

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2022/HP/A047

IN THE MATTER OF: SECTIONS 5, 72, 73, 74, 75 AND 77 OF THE
ACCOUNTANTS ACT NO 13 OF 2008

AND

IN THE MATTER OF: ALLEGED PROFESSIONAL MISCONDUCT OF
A MEMBER

BETWEEN:

HLB ZAMBIA (*Sued as a Firm of Accountants*) **APPELLANT**

AND

ZAMBIA INSTITUTE OF CHARTERED ACCOUNTANTS **RESPONDENT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THE 14th DAY OF AUGUST,
2023.

For the Appellant : Mr. N. Yalenga, Messrs Nganga Yalenga & Associates and
Mr C. Mapape, in house Counsel

For the Respondent : Mr. R. Musumali and Mr. M. Nyirenda, Messrs SLM Legal
Practitioners

J U D G M E N T

CASES REFERRED TO:

1. *Re Liso* 1969 ZR 6
2. *Phiri v The People* 1970 SJZ 178
3. *Solomon Chilimba v The People* 1971 ZR 36
4. *Mulenga v Mumbi Ex Parte Mhango* 1975 ZR 78
5. *Augustine Kapembwa v Danny Maimbolwa and Attorney-General* 1981 ZR 127
6. *Attorney General v Marcus Kapumbe Achuime* 1983 ZR 1
7. *Anderson Kambela Mazoka v Levy Patrick Mwanawasa* SCZ EP 1 of 2002
8. *Sablehand Zambia Limited v Zambia Revenue Authority* 2005 ZR 109
9. *Sonny Paul Mulenga & Vismer Mulenga v The Valuation Surveyors Registration Board* 2009 ZR 54

10. *Hanif Bhura v Ismail Ibrahim Ismail Appeal No 146/2013*

LEGISLATION REFERRED TO:

1. ***The Partnership Act 1890***
2. ***The Accountants Act No 13 of 2008***

OTHER WORKS REFERRED TO:

1. ***Maxwell on Interpretation of Statutes 12th Edition by P St J Langan***

1. INTRODUCTION

1.1 This is an appeal by the Appellant, HLB Zambia, a firm of Accountants, which was disciplined by the Respondent, the Zambia Institute of Chartered Accountants, and was found guilty of professional misconduct on 8th September, 2022.

2. BACKGROUND

2.1 The background of the matter, is that on 31st January, 2020, the Securities and Exchange Commission lodged a complaint with the Zambia Institute of Chartered Accountants. That complaint alleged that HLB Zambia, was engaged by Laurence Paul Investments Limited, an entity that is licenced by the Securities and Exchange Commission and is authorised to manage a Collective Investment Scheme (CIS) known as Laurence Paul Unit Trust (LPUT), to audit its' financial statements for the financial years ending 31st December, 2016, 31st December 2017 and 31st December, 2018.

2.2 In December, 2018, the Securities and Exchange Commission directed all CIS Management Companies to self-declare assets and liabilities arising from deposit taking activities, which is not permitted under the dealer's

licences, which were issued by the said Securities and Exchange Commission. In pursuance of that directive, the Securities and Exchange Commission undertook a detailed review of Laurence Paul Investments Limited's audited financial statements and other information which was submitted for the company for the stated period, in Order to ascertain its' compliance.

2.3 In its' complaint to the Zambia Association of Chartered Accountants, the Securities and Exchange Commission alleged the following:

- i. That HLB failed to account for the treatment of investment land which was purchased by Laurence Paul Investments Limited in the audited financial statements of 2018, which amounted to Eleven Million Seven Hundred and Sixty-Two Thousand, Four Hundred and Eighty-Two Kwacha (K11, 762, 482.00), which had been disclosed as other short-term investments, and there were no further disclosures regarding the short-term deposits.
- ii. That the firm in the audited financial statements of 2018, included an amount of Nineteen Million Eight Hundred and Sixteen Thousand Kwacha (19, 816, 000.00) and disclosed it as Long-Term Investments, which amount was further disclosed as land in Siavonga, which was acquired for speculation and re-sale.

- iii. In addition, it included the amount of Eleven Million Seven Hundred and Sixty-Two Thousand, Four Hundred and Eighty-Two Kwacha (K11, 762, 482.00) which was reflected in the 2017 audited financial statements as other short-term investments. Further, there was no disclosure of the accounting policy on investment property in the notes to the audited financial statements.
- iv. The audited financial statements did not discuss whether the entity accounted for land using IAS 40, IFRS 5 or IAS 16. It was not clear whether the property met the definition of investment property.
- v. The directors report for the audited financial statements from 2016 to 2018 were not dated.
- vi. The auditor's report on legal and other regulatory requirements did not make mention of the Securities Act.
- vii. There was inadequate disclosure of the events after the reporting dates in the audited financial statements for 2016, 2017, and 2018. This was on account of the collapse and liquidation of Genesis Financial Services Limited in 2017, followed by the collapse of Focus Financial Services Limited in 2018, both events which occurred after the 2016 and 2017 year ends and before the audited statements were approved.

- viii. There were insufficient details on related party transactions with regard to the Laurence Paul Unit Trust with Focus Financial Services Limited. Further, there was no disclosure of liability of Eight Hundred and Eighty-Eight Four Thousand Nine Hundred and Thirteen Kwacha (K884, 913.00), which was owed to the Laurence Paul Unit Trust, arising from the collapse of Genesis Financial Services Limited in which Laurence Paul Unit Trust had invested. In the audited financial statements of 2018, an amount of Five Million Three Hundred and Thirty-Six Thousand, Five Hundred and Sixty-Seven Kwacha (K5, 336, 567.00) reported to have been owed to Laurence Paul Group was not reflected in the statement of financial positions.
 - ix. The printout from the Ministry of Lands on the Seven (7) parcels of land indicated that there was no disclosure of related party transactions as Six (6) parcels of land were in the names of the company director, former accountant and other individuals, and not in Laurence Paul's names.
 - x. The audited financial statements for the stated period had typos which raised questions about the reviews that were undertaken by HLB Zambia as the auditor.
- 2.4 HLB responded to the allegations denying the allegations, and a hearing was held. In a Ruling dated 8th September, 2022, the Disciplinary Committee of the Zambia Institute of
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Chartered Accountants found HLB Zambia guilty of professional misconduct, and Ordered as follows:

1. HLB Zambia is hereby censured.
2. HLB Zambia is hereby cautioned.
3. HLB Zambia is hereby fined One Hundred Thousand Penalty Units to be paid to the Securities and Exchange Commission within Thirty (30) days of the Ruling; and
4. HLB Zambia shall bear the costs of the complaint; and
5. Leave to appeal to the High Court within Thirty (30) days is granted.

3. NOTICE OF APPEAL

3.1 HLB Zambia, being dissatisfied with the Ruling, filed a Notice of Appeal on 30th September, 2022, raising the following Four (4) grounds of appeal:

1. The Disciplinary Committee of the Zambia Institute of Chartered Accountants erred in law and fact, when it held that HLB Zambia was guilty of professional misconduct in the absence of evidence to support the findings.
 2. The Disciplinary Committee of the Zambia Institute of Chartered Accountants erred in law and fact when it held that HLB Zambia as whole was liable to be censured for the alleged misconduct of a single member when Act No 13 of 2008, places the liability for misconduct on an individual member.
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3. The Disciplinary Committee of the Zambia Institute of Chartered Accountants erred in law and fact when it found and held that HLB Zambia had colluded with Laurence Paul Investments Limited to elude the provisions of the law and mislead potential investors in Laurence Paul Investment Services Limited when no such evidence was laid before the Committee.
4. The Disciplinary Committee of the Zambia Institute of Chartered Accountants erred in law and fact when it imposed the highest fine possible, when HLB Zambia was allegedly a first offender.

4. APPELLANTS HEADS OF ARGUMENT

- 4.1 HLB Zambia argued the grounds of appeal as below:

GROUND ONE

THE DISCIPLINARY COMMITTEE OF THE ZAMBIA INSTITUTE OF CHARTERED ACCOUNTANTS ERRED IN LAW AND FACT, WHEN IT HELD THAT HLB ZAMBIA WAS GUILTY OF PROFESSIONAL MISCONDUCT IN THE ABSENCE OF EVIDENCE TO SUPPORT THE FINDINGS.

- 4.2 In arguing this ground, it was stated that HLB Zambia is subject to the *Accountants Act No 13 of 2008*, as well as other international codes that regulate the accountancy profession. Therefore, in arguing the appeal, reliance was placed on the *Accountants Act No 13 of 2008* as well as the *IFAC Revised Code of Ethics*.
- 4.3 It was argued that Part 7 of the *Accountants Act No 13 of 2008* provides for disciplinary matters. Further *Section 72*

of the said Act lists what amounts to professional misconduct, and that this Section is read together with **Section 2 of the Act** in respect of offences under the Act. It was further argued that under **Section 73 (2) of the Act**, disciplinary proceedings can only be instituted where there are reasonable grounds to believe that a Chartered Accountant or a member has contravened either the Code of Ethics or the Act.

- 4.4 **Section 320.1 of the IFAC Code of Ethics** is further relied on, as providing that:

“A professional Accountant in the business should prepare or present such information fairly, honestly and in accordance with relevant standards so that the information will be understood in its’ context.”

- 4.5 It was argued that the issue that was to be decided by the Committee, was whether there was sufficient evidence or any evidence at all, to substantiate the claim that there was professional misconduct on the part of HLB Zambia. **Section 77 (4) of the Accountants Act No 13 of 2008** was cited as providing guidance on the discharge of the Committee’s mandate as follows:

“(4) A hearing before the Disciplinary Committee shall, for all purposes, and in particular for the purposes of Chapter XI of the Penal Code, be deemed to be a judicial proceedings.”

