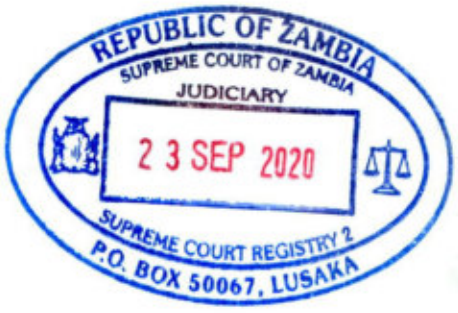
IN THE SUPREME COURT OF ZAMBIA **Appeal No. 34/2017**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



B E T W E E N :

ZAMBIA REVENUE AUTHORITY **APPELLANT**

AND

PROFESSIONAL INSURANCE CORPORATION ZAMBIA **RESPONDENT**

Coram: **Wood, Malila and Mutuna JJS, on 5th June, 2020 and 23rd September, 2020**

For the Appellant: Mr. F. Chibwe – In-house Legal Counsel, Zambia Revenue Authority

For the Respondent: Mr. M. Chiteba – Mulenga Mundashi Legal Practitioners

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MAJORITY RULING

Malila JS, delivered the majority decision of the court.

Cases referred to:

1. *Vauxhall Estates Limited v. Liverpool Corporation (1932) 1 KB 733*
2. *Thornburn v. Sunderland City Council and Others (2002) EW HC 195*
3. *Churchwardens and Overseers of West Ham v. Fourth City Mutual Building Society and Another (1892) 1QB 654*
4. *Thomas Mumba v. The People (1984) ZR 38*
5. *Lt. General Wilford Joseph Funjika v. Attorney General (2005) ZR 97*
6. *Webby Mulubisha v. Attorney General (2018/CC2/0013)*

7. *Thebus & Another v. The State (SACC 2003)*
8. *Zambia National Holdings Limited and United National Independence Party v. Attorney General (1994) SJ 22*
9. *Milford Maambo and Others v. The People (Selected Judgment No. 31 of 2017)*
10. *Attorney General v. Million Juma (1984) ZR1*
11. *Tuffar v. Attorney General (1980) GLR 637*
12. *Zambia Revenue Authority v. Fellimart Investment Ltd (SCZ Appeal No. 24 of 2017)*
13. *Mensah v. Attorney General (1997-98) 1GLR 227*
14. *GDC Logistics (Zambia) Ltd v. Joseph Kanyanta & 13 Others (SCZ Judgment No. 17 of 2017)*
15. *Zanaco v. Martin Musonda & 58 Others (Selected Judgment No. 24 of 2018)*
16. *Newplast Industries v. Commissioner of Lands & Attorney General (2001) ZR 51*
17. *Zambia National Holdings Limited and UNIP v. Attorney General (1994) SJ. 22*
18. *Faustin Mwenya Kabwe and Aaron Chung v. Justice Ernest Sakala and Judge Peter Chiengi and Attorney-General (SCZ Judgment No. 25 of 2012)*
19. *Noel Siamondo, Kelly Kapianga and the Young African Leaders Initiative Ltd v. The Electoral Commission of Zambia (Selected Judgment No. 24 of 2016)*
20. *Sanhe Mining Zambia Ltd v. Andrew Mazimba and Timurala Balaji (Z) Ltd (CAZ Appeal No. 87 of 2017)*
21. *Zega Limited v. Zambia Revenue Authority (CAZ Appeal No. 96 of 2018)*
22. *Pepper v. Hart (1993) 1 ALL ER 42*
23. *Matilda Mutale v. Emmanuel Munaile (SCZ Judgment No. 14 of 2007)*
24. *Richard Nsofu Mandona v. Total Aviation and Export Limited & 3 Others (Appeal No. 82 of 2009)*
25. *Vauxhall Estates Limited v. Liverpool Corporation ((1932) 1KB 733*
26. *Thornburn v. Saundeland City Council and Others (2002) EWHC 195*
27. *African Life Financial Services Ltd. v. Zambia Revenue Authority (Appeal No. 39 of 2017)*
28. *Zambia Revenue Authority v. Balmoral Farm (Selected Judgment No. 34 of 2019)*
29. *Mopani Copper Mines v. Zambia Revenue Authority (Appeal No. 24 of 2017)*
30. *London Street Tramways v. London County Council (1898) AC*

Legislation referred to:

1. *Supreme Court Rules (White Book) 1919 edition*
2. *Court of Appeal Act, No. 7 of 2016*
3. *Constitution of Zambia (Amendment) Act, No. 2 of 2016*
4. *Tax Appeals Tribunal Act, No.1 of 2015*
5. *Revenue Appeals Tribunal Act, No. 11 of 1998*
6. *Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia*
7. *Industrial Relations Court Rules*
8. *Statutory Interpretation (3rd ed. Butterworth, London, 1977) (at p. 225)*
9. *Constitution of Zambia Act No. 1 of 2016*

1.0. INTRODUCTION

1.1. The appeal in this matter was scheduled for hearing on the 5th June 2020. Both parties had duly filed their heads of argument in support of their respective positions.

1.2. At the hearing of the appeal, we were faced with an issue of great importance: *jurisdiction ratione materiae*. Having given the requisite notice, the respondent raised a preliminary objection to the appeal in terms of rule 19(1) of the Supreme Court Rules (White Book) 1999 edition.

1.3. The issue raised *in limine* was a fundamental one touching upon the jurisdiction of this court to entertain the appeal. The respondent plainly alleged that:

The Supreme Court does not have jurisdiction to hear the appeal as it is not properly before the court and ought to have been lodged before the Court of Appeal in accordance with the provisions of the Court of Appeal Act and the Constitution of Zambia as amended by Act No. 2 of 2016 [sic!]

1.4. The appellant, of course, impugned the preliminary issue, maintaining that the Supreme Court has jurisdiction to hear and determine the appeal.

1.5. And so it was, that rather than deal with the substantive appeal, the hearing on the 5th June 2020, was devoted to the preliminary issue, with each of the learned counsel exerting considerable energy to convince us that their respective position was correct. At the end of the exercise, we undertook to give the learned counsel's consummate arguments our full reflection and thus deferred delivery of our ruling. This is it.

1.6. The verdict represents the majority view on the preliminary issue. Our learned brother, Mutuna JS, will deliver the minority position.

2.0. BACKGROUND FACTS

1.1. The substantive appeal in this matter arises from a judgment of the Tax Appeals Tribunal (the Tribunal) given on the 5th July 2017, against the appellant following the respondent's challenge of the appellant's decision to impose Value Added Tax (VAT) on the respondent for the charge years 2008-2010. During the period covered, insurance services, particularly the sale of salvage motor vehicles, were VAT exempt in Zambia.

1.2. The trifling details of the claim, the arguments and the reasoning of the Tribunal are of no moment to the determination of the preliminary issue, for those go to the merits of the appeal.

3.0. THE RESPONDENT'S CASE ON THE PRELIMINARY OBJECTION

3.1. On behalf of the respondent, skeleton arguments and a list of authorities in support of the intention to raise a preliminary objection, were filed. There was also filed on behalf of the respondent, skeleton arguments in reply.

