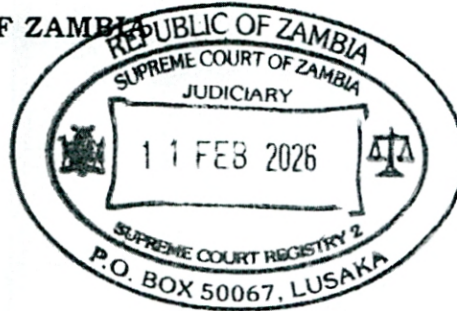


IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT NDOLA  
(Civil Jurisdiction)

SCZ/7/29/2025



BETWEEN :

MANOJ PATEL

1<sup>ST</sup> APPLICANT

BAXY PHARMACEUTICALS MANUFACTURING  
COMPANY LIMITED

2<sup>ND</sup> APPLICANT

AND

SANMUKH RAMANLAL PATEL

1<sup>ST</sup> RESPONDENT

DAXA SANMUKH PATEL

2<sup>ND</sup> RESPONDENT

INFINITY GROUP ZAMBIA LIMITED

3<sup>RD</sup> RESPONDENT

AL DWIA PARMA LCC

4<sup>TH</sup> RESPONDENT

**Coram: Malila CJ, Kaoma and Chisanga JJS on 3<sup>rd</sup> February  
2026 and 11<sup>th</sup> February 2026**

*For the Applicants:* Mr. J. Chimankata of Messrs CHOLT Legal  
Practitioners

*For the Respondents:* Mr. C. M. Sianondo and Mr. C. Malambo of Messrs  
Malambo and Company and Mr. T. Mubita of  
Messrs Paul Norah Advocates

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## R U L I N G

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Malila CJ, delivered the ruling of the court.

**Case referred to:**

1. *Diego Casilli v. Access Bank (Z) Limited & 5 Others (CAZ Appeal No. 259 of 2022)*
2. *Bidvest Foods Limited & Others v. CAA Import & Export Limited (SCZ Appeal No 56/2017)*
3. *Nkata & Four Others v. Attorney General (1966) ZR 124*
4. *Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172*
5. *Giles Yambayamba v. Attorney General & Another (SCZ Judgment No. 26 of 2025)*
6. *Patrick Makumbi & 25 Others v. Greytown Breweries Limited & 3 Others (SCZ Appeal No. 032/2012)*
7. *Martin Nguvulu & 34 Others v. Marasa Holdings Limited (SCZ Appeal No. 208/2016)*
8. *Bulk Transport Limited v. Mopani Coppermines Limited (SCZ Appeal No. 211 of 2016)*
9. *K V Wheels Construction Limited v. Investrust Plc (SCZ/8/29/2021)*
10. *Kapsch Trafficom South Africa Holdings Pvt Limited v. Intelligent Mobility Solutions Limited & Lamise Trading Limited (Appeal No. 7/32 of 2024)*
11. *Attorney General v. Kakoma (1975) ZR 216*

**Legislation referred to:**

1. *Supreme Court Rules, Chapter 25 of Laws of Zambia*
2. *Court of Appeal Act, No. 7 of 2016*
3. *Companies Act, No. 10 of 2017*
4. *Constitution of Zambia, Act No. 2 of 2016*
5. *Court of Appeal Rules, Statutory Instrument No. 65 of 2016*

**1.0. INTRODUCTION**

- 1.1. The applicants are the losing parties in an appeal that was determined by the Court of Appeal in August 2024. The Court of Appeal upheld a High Court judgment dismissing the applicants' claim. They sought leave to appeal the Court of

Appeal judgment to this court. Their application was unsuccessful.

- 1.2. A renewed application for permission to appeal before a single judge of this court was adjourned for consideration by the court in terms of Order 48 Rule 3 of the Supreme Court Rules.
- 1.3. The applicants thereupon filed extra copies of the application as per the rules, and hence this motion.

## **2.0. BACKGROUND**

- 2.1. The judgment of the High Court, which caused annoyance to the applicants, was delivered by Mwenda-Zimba J, on 22<sup>nd</sup> February 2023. She dismissed the applicants' numerous claims.
- 2.2. The proceedings before the High Court began as two separate actions that were ultimately consolidated into one. They each emanated from a series of business dealings by the parties principally arising from the shareholding in, and management of, the second applicant company.