- 4.6 The argument was that in light of the above provision, the Disciplinary Committee is required to be impartial, and was required to treat HLB Zambia fairly, and not to interpose its' own understanding and opinions, save for purposes of seeking clarity on issues that were brought out in the evidence. It was also submitted that the maxim, he who alleges must prove, applied to the Disciplinary Committee.
- 4.7 Consequently, it was for the Complainant, being the Securities and Exchange Commission to establish the misconduct by presenting facts that proved the allegation. It was argued that the only issue that was to be resolved by the Disciplinary Committee, was the treatment of land that was purchased by Laurence Paul, and whether as a result thereof, there was professional misconduct in the manner the same purchase was treated by HLB Zambia.
- 4.8 It was contended that the Disciplinary Committee in arriving at a decision that HLB Zambia had misconducted itself professionally, was bound by the definition and the provisions of **Section 72 of the Act**, entailing that it is not every wrong or disagreeable conduct that can be labelled as professional misconduct.
- 4.9 The findings of the Disciplinary Committee were stated as:
1. That the financial statements for the year ended 2017 disclosed that the land was not fully paid for and it was described as a short-term deposit. The Committee held that a short-term deposit is a financial asset that is accounted for under Financial International
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Reporting Standard IFR9. This being the case, land is a non-financial asset to be accounted for under IAS 16 or IAS 40.

2. The disclosure of the land as a short-term deposit implied that the value of the land could be easily liquidated into cash, which impacted on an investor's decision to invest. Further, that the land was in an area that could not easily be sold, and no title had been obtained, and the land remained traditional land.
3. The asset was not disclosed as held for sale and since there was no title, Laurence Paul had no authority to sell it.
4. There had been a failure to obtain and to review documentary evidence to ascertain ownership and existence of any fixed asset.
5. HLB Zambia had failed to prove ownership of the land beyond the documents that were submitted by the client.
6. There was inadequate work that was done by HLB Zambia in ascertaining whether the land in question was purchased by Laurence Paul in 2017, and conditions fulfilled for the right to the land to pass on to Laurence Paul for them to recognise the asset.
7. There was insufficient disclosure of the fact that the land was not on title and that there were director's interests which were also not disclosed.

8. The reclassification in 2018 had no disclosure of the circumstances that led to the said reclassification, contrary to the dictates of IAS 1.41 on reclassifications.
 9. There was failure to follow IAS 710 on misstatement in Prior Period Financial Statements (para12).
 10. There was failure to recognise the operating legal framework and regulation that Laurence Paul was required to comply with i.e there was no mention of whether Laurence Paul had complied with the Securities Act or not.
 11. There was failure to make adjustment and disclosures of events after the reporting dates for the accounts 2016, 2017 and 2018 on account of collapse of Genesis Financial Services Limited in 2017 and Focus Financial Services Limited in 2018 (being the companies that Laurence Paul had invested in) in apparent violation of IAS 560.
 12. There was no disclosure of liability in the sum of Eight Hundred and Eighty-Eight Four Thousand Nine Hundred and Thirteen Kwacha (K884, 913.00) which was owed to Laurence Paul Unit Trust from the collapse of Genesis Financial Services Limited in which Laurence Paul Unit Trust had invested.
 13. A sum of Five Million Three Hundred and Thirty-Six Thousand Five Hundred and Sixty-Seven Kwacha (K5, 336, 567.00) which was reportedly owed to the
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Laurence Paul Group had not been reflected in the statement of financial position in 2018, arising from the collapse of Genesis Financial Service Limited.

14. There was no disclosure of related party transactions contrary to the ISA 550 and ISA 700.12 as regards the Seven (7) pieces of land as Six (6) of those pieces of land were in the names of a director, an accountant and other individuals and not Laurence Paul's name.
15. HLB Zambia failed to disclose the related party transactions either because they were aware of the related party or appeared to cooperate with Laurence Paul's decision to conceal the transaction, thus misleading the users of the financial statements. This was a material disclosure that the investors should have been made aware of, as it is material information impacting on the company's potential decision and financial position.
16. HLB Zambia failed to properly review the directors' financial statements to ensure that they gave a true and fair view of the financial position of the company and its' financial performance in accordance with Section 265 of the Companies Act on account of the types of typos in the accounts for the period under review.
17. There was failure to comply with ISA 315 which requires auditors to identify and assess the risks or material misstatements through understanding the

entity and its' environment. HLB Zambia failed to report Laurence Paul's compliance with the legal and regulatory framework as espoused by the Securities Act.

4.10 The argument was that the record showed that the Securities and Exchange Commission called only One (1) witness Nonde Sichilima. It was contended that from the evidence on record, the Securities and Exchange Commission was intent on making HLB Zambia an example. Thus, Nonde Sichilima was a witness with an interest to serve and his testimony required corroboration.

4.11 That be that as it may, of critical importance to the decision, was that Nonde Sichilima testified that he was not up to date with audit knowledge, as he left audit a long time ago. Thus, he was unable to speak to some of the audit standards. The assertion was that Nonde Sichilima prevaricated on the important issue of "short term deposit", by stating in one instance that it was not in Order to report land as a short-term deposit in 2017, and on the other hand, stated that the Securities and Exchange Commission had its' own understanding of what constituted a short-term deposit, which did not include land, to merely having an issue with the presentation.

4.12 HLB Zambia's contention was that this could not be the degree of proof that was sufficient, for the Disciplinary Committee to met out punitive sanctions against it. Examples were given, of whether intention to sell the land

within Twelve (12) months qualified to have the land classified as a short-term deposit in 2017, and Nonde Sichilima had responded that it probably did, because they did not know what standard was applied at the time. He went on to state that it was difficult to state that they were right.

- 4.13 HLB Zambia argued that in its' view, this was a very serious indictment on the allegation of professional misconduct. It was stated that there could be no gray areas, as it was either that HLB Zambia had failed to meet that standard of reporting or it did. The argument was further that the Disciplinary Committee, by virtue of exercising judicial powers, could not fill in the gaps on behalf of the complainant, despite the many opinions that were expressed by the members when the witness for HLB Zambia, Herbert Mambo testified.
- 4.14 It was also stated that when the Chairperson of the Disciplinary Committee asked Nonde Sichilima if there was a format in which HLB Zambia should have presented the audit report, he had responded that there was no such format, and that the Zambia Institute of Chartered Accountants, as regulator of Accountants, was better placed to answer that question.
- 4.15 The argument was that in HLB Zambia's view, that question should have been resolved by the Securities and Exchange Commission calling witnesses to answer the question whether the report as prepared by HLB Zambia,

met the basic and complied with the minimum audit reporting standards. It was stated that no reporting standards were shown that HLB Zambia had breached.

4.16 It was further argued that Nonde Sichilima seemed to have been displeased with manner of reporting and presentation of the disclosures. However, HLB Zambia's witness, Herbert Mambo had shown the Disciplinary Committee what standard was used for the treatment of the land in the subsequent years, in spite of there having been speculation by a member Mr. Simfukwe, that the change was due to the fact that it had become clear that the land was not being sold.

GROUND TWO

THE DISCIPLINARY COMMITTEE OF THE ZAMBIA INSTITUTE OF CHARTERED ACCOUNTANTS ERRED IN LAW AND FACT WHEN IT HELD THAT HLB ZAMBIA AS A WHOLE WAS LIABLE TO BE CENSURED FOR THE ALLEGED PROFESSIONAL MISCONDUCT OF A SINGLE MEMBER WHEN ACT NO 13 OF 2008 PLACES LIABILITY FOR MISCONDUCT ON INDIVIDUAL MEMBERS

4.17 As regards ground Two of the Appeal, it was stated that as could be seen from the record, the complaint that was lodged by the Securities and Exchange Commission, was with regard to the quality of the audit reports relating to Laurence Paul which were prepared by the late Jonathan Mwale. It was further stated that the initial charge was

directed at the late Jonathan Mwale, who was asked to exculpate himself.

- 4.18 However, following the unfortunate passing on of Jonathan Mwale, the Disciplinary Committee for the Zambia Institute of Chartered Accountants decided to charge the entire firm with misconduct. Thus, a challenge by way of preliminary issue was raised to the charge, which was dismissed. In that regard, reference was made to the Ruling at page 250 of the Record of Appeal, in which the Disciplinary Committee stated that under ***the Partnership Act***, every partner is an agent of the firm and his other partners for purposes of the business of the partnership.
- 4.19 Further, that the acts of every partner who does any act for carrying out the usual business of the kind carried on by the firm, of which he is a member, binds the firm and the partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the persons with whom he is dealing, knows that he has no authority or does not believe him to be a partner.
- 4.20 The Disciplinary Committee on that basis, found that the late Jonathan Mwale was acting on behalf of the firm and his engagement was in furtherance of the usual business of HLB Zambia. As such, his acts bound the firm and the partners.
- 4.21 ***Sections 5,9 10, 11 and 12 of the of the Partnership Act, 1890*** were referred to, and the argument was that in light of those provisions, the Disciplinary Committee of the

Zambia Institute of Chartered Accountants had misapplied the said provisions. It was stated that in this jurisdiction, the Courts have held that the words that are used in a statute must be given their plain, ordinary and literal meaning.

- 4.22 Further, this is so where the words are clear, even though the intention by the legislator may have been different, or the result is harsh or undesirable, which is known as the literal rule of interpretation.
- 4.23 Relied on as authority, was the case of ***Anderson Kambela Mazoka v Levy Patrick Mwanawasa***⁽⁷⁾. The argument was that the provisions of ***Sections 10, 11 and 12 of the Partnership Act 1890*** are plain and ordinary, and state that partners become liable where the act of one of them results in loss to a third party. Therefore, it could not be said that the joint and several liability of partners is to be applied wholesome to each and every act of a partner.
- 4.24 It was also stated that the genesis of the complaint was the Securities and Exchange Commission, and no evidence was led to show that a third party lost or suffered injury as a result of the said audit, and consequently, the whole firm was liable to make good the loss.
- 4.25 ***Maxwell on Interpretation of Statutes 12th Edition by P St J Langan*** was quoted as providing that statutes that impose a penalty must be construed in a strict and narrow manner in favour of the person proceeded against. Thus, the argument was that the imposition of a fine as provided
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for under **Section 77 (5) (d) of the Accountants Act** was invocation of punitive powers.

- 4.26 It was further argued, that it therefore followed, that punitive action could only be meted out where it was established that there was misconduct as defined in the Act, by members of the public. The argument was also that it was not tenable to ascribe to a whole firm, the misconduct of a single member as each member is bound by the ethics and rules in their individual capacity. That any failure to adhere thereto, could and should only lead, to only the affected member facing the sanctions for misconduct.
- 4.27 Further in argument, HLB Zambia stated that the Zambia Institute of Chartered Accountants in the tribunal below did not show that all its' partners took part in the audits in issue. That in fact, the initial investigations that the Zambia Institute of Chartered Accountants conducted, recommended that the failure by the auditor to conduct his work with professional care and skill was a breach of the Code of Ethics.
- 4.28 Referring to the part of the *Code of Ethics* that had been earlier cited, HLB Zambia argued that the language used in the said Section, as well as in the Act is very clear in its' meaning as regards, firstly, what amounts to misconduct, and secondly who is liable for any misconduct. Arguing further, HLB Zambia stated that even the **Partnership Act** is also very clear, in that it relates to acts or omissions of a

partner that results in loss to a third party, which makes the entire partnership liable.