3.2. The respondent's position, in a nutshell, is that the appellant's filing of a notice of appeal and memorandum of appeal in the

Supreme Court on the 1st August 2017, against the judgment of the Tribunal was ill-fated as the appeal ought to have been filed in the Court of Appeal.

3.3. The learned counsel observed that section 15(1) of the Tax Appeals Tribunal Act provides that:

> **A party to an appeal from the Tribunal may appeal to the Supreme Court from the decision of the Tribunal...**

while section 22 of the Court of Appeal Act enacts that:

> **Subject to section 23, an appeal in a civil matter shall lie to the court from a judgment of the High Court or a quasi-judicial body.**

3.4. It was submitted that the provisions in the two pieces of legislation, referred to in the preceding paragraph, are contradictory to the extent that they prescribe different trajectories for appeals from the Tribunal. In that event, according to counsel, the provisions of the Court of Appeal Act must prevail granted that the Act, which came into force on 4th May 2016, was a later statute relative to the Tax Appeals Tribunal Act which entered into force on 6th April 2016.

3.5. In support of his submission, counsel for the respondent relied on the doctrine of implied repeal which stipulates that a later statute overrides a contradictory earlier statute. He also cited the English case of *Vauxhall Estates Limited v. Liverpool Corporation*[1] and quoted a passage from the judgment of the court in that case which reads as follows:

> **If they [statutes] are inconsistent to that extent, then the earlier Act is impliedly repealed by the later in accordance with the maxim *'leges posteriores priores contraria abrogant.'***

3.6. The learned counsel also referred to two other English judgments, namely, the High Court case of *Thornburn v. Sunderland City Council and Others*[2] and the older High Court case of *Churchwardens and Overseers of West Ham v. Fourth City Mutual Building Society and Another*[3]. From the former case, counsel quoted the definition of implied repeal as there given as follows:

> **The rule is that if Parliament has enacted successive statutes which on the true construction of each of them makes them irreducibly inconsistent provisions, the earlier statute is impliedly repealed by the later.**

From the latter decision, the learned counsel extracted the following passage explaining the test as to whether there has been repeal by implication:

> **The test of whether there has been a repeal by implication by subsequent legislation is this: Are the provisions of a later Act so inconsistent with, or repugnant to the provisions of an earlier Act that the two cannot stand together? In which case *'leges posteriors contrarias abrogant.'***

3.7. The learned counsel also lifted an obiter dictum sentence from the judgment of Chirwa J, then of the High Court of Zambia, in the case of *Thomas Mumba v. The People*[4] stating that:

> **Under ordinary interpretation of statutes, one would have said that the latest Act impliedly repealed or amended the old Act...**

3.8. On the basis of the foregoing authorities, it was counsel's fervid submission that the implied repeal doctrine operated in such a manner as to render section 15(1) of the Tax Appeals Tribunal Act, repealed for being inconsistent with a provision of a later Act, namely, section 22 of the Court of Appeal Act.

3.9. The learned counsel then shifted the argument to a different point touching on the Constitution. The contention was that Article 131(1) of the Constitution of Zambia and section 15(1)

of the Tax Appeals Tribunal Act are inconsistent in regard to the court to which an appeal from the Tribunal should be made.

3.10. Predictably, the issue of supremacy of the Constitution could not be ignored. In prefacing his submissions on the supremacy of the Constitution, counsel quoted from Article 1(1) and 131(1) of the Constitution. Article1(1) reads as follows:

> **This Constitution is the Supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.**

3.11. Article 131(1) of the Constitution, on the other hand, provides that:

> The Court of Appeal has jurisdiction to hear appeals from:
>
> **(a) The High Court;**
>
> **(b) Other courts, except for matters under the exclusive jurisdiction of the Constitutional Court; and**
>
> **(c) Quasi-judicial bodies, except a local government election tribunal.**

3.12. With the same intent, counsel cited a number of authorities and quoted portions of judgments in those cases germane to the argument on supremacy of the Constitution. First, he cited the case of *Lt. General Wilford Joseph Funjika v. Attorney General*[5] where we stated as follows:

> **The issue of conflict between an Act of Parliament and the Constitution is very basic. We know that the Constitution is the supreme law of Zambia and that if any other law is inconsistent with the Constitution that other law is, to the extent of the inconsistency, void.**

3.13. Next, counsel referred to a statement in the Constitutional Court of Zambia judgment in *Webby Mulubisha v. Attorney General*[6] that the supremacy of constitutional provisions is beyond question. Thereafter, he again adverted to the *Thomas Mumba*[4] case and quoted a statement made by the High Court in that case that:

> **Unless the Constitution is specifically amended, any Act that is in contravention of the Constitution is null and void.**

3.14. Counsel furthermore cited a Constitutional Court of South Africa decision in *Thebus & Another v. The State*[7] speaking to

the supremacy of the Constitution in a constitutional democracy and the subordination of all subsidiary legislation.

3.15. Based on all the authorities he cited, the learned counsel posited that Article 131(1) of the Constitution, which we have reproduced at paragraph 3.11 above, prevails over section 15(1) of the Tax Appeals Tribunal Act reproduced at paragraph 3.3 above. This is because of the doctrine of supremacy of the Constitution. Counsel urged us to uphold the preliminary objection.

3.16. No oral augmentation of the skeleton arguments was made by Mr. Chiteba who had instead filed detailed skeleton arguments in reply which we capture in part 5 of this ruling.

4.0. THE APPELLANT'S CASE ON THE PRELIMINARY OBJECTION

4.1. The appellant's learned counsel relied on the skeleton arguments filed in opposition to the preliminary objection. The appellant does not, at all, agree with the respondent's position and maintains that this court does indeed have jurisdiction to entertain appeals from the Tribunal.

4.2. The appellant's learned counsel submitted, to begin with, that the respondent has confined the debate on the jurisdiction of the Supreme Court to entertain appeals from the Tribunal, to the provisions in the Constitution that only deal with the jurisdiction of the Court of Appeal and has made no reference whatsoever to section125(2)(b) of the Constitution which deals specifically with the jurisdiction of the Supreme Court.

4.3. So far as is here material, Article 125(2)(b) of the Constitution provides that:

> **(2) The Supreme Court has –**
>
> **(b) jurisdiction conferred on it by other laws.**

This provision, according to counsel for the appellant, unambiguously recognizes that the Supreme Court may be conferred with jurisdiction by other laws; one such law being the Tax Appeals Tribunal Act No. 1 of 2015.

4.4. The learned counsel suggested that in order to appreciate the import of Article 125(2)(b) of the Constitution, one needs to understand two key components: 'jurisdiction' and 'other laws.' Citing our decision in *Zambia National Holdings Limited*

and United National Independence Party v. Attorney General[8], he submitted that the appeal filed by the appellant is in recognition of the two senses in which we explained the term jurisdiction in that case.

