

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

APPEAL NO. 12/2025

BETWEEN:

OCCUPATION HEALTHY SAFETY INSTITUTE

APPELLANT

AND

JAMES MATALIRO

RESPONDENT

Coram : Musonda, DCJ, Kabuka and Mutuna, JJS
On 3rd June, 2025 and 19th September, 2025 at 09:00
hours.

For the Appellant : *Mr. S. A. G. Twumasi and Mr. M. G. Numbwa of Kitwe
Chambers
Mr. L. Sikabanga – Board Secretary for the Appellant*

For the Respondents : *Mr. M. Mwachilenga of Messrs James and Doris
Legal Practitioners
Mr. C. Chungu of Messrs Nsapato and Company
Advocates*

J U D G M E N T

Mutuna, JS, delivered the judgment of the Court.

Following the hearing of this appeal, Justice J. K. Kabuka retired while the judgment was pending. This situation renders the status of this judgment as a majority one.

Cases referred to:

- 1) *Colgate Palmolive (Z) Inc v Abel Shemu Chika and 110 Others*, Appeal No. 181 of 2005
- 2) *Mohamed S. Itowala v Variety Bureau de Change*, SCZ Judgment No. 15 of 2001
- 3) *St. John Shipping Corporation v Joseph Rank Limited* (1956) 2 ALL ER 683
- 4) *Jalpa Pradeepbhai Desai v Bar Council of India and 2 Others*, SP/CIV/APP/No. 19743 of 2015
- 5) *Satish Kumar Sharma v The Bar Council of Himachal Pradesh*, Appeal (Civil) 5395 of 1997
- 6) *Coburn v Colledge* (1897) 1 QB 702 (CA)
- 7) *Muvi TV Limited v Killian Phiri & Kennedy Musweu*, Appeal 13 of 2015
- 8) *Samuel Miyanda v Raymond Handahu*, (1993-1994) Z.R. 187
- 9) *Anderson Kambela Mazoka & Others v Mwanawasa & 2 Others* (2005) ZR 138
- 10) *Seaford Court Estates Ltd v Asher* [1949] 2 KB 481
- 11) *Road Development Agency v Safricas Zambia Limited*, Appeal No. 3 of 2024

Legislation referred to:

- 1) *Legal Practitioners' Practice Rules, Statutory Instrument Number 51 of 2002*
- 2) *Legal Practitioners' Practice (Amendment) Rules 2025, Statutory Instrument Number 50 of 2025*
- 3) *Occupation Health and Safety Act Number 36 of 2010*
- 4) *Bar Council of India Rules*
- 5) *Law Association of Zambia, Act, (the Act)*
- 6) *The Rules of the Supreme Court, 1965*

Other Works referred to:

- 1) *Matibini P, Zambia Civil Procedure: Commentary and Cases*
- 2) *Halsbury's Laws of England, volume 3, 4th edition*
- 3) *American Bar Association (ABA) Canons of Professional Ethics*

Introduction

- 1) The legal profession is a noble profession. It thrives on the good reputation that it enjoys from members of the public which it serves. In order to preserve this good reputation, the conduct of legal practitioners is regulated by the provisions of the **Legal Practitioners' Act (the Act)**, with Law Association of Zambia, (LAZ) as the regulatory body.

- 2) To compliment the provisions of the Act, LAZ enacted **Rules** which are the subject of this appeal in 2002, and they are the **Legal Practitioners' Practice Rules, Statutory Instrument Number 51 of 2002 (the Rules)**. These **Rules** introduced a new feature under Part V relating to the regulation of employed legal practitioners, popularly known as in-house counsel. While this judgment was pending, the **Rules** were amended by the **Legal Practitioners' Practice (Amendment) Rules 2025, Statutory Instrument Number 50 of 2025** which came into force on 11th July, 2025. However, the amendment does not affect the provisions of the **Rules** which are at the heart of the dispute in this appeal.

- 3) Like the **Act**, pursuant to which they are made, the provisions of the **Rules** which govern the conduct of counsel and as such, the profession in general, are couched in a prohibitive manner. This demonstrates the seriousness with which the need to preserve the integrity of the profession is taken.
- 4) Further, the **Rules** were enacted by LAZ in consultation with the Chief Justice who is the head of the Judiciary and enjoys the lofty status of *Pater Familias* - father of the legal family. This in itself emphasises the important role the legal profession plays in society at large and hence the need for effective regulation of legal practitioners.
- 5) The dispute in this appeal calls upon us to interpret some of the provisions of the **Rules** as they relate to the respondent's engagement in the employ of the appellant and, in general, the restrictions placed upon the practice of the law by employed legal practitioners. The appeal seeks to assail the judgment of the Court of Appeal in terms of which that Court held that **Rules 24** and **27** of the **Rules**, do not restrict employed legal practitioners to only representing their employer.

Background

- 6) The background leading up to the appeal is that the respondent has been at all material times a legal practitioner practising under the name and style of Messrs Mumba Malila and Company, now known as Messrs James and Doris Legal Practitioners. While engaged in such practice, he was, on 23rd May, 2014, offered employment by the appellant as Board Secretary. The tenure of the employment was three years with either party retaining the option to terminate it by a month's notice.

- 7) The terms and conditions of the respondent's employment were contained in the letter of employment given to the respondent by the appellant on 23rd May, 2014. By the said letter, clause 5 stipulated that the respondent would be expected to work a daily shift of 8 hours from Monday to Friday between 08:00 hours and 17:00 hours. This condition was varied on 2nd June, 2014, by the Board Chairperson of the appellant upon the respondent's request. The two agreed that the respondent's daily presence at its Kitwe office would not be required. The respondent would only be compelled to report at the appellant's office when he was asked to

do so. This agreement was to enable the respondent continue practicing law in his firm.