- 4.29 Flowing from this, HLB Zambia contended that the imposition of a fine on it as a firm, was an attempt to extend the meaning of “*joint and several*” liability in the ***Partnership Act*** to things that are not covered by the Act.

GROUND THREE

THE DISCIPLINARY COMMITTEE OF THE ZAMBIA INSTITUTE OF CHARTERED ACCOUNTANTS ERRED IN LAW AND FACT WHEN IT HELD THAT HLB ZAMBIA HAD COLLUDED WITH LAURENCE PAUL INVESTMENTS SERVICES LIMITED TO EVADE THE PROVISIONS OF THE LAW AND TO MISLEAD POTENTIAL INVESTORS IN LAURENCE PAUL INVESTMENTS LIMITED WHEN NO SUCH EVIDENCE WAS LAID BEFORE THE COMMITTEE

- 4.30 On the third ground of appeal, HLB Zambia argued that it is trite law that an appellate Court will not normally overturn the findings of fact that are made by a lower Court, unless it is satisfied that the findings in question, which were made, were either perverse or were made in the absence of any relevant evidence, or on a misapprehension of the facts, or that such findings were on a proper view of the evidence, such that no trial Court, acting correctly could reasonably have made.

- 4.31 The case of ***Attorney General v Marcus Kapumbe Achuime***⁽⁶⁾ was cited as authority in that regard. It was argued that that HLB Zambia had demonstrated that the

Disciplinary Committee of the Zambia Institute of Chartered Accountants was guided by **Section 77 (4) of the Accountants Act No 13 of 2008**. HLB Zambia contended that the following findings by the Disciplinary Committee had caused it great consternation:

- i. At page R15 the Disciplinary Committee held that;
“We find that HLB Zambia failed to make the requisite adjustment based on the material events which occurred after the reporting date of the audited financial statements of 2016, 2017 and 2018. These events impacted the liquidation of Laurence Paul because they had invested in Genesis Financial Services Limited and Focus Financial Services Limited. Both occurred in 2018 and both events occurred before the signing of the audited financial statements.”
- ii. At page R16, the Disciplinary Committee held that,*“HLB Zambia failed to disclose such transactions among related parties. They were either aware of the related parties or appeared to cooperate with Lawrence Paul’s decision to conceal such transactions, thus misleading the users of the financial statements. This is a withheld disclosure that the investors should have been made aware of, as it is material information, impacting the company’s potential disclosure and financial position.”*
- iii. At page R18, the Disciplinary Committee held that
“We find that HLB Zambia failed to report on Laurence

Paul's compliance with the legal and regulatory framework as espoused by the Securities Act."

- 4.32 The argument was that as already shown, the Disciplinary Committee comprised members of the Accountancy profession, and they were duly bound to determine the matter based on the evidence that was adduced to support the allegation of professional misconduct, which was presented by the complainant, being the Securities and Exchange Commission.
- 4.33 It was stated that the finding by the Disciplinary Committee that there was collusion was not supported by any evidence. The contention was that collusion by its' very nature is akin to fraud, and a finding of fraud has to be supported by facts, and secondly, the allegation must be specifically pleaded. Relying on the case of ***Anderson Kambela Mazoka v Levy Patrick Mwanawasa***⁽⁷⁾, HLB Zambia, argued that the Supreme Court in the said case, emphasized the need for a party to be made aware of the claims made against them, so that they could adequately defend themselves, by the pleadings.
- 4.34 Reference was also made to the case of ***Hanif Bhura v Ismail Ibrahim Ismail***⁽¹⁰⁾ where it was stated that fraud as an allegation, must be specifically pleaded. It was stated that the complaint that was made by the Securities and Exchange Commission did not comprise allegations of fraud or collusion between HLB Zambia and Laurence Paul.

That had that been done, HLB Zambia would have had an opportunity to respond to the same.

- 4.35 Thus, as it was, the finding was made in the absence of HLB Zambia being given opportunity to respond to the allegation. It was argued, that this offended the principle of *audi alteram partem*.

GROUND FOUR

THE DISCIPLINARY COMMITTEE OF THE ZAMBIA INSTITUTE OF CHARTERED ACCOUNTANTS ERRED IN LAW AND FACT WHEN IT IMPOSED THE HIGHEST POSSIBLE FINE WHEN HLB ZAMBIA WAS A FIRST OFFENDER

- 4.36 On this ground, HLB Zambia referred to **Section 77 (5) (d) of the Accountants Act**, stating that it empowers the Disciplinary Committee to impose a fine, which does not exceed One Hundred Thousand penalty units. It was argued that the record showed that HLB Zambia was fined Thirty Thousand Kwacha (K30, 000.00), which is the maximum fine possible.
- 4.37 The argument in the alternative, was that the imposition of the maximum fine payable was harsh in the absence of aggravating factors, as a first offender is entitled to some degree of leniency.

5. ZAMBIA INSTITUTE OF CHARTERED ACCOUNTANTS ARGUMENTS IN RESPONSE

GROUND ONE

- 5.1 In response to ground One, the Zambia Institute of Chartered Accountants stated that HLB Zambia had argued that the finding of misconduct was not supported by any evidence. Their reaction was however that, the assertion lacked merit, as the findings that were made, were informed by the evidence that was adduced at the hearing.
- 5.2 The record of appeal was referred to, citing page 251, and stating that at that page, the witness Nonde Sichilima who works for the Securities and Exchange Commission as Manager Market Supervision, referred to documents, and he was subjected to rigorous cross examination by HLB Zambia, as seen at pages 252-259 of the record of appeal. It was contended that this evidence established professional misconduct in the conduct of the audit of Laurence Paul Investment Services Limited.
- 5.3 The argument was further that the witness Nonde Sichilima specifically at page 34 of the Record of Appeal, produced the documents that revealed the professional misconduct. It was also stated that, Herbert Mambo, the witness for HLB Zambia, as seen at pages 268-278 of the Record of Appeal, testified with the assistance of Masauso Mwale. Therefore, the finding of the Disciplinary Committee was supported by the evidence on record.

- 5.4 The argument was that in any event, HLB Zambia failed to specifically state which findings of fact were not supported by evidence. Thus, HLB Zambia had made bare and plain allegations that the findings were not supported by evidence, without clearly itemizing which findings were so made, so that they could be traversed.
- 5.5 Also argued, was that the findings that were made by the Disciplinary Committee could not be reversed or be interfered with by the High Court. In that regard, it was stated that **Section 79 (1) of the Accountants Act** empowers a dissatisfied party to appeal the decision of the Disciplinary Committee within Thirty (30) days to the High Court. The contention was that the import of that section, is that in dealing with appellate jurisdiction, the appeal Court will not normally interfere with findings of fact.
- 5.6 Reliance was placed on the case of **Attorney General v Marcus Kapumbe Achuime**⁽⁶⁾ which had been relied on by HLB Zambia, as well as the case of **Augustine Kapembwa v Maimbolwa and the Attorney General**⁽⁵⁾ where in agreeing with the holding in the case of **Attorney General v Marcus KapumbeAchuime**⁽⁶⁾ the Court stated that an appellate Court will be slow to interfere with a findings of fact that are made by a trial Court, which has had the opportunity and advantage of seeing and hearing the witness.
- 5.7 Thus, based on that, this Court could not set aside the findings of fact that the Disciplinary Committee, which had
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the opportunity to observe the witnesses made. It was argued that this was more so, as HLB Zambia had failed to prove to this Court that the decision of the Disciplinary Committee was perverse or that no reasonable tribunal could make such findings.

GROUND TWO

- 5.8 In respect of Ground Two, the argument by the Zambia Institute of Chartered Accountants, was that HLB Zambia had argued that on account of the ***Partnership Act, 1890***, the individual Accountant who compiled and signed off the audit reports, and not the firm as a whole, should have been censured. However, their argument was that HLB Zambia prepared the audit reports in issue, and they were signed off by the late Jonathan Mwale, for and on behalf of HLB Zambia.
- 5.9 Pages 91, 124 and 158 of the Record of Appeal were referred to, which were said to evidence that HLB Zambia signed the audit reports. Thus, the audit services were provided by HLB Zambia, which firm was sued in the proceedings before the Disciplinary Committee.
- 5.10 It was stated that in any event, ***the Partnership Act***, which had been referred to by HLB Zambia, supports the legal position that a partner in a firm is liable together with other partners of the firm, for all the obligations of the firm. Thus, it consequently followed, that HLB Zambia was liable for the acts of the firm, in the manner that it handled the audit of Laurence Paul, and it could be censured as a firm.
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- 5.11 Going further in argument, the Zambia Institute of Chartered Accountants argued that the **Accountants Act** itself, unequivocally provides that even a firm of Accountants can be held liable for professional misconduct, as seen in **Sections 2 and 24 of the Act**, which sections define a member, and provide for the registration of firms respectively.
- 5.12 It was further stated that **Section 75 (1) of the Act**, clothes the Disciplinary Committee with jurisdiction to hear and determine disciplinary action, that is instituted by the institute against a Chartered Accountant or a member. Also, in argument, it was argued that interpreting the Act in a manner that a firm such as HLB Zambia, could not be amenable to the jurisdiction of the Disciplinary Committee, would be to depart from the intention of the legislature, and would create absurdity.
- 5.13 In that regard, reference was made to the preamble of the Act, stating that it provides inter alia, the disciplinary procedures for the Accounting profession, and for the ethical auditing and accounting standards.
- 5.14 Thus, it would be a departure from the core purpose of the Act, if accounting firms such as HLB Zambia, which are registered under the Act, and offer accounting and audit services to the public, are excluded from the disciplinary procedures. The case of **Re Liso⁽¹⁾** was called to aid as authority, stating that Justice Magnus in dissenting, held

that one of the canons of construction of statutes is to avoid absurdity.

