs both in the Court of Appeal of Zambia and the High Court for Zambia on account of having been the architect of the confusion in this matter.*

9.0 PARTIES' RESPECTIVE ARGUMENTS ON APPEAL TO THIS COURT

9.0.1 While the Appellants and the 1st Respondent filed their respective Heads of Argument supporting/opposing the appeal, no like Arguments appear to have been filed on behalf of the 2nd and 3rd Respondents. At any rate, none of the latter parties' Arguments are on the Record of Appeal.

9.0.2 Before we take a dive into laying bare the Arguments which the two sides to the debate which this appeal necessarily involves, we feel constrained to address, at once, a pertinent issue which the learned Counsel for the 1st Respondent fronted as he set about to project

and canvas the Arguments which, he opined, lent oxygen to the position which the 1st Respondent has adopted in this appeal.

9.0.3 To be clear, before the first Respondent's Counsel could take a dive into his Arguments, he called our attention to and fronted the contention that the admission of this appeal into this Court was buoyed by the two grounds which the single member of this Court who had entertained the application for leave had highlighted, namely, grounds one and two. This, according to Counsel, was evident from the Ruling of the single judge at Pages 14 to 28 of the Record of Appeal, specifically at Page 27.

9.0.4 We pause here to observe that we are in agreement with learned Counsel for the 1st Respondent that this appeal ought to have been confined to the two grounds namely, grounds one and two, which had blessed it with the necessary oxygen to be admitted into this Court. Indeed, if any authority be required for the above position one need not look farther than our oft-

quoted decision in **Bidvest Foods & Others -v- CAA Import and Export Limited**¹ where we observed that:

“Where leave to appeal is granted on the basis that the appeal raises a point of law of public importance under Section 13(3) (a) of the Court of Appeal Act No 7 of 2016 only a ground of appeal raising such point (of law) will be covered by such leave. Any other proposed ground of appeal which does not satisfy this threshold will not be eligible for consideration on appeal ...”

- 9.0.5 Clearly, in launching their appeal in this Court the Appellants should have observed the boundaries which **Bidvest**¹ delineated in relation to the admission of an appeal into this Court if such admission is predicated on grounds which are specified in a Ruling granting permission to approach this Court of last resort.
- 9.0.6 In his Ruling granting permission to the Appellants to appeal to this Court, one of our number noted that only grounds one and two raised matters of public importance worthy of interrogation by this Court.
- 9.0.7 Having regard to our reflections in the last two paragraphs, we conclude that the issue of costs as pronounced upon by the Court of Appeal did not

receive the necessary oxygen for the purpose of the appeal's admission into and interrogation by this Court.

10.1 APPELLANTS' ARGUMENTS SUPPORTING THE APPEAL

- 10.1.1 As we intimated momentarily, the Appellants filed their composite Heads of Argument in support of the three grounds of Appeal on which their appeal is founded.
- 10.1.2 The Appellants' Arguments relative to each of their three grounds of Appeal were preceded by a background narrative in which the Appellants pointed out that both the 1st and 2nd Respondents had, historically, been interested in the Commercial Stand.
- 10.1.3 Counsel for the Appellants further argued that, although the 1st and 2nd Respondents had applied for the Commercial Stand and were duly invited to attend the interviews, only the 2nd Respondent's representative attended on the date which the 2nd Appellant had nominated.
- 10.1.4 According to Counsel, the 1st Respondent had, unsuccessfully, sought to have the date of the interviews postponed in order to give the 1st

Respondent's Managing Director and Shareholder an opportunity to personally attend the interviews.

10.1.5 Turning specifically to the first ground of appeal, Counsel for the Appellants contended that the Court below erred in both law and fact when it held that the refusal, by the 2nd Appellant, to give the 1st Respondent an opportunity to have its own interview was *improper and irregular* and that the refusal had the effect of giving the 2nd Respondent an undue and unfair advantage vis-à-vis the acquisition of the Commercial Stand.

10.1.6 The Appellants further contended under their first ground of appeal that the Court of Appeal's holding that the 2nd Appellant's refusal to extend to the 1st Respondent an opportunity to have its Managing Director separately interviewed after missing the original interviews did not give the 2nd Respondent any undue and unfair advantage given that both the 1st and the 2nd Respondents were invited to participate in the original interview.