- 2.3.** It so happens that the second applicant was incorporated in October 2011 with a nominal share capital of Five Thousand Kwacha divided into Five Thousand shares of One Kwacha each. It would appear from an official document from the Patents and Companies Registration Agency (PACRA) that the first applicant held 2500 shares while the first and second respondents held the remainder of the shares between them.
- 2.4.** The genesis of the troubles that have brought the parties here started with a call in March 2017 by the second applicant for an annual general meeting (AGM) of the second applicant company on 10<sup>th</sup> April 2017. The first and second respondents indicated their unavailability for the meeting on the appointed date. Not so for the first appellant who was available and thus proceeded with the AGM in the absence of the other two shareholders whose combined shareholding in the company was not insignificant.
- 2.5.** At the said AGM, interesting developments happened. A special resolution was passed. Its effect was to bring about sweeping changes in the management of the second applicant.

The company's records at PACRA were amended accordingly. The management of the second applicant was, going forward, essentially to be determined by the first applicant.

- 2.6.** The developments set out in the foregoing paragraph so riled the first and second respondent that they moved the High Court in December 2017, seeking various relief against the first and second applicants, centered around the alleged impropriety of the special resolution passed at the AGM.
- 2.7.** They sought a medley of relief and a declaration that the special resolution was null and void and consequently a reversal of all actions, measures and decision taken pursuant to, or in the aftermath of the said special resolution.
- 2.8.** The claims under this cause were commenced in the High Court, General Division. Some four years down the line, in May 2021, the first respondent commenced another action in the High Court, this time in the Commercial Division. It was against the third and fourth respondents.
- 2.9.** Numerous liquidated claims were put forth in the second action in respect of the shareholding in the second applicant,

sold by the first and second respondents to the fourth respondent for US\$8 million, and the sale to the fourth respondent of shares in Baxy Pharmaceuticals Limited, which was wholly owned by the first and second respondents. There were also claims arising from other delicate financial arrangements that were concluded between the parties including settlement agreements, debt swap agreements and sale of motor vehicles.

**2.10.** As indicated earlier, the two actions were subsequently consolidated through a consent order and heard as one commercial matter by the High Court.

### **3.0. DECISION OF THE HIGH COURT**

**3.1.** The learned High Court judge upheld the first and second respondents' claims against the first appellant, second appellant, third respondent and fourth respondent. She also held that the special resolution passed at the AGM of 10<sup>th</sup> April 2017 was null and void and that the shareholding in the second appellant did not change.

**3.2.** The court thus found that the first and second respondents held the 50% shares in the second applicant which they sold to the fourth respondent. She dismissed the counter-claims by the fourth respondent and the first applicant on the footing that the sale of the shares in the second applicant was valid.

**3.3.** Unhappy with the High Court judgment, the appellants appealed to the Court of Appeal, fronting eleven grounds of appeal alleging various errors and misdirections on the part of the High Court judge.

**4.0. DECISION OF THE COURT OF APPEAL AND APPLICATION FOR PERMISSION TO APPEAL**

**4.1.** The Court of Appeal, in its judgment delivered in August 2024, upheld the judgment of the High Court principally on account of the fact that the appeal assailed the lower court's findings of fact.

**4.2.** The decision of the Court of Appeal angered the appellants. They now seek to appeal to the Supreme Court. To do so, they required the permission of the Court of Appeal in accordance

with section 13 of the Court of Appeal Act and Rule 51 of the Supreme Court Rules, Chapter 25 of Laws of Zambia.

4.3. By motion filed in August 2024, the appellants beseeched the Court of Appeal to grant them permission to appeal on grounds that the intended appeal raises points of law of public importance and, further, that there are compelling reasons for the appeal to be heard by the Supreme Court.

4.4. Six grounds of the intended appeal, from which the Court of Appeal was invited to distill the two reasons for seeking leave to appeal, were these:

1. **That the Court of Appeal erred in law and fact when it upheld the finding by the High Court that the sum of US\$4,312,917.39 was a debt owed by the second appellant to Astrol Holdings which finding was arrived at solely on the basis of the demeanour of the witness at trial.**
2. **That the Court of Appeal erred in law and fact when it sustained the finding of the High Court that the first respondent gave out loans to the second appellant to the tune of US\$13,937,291.00 in the absence of evidence.**
3. **That the Court of Appeal erred in law and fact when it upheld the finding by the High Court that the first respondent did not breach his fiduciary duties to the second appellant as a director.**