4.5. He contended that the phrase "other laws" in the context of Article 125(2)(b) means "apart from this constitution" so that a prudent reading of Article 125(2)(b) should indicate that the Constitution allows "other laws" aside constitutional provisions to confer jurisdiction on the Supreme Court to hear appeals.

4.6. The learned counsel submitted that the words used in Article 125(2)(b) of the Constitution are plain clear and do not require any special rules of interpretation. He cited the Zambian Constitutional Court judgment in the case of *Milford Maambo and Others v. The People*[9], where that court stated that the primary rule of constitutional interpretation is that the true sense of the text should be derived from the plain meaning of the language used and, further, that all the relevant provisions bearing on the subject for interpretation shall be considered

together as a whole in order to give effect to the objective of the Constitution. Individual provisions of the constitution should not be segregated from the others and considered alone.

4.7. Counsel also referred to the case of *Attorney General v. Million Juma*[10] where we stated that where the language of an Act of Parliament is clear and explicit, it must be given effect whatever the consequences, for in that case, the words of the statute speak the intention of the Legislature.

4.8. It was further submitted that when the framers of the Constitution came up with Article 125(2)(b), they intended it to achieve the purpose of clothing the Supreme Court with the necessary jurisdiction to deal with the exigencies of the time as well as future developments that may arise under other laws.

4.9. In apparent contradiction of his earlier submission that the words used in the contested provisions were clear and required no special rules of interpretation, the learned counsel urged us to adopt a broad, generous and purposeful approach of interpretation of Article 125(2)(b) of the Constitution.

4.10. Adverting to the Ghanaian Supreme Court case of *Tuffar v. Attorney General*[11], counsel quoted from the opinion of Sowah JSC that a constitution embodies the will of the people and its language must be considered as if it were a living organism capable of growth and development, and that a broad and liberal spirit is required for its interpretation.

4.11. Counsel contended that it was instructive for this court to consider the history behind section 125(2) of the Tax Appeals Tribunal Act, which was in existence prior to the Constitution Amendment in 2016. The approach should be similar to that taken by this court in the case of *Zambia Revenue Authority v. Fellimart Investment Ltd*[12] where, in construing the provisions of the Tax Appeals Tribunal Act, No. 1 of 2015 the court embarked on a historical discovery mission of the Act – examining in the process, the relevant Parliamentary Select Committee's deliberations on the draft law.

4.12. The learned counsel reminded us that prior to the repeal and replacement of the predecessor Act to the Tax Appeals Tribunal Act – the Revenue Appeals Tribunal Act, No. 11 of

1998, appeals from the Tribunal lay to the High Court and that during the process of repealing that Act, Parliament was fully cognisant of the existing state of the law as regards appeals and did specifically and purposefully decided to repeal the appeal provision as evidence the Report on the Tax Appeals Tribunal Bill by the Parliamentary Select Committee on Economic Affairs, Energy and Labour, a portion of which counsel quoted.

4.13. It was contended that the respondent had interpreted a provision of the Constitution without reference to other provisions of the Constitution that materially impact on the subject under dispute. This approach, according to counsel, was wrong and liable to lead to misappreciation of the true meaning and import of the provision concerned.

4.14. Stressing the argument that any consideration of the issue of jurisdiction of this court in relation to appeals cannot be evenly concluded without reference to Article 125(2)(b) of the Constitution, counsel referred to another Ghanaian Supreme Court case of *Mensah v. Attorney General*[13] where at p. 227

Acquah JSC, warned against an interpretation that cherry-picks provisions of an enactment, stating that a better approach is to interpret the provision in issue in relation to the other provisions so as to render that interpretation consistent with other provisions and the overall tenor and spirit of the Constitution.

4.15. The learned counsel contended that by ignoring the provisions of Article 125(2)(b) of the Constitution, which deal with the jurisdiction of the Supreme Court, and focusing conveniently on Article 131(1) which deals with the jurisdiction of the Court of Appeal, the respondent is cherry-picking provisions of the Constitution – an approach totally at odds with established norms of constitutional interpretation.

4.16. Turning to section 6(1) of the Constitution of Zambia (Amendment) Act No. 1 of the 2016, which contains serving and transitional provisions, the learned counsel contended that, that too offered no solace to the respondent for the position it is espousing as there was no inconsistency between Article 125(2)(b) of the Constitution and section15(1) of the Tax

Appeals Tribunal Act. The latter provision draws its validity from the former.

4.17. According to counsel, the proper way to test the validity of section 15(1) of the Tax Appeals Tribunal Act should be not against Article 131(1) of the Constitution which deals with the jurisdiction of the Court of Appeal, but rather Article 125(2)(b) which deals with the jurisdiction of the Supreme Court.

4.18. Counsel also dispelled any notion that the Constitution (Amendment) Act, No. 2 of 2016 fundamentally altered everything. We were referred to our judgment in the cases of *GDC Logistics (Zambia) Ltd v. Joseph Kanyanta & 13 Others*[14], and the Constitutional Court judgment in *Zanaco v. Martin Musonda & 58 Others*[15] in both of which the suggestion by counsel that the amendment to the Constitution brought about a direct conflict between the Constitution and the Industrial and Labour Relations Act and the Industrial Relations Court Rules was rejected by the respective courts.

4.19. He finally referred to our decision *in Newplast Industries v. Commissioner of Lands & Attorney General*[16]. There, we stated that the mode of commencement of any action is generally provided by the relevant statute. Using that holding as authority, counsel submitted that the Tax Appeals Tribunal Act, No. 1 of 2015 draws its validity from Article 125(2)(b) of the Constitution which prescribes the procedure for appealing against a decision of the Tribunal by stipulating the forum for launching such appeals.

4.20. In his oral supplementation of the skeleton arguments Mr. Chibwe usefully unbundled the arguments made in the skeleton arguments and engaged us quite illuminatively as we sought clarifications on the appellant's position.

4.21. Mr. Chibwe particularly reinforced the skeleton argument when he submitted that the position of the Tax Appeals Tribunal Act, as respects the jurisdiction of the Supreme Court to hear appeals from the Tribunal, did not change with the amendment of the Constitution and the introduction of the Court of Appeal as the Tax Appeals Tribunal Act was one of

the existing laws that survived the amendment of the Constitution. He referred us to section 6 of the Constitution of Zambia Act No. 1 of 2016.

4.22. Section 6 of the Constitution of Zambia Act No. 1 of 2016 provides as follows:

> **(1) Subject to the other provisions of this Act, and in so far as they are not inconsistent with the Constitution as amended, existing laws shall continue in force after the commencement of this Act as if they had been made in pursuance of the Constitution as amended, but shall be construed with such modifications, adoptions, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution as amended.**
>
> **(2) Parliament shall, within such period as it shall determine, make amendments to any existing law to bring that law into conformity with, or to give effect, to this Act and the Constitution as amended.**

4.23. In his submission, there was no inconsistency between section 15(1) of the Tax Appeals Tribunal Act and the Constitution.

4.24. We were urged to dismiss the respondent's preliminary objection with costs.

5.0. THE APPELLANT'S REPOSTE

5.1. The appellant's learned counsel shortly replied to the arguments of the appellant opposing the preliminary objection.

