

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



2019/HP/0288

BETWEEN:

FINSBURY INVESTMENTS LIMITED**PLAINTIFF**

AND

**EASTERN AND SOUTHERN AFRICAN TRADE
AND DEVELOPMENT BANK
ATTORNEY GENERAL**

DEFENDANT**INTENDED INTERVENOR**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS
23rd DAY OF JANUARY, 2024**

For the Plaintiff : Mr P. Chomba and Mr. M. Nalishuwa, Mulenga
Mundashi Legal Practitioners

For the Defendant : Mr. R. Petersen and Mr C.J Mumba Chibesakunda
& Co

For the Intended Intervenor : Mr P. Shambulo, Principal State Advocate

R U L I N G

CASES REFERRED TO:

1. *Cropper v Smith* [1881 C.2207] – (1884) 26 CH D 700
2. *Sharp v Wakefield* HL 1891
3. *Gatti v Shoemith* 1939 1 CH 841
4. *The Arantzazu Mendi* 1939 1 ALL ER 719
5. *Hadkinson v Hadkinson* 1952 ALL ER 567
6. *Adams v Adams (Attorney General intervening)* 1970 3 ALL ER 572
7. *D. E. Nkhuwa v Lusaka Tyre Services Limited* 1977 ZR 43
8. *Industrial Finance Company Limited v Jacques and Partners* 1981 ZR 75
9. *Nahar Investment Limited v Grindlays Bank International (Zambia) Limited* 1984 ZR 81
10. *Palata Investments Limited and others v Burt Sunfield Limited and others* 1985 2 ALL ER 517
11. *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* 1989 KLR 19

12. *BP Zambia Plc v Interland* SCZ No 5 of 2001
13. *Sayer v Clarke Walker* 2002 1 WLR 3095
14. *Denton v TH White* [2004] EWCA Civ 906
15. *Zambia Privatisation Agency v Huddel Chisenga Chibbichabo and another* 2005 ZR 74
16. *NFC Africa Mining Plc v Techro Zambia Limited* SCZ No 22 of 2009
17. *Antonio Ventriglia v Eastern and Southern African Trade and Development Bank* SCZ No 13 of 2010
18. *Gabriel Mangamu Musonda v ZESCO Limited* 2010/HP/1268
19. *Molly Kyalukinda Turinawe & 4 others v Turinawe Ephraim & another* (Supreme Court Civil Application No 27 of 2010)
20. *Twapane Mining and E. M Storti Mining Limited* 2011 Vol 3 ZR 67
21. *Stanbic Bank v Micoquip Zambia Limited* SCZ No 22 of 2012
22. *Servas Inc v Rafidain Bank* [2012] UKSC 40
23. *Bernard Kutalika v Dainess Kalungu* Appeal No 73 of 2013
24. *JCN Holdings Limited v Development Bank of Zambia* 2013 ZR 299
25. *Investrust Bank Plc v Build It Hardware Limited and another* SCZ Appeal No 003/2013 (Jan 2018)
26. *Dar Farms Transport Limited v Moses Nundwe, Lima Bank (in liquidation) Lukanga Investment Development Limited and Mpongwe Farms Limited* Appeal No 46/2014
27. *Phillip Mutantika & Sheal Mulyata v Kenneth Chipungu* 2014 ZMSC 124
28. *Hope Foundation for Women and Children v Munalula Linyati* Appeal No 70 of 2015
29. *Standard Chartered Bank Plc v John M.C Banda* Appeal No 94 of 2015
30. *Puma Energy Zambia Plc v Competition and Consumer Commission* Appeal No 172 of 2015
31. *Viridor Waste Management Limited v Veolia ES Ltd* 2015 EWHC 2321 (Comm)
32. *Patson Sakala v Heinrich's Syndicate Limited and Heinrich's Beverages* Appeal No 08 of 2016
33. *Aristogerasimos Vangelatos and another v Metro Investments Limited and others* Selected Judgment No 35 of 2016
34. *Mpongwe Farms Limited v Dar Farms and Transport Limited* SCZ No 38 of 2016
35. *Henry Kapoko v The People* (2016/CC/0023) [2016] ZMCC 6 (7 November 2016)
36. *Stanbic Bank Zambia Limited v Savenda Management Services Limited* 2016 CAZ/08/040
37. *Zambia Sugar Plc v Lumuno Muwkali* [2018] NOM/35/2018
38. *Bizwayo Nkunika v Electoral Commission of Zambia and another* 2019/CCZ/005
39. *Barclays Bank v Jeremiah Njobu and 41 others* SCZ/09/21/2019
40. *Uganda v Natmbi Vincent* Criminal Application No 98 of 2019

41. *Dr David Nama and another v Republic of Romania and another* CAZ/08/374/2021
42. *ZSIC Life Limited v Mercy Namwila Kapaimba and 56 others* Application No 36/2022
43. *Golden Lotus Insurance Company Limited v ZESCO Limited and others* CAZ/08/266/2022

LEGISLATION REFERRED TO:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court of England, 1999 Edition*
3. *The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia*

OTHER WORKS REFERRED TO:

1. *Black's Law Dictionary, 9th Edition*
2. *Jackson and Powell on Professional Liability, 7th Edition, (Sweet and Maxwell, 2012)*
3. *Zambian Civil Procedure: Commentary and Cases Vol 2, by Patrick Matibini, 2017, Lexis Nexis*

1. INTRODUCTION

- 1.1 This Ruling is on Two (2) applications. The first was filed by Eastern and Southern African Trade and Development Bank, seeking an Order for extension of time within which to file the Notice of Appeal and Memorandum of Appeal on 6th September, 2021.
- 1.2 The said application was made pursuant to **Order 13 Rule 3 (3) and Order 13 Rule 12 of the Court of Appeal Rules, Statutory Instrument No 65 of 2016** as well as **Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia**.
- 1.3 The second application was made by the Attorney General on 24th April, 2023, to be joined as amicus curiae in these proceedings, pursuant to **Order 14 Rule 5 (1) of the High**

Court Rules Chapter 27 of the Laws of Zambia and Order 15 Rule 6 (2) (b) of the Rules of the Supreme Court of England, 1999 Edition.

- 1.4 The application for extension of time within which to appeal was supported by an affidavit and a combined List of Authorities and Skeleton Arguments. Also filed in support of the application, were a List of Authorities and Skeleton Arguments in reply on 18th July, 2023, as well as Supplementary List of Authorities and Skeleton Arguments in reply on 15th November, 2023.
- 1.5 In opposing the application, Finsbury Investments Limited filed an affidavit in opposition and List of Authorities and Skeleton Arguments in opposition on 28th June, 2023, as well as a supplementary List of Authorities and Skeleton Arguments in opposition on 20th October, 2023.

2. BACKGROUND

- 2.1 Finsbury Investments Limited commenced this action, by applying ex-parte for leave to issue and serve the Writ of Summons out of jurisdiction on 22nd February, 2019, which Order was granted on 1st March, 2019. Thereafter, on 5th March, 2019, the Writ of Summons and statement of claim, were filed, in which Finsbury Investments Limited seeks the following reliefs;
- i. Damages for conspiracy;*
 - ii. Damages for wrongful interference;*
 - iii. Interest;*
 - iv. Any other relief that the Court may deem fit; and*

v. *Costs.*

- 2.2 Eastern and Southern African Trade and Development Bank, on 29th April, 2019, entered appearance and filed its' defence. The said defence was amended on 8th May, 2019. Then thereafter, on 11th November, 2019, Eastern and Southern African Trade and Development Bank filed an application raising preliminary issues. Those preliminary issues were determined in a Ruling dated 26th May, 2020, which granted leave to appeal against the said Ruling.
- 2.3 The record shows that on 16th September, 2020, Eastern and Southern African Trade and Development Bank applied for a stay of proceedings pending determination of the appeal. In a Ruling dated 22nd October, 2020, I granted the Order staying the proceedings pending determination of whether the appeal was properly before the Court of Appeal.
- 2.4 Then on 6th September, 2021, Eastern and Southern African Trade and Development Bank filed an application for extension of time, within which to file the Notice of Appeal and Memorandum of Appeal. After that, on 22nd November, 2021, the said Eastern and Southern African Trade and Development Bank, filed an ex-parte application for an Order permitting amendment of the application which was filed on 6th September, 2021.
- 2.5 Finsbury Investments Limited, however, on 19th November, 2021, applied to set aside those applications. In a Ruling dated 17th February, 2022, I set aside Eastern and Southern African Trade and Development Bank's applications.

Thereafter, on 17th March, 2022, Eastern and Southern African Trade and Development Bank applied to stay these proceedings pending determination of the appeal in the Court of Appeal. I declined to grant the application in a Ruling dated 18th May, 2022.

- 2.6 Following that Order, Finsbury Investments Limited, applied for extension of time to comply with the Orders for Directions, which was granted. Thus, Orders for Directions were given in a Ruling dated 12th July, 2022, and in pursuance of those Orders for Directions, Eastern and Southern African Trade and Development Bank filed its' List of Documents and description of documents to be relied on at trial on 8th August, 2022.
- 2.7 The same was amended on 17th October, 2022, and on the same date, Finsbury Investment Limited also filed an amended List of Documents. Then on 3rd October, 2022, the parties entered into a Consent Order to vary the Orders for Directions, which were issued on 12th July, 2022. The record also shows that on 20th January, 2023, Eastern and Southern African Trade and Development Bank filed a Notice of Motion accompanied by an affidavit and Skeleton Arguments to adjourn trial of the matter, in Order to enable it to adduce further evidence.
- 2.8 The application was granted on 1st February, 2023. However, prior to that, on 30th January, 2023, Eastern and Southern African Trade and Development Bank filed an application, to

file supplementary bundles of documents. In a Ruling dated 30th May, 2023, that application was granted.

- 2.9 Thereafter, the application that is subject of this Ruling was set for hearing after the Court of Appeal delivered its' Judgment on appeal on 30th May, 2023, in respect of my Ruling dated 17th February, 2022.

3. AFFIDAVIT IN SUPPORT

- 3.1 Edward Sampa, who is an Advocate and Principal Legal Officer at Eastern and Southern African Trade and Development Bank, deposed that this Court on 26th May, 2020 delivered a Ruling, which was exhibited as 'ES1', and which dismissed the preliminary issues that were raised by Eastern and Southern African Trade and Development Bank.
- 3.2 Referring to the email, which was exhibited as 'ES2', he averred that the advocates for Eastern and Southern African Trade and Development Bank, sent the email to the said Eastern and Southern African Trade and Development Bank enclosing the Ruling, and advised that the period within which to appeal was Thirty (30) days.
- 3.3 Then by the e-mail, which was exhibited as 'ES3', Eastern and Southern African Trade and Development Bank, through its' Legal Officer, informed its' advocates that they would acquaint themselves with the Ruling, and they would revert in the course of the week with instructions on the appeal. Thus, thereafter, the advocates were instructed to appeal, with calls being had to discuss the appeal, as shown by the email correspondence, which was exhibited as 'ES4',

and was exchanged with the Legal Officer for Eastern and Southern African Trade and Development Bank and Charles C. Mumba of Messrs Chibesakunda & Co.

- 3.4 Still in averment, it was stated that Eastern and Southern African Trade and Development Bank and its' advocates, believed that the final date for filing the Notice of Appeal and Memorandum of Appeal was Friday, 26th June, 2020, with the email exhibited as 'ES5' being referred to.
- 3.5 Thus, the Notice of Appeal and Memorandum of Appeal, which were exhibited as 'ES6', were filed on 26th June, 2020, and Eastern and Southern African Trade and Development Bank by the e-mail exhibited as 'ES7', were informed of the said filing, and the next steps that were to be taken. Then as evidenced by the e-mail which was exhibited as 'ES8', Finsbury Investments Limited was notified of the filing of the Notice of Appeal and Memorandum of Appeal, within Fourteen (14) days.
- 3.6 It was also deposed that in furtherance of the appeal, on 25th August, 2020, Eastern and Southern African Trade and Development Bank within Sixty (60) days of filing the Notice of Appeal and Memorandum of Appeal, filed the Record of Appeal in the Court of Appeal, together with the heads of argument, as well as a Notice of Payment of Security for Costs into Court. The said documents were exhibited as 'ES9-ES11'.
- 3.7 Then on 22nd July, 2020, the advocates for Eastern and Southern African Trade and Development Bank wrote the

letter exhibited as 'ES12', to the Registrar of the High Court, following up on the proceedings in the Court below, which were required for the Record of Appeal. It was also deposed that on 16th September, 2020, Eastern and Southern African Trade and Development Bank, applied for a stay of the Court proceedings before this Court. He stated that by a Ruling dated 22nd October, 2020, and which was exhibited as 'ES14', the application was granted.