- 5.15 It was therefore argued, that this Court should interpret ***the Accountants Act*** with an approach that would avoid creating absurdity, by holding that a firm of Accountants cannot be held guilty, and be found liable for professional misconduct. That doing so, would result in a situation where accounting firms would not be regulated by the Zambia Institute of Chartered Accountants and unethical accountants would hide behind the curtain of the firm. The prayer was that Ground two of the appeal be dismissed.

GROUND THREE

- 5.16 In respect of Ground Three, the Zambia Institute of Chartered Accountants stated that this ground attacked the finding of the Disciplinary Committee that there was collusion between HLB Zambia and Laurence Paul to evade the law and mislead potential investors, as there was no evidence to support such a finding.
- 5.17 It was reiterated that an appellate Court cannot set aside the findings of fact which are made by a trial Court, unless as argued in Ground One. However, as noted in paragraph 10 of the Zambia Institute of Chartered Accountant's arguments, HLB Zambia had not demonstrated or explained what findings of fact were made by the Disciplinary Committee which were perverse or unreasonable.

- 5.18 In arguing that the Disciplinary Committee tabulated and analysed the evidence before making a finding, the Zambia Institute of Chartered Accountants, referred to the Ruling of the Disciplinary Committee in paragraphs 3.13 and 3.14 at pages R11 and R12 which are at pages 245 and 246 of the Record of Appeal. It was contended that in those paragraphs, the Disciplinary Committee found that HLB Zambia failed to disclose related party transactions in the audited financial statements that it prepared.
- 5.19 Those transactions were indicated as the sum of Eight Hundred and Eighty-Four Thousand Nine Hundred and Thirteen Kwacha (K884, 913.00) which was owed to Laurence Paul Unit Trust following the collapse of Genesis Financial Services Limited. Further, in the 2018 audited financial statements, the sum of Five Million Three Hundred and Thirty-Six Thousand Five Hundred and Sixty-Seven Kwacha (K5, 336, 567.00) purported to have been owed to Laurence Paul Group had not been reflected.
- 5.20 It was also argued, that the Disciplinary Committee found that lastly, the printouts from the Ministry of Lands showed that out of the Seven (7) properties, Six (6) were in the names of third parties, and not Laurence Paul. It was argued that premised on those findings, the Disciplinary Committee made a finding that HLB Zambia did not disclose such transactions among related parties, which it was aware of, or it cooperated with Laurence Paul's decision to conceal the transactions.
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- 5.21 The argument that was also advanced, was that the Disciplinary Committee upon analyzing the standard requirements under ISA 550, formed the opinion that HLB Zambia ought to have disclosed that information as it impacted on potential decisions and the financial position of Laurence Paul.
- 5.22 Thus, the submission was that the Disciplinary Committee was on terra firma, in finding that there was collusion between HLB Zambia and Laurence Paul which decision was well reasoned, as illustrated above. Therefore, this Court could not interfere with the finding, which was well reasoned and well-researched.
- 5.23 The argument that the allegations of fraud were not pleaded, and therefore HLB Zambia did not have opportunity to respond to the allegation was without merit. This was on the basis that the summons that were served on HLB Zambia, inviting it to appear before the Disciplinary Committee, which was at page 36 of the Record of Appeal, stated that HLB Zambia, failed to conduct a proper audit and report thereof in the financial statements for 2016, 2017, and 2018.
- 5.24 It was accordingly contended that the finding of collusion fell within the scope of the allegation of failure to report transactions. That in other words, the reason why HLB Zambia failed to report critical transactions, was because it colluded with Laurence Paul, in accordance with the Ruling
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of the Disciplinary Committee. Based on that, it was argued that the ground of appeal be dismissed for want of merit.

GROUND FOUR

- 5.25 As for Ground Four of the appeal, it was stated that HLB Zambia had argued that it should have been accorded leniency, being a first offender, and the highest penalty available should not have been imposed. However, the position taken by the Zambia Institute of Chartered Accountants, was that to the contrary, the penalties that were imposed on HLB Zambia are not the highest possible sanctions that a firm that has been found guilty of professional misconduct can receive.
- 5.26 It was submitted that **Section 77 (5) of the Accountants Act** provides the penalties that can be imposed for professional misconduct. Thus, in view of the punishments that can be imposed, the penalties that were imposed on HLB Zambia were not relatively harsh nor severe, as it was facing the potential punishment of suspension or cancellation of its' certificate of registration as a member of the Zambia Institute of Chartered Accountants on account of the finding that it had professionally misconducted itself.
- 5.27 However, suspension or cancellation of the certificate of registration was not imposed. Consequently, it could not be argued that the imposition of a fine of Thirty Thousand Kwacha (K30, 000.00) was harsh, and the argument was not supported by the law.
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- 5.28 It was also argued that the Disciplinary Committee did not depart from the principles of sentencing, but rather, considered the gravity of allegations that were made against HLB Zambia. That in that regard, specifically at page 246 of the Record of Appeal, the Disciplinary Committee in its' Ruling, found that HLB Zambia concealed material information and transactions, of Laurence Paul in its' audited financial statements, which was aimed at misleading the users of the financial statements, such as the investing public.
- 5.29 It was stated that this affected the company's potential decisions and the investing public, making it a serious allegation and undermined the integrity of the Accounting profession. The case of ***Sonny Paul Mulenga & Vismer Mulenga v The Valuation Surveyors Registration Board*** ⁽⁹⁾ was cited as authority. It was stated that the Supreme Court in that matter, had explained that for any conduct to infringe professional rules, and to be defined as misconduct, there must be proof that the conduct complained of, has not only been serious, but it has been such that, it undermines the integrity of such person to the extent that he cannot be expected to uphold the standard of that profession in question, and that no amount of repentance could redeem his integrity in that profession.
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6. SUBMISSIONS AT THE HEARING

SUMISSIONS BY COUNSEL FOR HLB ZAMBIA

- 6.1 At the hearing, Counsel for HLB Zambia stated that they filed the record of appeal and heads of argument on 23rd December, 2022, on which they relied. In augmenting, Counsel stressed that the main contention by HLB Zambia was that it was facing charges of professional misconduct, which according to the Disciplinary Committee for the Zambia Institute of Chartered Accountants, was sufficiently proved, as per pages 231-248 of the Record of Appeal.
 - 6.2 It was submitted that the offence as far as Accountants are concerned, is provided for in **Section 72 of the Accountants Act No 13 of 2008**. Therefore, it is only in instances that are covered in that provision, that amount to professional misconduct. Counsel also stated that for the offence to be proved, there must be facts to substantiate the offence.
 - 6.3 The submission was that the heads of argument had rehashed the evidence that was laid before the Disciplinary Committee, and the Court's attention was drawn to the Record of Appeal, and in particular to the Ruling of the Disciplinary Committee, which stated that the basis of the complaint was the treatment of land that was purchased by Laurence Paul, whose accounts HLB Zambia audited.
 - 6.4 Counsel submitted that in the heads of Argument relating to ground One, they had highlighted the findings that were made by the Disciplinary Committee, with regard to how
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the land was treated in the account for various years, that is whether it was a short-term or long-term deposit.

- 6.5 It was stated, that as could be seen from lines 32-34 at page 272 of the Record of Appeal, it was conceded by One (1) of the Disciplinary Committee's members that in relation to the land, short-term and long-term deposits as terms of the accounting profession could be used interchangeably.
 - 6.6 However, despite that finding or admission, HLB Zambia was still found guilty of professional misconduct. Still in submission, Counsel stated that secondly, Nonde Sichilima who was called as a witness told the Disciplinary Committee that he left the auditing profession some time back, and he was therefore not familiar with the changes in the use of various accounting standards.
 - 6.7 Thus, from this, it was clear that what was in issue was simply disagreement on the manner in which the information was presented by HLB Zambia in the financial statements. Counsel also stated that it was established that disclosures relating to the land was made by HLB Zambia, but in the opinion of the Securities and Exchange Commission, the said disclosures lacked sufficient information.
 - 6.8 It was therefore a question of whether not having furnished sufficient details, amounted to professional misconduct, as defined by *the Accountants Act*, and whether the failure brought the Accounting profession into disrepute. It was also submitted that the first witness for the Securities and
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Exchange Commission, when asked whether intention to sell land within Twelve (12) months qualified as a short-term deposit, responded that it probably did.

- 6.9 The contention was that as long as the standard that was used was not known, it did not amount to professional misconduct, as was found by the Disciplinary Committee. Counsel took the view that the findings were perverse and were not based on irrefutable evidence, which was presented by Nonde Sichilima who was called by the Securities and Exchange Commission.
- 6.10 In his continued submission, Counsel stated that the second issue related to reliance by the Disciplinary Committee on the principle of several and joint liability, as espoused by **the Partnership Act**. He stated that whilst it is true that in our law, an Accounting firm exists as a partnership, and it is amenable to **the Partnership Act**, the principle of joint and several liability of the partners does not extend to issues that do not arise from contract or tort.
- 6.11 This Counsel stated, entailed that in other words, criminal punitive action on a whole firm on account of an alleged partner's liability, as joint and several liability under **the Partnership Act** was a misapprehension of the law.
- 6.12 His contention was that from the provisions of the Act, each member is required to uphold the ethical standards of the profession in their individual capacity. That in this matter, the Record of Appeal at page 6, showed that the

genesis of the proceedings was the conduct of Jonathan Mwale, a partner in HLB Zambia who was asked to exculpate himself over his participation in the audits of Laurence Paul's accounts from 2016-2018.

- 6.13 However, unfortunately, before the Disciplinary Committee could sit to hear the case, Jonathan Mwale passed away due to COVID 19. Thereafter, the charge was issued to the whole firm. It was Counsel's submission that no loss having been suffered by a third party as a result of breach or contract or tortious liability by any of the partners, it was an error of the law, by the Disciplinary Committee to hold the firm criminally liable for what a member of the firm did.
- 6.14 Counsel submitted that the Zambia Institute of Chartered Accountants initially raised a complaint against the late Jonathan Mwale, being the person who prepared the accounts, so that he could face the Standards and Regulation Board of the Zambia Institute of Chartered Accountants, because of his failure to conduct the audits with care and skill, which was a breach of the Code of Ethics.
- 6.15 Thus, Counsel submitted that their argument was that because the auditor, whose conduct was called into question, passed away, the Zambia Institute of Chartered Accountants could not decide to change its' focus on the rest of the firm, and proceed to fine the entire firm, as

partners under *the Partnership Act*, are jointly and severally liable.