5.2. After reminding us of our holding in *Zambia National Holdings Limited and UNIP v. Attorney General*[17] that one sense in which jurisdiction is to be understood is that it is the authority of a court to decide matters and that the limits of such authority will be stated in relevant legislation, the learned counsel submitted that the appellant's argument that it is only the jurisdiction of the Supreme Court and not that of the Court of Appeal that should form the focus of the assessment of the jurisdictional competence, is without merit.

5.3. In his submission, all legislation bearing on the issue ought to be interrogated in order to ascertain the limits of authority on each of the courts in Zambia. That legislation must be read together, as opposed to being considered separately or individually in order to establish the jurisdictional limits of the courts.

5.4. The learned counsel quoted Article 125(2)(b) as well as Article 131(1) of the Constitution before submitting that while Article 125(2)(b) grants broad and wide casting jurisdiction to the Supreme Court, Article 131(1) limits the jurisdiction of the Supreme Court by expressly specifying appeals which must lie to the Court of Appeal.

5.5. In counsel's understanding, Article 131(1) specifically requires all appeals from quasi-judicial bodies to be heard by the Court of Appeal and, therefore, Article 125(2), which grants the Supreme Court jurisdiction as conferred by other laws, implies that such other laws are subject to the Constitution which by Article 131(1) has superseded the Tax Appeals Tribunal Act.

5.6. It was also argued that by focusing solely on Article 125(2)(b) of the Constitution, the appellant was attempting to rob the Court of Appeal of its jurisdiction as expressly given it by Article 131(1) of the Constitution. Furthermore, by addressing Article 125(2)(b) to the exclusion of Article 131(1), the appellant was going against its own argument that all provisions of the Constitution must be read together.

5.7. The learned counsel posited that in reading Article 125(2)(b) and 131(1) together, the rules of interpretation must be applied. To this effect, counsel cited the case of *Faustin Mwenya Kabwe and Aaron Chungu v. Justice Ernest Sakala and Justice Peter Chiengi and Attorney-General*[18] where we stated as follows:

> **Wherever there is no ambiguity in the meaning of a statute or indeed the Constitution itself, the primary principle of interpretation is that the meaning of the text should be derived from the plain meaning of the language used.**

5.8. The learned counsel also referred us to the case of *Noel Siamondo, Kelly Kapianga and the Young African Leaders Initiative Ltd v. The Electoral Commission of Zambia*[19] where the Constitutional Court emphasised the position that provisions of the Constitution must be construed according to the plain and ordinary meaning of the words and they must be in consonance with other related provisions in the Constitution when read as a whole. Only when this is not possible should resort to the purposive approach be had. The Court of Appeal holding in *Sanhe Mining Zambia Ltd v. Andrew*

Mazimba and Timurala Balaji (Z) Ltd[20] to the same effect, was also cited as persuasive authority.

5.9. Furthermore, counsel referred to the case of *Zega Limited v. Zambia Revenue Authority*[21] as an appeal from the decision of the Tribunal handed down on 14th August 2017, long after the passing of the amended Constitution that appropriately went on appeal to the Court of Appeal as opposed to this court.

5.10. Counsel for the respondent, like his counterpart for the appellant, and in spite of all that he had said, submitted that there was no ambiguity in the words contained in the provisions of the Constitution as regards where appeals from the Tribunal lie. However, if this court was of the inclination that there was some ambiguity, counsel suggested that the court should apply the mischief and purposive rules as held in the *Sanhe Mining*[20] case. He also referred to the case of *Pepper v. Hart*[22] as additional authority on the same point.

5.11. The learned counsel also submitted that when read together with Article 125(2)(b) of the Constitution, the purpose of Article 131(1) is to limit the broad jurisdiction conferred upon the

Supreme Court and no exception is provided to the constitutional provision in Article 131(1).

5.12. Responding specifically to the reference by counsel for the appellant to the Report of the Parliamentary Select Committee on Economic Affairs, Energy and Labour, counsel argued that the said Report and the Tax Appeals Tribunal Act were passed prior to the amendment to the Republican Constitution in 2016. They do not, therefor, assist the appellant's position as they were, in any case, superseded by the amended Constitution.

5.13. Counsel once again submitted on the issue of ambiguity in the wording of provisions in the Constitution. He referred to the case of *Matilda Mutale v. Emmanuel Munaile*[23] where we stated that where a strict interpretation of a statute gives rise to an absurdity and unjust situation, the judges can and should use their good sense to remedy it by reading words into it, if necessary so as to do what Parliament would have done had it had the situation in mind.

5.14. With the foregoing submissions, the learned counsel implored us to uphold the preliminary objection.

6.0. ISSUES FOR DETERMINATION AND THE JURISDICTION TO DO SO

6.1. We are grateful to counsel for both parties for their most informative and illuminating reflections on the issues raised in the preliminary objection.

6.2. The principal issue arising in the objection *in limine* is the threshold one of jurisdiction – going to the very foundation of the appeal. Are we as the Supreme Court, the correct forum to entertain the appellant's appeal.

6.3. Put into homely metaphor, the question we are being called upon to determine requires us to ascertain whether the appeal is properly before us by virtue of section 15 of the Tax Appeals Tribunal Act as read with Article 125(2)(b) of the Constitution or whether section 4 and 22 of the Court of Appeal Act as read with Article 131(1) of the Constitution precludes this court from determining the appeal on the basis that it is from a

decision of the Tribunal, a quasi-judicial body from which appeals should lie to the Court of Appeal.

6.4. Is there any disharmony between two constitutional provisions, namely Article 125(2)(b) granting the Supreme Court jurisdiction conferred on it by "any other laws," on one hand, and section131(1) of the Constitution granting the Court of Appeal the mandate to hear appeals emanating from decisions of quasi-judicial bodies save a local government election tribunal?

6.5. More grievously, we believe the issue we have to determine is whether there is any conflict between section15(1) of the Tax Appeals Tribunal Act which, as quoted at paragraph 3.3 of this ruling, directs that an appeal from the Tribunal lies to the Supreme Court, and sections 4 and 22 of the Court of Appeal Act (substantially reproduced at paragraph 3.3 of this ruling) which states that an appeal from a judgment of the High Court or a quasi-judicial body shall lie to the Court of Appeal?

6.6. We are here faced with a somewhat interesting paradox. Jurisdiction is the gateway to the temple of justice. In this case the question is whether the gatekeeper will allow the appellant access to the temple. Yet the issue is more complex than that. The gatekeeper's very authority to determine whether or not to grant access is also in question. Can the Supreme Court determine whether constitutionally, it has jurisdiction to determine a jurisdictional question if that question hinges on a constitutional provision?