- 3.8 The averment was that however, prior to that, on 11th September, 2020, Finsbury Investments Limited had applied in the Court of Appeal to dismiss the appeal for irregularity, as the appeal was filed a day late, and without the leave of the Court. Exhibited as 'ES15', was a copy of the application to dismiss, and it was stated that to Edward Sampa's belief, which he verily believed to be true, and he had been advised his advocates, that the said application was served on Counsel for Eastern and Southern African Trade and Development Bank, on or about 28th September, 2020, which was exhibited as 'ES16'.
- 3.9 He also deposed that Eastern and Southern African Trade and Development Bank on or about 28th September, 2020, when served the said application, became aware that the appeal was in fact filed a day late.
- 3.10 Edward Sampa's averment was that upon the appeal being challenged, Eastern and Southern African Trade and Development Bank sought instructions from its' advocates, which culminated in the advocates for Eastern and Southern

African Trade and Development Bank, filing an application in the Court of Appeal on 23rd October, 2020, to cure the defect, and an opposition to the application to dismiss the appeal, which was exhibited as 'ES17'.

- 3.11 It was stated that the applications to dismiss the appeal and to cure the defect were heard by the Court of Appeal, on 28th October, 2020, and on 6th August, 2021, approximately Ten (10) months after the applications were heard, the Ruling on the applications was delivered. The said Ruling was exhibited as 'ES18', and it was deposed that the Court of Appeal determined that it did not have jurisdiction to extend time within which to appeal, as such extension could only be granted by the High Court, where the original leave to appeal was granted.
- 3.12 Then between 6th August, 2021, and the date on which the application was filed before this Court, Eastern and Southern African Trade and Development Bank together with its' advocates were reviewing the Ruling and assessing its' options going forward.
- 3.13 It was stated that additionally, the internal organs of Eastern and Southern African Trade and Development Bank, it being a regional organisation with multiple decision-making organs, were further considering the way forward, and were making a decision on the best option to take. Edward Sampa stated that Eastern and Southern African Trade and Development Bank through himself, instructed the advocates for Eastern and Southern African Trade and

Development Bank, to apply to the High Court for extension of time within which to file the Notice of Appeal and Memorandum of Appeal.

3.14 It was averred that Eastern and Southern African Trade and Development Bank acted in good faith, and that the delay was inadvertent. He also stated that there was no dilatory conduct on the part of Eastern and Southern African Trade and Development Bank, and the application was promptly made to the Court of Appeal.

3.15 Still in averment, it was deposed that the appeal had prospects of success, and that it had raised issues of significant public interest. Further, by leave being granted, Finsbury Investments Limited would not be prejudiced.

4. LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN SUPPORT

4.1 The argument advanced, was that a single Judge of the Court of Appeal, guided that this Court has jurisdiction to deal with the application to extend time within which to appeal. It was further argued that similar guidance was given in the case of ***Investrust Bank Plc v Build It Hardware Limited and another*** ⁽²⁵⁾.

4.2 Still in argument, the position taken was that, in that case, the Supreme Court guided that an application for leave to appeal, must in the first instance, be made in the High Court. It was also stated that ***Order 13 Rule 12 of the Court of Appeal Rules, Statutory Instrument No 65 of 2016***, provides that where an application may be made to

the High Court, it shall in the first instance be made in the High Court.

- 4.3 Further reference was made to **Order 13 Rule 3 of the Court of Appeal Rules**, as empowering the Court of Appeal to extend time for taking an appeal to that Court. The case of **Stanbic Bank Zambia Limited v Savenda Management Services Limited** ⁽³⁶⁾ was argued as having held that while **Section 25 of the Court of Appeal Act** uses the word “shall”, strictly speaking, that provision is not mandatory, as **Order 13 of the Court of Appeal Rules** confers discretion on the Court of Appeal to extend time which an appeal may be brought for sufficient reasons.

APPLICABLE CASE LAW AND CONSTITUTIONAL PROVISIONS IN SUPPORT OF THE APPLICATION

- 4.4 It was argued that authorities from the Supreme Court and the High Court are abound, which illustrate that breach of the Rules of the Court in lodging an appeal, does not necessarily mean that the right to appeal is bound to fail. It was stated that in considering an application to extend time within which to appeal, the Court looks at:
- i. The circumstances of the particular case;
 - ii. The reasons for the delay, and whether there was dilatory conduct and/or mala fides on the part of the appellant;
 - iii. Whether there has been, in the circumstances of the case, inordinate delay;

- iv. If it is determined that there has been inordinate delay, the Court examines the merits of the grounds of appeal;
- v. Whether the respondent will suffer prejudice if the appeal is heard.

4.5 It was argued that the Court of Appeal in the case of **Stanbic Bank Zambia Limited v Savenda Management Services Limited** ⁽³⁶⁾ extensively examined the circumstances that apply to an application to extend time within which to appeal.

4.6 The argument was also that in the particular circumstances of this case, the application should be allowed, as the reason for the delay in appealing within time, was inadvertence or error, without mala fides.

4.7 The case of **D. E. Nkhuwa v Lusaka Tyre Services Limited** ⁽⁷⁾ was relied on, as having held that:

“The granting of an extension of time within which to appeal is entirely in the discretion of the Court, but such discretion will not be exercised without good cause.”

4.8 It was further argued, that in the case of **Gatti v Shoemith** ⁽³⁾, the Court held that an error in filing an appeal out of time could be cured. Further, that in that case, the Court stated that there was nothing in the nature of the mistake, to exclude it from being a proper ground for allowing the appeal, and that treating the matter so, depended on the facts of each individual case.

- 4.9 The continued argument was that similarly in this case, the delay in filing the appeal, was due to a mistake on the part of Eastern and Southern African Trade and Development Bank and its' legal advisor, who had laboured under the mistaken belief that the appeal ought to have been filed by Friday 26th June, 2020, as opposed to Thursday 25th June, 2020.
- 4.10 It was added that Finsbury Investments Limited took well over Sixty (60) days to signal the error, by taking out the application challenging the appeal. Thus, the delay was not inordinate. Eastern and Southern African Trade and Development Bank went on to argue, that in line with **Order X Rule 3 (9) of the Court Appeal Rules, Statutory Instrument No 65 of 2016**, it served Finsbury Investments Limited the Notice of Appeal and Memorandum of Appeal, within Fourteen (14) days.
- 4.11 Therefore, Finsbury Investments Limited was aware of the appeal, and this underscored the lack of mala fides on the part of Eastern and Southern African Trade and Development Bank. It was stated that on being made aware of the error, Eastern and Southern African Trade and Development Bank promptly made the application to extend time within which to appeal on 30th October, 2020, after Finsbury Investments Limited brought the error to its' attention, on 28th September, 2020.

- 4.12 Then on being guided, it made the application promptly before this Court, within approximately Five (5) weeks after the Ruling by the Court of Appeal.
- 4.13 Also argued, was that the delay in filing the appeal, was a day after the time had lapsed. It was stated that the application was made Five (5) weeks after the Ruling of the Court of Appeal, as Eastern and Southern African Trade and Development Bank, was reviewing the Ruling of the Court of Appeal, and assessing its' options going forward. It was also argued that the internal organs of Eastern and Southern African Trade and Development Bank, it being a regional institution with various decision-making organs, were further considering the way forward.
- 4.14 Thus, it was reiterated that the delay in making the application was not inordinate. The cases of ***Patson Sakala v Heinrich's Syndicate Limited and Heinrich's Beverages*** ⁽³²⁾ and ***Zambia Sugar Plc v Lumuno Muwkali*** ⁽³⁷⁾ were cited as cases in support, stating that in the case of ***Patson Sakala v Heinrich's Syndicate Limited and Heinrich's Beverages*** ⁽³²⁾, the Court of Appeal held that the delay of Two (2) months in appealing, as they were reviewing the Judgment of the Court and assessing the prospects of success of the appeal, was sufficient reason to exercise the discretion in their favour.
- 4.15 Then in the ***Zambia Sugar Plc v Lumuno Muwkali*** ⁽³⁷⁾ case, time to appeal was extended, as the delay was occasioned by

the Appellant being a corporate entity, where decisions are not made by a single person, but require consultation.

- 4.16 The decision by the Supreme Court in the case of ***Standard Chartered Bank Plc v John M.C Banda*** ⁽²⁹⁾, was also relied on, stating that they noted that the Rules of Court should not generally be used as a minefield for parties who make fairly inadvertent mistakes, that do not translate into tangible prejudice to the other party. That where an irregularity can be cured without prejudice to the other party, then it is desirable that it should be made out right, subject to an Order for costs against the erring party.
- 4.17 It was argued that the Court, in the English case of ***Cropper v Smith*** ⁽¹⁾ held that Courts do not exist to punish the parties for the mistakes that they make in the conduct of their cases. That the Court should correct errors or mistakes, that are not fraudulent or intended to overreach.
- 4.18 Further in argument, it was stated that in the case of ***Twampane Mining Co-operative Limited v E.M Storti Limited*** ⁽²⁰⁾, the Supreme Court relied on the English case of ***Palata Investments Limited and others v Burt Sunfield Limited and others*** ⁽¹⁰⁾, where it was held that in cases where the delay is very short, and there is an acceptable excuse for the delay, as a general rule, the applicant should not be deprived of the right to appeal, and so no questions of the merits of the appeal will arise.
- 4.19 Thus, there being no significant delay between the time when the Notice of Appeal and the Memorandum of Appeal ought

to have been filed, and the date on which they were filed, being a day only, and Finsbury Investments Limited not having suffered any prejudice, the application should be granted.

- 4.20 Other arguments advanced, were that Eastern and Southern African Trade and Development Bank continued to prosecute the appeal, unaware of the error, and even paid for security for costs before the Court of Appeal.

PROSPECTS OF SUCCESS OF THE APPEAL

- 4.21 The prospects of success of the appeal were also argued, and it was stated that in the circumstances of the case, it was just and proportionate to grant the application. The provisions of **Article 118 (2) (e) of the Constitution** were highlighted, and the argument was that the Constitutional Court in the case of **Henry Kapoko v The People** ⁽³⁵⁾ held that:

“While the facts and the law in each case will vary, the principle laid out by the Court on the meaning and application of Article 118 (2) remains constant. Article 118 (2) (e) is not intended to do away with existing principles, laws and procedures, even where the same constitute technicalities. It is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality.”

- 4.22 It was argued that the Constitutional Court stated, in that matter, that the Court is required to determine the

circumstances of each individual case. That this approach was in line with the principles that were set out in the English case of *Denton v TH White* ⁽¹⁴⁾, where the need to evaluate the circumstances of the case, so as to deal with the case justly will be satisfied, was stressed.

WHETHER FINSBURY INVESTMENTS LIMITED WILL SUFFER PREJUDICE IF TIME IS EXTENDED TO APPEAL?

- 4.23 On the question of prejudice, the case of *Denton v TH White* ⁽¹⁴⁾, whose decision was approved in the case of *Viridor Waste Management Limited v Veolia ES Ltd* ⁽³¹⁾, was relied on, to the effect that where the failure can be seen to be neither serious nor significant, or where good reason is demonstrated, or where it is otherwise obvious that the relief from sanctions is appropriate, the parties should agree that relief from sanctions can be granted, without the need for further costs to be expended in satellite litigation.

THE APPEAL IS CONCERNED WITH MATTERS OF PUBLIC INTEREST

- 4.24 The argument was also that the appeal was concerned with matters that are of significant public interest, which the Court of Appeal ought to determine. In that regard, reliance was placed on the case of *Servas Inc v Rafidain Bank* ⁽²²⁾ where the Supreme Court held that the commercial purposes exception, did not apply on the facts of the case, and dismissed the appeal against the decision upholding immunity from execution.

- 4.25 That in doing so, the Supreme Court agreed with the reasoning of the Court of Appeal, that the origin of the debts was irrelevant, when deciding whether the property was in use for commercial purposes, emphasizing public interest in keeping a Central Bank's property immune from enforcement.
- 4.26 It was argued that in this case, the public interest is more acute, as provided under *Article 151 of the Common Market for Eastern and Southern Africa (COMESA) Treaty*. Further that under *Article 4* of the said Treaty, it engages in commercial transactions, which is at the core of its' mandate.
- 4.27 It was also argued that under *Article II of the New York Convention*, contracting parties are required to recognise an agreement in writing, under which the parties have undertaken to submit to arbitration, all or any differences that arise between them, whether contractual or not.

5. AFFIDAVIT IN OPPOSITION

- 5.1 Sokwani Peter Chilembo, the Group Legal Counsel for the Mahtani Group of Companies, which is part of Finsbury Investments Limited deposed, giving a history on how the proceedings were commenced, and the applications that were further made in the matter, as given in the background to the matter above.
- 5.2 He stated that in the Ruling dated 26th May, 2020, which dismissed the preliminary issues that were raised by Eastern and Southern African Trade and Development Bank, leave

was granted to appeal. Then on 26th June, 2020, more than Thirty (30) days after the Court's Ruling, Eastern and Southern African Trade and Development Bank filed a Notice and Memorandum of Appeal in the Court of Appeal. Then subsequently, the Record of Appeal and Heads of Arguments were filed before that Court.

- 5.3 He also deposed that on 11th September, 2020, Finsbury Investments Limited, applied before the Court of Appeal to dismiss the appeal for irregularity, as the appeal was filed a day late, and without the leave of the Court. It was his averment, that in a bid to circumvent the irregularity in filing the appeal a day late, Eastern and Southern African Trade and Development Bank filed an application in the Court of Appeal on 23rd October, 2020, for extension of time within which to file the Notice of Appeal and Memorandum of Appeal in the Court of Appeal.
- 5.4 Then on 6th August, 2021, the Court of Appeal delivered its' ruling, dismissing the appeal for want of jurisdiction, as it was filed late, without the leave of the Court. It was stated that the Court of Appeal also considered the application to extend time to appeal, and dismissed the same.
- 5.5 Sokwani Peter Chilembo also deposed that on 6th September, 2021, more than Thirty (30) days after the Ruling of the Court of Appeal was delivered, Eastern and Southern African Trade and Development Bank, applied before this Court for extension of time within which to file the Notice and Memorandum of Appeal in the Court of Appeal.