- 4. The Court of Appeal erred in law and fact when it held that the shareholding in the second appellant company remained the same as it was at incorporation.**
- 5. The Court of Appeal erred in law and fact when it sustained the awards of costs in the High Court and in the Court of Appeal against an interested party to the proceedings.**
- 6. The Court of Appeal erred in law when it found that the appellants' heads of argument were prepared contrary to the guidance in the *Diego Casilli*<sup>(1)</sup> case and order 10/9/10 of the Court of Appeal Rules**

- 4.5. The respondents opposed the application on grounds that the intended appeal did not meet the threshold for the grant of leave.
- 4.6. In its ruling on the application, the Court of Appeal declined to grant leave on the ground that the intended appeal is premised on findings of fact and that there are no prospects of success.
- 4.7. It was in the circumstances set out above that the applicants renewed the application for leave before a single judge of this court who in turn adjourned the application for the consideration of the court.

**5.0. THE APPLICANT'S CASE**

5.1. As regards the issue whether the intended appeal raises a point of law of public importance, it will be noted that in the present case, the arrangements that gave rise to the differences that have seen the parties come to this point, had a private origin. The companies involved, the shares in those companies, the individuals concerned, the contractual arrangements etc., were all private in nature.

5.2. Yet, in the supporting affidavit for the motion for leave to appeal sworn by Manoj Patel, an attempt is made to explain how the seemingly private issues transcend into the public interest space in the paragraphs quoted below:

**6 That I believe that the issue to do with how the Second Appellant contracted a debt of US\$4,312,917.39 from Astrol Holdings canvassed under Ground One of the intended appeal, which was decided solely on the demeanour of the 1<sup>st</sup> Respondent at trial raises a point of law of public importance.**

**7. That I verily believe that the entire country stands to benefit from a endorsement by both the Court of Appeal and the Supreme Court on whether the demeanor of a witness in civil matters can establish the existence of contracts relationship viz loan agreements [sic!]**

**8. That I verily believe from information given to me by my advocates that the weight of evidence to be placed on demeanour of a witness transcends the parties to this dispute and affects the entire jurisdiction, especially where the demeanour is based on the conduct of a witness during the head of cross-examination.**

**5.3.** That is not all. The supporting affidavit explains further why points of law of public importance arise from the seemingly private arrangements of the parties to the current appeal.

**13. That I am advised by my advocates and do verily believe the same to be true that the intended appeal in ground give (5) raises a point of law of public importance in that a certification by the apex court on whether an Interested Party can be condemned in costs when such party can neither be a successful nor unsuccessful party in a suit will help the courts in the adjudication of cases.**

**14. That I am advised by my advocates and do verily believe the same to be true that the intended ground six (6) of the appeal to the Supreme Court raises a point of law of public importance in that the entire jurisdiction stands to benefit from an endorsement by both the Court of Appeal and if leave is granted, the Supreme Court on the requisite number of pages for Heads of Arguments.**

**15. That the law is unsettled as to the effect of failure to submit Heads of Arguments in 30 pages or thereabout and below.**

**16. The public at large and indeed all litigants stand to benefit not only from the decision of the Court of Appeal on this issue but also if leave is granted, from a decision of the highest court of the land on points of law I have stated in this my affidavit.**

5.4. Concerning the aspect of other compelling reason for the appeal to be heard as a basis for the grant of leave to appeal, the deponent of the supporting affidavit points to the issue of how the first appellant acquired 51% shareholding in the second appellant company in light of the fact that shareholding is consistent with the annual returns filed for years at PACRA.

5.5. In the skeleton arguments in support of the motion for leave to appeal, counsel for the applicant reiterated that points of law of public importance may be gleaned from grounds one, five and six of the proposed appeal while ground four was singled out as offering other compelling reasons for the grant of leave. In the skeleton arguments, grounds two and three are not specifically located in the discussion as to what factors they represent in the scheme of leave to appeal.

5.6. At the hearing of the motion, Mr. Chimankata, learned counsel for the applicant, in augmenting the written arguments, stressed that the Court of Appeal's agreement with the High Court that the dismissal of the claim of US\$4,312,917.39 and the upholding of the claim for US\$13,937,291.00 as money allegedly paid fraudulently by Astrol Holdings and being a loan to the second applicant respectively, was on the basis of the demeanour of a witness rather than available evidence.