- 8) During the life of the respondent's employment with the appellant, a dispute arose regarding certain conditions of service which the respondent contended the appellant had failed to avail him. These conditions related to his entitlement to a car loan. He therefore, took out an action in the Industrial and Labour Division of the High Court at Solwezi. Subsequently, and acting on the advice of the Attorney General, the appellant withheld the respondent's gratuity when his employment was terminated.

The Dispute in the High Court and Decision

- 9) The claim by the respondent in the High Court was for damages for breach of contract. He contended that the appellant breached the contract of employment because it did not fully comply with the condition regarding the self-liquidating motor vehicle loan scheme. He contended that the appellant had treated him differently from the other employees who were similarly circumstanced. This, according to the respondent, was unfair.

- 10) Arising from the matters in the preceding paragraph, the respondent claimed for an order that the appellant immediately buys him a motor vehicle and avail him the benefit of the self-liquidating motor vehicle loan scheme. He also claimed for payment of his gratuity which was withheld, together with interest and costs.
- 11) The appellant denied the respondent's claim on the ground that he had breached the contract of employment by failing to properly advise the Chairperson of the appellant regarding the variation of his contract of employment. They contended that the respondent acted negligently and unprofessionally when he failed to advise the Chairperson of the appellant that the variation of his contract required approval of the appellant's Board of Directors. To this end, the appellant claimed that the variation of the respondent's contract of employment was irregular and contrary to the provisions of the **Occupation Health and Safety Act Number 36 of 2010**.
- 12) The appellant also contended that although the respondent was a full-time employee, he was hardly present at its office. Further, he

discharged his duties negligently because, while still employed by the appellant, he engaged in private practice.

- 13)** Lastly, the appellant contended that it acted on the advice of the Attorney General in refusing to honour the respondent's claim in respect of his conditions of service.

Decision by the Learned High Court Judge

- 14)** In determining the matter before him, the Learned High Court Judge identified two issues as being in dispute as follows:

14.1 Whether the respondent had been discriminated against and or unfairly treated by the appellant in respect of the benefit arising from his conditions of service which entitled him to gratuity and a motor vehicle loan; and,

14.2 Whether there has been a breach of contract on the part of the appellant.

- 15)** The Judge then noted the fact that the conditions of service which the respondent sought to enforce were contained in his contract of employment and self-liquidating motor vehicle loan facility policy.

These documents, he observed, were produced as exhibits to the respondent's affidavit in support of the Notice of Complaint. The Judge then restated the principle in the case of **Colgate Palmolive Zambia Limited v Chuka**¹ which compels courts to enforce agreements entered into by parties freely and voluntarily. He clarified his duty by stating that the court must also ensure that the contract sought to be enforced is legal and enforceable at law.

- 16)** Next, the Judge set out the undisputed facts which revealed that the respondent was a legal practitioner practicing at the time, under the name and style of Messrs Mumba Malila and Partners. That he had appeared before the Judge and other courts in that capacity. He then reviewed the letter of employment dated 23rd May, 2014, offering the respondent employment and concluded that its effect was that the respondent was not only employed on a full-time basis as Board Secretary but was also a salaried employee. The Judge noted further that although the letter of employment was dated 23rd May, 2014, the respondent only accepted it after clause 5 was amended to permit him work off-site.

- 17) According to the Judge, the appellant was aggrieved by the variation of the contract. He then redefined the issue in dispute as being whether legal practitioners in private practice can, while acting in such capacity, be employed on full-time or part-time basis by a legal entity or person. In determining the issue, the Judge considered the effect of **Rules 24(2)** and **27** of the **Rules** and the decisions in the cases of **Mohamed S Itowala v Variety Bureau de Change**² and **St. John Shipping Corporation v Joseph Rank Ltd**³. The two **Rules** regulate the practice of employed legal practitioners while the two decisions deal with enforcement of contracts which are prohibited by statute or involve the commission of an act which is legally objectionable.
- 18) He held that a legal practitioner employed by a non-practitioner is not allowed to work for any other person other than the employer and is not permitted to engage in private practice. In arriving at this decision, he was persuaded by the decision of an Indian Court in the case of **Jalpa Pradeepbhai Desai v Bar Council of India and 2 Others**⁴ which held that employed legal practitioners in India

are barred from doing work for any person other than their employer.

- 19) The court's decision in the Indian case was based on the interpretation it gave **Rule 49 of Chapter II, Part 6** of the **Bar Council of India Rules** which states as follows:

“49. An Advocate shall not be a full-time salaried employee of any person, Government, firm, corporation or concern, so long as he continues to practice, and shall, on taking up any employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practice as an Advocate so long as he continues in such employment.”

The Judge likened the foregoing **Rule** to **Rule 24(2)** of the **Rules** and felt persuaded to follow the decision in the Indian case because like Zambia, India draws its principles on practice of the law from the courts in the Commonwealth.

- 20) By way of emphasis, the Judge distinguished employed private practitioners as full-time salaried employees from private practitioners engaged in part-time lecturing at universities and other institutions of learning. He held that the latter is permissible,

because as a part-time lecturer, the private practitioner is not considered as representing the institution of learning where he or she is employed as a lecturer.

- 21)** By way of conclusion, the Judge held that the contract of employment entered into by the appellant and respondent was tainted with illegality and enforcement of such a contract would be contrary to the **Rules**. He clarified his holding that a company is not, however, precluded from engaging a legal practitioner in private practice to do work for it as long as the engagement is through the law firm in which the practitioner practices.
- 22)** Having held the contract to be a nullity, the Judge found that the contract of employment could not, on the basis of our decision in the case of **Mohamed S Itowala v Variety Bureau de Change**² be enforced. He accordingly dismissed both the respondent's claim and appellant's counter claim.