- 5.6 It was averred that on 29th November, 2021, Finsbury Investments Limited filed a Notice to set aside the application for extension of time to file the Notice of Appeal and the Memorandum of Appeal, on the ground of want of jurisdiction, on the part of the High Court.
- 5.7 His continued contention was that on 17th February, 2022, this Court dismissed the application by Eastern and Southern African Trade and Development Bank, and by that Ruling, granted leave to appeal. Then on 10th March, 2022, Eastern and Southern African Trade and Development Bank filed the Notice of Appeal and Memorandum of Appeal.
- 5.8 He went on to depose that on 30th May, 2023, the Court of Appeal delivered its' Judgment on the appeal, in relation to the Ruling dated 17th February, 2022, which was exhibited as 'SPC1', stating that this Court erred in finding that it had no jurisdiction to grant extension of time to file the Notice of Appeal and Memorandum of Appeal, on the ground that a single Judge of the Court of Appeal had dismissed the application.
- 5.9 It was stated that on 12th June, 2023, Finsbury Investments Limited filed a Notice of Motion for Leave to Appeal to the Supreme Court against the Judgment of Court of Appeal, which was exhibited as 'SPC2'.

6. LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN OPPOSITION

- 6.1 The law in ***Order 13 Rule 3 (3), and Order 13 Rule (12) of the Court of Appeal Rules, Statutory Instrument No 65***

of 2016, and **Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia**, which were relied on, in making the application was cited. It was argued that pursuant to those provisions of the law, the Court could extend time for appealing, upon sufficient reasons being given. It was also stated that an application for extension of time to appeal, is granted in the Court's discretion, where sufficient and satisfactory reasons are given.

- 6.2 In support of that position, the case of **D. E. Nkhuwa v Lusaka Tyre Services Limited** ⁽⁷⁾ was stated as having held that:

“The granting of an extension of time within which to appeal is entirely in the discretion of the Court, but such discretion will not be exercised without good cause.

In addition to the circumstances of the delay and the reasons therefore which provide the material on which the Court may exercise its discretion, another most important factor is the length of the delay itself.

Rules prescribing times within which steps must be taken must be adhered to strictly and practitioners who ignore them will do so at their own peril.”

- 6.3 It was further argued that the Court of Appeal in the case of **Stanbic Bank Zambia Limited v Savenda Management Services Limited** ⁽³⁶⁾ guided that each application will be

considered on its' own facts, and therefore it was inappropriate to uplift the ratio decidendi of the Supreme Court in one case, with its' own peculiar facts, dealing with a specific rule, and apply it to all cases in a regimented manner, regardless of the particular rules.

- 6.4 That based on that, Eastern and Southern African Trade and Development Bank, could not blindly rely on English cases or decisions from other Courts, to justify the application for extension of time within which to appeal in this case. Thus, the reliance on the case of **Gatti v Shoemith** ⁽³⁾, where the English Court of Appeal held that where a party is out of time due to a misunderstanding of the rule by his legal advisor, that may be sufficient reason for granting leave to appeal out of time, that should be read in line with the set of facts in the matter.
- 6.5 It was argued that in that case, the appellant due to a misreading of the rule, was a few days late in entering the appeal, but had informed the respondent's advocates of its' intention to appeal within time. Premised on that, the Court found that there was nothing in the nature of the mistake, that excluded it from being a proper ground for allowing the appeal to be effective, even though it was out of time.
- 6.6 It was argued that the Court in that matter, stated that treating the matter so, was dependent on the facts of the case.
- 6.7 The contention was that in this matter, the facts revealed that the Court of Appeal dismissed the application, and in

line with the decisions by the Supreme Court, such an appeal could not be relaunched. Further, the facts of the case revealed that there was no misreading of the rules. It was further argued that in any event, if there was a misreading of the rules, the Supreme Court in the case of ***Phillip Mutantika & Sheal Mulyata v Kenneth Chipungu*** (27) guided that:

“Although it has also been argued and spiritedly so, if we may say, that the Appellants should not be prejudiced by the default of their Counsel and/or his negligence or incompetence, our firm position has always been that the relationship between a party and his lawyer is of no concern of the Court, as that is a private matter which has nothing to do with the Court. Hence, it cannot be used as a ground for ordering restoration of an Appeal that was dismissed due to absence of the Appellants and their legal Counsel. Surely, the incompetence or negligence of one’s legal Counsel cannot be sufficient ground for restoring an Appeal that was dismissed.

In July Danobo T/A Juldan Motors vs Chimsoro Farms Limited⁵, we took the position that if at all the Appellant would suffer any prejudice by the stand that we took of dismissing the appeal, then he may have recourse to his legal Counsel who did not handle his appeal properly. It follows that if

the Appellants in the current case will be prejudiced in any way by the stand that we have taken of declining to order the restoration of the Appeal, it is up to them to seek recourse from their legal Counsel.”

- 6.8 It was also argued that in the case of ***Barclays Bank v Jeremiah Njobu and 41 others*** ⁽³⁹⁾, it was held that where an appeal is dismissed on its’ merits or on a technicality, that appeal cannot be relaunched, revived or resuscitated.
- 6.9 Further, in the case of ***Dar Farms Transport Limited v Moses Nundwe, Lima Bank (in liquidation) Lukanga Investment Development Limited and Mpongwe Farms Limited*** ⁽²⁶⁾, the Supreme Court held that the appeal was incompetent, and properly so, because it offended the mandatory requirements of ***Rule 50 (2) of the Supreme Court Rules***. It was argued that the Court in that matter, stated that in their view, an appeal that was dismissed in those circumstances, could not see the light of day again.
- 6.10 It was further argued that while Finsbury Investments Limited was alive to the Ruling of the Court of Appeal that this Court misdirected itself in holding that it had no jurisdiction to extend time within which to appeal, on the ground that a single Judge of the Court of Appeal dismissed the appeal, they argued that the Court in considering the application would come to the inescapable conclusion, that it could not grant extension of time to appeal, because the Court of Appeal dismissed the appeal for irregularity.

- 6.11 Still in argument, it was stated that Eastern and Southern African Trade and Development Bank, could not benefit from the circumstances that it had created, highlighting the history of the applications, that had been made in relation to the application to extend time within which to appeal. It was argued that a month after the Court of Appeal delivered its' Ruling dismissing the appeal, Eastern and Southern African Trade and Development Bank filed the application to extend time to appeal before this Court.
- 6.12 Thus, a period of almost One (1) year had elapsed before the application was again made, which amounted to inordinate delay. It was stated that the only reason that was advanced for filing the appeal late initially, was that the advocates for Eastern and Southern African Trade and Development Bank had miscomputed the time for bringing the appeal. However, that reason would only have been justified, had Eastern and Southern African Trade and Development Bank, on being notified of the irregularity in the appeal, immediately withdrawn the same, and filed an application for extension of time within which to appeal.
- 6.13 However, it proceeded to argue that the appeal was properly before the Court of Appeal, and that was negligence in itself. Thus, Eastern and Southern African Trade and Development Bank was not entitled to the Order being granted. Reliance was placed on the case of ***Dar Farms Transport Limited v Moses Nundwe, Lima Bank (in liquidation) Lukanga Investment Development Limited and Mpongwe Farms***

Limited ⁽²⁶⁾ earlier cited, stating that the Court in that matter, noted that jurisdiction to consider an Order that is earlier made, can only be done within the law, and not willy nilly. That where such default arises from Counsel's ineptitude, the Court will never exercise such jurisdiction.

6.14 Also cited, was the case of **Nahar Investment Limited v Grindlays Bank International (Zambia) Limited** ⁽⁹⁾, stating that in that matter, guidance was given as follows:

“We wish to remind appellants that it is their duty to lodge records of appeal within the period allowed, including any extended period. If difficulties are encountered which are beyond their means to control (such as the non-availability of the notes of proceedings which it is the responsibility of the High Court to furnish), appellants have a duty to make prompt application to the court for enlargement of time. Litigation must come to an end and it is highly undesirable that Respondents should be kept in suspense because of dilatory conduct on the part of appellants. Indeed, as a general rule, appellants who sit back until there is an application to dismiss their appeal, before making their own frantic application for an extension, do so at their own peril.”

7. LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN REPLY

- 7.1 Eastern and Southern African Trade and Development Bank, contended that Finsbury Investments Limited had argued that the Court of Appeal in its' Judgment, had stated that this Court erred in holding that it had no jurisdiction to grant extension of time to appeal, on the ground that a single Judge of the Court of Appeal had dismissed the appeal. It was also stated that Finsbury Investments Limited has also agreed that the Court of Appeal found that this Court had the requisite jurisdiction to hear and determine the application.
- 7.2 However, in opposing the application, Finsbury Investments Limited, had advanced Two (2) grounds, the first being that that this Court has no jurisdiction to determine the application to revive or resurrect the appeal which was dismissed by the Court of Appeal, and that Eastern and Southern African Trade and Development Bank had not advanced any reasons that warranted the granting of extension of time within which to appeal.

ARGUMENTS WERE RES JUDICATA

- 7.3 It was argued, that the arguments relating to this Court lacking jurisdiction to hear the application, was an abuse of the Court process, as the arguments that were advanced by Finsbury Investments Limited were res-judicata, having been properly determined by the Court of Appeal previously. Secondly, the said arguments disregarded the correct test as

set out by the Court of Appeal, which dismissed the argument on jurisdiction.

- 7.4 Thirdly, Finsbury Investments Limited had misapplied the case law on which it purported to rely. In that regard, the definition of *res judicata* as given by ***Black's Law Dictionary, 9th Edition at page 1425*** was cited. Further reference was made to the case of ***Mpongwe Farms Limited v Dar Farms and Transport Limited*** ⁽³⁴⁾ stating that the Court in that matter, pronounced itself on the definition of *res judicata* as given by ***Black's Law Dictionary***.

DIRECTIONS BY THE COURT OF APPEAL

- 7.5 It was also argued, that the Court of Appeal in its' judgment, gave directions on the test that is applicable in granting extension of time within which to appeal. These were named as:
- i. The circumstances of the delay;
 - ii. Whether there was dilatory conduct on the part of the applicant/appellant;
 - iii. Whether there was delay in applying for extension of time;
 - iv. The merits of the appeal.
- 7.6 The submission was that Eastern and Southern African Trade and Development Bank, was alive to the fact that Finsbury Investments Limited was desirous of appealing the Judgment of the Court of Appeal to the Supreme Court, and had in fact filed a Notice of Motion for leave to appeal. However, it was argued that parties to a matter must comply

with a Judgment of the Court, unless it is set aside on appeal, as was confirmed in the case of ***Bizwayo Nkunika v Electoral Commission of Zambia and another*** ⁽³⁸⁾, which approved the holding in the case of ***Hadkinson v Hadkinson*** ⁽⁵⁾.

SUFFICIENT REASONS HAD BEEN ADVANCED THAT WARRANTED THE GRANTING OF LEAVE TO APPEAL OUT OF TIME

- 7.7 It was argued that Finsbury Investments Limited had attacked the reliance on the case of ***Gatti v Shoemith*** ⁽³⁾, submitting that the Court in exercising its' discretion, should consider the facts of each case. Eastern and Southern African Trade and Development Bank agreed with that argument, and stated that in relying on that case, the intention was not to uplift the ratio decidendi in that case, but rather the principle that was espoused in the said case.
- 7.8 In that regard, the submission was that the principle that was espoused in that case, was that the Court may exercise its' discretion to extend time, where a mistake has been made by an applicant and their advocates in computing time for filing an appeal.
- 7.9 It was further argued that Eastern and Southern African Trade and Development Bank, was not trying to resuscitate an appeal that had been dismissed on account of offending a mandatory rule of the Court. That as noted by the Court of Appeal, in its' Judgment dated 30th May, 2023, the rule that

was breached was regulatory, and therefore, this Court still retained jurisdiction to make an Order in the circumstances.

7.10 Reference was made to the case of ***Stanbic Bank Zambia Limited v Savenda Management Services Limited*** ⁽³⁶⁾, stating that the Court of Appeal in that matter, noted that the error that was made by Counsel in asking for leave, when no leave was required, was sufficient reason on which the Court could exercise its' discretion to extend time within which a notice of appeal could be filed, as there was no mala fide on the part of the applicant.

7.11 It was reiterated as earlier argued, that the Court in the English case of ***Cropper v Smith*** ⁽¹⁾ held that Courts do not exist to punish the parties for the mistakes that they make in the conduct of their cases. That the Court should correct errors or mistakes that are not fraudulent or intended to overreach.