- 10.1.7 According to the Appellants' Counsel, it was the aforementioned invitation to the duo which was to culminate in the successful interviewee being allocated the Commercial Stand.
- 10.1.8 The Appellants' Counsel further contended that the 1st Respondent's failure to attend the interviews in question could not be blamed on the 2nd Appellant.
- 10.1.9 The Appellants' Counsel also submitted that, being a body Corporate, the 1st Respondent could have been represented at the interview by any other representative other than its Managing Director and Shareholder who was said to have been outside Zambia at the time of the interviews.
- 10.1.10 It was also Counsel for the Appellants' strong submission that the same reasoning which has been projected above applied to the unavailability of the 1st Respondent's Counsel at the interviews.
- 10.1.11 The Appellants' Counsel went on to submit that, at law, a limited Company is a distinct legal person which exists independently of its Shareholders or Directors. In this regard, learned Counsel referred us to a passage

which was drawn from the legendary and celebrated case of **Salomon -v- Salomon**² whose salutary principles have been adopted in countless Zambian cases including this Court's decision in the case of **Anti-Corruption Commission -v- Serioes Farms Limited**³, among many others.

10.1.12 The Appellants' Counsel concluded his arguments around the first ground of appeal by submitting, in effect, that the 1st Respondent should solely take the blame for failing to nominate another person to go and attend the interviews in question on its behalf instead of insisting that only the 1st Respondents' Managing Director could attend the subject interview on the 1st Respondent's behalf.

10.1.13 Turning to the second ground of appeal, by which the Appellants' Counsel faulted the Court below for having held to the effect that only the 1st and 2nd Respondents and not any other person should be interviewed for the Commercial Stand and by a different Panel on a date to be agreed by the Parties through their Counsel, learned Counsel for the Appellants was at pains to

come to terms with this holding which, according to him, offended the law. In this regard, Counsel cited our judgment in the case of **Justin Chansa -v- Lusaka City Council**⁴ where we held thus:

“The authority to consider applications for land allocation from members of the public is vested in the President of Zambia who has delegated this authority to the Commissioner of Lands.... The powers to allocate land and make offers to successful applicants is reposed in the Commissioner of Lands”

10.1.14 According to the Appellants’ Counsel, the holding of the Court below, as captured in the second ground of appeal, offends the law to the extent that the same seeks to limit the manner in which the 2nd Appellant performs his public functions by directing that the 2nd Appellant should conduct interviews relating to the allocation of the Commercial Stand only with the 1st and 2nd Respondents to the exclusion of the general public and on a date to be agreed between the 1st and 2nd Respondents’ Advocates. In Counsel’s estimation, such an approach would be tantamount to the 2nd Appellant ceding his public duty to private entities.

10.1.15 In resisting the lower Court's order that fresh interviews to be conducted by a different Panel should be arranged in which only the 1st and 2nd Respondents should participate, the Appellants' Counsel submitted that, in the event of the proposal to call for fresh interviews finding favour with this Court, such interviews should not be restricted to the 1st and 2nd Respondents but must, in the interest of transparency, be open to the general public and consistent with the 2nd Appellant's *modus operandi* in matters of land alienation.

11.1.0 **1ST RESPONDENT'S ARGUMENTS OPPOSING THE APPEAL**

11.1.1 The 1st Respondent's point of departure in attacking the Appellants' first ground of appeal was to contend that only the 1st Respondent properly applied for the Commercial Stand in response to the advertisement which had been placed in various media by the 3rd Respondent.

11.1.2 According to the 1st Respondent's Counsel, the 2nd Respondent did not apply, in the prescribed form, for

the Commercial Stand and yet *'the Appellants'* went ahead to interview its representative while ignoring the 1st Respondent's request to re-schedule the interviews on the basis that the persons that the 1st Respondent desired to represent it at the interviews were unavailable on the date that had been appointed for the same.

11.1.3 According to the 1st Respondent's further contention, there was total impropriety in the manner the Appellants had organized the interviews, not least because the 2nd Respondent had not applied while the advertisement relating to the Commercial Stand made no mention of interested applicants having to attend interviews; when the same were to be conducted e.t.c. According to the 1st Respondent's Counsel, the afore-mentioned **'omissions'** made it difficult for interested applicants to be constantly alert and prepare for the interviews.

11.1.4 The 1st Respondent's Counsel further complained that, inspite of the 1st Respondent's Counsel having written a letter to the 2nd Appellant on 31st July, 2003

seeking to have the interviews which had been set for 6th August, 2003 re-scheduled to mid-September in order to allow for the 1st Respondent's Managing Director to return to Zambia from overseas, the 2nd Appellant's appeal was totally ignored.