Appeal to the Court of Appeal and decision of the Court.

- 23)** The respondent was unhappy with the decision of the Learned High Court Judge and launched an appeal to the Court of Appeal. The

appeal questioned the interpretation given by the Judge to **Rules 24(2)** and **27** of the **Rules**. It also questioned the decision by the Judge that the contract of employment entered into by the two parties was tainted with illegality and that any attempt to enforce it would contravene the **Rules**. As an alternative, the appeal questioned the failure by the Judge to address his mind to the principle of *quantum meruit*.

- 24)** After considering the arguments by counsel for the two parties, the Court of Appeal resolved that the determination of the appeal revolved around the interpretation to be given of **Rules 24(2)** and **27** of the **Rules**. It thus identified the issue for determination as being, whether an employed legal practitioner is permitted to engage in private practice. It held that **Rule 24(2)** prohibits a non-legal practitioner from employing a legal practitioner to do legal work for third parties for the benefit of the non-legal practitioner (the employer). Agreeing with the argument presented by the respondent, the court held that **Rule 24(2)** was intended to prevent a situation where non-legal practitioners employ legal practitioners for purposes of offering legal services to third parties or the public.

- 25)** After interpreting **Rule 24(2)** as aforesaid, the court went on to hold that **Rules 24(2)** and **27** do not bar legal practitioners in private practice from taking up employment on a full time or part time basis as employed legal practitioners and while maintaining such employment, to continue practicing in private practice.
- 26)** In its quest to explain the effect of **Rule 27** of the **Rules**, the Court of Appeal went on to hold that the **Rule** sets out the conditions an employed legal practitioner must meet in order to practice law. The first being that the practitioner must hold a current practicing certificate while the second is that the practitioner must act on behalf of his or her employer or under the conditions set out in **Rule 30** relating to separate business. This was defined by the court as any business which is not related to the practice of the law.
- 27)** In addition, the second condition to **Rule 27** also prohibits a legal practitioner from acting for an employee or client of his employer. According to the court, this condition does not at all mean that an employed legal practitioner is prohibited from engaging in private

practice. The only category of legal practitioners who are prohibited from engaging in private practice are those holding public office and regulated under **Rule 40**. The court concluded that the last condition was that the legal practitioner must have practiced as an advocate for a minimum period of three years.

28) In reviewing the holding by the High Court Judge that the contract of employment was tainted with illegality, the court held that since the position held by the respondent of Corporate Secretary was not a public office or position in Government, he was not barred from engaging in private practicing while holding the said position. Consequently, the court held that the Judge erred when he found that the contract of employment was tainted with illegality because it contravened the **Rules**.

29) Arising from the holding in the preceding paragraph, the court also held that it was a misdirection on the part of the Judge to rely on the Indian case and its interpretation of **Rule 49 of Chapter II, Part 6** of the **Council Rules of India**. The reasoning of the court was that the principle in that case does not apply to our jurisdiction because the **Rules** do not contain any provision similar or

equivalent to **Rule 49**. It then went to great length explaining how the legal profession has evolved over the years resulting in legal practitioners being permitted to engage in considerably more activities than was the case before. In support of this, it quoted a passage from **Halsbury's Laws of England, 4th edition, volume 3, paragraph 1127** as follows:

“Practicing barristers were formally under a general obligation not to engage in any other profession or business or be an active partner, salaried official or employee engaged in another profession or business. This rule has been reviewed by the Bar Council and replaced by new rules which together with the various ad hoc rulings of the Council, considerably widen the scope and number of supplementary occupations in which practicing barristers are permitted to engage.

Nonetheless, a barrister in practice must make that his primary occupation and must refrain from engaging in any other occupation which may adversely affect the reputation of the Bar...”

- 30)** The court then referred to **Rule 32(1)(b)** of the **Rules** and held that it forbids legal practitioners from engaging in any occupation which may adversely affect a legal practitioner's reputation or prejudice the ability of the legal practitioner to attend properly to the interests

of the client. The court held that the record did not reveal any evidence showing that as a consequence of the respondent taking up the appointment of Corporate Secretary, his ability to attend to his client's needs was impaired. To the contrary, it held that the appellant was actually satisfied with his service and extended his contract for a further three years.

- 31)** Finally, the court addressed the issue of enforcement of the contract of employment. It held that since there was no illegality or other vitiating factor, its duty was to enforce the contract in line with our decision in the case of **Colgate Palmolive Zambia Limited v Chuka**¹. It granted the respondent the relief claimed in the High Court.

Appeal to this court and arguments by the parties

- 32)** The appellant was unhappy with the decision of the Court of Appeal and launched this appeal fronting four grounds of appeal. The grounds of appeal are as follows:

32.1 The Court of Appeal of Zambia misdirected itself in law when it held that **Rules 24(2)** and **27** of the **Legal Practitioners'**

Practice Rules, SI No. 51 of 2002 does not stop an advocate in private practice to also work for another institution or company either on full time or part time basis;

32.2 The Court of Appeal of Zambia erred in law when it held that **Rules 24(2) and 27** of the **Legal Practitioners' Practice Rules, SI No. 51 of 2002** does not prohibit a legal practitioner employed as in-house counsel from engaging in private practice;

32.3 The Court of Appeal of Zambia erred in law and in fact when it held that the respondent was not required to cease or refrain from engaging in private practice upon his appointment; and,

32.4 The Court of Appeal of Zambia misdirected itself in law and fact when it entered judgment in favour of the appellant against the respondent without giving the respondent sufficient opportunity of contesting the appeal on that ground.