7.12 Further stress was made on the decision by the Supreme Court in the case of ***Standard Chartered Bank Plc v John M.C Banda*** ⁽²⁹⁾, where they stated that the Rules of Court should not generally be used as a minefield for parties who make fairly inadvertent mistakes, that do not translate into tangible prejudice to the other party. That where an irregularity can be cured without prejudice to the other party, then it is desirable that it should be made out right, subject to an Order for costs against the erring party.

**TIME LAPSE BETWEEN BECOMING AWARE OF THE
IRREGULARITY IN THE APPEAL BEING FILED AND**

DELIVERY OF THE JUDGMENT OF THE COURT OF APPEAL

- 7.13 On this ground, the argument was that Finsbury Investments Limited had argued that time had lapsed from when Eastern and Southern African Trade Development Bank became aware that the appeal was filed a day late, and when the Court of Appeal delivered its' Judgment on 6th August, 2021. Thus, this should go against Eastern and Southern African Trade Development Bank.
- 7.14 It was argued that Finsbury Investments Limited had stated that Eastern and Southern African Trade Development Bank, should have withdrawn the appeal before the Court of Appeal, and filed an application for extension of time within which to appeal before this Court. However, the argument was firstly that, there was no inordinate delay in bringing the application before Court.
- 7.15 Secondly, Eastern and Southern African Trade and Development Bank and its' advocates, were of the firm view that the Court of Appeal had the requisite jurisdiction to grant the extension of time within which to appeal. Thus, it contested the application by Finsbury Investments Limited to dismiss the appeal. However, a single Judge of the Court of Appeal guided that this Court was the Court that was vested with jurisdiction to hear the application.
- 7.16 The third limb of argument, was that Eastern and Southern African Trade and Development Bank, was well within its' rights to contest the application to dismiss the appeal.

Fourthly, in opposing the application, it did not act with mala fide and/or in a dilatory manner.

7.17 Fifthly, Finsbury Investments Limited was aware of the appeal, and yet it sat back until Eastern and Southern African Trade and Development Bank had filed all its' documents, before it raised issue with the appeal, months down the line. This it was argued, was deliberate, with the aim of disadvantaging and derailing Eastern and Southern African Trade and Development Bank, which was an abuse of the Court process.

FAILURE TO ADDRESS THE TEST APPLICABLE FOR GRANTING EXTENSION OF TIME WITHIN WHICH TO APPEAL

7.18 The argument was that Finsbury Investments Limited had failed to address the test that had been laid down for granting extension of time within which to appeal, as set out above. Further, it had not shown what prejudice it would suffer if the application were allowed, and that an Order for costs would not atone.

7.19 It was argued that to the contrary, denying the application would cause manifest injustice to Eastern and Southern African Trade and Development Bank. Thus, on that basis, the application should be allowed.

8. SUPPLEMENTARY LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN OPPOSITION

WHETHER THE APPLICATION FOR EXTENSION OF TIME IS PROPERLY BEFORE THIS COURT?

- 8.1 These arguments addressed whether the application was properly before this Court. In that regard, it was stated that the application had been made pursuant to **Order 13 Rule 3 (3) and Order 13 Rule 12 of the Court Appeal Rules, Statutory Instrument No 65 of 2016** as read with **Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia**.
- 8.2 The argument was that this Court has its' own Rules, and under the Court of Appeal Rules, the Court that is vested with jurisdiction to extend time for making applications, including applications for leave to appeal, is defined in **Section 2 of the Court of Appeal Act**, as the Court of Appeal.
- 8.3 Reliance was placed on the case of **Dr David Nama and another v Republic of Romania and another** ⁽⁴¹⁾ where it was observed that, the Court of Appeal was moved pursuant to **Order 14A of the Rules of the Supreme Court of England**, which was inapplicable to that Court. Therefore, the application was incompetent.
- 8.4 As regards the reliance on **Order 3 Rule 2 of the High Court Rules**, in making the application, it was argued that the said Rule is subject to any particular Rules. Consequently, a party cannot move an application, on the basis of that Rule alone, without citing any other provision. As authority, the case of **Bernard Kutalika v Dainess Kalungu** ⁽²³⁾ was cited,

stating that the Supreme Court in that matter, pronounced itself on the use of **Order 3 Rule 2 of the High Court Rules**, when it stated as follows:

“It is our considered view that an injunction ought to be prompted by an application. A Judge cannot exercise the discretion to grant an injunction in a vacuum for it is trite law that a Court must not grant a party relief which he has not sought, or which is more than he has sought. In saying so, we are not unmindful of the provisions of Order III (2) of the High Court Rules Chapter 27 of the Laws of Zambia. That order provides that:

“Subject to any particular rule, the court or judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitle to the benefit not the order or not.”

This provision in our view presupposes an application in the first place. Only after a court has been moved would it have the power to do what is envisioned in Order III of the High Court Rules. In any case, this order stipulates a general rule that does not absolve a party seeking an injunction from applying in the normal way and proving his case as required by the rules of the Court.”

8.5 Other authorities cited in that regard, was the case of ***Gabriel Mangamu Musonda v ZESCO Limited*** ⁽¹⁸⁾, which reiterated that ***Order 3 Rule 2 of the High Court Rules***, is subject to any particular Rules.

WHETHER THE REQUIREMENTS OF ORDER 13 RULE 3 OF THE COURT OF APPEAL HAVE BEEN MET WARRANTING THIS COURT TO EXTEND TIME WITHIN WHICH TO APPEAL

8.6 On this ground, the argument was that a reading of ***Order 13 Rule 3 of the Court of Appeal Rules***, revealed that an application for extension of time within which to appeal can be made before the Court of Appeal in Two (2) ways. These were named as:

- i. An application being filed in the Court of Appeal Registry within Twenty-One (21) days after the expiration of time within which the Notice of Appeal and Memorandum of Appeal ought to have been filed.
- ii. Where an applicant does not file the application for extension of time within the prescribed Twenty-One (21) days, the applicant is required to obtain leave of Court before filing the application for extension of time.

8.7 That this position was clarified by the Court of Appeal in the case of ***ZSIC Life Limited v Mercy Namwila Kapaimba and 56 others*** ⁽⁴²⁾. The argument was that in this case, this Court delivered its' Ruling on 26th May, 2020, and the application for extension of time within which to appeal was only filed on 6th September, 2021, a period over more than

One (1) year later. Therefore, leave to appeal was sought more than Twenty-One (21) days after the time within which leave to file the Notice of Appeal and Memorandum of Appeal, after the time to appeal, could have been obtained, had lapsed.

8.8 Therefore, the application had not met the requirements of **Order 13 Rule 3 of the Court of Appeal Rules**. It was argued that in the case of **JCN Holdings Limited v Development Bank of Zambia** ⁽²⁴⁾, the Supreme Court, held that it is settled law, that if a matter is not properly before the Court, the Court has no jurisdiction to make any Orders or grant any reliefs.

8.9 Other cases cited as authority were **Aristogerasimos Vangelatos and another v Metro Investments Limited and others** ⁽³³⁾ and **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited** ⁽¹¹⁾.

WHETHER EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK HAD ADAVANCED SUFFICIENT REASONS FOR THIS COURT TO EXTEND TIME TO APPEAL?

8.10 In relation to this argument, it was stated that this Court has discretion to extend time within which to appeal, where sufficient grounds are shown. That the only reason that had been advanced, was that Eastern and Southern African Trade and Development Bank, believed that the Notice of Appeal and Memorandum of Appeal was supposed to be filed on 26th June, 2020, instead of 25th June, 2020.

8.11 It was argued that the said reason, could not, by any stretch of imagination, be considered as sufficient reason, but was negligence on the part of the advocates for Eastern and Southern African Trade and Development Bank, who have the duty to represent their client properly and diligently. It was conceded that this Court has discretion to grant extension of time, where there are sufficient reasons.

8.12 However, in this matter, no sufficient reasons had been provided, warranting the grant of extension of time to appeal. As authority, the case of ***Industrial Finance Company Limited v Jacques and Partners*** ⁽⁸⁾ was relied on, whose holding was as follows:

“Where a lawyer has instructions, he has a professional duty to protect his client so that where it is shown that the advocate has failed to exercise his duty to the cost of his client, the lawyer must make good and pay for that damage.”

8.13 Further reliance was placed on ***Jackson and Powell on Professional Liability, 7th Edition, (Sweet and Maxwell, 2012) in paragraph 11-98 at page 850***, where the learned authors state that:

“Once proceedings are underway, the claimants’ solicitor has a duty to prosecute the action with reasonable diligence. If therefore, the action is struck out for delay, such failing to comply with time limits, he will not have a defence to an action for breach of duty, unless the client has caused or

consented to the delay. It appears that delay by Counsel does not afford the solicitor a defence. If Counsel is dilatory, the solicitor should regularly chase up, and if no response is forthcoming, withdraw his instructions, and pass them to another barrister for a more speedy response.”

- 8.14 The cases of ***Twapane Mining and E. M Storti Mining Limited*** ⁽²⁰⁾ and ***NFC Africa Mining Plc v Techro Zambia Limited*** ⁽¹⁶⁾ were cited as having held that the rules of the Court, exist to ensure that matters are heard in an orderly and expeditious manner, and that those who choose to disobey them, do so at their own peril.
- 8.15 Thus, the argument was that no sufficient reasons had been given, upon which this Court could exercise its’ discretion to extend time to appeal, save for the negligence on the part of Counsel for Eastern and Southern African Trade and Development Bank, in failing to obey the rules of the Court.
- 8.16 It was also argued that Eastern and Southern African Trade and Development Bank was guilty of dilatory conduct, as even after being notified by Finsbury Investments on 11th September, 2020, that it had not followed the Rules of the Court of Appeal, in the manner that it filed the Notice of Appeal and Memorandum of Appeal, and it sought to file the application for extension of time within which to appeal before the Court of Appeal.
- 8.17 However, the application was dismissed for want of jurisdiction on the part of that Court. It was stated that

Eastern and Southern African Trade and Development Bank only came to file the application before this Court, on 6th September, 2021, after the Court of Appeal delivered its' Ruling, dismissing the appeal for irregularity.

- 8.18 The argument that was reiterated, was that in the case of ***Nahar Investments Limited v Grindlays Bank International (Zambia) Limited*** ⁽⁹⁾, the Court held that litigation must come to an end, and that it is highly undesirable that a party to litigation should be kept in suspense because of the dilatory conduct of another.
- 8.19 It was also stated that the holding in the case of ***Uganda v Natmbi Vincent*** ⁽⁴⁰⁾, was that, time will not be extended if the applicant is guilty of dilatory conduct or inordinate delay. Also relied on, was the case of ***Molly Kyalukinda Turinawe & 4 others v Turinawe Ephraim & another*** ⁽¹⁹⁾ where Lady Justice Kisakye stated that:

“It is therefore important to consider the following questions before I dispose of this application:

- i. Whether the applicants have established sufficient reasons for this Court to extend time in which they may lodge the appeal?***
- ii. Whether the applicants are guilty of dilatory conduct?***
- iii. Whether any injustice would be occasioned if the application is not granted?***

The basis of the applicant’s affidavit is to be found in the affidavit evidence.”

8.20 The prayer was that as Eastern and Southern African Trade and Development Bank, had been guilty of dilatory conduct, the application should not be granted.

9. SUPPLEMENTARY SKELETON ARGUMENTS IN REPLY TO THE SUPPLEMENTARY SKELETON ARGUMENTS IN OPPOSITION

9.1 These arguments addressed the following:

ARGUMENTS BY FINSBURY INVESTMENTS LIMITED DISREGARDED THE JUDGMENT OF THE COURT OF APPEAL DATED 30th MAY, 2023

9.2 It was stated that in opposing the application, Finsbury Investment's Limited had wrongly interpreted and understood the Judgment of the Court of Appeal. On that basis, the prayer was that the said arguments should be disregarded, as the Court of Appeal conclusively determined them, in its' Judgment dated 30th May, 2023.

9.3 It was also argued, that the position that had now been taken by Finsbury Investments Limited, was curiously at odds with its' previous position, where it had acknowledged the High Court's authority under the High Court Rules, to address the application for extension of time, as could be seen from the affidavit in opposition dated 28th June, 2023.

9.4 The argument was that the Judgment of the Court of Appeal directed that the application for extension of time be heard and determined on its' merits by the same Judge. Thus, based on that decision, Eastern and Southern African Trade

and Development Bank, had made the application, which was a binding decision, and was res judicata.

9.5 Further, on Finsbury Investments Limited, attempting to raise the issue of the lapse of Twenty-One (21) days within which the application for extension of time, should have been raised, the position taken was that this was a flawed argument. In that regard, it was stated that the said argument, had failed to recognise the binding Judgment of the Court of Appeal, which was dated 30th May, 2023, which directed that the application for extension of time be determined on its' merits.

9.6 The case of ***Bizwayo Newton Mkunika v Lawrence Nyirenda and the Electoral Commission of Zambia*** ⁽³⁸⁾ was reiterated, as having held that:

“It is trite that an Order or Judgment of a Court of competent jurisdiction binds the parties to that action who are obliged to obey it, unless and until it is vacated, set aside on appeal or otherwise.”