- 11.1.5 According to the 1st Respondent's advocates' aforementioned letter, its author, Counsel Mumba S. Kapumpa SC, was also not going to be available on the date of the interviews by reason of the fact that he was going to be having a prior Court engagement at Kabwe.
- 11.1.6 The 1st Respondent's Counsel further submitted, citing well known authorities, that in order for the Company to appoint any other person to represent it, it had to do so formally, via a resolution.
- 11.1.7 Referring to reported Zambian Cases such as **Boxtel -v- Kearney⁵; and, Zambia Consolidated Copper Mines PLC -v- Richard Kangwa and Others⁶** the First Respondent's Counsel posited that shareholders enjoy, as a matter of right, overriding

authority over the Company's affairs and even over the wishes of mere nominees or Directors.

- 11.1.8 The First Respondent's Counsel then went on to contend that there was evidence on record showing that the [**1st Respondent's Managing Director**] was the only one to make such decisions [*i.e. to represent the 1st Respondent at the interview*].
- 11.1.9 The 1st Respondent's Counsel insisted that only the 1st Respondent's shareholders were appropriate to attend the interviews in question adding that the Appellants ought to have yielded to the Shareholders' wishes.
- 11.1.10 According to the 1st Respondent's Counsel, Public Offices like the Appellants should always exude fairness and fair play in their decision-making process. Counsel accordingly submitted that the process which the Appellants allowed to prevail had compromised the integrity of the interviews in question. Under these circumstances, learned Counsel submitted that the Court of Appeal's

decision in terms of which the trial Court's judgment was assailed could not be impeached.

11.1.11 Turning to the 2nd Ground of Appeal, in terms of which the Appellants' Counsel contended that the lower Court erred both in law and fact when it held that only the 1st Respondent and the 2nd Respondents and no one else should be interviewed by a different Panel on a date to be agreed by the parties through their respective advocates for the Commercial Stand in question, the 1st Respondent's Counsel's immediate reaction to this ground was that the same did not have the support of the parties' respective pleadings in High Court Cause 2009/HP/A60 as they were filed in the High Court Registry at Lusaka prior to the trial of the action before the Hon. Mr. Justice E.L. Musona.

11.1.12 According to learned Counsel for the 1st Respondent, in the absence of the Appellants' 2nd Ground of Appeal and the Arguments relating thereto being supported by relevant pleadings, this ground (Ground Two) together with the Arguments

supporting the same should be disregarded and wholly discounted by this Court for being devoid of merit.

11.1.13 In Counsel for the 1st Respondent's estimation, the scenario which is envisaged in the 2nd Ground of Appeal, namely, re-advertising and opening up the Commercial Stand to other applicants, is not tenable because the Appellants already exercised their mandate (namely, advertising the Stand, inviting interested applicants to apply and attend the interview).

11.1.14 The 1st Respondent's Counsel cited the case of ***Justin Chansa -v- Lusaka City Council***⁴ to support his proposition in 11.1.13 to the effect that both the 1st and 2nd Appellants' power and role in relation to the Commercial Stand having been duly exercised, the duo now stands ***functus officio***.

11.1.15 To further reinforce his view around the meaning and effect of the expression '***functus officio***', the 1st Respondent's Counsel referred to ***Black's Law***

Dictionary, 10th Edition, which defines the term thus:

“[having performed his or her office]” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

11.1.16 At the hearing of the appeal, learned Counsel for the 1st and 2nd Appellants, Mr. C. Mulonda, confirmed having filed the Appellants’ Heads of Argument upon which the appealing duo was relying. We were, accordingly, invited to set aside the judgment of the Court of Appeal while restoring the judgment of the trial Court.

11.1.17 For their part, Mr. S. Sikota, SC (leading) and Mr. Sianondo, learned Counsel for the 2nd and 1st Respondents respectively, indicated at the hearing that the 1st and 2nd Respondents fully supported the Appellants’ Arguments with respect to the 1st ground of appeal and joined the Appellants in inviting us to restore the judgment of the trial Court.

11.1.18 With regard to the 2nd ground of Appeal, the 1st and 2nd Respondents’ Counsel submitted that only the 1st and 2nd Respondents should be allowed to participate in the

interviews for the Commercial Stand and adding that only the duo had shown interest in the Stand.

11.1.19 Counsel then went on to refer us to the Supreme Court of Kenya's Judgment in ***Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others***⁷ where that Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, **"The Origins of the Functus Officio Doctrine, with Special Reference to its application in Administrative Law"** (2005) 122 SALJ 832 which reads:

"... The *Functus Officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter ... The [principle]" is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

11.1.20 The sentiments which have been quoted in the preceding paragraph were expressed in the case of **Re**

56 Denton Road, Twickenham, Middlesex⁸ where Vaisey J relied on *Livingstone v Westminster Co*⁹ and *Robertson v Minister of Pensions*¹⁰ (1949) 1 QB 227 for the proposition that:

“[any]” such decision or determination made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and cannot, in the absence of express statutory power of the consent of the person or persons affected, be altered or withdrawn by that body ... The contrary view would introduce a lamentable measure of uncertainty.”