- 6.16 On the allegation of collusion on the part of HLB Zambia and Laurence Paul, Counsel stated that Nonde Sichilima who testified on behalf of the Securities and Exchange Commission, told the Disciplinary Committee that the collusion was in relation to the law relating to how much land One (1) person or an entity can hold.
- 6.17 Counsel reiterated the arguments as advanced in the heads of argument that collusion by its' nature connotes an inference of fraud. Therefore, it had to be specifically pleaded, and secondly, it had to be proved. It was stated that the issue of fraud only arose during the course of the proceedings, as seen at page 267 of the Record of Appeal, particularly lines 15-20.
- 6.18 He explained that as could be seen at that page, the Chairperson of the Disciplinary Committee recognised that there seemed to be deviation from the complaint. Counsel stated that pages 6-7 of the Record of Appeal contained the charges that HLB Zambia was slapped with.
- 6.19 Counsel's continued submission was that HLB Zambia had never stated that it had sight of the title deeds for the Seven (7) pieces of land, but that it was in copy, and the same title deeds were submitted to the Securities and Exchange Commission. The assertion that the issue of collusion was not part of the charges and had not been proved was
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reiterated, with Counsel emphasizing that the Disciplinary Committee is a judicial authority.

- 6.20 Therefore, it was bound to explain the rejection of HLB Zambia's explanation that it was given copies of the title deeds, which were given to the Securities and Exchange Commission.
- 6.21 This Court, on that basis, was urged to set aside the finding of collusion that was made by the Disciplinary Committee in line with the case of **Hanif Bhura v Yusuf Ibrahim Issa**⁽¹⁰⁾, on the basis that fraud needed to be specifically pleaded. Further, that as HLB Zambia was not facing a charge of collusion, it did not respond to the same.
- 6.22 On the fine that was imposed on HLB Zambia, Counsel's submission was that the imposition of the maximum fine where there were no aggravating circumstances and history of infraction of the **Accountants Act**, and more so that the Securities and Exchange Commission's indication was that example should be made of HLB Zambia, entailed that there was no objectivity, but the desire to purely punish HLB Zambia, as evidenced at page 45 of the Record of Appeal in lines 5-15.
- 6.23 Counsel submitted that the offence of professional misconduct was not proved as the evidence of the sole witness, Nonde Sichilima, who testified on behalf of the Securities and Exchange Commission did not establish the requirements to prove professional misconduct, as he held several positions regarding the facts that were alleged to

have been established to prove the offence. The prayer was that the appeal succeeds with costs.

RESPONSE BY COUNSEL FOR THE ZAMBIA INSTITUTE OF CHARTERED ACCOUNTANTS

- 6.24 In response, Counsel for the Zambia Institute of Chartered Accountants, told the Court they relied on the heads of argument in response, which were filed on 27th January, 2023. Counsel stressed that this is an appeal, and not a hearing of the Disciplinary Committee. Therefore, appeals are heard on points of law, or on a mixture of law and facts. Counsel further stated that it was incorrect to argue an appeal purely on findings of fact.
- 6.25 Thus, his submission was that save for the argument in the alternative, relating to the harshness of the penalty that was imposed, their view was that HLB Zambia had argued findings of fact, which was incorrect.
- 6.26 Nevertheless, Counsel stated that in relation to the argument that the complaint was initially laid against the late Jonathan Mwale and not HLB Zambia, the genesis of the complaint was a letter that was authored by the Securities and Exchange Commission to the Zambia Institute of Chartered Accountants, which was at page 77 of the Record of Appeal. Counsel stated that the said letter confirmed that the complaint was targeted at the whole firm.
- 6.27 This Counsel clarified, as being at page 78, which was a continuation of the said letter, whose instruction was that

disciplinary action be instituted against the firm. He stated that the only reason why the subsequent correspondence was addressed to the late Jonathan Mwale was because, he was the person that responded to the letter, which was at page 79 of the Record of Appeal. Further, he had responded as a partner of the firm.

- 6.28 On further evidence that the investigations were targeted at the whole firm, Counsel stated that page 37 of the Record of Appeal established so. Therefore, the submission that the complaint was against Jonathan Mwale was not supported by any evidence. Counsel's view was therefore that there was nothing wrong in initiating the complaint against the firm under ***the Accountant's Act***.
- 6.29 This was because the Act conferred jurisdiction on the Disciplinary Committee to hear a matter against an Accountant or a member, which is deliberately stated in ***Sections 75 (1) and 77 (5) of the Accountants Act***. Counsel added that this illustrates that a firm of Accountants can be found liable by the Disciplinary Committee, in keeping with the spirit of the Act to regulate the Accounting profession.
- 6.30 It was also submitted that HLB Zambia was found wanting not only in relation to the land, but also in relation to concealment of third-party transactions from the financial statements, following the collapse of Genesis Financial Services Limited as seen at page 246 of the Record of Appeal. The submission that was also made, was that HLB

Zambia made other incorrect reports, and on the land, they did not disclose that Six (6) parcels of land were not in the name of Laurence Paul.

- 6.31 It was stated that this was confirmed from the printouts that were obtained from the Patents and Companies Registration Agency (PACRA), which were at pages 193, 194 and 195 of the Record of Appeal. Therefore, premised on the above, the Disciplinary Committee could not be faulted after having been faced with such evidence, by finding that HLB Zambia fell short of the accounting standards.
- 6.32 The view that was also taken, was that the conduct of HLB Zambia had far reaching consequences as Laurence Paul is an investment firm, that is regulated by the Securities and Exchange Commission. Thus, invariably, members of the public could be attracted to invest in it, based on the financial reports that were prepared by HLB Zambia.
- 6.33 Consequently, if the said reports concealed information and did not report according to the Accounting standards as auditors, the public could make risky decisions to invest in Laurence Paul. He stated that this was the finding by the Disciplinary Committee at page 248 of the Record of Appeal, contrary to the submissions by HLB Zambia.
- 6.34 On the submissions relating to ***the Partnership Act***, Counsel stated that without conceding the provisions of that Act, they beseeched the Court to rely on the provisions of the ***Accountants Act***, in the main, as that is the Act that is applicable. He added that ***the Partnership Act*** is

general, and the primary Act should prevail in the event of conflict in interpretation.

- 6.35 As for the issue of collusion, the submission was that the Notice of complaint that was filed, which was at page 36 of the Record of Appeal, was couched broadly, as it contained an allegation of failing to conduct proper audit and report thereon. Counsel's submission was that matters of collusion as found in the Ruling of the Disciplinary Committee fell under the general category of failing to report.
- 6.36 Further in submission, Counsel stated that the Disciplinary Committee was mandated to give a reason as to why it found that there was inadequate reporting under ***the Accounting Act***, and therefore, its' decision had to be reasoned. That on that account, it had the power to find that there was possible collusion between HLB Zambia and Laurence Paul. It was stated that in any event, the summons to appear, which were at page 36 of the Record of Appeal, was not a pleading for the strict rule on pleadings to apply.
- 6.37 Counsel also in submission, stated that HLB Zambia was given sufficient notice of what it was facing before the Court, as an allegation of failing to report gave sufficient notice on improper conduct and fraud as a whole.
- 6.38 It was also submitted that the fact that HLB Zambia was fined did not entail that it was found criminally liable. Counsel's view was that the summons to appear which was

at page 36 of the Record of Appeal, and even under **the Accountants Act**, there is no provision that the proceedings of the Disciplinary Committee are criminal in nature.

- 6.39 He stated that the reason why proceedings under the Act are deemed as judicial proceedings, is for purposes of assisting the Disciplinary Committee to receive evidence, and in instances of perjury or failure to appear before the said Disciplinary Committee, to furnish evidence of such.
- 6.40 On the fine in **Section 77 of the Accountants Act**, Counsel stated that it could be termed as a civil fine. He added that the fine that was imposed could not be termed as severe and harsh, as under the Act, the worst penalty that an Accountant or a member can receive, is cancellation of their practicing certificate.
- 6.41 It was Counsel's submission that in his understanding of **Section 77 of the Accountants Act**, where a Chartered Account or a member is found guilty of professional misconduct, it is a must that their practicing certificate should be cancelled. Therefore, for HLB Zambia to have been fined, the same was not harsh or severe, as the Disciplinary Committee considered that it was a first offender and it spared it from de-registration.
- 6.42 In conclusion, Counsel submitted that the decision of the Disciplinary Committee was well reasoned and it was backed by evidence. He asked the Court not to interfere with the findings and dismiss the appeal with costs.

REPLY BY COUNSEL FOR HLB ZAMBIA

- 6.43 The submission in reply was that, as regards the provision of sanctions in **Section 77 (5) of the Accountants Act**, which include cancellation of the certification of registration, such could only be done where professional misconduct had been proved. On when reversal of findings of fact may be made, Counsel stated that they agreed with the second authority that had been cited in that regard.
- 6.44 It was stated that the Disciplinary Committee indicated that failure to disclose was part of collusion. Reference was made to pages 252-259 of the Record of Appeal, where evidence relating to failure to disclose was given. Counsel stated that this Court would note from those pages, that the finding of failure to disclose was not based on the evidence that was adduced, and it could be set aside.
- 6.45 Counsel also in reply, told the Court that their submission was not that the Disciplinary Committee could not discipline a firm, but that the duty to uphold the ethics is placed on a member, as seen from **Section 2 of the Act**. He added that from that Section, a member is recognised in their individual capacity.
- 6.46 The submission was that, tied to that, was whether the late Jonathan Mwale or HLB Zambia was to answer. Counsel stated that the answer was found at pages 37-43 of the Record of Appeal, where the late Jonathan Mwale was found to have been the person that conducted the audits, and it was recommended that he faces the Standards and

Regulation Board. The reply was also that the charge at page 6 of the Record of Appeal was raised against the late Jonathan Mwale.

- 6.47 With regard to the response that the offence of collusion fell within the general category of failure to report, Counsel submitted that even assuming that there was collusion, which they submitted there was none, it should have been shown who colluded with Laurence Paul.
- 6.48 Further in reply, Counsel stated that under the Act, an individual member is responsible for failure to comply with the Act. The Court was asked to find that while there was insufficient disclosure, that in certain instances did not amount to professional misconduct, as defined in the Act.
- 6.49 Whilst acknowledging that the audit financial reports were signed off in the name of HLB Zambia, Counsel contended that the firm as a whole, could not be liable for any failure if at all, by the late Jonathan Mwale, to uphold the standards that are required to be met by an auditor in the discharge of their duties.
- 6.50 It was thus submitted that this Court should vacate the findings and the Order to pay the fine which was imposed on HLB Zambia.