9.7 The case of ***Hadkinson v Hadkinson*** ⁽⁵⁾ was also stressed as further authority in this regard. It was argued that in any event, the application to extend time was made pursuant to both the Court of Appeal and the High Court Rules, and that ***Order 13 Rule 12 of the Court of Appeal Rules***, states that where an application may be made to the Court or the High Court, it shall be made in the first instance, to the High Court. Therefore, this Court has jurisdiction to extend time, and the authorities that had been relied on by Finsbury

Investments Limited in support of the position, were distinguishable from this case.

9.8 **Section 47 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia** was relied on, as providing that:

“47. Save as is otherwise expressly provided, whenever any form is prescribed by any written law, an instrument or document, which purports to be in such form, shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or document, or which is not calculated to mislead.”

9.9 Thus, going by the above, it was argued that if use of the Court of Appeal Rules was faulty in making the application, then such was not a fundamental defect or irregularity, but rather, was curable. It was stated that the core purpose of the application, was to extend time within which to appeal, and use of the Court of Appeal Rules, would not compromise the substance of the application, or in way lead to confusion or mislead the Court in any way.

9.10 That furthermore, for as long as the substance of the application remained the same, even after the defect was removed, the document should be considered as valid, and that the application was competently before the Court.

9.11 Reliance in that regard, was placed on the case of **Golden Lotus Insurance Company Limited v ZESCO Limited and others** ⁽⁴³⁾, where the Court of Appeal stated as follows:

“If the defect in an instrument is in form, it is not a fundamental defect or irregularity and it can be cured. It is our considered view that the defect in the notice in question is not in substance but in form as it clearly shows the grounds upon which the preliminary objection is anchored. We therefore find no merit in the objection raised by the appellant.”

9.12 It was argued that the Court in that matter, proceeded to consider the application, even though it was defective in form, as the defect did not go to the substance, and was therefore curable.

**ARGUMENTS BY FINSBURY INVESTMENT LIMITED
FAILED TO ACKNOWLEDGE THE DISCRETION OF THE
COURT WHEN CONSIDERING APPLICATIONS FOR
EXTENSION OF TIME**

9.13 The criteria laid down in the case of ***Stanbic Bank v Savenda Management Services Limited*** ⁽³⁶⁾ in considering an application for extension of time within which to appeal was repeated. It was further argued that in the case of ***Sayer v Clarke Walker*** ⁽¹³⁾, the Court held that when considering an application to extend time for appealing, the Court regards among others, the interest of the administration of justice, whether the failure to comply was intentional, and whether the party in default has complied with the other rules, practice directions, the Court Orders and any relevant pre-action protocols.

- 9.14 It was stressed that the affidavit filed in support of the application, showed that Eastern and Southern African Trade and Development Bank believed that the final date for filing the Notice of Appeal and Memorandum of Appeal was Friday 26th June, 2020, as shown by emails that were exchanged, which were exhibited as 'ES5'.
- 9.15 The holding in the case of ***D Nkhuwa v Lusaka Tyre Services Limited*** ⁽⁷⁾ was reiterated, that the Court should consider the circumstances of the delay. Thus, the delay was due to an honest mistake, and did not amount to dilatory conduct.
- 9.16 It was further argued that in the case of ***Puma Energy Zambia Plc v Competition and Consumer Commission*** ⁽³⁰⁾, the Court explained use of the word "may", and stated that in statutory interpretation, it connotes discretion or choice between two alternatives. The submission was also that in the case of ***Sharp v Wakefiled*** ⁽²⁾, the Judge opined that where judicial discretion is exercised, the action should be according the rules of reason and justice, not according to the law, and not humour.
- 9.17 That in other words, discretion ought not to be arbitrary, but regular and legal. Thus, it is in the discretion of this Court, to consider the circumstances of the case, and the reasons for the delay.

**ARGUMENTS BY FINSBURY INVESTMENTS LIMITED
AMOUNT TO ABUSE OF THE COURT PROCESS**

9.18 It was reiterated that the arguments by Finsbury Investments Limited amounted to abuse of Court process, with the definition as given by *Black's Law Dictionary* being repeated. The case of *BP Zambia Plc v Interland* ⁽¹²⁾ was also relied on as authority. On that score, the prayer was that opposition to the application, should be dismissed for want of merit.

10. SUBMISSIONS AT THE HEARING

**SUBMISSIONS BY COUNSEL FOR EASTERN AND
SOUTHERN TRADE AND DEVELOPMENT BANK**

10.1 At the hearing, Counsel for Eastern and Southern African Trade and Development Bank, submitted that in applying for extension of time within which to appeal, that application had been made pursuant to *Order 13 Rule 3 and Order 13 Rule 12 of the Court of Appeal Rules, Statutory Instrument No 65 of 2016*. He stated that the application was supported by an affidavit which was filed 6th September, 2021, as well as the combined List of Authorities and Skeleton Arguments of even date.

10.2 Counsel further stated that they had also filed Skeleton Arguments in reply on 18th July, 2023, and supplementary Skeleton Arguments in reply on 15th November, 2023. His submission was that save for the right to reply, they relied on the said documents in their entirety, and the prayer was that the application be granted.

RESPONSE BY COUNSEL FOR FINSBURY INVESTMENTS LIMITED

- 10.3 In response, Counsel for Finsbury Investments Limited, stated that they relied on the affidavit in opposition, which was filed on 28th June, 2023, together with Two (2) sets of Lists of Authorities and Skeleton Arguments, as well as a supplementary List of Authorities and Skeleton Arguments which was filed on 20th October, 2023.
- 10.4 In augmenting, Counsel's submission was that the application by Eastern and Southern African Trade and Development Bank, had been made pursuant to the Court of Appeal Rules, which do not apply to this Court. He stated that they had referred to numerous authorities that demonstrated that the application was incompetent, due to the rules relied on, in making the application, being inapplicable.
- 10.5 The submission was further that secondly, Eastern and Southern African Trade and Development Bank, had relied on **Order 3 Rule 2 of the High Court Rules**, in making the application. However, they had also demonstrated that, that provision could not be relied on, as the anchor provision in making the application. Counsel stated that a substantive provision which endows the Court with jurisdiction to grant the relief sought should be relied on. Therefore, his submission was that in light of that, the application had not been made pursuant to any substantive provision.

- 10.6 The third limb of augmentation, was that in the combined List of Authorities and Skeleton Arguments in reply, it had been argued that the application was competent as the Court of Appeal had directed that the application for extension of time should be heard. It was Counsel's view, that that notwithstanding, this Court in considering the application could not fold its' arms in respect of the irregularities that were inherent in the application.
- 10.7 It was further submitted that the Court had to consider the propriety of the application before considering the merits of the said application.
- 10.8 Lastly in submission, Counsel stated that even assuming that the Court found that the Rules that had been relied on, in making the application were applicable, the application fell short of satisfying the requirements of **Order 13 Rule 2 of the Court of Appeal Rules**, which states that an application to extend time has to be made within Twenty-One (21) days of the expiration of the Act which ought to have been done.
- 10.9 It was added that where this was not done, a Two (2) staged process had to be followed by the party seeking leave to extend time. In that regard, it was stated that such a party had to seek leave to bring the substantive application to extend time. Secondly, where the leave was granted, then the application could be made.
- 10.10 Counsel further in submission, stated that the record showed that no such application for leave to extend time

within which to bring the application had been made, the application having been filed outside the Twenty-One (21) days prescribed by **Order 13 Rule 3** which had been relied on in making the application.

10.11 It was submitted that in view of that, the application was fatally incurable, and should not be granted by the Court. Counsel's prayer was that the application be dismissed with costs.

**REPLY BY COUNSEL FOR EASTERN AND SOUTHERN
AFRICAN TRADE AND DEVELOPMENT BANK**

10.12 Counsel in reply, stated that they drew the Court's attention to the combined List of Authorities and Skeleton Arguments which were filed on 18th July, 2023, as well as the supplementary List of Authorities and Skeleton Arguments dated 23rd November, 2023.

10.13 As to the Rules that were applicable in making the application, it was stated that the List of Authorities and Skeleton Arguments dated September 2021, from paragraphs 5-15 and paragraphs 21-32 of the supplementary List of Authorities and Skeleton Arguments referred. Counsel stated that their position was that the Rules and the law that had been cited therein, empowered the Court to hear the application and grant the reliefs sought.

10.14 In respect of the competency of the application, and the direction that was given by the Court of Appeal that the application be heard, as well as the contention on the

Twenty-One (21) day time frame, Counsel's submission was that in their Skeleton Arguments in reply, they had addressed those issues. The Court was also asked to take note of the history of the matter as set out in the affidavits.

10.15 In that regard, the submission was that the Court of Appeal ruling that they had both referred to, stemmed from a Ruling of this Court on the very application. It was stated that as argued in the Skeleton Arguments in reply, the Twenty-One (21) days requirement was new, as seen at point F. Therefore, it should not be considered, as it was an abuse of the Court process.

10.16 Counsel added that Finsbury Investments Limited was trying to shut the stable door after the horse had bolted. He went on to submit that the application was made in September, 2021, and Finsbury Investment Limited reacted to it, and now raised the argument on the Twenty-One (21) days. It was submitted when all was considered, the Court would be satisfied that Eastern and Southern African Trade and Development Bank had demonstrated that it was entitled to the relief sought.

10.17 On that score, the prayer was that the application to extend time to appeal be granted.

11. DECISION OF THIS COURT

11.1 I have considered the application. It is for extension of time within which to appeal, which was made pursuant to **Order 13 Rule 3 and Order 13 Rule 12 of the Court of Appeal Rules, Statutory Instrument No 65 of 2016**, as read with

Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.

11.2 **Order 13 Rule 3 of the Court of Appeal Rules** provides that:

“3. (1) The Court may, for sufficient reason extend the time for—

- (a) making an application, including an application for leave to appeal;**
- (b) bringing an appeal; or**
- (c) taking any step in or in connection with an appeal.**

(2) An application to the Court for extension of time in relation to a judgment or the date of expiration of the time within which the application ought to have been made, shall be filed in the Registry within twenty one days of the judgment or such time within which the application ought to have been made, unless leave of the Court is obtained to file the application out of time.

(3) The Court may for sufficient reason extend time for making an application, including an application for leave to appeal, or for bringing an appeal, or for taking any step in or in connection with any appeal, despite the time limited having expired, and whether the time limited for that purpose was so limited by the order of the Court, by these Rules, or by any written law.”

11.3 The **Order 13 Rule 12 of the said Court of Appeal Rules** states that:

“12. Where an application may be made to the Court or the High Court, it shall be made in the first instance to the High Court.”

11.4 **Order 3 Rule 2 of the High Court Rules** on the hand is as follows in provision:

“2. Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.”

11.5 It has been argued that while the Court of Appeal directed that I hear the application to extend time within which to appeal, the application for extension of time within which to appeal was made pursuant to inapplicable provisions of the law. This is because **Order 13 Rule 3 of the Court of Appeal Rules**, which has been relied on, in making the application, applies to the Court of Appeal and not the High Court.

11.6 This was on the basis that under **Section 2 of the Court of Appeal Rules, the Court** is defined as the Court of Appeal.

11.7 Then with regard to **Order 3 Rule 2 of the High Court Rules**, the contention was that, that Rule can only be invoked after reference is made to a particular Rule that gives the Court power to make an Order.

- 11.8 In response to that line of argument, Eastern and Southern African Trade and Development Bank argued the issue of the application for extension of time to appeal having been made pursuant to **Order 13 Rule 3 of the Court of Appeal Rules** was only being raised at that point. Therefore, it was an abuse of the Court process, Finsbury Investments Limited having earlier responded to the application.
- 11.9 It was also stated that **Order 13 Rule 12 of the Court of Appeal Rules** provides that where an application may be made to the Court of Appeal or to the High Court, it should in the first instance be made to the High Court. Therefore, the Court of Appeal Rules are applicable to the application. That in any event, **Order 3 Rule 2 of the High Court Rules**, has also been relied on, in making the application.
- 11.10 With regard to the use of **Order 3 Rule 2 of the High Court Rules** in making an application, the Supreme Court in the case of **Bernard Kutalika v Dainess Kalunga** ⁽²³⁾ where one of grounds of appeal challenged the decision of the Judge of the High Court in granting an Order of injunction based on a counterclaim, guided that:

“A grant of an injunction is ordinarily predicted on an application. As envisaged under Order 30 of the High Court Rules, an application for an interlocutory injunction is an application made in chambers. It must be made by summons which must be addressed to all the persons on whom it is to be served, and accompanied by an affidavit.....

It is our considered view that an injunction ought to be prompted by an application. A judge cannot exercise the discretion to grant an injunction in a vacuum for it is trite law that a court must not grant a party relief which he has not sought, or which is more than he has sought. In saying so, we are not unmindful of the provisions of Order III (2) of the High Court Rules Chapter 27 of the Laws of Zambia. That order provides that:

“Subject to any particular rule, the court or judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitle to the benefit not the order or not.”

This provision in our view presupposes an application in the first place. Only after a court has been moved would it have the power to do what is envisioned in Order III of the High Court Rules. In any case, this order stipulates a general rule that does not absolve a party seeking an injunction from applying in the normal way and proving his case as required by the rules of the court.”

11.11 It can be seen from the above, that in Order for a Court to exercise its' powers under **Order 3 Rule 2 of the High Court Rules**, it should have been moved pursuant to an applicable

provision of the law. Thus, the question that arises in this application, is whether making the application for extension of time within which to appeal before this Court pursuant to **Order 13 Rule 3 and Order 13 Rule 12 of the Court of Appeal Rules** was tenable at law?

