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

SCZ/07/32/2024

BETWEEN:

KAPSCH TRAFFICCOM SOUTH AFRICA HOLDING PTY LIMITED — **APPLICANT**

AND

INTELLIGENT MOBILITY SOLUTIONS LIMITED — **RESPONDENT**

LAMISE TRADING LIMITED — **INTERESTED PARTY**

CORAM: **Malila CJ, Kaoma and Chisanga JJS**
on 4th March, 2025 and 3rd September, 2025

For the Applicant:	Mr. K. Phiri – Corpus Legal Practitioners
For the Respondent:	Mr. P. Chomba – Messrs Mulenga Mundashi Legal Practitioners
For the interested Party:	Mr. L. Linyama with Mr. J. Chileshe – Messrs Eric Silwamba, Jalasi, Linyama Legal Practitioners

R U L I N G

Malila, CJ delivered the ruling of the Court.

Cases referred to:

1. *Kakoso Metals Limited v. Konkola Copper Mines Plc. (SCZ/7/2024)*
2. *Jonathan Van Blerk v. Attorney General & Others (Appeal No. 7 of 2020)*
3. *Zana Enterprises Limited & 20 Others v. National Pension Scheme Authority and Liberty Properties Ltd. (Appeal No. 122/2013)*

4. *Muvi Television Limited v. National Pensions Scheme Authority and Liberty Properties (SCZ Appeal No. 57/2013)*
5. *Barclays Bank Plc. v. Jeremiah Njovu and 41 Others (Appeal No. 140/2015)*
6. *Stanbic Bank Zambia Limited v. Micoquip Zambia Limited (Appeal No. 134/2012)*
7. *July Donobo v. Chimsoro Farms Limited (2009) ZR 149*
8. *Zambia Revenue Authority v. Charles Walumweya Muhau Masiye (SCZ Appeal No. 56 of 2012)*
9. *Access Bank (Z) Ltd. v. Group Five ZCON Business Park Joint Venture (SCZ/8/52/2014)*
10. *Leopold Walford (Zambia) Limited v. Unifreight (1985) ZR 65*
11. *Lewis Chisanga Mosho v. Shoprite Holdings Ltd (SCZ Appeal No. 40 of 2014)*
12. *In Bank of Zambia (As Liquidator of Credit African Bank Ltd. in liquidation) v. AL Shams Building Materials Company Ltd. (Appeal No. 214/2013)*
13. *Peter David Lloyd v. JR Textile Limited (SCZ Appeal No. 137 of 2011)*
14. *Socotec International Inspection (Z) Ltd. v. Finance Bank (Appeal No. 149 of 2011)*

Other work referred to:

1. *Court of Appeal Act No. 7 of 2016*
2. *Corporate Insolvency Act No. 9 of 2017*
3. *Companies (Winding-up) Rules 1929*
4. *Companies (Winding-up) Rules 2004*
5. *Supreme Court Rules, Chapter 25 of the Laws of Zambia*

1.0. INTRODUCTION

1.1. The proper identification of the circumstances under which leave to appeal from the Court of Appeal to the Supreme Court must be granted, has continued to cause angst and consternation to many parties desiring to appeal. This is not because the factors which should inform the grant of leave are

not properly defined or explained. In point of fact, they are clearly set out in section 13(3) of the Court of Appeal Act and have been elaborated upon by this court. The real difficulty is how to logically and convincingly structure and locate the grounds of appeal within the section 13(3) bases for the grant of leave to appeal.

1.2. A distinct though related, and equally worrisome issue has to do with the preparation of records of motion, compliant in every which way with the relevant rules of court. In the present motion both these challenges play out prominently, though this ruling turns on the latter issue.

2.0. BACKGROUND

2.1. The applicant in this motion tried, without success, to obtain leave to appeal a decision of the Court of Appeal given against it on 15th March, 2024. The Court of Appeal disagreed with the applicant that the proposed appeal satisfied any of the threshold factors prescribed in section 13(3) of the Court of Appeal Act.

2.2. A renewed application for leave to appeal launched before a single judge of this court suffered no better fate. He pronounced himself on each of the arguments relative to the factors relied upon by the applicant to justify the grant of leave, stating that he was not persuaded that a proper case for the grant of leave had been made. The whole application for leave hadn't a leg to stand on.