5.7. Counsel specifically called our attention to paragraphs 9.23 and 9.24 of the Court of Appeal Judgment [at J21]. They read as follows:

**9.23. The learned judge held, with regard to the US\$4,312,917.39 that she was inclined to accept the 1<sup>st</sup> respondent's testimony because the witness was consistent and of a calm demeanour. In the learned judge's observation, this was in sharp contrast to the 1<sup>st</sup> appellant's witness who was inconsistent, tottery and therefore unreliable.**

**8.24. On the basis of the above, we would be slow to take issue with the learned judge's findings of fact based on the demeanour of witnesses as she had first-hand view and assessment of the witnesses.**

- 5.8.** The point made by counsel was that in civil matters, demeanor is not a defined basis for substantively determining the rights of the parties. The decision of the Court of Appeal is of interest to the wider public as it seems to have placed accent on the demeanour of a witness rather than on objective evidence to make a determination of the parties' rights. This, according to counsel, makes the point one of law of public importance.
- 5.9.** The second point the learned counsel stressed had to do with PACRA. This office, according to counsel, is a repository of companies' details and records and thus has a responsibility to ensure that the records it keeps are correct. By the public records kept at PACRA the first applicant was erroneously reflected as having 51% shares in the second applicant.
- 5.10.** It was Mr. Chimankata's submission that on appeal, should leave to appeal be granted, the applicants will canvas the argument that the company's records at PACRA ought to be a correct reflection of the company's state of affairs and will seek

this court's direction. This, therefore, was a compelling reason for the appeal to be heard.

**5.11.** The final point highlighted by counsel for the applicant relates to ground six of the proposed grounds of appeal. He took issue with the Court of Appeal's restriction of the heads of argument to thirty pages and its purportedly promulgating practice rules when under section 30 of the Court of Appeal Act, the power to do so reposes in the Chief Justice.

**5.12.** On the basis of the foregoing, we were urged to allow the motion and grant leave to the applicants to appeal.

**6.0. THE RESPONDENTS' CASE**

**6.1.** The affidavit in opposition to the notice of motion was sworn by Sanmukh Ramanlal Patel. In it the deponent averred that he believes that the intended appeal raises no point of law of public importance, nor are there any compelling reasons for the appeal to be heard. This is because the grounds of appeal, in his view, relate to findings of fact, which findings were supported by the evidence on record.

- 6.2.** It is also averred that a trial court has the opportunity to see the demeanour of witnesses and is entitled to make findings of fact based on such demeanor. In the present case, the findings of fact made by the trial court cannot be said to have transcended the interest of the parties to the dispute.
- 6.3.** Regarding the 51% shareholding, the deponent of the affidavit in opposition states that at no point did the first applicant acquire 51% shareholding in the second applicant company and that there is no evidence to support that claim. The position is that there were numerous anomalies on the PACRA register after the incorporation of the second applicant.
- 6.4.** On costs, Mr. Patel confirmed his belief that costs are awarded in the discretion of the court and parties to a cause will incur costs as a result of an interested party's involvement.
- 6.5.** As regards the Court of Appeal's statement on the number of pages that heads of argument should have, the deponent of the affidavit believes the remarks of the court were merely given *obita dictum*.

- 6.6. In the skeleton arguments in opposition to the motion, the respondents' learned counsel devoted time to explain why appeals to the Supreme Court are now restricted. He made reference to numerous foreign case authorities many of which were considered in **Bidvest Foods Limited & Others v. CAA Import & Export Limited**<sup>(2)</sup>. We do not intend to rehash those arguments and authorities for they are now common cause.
- 6.7. Counsel for the respondent then went on to discuss the fate of an appeal premised on findings of fact. Starting with the case of **Nkata & Four Others v. Attorney General**<sup>(3)</sup>, moving on to **Wilson Masauso Zulu v. Avondale Housing Project Limited**<sup>(4)</sup>, counsel stressed that an appeal premised on findings of fact is to be allowed only in defined circumstances, namely where the findings are either perverse or made in the absence of any relevant evidence, or upon a misapprehension of facts. Counsel submitted that the intended appeal challenges findings of fact under circumstances that do not satisfy the threshold for interference with those findings by an appellate court as set out in the case law developed by this court.