11.1.21 According to Counsel for the 1st Respondent, the law which regulates the advertising of land is the **Land Circular No. 1 of 1985**. This law, according to the 1st Respondent's Counsel, did not give the Appellants power to review their decision once the power had been exercised as was the case in this matter. The advertisement was done and the public invited to apply and a closing date made public. If the Appellants were to be allowed to proceed with what they seek to achieve through this ground of appeal, there would be no end for finality for the decision makers nor any beginning of

enforcement of their decision. Thus, the decision makers in the position of the Appellants, would change their positions as they like, to the pain of the parties who had in fact complied, which they should not be permitted.

11.1.22 Learned Counsel for the 1st Respondent further submitted that the advertisement in question was under the direction of a Court Order which was complied with and that the Court of Appeal was not limiting the power of the Appellants but, instead, it was in compliance with what the Appellant had set itself including the closing dates of receiving application. Accordingly, we were urged to dismiss this second ground of appeal as well.

12.0 **CONSIDERATION OF THE APPEAL AND OUR DECISION**

12.1 We have examined the judgment appealed against in the context of the material which was before the Court below, the Grounds of Appeal together with the Heads of Argument for and contesting the appeal. We must immediately pay tribute to Counsel on either side of the

debate which this appeal is about for their helpful exertions.

12.2 As we previously observed, having regard to the fate which befell what the Appellants had presented as the 3rd Ground of appeal in the Memorandum of Appeal and that ground's relative Heads of Argument, we propose to confine the ensuing discourse to the 1st and 2nd Grounds of Appeal. In point of fact, we are of the irresistible view that the first ground is not only the determinative ground for this appeal but constitutes the pillar on which the second and wholly contingent ground hangs. Indeed, the outcome of our rather holistic inquiry into the myriad of issues which the first ground of appeal projects will wholly inform the necessity/futility or otherwise of considering the second ground of appeal.

12.3 As debated before us, the first ground posited that ***“the Court below erred both in law and in fact when it held that the failure [on the part of the 3rd Respondent] to afford the 2nd Respondent an interview [in relation to the acquisition of the Commercial Stand in question] was improper and irregular and gave the 2nd***

Respondent [an] undue and unfair advantage” (the italicized words in square brackets have been added by ourselves to achieve the necessary clarity).

12.4 In opening his Arguments supporting the Appellants’ first ground of appeal, learned Counsel for the Appellants, Mr. Mulonda, contended that the conclusion by the Court below that it was ‘improper’ and ‘irregular’ for the 2nd Appellant not to have afforded the 1st Respondent an interview in relation to the acquisition of the piece of land in question [allegedly because] this failure gave the 2nd Respondent an undue and unfair advantage, was wrong in fact.

12.5 Learned Counsel for the Appellants went on to contend that, contrary to the conclusion which the lower Court reached as highlighted above, the 2nd Appellant did, by a letter dated 30th July, 2003, invite (albeit separately) both the 1st and 2nd Respondents to attend the interviews in question on 6th August, 2003 at 09:30 and 10:00 hours respectively. Counsel went on to add that the successful interviewee was the one who was to be allocated the Commercial Stand.

- 12.6 Arising from the contention in the preceding paragraph, Counsel for the Appellants submitted that there was no question of the 2nd Respondent having been afforded an undue and unfair advantage in relation to the 1st Respondent.
- 12.7 According to learned Counsel for the Appellants, the 1st Respondent's failure to attend the interviews in question was something of its (that is, the 1st Respondent's) own making which could not be blamed on the 2nd Appellant. Counsel further projected that the absence or unavailability of the 1st Respondent's Managing Director or shareholder and the Company's legal representative on the date of the interviews in question could not have totally incapacitated the 1st Respondent, which is a body Corporate, from attending and participating in the interviews through the medium of another human representative.
- 12.8 In buttressing the contention in the preceding paragraph, the Appellants' Counsel referred us to the celebrated English case of **Salomon -v- Salomon**² and invited us to accept that no good ground existed or was proffered by the

1st Respondent to justify its failure to send another representative to attend the subject interviews on its behalf seeing that the 1st Respondent is a body corporate.

12.9 As we understood him, the gist of Counsel for the 1st Respondent's contentions under the 1st ground of appeal was that the 1st Respondent's Managing Director, who was away, was the only person who was best suited to represent the 1st Respondent at the interviews. Counsel also asserted that the absence of advance notice as to when the interviews were to be conducted meant that the 1st Respondent had no opportunity to designate someone else to represent the 1st Respondent in relation to the interviews in question.