2.3. Feeling blue, the applicant renewed the application to the full court through the current motion. As in the previous two attempts to obtain leave, the applicant contended that the two grounds of appeal it had proposed to put forth raised a point of law of public importance and offered prospects of success.

2.4. Those two grounds, as set out in the initial motion for leave to appeal filed before the Court of Appeal, read as follows:

> 1. **The court below erred in law and in fact when it found at page J35 of the judgment that the court below could determine on its own motion that the petition was irregularly before the court in the absence of a formal application by the Interested Party challenging the said irregularity contrary to judicial precedent of the Supreme Court when the law requires that parties should adhere to**

procedural rules in the manner that applications are filed before court; and

2. **The court below erred in law and in fact when it found at page J37 and J38 of the judgment that the amount owed was disputed on substantial grounds and that the applicant had not yet proved the debt thereby denying the applicant's petition to wind-up the respondent which was against the weight of the evidence and the law contrary to well established principles of perverse findings in regard to evidence.**

2.5. Put into its factual perspective, the action before the High Court was one by the applicants for winding-up of the respondent company. This followed the alleged failure by the respondent company to settle accounts arising from some business transactions involving goods and services supplied by the former to the latter. The interested party was a shareholder in the respondent company and sought to join the winding-up petition as a such.

2.6. The High Court found, among other things, that the debt had been disputed on substantial grounds and that the proceedings before it were not proper proceedings for the court to settle the question as to how much was owed by the respondent to the applicant (petitioner). It also held that while the applicant's

reliance upon section 57(1)(b) of the Corporate Insolvency Act No. 9 of 2017 in bringing up the winding-up petition was faultless, the reliance by the applicant on the Companies (Winding-up) Rules 1929 was wrong as the correct Rules to have been relied upon were the Companies (Winding-up) Rules 2004. The court thus dismissed the petition.

2.7. On appeal by the applicant to the Court of Appeal, that court agreed with the lower court that it was the 2004 Companies (Wingding-up) Rules rather than the Companies (Winding-up) Rules 1929, which applied. It also agreed with the High Court that the amount owed by the respondent to the applicants was disputed on substantial grounds. The court thus dismissed the appeal and upheld the High Court judgment.

2.8. The applicant then sought leave to appeal the Court of Appeal judgment on the basis of the reasons set out at paragraph 2.3, which leave, as stated at paragraph 2.1 was declined.

2.9. At the hearing, on 4th March 2025, of the renewed application for leave to appeal, we were confronted with a technical challenge regarding the record of motion before us. Mr. Phiri,

learned counsel for the movant of the motion, rose to pre-emptively inform us that the applicant's record of motion was not in conformity with rule 48 of the Supreme Court Rules.

2.10. To ensure that a compliant record of motion was before us, the learned counsel sought leave to withdraw the record, effect amendments to it, and then refile it.

2.11. Mr. Chomba, learned counsel for the respondent, offered no objection to the application.

2.12. Mr. Linyama, learned counsel for the interested party, stoutly but shortly opposed the application. He submitted that once withdrawn the motion would stand dismissed. He cited the case of **Kakoso Metals Limited v. Konkola Copper Mines Plc**[1] where we guided that withdrawal of a motion could lead to the dismissal of the same. He prayed for costs.

2.13. Mr. Chileshe, learned co-counsel for the interested party, reiterated Mr. Linyama's brief submission, recalling that it was on the 3rd December 2024 when we did not allow a motion with similar defects as the current motion to proceed, but urged the

movant of the motion to withdraw it. Upon withdrawal, the motion was dismissed with costs.

2.14. In replying to the submissions made on behalf of the interested party, Mr. Phiri invoked the Rubicon principle as we explained it in the case of **Jonathan Van Blerk v. Attorney General & Others**[2]. He submitted that in that case we were faced with a similar situation as in the present. There was a defect in the record of appeal and we were of the view that the sanction of dismissal of the appeal should only be given when the Rubicon had been crossed. In that case, it had not.

2.15. To be clear, in **Jonathan Van Blerk v. Attorney General & Others**[2], we stated as follows:

> **In the present case, the appellant has not crossed the Rubicon by proceeding to argue the appeal in the face of hurdles presented by the preliminary objection, but has instead opted to withdraw the appeal so as to cure the defects.**

2.16. Mr. Phiri relied on the above quoted judgment to urge us to allow the amendment upon the withdrawal of the motion, and the filing of a fresh record.