- 6.8. Counsel reiterated the point we made in the case of **Giles Yambayamba v. Attorney General & Another**<sup>(5)</sup> that the ascription of probative value to evidence given by witnesses is preeminently the business of the trial court which has the opportunity to see and hear the witnesses. Equally, echoed was the observation we made in **Patrick Makumbi & 25 Others v. Greytown Breweries Limited & 3 Others**<sup>(6)</sup> that assessment of conflicting witnesses' evidence is in the province of the trial court. Similar sentiments were made in **Martin Nguvulu & 34 Others v. Marasa Holdings Limited**<sup>(7)</sup> and in **Bulk Transport Limited v. Mopani Coppermines Limited**<sup>(8)</sup> both of which counsel cited.
- 6.9. The short point made by counsel for the respondent is that all grounds of the intended appeal do not fit into the criteria for granting leave to appeal. We were thus urged to dismiss the application for leave to appeal.
- 6.10. At the hearing of the appeal Mr. Sianondo briefly submitted that as we observed in our decision in **K V Wheels Construction Limited v. Investrust Plc**<sup>(9)</sup> there ought, in the first place, to be a point of law in the intended appeal if leave to appeal is to be

granted on the basis that the appeal raises a point of law of public importance.

**6.11.** Counsel also reacted to the submission of the applicants' counsel on the prescription by the Court of Appeal of the page limit for heads of argument, contending that the guidance given by that court in **Diego Casilli v. Access Bank (Z) Limited & 5 Others<sup>(1)</sup>** was intended for the better management of proceedings before it in the absence of rules on the point.

**6.12.** Mr. Malambo highlighted the arguments made in the skeleton arguments and the averments in the affidavit in opposition, stressing that the application before us did not satisfy any of the factors as set out in section 13 of the Court of Appeal Act relative to the grant of leave to appeal. We were thus urged to dismiss the motion.

## **7.0. ANALYSIS AND DECISION**

**7.1.** We are grateful to counsel for the respective parties for their efforts.

- 7.2. Recently, in **Kapsch Trafficom South Africa Holdings Pvt Limited v. Intelligent Mobility Solutions Limited & Lamise Trading Limited**<sup>(10)</sup> we reiterated that consideration for the grant of permission to appeal to the Supreme Court constitutes a critical juncture in the appellate process and, therefore, that it should be informed by a careful and judicious appraisal of the reasons advanced for the application for leave to appeal, measured against the template set by section 13 of the Court of Appeal Act.
- 7.3. In **Bidvest**<sup>(2)</sup>, a case that is now regarded as our *locus classicus* on the issue of leave to appeal, we set out to answer almost exhaustively, various questions that would potentially arise from the provisions of section 13 of the Court of Appeal Act, No. 7 of 2016, on the condition for the grant of leave to appeal.
- 7.4. Section 13 of the Court of Appeal Act sets out three bases upon which leave to appeal in civil matter must be anchored, namely raising a point of law of public importance, carrying reasonable prospects of success, and there being other compelling reasons for the appeal to be heard.

- 7.5.** An intended appeal that does not meet any of the threshold requirements for appellate review as set out in section 13 of the Court of Appeal Act will not cross the critical point of being granted leave to appeal.
- 7.6.** Under the renewed application for permission to appeal now before us, we have to yet again consider whether the intended appeal satisfies the two threshold tests relied upon by the applicants, namely the appeal raising a point of law of public importance, and the existence of other compelling reasons for the appeal to be heard.
- 7.7.** What is clear to us is that much of the arguments addressed to us by counsel for the parties went way beyond the basis upon which the Court of Appeal declined to grant leave.
- 7.8.** We discern from the ruling of the Court of Appeal that leave to appeal was refused for principally three reasons. First, that the intended appeal, as can be gleaned from the proposed grounds of appeal, is intended to assail findings of fact. This is clear from a number of paragraphs in that ruling.
- 7.9.** In paragraph 5.19, for example, the court stated as follows:

**In *casu*, we directed our mind to the intended grounds of appeal (cited at paragraph 2.3 above). It is clear as day, that the proposed grounds of appeal are based on challenging findings of fact, will not find much favour with us, less still with the Supreme Court, as the final arbiter of disputes.**

And at paragraph 5.22 the court stated:

**At best, the applicants are attempting to challenge findings of fact which were arrived at by the lower court and upheld in our judgment. We have examined our judgment, now assailed and in paragraphs 9 to 9.16 thereof, we upheld the findings of the lower court on the issues, for reasons sufficiently canvassed in our judgment. Again, these being findings of fact, we were not convinced to depart from them.**

**7.10.** The crowning statement by the court on the issue of the appeal being against findings of fact, comes in paragraph 5.30 where the court states that:

**We reiterate that all the intended grounds of appeal are findings of fact, grounded on evidence before the court. There are no prospects of success.**

**7.11.** We wish to first examine the view by the court that the findings sought to be challenged in the intended appeal are ones of fact as opposed to ones that raise legal points. We have in paragraph 4.4., set out the proposed grounds of appeal as framed by the applicants.