6.7. In embarking upon this exercise, we must be very clear from the outset that we are fully alive to the provisions of Article 128 of the Constitution which provides that:

> **(1) .....the Constitutional Court has original and final jurisdiction to hear –**
>
> > **(a) a matter relating to the interpretation of this Constitution...**
>
> **(2) .....where a question relating to this Constitution arises, the person presiding in that court shall refer the question to the Constitutional Court.**

6.8. The remit of our jurisdiction in regard to issues touching on provisions of the Constitution is severely circumscribed. As we observed in the case of *Richard Nsofu Mandona v. Total Aviation and Export Limited & 3 Others*[24]:

> **Where, ... a matter arises whose substance is primarily interpretation of a provision of the Constitution, this court would be obliged to refer such matter to the Constitutional Court in terms of Article 128(2) to which we have alluded. This does not in any case mean that every time the Constitution is mentioned in arguments made before this court, we shall close our records of appeal and rise until the Constitutional Court determines any such arguments. Making observations on obvious constitutional provisions as we determine disputes of a non-constitutional nature, is not, in our view, necessarily averse to the letter and spirit of the Constitution nor would it encroach or usurp the jurisdiction of the Constitutional Court.**

6.9. We stress the point that the Supreme Court is no forum for interpreting the Constitution. Luckily neither party to the current proceedings has invited us to undertake anything resembling constitutional interpretation, nor do we apprehend that a question relating to the Constitution has arisen to warrant a reference to the Constitutional Court in terms of Article 128(2) of the Constitution. Although some of the submissions of counsel are couched in constitutional

language, we perceive the arguments raised as not being constitutional in substance.

6.10. To the contrary we see the preliminary objection as principally raising an issue that requires of this court to make sense out of seemingly conflicting statutory provisions, that is to say the Tax Appeals Tribunal Act, and the Court of Appeal Act; an issue requiring policy coherence analysis on our part. In the process, inevitable reference to the Constitution must be made, not by way of substantive interpretation, but rather by way of soliciting initial answers to the issue of jurisdiction. This, to us, is perfectly consistent with what we stated in the *Richard Nsofu Mandona*[24] case as we have quoted it in paragraph 6.8 of this ruling.

6.11. The gatekeeper thus has the power to consider a request for access to the temple of justice.

7.0. OUR ANALYSIS

7.1. We have set out at paragraph 3.3 the provisions of section 15(1) of the Tax Appeals Tribunal Act and section 22 of the Court of Appeal Act, which at face value appear to be at odds

with each other. What neither counsel referred to in their submissions is section 4 of the Court of Appeal Act which, like section 22, enacts that that the court shall hear appeals from the High Court and "a quasi-judicial body except a local government election tribunal."

7.2. The Tax Appeals Tribunal Act specifically states that an appeal from the Tribunal shall lie to the Supreme Court. This *prima facie* appears to be perfectly in harmony with Article 125(2)(b) of the Constitution as quoted at paragraph 4.3 of this ruling thus giving the Supreme Court jurisdiction to entertain appeals based on jurisdiction under 'other laws.' Article 131(1), on the other hand, empowers the Court of Appeal to hear appeals from "quasi-judicial bodies" except a local government election tribunal.

7.3. The respondent's argument as articulated by Mr. Chiteba is that a combined reading of section 22 of the Court of Appeal Act and Article 131(1) of the Constitution do deprive the Supreme Court of any jurisdiction to deal with appeals from quasi-judicial bodies such as the Tribunal.

7.4. On the other hand, the appellant's argument as adumbrated by Mr. Chibwe is that a reading of Article 125(2)(b) of the Constitution and section 15(1) of the Tax Appeals Tribunal Act clearly clothe the Supreme Court with the necessary jurisdiction to hear and determine appeals from the quasi-judicial body in the nature of the Tax Appeals Tribunal by reason of section 15(1) of the Tax Appeals Tribunal Act.

7.5. We are cognizant of the four interpretational rules applicable to both constitutional and statutory interpretation. First, is the need to ascertain the intent of those who enacted the law and to thus employ an interpretation that best captures that intent. Second, is to arrogate to words used, their plain meaning unless that approach violates the spirit of the provision. Third is, as much as possible, to construe the provisions in a manner that promotes harmony with each other; and finally, is to allow the specific to prevail over the general.

7.6. When viewed against Article 131(1) of the Constitution, sections 4 and 22 of the Court Appeal Act reveal some *prima facie* glaring uncertainties in the language employed. The Court of Appeal Act is by those sections enjoined to receive and determine appeals from *the High Court or a quasi-judicial body.* A plain reading of these provisions would seem to us to suggest that appeals reviewable by the court could be from any quasi-judicial body, as opposed to being from all quasi-judicial bodies. We shall develop this argument later on.

7.7. The first point of call is to ascertain the intention of Parliament. Our view is that in order to do so, we have to examine the plain language used in legislation as well as in the Constitution. Not much joy can be derived from employing this approach granted that the provisions at face value appear to lend themselves to different interpretations as revealed in the arguments of counsel.

7.8. Given the seeming contradiction or possible disharmony of the provisions, referred to in the preceding paragraph with those of the Tax Appeals Tribunal Act, we believe that the third and

fourth criteria of interpretation as alluded to in paragraph 7.5 of this ruling, that is to say, harmonise provisions where possible and the specific prevailing over the general, are the approaches that will make the most sense out of these statutory provisions.

7.9. There is nothing in Article 125(2)(b) as read with Article 131(1) that suggests that Article 131(1) was intended to limit the jurisdiction of the Supreme Court to hear appeals from the Tribunal as envisioned in Article 125(2)(b). We thus are not persuaded by Mr. Chiteba's argument in this regard.

7.10. As we have stated, both parties have argued that there are no contradictions in the provisions of the law as regards the jurisdiction of the two courts to entertain appeals from quasi-judicial bodies. What is perhaps not clear from the submissions of either counsel is the area of convergence or harmony. This was somewhat overshadowed by the emphasis each party placed, not on complementarity, but on perceived exclusivity of jurisdiction.

7.11. Our considered view is that the two statutory provisions, that is to say those contained in the Court of Appeal Act, on one hand, and those set out in the Tax Appeals Tribunal Act, on the other hand, do not after all conflict. Here we revert to the point we partly referred to at paragraph 7.6 of this ruling. Sections 4 and 22 of the Court of Appeal Act in their present formulation empower the Court of Appeal to hear appeals from quasi-judicial bodies generally – any quasi-judicial body, except the quasi-judicial body specifically identified in Article 131(1) of the Constitution, namely a local government electoral tribunal. This provision does not, in our view, give the Court of Appeal exclusivity in hearing appeals from quasi-judicial bodies.

7.12. Section 15(1) of the Tax Appeals Tribunal Act on the other hand directs that appeals from one quasi-judicial body which the Act specifically deals with - the Tax Appeals Tribunal – shall lie to the Supreme Court. This, in our considered opinion, creates a second exception to the quasi-judicial bodies whose appeals are within the jurisdictional mandate of the Court of

Appeal to determine. There is thus no conflict in our opinion between sections 4 and 22 of the Court of Appeal Act and section 15 of the Tax Appeal Tribunal Act.

7.13. Even if one considered Articles 125(2)(b) – granting the Supreme Court the right to hear appeals by virtue of jurisdiction granted upon it by other laws – and section 131(1) empowering the Court of Appeal to hear appeals from quasi-judicial bodies except a local government electoral tribunal, no conflict is to us evident.