12.10 To support the contentions in 12.9, the 1st Respondent's Counsel placed reliance on the case law which we earlier alluded to above.

12.11 As earlier observed, no Heads of Argument were filed on behalf of the 2nd Respondent in reaction to the Appellants' first ground of appeal. It will be recalled, however, that at the hearing of the appeal, learned Counsel for the 2nd Respondent, Mr. S. Sikota SC, invited us to record the fact

that he supported the appeal with respect to the first ground of appeal. Mr. Sikota S.C. also expressed his support for the judgment of the trial Court. In addition, Mr. Sikota S.C. confirmed his adoption of the Appellants' arguments in support of the first ground of appeal.

12.12 We have keenly considered the Appellant's Arguments and submissions around the first ground of appeal as summarised above relative to those of the 1st Respondent's. We have also taken note of the position which learned Counsel for the 2nd Respondent adopted at the hearing of the appeal and are in no difficult to state that we have found ourselves more attracted to the Appellants' contentious and exertions so far as the same revolved around the first Ground of Appeal.

12.13 In taking the position which we have taken in the preceding paragraph, we have noted the reasoning of the Court of Appeal in the judgment under attack which reasoning, we dare add, inexorably attracted or invited the first ground of appeal. As we see it, the reasoning of the Court of Appeal found expression via the following statements:

“The evidence on record shows that the [1st Respondent] had only two shareholders, both of whom were in Europe at the time of the interviews. These...two [were] the best placed to attend the interviews and address the issues. According to the letter of 31st July, 2003, the [1st Respondent’s] lawyer was also committed elsewhere and even if he had attended the interviews, the best he was going to do was to ask for a re-scheduled (SIC) date. In any case, you cannot force a party to send alternative people when they knew (SIC) and understood on their part who was best suited to attend to the matter. We note that the Lands Committee, through [the Commissioner of Lands] did not proffer any explanation as to why they could not accommodate the request by the Appellant, in order to afford them an opportunity to be heard in view of the history of the matter...

The failure to afford the [1st Respondent] an interview was improper and irregular and gave the 1st Respondent undue and unfair advantage”

- 12.14 It is beyond dispute or controversy that the 1st and 2nd Respondents were the entities which were targeted and invited for the interviews in question. It is equally indubitable that the 1st and 2nd Respondents were at all material times artificial legal persons or bodies corporate which only acted through the medium of their duly authorized human agents. The 1st and 2nd Respondents were neither sole traderships nor partnerships.

12.15 The letters of invitation to attend the interviews in question which were addressed to Cetina Transport Limited (the 2nd Respondent) and Metro Investments Limited (the 1st Respondent) as corporate entities emanated from the 2nd Appellant and were dated 30th July, 2003. Those letters, whose subject matter was ***“Interviews for Stand No. 22756, Lumumba Road, Lusaka”*** read as follows:

“Refer to the above captioned matter.

Following the advertisement in the “Times [of Zambia]” on 11th May, 2003 and your application dated 12th May, 2003, you are hereby invited for interviews on 6th August, 2003, in the Ministerial Conference room at 10:00 hours. Your attendance will be appreciated.”

12.16 It is worthy noting that the contents of the above letter to both the 1st and 2nd Respondents were exactly the same save that the letter to the 2nd Respondent described its (ie, the 2nd Respondent’s) application letter as having been dated 13th May, 2003 while its interview appointment time was indicated as 09:30 hours. For the avoidance of doubt, the interview appointment time for the 1st Respondent was specified as 10:00 hours. (We briefly pause here to discount the 1st Respondent’s allegation that the 2nd

Respondent did not apply for the Commercial Stand, given what has been adverted to in this paragraph).

12.17 It is also worthy of note that the advertisement referred to in paragraph 12.15 above was of the nature of a *Public Notice* by the 3rd Respondent and was couched in the following terms:

“NOTICE

The Lusaka City Council invites interested individuals or organisations capable of developing Stand No. 22756 located along Lumumba Road [and] measuring 2295 square metres in the Lusaka Province of the Republic of Zambia.

Applications forms can be obtained in Room 203 Old Wing, Civic Centre. These are to be accompanied [with] a non-refundable fee of K100,000.00.

Applicants are requested to submit photostat copies of documents to support their application together with their application form, i.e.

- (i) Certificate of incorporation**
- (ii) Support evidence of financial capabilities**
- (iii) Investment licence (investors)**
- (iv) Up to date bank statement”**

12.18 As we see it, it can scarcely be doubted that, so far as the possible acquisition of the Commercial Stand was concerned, the 1st and the 2nd Respondents were targetted in their capacity as corporate entities.