**7.12.** We must be very clear in our appreciation of the distinction between a point of law and a point of fact. The former deals with the interpretation or application of a legal principle while the latter concerns actuality, evidence, or circumstances of a case. The most elementally way to envision a factual point is seeing it as arising from a question such as 'what happened?' 'Where is it kept?' For points of law on the other hand the question would be typically in the nature of 'what does that imply?' 'Whose obligation was it?' etc.

**7.13.** There is then a hybrid situation of some law and some facts making a point one of mixed law and fact.

**7.14.** While it should be conceded that one can hardly separate law from its factual milieu, the dichotomy between law and fact in a ground of appeal is much more than the ordinary relationship between law and fact.

**7.15.** In dealing with grounds of appeal based on mixed law and fact the court must be satisfied that the content of law is inseparable from the content of facts. A little grain of fact in

them should not tilt the position to straight mixed law and fact.

**7.16.** The first proposed ground of appeal impugns the High Court's finding that the sum of US\$4,312,917.39 was a debt owed by Astrol Holdings. This could well be a factual issue.

**7.17.** Our view, however, is that ground one is not one premised on law or fact alone. The finding being assailed is one of mixed law and fact because the determination of the existence of that debt could well involve applying legal principles to the facts established, more so that the facts in this case show that the claim of US\$4,312,917.39 came in a counter-claim that was dismissed amidst claims that it was paid fraudulently to Astrol Holdings. The existence of the debt is so intricately woven to legal points that it can hardly be treated as purely one of fact.

**7.18.** The second ground relates to the holding by the trial court that the first respondent gave out loans to the second applicant to the tune of US\$13,937,291. Our view is that this could well be a factual issue the determination of which would

require a response to the question 'was US\$13,937,291 given to the second applicant as a loan?

**7.19.** The third ground questions whether the first respondent did not breach his fiduciary duties to the second applicant as a director. Determining the existence of fiduciary duties, let alone when they are breached, clearly entails resort to the law and to legal principles. In our respectful view, to answer the question whether there was a breach of a fiduciary duty is not a matter of eliciting a response from a witness of fact. It entails an interrogation of legal principles.

**7.20.** Ground four, in our considered opinion, does not raise factual points. Shareholding in a company is a much more complex issue than ownership of a bicycle. It is not exclusively proved by returns at PACRA. Under section 190 of the Companies Act, for example, transmission of shares is by operation of the law in a manner that can overtake the paper work at PACRA. Shares could be surrendered or forfeited under section 148. Section 188 of the Companies Act provides for the transfer of shares. Allotment of shares as well as their transfer are

hugely legal points especially in an environment where the concept of beneficial ownership of shares exists.

**7.21.** The fifth ground has to do with costs. Of course, the award of costs is generally in the discretion of the court, yet, there are well established legal principles that guide the exercise of that discretion. For example, that costs follow the event; that costs can be thrown away, etc. We thus do not believe that ground five raises purely factual issues as the Court of Appeal was inclined to conclude.

**7.22.** Ground six relates to the holding by the Court of Appeal that heads of argument must have an upper limit of 30 pages. Is this a factual or legal point? Our view is that it is a legal one because whatever the court does or directs must have a legal basis; it must be anchored in legality.

**7.23.** Our conclusion, therefore, is that contrary to the holding by the Court of Appeal that all the proposed grounds of appeal are anchored on the trial court's findings of fact, they are in fact not. The Court of Appeal was thus plainly wrong to base

its rejection to consider the applicants' application for leave to appeal on that basis.