3.0. ANALYSIS AND DECISION

3.1. As we have observed at the outset of this ruling, preparation and submissions of non-compliant records of motion has featured repeatedly in our court leading to delays, adjournments and in some cases, dismissal of the motions. This invariably entails additional costs and potential prejudice to one or both parties.

3.2. The question we are here confronted with is whether, once a record of motion is withdrawn, the inevitable consequence is that it stands dismissed.

3.3. As we stated at the time we adjourned this matter after hearing the parties, our jurisprudence on the point seems at face value to be ambivalent on the consequences of failure to comply with the rules regarding the preparation of the record of appeal or record of motion.

3.4. In **Zana Enterprises Limited & 20 Others v. National Pension Scheme Authority and Liberty Properties Ltd**[3], we broadly expressed ourselves on the effect of withdrawal of an appeal as follows:

> **On a broader canvass, we are of the settled view that once a notice of withdrawal or discontinuance of appeal [is filed],**

whether with or without an order of the court, the abandonment implies that the appeal is dismissed. When an appeal is withdrawn at the stage when it is ripe for hearing, as in the present case, it is by implication a concession that it has no prospects of success, for whatever reason. The effect of the withdrawal, therefore, is that the appeal is dismissed...

3.5. The underlying reasoning in the **Zana**[3] case that abandoning of a cause at the advanced stage often implies acknowledgement of lack of merit was applied in **Muvi Television Limited v. National Pensions Scheme Authority and Liberty Properties**[4].

3.6. Quite a different result was given in **Barclays Bank Plc. v. Jeremiah Njovu and 41 Others**[5]. There, referring to an earlier order involving the same parties, we stated as follows:

While agreeing with the respondent's lawyer that there is no rule in the Supreme Court Rules that allows a party to withdraw a record of appeal, we pointed out that Rule 68 of the Supreme Court Rules, which entitles a party to amend a record of appeal, inevitably entails in effect, a withdrawal of the record sought to be amended for purposes of replacing it with the corrected or amended record. We also pointed to our inherent jurisdiction and the need to do justice as founding our authority to reprieve an appeal by allowing a withdrawal of a record even in the absence of a clear stipulation to that effect in our rules. Having said so we concluded as follows:

> **We accordingly grant the appellant leave to withdraw the record of appeal so as to comply with Rule 58(5) of the Supreme Court Rules.**

3.7. More significantly, in the **Jeremiah Njovu**[5] case, we delved into the nuanced distinction between withdrawing a record of appeal and withdrawing the appeal itself. It was that fine distinction that we repeated in **Stanbic Bank Zambia Limited v. Micoquip Zambia Limited**[6] when we stated as follows:

> **We have seriously considered the application to withdraw the record of appeal. The position of this court as taken in the case of *Barclays Bank Zambia Limited v. Jeremiah Njovu and 41 Others*[5] is that the withdrawal of the record of appeal, even if it contains a copy of the notice of appeal, is not synonymous with the withdrawal of the appeal and that this is more so where the withdrawal of the record of appeal is with a view of correcting a defect, either in the record itself or the process leading to its filing.**

3.8. As regards the dismissal of appeals on account of the failure to comply with rules in its preparation, Rule 68(2) of the Supreme Court Rules states that:

> **If the record of appeal is not drawn up in the prescribed manner, the appeal may be dismissed.**

3.9. In **July Donobo v. Chimsoro Farms Limited**[7] we stated that:

> **... failure to compile the record of appeal in the prescribed manner is visited by sanctions under Rule 68(2) of the Rules of**

> **the Supreme Court. The sanction is that the appeal may be dismissed. In this case, there is no doubt, and is admitted by the learned counsel for the appellant, that the record of appeal is incomplete as the record of proceedings of the court below is missing. It follows that the record of appeal is not prepared in the manner prescribed by the rules of court. We therefore invoke the provisions of Rule 68(2) and dismiss the appeal.**

3.10. Likewise, we dismissed the appeal under Rule 68(2) of the Rules of the Supreme Court in **Zambia Revenue Authority v. Charles Walumweya Muhau Masiye**[8] as the irregularities went to the root of the appeal. This is principally because as we pertinently observed in **Access Bank (Z) Ltd. v. Group Five ZCON Business Park Joint Venture**[9]**:**