12.19 It is also, needless to say, plainly elementary that, as corporate or artificial entities, the 1st and the 2nd Respondents were bound to act through the medium or instrumentality of their authorized human agents.

12.20 Earlier in this judgment, we quoted some passages from the judgment of the Court of Appeal which is now under attack which captured part of that lower Court's rather astonishing reasoning that:

"The two Shareholders were the best placed to attend the interview and address the issues ... You cannot force a party to send alternative people when they knew and understood on their part who was best suited to attend to the matter"...

12.21 It will also be recalled that, in the course of delivering its judgment, the Court of Appeal took a very dim view of the evidence of Mausamvu Wanki (DW 2) who had testified on behalf of the 2nd Appellant.

12.22 According to the Court of Appeal, in his evidence, DW2 'deliberately' made no reference to the 1st Respondent's letter requesting for the re-scheduling of the interviews. In the view which the Court of Appeal took, the evidence of DW2 demonstrated that the 2nd Appellant was not

prepared to accommodate the 1st Respondent's request to re-schedule the interview by all means despite the fact that the dispute over the Commercial Stand needed to be handled with care, transparency and equity as this Court had earlier counselled.

12.23 We, yet again, pause here to mention that when the dispute the subject of the present appeal first entered this Court, the position which we took in relation to the dispute over the Commercial Stand was that **Circular Number 1 of 1995** on Land Allocation was not followed when the Commercial Stand was earlier allocated. Furthermore, this Court expressed its agreement with the Order of the Lands Tribunal in terms of which that quasi-judicial forum directed that the Commercial Stand should be advertised and all applications for the same considered on merit before the successful applicant is chosen.

12.24 We feel constrained to pause here, yet again, and return to the view which the Court of Appeal took in relation to the 2nd Appellant's decision to proceed with the interviews of 6th August, 2003 inspite of the 1st Respondent's request to re-schedule the same.

- 12.25 It is quite evident from what we have unravelled above that the 2nd Appellant's decision to proceed with the interviews in question did not find favour with the Court of Appeal on account of the factors and circumstances which we have already highlighted above. To put it plainly, the Court of Appeal would have preferred to have the 2nd Appellant re-schedule the same.
- 12.26 It may, perhaps, be helpful, if we can, at this stage, lay bare how the request to re-schedule the interviews for the Commercial Stand was packaged by the 1st Respondent's lawyers in their letter which was dated 31st July, 2003:

M.88/MSK/02

"31st July, 2003

**The Commissioner of Lands
Lands Department
P O Box 50694
LUSAKA**

Dear Sir

**RE: INTERVIEWS FOR STAND NO. 22756,
LUMUMBA ROAD - LUSAKA**

Kindly refer to your letter dated 30th July, 2003, addressed to our clients, Messrs Metro Investments Limited, concerning interviews which are scheduled for Wednesday 6th August, 2003. Unfortunately, the Managing Director of our client company is out of the country and the undersigned will be attending court in the Supreme Court sitting in Kabwe on the same date.

We ask that you kindly re-schedule the interviews to mid-September 2003 when our client will be back in the country. We apologise for any inconvenience our request may cause, but you will kindly appreciate the interest our client has in this matter.

We shall be grateful for your understanding.

**Yours faithfully
MALAMBO & COMPANY**

Mumba S. Kapumpa

12.27 Our reading of the letter in 12.26 which, for the avoidance of any doubt, was written on the 1st Respondent's behalf does not suggest, even remotely, that:

- (i) only the 1st Respondent's Managing Director/ Shareholder could have represented the 1st Respondent at the interview; or
- (ii) that the day-to-day affairs and business of the 1st Respondent were to remain frozen and unmanaged for the entire period that the Managing Director referred to in (i) was to remain outside the Republic of Zambia; or
- (iii) that the 1st Respondent did not have anyone among its cadre of employees who discharged functions relating to the Company's:
 - (a) Accounting/Finance/Auditing functions;
 - (b) Company Secretarial function

12.28. We confirm that we highlight our observations at 12.27 in order to dispel the ostensible notion, canvassed on behalf of the 1st Respondent, that only this Company's Managing Director could have represented it at the interviews in question. As we see it, this clearly porous notion by the 1st Respondent cannot even withstand the force of its own acknowledgement, at para 12.9 of this judgment, that the 1st Respondent actually had the option of designating someone else to attend the interviews on its behalf.