**7.24.** The second reason for the refusal to grant leave was that the appeal did not raise any point of law of public importance. This was articulated by the court in various paragraphs. At paragraph 5.13, for example, the court stated that:

**It is clear from a perusal of the grounds of appeal that the intended appeal is grounded on findings of fact, which in terms of the *K V Wheels*<sup>(9)</sup> case, does not qualify as raising a point of law.**

And at paragraph 5.20 the court stated that:

**Further, issues to do with shareholding structure, the composition of a corporate entity, and disputes emanating therefrom, are only truly of concern to members of the company. They cannot by any stretch of imagination, evolve into a public element appeal of their own [sic!].**

Elsewhere in the ruling, the court stated (paragraph 5.22) that:

**We are of the considered opinion that this argument is speculative and hypothetical, as there is no point of law that has been raised against PACRA, which warrants the Supreme Court to intervene nor has it been shown how the public will benefit from the so called efforts to "sanitise the public service system."**

**7.25.** Mr. Chimankata, for the applicants, forcefully submitted that proposed grounds of appeal one, five and six all raise points of law of public importance. He has also argued that there are other compelling reasons for the appeal to be heard. His counterparts, Mr. Sianondo and Mr. Malambo have argued to the contrary.

**7.26.** Concerning a point of law of public importance, we have in a surfeit of case authorities explained the circumstances in which an intended appeal will be said to raise a point of law of public importance as envisioned in section 13 of the Court of Appeal Act.

**7.27.** We have repeatedly stated that such a point is constituted by the existence of a substantial question of law that overshoots the private interests of the parties to a given *lis* and bears upon the legal rights and interests of the broader community.

**7.28.** We find it neither necessary nor desirable that we should repeat the many statements we have made in various decided cases as to what constitutes a point of law of public importance.

7.29. In **Bidvest**<sup>(2)</sup> we cautioned, however, that even appeals that have their origins in private treaty or relations may well end up raising a point of law of public importance. This is how we articulated the point:

**Many cases of a purely private nature including many in contract and tort are unlikely to raise points of law of public importance since they quite often are designed to resolving the dispute to the satisfaction only of one or the limited parties to a particular dispute. This, however, is not in any way to suggest that such dispute would never transcend or snowball into the public arena or arouse or engage broader public interest or concern. To be certain, where there is a discernable public interest or public policy concern in the anticipated elucidation by the Supreme Court of a point of law in what is otherwise litigation between private parties, there is a definite possibility that such point of law would be one of public importance notwithstanding its private genesis.**

7.30. The final basis for the rejection of leave to appeal was that the appeal had no prospects of success. As noted at paragraph 4.6 above, the Court of Appeal devoted a couple of paragraphs [at R18] discussing prospects of success and why the intended appeal had none.

7.31. We must state that while the analytical framework for leave to appeal envisages the trilogy of factors set out in section 13

relevant to civil matters appeals, there is no need to consider all these factors particularly when they have not all been raised by the applicant for leave.

**7.32.** What is noteworthy is that in their application for leave before the Court of Appeal, the applicants did not put forth prospects of success as a reason for the court to grant leave. The court gratuitously delved into it. This was unnecessary.

**7.33.** What the applicant requested the court but for some reason the court did not dare to address it, was that there were other compelling reasons for the appeal to be heard.

**7.34.** We propose to consider the two factors i.e. point of law of public importance and compelling reasons together considering that they cut across various proposed grounds of appeal.

**7.35.** Our view of this case is that it is not only fact intensive but those convoluted facts are complex. It presents a labyrinthine factual matrix involving a multifaceted and nuanced set of circumstances.

7.36. The issue of the US\$4,312,917.39 debt owed by the second appellant to Astrol Holdings was hugely contested. As is clear from the judgment of the Court of Appeal [at paragraphs 7.6 – 7.7], the applicant's counter-claim for that sum was dismissed while the court upheld the claim for US\$13,937,291.00 by the first respondent. There were allegations of fraudulent payment to Astrol Holdings.

7.37. Mr. Chimankata's argument, as we understand it, is that rather than make findings of fact on the evidence available so that her ultimate decision was informed by those findings, the trial judge, and endorsed subsequently by the Court of Appeal, anchored her findings on the demeanour of a witness.

7.38. We, of course, accept the submission of Mr. Sianondo and Mr. Malambo regarding the propriety of the court's reluctance to upset findings of fact. The authorities cited are all on point.

7.39. However, a court's findings of fact should be firmly grounded in the evidence presented before it. It is for this reason that in **Attorney General v. Kakoma**<sup>(11)</sup>, a case cited by the learned counsel for the respondent, we stated that:

**A court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it having seen and heard the witnesses giving evidence.**

7.40. While reliance on witnesses' demeanour is significant in assessing which witnesses' evidence should be assigned weight, relying solely on witnesses' demeanour can lead to inaccurate assessments as it is subjective and can be influenced by biases, cultural differences, or even the witness's emotional state.