7.14. Reading the two provisions in a manner that promotes harmony, comfortably leads us to the interpretation that the Supreme Court does not generally have jurisdiction to hear appeals from quasi-judicial bodies unless 'other laws' give it such jurisdiction. One such law is the Tax Appeals Tribunal Act (Section 15(1). In this regard we agree with counsel for the appellant.

7.15. The Court of Appeal, on the other hand, has the mandate (though not an exclusive one) to hear appeals from all quasi-judicial bodies (except a local government electoral tribunal

and all other tribunals in respect of which other laws give such jurisdiction to the Supreme Court (under article 125(2)(b)). To the extent that no exclusivity of jurisdiction is reserved for the Court of Appeal to hear all appeals arising from quasi-judicial bodies, an interpretation that implies that position would, to us, be plainly absurd.

7.16. The provisions of sections 4 and 22 of the Court of Appeal Act are, in our considered view, couched very generically in the sense that appeals lie from "a quasi-judicial body" (any quasi-judicial body) except a local government electoral tribunal. In contrast, section 15(1) of the Tax Appeals Tribunal Act is couched in very specific terms as an appeal from the Tribunal (specifically the Tax Appeals Tribunal) lies to the Supreme Court. We do not thus agree with Mr. Chiteba that Article 125(2)(b) grants broad and wide casting jurisdiction on the Supreme Court. It, to the contrary, gives very specific jurisdictional powers.

7.17. With estimable clarity, the learned counsel for the respondent also advanced an argument premised on the doctrine of implied repeal, complete with authorities including, as we have earlier on recounted, the English High Court cases of *Vauxhall Estates Limited v. Liverpool Corporation*[25] and *Thornburn v. Saundeland City Council and Others*[26].

7.18. We fully appreciate the force of the argument premised on the doctrine of implied repeal and are sympathetic to the position taken by the respondent in this regard. We have equally had recourse to the learned author Francis Bennion, *Statutory Interpretation* (3rd ed. Butterworth, London, 1977) (at p. 225) where he puts the position thus:

> **Where a later enactment does not expressly repeal an earlier enactment which it has power to override, but the provisions of the later enactment are contrary to those of the earlier, the later, by implication, repeals the earlier in accordance with the maxim *leges posteriors contrarias abrogant* (later laws abrogate earlier contrary laws). This is subject to the exception embodied in the maxim *generalia specialibus non derogant* (a general provision does not derogate from a special one).**

7.19. At page 214 and 215 Bennion states that:

> **If a later Act cannot stand with an earlier, Parliament (though not said so) is taken to intend an amendment of the earlier. This is a logical necessity since two inconsistent texts cannot both be valid without contravening the principle of contradiction.**

7.20. Taking the position as explained by Bennion, and turning to the contested provisions, that is to say sections 4 and 22 of the Court of Appeal Act, and section 15(1) of the Tax Appeals Tribunal Act, and even assuming for a moment that the two provisions are not in harmony with each other, we would have to contend with the following three questions in considering whether the later Act, i.e. the Court of Appeal Act, repeals by implication, the earlier Act, i.e. the Tax Appeals Tribunal Act:

(a) Does the Court of Appeal have power to override the Tax Appeals Tribunal Act?

(b) Is the later Act so inconsistent that it cannot stand with the earlier?

(c) Do the provisions of these enactments, applying the maxim *generalia specialibus non derogant,* warrant the implied repeal of section 15(1)(b) of the Tax Appeals Tribunal Act?

7.21. Upon careful reflection, we think all the three questions posed in the preceding paragraphs should solicit a negative reply. Neither the preamble nor any of the thirty sections of the Court of Appeal Act show that the Act was intended to override the Tax Appeals Tribunal Act. The two Acts are not irredeemably inconsistent either. A perusal of the provisions of these enactments in fact reveals that it is the Tax Appeals Tribunal Act which contains specific or special provision thus making it an unlikely candidate for implied repeal.

7.22. Our conclusion on the issue of implied repeal, therefore, is that sections 4 and 22 of the Court of Appeal Act did not impliedly repeal section 15(1) of the Tax Appeals Tribunal Act.

7.23. We agree with Mr. Chibwe that section 6 of the Constitution of Zambia Act No. 1, is only relevant where an existing law is in conflict with the amended Constitution. We have demonstrated that the existing law (i.e. the Tax Appeals Tribunal Act) is not in conflict with the Constitution.

7.24. Mr. Chiteba, citing the case of *Zega Limited v. Zambia Revenue Authority*[21] decided by the Court of Appeal, has argued that that case took the correct appeal path from a decision of the Tribunal. Needless to state that citing that example does not constitute any legal argument, nor does it further any such argument.

7.25. For the benefit of counsel and in deference to Mr. Chiteba's effort, we must state that this court has in the recent past determined several appeals from the Tribunal and in doing so proceeded on a clear understanding on the part of counsel for the parties to the appeals and of this court that appeals from the Tribunal lie to this court. *African Life Financial Services Ltd. v. Zambia Revenue Authority*[27] was an appeal against a decision of the Tribunal given on September 2017, (post the 2016 amendment to the Constitution). Mr. Chiteba, learned counsel for the respondent in the present appeal, and the movant of this preliminary objection, appeared as counsel for the appellant in that appeal. He did not raise the issue of jurisdiction.

7.26. In *Zambia Revenue Authority v. Balmoral Farm*[28] this court determined an appeal against a decision of the Tribunal given post the creation of the Court of Appeal. Again, both parties as well as the court proceeded on the clear understanding that this court was properly clothed with jurisdiction to determine the appeal.

7.27. More recently, in *Mopani Copper Mines v. Zambia Revenue Authority*[29], we again determined a tax dispute arising from a judgment of the Tribunal given on 8th December 2010. The notice of appeal was filed on 20th December 2016. There was no jurisdictional question raised.

7.28. We have given all these examples of cases decided by this court on appeal from the Tribunal in the aftermath of the birth of the Court of Appeal in order to demonstrate two things; first, the need for predictability and consistency in what we as the apex court do and second, integrity of counsel and judicial estoppel.

7.29. As regards the first of these, there is no doubt, whatsoever, that constant shifting of positions by this court would be inconsistent with predictability of court judgments and the credibility of the justice system itself. It contravenes public policy. We as the apex court should not be encouraged to shift goal posts with each argument made by counsel especially where reasonable and right-minded citizens and business houses have legitimately ordered their affairs on the basis of a certain understanding of the state of the law.

7.30. And indeed, there is much public good to be gained by finality on some aspects determined by this court. As the Earl of Halsbury LC remarked in *London Street Tramways v. London County Council*[30] :

> **Of course, I do not deny that cases of individual hardships may arise and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice to be compared with the inconvenience – the disastrous inconvenience of having each question subject to be reargued and the dealings of mankind rendered doubtful by reason of the different decisions so that in truth and in fact there would be no real final court of final appeal?**

7.31. The issue of the jurisdiction of the Supreme Court is one that was assumed in all the cases, some of which we have alluded to, where we had determined appeals from the Tribunal. To reopen that issue merely because it had not been specifically argued and expressly determined, places the appeal in as bad a place as reopening a determined question. While we harbor no illusion whatsoever that repeated application of a demonstrably mistaken legal position does not make it right and that this court has inherent power to correct its own past errors, we believe the situation before us does not present any circumstance to warrant correction.