11.12 The provisions of **Order 13 Rule 3 of the Court of Appeal Rules** as seen above vest jurisdiction in the Court to grant extension of time within which to appeal. Court is defined in those Rules as:

"Court" means the Court of Appeal, and includes a single judge hearing an interlocutory matter;"

11.13 Therefore clearly, under those Rules, this Court as a High Court is not included. Eastern and Southern African Trade and Development Bank in responding to the argument, that this Court has no jurisdiction to hear the application as it was made pursuant to an inapplicable provision of the law, relied on the case of **Golden Lotus Insurance Company Limited v Zesco and others** ⁽⁴³⁾ to contend that the Court of Appeal in that matter held that where a defect is in substance and not form, the Court still retains jurisdiction to hear the application.

11.14 Eastern and Southern African Trade and Development Bank also argued that the issue relating to the use of **Order 13 Rule 3 of the Court of Appeal Rules** in making the application could not stand, as the Court of Appeal directed this Court to hear the application. In the case of **Golden Lotus Insurance Company Limited v Zesco and others**

(43) one of the preliminary objections that was raised was that the Notice of Motion ought to have complied with Forms III and IV in the first schedule of the rules, as provided for in Order VII Rule 1 (1).

11.15 Further, that the Notice of Motion did not have provision for the Master of the Court of Appeal to sign the document, and that the notice had no grounds upon which relief was sought. The Court of Appeal held as follows as regards that preliminary objection:

“With regard to the manner and form in which the notice to raise the preliminary objection has been presented, it has been argued that it falls short of the prescribed form in the first schedule of the Court of Appeal Rules. We have perused the notice and as submitted by the appellant, it falls short of the prescribed form as it does not appear to move the Court, it does not show the order which is being sought and does not have a provision for the Master of the Court of appeal to sign. The question is whether the 1st respondent should be penalized for this shortfall.

In our view, Section 47 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia sheds some light on the consequences of defects in form on the one hand and in substance on the other. It provides that-

"Save as is otherwise expressly provided, whenever any form is prescribed by any written law, an instrument or document, which purports to be in such form, shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or document, or which is not calculated to mislead."

The significance of the above section is that if the defect in an instrument or document is in form, it is not a fundamental defect or irregularity and it is curable. It is our considered view that the defect in the notice in question is not in substance but in form as it clearly shows the grounds upon which the preliminary objection is anchored. We therefore do not find merit in the objections raised by the appellant."

11.16 Thus, the holding in the case related to the form of a prescribed document, and not the authority pursuant to which an application is made. The said case is therefore inapplicable in relation to the issue that is in contention in the application. While, it is true that the Court of Appeal directed that I hear the application, it did not pronounce itself on the propriety of the law that had been relied on, in making the application, but rather, found that the rule that had been breached was regulatory and mandatory.

11.17 The Court of Appeal went to consider the principles that are applicable when granting an Order for extension of time within which to appeal. Consequently, the Court of Appeal not having addressed the question of the competence of the law that had been relied on, in making the application, it is an issue that can be raised in this application, more so that a Court in considering an application has to be satisfied that it has been properly made.

11.18 The case of ***Dr David Nama and another v Republic of Romina and another*** ⁽⁴¹⁾ was cited by Finsbury Investments Limited, arguing that the Court of Appeal in that matter held that the application was incompetently before it, as it had been moved pursuant to ***Order 14A of the Rules of the Supreme Court of England***, which Rules did not apply to that Court.

11.19 In terms of the Rules that apply in the ***High Court, Section 10 of the High Court Act Chapter 27 of the Laws of Zambia*** provides that:

“10. (1) The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or any other written law, or by such rules, orders or directions of the Court as may be made under this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or such written law, and in default thereof in substantial

conformity with the Supreme Court Practice, 1999 (White Book) of England and subject to subsection (2), the law and practice applicable in England in the High Court of Justice up to 31st December, 1999.

(2) The Civil Court Practices, 1999 (Green Book) of England and any civil court practice rules issued in England after 31st December, 1999, shall not apply to Zambia.

11.20 Therefore, the starting point is whether there is a provision in the **High Court Rules Chapter 27 of the Laws of Zambia**, that deals with applications for extension of time. If not, the **Rules of the Supreme Court of England**, can be invoked. **Order XLVII of the High Court Rules**, which deals with appeals, provides for appeals from the Subordinate Court to the High Court.

11.21 In the case of **Investrust Bank Plc v Build IT Hardware Limited and Yousuff Issa** ⁽²⁵⁾, an argument was raised by Counsel for the Respondent that **Rule 12 (1) of the Supreme Court Rules** provided for the powers of the Supreme Court to, with sufficient reason, extend time for making an application. It was submitted that according to **Rule 12**, the power to grant leave was vested in the Supreme Court, and could not be used to move the High Court or be invoked by way of an appeal before the Supreme Court.

11.22 The Supreme Court in considering that argument, stated as follows:

“Rule 12 of the Supreme Court Rules allows this Court to hear an application for extension of time, in this case, within which to apply for leave to appeal. In terms of Rule 50, the High Court may grant or refuse leave to appeal without formal application at the time when judgment is given. Where leave is given, the appellant shall proceed to give notice of appeal in accordance with the provision of Rule 49.

Where leave was neither granted nor denied at the time judgement is given, the application for leave shall be by motion or summons, which shall state the grounds of the application, and shall, if necessary, be supported by affidavit. Clearly this Rule applies when the court which delivered the judgment, grants leave to appeal or when it refuses to grant leave. In the case before us, the learned judge granted leave to appeal against his ruling and the appellant, not having appealed within time, sought leave to file a notice of appeal out of time. It is not disputed that the ruling upon which the appellant sought leave to appeal out of time was delivered on 14th August, 2012 and leave to appeal was granted at the time of the delivery of the ruling. On 18th October, 2012 the appellants filed an application for leave to file

appeal out of time. That application was refused by the learned judge, hence the present appeal.”

11.23 The Supreme Court noted that in their view, the appeal turned on the question whether or not following the refusal by the High Court to grant leave to appeal out of time, the correct procedure as set out in the Rules was followed. They agreed with counsel for the respondent, that upon the High Court declining the application for leave to file appeal out of time, the appropriate thing that the appellant should have done, was to renew the application before a single Judge of Supreme Court, with the prospect of escalating the application to the full Court, in the event that the single Judge declined to grant it.

11.24 They noted that by lodging an appeal, rather than a renewed application before a single judge, the procedure adopted by the appellant was, therefore, wrong, and the appeal was bound to fail on that basis alone. However, for good measure, the Supreme Court also considered whether the substance of the appeal itself had any merit.

11.25 The above decision was made in 2012, before the Court of Appeal was established in 2016. It is however noteworthy that ***Rule 12 of the Supreme Court Rules*** which empowered the Supreme Court to extend time to appeal a Judgment of the High Court, is the same as ***Order 13 Rule 3 of the Court of Appeal Rules, Statutory Instrument No 65 of 2016***. Further, ***Rule 17 of the Supreme Court Rules*** was the same in provision as ***Order 13 Rule 12 of the Court***

of Appeal Rules which states that where an application can be made to the Court of Appeal, and to the High Court, it must be made to the High Court in the first instance.

11.26 That being the position, as the Supreme Court in the above matter found that the application could be made pursuant to **Rule 12 of the Supreme Court Rules** before the High Court, before being renewed before a Single Judge of the Supreme Court where the High Court refused to extend time, it naturally follows that even in this case, there is no irregularity in the application having been launched pursuant to **Order 13 Rule 3 and Order 13 Rule 12 of the Court of Appeal Rules**, as those are the Rules that clothe this Court with jurisdiction to hear an application for extension of time within which to appeal to the Court of Appeal. The application was therefore properly made to this Court.

11.27 As regards the argument that the application for extension of time within which to appeal was lodged for than Twenty-One (21) days after the time within which to appeal had lapsed, the Supreme Court in the case of **Investrust Bank Plc v Build IT Hardware Limited and Yousuff Issa** ⁽²⁵⁾ stated that:

“Particularly for the application which is subject of this appeal, the appellant was supposed to file the application for extension of time within 21 days of the expiry of the 14 day period for filling of the notice of appeal, which would have been

about the 21st of September, 2012. The application was filed 50 days after the judgement even though leave to appeal had been in the appellants' hands.

In Twampane, we considered the length of the delay and concluded that 39 days was too long a period of delay, whilst in Palata Investments Limited and Others v. Burt & Sinfield Limited and others, a delay of 3 days was considered to be a short delay. We hold the view, as we did in the Twampane case, that the period of the delay in this matter cannot be regarded as short.

In Water Wells Limited v. Wilson Samuel Jackson, we considered that instead of the explanation for the default, it is the merits of the case that is of primary concern. And that where the period of delay is short enough a factor which could be compensated for by an order for costs, it remains to be considered whether the primary consideration, the merit of the case, exists.”

11.28 The delay of Fifty (50) days was found to be inordinate in that case. In this matter, the affidavit evidence shows that the appeal was filed a day late, on 26th June, 2020 instead of 25th June, 2020. It was only after Finsbury Investments Limited filed the application before the Court of Appeal on 11th September, 2020, to dismiss the appeal for irregularity, that Eastern and Southern African Trade and Development

Bank applied before the Court of Appeal to extend time within which to appeal on 23rd October, 2020, having been served the application to dismiss the appeal on 28th September, 2020.

11.29 The Court of Appeal by the Ruling dated 6th August, 2021 dismissed the appeal. Then on 6th September, 2021, Eastern and Southern African Trade and Development Bank filed the application to extend time within which to appeal before this Court.

11.30 It will therefore be seen that the facts in the case of ***Investrust Bank Plc v Build IT Hardware Limited and Yousuff Issa*** ⁽²⁵⁾ are distinguishable from the facts of this case. In the ***Investrust Bank Plc v Build IT Hardware Limited and Yousuff Issa*** ⁽²⁵⁾ case, there was a delay in seeking leave to appeal out of time by Fifty (50) days, which was found to be inordinate delay.

11.31 In this matter, the appeal was filed a day late, and when it was brought to the attention of Eastern and Southern African Trade and Development Bank that the appeal was filed out of time, within Three (3) weeks of being served, the application to dismiss the appeal, an application was made to extend time before the Court of Appeal.

11.32 Eastern and Southern African Trade and Development Bank, has cited authorities by the Court of Appeal, including the case of ***Zambia Sugar Plc v Lumuno Mukwali*** ⁽³⁷⁾ where the Court extended time within which to appeal, as the delay was occasioned by the applicant being a corporate body,

where decisions are not made by one person, and there is need for consultation.

11.33 It has been argued in this matter, that Eastern and Southern African Trade and Development Bank is an international organisation, that has various decision making organs which had to be consulted before the application for extension of time was made. Thus, the delay of about Three (3) weeks in applying for extension of time before the Court of Appeal, and another delay of almost a month following the Judgment of the Court of Appeal before applying to this Court cannot be considered to be inordinate delay.

11.34 The principles that are considered in granting extension of time within which to appeal have been seen above, and were stated by the Court of Appeal in the case of **Stanbic Bank Plc v Savenda Management Services** ⁽³⁶⁾. These include:

- i. The circumstances of the particular case;
- ii. The reasons for the delay and whether there was any dilatory conduct;
- iii. Whether there has been any inordinate delay in the circumstances, the Court examines the merits of the grounds of appeal; and
- iv. Whether the respondent will suffer prejudice if the appeal is heard.

11.35 While Finsbury Investments Limited argued that a single Judge of the Court of Appeal dismissed the appeal, and I should find on that basis, that the application is incompetently before me, as rightly argued by Eastern and

Southern African Trade and Development Bank, that issue is res judicata. The Court of Appeal in its' Judgment dated 30th May, 2023, found that I still had jurisdiction to hear and determine the application to extend time within which to appeal, despite the Ruling of a single Judge of that Court.

11.36 Therefore, any arguments in relation to dismissal of the appeal are without merit.

11.37 The Supreme Court in the case of ***Investrust Bank Plc v Build IT Hardware Limited and Yousuff Issa*** ⁽²⁵⁾ with regard to the considerations that apply to extension of time within which to appeal stated that:

“We note that the power vested in this Court by virtue of Rule 12 of the Supreme Court Rules is not unfettered; it is to be exercised only where it can be shown that there was sufficient reason to exercise the discretion to extend the time. In other words the court has to be satisfied that there is good cause. The case of Nhkuwa v. Lusaka Tyre Services Limited which both counsel have referred to, explicitly elaborates this point in a passage the learned counsel for the appellant quoted and which we have already reproduced in this judgment. Yet, we also stated in that case that:

“In addition to the circumstances of the delay and the reasons therefore which provide the material on which the Court may exercise

this discretion another important factor is the length of the delay itself.”

11.38 I have looked at the circumstances of the delay, and Eastern and Southern African Trade and Development Bank being a regional institution, it is trite that it has a bureaucratic structure in terms of decision making. One person is not vested with decision making powers, but involves a process of hierarchy. I have as a result found that the periods of about One (1) month and Three (3) weeks to seek extension of time within which to appeal before the Court of Appeal and this Court respectively cannot be regarded as inordinate delay.