The grounds of appeal question the interpretation given to **Rules 24(2) and 27** and the alleged failure by the Court of Appeal to give

the appellant an opportunity to present its case prior to entering judgment against it.

- 33)** Counsel for the two parties have gone to great length in explaining their clients' positions in the heads of argument. In our determination of the appeal, we have focused our consideration to those arguments which aid us in interpreting **Rules 24(2)** and **27** of the **Rules** and determining whether the appellant was given an opportunity to be heard prior to entry of judgment against it.
- 34)** In opening the appellant's arguments, counsel for the appellant took the view that an employed legal practitioner, such as the respondent, is not permitted by **Rule 24** to do any legal work other than that of the employer. The respondent was, therefore, barred from engaging in private practise while in the employ of the appellant.
- 35)** In arriving at this conclusion, counsel began by interpreting **Rule 24(1)** of the **Rules** which explains the application of **Part V** of the **Rules** titled "Employed Legal Practitioners". The **Rule** states as follows:

“24(1). This part applies to a practitioner employed by a non-practitioner employer in the course of the practitioner’s employment with such a non-practitioner employer but -

(a) Does not apply to any private practice of such practitioner.

(b) Does not apply to practitioner employed by Government.”

Counsel argued that as a consequence of his employment with the appellant and while such employment continued, **Part V** of the **Rules** applied to the respondent.

- 36)** Advancing their arguments, counsel went on to explain that the exception under **Rule 24(1)(a)** of the **Rules** referred to any practice of law conducted through a law firm regulated by the Law Association of Zambia and other law. The exception does not apply to employed legal practitioners. According to counsel, a legal practitioner may only engage in private practice with a firm regulated by Law Association of Zambia and if he or she has satisfied the qualifications to practice as a principal or in employment of a private practitioner. Further, and in accordance

with **Rule 2**, a firm is defined as a business concern for the practice of the profession of a legal practitioner and includes a sole practitioner. To the contrary, the respondent was employed to practice law as a legal practitioner by a non-practitioner employer. Counsel concluded that **Part V** did apply to the respondent especially that the evidence on record reveals that there was an offer of employment made to him and a contract on a fixed term of employment entered into.

37) Having established that the respondent was subject to **Part V** of the **Rules**, counsel set out the conditions under which he could practice law by reference to **Rule 27** of the **Rules**. They argued that the respondent was required to have a current practicing certificate; was to appear either on behalf of his employer or under the terms of **Rules 30(3)** and, he was not to act for any employee or client of the appellant; and, to have at least three years practical experience.

38) Arising from the provisions of **Rules 27**, counsel submitted that the respondent's practice as a legal practitioner under **Part V** was restricted to appearing on behalf of the appellant or engage in other

permissible non-legal business under **Rule 30**. In breach of this and **Rule 24(2)**, the respondent practiced both as an employed legal practitioner and as an advocate for and on behalf of third parties while still employed by the appellant. According to counsel, these acts are forbidden because they have the potential of leading to chaos and bringing the legal profession into disrepute.

- 39)** Counsel agreed with the finding by the Learned High Court Judge that the only way the respondent could be engaged in his capacity as a private legal practitioner by the appellant was through his law firm. They also endorsed the Judge's reliance on the decisions in the cases of **Satish Kumar Sharma v The Bar Council of Himachal Pradesh**⁵ and **Jalpa Pradeepbail Desai v Bar Council of India and 2 Others**⁴.
- 40)** Advancing their arguments, counsel submitted on the regulatory role of LAZ and the power of the LAZ Council to appoint members of the Legal Practitioners' Committee pursuant to **section 13(7)** of the **Act**. They then set out the functions of the Legal Practitioners' Committee and submitted that its decision and those of the Disciplinary Committee, are binding on all legal practitioners

seeking to practice in Zambia. As such, a legal practitioner is bound to seek the guidance of the Legal Practitioners' Committee when in doubt as to the business or practice he or she can engage in.

41) They submitted further that this is not unique to Zambia and quoted a passage from **Halsbury's Laws of England, 3rd edition**, which compels a practicing Barrister in England and Wales to keep abreast with rulings made by the Bar Society on the types of extra professional activities which are permitted.

42) Quoting from **Rules 13(3)** and **31(2)(b)**, which respectively, require the proper supervision of law firms and bars legal practitioners from engaging in any activity which may adversely affect the reputation of the legal practitioners or his or her ability to attend to the client's interests, counsel summed up as follows:

42.1 The respondent breached **Rule 13(3)** and the fundamental rules of ethics when he took on employment with the appellant while still in private practice. Consequently, the contract of employment he entered into with the appellant was illegal; and,

42.2 The fact that the respondent continued to practice law in private practice while employed by the respondent clearly prejudiced his ability to attend properly to the interests of his client especially that he did so without the authority of the Legal Practitioners' Committee.

43) Turning to the contention of conflict of interest, counsel began by setting out the provisions of **Rules 25** and **33(1)(7)** of the **Rules**. The rules bar an employed legal practitioner from acting in a matter where there is potential for conflict of interest and that would result in him or her being professionally embarrassed. Counsel submitted as follows:

43.1 The respondent had a duty to inform the appellant's Board Chairperson that amending his contract of employment to allow him to work part time, was likely to create and did in fact create a conflict of interest; and,

43.2 The respondent ought to have known that taking up employment with the appellant on a part time basis, had the potential of creating conflict of interest.