12.29 We must also accept and align ourselves with learned Counsel for the Appellants' contention that yielding to the position which was canvassed on behalf of the 1st Respondent and which, for the avoidance of doubt, revolved around the 1st Respondent's purely internal arrangements, would have been tantamount to having the 2nd Appellant and the 3rd Respondent improperly abandoning the *modus operandi* of their statutory roles in order to accommodate the 1st Respondent's private interests. In making this observation, we are alive to manner (in which the trial was approached in the sense of the nature of the court action which the 1st Respondent

had instituted) and the type of relief which were deliverable thereby.

12.30 It is worth recalling that, according to the invitation which we referred to in paragraph 12.17, the invitation by the 3rd Respondent to have “... **interested individuals or organizations capable of developing [the Commercial Stand]** **apply to be considered for the Commercial Stand**” in question required such individuals or organisations to submit their applications together with photostat copies of:

- (a) **Certificate [relating to the Applicant Company's] incorporation**
- (b) **Evidence/Proof of financial capacity**
- (c) **Investment licence (in the case of investors)**
- (d) **Up to date bank statements**

12.31 In the view which we have taken, it cannot be far-fetched or even deemed as speculative for us to suggest that it is the availability or fulfilment of the requirements specified in 12.30 which was critical to the 30-minute interviews in question.

12.32 Indeed, fulfilling the requirements in 12:30 above was not going to necessarily or unavoidably require the physical or personal presence of the 1st Respondent's Managing Director or Shareholder as any suitably authorized agent or officer of the Company could have been designated to perform the role which was envisaged in 12.30. In this regard, we totally discount, as being wholly disingenuous, the Court of Appeal's disposition, as fully adverted to at 12.13, that only one of the 1st Respondent's two Shareholders could have attended the interviews or, indeed, performed the role which, in the light of our observations at 12.28 above, the invitation at 12.30 envisaged.

12.33 In point of fact, it would be idle even to suggest that any advocate from the firm of advocates known as Malambo & Co., other than Mr. M. Kapumpa, could not have proceeded to attend the interviews on behalf of the 1st Respondent and fulfilled the requirements adverted to in 12.30.

12.34 Moving away from the theme of the last few preceding paragraphs, it will be recalled that a poignant feature of

the Appellants' 1st ground of appeal stemmed from the Court of Appeal's holding that the 3rd Respondent's failure (or refusal) to afford the 1st Respondent an interview was "*improper and irregular*" and [allegedly] gave the 2nd Respondent an *undue and unfair advantage*.

12:35 It will also be recalled that the Appellants reacted to the assertion in 12.34 by contending that the 1st Respondent's failure to participate in the interviews in question was of its own making given the option which was available to it (the 1st Respondent) to send a representative, other than its (preferred) Shareholder and Managing Director, to the interviews.

12.36 Having regard to our observations at 12.32 and 12.33 above, a feature of the Court of Appeal's judgment which we found most troubling in the light of the totality of the evidence before that Court was the suggestion that the 3rd Respondent's failure (or refusal) to accord the 1st Respondent an interview in connection with the 1st Respondent's desire to acquire the Commercial Stand was "*improper and irregular*" without that Court clearly/adequately/sufficiently projecting what, precisely,

it was that was 'improper' or 'irregular' about the 3rd Respondent not interviewing a party which, inspite of having been interested in acquiring the Commercial Stand, had, for no sufficient or credible cause, failed to present itself for the interviews in question.

12.37 To put it plainly and simply, how did the Court of Appeal find it justifiable to impute the rather weighty tags of 'impropriety' and 'irregularity' to the 3rd Respondent in the light of the circumstances (the evidence) surrounding the non-participation of the 1st Respondent in the interviews in question as Counsel for the Appellants contended?

12:38 According to the **Oxford Dictionary of Current English** 4th edition, the adjective 'improper' means 'not in accordance with *accepted Standards and behavior*' while the word 'irregular' means 'not according to a rule or *standard*'.

12.39 For its part, **the Oxford Advanced Learners' Dictionary**, 10th edition, defines the word improper' as 'dishonest' or 'morally' wrong: 'not right' or *appropriate for the situation*. The same Dictionary defines 'irregular' as 'not normal; 'not according to the usual roles'.

- 12.40 Having regard to our unpacking of the words '*improper*' and '*irregular*' above, the following questions appear to us to beg answers: what was it that was '*not in accordance with accepted standards and behavior*' or not consistent with '*a role or standard*' about the 3rd Respondent's decision (as the 2nd Appellant's agent) to proceed with the interviews in question as originally communicated to the invited participants to the interviews (who for the avoidance of doubt, had included the 1st Respondent)?
- 12.41 In its judgment, as quoted at para 12:13 above, the Court of Appeal reasoned that the 2nd Appellant did not proffer any explanation as to why it (or the 3rd Respondent) could not accommodate the 1st Respondent's request to postpone or re-schedule the interviews in question thereby denying the 1st Respondent the opportunity to participate in the interviews and that this failure to accord the 1st Respondent an interview was '*improper and irregular*'
- 12.42 It is worth signalling at this stage that the reasoning and approach of the Court below, as captured in the judgment appealed against, appears to have been rather superficial

and ignored the public and Statutory origin and basis of the 2nd Appellant's (acting by the 3rd Respondent's) role.