11.39 Coming the reasons for the delay in seeking leave to extend time to appeal, this has been attributed to a mistaken belief that the period with which to appeal lapsed on 26th June, 2020, as opposed to 25th June, 2020. Finsbury Investments Limited has argued that this reason cannot by any stretch of imagination be valid, as it is evidence of incompetence on the part of Counsel for Eastern and southern African Trade and Development Bank, as they have a duty to represent their client properly and diligently.

11.40 Thus, the English case of ***Gatti v Shoemith*** ⁽³⁾ is inapplicable to this case.

11.41 It has been seen that the reason for the delay in appealing is one of the considerations that a Court faced with an application to extend time within which to appeal looks at. Mistaken belief as to the time when the period in which to

appeal lapses, is a valid reason to extend time, especially where no evidence of mala fide is revealed.

11.42 The facts of this case do not reveal mala fide in filing the appeal out of time, and without leave of the Court, as there was a mistaken belief that time within which to appeal would only lapse of 26th June, 2020, and not 25th June, 2020. As such, Eastern and Southern African Trade and Development Bank has given sufficient reason for the delay.

11.43 Moreover, it has argued that the appeal intends to raise matters of significant public interest, which Finsbury Investments Limited has not rebutted in any way.

11.44 All in all, sufficient reasons for the delay in filing the application having been advanced, this a proper case where time within which to appeal should be extended. I accordingly extend time within which Eastern and Southern African Trade and Development Bank shall file the Notice of Appeal and Memorandum of Appeal in the Court of Appeal against my Ruling dated 26th May, 2020.

11.45 This shall be done by 22nd February, 2024, failure to which the leave will be deemed will not have been granted. Having granted extension of time for filing of the Notice of Appeal and Memorandum of Appeal, I will proceed to determine the application that was made by the Attorney General to be joined as Intervener on 23rd April, 2023.

12. SUMMONS FOR JOINDER

12.1 The summons which were filed pursuant to ***Order 14 Rule 5 (1) of the High Court Rules Chapter 27 of the Laws of***

Zambia and **Order 15 Rule (6) of the Rules of the Supreme Court of England, 1999 Edition** as well as the inherent jurisdiction of the Court, sought the joinder of the Attorney General to these proceedings as amicus curiae on the following grounds:

- i. That the State has a direct and sufficient interest in the subject matter of the appeal;*
- ii. The State be permitted to express its' views as it is the entity that granted Eastern and Southern African Trade and Development Bank immunity from suits in Zambia;*
- iii. The appeal concerns issues which affect the prerogatives of the State and also which are matters of public policy;*
- iv. This being an issue of immunity from suit in Zambia, the State must speak with one voice; and*
- v. Without the involvement of the State, the appeal cannot effectually and completely be determined and adjudicated.*

13. AFFIDAVIT IN SUPPORT OF APPLICATION FOR JOINDER

13.1 Marshal Mubambe Muchende SC, the Learned Solicitor General in deposing to the affidavit, stated that the Office of the Attorney General in keeping with its' statutory objectives, has been consistent and steadfast in protecting the interests of the Government of the Republic of Zambia, and by extension, the interests of the people of the Republic of Zambia.

- 13.2 He averred that this matter deals with issues that affect the State's prerogatives and issues of public policy. Therefore, it has significant public interest and ramifications. It was also stated that the appeal is concerned with issues in which the State has direct and sufficient interest.
- 13.3 The Learned Solicitor General went on to aver that Eastern and Southern African Trade and Development Bank, formerly known as the PTA Bank, was established by a Treaty, pursuant to Chapter Nine of the Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States (The PTA Treaty). He stated that the said Treaty was replaced by the Treaty establishing the Common Market for Eastern and Southern Africa in 1994 (The Comesa Treaty), which was exhibited as 'MM1'.
- 13.4 Further in the affidavit, the Learned Solicitor General deposed that he verily believed it to be true, that the Charter for Eastern and Southern African Trade and Development Bank was adopted by the Council of Ministers for the Preferential Trade Area for Eastern and Southern African States on 12th July, 1985 in Bujumbura, Burundi, and that it entered into force on 6th November, 1985. The said Charter was exhibited as 'MMM2'.
- 13.5 Still in deposing, the Learned Solicitor General stated that the Republic of Zambia is a founding member of the Preferential Trade Area for Eastern and Southern Africa, the predecessor for the Common Market for Eastern and Southern Africa (COMESA), whose headquarters are in

Lusaka, Zambia. He added that Zambia, is a founding shareholder of Eastern and Southern African Trade and Development Bank.

- 13.6 It was also averred that owing to the provisions of the COMESA Treaty and the Charter for Eastern and Southern African Trade and Development Bank, the Republic of Zambia was under obligation to grant Eastern and Southern African Trade and Development Bank immunity from suit in Zambia. Consequently, in fulfilment of that obligation, the Republic of Zambia, through the Republican President, granted Eastern and Southern African Trade and Development Bank immunity from suit, by way of enactment of **Statutory Instrument No 123 of 1992, The Diplomatic Immunities and Privileges (Preferential Trade Area for Eastern and Southern African Trade and Development Bank) Order 1992**, pursuant to the **Diplomatic Immunities and Privileges Act, Chapter 20 of the Laws of Zambia**.
- 13.7 It was repeated that the appeal raises issues surrounding the grant of immunity to Eastern and Southern African Trade and Development Bank by the Republic of Zambia, and particularly, the Zambian Courts interpretation of the Charter for Eastern and Southern African Trade and Development Bank, as adopted under the Zambian law under **The Diplomatic Immunities and Privileges (Preferential Trade Area for Eastern and Southern African Trade and Development Bank) Order 1992**.

13.8 It was also deposed that the decision of this Court would have a great impact on whether Zambia will or would be, in compliance, or in breach of its' obligations under the COMESA Treaty and the Charter for Eastern and Southern African Trade and Development Bank.

13.9 Other averments made, related to the failure by Zambia to properly recognise and apply the immunity which Eastern and Southern African Trade and Development Bank is entitled under both international and domestic law, which would result in Eastern and Southern African Trade and Development Bank being unlikely to fund further projects in this jurisdiction, whose result would be detrimental economically, at both the regional level with Zambia being part of the COMESA Treaty, and at a national level.

13.10 Therefore, the contention was that the Attorney General is a major stakeholder in the administration of justice, and the economic well being of the Republic of Zambia and its' people, and as such, is a bona fide party. Further, the Attorney General on that basis, should be joined to these proceedings as amicus curiae.

14. LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN SUPPORT

14.1 The law in ***Order 14 Rule 5 (1) of the High Court Rules, Chapter 27 of the Laws of the Zambia*** and ***Order 15 Rule (6) of the Rules of the Supreme Court of England*** which had been relied on, in making the application was cited. It

was added that the explanatory notes in **Order 15/6/9 of the Rules of the Supreme Court of England** state that:

“To entitle a person not a party to an action to intervene and to be joined as a party, the rule requires that the would-be intervener should have some interest which is directly related or connected with the subject matter of the action.”

- 14.2 It was also argued that the Supreme Court in the case of **Hope Foundation for Women and Children v Munalula Linyati** ⁽²⁸⁾ held that it is a well settled position of the law, for joining a person to an action, that they be bound or otherwise affected by the results of the action. Therefore, the Court is expected in the interests of justice, to join as plaintiffs or defendants, anyone who may have a stake in the subject matter of the suit or who may be affected by the decision.
- 14.3 The argument was further that the Attorney General had demonstrated that the State has a direct and sufficient interest in the subject matter of the appeal, which entitled the Attorney General to be joined as *amicus curiae*.
- 14.4 In furtherance of that argument, the case of **Adams v Adams (Attorney General intervening)** ⁽⁶⁾ was cited as having recognised the instances where the Attorney General may be joined to proceedings in a private suit, with the question of public policy arising in the suit, being such instance.

- 14.5 Further reliance was placed on the case of ***The Arantzazu Mendi*** ⁽⁴⁾, arguing that *Lord Atkin*, in that case stressed the importance of the State speaking with one voice, that is both the Judiciary and the Executive.
- 14.6 It was argued that the Notice of Appeal and Memorandum of Appeal raised important questions of public interest on which the Executive has a view, and wished to bring to the attention of this Court, through the intervention of the Attorney General. Thus, the argument was that the office of the Attorney General is statutorily created under the ***Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by Act No 2 of 2016***, and the objectives of that office set out thereunder, as read with the ***State Proceedings Act, Chapter 71 of the Laws of Zambia***.
- 14.7 As stated in the affidavit in support of the application, the argument was that the Attorney General has a duty to protect the interests of the Government of Zambia as they pertain to agreements, treaties or conventions that the Government has entered into, which had come to the fore in this matter.
- 14.8 In that regard, the averments made as to how the Eastern and Southern African Trade and Development Bank came about were repeated, as well as the fact that Zambia is a founding member of the Preferential Trade Area for Eastern and Southern Africa, the predecessor to COMESA.
- 14.9 *Article 174 of the COMESA Treaty* was highlighted as recognising institutions established under the Preferential

Trade Area for Eastern and Southern Africa, stating that members states are required to recognise those institutions. It was also argued that the said *Article 174* recognised the rights and obligations arising from certain agreements concluded under the PTA Treaty not being affected by that Treaty. Further, under paragraph 5 of the same Article, the agreement on Privileges and Immunities adopted by the PTA member states in December, 1983 (the COMESA Agreement on Privileges and Immunity) was one such agreement adopted under the PTA Treaty, whose provisions have remained in force under the COMESA Treaty.

14.10 *Article 186.4 of the COMESA Treaty* which provides that the COMESA Agreement on Privileges and Immunities shall extend to COMESA Institutions, such as Eastern and Southern African Trade and Development Bank was also highlighted, as well as Articles 42, and 43 of the Eastern and Southern African Trade and Development Bank which provide for immunity from law suits and privileges.

14.11 Further in argument, it was stated that the purpose behind the establishment of Eastern and Southern African Trade and Development Bank was to finance and foster trade, regional economic integration and sustainable development via trade finance, project and infrastructure finance, asset management and business advisory service.

14.12 It was stated that due to that importance, Eastern and Southern African Trade and Development Bank required to

be accorded certain privileges in Order to achieve its' objectives as set out in Article 43 of its' Charter.

14.13 Thus, the Agreement on Privileges and Immunities that was adopted by the PTA Member States in December 1983 (the COMESA Agreement on Privileges and Immunities) was one such agreement that was adopted under the PTA Treaty which remains in force under the COMESA Treaty.

14.14 Therefore, the argument was that by Zambia acceding to the Charter for Eastern and Southern African Trade and Development Bank, it agreed to be bound by its' terms, including the obligation to recognise and respect the principle that Eastern and Southern African Trade and Development Bank as an international organisation, enjoys immunity from every legal process in Zambia, except when it is exercising borrowing powers.

14.15 It was also stated that the Diplomatic Immunities and Privileges Act has enshrined the said diplomatic immunity and privileges, and the President of the Republic of Zambia by virtue of the authority given to him by Section 4 of that Act issued an Order known as ***Statutory Instrument No 123 of 1992- The Diplomatic Immunities and Privileges (Preferential Trade Area for Eastern and Southern African Trade and Development Bank) Order 1992.***

14.16 The contention was that in consequence, the Government has direct and sufficient interest in the appeal, and in particular on the questions relating to Eastern and Southern African Trade and Development Bank's immunity from suits

in Zambia, and that by being joined to the matter, the appeal will be effectually and completely determined.

14.17 The arguments also relating to compliance with or breach of the treaties, as stated in the affidavit filed in support of the application were also reiterated. Recognition was made of the Judgment of the Supreme Court in the case of ***Antonio Ventriglia v Eastern and Southern African Trade and Development Bank SCZ No 13 of 2010***, which touched on the immunity of Eastern and Southern African Trade and Development Bank.

14.18 However, it was emphasized that the State was not a party to that matter, and that consequently, it was not given an opportunity to give its' views on the matter.

JOINDER AS AMICUS CURIAE

14.19 With regard to being joined as amicus curiae, the definition of the said *amicus curiae*, as given by ***Black's Law Dictionary*** was stated as:

“A person who is not party to the lawsuit but who petitions the Court or is requested by the Court to file a brief in an action because that person has a strong interest in the subject matter.”

14.20 The argument was that it is trite that the Court has discretion to allow a party to join proceedings as amicus curiae. That in this matter, the Attorney General had demonstrated that it has sufficient interest in the matter, and the joinder would enable complete and effectual adjudication of the matter.

15. SUBMISSIONS AT THE HEARING

SUBMISSIONS BY COUNSEL FOR THE ATTORNEY GENERAL

- 15.1 Counsel for the Attorney General, in making the application, stated that they relied on the affidavit that was filed in support of the application, together with the List of Authorities and Skeleton Arguments in support. He also stated that the application was anchored on **Order 14 Rule 5 (1) of the High Court Rules** as read with **Order 15 Rule 6 of the Rules of the Supreme Court of England, 1999 Edition**.
- 15.2 The submission was that the combined effect of those provisions, was that they allow a person who has interest in the subject matter of the suit, to be joined so that the matter is effectually and completely adjudicated. It was reiterated that the State has sufficient interest in the subject matter of the suit, which entitled the Attorney General to be joined as a friend of the Court.
- 15.3 In so submitting, reliance was placed on **Order 15 Rule 6 (10) of the Rules of the Supreme Court of England, 1999 Edition** as well as the case of **Adams v Adams and (Attorney General Intervening)** ⁽⁶⁾. It was stated that by those Two (2) authorities, the Attorney General has a right to intervene in a private suit, where the suit raises questions of public policy, on which the Executive may have views, which it desires to bring to the notice of the Court.