- 44) The next limb of counsel's arguments addressed ground 4 of the appeal. They argued that the judgment of the Learned High Court Judge which was the subject of the appeal, did not consider the claims on the merits, as pleaded by the two parties. The Judge determined the matter on a technicality based on points of law which was the subject of the appeal. However, in determining the appeal, the Court of Appeal went ahead and determined the respondent's claim, on the merits, without affording the appellant an opportunity to be heard.
- 45) To reinforce their arguments, our attention was drawn to passages from the judgment of the Court of Appeal which they contended reveal a consideration of the case as pleaded in the High Court on the merits. They also drew our attention to the decision the single Judge of this Court on the motion for permission to appeal in which he expressed the view that the Court of Appeal may have veered off course.
- 46) Counsel also referred us to **Order 18/0/2** of the white book on the purpose of pleadings, the cases of **Coburn V Colledge⁶**, **Muvi TV**

Limited v Killian Phiri and Kennedy Musweu⁷ and the text by **Dr. Patrick Matibini SC, Zambia Civil Procedure - Commentary and Cases**. These authorities speak to pleadings in general. We were urged to allow the appeal.

47) In opening the arguments opposing the appeal, counsel for the respondent urged us to apply the literal rule of interpretation in interpreting the meaning of **Rules 24** and **27** of the **Rules**. They called in aid of their arguments, our two decisions in the cases of **Samuel Miyanda v Raymond Handahu**⁹ and **Anderson Kambela Mazoka and Others v Mwanawasa and 2 Others**¹⁰, in which we said that legislation should be interpreted literally and words must be given their natural and ordinary meaning.

48) According to counsel, a literal interpretation of **Rule 24** reveals that it does not apply to a legal practitioner in private practice nor does it prohibit such legal practitioner from simultaneously serving as in-house counsel. Further, if an employed legal practitioner while still in employment, engages in private practice, the provisions of **Part V** will not apply. In arriving at the foregoing, they interpreted the exception in **Rule 24 (1)(a)** to relate to the private practice of

an employed legal practitioner and not private practice through a law firm as argued by the appellant.

49) Advancing their arguments, counsel submitted that the appellant has not demonstrated how the respondent breached **Rules 24** and **27**. The evidence on record reveals that the respondent's contract was varied by the appellant to allow him to practice in his firm and only report to the appellant's offices when he was required to do so. Further, the proscription from working for another person imposed on employed legal practitioners relates to work carried out in the course of employment which would breach the **Act** or the **Rules**. There was, according to counsel, no such breach of the **Act** and **Rules** by the respondent because his activities in private practice fell outside the scope of **Rule 24**.

50) Counsel then explained in detail the principles relating to the purposive approach to statutory interpretation by reference to two decisions of this Court. They argued that even if we adopt this approach in interpreting **Rules 24** and **27**, we will hold that the respondent did not breach the **Rules**. The crucial words in **Rule 24** are those in **subrule (2)** which state: "AS PART OF HIS

EMPLOYMENT". These words, counsel argued, proscribe employed legal practitioners from doing work for any other person other than his employer as part of his employment.

- 51) They went on to argue that **Rule 24(2)** seeks to prevent a situation where non-practitioners like Trade Kings or Shoprite (as examples) would start employing legal practitioners so that they (Trade Kings and Shoprite) offer legal services to the public for profit.
- 52) Tracing the genesis of **Rules 24** and **27** to **Canons 35** and **47** of the **American Bar Association (ABA), Canons of Professions Ethics**, counsel argued that the two Canons are aptly headed "*inter-mediaries*" and "*Aiding the Unauthorized Practice of Law*" and mirror **Rules 24** and **27** of the **Rules**. The canons state as follows:

"35. The professional services of the lawyer should not be controlled or exploited by any law agency, personal or corporate, which intervenes between clients and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent

are not deemed such intermediaries. A lawyer may accept employment from any organisation, such as an association, club or trade organisation to render legal business in any matter in which the organisation as an entity, is interested, but this employment should not include the rendering of legal services to the members of such organisation in respect of their individual affairs; and,

47. No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorised practice of law by any law agency, personal or corporate”.

Counsel concluded that these canons do not prohibit employed legal practitioners from engaging in private practice.

- 53) The next limb of counsel’s argument was that in determining this appeal, we should not limit ourselves to interpreting the two **Rules** but also inquire into whether the conduct of employed legal practitioners engaging in private practice had assumed the status of usage. In other words, the tradition of private practitioners being engaged in other ventures and occupation, such as lecturing, arbitration, business ventures and in-house counsel, is so well known and practiced in Zambia that it has become acceptable. To

support their argument, counsel drew our attention to the text of **Halsbury's Laws of England 4th edition, volume 3**, which explains the other professional and business ventures which Barristers in England and Wales are permitted to engage in.

54) Arguing in the alternative, counsel contended that the practice of private practitioners engaging in other business such as lecturing, arbitration, company secretarial services, farming etc. has become so prevalent in Zambia that we must take judicial notice of it and consider it as acceptable practice.

55) As for the interpretation to be given to **Rule 27**, counsel submitted that the respondent met all the requirements in that Rule and there is nothing in the **Rule** which prohibits him from serving as Board Secretary of the appellant while being engaged in private practice. To justify this argument, counsel argued as follows:

55.1 Rule 24 does not apply to the private practice of the employed legal practitioner;

55.2 The respondent was neither breaching any rule nor acting against the appellant's interest or failing to carry out his duties or bringing the legal profession into disrepute; and, was

55.3 In any case, permitted to continue practicing in his law firm by the appellant.

56) Counsel concluded that the interpretation given to the two **Rules** by the Learned High Court Judge amounted to altering our law by importing provisions from the **Indian Bar Council Rules** into our **Rules** which resulted in an injustice. They relied on the English case of **Seaford Court Estates Limited v Asher**¹¹ which states as follows:

“a Judge must not alter that of which it (a statute) is woven, but he can and should iron out the creases.”