7.41. Our view is that the demeanour of a witness cannot be a substitute for evidence where proof is warranted. What proves an issue is evidence rather than the demeanour of the evidence giver.

7.42. In the present case, we have seen the summary of the issue respecting the US\$4,312,917.39 by the Court of Appeal referring to the trial court judgment. At paragraph 9.23 and 9.24 of the Court of Appeal judgment, is given the following rendition of how the trial judge approached the issue:

**9.23. The learned judge held, with regard to the US\$4,312,917.39, that she was inclined to accept the 1<sup>st</sup>**

**respondent's testimony because the witness was consistent and of a calm demeanour. In the learned judge's observation, this was in sharp contrast to the 1<sup>st</sup> appellant's witness who was inconsistent, tottery and therefore unreliable.**

**9.24. On the basis of the above, we would be slow to take issue with the learned judge's findings of fact based on the demeanour of witnesses as she had first hand view and assessment of the witnesses.**

**7.43.** We have not seen any reference to the actual evidence relied upon, let alone what evidence, given by the witnesses whose demeanour was called in issue, was conflicting. We are thus inclined to agree with Mr. Chimankata that it was the demeanour rather than the evidence that the trial judge relied upon to make her decision.

**7.44.** We understand the applicants as suggesting that substantial injustice was occasioned to them by the serious flaws in the trial process that might have affected the result. It is not our place to comment on the merits of the case at this stage.

**7.45.** Notwithstanding their purely private origins, the issues canvassed by this proposed appeal under ground one, raises a point of law of public importance. We equally believe that

there is need to clarify issues of fiduciary duties and shareholding in a company which are raised under grounds three and four.

**7.46.** In **Bidvest**<sup>(2)</sup> we dealt with instances in which section 13(3)(d) of the Court of Appeal Act relating to other compelling reasons for the appeal to be heard could be invoked. We stated in that case that that provision creates a French window that could be used in circumstances other than those envisioned in the other sub-section of section 13(3), that is to say where neither the raising of a point of law of public importance, nor the possession of prospects of success can be properly or solely be invoked.

**7.47.** In explaining further when the sub-section can be deployed, we stated as follows:

**Our considered view is that this sub-section contemplates an appeal which may not necessarily raise a point of law of public importance or one contemplated in sub-section (3)(b), (c) and (d). It could be exploited for other judicial exigencies as dictated by the interests of justice, having regard to all the circumstances of the case such as the manner in which the case was conducted, for example, where the hearing was demonstrably tainted by some procedural irregularity or was**

done in disregard of the tenets of due process. Yet, the provision may also be used in aid of the need for the development of jurisprudence as envisioned in article 125(3) of the Constitution of Zambia as amended by Act No. 2 of 2016

We think this provision could also provide a pathway for the court to depart from existing precedent owing to changed circumstances, to settle contradictory positions, or to clarify the law where this becomes necessary.


7.48. We consider that there are significant legal principles at stake in this appeal. They include the efficacy of the records kept by a public office, PACRA; the power of individual courts to issue practice guidelines and the legal status of such guidelines. As we recently observed in the case of **Kapsch Trafficcom South Africa**<sup>(10)</sup> which we referred to earlier in this judgment:


**We believe that points of law which remain unsettled, or have been decided inconsistently by lower courts (or even for that matter, by this court) and necessitate authoritative guidance, or pose questions which bear upon fundamental rights or freedoms, or involve a matter of statutory interpretation that has a broad implication, qualify as matters of law of public importance.**

7.49. Besides the case raising significant legal points that need authoritative clarification by this court, there are compelling reasons for this appeal to be heard.

7.50. From our assessment of the various aspects of the trial process as ventilated in the preceding pages, we form the view that this appeal raises points of law of public importance and that there are other compelling reasons for the appeal to be heard.

7.51. We thus grant leave to the applicants accordingly. Costs shall abide the outcome of the appeal.

  
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Mumba Malila  
**CHIEF JUSTICE**

  
.....  
R M. C. Kaoma  
**SUPREME COURT JUDGE**

  
.....  
F. M. Chisanga  
**SUPREME COURT JUDGE**