7. DECISION OF THIS COURT

- 7.1 I have considered the appeal. It raises Four (4) grounds of appeal. I will begin with ground Two of the appeal.
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GROUND TWO

- 7.2 This ground alleges that the Disciplinary Committee of the Zambia Institute of Chartered Accountants erred in law and in fact when it held that HLB Zambia as a whole, was liable for the alleged misconduct of a single member when the **Accountants Act No 13 of 2008** places liability on an individual member.
- 7.3 In arguing this ground, HLB Zambia contended that in the initial complaint, that was lodged by the Securities and Exchange Commission, the charge was directed at the late Jonathan Mwale, who was the person that prepared the audit reports for Laurence Paul, and he was asked to exculpate himself. However, following the unfortunate demise of the said Jonathan Mwale, the Disciplinary Committee decided to charge the entire firm with misconduct.
- 7.4 It was also stated that when HLB Zambia appeared before the Disciplinary Committee, it raised the issue. However, the same was dismissed in a Ruling, wherein it was stated, that under the **Partnership Act 1890**, every partner is an agent of the firm and the other partners, for purposes of business of the partnership, and that the acts of every partner who does any act for carrying on the usual business of the kind that is carried on by the firm, of which he is a member, binds the firm and their partners.
- 7.5 That this is not so, where the partner so acting had no authority to act for the firm in the particular matter, and

the person with whom he is dealing with, either knows that they have no authority or they do not believe that they are a partner.

- 7.6 Based on that, the Disciplinary Committee found that the late Jonathan Mwale was acting on behalf of the firm and his engagement was in furtherance of the usual business of HLB Zambia. He consequently bound the firm and the partners.
- 7.7 HLB Zambia relying on **Sections 9, 10, 11 and 12 of the Partnership Act** argued that those provisions of the law, give hind sight on whether a partner can be held liable for professional misconduct. It was submitted that those provisions are clear, that partners are liable where the acts by one of them, results in loss to a third party. Therefore, the principle of joint and several liability is not applied wholesale to each and every partner.
- 7.8 The Zambia Institute of Chartered Accountants in response, stated that the audited books of accounts were prepared by HLB Zambia, and were signed by the late Jonathan Mwale for and on behalf of HLB Zambia, as evidenced at pages 91, 124 and 158 of the Record of Appeal. It was argued that the **Partnership Act 1890** in fact supports the legal position that a partner in a firm is liable jointly with the other partners for all the obligations of the firm.
- 7.9 It was further submitted that under **Section 2 of the Accountants Act**, a member of the Zambia Institute of

Chartered Accountants is defined, while **Section 24 of the said Act** provides for the registration of firms. Then under **Section 75 (1) of the Act**, the Disciplinary Committee is mandated to hear any matter against a Chartered Accountant or a member, and to impose any sanctions as provided under **Section 77** of the said Act.

7.10 The preamble of the **Accountants Act** states that the purpose of the Act as:

“An Act to regulate the accountancy profession; continue the existence of the Zambia Institute of Chartered Accountants and re-define its functions and powers; provide for the regulation of the education and training of accountants; provide for the setting of ethical, auditing and accounting standards; provide for the making and investigation of disclosure made in the public interest; define professional misconduct and provide for disciplinary procedures for the accountancy profession; repeal and replace the Accountants Act, 1982, and provide for matters connected with or incidental to the foregoing.”

7.11 The Act therefore, among others, regulates the accounting profession and provides for what amounts to professional misconduct, and the disciplinary procedures for the accounting profession. **Section 2 of the said Accountants Act** defines a *member* as:

““Member” means a person registered as a Member of the Institute in accordance with the provision of the constitution of the Institute;”

7.12 Then under **Section 24 of the Act** it provides that:

“24. (1) A person who registers a firm of accountants under the Registration of Business Names Act shall register the firm with the Institute in the prescribed manner and form upon payment of the prescribed fee.

(2) The Institute shall register a firm of chartered accountants by entering in the Register in Zambia, the name of the firm as registered under the Registration of Business Names Act, together with the name of each partner of the firm and any other information as may be prescribed.

7.13 The above entails that individuals and firms of Accountants may be registered under the Act, and on being registered under the Act, they are subject to the Act. That said, under **Section 73 of the Act** complaints may be lodged against a Chartered Accountant or a member as follows:

“73. (1) A person may lodge a complaint with the Disciplinary Committee against a chartered Committee or Member where the person alleges that the chartered accountant or Member has contravened the Code of Ethics or any position of this Act.

(2) The Institute may initiate disciplinary action under this section where the Institute has reasonable grounds to believe that a chartered accountant or Member has contravened the Code of Ethics or any provision of this Act.

(3) A complaint or allegation shall be made to the Secretary in the prescribed manner and form.”

7.14 It is clear from the above, that a complaint may be lodged against a chartered Accountant or a member, who may then be subjected to disciplinary action.

7.15 **Section 72 of the Act** provides for what amounts to professional misconduct. It states that:

“72. A Member commits professional misconduct if the Member-

(a) contravenes the provisions of this Act;

(b) unlawfully disclosed or uses to the Member’s advantage any information acquired in the course of professional work on behalf of a client;

(c) engages in conduct that is dishonest, fraudulent or deceitful;

(d) commits an offence under any other law;

(e) engages in any conduct that is prejudicial to the accountancy profession or is likely to bring it into disrepute; or

(f) Breaches the Code of Ethics or accounting or auditing pronouncements or encourages

another Member to breach or disregard the principles of the Code of Ethics or accounting or auditing pronouncements.”

7.16 The Section in stating what amounts to professional misconduct, refers to acts that are done by a member who is defined under the Act. **Section 9 of the Partnership Act 1890** provides that:

“Every partner in a firm is liable jointly with the other partners... for all debts, obligations of the firm incurred whilst he is a partner, and after his death, his estate is also severally liable in due course of administration for such debts or obligations so far as they remained unsatisfied.”

7.17 Then **Section 10 of the said Act** states that:

“Where by any wrong act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in a firm, or any penalty is incurred, the firm is liable to the same extent as the partner so acting or omitting to act.”

7.18 Then **Section 11 of the said Partnership Act** is as follows in provision;

In the following cases; namely-

(a) Where one partner acting within the scope of his apparent authority receives the money

or property of a third person and misapplies it; and

(b) Where a firm in the course of business received money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm;

The firm is liable to make good the loss.”

7.19 **Section 12 of the said Act** provides that:

“Every partner is liable with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the preceding sections.”

7.20 The law in **the Partnership Act** is clear that a partner is liable jointly and severally for all debts, obligations of the firm, and for any loss or injury that occurs to third parties while they are partner.

7.21 This entails that as in this matter, there were obligations placed on HLB Zambia in the preparation of audited accounts for Laurence Paul, that any default by its' Chartered Accountant or member in the preparation of the said audited accounts, would be the default of each other partner of the firm, who is either a Chartered Accountant or a member.

7.22 This is because, that is the person who under **Section 72 of the Accountants Act** is liable to be found guilty of

professional misconduct. The fact that firms of Accountants are registered under ***the Accountants Act***, which are partnerships by their nature, as they are registered as business Names, each partner is an agent of the other partners.

7.23 The result of this, is that liability is as provided in the ***Partnership Act of 1890***, and the observance of the Code of ethics and ***the Accountants Act***, in the conduct of the firm's usual course of business by a member who is a partner of a firm, is done as an agent for the other partners. That being the position, ground Two of the appeal fails.

GROUND ONE

7.24 Having found that ground two of the appeal fails, I will deal with ground One of appeal. This ground attacks the Disciplinary Committee's finding that HLB Zambia was guilty of professional misconduct on the basis that there was no evidence that was led to support the finding.

7.25 Citing ***Section 320.1 of the IFAC Code on Ethics*** and stating that it provides that an Accountant must present information fairly, honestly and in accordance with the relevant standards so that the information will be understood in its' context, and ***Section 77 (4) of the Accountants Act*** which provides that the hearing before the Disciplinary Committee shall be deemed a judicial proceedings, HLB Zambia contended that the Disciplinary Committee was required to act fairly, and not to interpose

its' own understanding and opinion, for purposes of seeking clarity on issues that were brought out in evidence.

7.26 The assertion was that the Disciplinary Committee during the hearing, realised that it went outside the complaint that was lodged by the Securities and Exchange Commission, and that the only issue that it was to resolve, was the treatment of land in Laurence Paul's audited accounts, and whether as a result thereof, there was professional misconduct that was committed by HLB Zambia.

7.27 It was stated that Nonde Sichilima who was called as a witness from the Securities and Exchange Commission, told the Court that he left audit some time back. Therefore, he was not familiar with the current audit standards. The contention was that this witness, stated that it was in order to report the land as short-term deposit in 2017, but on the other hand stated that the Securities and Exchange Commission had its' own understanding of what a short-term deposit is, and that land was not one of them.

7.28 The other submission was that when the Chairperson asked Nonde Sichilima about the format in which the audit reports should have been presented, he had answered that there was no such format, and that the Zambia Institute of Chartered Accountants as regulator of Accountants, was better placed to answer that question.

7.29 The other basis, was that Herbert Mambo who was called as a witness by HLB Zambia, testified that the standards that are used in audit reports are not inserted in the notes.

It was contended that on that basis, the standard of proof had not been met.

- 7.30 The Zambia Institute of Chartered Accountants on the other hand argued that Nonde Sichilima who was called as a witness from the Securities and Exchange Commission presented all the documents that were gathered during the investigations, and this witness was subjected to rigorous cross examination, as seen at pages 252-268 of the Record of Appeal. Further, HLB Zambia called Hebert Mambo as its' witness and he was assisted by Masauso Mwale.
- 7.31 It was the Zambia Institute of Chartered Accountants contention, that the assertion by HLB Zambia that no evidence was led to support the findings was just mere assertion without any demonstration of how the findings that were made were not supported by any evidence.
- 7.32 Indeed, the cases of ***Attorney General v Marcus Kapumbe Achuime***⁽⁶⁾ and ***Augustine Kapembwa v Maimbolwa and the Attorney General***⁽⁵⁾ laid down the principles that guide an appellate Court. In the case of ***Attorney General v Marcus Kapumba Achuime***⁽⁶⁾ the Supreme Court held that:

“The appeal Court will not reverse findings of fact made by a trial Judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the

evidence, no trial court acting correctly can reasonably make.”