7.32. As regards the issue of judicial estoppel, it will be noted that in the case of *African Life Financial Services v. Zambia Revenue Authority*[27], it was Mr. Chiteba, learned counsel for the respondent in this appeal, who had represented the appellant in that case having launched the appeal premised on his understanding that this court has jurisdiction to entertain appeals from the Tribunal. In this appeal, he has taken the very opposite position.

7.33. The doctrine of judicial estoppel prevents a party from asserting a position in one legal proceeding that directly contradicts a position taken by the same party in an earlier proceeding. This doctrine against assertion of inconsistent position is designed to protect the integrity of the judicial process.

7.34. The point we make is not that counsel is stuck by a legal position he takes no matter how erroneous it may be. He is entitled to argue the law as he understands it at any future time even if that understanding contradicts his previous understanding of it.

7.35. We must also add that counsel is ordinarily never a party to proceedings so as to be caught up by the doctrine of judicial estoppel where he represents different parties. To be clear, Mr. Chiteba was never a party to either actions. We only flag the concept of judicial estoppel as a caution to counsel whose personal integrity and the higher professional duty to the court underpins everything else that he does in his search for justice on behalf of instructing litigants.

8.0. CONCLUSION

8.1. We reiterate that this court has the mandate to continue to entertain appeals from the Tribunal for as long as Article 125(2(b) as presently formulated remains undisturbed, and 'other law,' whatever they may be, confer on this court the power to entertain appeals from quasi-judicial bodies.

8.2. The fact that this preliminary objection was raised at all and so seriously debated, coupled with the division in opinion on our part should be sufficient indication that there is need for the relevant organs of government to take necessary steps to further clarify the position regarding the path of appeals from quasi-judicial bodies. If exclusivity of the Court of Appeal's jurisdiction to hear and determine appeals from quasi-judicial bodies is desired, necessary amendments should be made to legislation to clearly reflect that wish. If no such intention exists, the law still requires legislative clarification so as to forestall costly second guessing of the intention of Parliament as the parties here have done.

8.3. For the reasons we have articulated, the preliminary objection is dismissed.

8.4. The parties shall bear their respective costs.

A. M. Wood
SUPREME COURT JUDGE

M. Malila
SUPREME COURT JUDGE

DISSENTING RULING

Mutuna JS, delivered the following minority ruling of the Court.

Cases referred to:

1) **Vauxhall Estates Limited v Liverpool Corporation (1932) 1 KB 733**
2) **Thornburn v Sunderland City Council and others (2002) EWHC 195**
3) **Church Wardens and Oversees of Westham v Fourth City Mutual Building Society and another (1982) 1 QB 654**
4) **Thomas Mumba v The People (1984) ZR reprint 45**
5) **Lt. General Wilford Joseph Funjika v The Attorney General (2005) ZR 97**
6) **Webby Mulubisha v The Attorney General 2018/CCZ/0013**
7) **Thebus and another v The State (2003) AHRLR 230**
8) **Konkola Copper Mines PLC v Copper Fields Mining Services LTD (2010) 3 ZR page 156**

9) **Afritec Asset Management Company Limited and CDP Properties v The Gynae and Ante-Nantal Clinic Limited v Kenneth Mwaka SCZ judgment number 11 of 2019**
10) **Zambia National Commercial Bank Plc v Geoffrey Muyamwa and 88 Others SCZ judgment No. 37 0f 2017**
11) **Adegoke Motors Ltd v Adesonya (1989) 13 NWLN 250**

Statutes referred to:

1) **Supreme Court Rules, Cap 25**
2) **Constitution, Cap 1**
3) **Constitution of Zambia (Amendment) Act, No. 2 of 2016**
4) **Constitution of Zambia Act, No. 1 of 2016**
5) **High Court Act, Cap 27**
6) **Arbitration Act, No. 19 of 2000**

Works referred to:

1) **Francis Bennion, Statutory Interpretation, third edition, Butterworth, London, 1997**

1) **Abstract**

1.1 I have read the decision of the majority members of the Court reflected in the opinion of Malila JS, and respectfully disagree with it. For this reason, I have decided to deliver a dissenting decision.

1.2 The dissent on my part has been prompted by my disagreement with the decision by the majority, that

Section 15(1) of the ***Tax Appeals Tribunal Act*** is not in conflict with Section 22 of the ***Court of Appeal Act*** and Article 131(1) of the ***Constitution***.

1.3 I am also in disagreement with the majority decision in its interpretation of Article 125(1) of the ***Constitution*** and in so far as it speaks to the effect of Section 6 of the ***Constitution of Zambia Act*** because it ignores the genesis and rationale for the section.

1.4 Last of all, my dissent is also prompted by my disagreement with the majority that we have jurisdiction to hear appeals from the ***Tax Appeals Tribunal*** because in the past, post the amendment of the ***Constitution***, we have entertained such appeals. The majority decision seeks to justify this reasoning on the basis of the need for predictability and consistency as the apex Court.

2) **Introduction**

2.1 When this matter came up on the hearing of the appeal, the Respondent raised a preliminary motion,

requesting us to dismiss the appeal on the ground that we do not have jurisdiction to hear it.

2.2 The Respondent has contended that the appeal is incompetent as it ought to have been presented to the Court of Appeal and not our Court. The motion is by virtue of Rule 19/1, of the ***Supreme Court Rules***.

3) **Background**

3.1 The backdrop to this appeal is that it arises from a judgment of the Tax Appeals Tribunal (the Tribunal) delivered on 5th July 2017. Prior to that date, in 2016, the ***Constitution*** was amended to, among other things, establish the Court of Appeal.

3.2 In establishing the Court of Appeal, the ***Constitution*** set out the jurisdiction of the Court to be that of hearing appeals from; the High Court; other Courts, except for matters under the exclusive jurisdiction of the Constitutional Court; and quasi-

judicial bodies, except a local government elections tribunal.

3.3 This new dispensation ushered in by the ***Constitution*** (as amended) also brought in the ***Court of Appeal Act*** which provides for, among other things, appeals in civil matters lying to the Court of Appeal from judgments of the High Court and quasi-judicial bodies.

3.4 The provisions of the ***Court of Appeal Act*** are couched in the manner expressed in the preceding paragraph, notwithstanding the provisions of the ***Tax Appeals Tribunal Act*** which stipulate that appeals from the Tribunal shall lie to the Supreme Court.

3.5 As often happens, when a ***Constitution*** is amended there is bound to be a conflict between its provisions and those of other existing laws. In anticipation of this, the Legislature saw it fit to enact Section 6 of the ***Constitution of Zambia Act*** which preserves all

laws passed prior to the ***Constitution*** (as amended) to the extent that they were not in conflict with it.