> **... justice also requires that this court; indeed, all courts, must never provide succour to litigants and their counsel who exhibit scant respect for the rules of procedure. Rules of procedure and timelines serve to make the process of adjudication fair, just and even-handed.**

3.11. We have however, also held that not every failure to comply with court rules will be fatal. Thus, in both **Leopold Walford (Zambia) Limited v. Unifreight**[10] and **Lewis Chisanga Mosho v. Shoprite Holdings Ltd**[11] we stressed that a breach of a regulatory rule that is curable is not lethal to the defaulter's case. Thus, in **Bank of Zambia (As Liquidator of Credit African Bank Ltd. in liquidation) v. AL**

Shams Building Materials Company Ltd.[12] we decided that not every breach of a procedural rule will attract the ultimate sanction of dismissal of an appeal.

3.12. Thus, in **Peter David Lloyd v. JR Textile Limited**[13] the appellant omitted from the record of appeal an affidavit and transcript of proceedings. We held that, on the facts of the case, the defect was curable and we allowed the appellant to amend the record of appeal.

3.13. As we stated in the **Jonathan Van Blerk**[2] case,

> **It should also be borne in mind that not all cases are similar. We invariably have to make decisions based on the particular facts of each case. In this case, the respondents have not shown that they would suffer any prejudice if the application to withdraw and amend is granted. An amendment would in our view bring to the fore the real dispute in issue. We therefore allow the application as prayed and order that the applicant refile his record of appeal as amended within thirty days of the date of this ruling failing which the appeal shall stand dismissed.**

3.14. More somberly, in **Socotec International Inspection (Z) Ltd. v. Finance Bank**[14], we allowed the appellant whose record had omitted certain documents, to amend the record. We observed in that case that:

Whether the appeal will be dismissed or not will depend on the peculiar circumstances of each case.

3.15. We understand the apparent uneasiness of counsel at the hearing of the motion. They each clung to authorities favourable to their respective sides and did not elaborate on the nuances or peculiarities of the case so as to locate it in one and not the other of the authorities.

3.16. These authorities were decided by us, but at face value appear irreconcilable. The seemingly diametrically opposed positions in case law on the issue instigates repeated appeals to this court to clarify under what circumstances a failure to prepare a record of appeal or record of motion will be fatal.

3.17. In an application that dealt specifically with a failure to comply with the rules relating to the preparation of a record of appeal, we seized the opportunity to explain ourselves on the seemingly contradictory positions we have taken. This was in the case of **Access Bank (Z) Ltd. v. Group Five ZCON Business Park (Z) Ltd**[9]. We in that case stated as follows:

Although at first blush our decisions on when or when not to dismiss an appeal for failure to comply with rules of court appear contradictory, they are in truth not. In our estimation,

> **the wording of Rule 68 is not a panacea for allowing all procedural shortfalls. It is plain that whether or not an appeal is to be dismissed under that rule is to be taken on a case-by-case basis. As counsel for the applicant has rightly submitted, this invariably implicates the exercise of judicial discretion. Since facts of two cases are never always the same, a court cannot be bound by a previous decision to exercise discretion in a regimented way because that would be, as it were, putting an end to discretion.**

3.18. Granted the foregoing exposition, and without getting into the nuances of whether a withdrawal of a record of motion is synonymous with the withdraw of the motion for leave, we must determine each application to withdraw the record for purposes of amendment and refiling, on its own contextual matrix and merit. Here, the respondent did not object to the application. The interested party did not demonstrate, or even suggest that it is bound to suffer any prejudice. The applicant had not crossed the Rubicon but made the application totally unprompted by either opposing parties or the court.

3.19. The pendulum, in our view, weighs in favour of the applicant. We are thus inclined to exercise our discretion in favour of granting the application to withdraw the record, amend it and refile it, and we do so.

3.20. We thus allow the application by the applicant as prayed and order and direct that the applicant be, and is hereby permitted to withdraw its record of motion and to amend it within thirty (30) days from the date of this ruling failing which the motion shall stand dismissed.

3.21. We order that costs shall be in the cause.

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Mumba Malila
CHIEF JUSTICE

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R. M. C. Kaoma
SUPREME COURT JUDGE

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F. M. Chisanga
SUPREME COURT JUDGE