12.43 As we see it, the superficial nature of the Court of Appeal's approach and reasoning were clearly borne out by the Order the Court made directing not only who was to be interviewed for the Stand, how the Panel of the interviewers was to be constituted and the period within which the interviews were to take place.

12:44 It seems to us that, by taking the approach which the Court of Appeal took in its judgment as borne out by what we have adverted to in paras 12.42 and 12.43 above, that Court was or, at any rate, appears to have been more concerned about the fate which had befallen the 1st Respondent even at the expense of the 2nd Appellant (acting by its agent, the 3rd Respondent)'s obligation to discharge its functions in accordance with the law. This is indeed, the essence of what learned Counsel for the Appellants rightly complained about as we recounted at 10.1.14 above.

12.45 Indeed, we are also in entire agreement with learned Counsel for the Appellants' contention that it was not open

to the Court below to prescribe, via its Order now the subject of the 2nd ground of appeal, how the 2nd Appellant should or was to discharge his legal or statutory authority on behalf of the President of Zambia as we observed in **Justin Chansa -v- Lusaka City Council**⁴.

12:46 With all due respect, it also seems to us that, in its judgment, the Court of Appeal appears not to have paid sufficient attention to the relief which the 1st Respondent was seeking before the trial court namely:

“An order that the allocation of the (Commercial Stand) by the Commissioner of Lands [the 2nd Appellant] to the [2nd Respondent] be declared null and void and that [the 1st Respondent was] entitled to be offered the same property”

12.47 A pertinent issue or question which flows from the relief which the 1st Respondent was seeking in the trial Court and which it had pleaded as captured in the preceding paragraph was: *did the 1st Respondent marshal the necessary evidence, let alone, articulate any relevant law, to entitle the trial Court, or, indeed, the Court below, to pronounce the allocation of the property in question to the 2nd Respondent “null and void”?*

- 12:48 While it is completely otiose, for the purpose of the task at hand, to delve into the countless decisions which have authoritatively unravelled the meaning of the expression “*null and void*”, it is sufficient merely to call to mind its ordinary or dictionary meaning, namely, ‘... **having no legal force or effect or not valid**’ or, in the words of **Barroni’s Dictionary of legal Terms**, 4th edition, “**an act having no legal force or validity**”
- 12.49 In all seriousness, on what legal basis (appropriately supported by evidence) could a Court, properly directing itself, have felt entitled to order or declare the allocation of the Commercial Stand to the 2nd Respondent ‘*null and void*’?
- 12.50 Furthermore, in what legally plausible sense could the allocation of the Commercial Stand to the 2nd Respondent, in the circumstances which have been highlighted in this judgment, have been ‘*null and void*’ in the sense of the same (i.e the allocation) having had no legal force or effect, or legally invalid?
- 12.51 Speaking for ourselves, we are at a loss to appreciate and cannot even imagine how the non-participation of the 1st

Respondent in the interviews which had culminated in the allocation of the Commercial Stand to the 2nd Respondent could have plausibly rendered such allocation '*null and void*' unless, of course, a besmirched or soiled meaning is attributed to this expression.

12.52 In truth, we harbour no doubt that the Court of Appeal approached the appeal which was before it rather casually and superficially. Indeed, had that Court proceeded otherwise, it would, at the very least, have upheld the reasoning and conclusion of the trial Court.

12.53 In passing, we do honestly lament that the judgment appealed against substantively raised far too many questions than it answered. This, in and of itself, was a red flag which only served to undermine the judgment's integrity and legitimacy.

12.54 Thus far and, when all is said and done, we are in no difficulty to uphold the first and only determinative ground of appeal. As previously indicated in this judgment, the 2nd ground was contingent upon the fate of the first and stands consumed by the latter's triumph. For completeness, any interlocutory orders which may have

been granted along the way and which have a bearing on the outcome we have just announced stand discharged.

12.55 As for costs, these will be for the Appellants and the 2nd Respondent in the High Court, Court of Appeal and this Court. The Order of the Court of Appeal in its judgment of 24th April, 2020 condemning the 3rd Respondent to costs stands set aside. For the removal of any doubt, the costs are to be taxed in default of agreement.

.....
M. MUSONDA
DEPUTY CHIEF JUSTICE

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