57) Advancing their arguments, counsel submitted that **Rule 24** does not forbid the respondent from being employed as Board Secretary of the appellant while engaging in private practice. To support this, they referred us to the letter from the appellant to the respondent varying clause 5 of his contract of employment. We have not summarised the argument advanced here in detail because it was

misconceived. We have demonstrated in the latter parts of this judgment that **Part V** is directed at regulating employed legal practitioners and not private practitioners. Therefore, the question in the dispute in this matter is whether, while employed by the appellant as Board Secretary, the respondent could engage in private practice and not whether, while practicing law in private practice, the respondent could be employed as the appellant's Board Secretary.

- 58)** The last limb of counsel's arguments addressed ground 4 of the appeal which attacked the judgment entered against the appellant in favour of the respondent in respect of the action which was before the High Court. The thrust of counsel's argument was that in arriving at its decision, the High Court did apply its mind to the defence mounted by the appellant. As such, the Judge determined the matter on the merits and the Court of Appeal was therefore, on firm ground when it still considered the merits and demerits of both the respondent's claim and appellant's counterclaim.
- 59)** Counsel went on to argue that the respondent's claim was dismissed by the High Court solely on the basis that his contract

of employment was illegal because he could not, while employed as Board Secretary, also engage in private practice. This, according to counsel, was the primary legal point that barred enforcement of the respondent's contractual rights. For this reason, the appellant cannot seek a re-hearing of the matter by the High Court because the dispute between the parties revolved solely on points of law that can be determined at this stage based on what is on record.

- 60) We were reminded of what we said in the case of **Road Development Agency v Safricas Zambia Limited**¹², that an appeal is a hearing on the record and an appellate court can consider any legal issues arising out of the record whether or not a party raised such an issue. They thus, urged us to consider the merits and demerits of the matter which was deployed before the High Court because there is sufficient evidence on the record to enable us do so.
- 61) Counsel concluded by going to great length by setting out principles on enforcement of employment contracts and cited a number of cases supporting their arguments. This portion of counsel's arguments was clearly beyond the scope of the appeal.

We, therefore, have not reproduce them. We were urged to dismiss the appeal.

- 62)** In the relevant portions of arguments in reply, counsel for the appellant restated their earlier arguments. At the hearing, both sets of advocates also restated their written arguments.

Consideration and decision by the Court

- 63)** The dispute in this matter revolves around the interpretation which the Court of Appeal gave to **Rules 24** and **27** of the **Rules**. It also involves the manner in which that Court resolved the dispute. The contention by the Appellant, in this regard, is that since the High Court determined the dispute based on a technicality, which was the subject of the appeal, the Court of Appeal should not have determined the dispute on the merits by reference to the pleadings filed in the High Court.
- 64)** The two crucial holdings by the Court of Appeal on the interpretation of **Rules 24** and **27** are at pages 44 and 45 of the record of appeal. They state as follows:

“50. In our view, this rule prohibits a non-legal practitioner from employing a legal practitioner to do legal work for 3rd parties for the benefit of the non-legal practitioner (his employer). We therefore agree with the appellant that Rule 24(2) was intended to avoid a situation where non-legal practitioners employ legal practitioners for purposes of offering legal services to third parties or the public. In our view, Rule 24(2) does not stop an advocate in private practice to also work for another institution or company either on a full-time or part-time basis; and

51. Similarly, Rule 27 does not prohibit a legal practitioner employed as in-house counsel from engaging in private practice.”

- 65) The first holding suggests that the Rules are meant to regulate non-legal practitioners. This is evident from the portion of the holding which reads in part “...**that Rule 24(2) was intended to avoid a situation where non-legal practitioners employ legal practitioners for purposes of offering legal services to third parties or the public ...**”. The **Rules** are titled “**the Legal Practitioners’ Practice Rules**” and they are a Code which regulates the conduct of legal practitioners. In particular, **Rule 24**

falls in **Part V** which regulates the conduct of in-house counsel, or employed legal practitioners.

66) The **Rules** do not regulate the conduct of non-legal practitioners as suggested by the decision of the Court of Appeal. The conduct which the Court of Appeal held is regulated by the **Rules** is actually regulated by **sections 48** and **51** of the **Legal Practitioners' Act** which bar legal practitioners acting as agents for unqualified persons and body corporates purporting to act as qualified advocates.

67) We, therefore, dismiss the arguments by counsel for the respondent in the earlier part of this judgment which support the reasoning of the Court of Appeal. We would also like to dispel the notion by the Court of Appeal which counsel for the respondent appeared to endorse that what is at the heart of the dispute is the regulation of counsel in private practice as it relates to their employment as employed legal practitioners. **Part V** of the **Rules** is directed at a legal practitioner's circumstances as an employed legal practitioner. It does not extend to legal practitioners in private practice. Our focus in interpreting **Rule 24** must, therefore, be on

what is permissible and not permissible conduct by employed legal practitioners. In other words, what was the respondent permitted to do and barred from doing as an employee of the appellant as opposed to his role as partner in his law firm.