- 15.4 Counsel reiterated that the issue of the immunity of Eastern and Southern African Trade and Development Bank, which was granted to it by the Republic of Zambia by acceding to the Charter for the said Eastern and Southern African Trade and Development Bank, as well as the COMESA Treaty had arisen in these proceedings.
- 15.5 Further, that the Attorney General by virtue of **Article 177 of the Constitution** as amended, being obligated to advise the Government to adhere to the various agreements, treaties or conventions that the State has entered into, was in issue.
- 15.6 He further submitted, as argued in the Skeleton Arguments on how Eastern and Southern African and Trade and Development Bank formerly traded as the PTA Bank, which was established by a treaty, and that the Government of the Republic of Zambia is a founding member of that Treaty. Counsel further highlighted, as argued in the Skeleton Arguments, the obligations that Zambia has under the Treaties, and the privileges and immunities that Eastern and Southern African and Trade and Development Bank has under the Treaties.
- 15.7 Also highlighted, was the effect that Zambia had given to Eastern and Southern African and Trade and Development Bank with regard to immunity by the enactment of **Statutory Instrument No 123 of 1992- The Diplomatic Immunities and Privileges (Preferential Trade Area for**

Eastern and Southern African Trade and Development Bank) Order 1992.

- 15.8 Premises on that, it was submitted that the State has sufficient interest in these proceedings. Counsel reiterated that they were aware of the decision by the Supreme Court in the case of ***Antonio Ventriglia v Eastern and Southern African Trade and Development Bank*** ⁽¹⁷⁾, which touched on the immunity of the said Eastern and Southern African Trade and Development Bank. However, Counsel repeated as argued in the List of Authorities and Skeleton Arguments, that the State was not a party to those proceedings, and therefore, it was not given opportunity to give its' views or input in the matter.
- 15.9 On that basis, the prayer was that the Attorney General be joined to the proceedings, so that it could air its' views, and possibly persuade the Court to depart from the 2010 decision.

RESPONSE BY COUNSEL FOR EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK

- 15.10 In response, Counsel for Eastern and Southern African Trade and Development Bank stated that they had no objection to the application, as they understood that the intervention by the State was necessary, as it would aid the Court in determining the issues that had been raised in the matter, and also because it was a party that had interest in the matter, through membership to Eastern and Southern

African Trade and Development Bank, and from there stemmed its' obligations.

15.11 Counsel added that the granting of immunity gave rise to obligations on the part of the State, and therefore, the Attorney General should be joined to the proceedings.

RESPONSE BY COUNSEL FOR FINSBURY INVESTMENTS LIMITED

15.12 Counsel for Finsbury Investments Limited on the other hand, opposed the application, submitting that this Court had no jurisdiction to hear and determine the application as firstly, the Court was functus officio, as far as the immunity for Eastern and Southern African Trade and Development Bank was concerned. Then secondly, the issues relating to the immunity of Eastern and Southern African Trade and Development Bank, which formed the sole basis of intended intervenor joining the proceedings was heard and determined by this Court by the Ruling dated 26th May, 2020.

15.13 As the last point of opposition, Counsel stated that this was not a proper case for hearing and determining the application as the Court is functus officio. In that regard, reference was made to the learned author **Patrick Matibini** in the book, **Zambian Civil Procedure: Commentary and Cases Vol 2 at page 1135, Lexis Nexis, 2017** submitting that he states therein, that as a matter of principle, once a Judgment or Order is made, the Court is functus officio, and no longer has jurisdiction over the matter in controversy.

- 15.14 The case of **Zambia Privatisation Agency v Huddel Chisenga Chibbichabo and another** ⁽¹⁵⁾ was further relied on, as having reiterated the above position.
- 15.15 Counsel stated that the issue of immunity being res judicata, the case of **BP Zambia Limited v Interland** ⁽¹²⁾, where it was held that a party with a dispute over another, cannot be allowed to deploy his grievance piecemeal in scattered litigation and keep hauling the same opponent over the same matter, applied.
- 15.16 It was stated that a reading of especially paragraphs 6-22 of the affidavit that had been filed in support of the application, revealed that the reason advanced for the intended joinder, was because the Government of Zambia had granted immunity to Eastern and Southern African Trade and Development Bank.
- 15.17 However, it was repeated that this Court is functus officio, having determined those issues after the preliminary issues were raised pursuant to **Order 14A of the Rules of the Supreme Court of England**. Thus, the only recourse available was an appeal, and that in the manner that the application had been couched, it suggested that the intended intervenor intended to join the appeal, and not these proceedings.
- 15.18 Counsel took the view that the Court did not have jurisdiction to join an intended intervenor to a non-existent appeal, as the Court of Appeal dismissed the appeal. He stated that in the case of **Stanbic Bank v Micoquip Zambia**

Limited ⁽²¹⁾, the Supreme Court held that as there was no appeal or application to review, there was no basis upon which to join the appellant to the proceedings, which in event had come to end, was premised.

15.19 Thus, there being no appeal, the issues sought to be raised could not be heard and determined. Counsel urged this Court to take note of the decision by the Court of Appeal when it determined the appeal. His prayer was that the application be dismissed.

REPLY BY COUNSEL FOR THE ATTORNEY GENERAL

15.20 It was stated in reply, that **Order 15 Rule 6 of the Rules of the Supreme Court of England** empowers the Court to join a party at any stage of the proceedings. Counsel submitted that the application was simply that the Attorney General be joined as a friend of the Court, in light of the fact that the State is a founding member of Eastern and Southern African Trade and Development Bank.

15.21 On that basis, the contention was that this Court is not functus officio. As to the issues sought to be raised being res judicata, Counsel stated that the said principle did not apply to the Attorney General, as he was not a party to the proceedings. That in any event, in the case of **Antonio Ventriglia v Eastern and Southern African Trade and Development Bank** ⁽¹⁷⁾, the Supreme Court determined that the immunity for Eastern and Southern African Trade and Development Bank was limited, and not absolute.

15.22 It was also submitted that **Statutory Instrument No 123 of 1992** is still effective as the Republic of Zambia has continuing obligations towards Eastern and Southern African Trade and Development Bank.

15.23 On the question of the affidavit referring to there being no appeal, Counsel contended that that was a typographical error. He stated that what moved the Court was the summons, which had been properly couched, and the application was properly couched.

16. DECISION OF THIS COURT

16.1 I have considered the application. It is for the joinder of the Attorney General as amicus curiae to the proceedings pursuant to **Order 14 Rule 5 (1) of the High Court Rules, Chapter 27 of the Laws of Zambia** and **Order 15 Rule 6 (2) (b) of the Rules of the Supreme Court of England, 1999 Edition**.

16.2 **Order 14 Rule 5 (1) of the High Court Rules** states that:

“5. (1) If it shall appear to the Court or a Judge, at or before the hearing of a suit, that all the persons who may be entitled to, or claim some share or interest in, the subject-matter of the suit, or who may be likely to be affected by the result, have not been made parties, the Court or a Judge may adjourn the hearing of the suit to a future day, to be fixed by the Court or a Judge, and direct that such persons shall be made either plaintiffs or defendants in the suit, as the case may be. In

such case, the Court shall issue a notice to such persons, which shall be served in the manner provided by the rules for the service of a writ of summons, or in such other manner as the Court or a Judge thinks fit to direct; and, on proof of the due service of such notice, the person so served, whether he shall have appeared or not, shall be bound by all proceedings in the cause:

Provided that a person so served, and failing to appear within the time limited by the notice for his appearance, may, at any time before Judgment in the suit, apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms (if any) as the Court or a Judge shall think fit. The Court or a Judge upon the application of any party may give directions for service upon a new party of copies of any writ of summons or other document or process and also may give such other directions in relation to the adding of such new party as justice and the circumstances of the case may require.”

16.3 The provisions of *Order 15 Rule 6 (2) (b) of the Rules of the Supreme Court of England* are:

“(2) Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application –

(b) order any of the following persons to be added as a party, namely -

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.”

16.4 From the above, it can be seen that a party may be joined to the proceedings where they claim or share some interest in the subject matter of the suit, or where they may be affected by the outcome of the suit. Further, an Order for joinder may be made, to ensure the effectual and complete determination of a matter.

16.5 There is a plethora of authorities in this jurisdiction that have made pronouncements on the same. In the explanatory notes in **Order 16/6/8 of the Rules of the Supreme Court of England** it states that:

“Generally, in common law and Chancery matters, a plaintiff who conceives that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone. He cannot be compelled to proceed against other persons whom he has no desire to sue (quoted with approval by Wynn-Parry J. in Dollfus Mieg, etc. v. Bank of England [1951] Ch. 33).

Under this rule, however, a person who is not a party may be added as Defendant against the wishes of the Plaintiff either on the application of the Defendant or on his own intervention, or in rare cases by the Court of its own motion. The jurisdiction of the Court under this rule is entirely discretionary.

The scope of this rule, so far as concerns the joinder of persons not parties, other than the Commissioners of Inland Revenue has been significantly extended by the addition of para. (2)(b)(ii). The terms of this subparagraph bear a close affinity to the terms of O.16, r.1 (1)(c) this sub-para. refers to "a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter", and O.16, r.1 (1)(c) refers to "any question or issue relating to or connected with the original subject matter of the action". In this respect, it would therefore seem

that the objects of para. (2)(b) as to joinder of parties are broadly the same as the objects of the rules relating to third party proceedings, namely (a) to prevent multiplicity of actions and to enable the Court to determine disputes between all parties to them in one action, and (b) to prevent the same or substantially the same questions or issues being tried twice with possibly different results (see para. 16/0/2. Under O.16, r.1, these objects are achieved by enabling a person not a party to be joined as a third party; under para. (2) of this rule these objects are achieved by enabling a person not a party to be added as a party. One important difference is that a non-party can himself apply under para. (2) of the rule to be added as a party, but he cannot apply under O.16, r.1, to be joined as a third party.”

16.6 Further in the explanatory notes in *Order 15/6/9 of the said Rules of the Supreme Court of England*, it is stated that:

“To entitle a person not a party to an action to intervene and to be joined as a party, the rule requires that the would-be intervener should have some interest which is directly related or connected with the subject matter of the action.”

16.7 With respect to the Attorney General the explanatory notes in **Order 15/6/10 of the Rules of the Supreme Court of England** provide that:

“The Attorney-General has a right of intervention in a private suit wherever it may affect the prerogative of the Crown, including its relations with foreign states, and also at the invitation or with the permission of the Court, where the suit raises any question of public policy on which the executive may have a view which it may desire to bring to the notice of the Court.”

16.8 I heard the application by the Attorney General to be joined as amicus curiae on 14th June, 2023, whose Ruling I deferred to the determination of the application for extension of time within which to appeal. Extension of time within which to appeal has been granted. I have noted the reasons that were advanced by the Attorney General in making the application.

16.9 The case of ***Adams v Adams and (Attorney General Intervening)*** ⁽⁶⁾ was relied on, in support of the application. The Attorney General further argued that in applying to be joined to this matter, there were alive to the decision by the Supreme Court in the case of ***Antonio Ventriglia v Eastern and Southern African Trade and Development Bank*** ⁽¹⁷⁾ but that they were not made a party to that suit, and therefore, their views were not considered in that matter.

- 16.10 Counsel for Eastern and Southern Africa Trade and Development Bank had no objection to the application on the basis that other than the State's interest in the matter, it is also a member of COMESA and the Eastern and Southern African Trade Development Bank under which it has obligations.
- 16.11 Counsel for Finsbury Investments Limited on the other hand contended that this Court was functus officio in relation to the issue of the immunity for Eastern and Southern African Trade and Development Bank, having determined the same in the Ruling dated 26th May, 2020.
- 16.12 However, the contention was made when I had not yet granted extension of time within which to appeal. I have earlier in the Ruling granted extension of time within which to appeal. It consequently follows that the arguments that were advanced by Finsbury Investments Limited to the effect that I was functus officio have since been overtaken.
- 16.13 My view is that sufficient basis has been advanced for the application to be joined, being that the Attorney General has interest in the subject matter of the suit, and it wishes to air its views on the question of the immunity of Eastern and Southern African Trade and Development Bank, which it did not have opportunity to do, as it was not a party to the case ***Antonio Ventriglia v Eastern and Southern African Trade and Development Bank*** ⁽¹⁷⁾ .
- 16.14 I accordingly grant an Order for the joinder of the Attorney General as amicus curiae in these proceedings. The matter

shall come up on for a status conference on 9th February, 2024 at 08:20 hours. Costs shall be in the cause, and leave to appeal is granted.

DATED AT LUSAKA THE 23rd DAY OF JANUARY, 2024

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**