7.33 Then in the case of *Augustine Kapembwa v Danny Maimbolwa and Attorney-General*⁽⁵⁾, the holding was that:

“The Appellate Court would be slow to interfere with a finding of fact made by a trial Court, which has the opportunity and advantage of seeing and hearing the witnesses but in discounting such evidence the following principles should be followed: That:

“(a) by reason of some non-direction or mis-direction or otherwise the Judge erred in accepting the evidence which he did accept; or

(b) in assessing and evaluating the evidence the Judge has taken into account some matter which he ought not to¹²⁸ have taken into account, or failed to take into account some matter which he ought to have taken into account; or

(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or

(d) in so far as the Judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."

- 7.34 A perusal of the Ruling of the Disciplinary Committee which is at pages 231-248 of the Record of Appeal, shows that with regard to how the land was treated in the audited financial statements at page R12 at page 241 of the Record of Appeal, the financial statements for the year ending 2017 disclosed the land which was not fully paid for during the year as a short-term deposit.
- 7.35 Nonde Sichilima, as seen at page 252 of the record of appeal testified, giving details of how information was captured in the audit reports. This witness testified that no accounting standards were applied to the land, and at page 259, he explained why land did not qualify as a short-term deposit. Nonde Sichilima also stated what standards were to be used to report on the land in the audit statements.
- 7.36 The record will further show that at page 269, Herbert Mambo in his testimony, agreed that the land was the biggest asset for Laurence Paul that was disclosed in the audit reports. He stated that at page 275, the late Jonathan Mwale when asked whether he had checked the title for the land, had responded that it was on title.
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- 7.37 The Disciplinary Committee in its' findings took the view that a short-term deposit is one where a sum of money is invested for a short period of time at an agreed interest rate. Then at the end of the short-term deposit period, the bank or the lender returns the original amount that was invested together with any interest that is earned thereon.
- 7.38 They noted that the short-term investment must be readily convertible to a known amount of cash, and must be subject to an insignificant risk of change in value. The Disciplinary Committee further found that in Order for it to be classified as a short-term, it must have short-term maturity. Thus, a short-term deposit is a financial asset that is accounted for under International Financial Reporting Standard IFRS 9.
- 7.39 The Disciplinary Committee found that therefore, land is a non-financial asset, being one that is not traded on the financial markets, and its' value is derived from its' physical characteristics rather than from contractual claims. They stated that land could be accounted for under IAS 16 or IAS 40. The Disciplinary Committee went on to find that the disclosure as short-term deposit, implied that the value of the land could easily be converted into cash.
- 7.40 It noted that the assessment for investors and the regulator is based on how liquid the fund is. The finding was that the land was the biggest asset on the balance sheet, and its' disclosure as a fixed deposit implied that the fund was liquid. The Disciplinary Committee however, took the

position that the land in question was situated in an area where it could be easily sold, and further title to the said land had not been obtained, and the same had remained as traditional land. They stated that by 2019, the land had not been sold.

- 7.41 The Disciplinary Committee also found that had the land been held for sale, that also required certain disclosures which were not made, and since Laurence Paul had not yet acquired the land, it had no authority not sell it. That this was compounded by the failure to obtain and review documentary evidence to support the disclosure.
- 7.42 It was stated that in Order to ascertain ownership and the existence of fixed assets, the auditor is required to verify the records of assets of ownership with reference to the documentary evidence and evaluation of the controls on the fixed assets.
- 7.43 However, HLB Zambia had failed to show ownership of the land beyond the documents that the client submitted. The Disciplinary Committee noted that the land was included in the 2017 financial statements as a deposit, when the land was only actually acquired in May 2018, while title to One (1) of the pieces of land was acquired in June 2018 for Two Hundred and Seventy-Seven (277) hectares.
- 7.44 The finding was that the land was only advertised for sale on 2nd April, 2019, and prospective buyers only expressed interest in buying it in July, 2019. Also noted by the Disciplinary Committee, was that an acknowledgement of

receipt of the funds was only issued by Sikoongo Chiefdom in 2019, with reference to the agreement of May 2018. That this brought into question, the earlier Ten Million Kwacha (K10,000,000.00) investment property which was recognised in 2017, and was disclosed as a short-term deposit.

- 7.45 The Disciplinary Committee found that the response by HLB Zambia, referred to an initial agreement with Kashin Investments who was said to be the title holder to One (1) of the Six (6) pieces of land. Based on that, it was found that HLB did inadequate work with regard to ascertaining whether the land in question was purchased by Laurence Paul in 2017, and whether it had satisfied the rights to pass on the land to it, in Order that it could be recognised as an asset.
- 7.46 HLB Zambia was also found to have made insufficient disclosure, and the fact that the land was not on title, required disclosure and the directors' interests should have been disclosed in the financial statements. It was stated that the fact that the land was not on title and the fact that the documents that were filed at the Ministry of Lands for processing title had related party interests should have been disclosed in the financial statements.
- 7.47 The Disciplinary Committee also stated that the reclassification that was done in 2018, was done without the circumstances that led to the re-classification being indicated. They noted that as this was a material balance in

the financial statements, there should have been a lot more disclosure, as dictated by the Accounting standards to give sufficient information to the users of the financial statements.

7.48 They noted that IAS 1.41 states that when an entity re-classifies comparative amounts, it shall disclose:

(a) The nature of the re-classification.

(b) The amount of each item or class of items that is re-classified.

(c) The reasons for the reclassification.

7.49 It was also stated that the standard that is required for such disclosures is ISA 710 (Misstatement in Prior Period Financial Statements). The Disciplinary Committee noted that this standard states that when the prior period financial statements that are misstated have not been amended and an auditor's report has not been issued, but the corresponding figures have been properly re-stated or appropriate disclosures have been made in the current period financial statements, the auditor's report may include an Emphasis of Matter paragraph, describing the circumstances and referring to where relevant, disclosures that fully describe the matter that can be found in the financial statements, as provided in ISA 706.

7.50 Also found by the Disciplinary Committee, was that the auditor's report on the legal and other regulatory requirements did not mention the Securities Act. ISA 220 was noted as providing that quality control systems,

policies and procedures are the responsibility of the audit firm. That under ISQC 1, the firm has an obligation to establish and maintain a system of quality control to provide it with reasonable assurance that:

(a) The firm and its' personnel comply with professional standards and applicable legal and regulatory requirements and;

(b) Reports issued by the firm or engagement partners are appropriate in the circumstances.

7.51 The Disciplinary Committee took judicial notice of the fact that Laurence Paul activities were regulated by the Securities Act. Therefore, the audit ought to have reported on compliance or non-compliance with the said Act. It was found that HLB Zambia failed to recognise the operating framework/regulation that Laurence Paul was supposed to comply with.

7.52 They went on to note that Laurence Paul as a licenced dealer by the Securities and Exchange Commission, was required to comply with the Securities Act, but whether it did comply was not mentioned in the audited financial statements by HLB Zambia.

7.53 With respect to the failure by HLB Zambia to make adequate disclosure after the reporting dates in the audited financial statements for 2016; 2017 and 2018, the Disciplinary Committee noted that this related to the collapse and liquidation of Genesis Financial Services Limited in 2017 followed by the collapse of Focus Financial

Services Limited in 2018, with both events having occurred after the 2016 and 2017 years ended, and before the audited financial statements were approved.

- 7.54 It was observed that ISA B560 requires an auditor to perform audit procedures that are designed to obtain sufficient appropriate audit evidence, that all events occurring between the date of the financial statements have been identified. HLB Zambia was found to have failed to ensure that Laurence Paul made sufficient disclosures of material events which occurred after the reporting dates of the audited financial statements of 2016, 2017 and 2018.
- 7.55 The finding by the Disciplinary Committee was that those events impacted on the liquidation of Laurence Paul, because they had invested in Genesis Financial Services and Focus Financial Services Limited. It was stated that these events occurred in 2018 before the audited financial statements were signed.
- 7.56 In respect of the failure by HLB Zambia to provide sufficient details on related party transactions with regard to Laurence Paul Unit Trust and Focus Financial Services Limited, the Disciplinary Committee noted that there was further failure to disclose the liability of Eight Hundred and Eighty Four Thousand Nine Hundred and Thirteen Kwacha (K884,913.00) which was owed to Laurence Paul Unit Trust arising from the collapse of Genesis Financial Services Limited in which Laurence Paul Unit Trust had invested.

7.57 It was observed that in the audited financial statements of 2018, it was alleged that an amount of Five Million Three Hundred and Thirty-Six Thousand Five Hundred and Sixty-Seven Kwacha (K5,336,567.00) was reported as being owed to Laurence Paul Group had not been reflected in the statement of financial position. Further, that the print out from the Ministry of Lands on the Seven (7) parcels of land indicated that there was no disclosure of related party transactions, as Six (6) parcels of land were in the name of a Company director, a former accountant and other individuals, and not in the names of Laurence Paul.

7.58 Standard ISA 550 was stated as providing that in forming an opinion on the financial statements in accordance with ISA 700.12, the auditor shall evaluate:

(a) Whether the identified related party relationships and transactions have been properly accounted for and disclosed in accordance with the applicable reporting framework (Ref Para A46); and

(b) Whether the effects of the related party relationships and transactions:

(i) Prevent the financial statements from achieving fair presentation (for fair presentation frameworks); or

(ii) Cause the financial statements to be misleading (for compliance frameworks) (Ref Para A47).

7.59 The Disciplinary Committee found that related party transactions called for more disclosure and once an auditor

uncovers a related party transaction, they have additional responsibilities to closely examine each transaction among the related parties. On that basis, the Disciplinary Committee found that HLB was either aware of the related party or appeared to cooperate with Laurence Paul's decision to conceal such transactions, thereby misleading the users of the financial statements.