68) Rule 24(2) specifically prohibits employed legal practitioners from providing legal services to anyone other than their employer. Such practitioner, is therefore, limited in his practice to practicing only for one client, the employer. For this reason, when a practicing certificate is issued to such practitioner, it clearly indicates who the employer is. In the earlier part of this judgment, we have explained the fact that, prior to the enactment of the Rules, there was no provision in the **Act** specifically directed at regulation of employed legal practitioners. The rationale for the introduction of **Part V** of the **Rules** is as follows:

68.1 Prior to the introduction of **Part V** of the **Rules**, employed legal practitioners had a master servant relationship with their employers. **Part V** was intended to redefine this relationship by making employed legal practitioners also accountable to

the profession and exercise some level of independence in discharging their professional duty to the employer;

68.2 Before and after the promulgation of the **Rules**, there has been encroachment on the business of provision of legal services not only by unqualified persons but also members of other professions. The provision of legal services which have suffered the most are conveyancing, liquidations, receiverships and business rescue. This has resulted in the business of provision of legal services shrinking with private practitioners having to scramble for the limited business. This is at great cost to private practitioners and, as a way of leveling the playing field, LAZ limited the players in the business and excluded employed legal practitioner, whose costs and other overheads were taken care of by their employers, therefore, they would have an undue advantage from participating in sharing the shrinking “cake”, called legal business; and,

68.3 Employed legal practitioners are exposed to the clients and trade secrets of their employers. If they are allowed to operate

law firms or practice in private practice, the potential for conflict of interest would be very high because there is a temptation to divert these clients to their own law firms and use the trade secrets to their advantage against their employer. This risk is higher and can be more damaging in institutions such as banks and other financial institutions. Hence the need to restrict the activities of employed legal practitioners to their employers only.

- 69)** Counsel for the respondent has argued that **Rule 24(2)** does not apply to the respondent because of the exception under **Rule 24(1)(a)**. They argued that the exception excludes legal practitioners in private practice and does not prohibit such a practitioner from simultaneously serving as an employed legal practitioner. The appellant countered this by arguing that the exception relates to private practice of a legal practitioner in a law firm as opposed to practicing in-house as an employed legal practitioner.
- 70)** The argument by the respondent fails to recognize the fact that a legal practitioner cannot have a dual role as an employed legal

practitioner and counsel in private practice. The minute counsel in private practice assumes the role of an employed legal practitioner, as the respondent did, he is subject to **Part V** of the **Rules** and loses the right to practice in private practice.

71) The **Rule** does not permit, as asserted by the respondent, an employed practitioner to engage in private practice while still employed by a non-practitioner employer. The reference in **Rule 24(1)(a)** to “... **any private practice of such practitioner** ...” is to emphasise that the provisions of **Part V** will not regulate the conduct of a legal practitioner in private practice. This is the intention we have attributed to the drafters of the **Rules**. We must though, admit the poor draftsmanship of the **Rule**. We can, therefore, understand the misapprehension of the **Rule** by both the Court of Appeal and the counsel for the respondent. In addition, **Rule 24(1)(a)** should not be read in isolation from **Rules 24(2)** and **27(b)** which specifically restrict the practice of employed legal practitioners to representing their employer.

72) Counsel for the respondent also asked us to take judicial notice of the fact that a number of legal practitioners in private practice are

also engaged in other businesses such as lecturing, arbitration and being employed as corporate counsel. He went as far as saying the conduct had assumed the status of usage in the profession. A distinction must be made between permissible separate business as envisaged under **Rule 30** from the limitations of the areas of practice employed legal practitioners are permitted to engage in. All legal practitioners, i.e. those in private practice and employed legal practitioners are permitted to engage in separate business which is unrelated to the practice of the law. But employed legal practitioners cannot engage in private practice and such practice is not the separate business envisaged under **Rule 30**.

- 73)** We listened to counsel make this submission which appeared to suggest that the conduct of the respondent was permissible and wondered, in utter shock, as to whether what we were hearing reflected the low levels to which standards at the Zambian Bar had fallen. Courts take judicial notice of notorious facts such as the sun rising in the east and setting in the west. They do not endorse a breach of practice rules and misconduct however prevalent. The Rules which are subject of this dispute were promulgated by LAZ

with the concurrence of the Chief Justice, *Pater Familias*. We, and indeed all other Courts have an obligation to ensure that the conduct of counsel is in conformity with the Rules.

- 74)** LAZ equally has a responsibility to ensure that the **Rules** are enforced. It, therefore, comes to us as a surprise that while this dispute has been raging in our Courts, which are a public forum, for 6 years now, LAZ has made no effort whatsoever to address it. The best LAZ did was to attempt to file an *amicus* brief before our court well after proceedings had closed and this judgment reserved. No effort was made to join the proceedings as an interested party in the lower courts or indeed our court. LAZ, chose instead, to allow the transgression to go unimpeded. The inaction by LAZ must be condemned in the strongest terms.
- 75)** As for the interpretation to be given to **Rule 27**, we have set out the holding of the Court of Appeal at paragraph 64 of this judgment. To recap, the Court of Appeal took the view that **Rule 27** does not prohibit employed legal practitioners from engaging in private practice.

76) **Rule 27** states as follows”

“27. An employed practitioner shall practice as an advocate or practitioner only where the following conditions are met:

- a) The practitioner holds a current practicing certificate;***
- b) The practitioner is appearing either on behalf of his or her employer, or under the terms of rule 30; and the practitioner shall not act for any employee or client of the employer; and***
- c) The practitioner has practiced as a practitioner for at least three years”.***

Rule 27(a) is a requirement under **section 35** of the **Legal Practitioners Act**. The section obliges all legal practitioners, except those practicing in Government, to apply for practicing certificates on an annual basis.

77) The application for such practicing certificates is made pursuant to **section 36** of the **Legal Practitioners Act** which requires an applicant to complete a declaration form which must, among other things, state: “... **the name and place of business of the applicant ...**” The relevance of this detail is that a legal practitioner is limited to practicing in a particular law firm or institution named

in the application. This is to ensure transparency, i.e. clients know what firm to hold accountable in the event of a professional negligence suit and for ease of regulation by LAZ. **Rule 27(b)** specifically restricts the practising of employed legal practitioners to representing their employers.

- 78)** Last, as for **Rule 27(c)**, the three years practical experience is the minimum number of years a practitioner should practice to qualify to work unsupervised. Most, if not all, employed legal practitioners are not supervised by their seniors, hence the requirement of the three years practical experience.
- 79)** Arising from what we have stated in the preceding paragraph, we hold that there was a misdirection on the part of the Court of Appeal in interpreting **Rule 27**.
- 80)** Coming now to the last ground of appeal on the appellant's contention that it was not heard prior to the Court of Appeal granting the respondent the reliefs he sought. The nature of matter which was deployed before the High Court can be discerned from the notice of complaint and affidavit in support filed by the

respondent and answer, counterclaim and affidavit filed by the appellant. The respondent sought, among other things:

80.1 *An order and declaration that the complainant has been treated differently and/or unfairly by the respondent as compared to the Director, Deputy Director and Finance Manager.*

80.2 *Damages for breach of contract.*

80.3 *An order for the immediate payment of the complainant's accrued gratuity.*

81) In its answer and counterclaim, the appellant contended as follows:

“3. The respondent will aver that the complainant has not been working according to his contract of employment which provides that the complainant work 8 hours a day from 8:00 hours to 17:00 hours from Monday to Friday.

4. The respondent will aver that the complainant negligently did not advise the Chairperson of the Board when his contract of employment was varied without following laid down procedure...”

And the respondent counterclaims:

“1. An order and declaration that the complainant’s terms and conditions as a full-time employee, be changed to that of a part time employee when his contract of employment was varied...”

From what we have revealed above, it is clear that both parties sought declarations to be made by the court. For his part, the respondent sought to have the court declare that he had been treated unfairly and differently from similarly circumstanced employees, while the appellant sought to have the court declare that the respondent’s terms of employment be changed to that of a part time employee.

82) While we have deliberately refrained from commenting on the tenability or viability of the two declaratory reliefs alluded to above, a perusal of the decision by the Learned High Court Judge reveals that he did not consider these reliefs and, therefore, did not grant or dismiss them. However, his determination that the contract of employment was a nullity because it was in contravention of the **Rules** in effect determined the respondent’s claim with finality as

he could not benefit from such a contract. In other words, the reliefs claimed could not be awarded to him. This is in line with the **Mohamed S Itowala v Variety Bureau de Change²** case. Some of the claims made by the appellant were also negated by the nullification of the contract such as the claim for variation of the contract terms to part time basis.

83) The appellant attributed professional negligence to the respondent arising from the latter's failure to advise the Chairperson of the appellant's Board of Directors *vis a vis* the execution of his duties. This claim was not determined by the High Court and was thus not the subject of the appeal to the court. The issues which the High Court determined have been set out at paragraphs 14 and 17 of this judgment. They are all directed at resolution of the respondent's claim and not the appellant's counterclaim. These were the issues which were escalated to the Court of Appeal.

84) We agree with the argument by counsel for the respondent that an appeal is a rehearing on the record and that as long as there is sufficient material on the record for an appellate court to determine an issue the trial court did not determine, the appellate court

should, for expediency's sake and saving on the parties' costs, determine it. The omission to determine such an issue by the trial court may in itself be a ground for appeal. However, the nature of the reliefs sought by the appellant which were not determined by the High Court Judge especially the allegation of negligence on the part of the respondent in his advice to the appellant's Board Chairperson, involve conflicting evidence which was not resolved. The fate of some of this evidence might depend on the demeanor of the witnesses which only a trial, and not appellate court, can resolve.

85) For this reason, we are of the firm view that the Court of Appeal erred when it proceeded to determine the fate of the appellant's counterclaim before the High Court heard it on the merits and without affording the appellant an opportunity to be heard. We are also of the firm view that this is an appropriate matter to refer back to the Learned High Court Judge to determine the counterclaim by the appellant. We are compelled to explain that the reliefs sought in the counterclaim are not defeated by the holding of the High Court Judge that the contract was a nullity because the

nullification of the contract does not invalidate the relief sought by the appellant relating to the respondent's alleged negligence in the performance of and prior to entry into the contract of employment in question. That is in relation to the advice which was given to the appellant's Board Chairperson by the respondent on amendment of the contract. However, the claim for negligence as it relates to the respondent's execution of his duties under the nullified contract is affected by its nullification and cannot be claimed.

86) We also note that the negligence which has survived the nullification of the contract is not an employment dispute. It will therefore, have to be pursued in the appropriate Division of the High Court.

Order and conclusion

87) We accordingly order as follows:

87.1 We set aside the decision of the Court of Appeal in its entirety.

87.2 We uphold the decision of the Learned High Court Judge to the extent only that it held the contract of employment to be

a nullity and that the parties could not enforce any of the rights or obligations arising therefrom.

87.3 We remit the matter back to the High Court for purposes of determination of the appellant's counterclaim as it relates to the alleged negligence perpetrated by the respondent prior to execution of the contract of employment.

87.4 The appeal therefore, succeeds on all four grounds. In view of the Division from which this appeal emanated, we order that the parties will bear their respective costs.

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M. MUSONDA, SC
DEPUTY CHIEF JUSTICE

RETIRED
.....
J. K. KABUKA
SUPREME COURT JUDGE

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