- 7.60 They noted that it was a withheld disclosure that investors should have been made aware of, as it is material information that impacted on the company's potential decisions and financial position.
- 7.61 From the above findings that were made by the Disciplinary Committee, it will be noted that the omissions that were alleged on the part of HLB Zambia, were in relation to matters that HLB Zambia did not contest when Nonde Sichilima testified. The fact that this witness had left audit some time and he was not aware of the current auditing standards did not impact the decision of the Disciplinary Committee as the said Committee, in making findings referred to the standards that are applicable when audit is being done, which Nonde Sichilima had referred to.
- 7.62 It consequently follows that even though Nonde Sichilima did not know the standards that apply currently, he did speak to standards that the Disciplinary Committee found were applicable, and which were not discredited as being inapplicable by HLB Zambia. The issue of Nonde Sichilima

being a witness with an interest to serve did not arise on that basis.

7.63 **Section 72 of the Accountants Act** in stating what amounts to professional misconduct states that this includes:

“(i) engages in any conduct that is prejudicial to the accountancy profession or is likely to bring it into disrepute; or

(ii) Breaches the Code of Ethics or accounting or auditing pronouncements or encourages another Member to breach or disregard the principles of the Code of Ethics or accounting or auditing pronouncements.”

7.64 The Disciplinary Committee made finding that touched on breach of the Code of Ethics and Accounting Standards and these findings were not perverse, and neither were they those that were made in the absence of relevant evidence, or those that a trial Court properly directing itself, could not have made, as it was not contested that the failure in reporting, resulted in breach of the said provisions.

7.65 Ground One of the appeal fails, and it is dismissed.

GROUND THREE

7.66 In respect of Ground Three, it alleges that the Disciplinary Committee of the Zambia Institute of Chartered Accountants erred in law and in fact, when it found that there was collusion between HLB Zambia and Laurence Paul to evade the provisions of the law, and to mislead

potential investors in Laurence Paul Investments Services, when there was no evidence that was laid before the Disciplinary Committee to support such an allegation.

- 7.67 In the arguments, HLB Zambia stated that collusion is akin to fraud, and a finding of fraud must be supported by evidence. It was also alleged that a finding of fraud must be specifically pleaded.
- 7.68 In response, the Zambia Institute of Chartered Accountants stated that the Disciplinary Committee tabulated the evidence that was presented, and analysed it, before it arrived at a decision, as seen at pages R11 and R12 of the ruling which is at pages 245 and 246 of the Record of Appeal.
- 7.69 It was argued that HLB Zambia failed to disclose the related transactions in the audited financial statements, which related to the Eight Hundred and Eight-Four Thousand Nine Hundred and Thirteen Kwacha (K884, 913.00), which was owed to Laurence Paul following the collapse of Genesis Financial Services, and that in the 2018 audited financial statements, the amount of Five Million Three Hundred and Thirty-Six Thousand Five Hundred and Sixty-Seven Kwacha (K5,336,567.00) which was owed to Laurence Paul Group was not reflected.
- 7.70 Lastly, that the printouts from the Ministry of Lands showed that out of the Seven (7) parcels of land, only One (1) was in the name of Laurence Paul for Two Hundred and

Seventy-Seven (277) hectares of land, while the rest were in the names of third parties.

7.71 The Zambia Institute of Chartered Accountants argued that the summons which were issued to HLB Zambia did not qualify as a pleading, and the finding of collusion was within the scope of the allegations of failure to report transactions.

7.72 Indeed, it is trite that allegations of fraud must be distinctly pleaded and at trial, evidence must be led to distinctly prove the allegations. The holding in the case of ***Sable hand Zambia Limited v Zambia Revenue Authority*** ⁽⁸⁾ was that:

“(i) Where fraud is an issue in the proceedings, then a party or wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, at the trial of the cause, the party alleging fraud must equally lead evidence, so that the alleging fraud must equally lead evidence, so that the allegations is clearly and distinctly proved.

(ii) Allegations of fraud must, once pleaded, be proved on a higher standard of proof, than on a mere balance of probabilities, because they are criminal in nature.”

7.73 *Fraud* is defined in ***Black’s Law Dictionary by Bryan A. Garner, 9th Edition Thomas Reuters 2009*** at page 731 as:

“1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. 2. A misrepresentation made recklessly without belief in its’ truth to induce another person to act. 3. A tort arising from a knowing misrepresentation made to induce another to act to his or her detriment. 4. Unconscionable dealing esp in contract law, the unfair use of power resulting in unconscionable bargain.”

7.74 Collusion on the other hand is defined by the said ***Black’s Law Dictionary*** as:

“An agreement to defraud another or to do or obtain something forbidden by the law”

7.75 From the definitions, it can be seen that fraud and collusion are related. Therefore, if the allegations against HLB Zambia included collusion or fraudulent conduct, it should have been put on notice in respect of that allegation, and at the hearing, evidence should have been led to strictly prove the alleged collusion.

7.76 The summons to appear for the Disciplinary Committee which is at page 36 of the Record of Appeal cannot be said to be the pleading that made allegations against HLB Zambia, as it merely invited HLB Zambia to appear at the disciplinary hearing. The letter that was written to the late Jonathan Mwale by the Zambia Institute of Chartered Accountants, which is at page 6 of the Record of Appeal

informing him of the complaint, highlighted the nature of complaint.

- 7.77 This was with regard to inappropriate treatment of parcels of land that Laurence Paul purchased as short-term deposit and not investment property. The allegations also related to inappropriate inclusion of the land in the financial statements for 2017, when the land was acquired in May 2018. Further, that the valuation of the land was not correct, and the fact that despite him making representations to the Securities and Exchange and Exchange Commission, that he had had sight of the titles for the Seven (7) parcels of land, only One (1) was in the name of Laurence Paul.
- 7.78 Based on those allegations, the late Jonathan Mwale was asked to respond in writing within Seven (7) working days. From this, it can be seen that while an allegation was made regarding failure to state in whose names, title to the parcels of land was, there was no allegation that the late Jonathan Mwale colluded with Laurence Paul to conceal third party transactions in the audited statements.
- 7.79 Then at pages 37-43 of the Record of Appeal, is a report on the allegations that were made by the Zambia Institute of Chartered Accountants, which highlighted the allegations as regards to the audited financial statements by HLB Zambia for 2016, 2017 and 2018, which related to the land and inadequate disclosures of events after the reporting dates. It can be seen from this, that there was a process of

investigations that were conducted before the disciplinary charges were preferred.

7.80 In the case of *Mulenga v Mumbi Ex Parte Mhango* ⁽⁴⁾ it was held that:

“(i) No order should be made to the detriment of an individual unless he is a party to the proceedings and is given an opportunity to be heard before any such order is made. Anything done to the contrary would be a breach of the rules of natural justice.”

7.81 The law in **Section 77 (4) of the Accountants Act No 13 of 2008** is that the proceedings of the Disciplinary Committee are like judicial proceedings. This entails that a Chartered Accountant or a member who appears before it facing disciplinary charges, must be treated fairly, and they must be put on notice on any allegations that are brought against them.

7.82 Therefore, HLB Zambia not having been put on notice on the allegations of collusion, the Disciplinary Committee erred in making a finding as to collusion, as it bordered on fraud, and it should have been specifically pleaded or included in the letter that informed HLB Zambia of the charges that had been preferred against it. Ground Three of the appeal succeeds and the finding of collusion is accordingly set aside.

GROUND FOUR

- 7.83 Ground 4 of the appeal attacks the imposition of a fine by the Disciplinary Committee, which was the highest possible fine when HLB Zambia was a first offender.
- 7.84 The contention by HLB Zambia was that the imposition of the fine of Thirty Thousand Kwacha (K30,000.00) was harsh, in view of the fact that it was a first offender and there was no evidence of aggravating circumstances. Therefore, it deserved leniency.
- 7.85 The Zambia Institute of Chartered Accountants in response, argued that the maximum penalty that a Chartered Accountant or a member may receive on being found guilty of professional misconduct, is having their licence cancelled. That in this case, a fine was imposed on the basis that HLB Zambia was a first offender.
- 7.86 Indeed, a first offender deserves leniency, when there are no aggravating circumstances. In the case of ***Phiri v The People*** ⁽²⁾, it was held that;

“A first offender should not be denied leniency although circumstances may make the application of such leniency minimal. The reason for dealing with a first offender leniently is in the hope that a severe sentence is not necessary and that a lenient sentence will be sufficient to teach a previously honest man a lesson.”

- 7.87 Then in the case of ***Solomon Chilimba v The People*** ⁽³⁾ it was stated that;

“Unless the case has some extraordinary features which aggravate the seriousness of the offence, a first offender ought to receive the minimum sentence. Such a feature in cases of stock theft might be an unusually large number of animals stolen, or facts which point to a well-planned rustling operation.”

- 7.88 In this matter, the evidence on record shows that HLB Zambia was a first offender. The Disciplinary Committee however, found that the inadequate disclosures in the audit report had the potential of misleading the public who may wish to invest in Laurence Paul, based on its’ financial position.
- 7.89 It is noteworthy that the complaint that was made by the Securities and Exchange Commission, came against the backdrop that the Securities and Exchange Commission had issued a directive to Collective Investments Schemes (CIS) Management Companies to self-declare assets and liabilities arising from deposit taking activities which were not permitted under the Dealer’s licences issued by the Securities and Exchange Commission.
- 7.90 Based on that, the Securities and Exchange Commission undertook detailed review of Laurence Paul’s audited financial statements and other information. Thus, it can be seen, that arising from the review of Laurence Paul’s audited statements, complaints arose against HLB Zambia

as its' auditor, which revealed failure to adequately disclose information in the audit reports.

7.91 That in itself was aggravating, as it impacted on Laurence Paul's financial position. As argued by the Zambia Institute of Chartered Accountants, the fine that was imposed was not the highest sanction that could be imposed, as cancellation of the practicing licence for HLB Zambia was highest punishment that could be imposed. The fine of Thirty Thousand Kwacha (K30,000.00) which was imposed, therefore does not come with a sense of shock and neither can it be said that it was inappropriate in the circumstances.

7.92 Ground Four of the appeal fails.

8. CONCLUSION

8.1 Having found that the Disciplinary Committee did not err in finding that HLB Zambia was guilty of the offence of professional misconduct, and also having found that the penalty of the fine that was imposed was not harsh in light of the fact that HLB Zambia was a first offender, the appeal fails, and it is dismissed with costs to the Zambia Institute of Chartered Accountants. The costs if not agreed shall be taxed. Leave to appeal is granted.

DATED AT LUSAKA THE 14th DAY OF AUGUST, 2023



S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**