3.6 It is arising from the conflict in the provisions of the ***Constitution*** (as amended) and ***Court of Appeal Act***, on the one hand, and the ***Tax Appeals Tribunal Act*** on the other, that the two parties have anchored their respective positions.

4) **Arguments advanced by the parties**

4.1 Counsel for both parties went to great length in articulating their respective positions as revealed by the summary of their arguments in the majority decision. These arguments are by and large peripheral to the issues in contention and, as such, in this opinion I have limited the summary to the relevant arguments only.

4.2 The thrust of the arguments by Mr. M. Chiteba, counsel for the Respondent, are twofold. The first is that since there is a conflict in the provisions of the ***Court of Appeal Act*** and the ***Tax Appeals Tribunal***

Act, those of the ***Court of Appeal Act*** should prevail because that Act is later in time and, is, as a result, presumed to have amended the former Act to the extent of the inconsistency.

4.3 Counsel argued that the principle articulated in the preceding paragraph is the doctrine of implied repeal and referred us to three English cases as follows: ***Vauxhall Estates Limited v Liverpool Corporation[1]; Thornburn v Sunderland City Council and others[2]*** and ***Church Wardens and Oversees of Westham v Fourth City Mutual Building Society and another[3]***. These cases state that where there is a conflict in two statutes, it is presumed that Parliament intended to amend the earlier statute by enactment of the provisions of the later one.

4.4 Mr. Chiteba also referred us to the High Court decision in the case of ***Mumba v The People[4]*** where Chirwa J, (as he then was) said, at page 47, *inter alia*,

that under ordinary interpretation of statutes one would have said that the latest Act impliedly repealed or amended the old Act.

4.5 The second limb of Mr. Chiteba's arguments was that since there is inconsistency between the ***Constitution*** and ***Tax Appeals Tribunal Act*** in respect of where an appeal lies from the Tribunal, the provisions of the ***Constitution*** should prevail. Counsel justified his argument on the basis that the ***Constitution*** is the supreme law of the land and its provisions prevail over those of any statute.

4.6 In support of his arguments, counsel drew our attention to the decision in the case of ***Lt. General Wilford Joseph Funjika v The Attorney General***[5] where we held as follows at page 104

> **"The issue of conflict between an Act of parliament and the Constitution is very basic. We know that the Constitution is the supreme law of Zambia and that if any other law is inconsistent with the Constitution, that other law is, to the extent of the inconsistency, void."**

He also drew our attention to the pronouncement by the Constitutional Court in the case of ***Webby Mulubisha v The Attorney General***[6] that the supremacy of constitutional provisions is beyond question. The other cases counsel referred to were the ***Mumba***[4] case and ***Thebus and another v The State***[7] which also speak to the supremacy of the ***Constitution***.

4.7 Counsel concluded that since Section 15(1) of the ***Tax Appeals Tribunal Act*** is in conflict with Article 131(1) of the ***Constitution*** it is void on the ground that the ***Constitution*** of Zambia is the supreme law of the Republic. He urged us to allow the motion and dismiss the appeal for being incompetent.

4.8 In the Appellant's arguments in response, both written and *viva voce*, counsel for the Appellant, Mr. F. Chibwe, went to great length at restating our pronouncements on the jurisdiction of this Court and the rules of interpretation in relation to the

Constitution. I have not summarized these arguments because they are not relevant to the issue that lies at the heart of this motion.

4.9 The thrust of Mr. Chibwe's arguments, was that in advancing its arguments, the Respondent has focused on the jurisdiction of the Court of Appeal and yet the motion seeks to dismiss the appeal on the ground of want of jurisdiction by this Court. Counsel was essentially saying that there are other provisions of the law to look to apart from the ***Court of Appeal Act*** and ***Constitution***, in ascertaining the jurisdiction of this Court.

4.10 Mr. Chibwe advanced his argument by stating that the jurisdiction of our Court, as it relates to the appeals from the Tribunal, is defined by Article 125(2) (b) of the ***Constitution*** as amended. I am compelled to quote this Article because my decision turns on the interpretation I have given to it. The Article reads in part as follows:

> **"125(1) Subject to Article 128, the Supreme Court is the final Court of appeal.**
>
> **(2) The Supreme Court has-**
>
> **(a) appellate jurisdiction to hear appeals from the Court of Appeal, and**
>
> **(b) jurisdiction conferred upon it by other laws ....**

I have underlined the relevant portion of the Article which Mr. Chibwe attached importance to.

4.11 Counsel argued that stemming from this Article, in determining the jurisdiction of this Court one should not restrict himself to the ***Constitution*** but should also look at the *"... other laws ..."* from which this Court derives its jurisdiction. In this case the "*other law*" is the ***Tax Appeals Tribunal Act***, specifically Section 15(1). This section states in part that *"a party to an appeal from the Tribunal may appeal to the Supreme Court from the decision of the Tribunal ..."*

4.12 According to Mr. Chibwe, this provision of the ***Tax Appeals Tribunal Act*** vests jurisdiction in our Court to determine appeals from the Tribunal. He

reinforced his argument by submitting that the position has not changed with the amendment of the ***Constitution*** and introduction of the Court of Appeal because the ***Tax Appeals Tribunal Act*** is one of the *"existing laws"* that survived post the amendment of the ***Constitution***. He drew our attention to Section 6 of the ***Constitution of Zambia Act***, which state as follows:

> **"6(1) Subject to the other provisions of this Act, and so far as they are not inconsistent with the Constitution as amended, existing laws shall continue in force after the commencement of this Act as if they had been made in pursuance of the Constitution as amended, but shall be construed with such modifications, adoptions, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution as amended.**
>
> **(3) Parliament shall, within such period as it shall determine, make amendments to any existing law to bring that law into conformity with, or to give effect to, this Act and the Constitution as amended."**

4.13 In concluding, Mr. Chibwe contended that the Respondent had infact conceded on the need to

consider the jurisdiction of this Court not only in light of the ***Constitution*** but also *"other laws"* as provided by Article 125(2)(b) of the ***Constitution***.

4.14 We were urged to dismiss the motion.

4.15 In reply, Mr. Chiteba argued that if the intention of Parliament was to exclude appeals from the Tribunal lying to the Court of Appeal, it would have specifically stated this in Article 131 (1) of the ***Constitution***, as was the case with appeals from the local government elections tribunal. This Article states as follows:

> **"The Court of Appeal has jurisdiction to hear appeals from**
> **(a) The High Court;**
> **(b) Other Courts, except for matters under the exclusive jurisdiction of the Constitutional Court; and**
> **(c) Quasi-judicial bodies; except a local government elections tribunal."**
>
> The underlining is mine for emphasis only.

4.16 Mr. Chiteba concluded by contending that the *"other laws"* referred to in Article 125(2)(b) of the ***Constitution***, as amended, are still subject to the

doctrine of implied repeal. These other laws, must not be in conflict with later laws.

5) **My consideration and decision**

5.1 I would like to begin by thanking counsel for the industry deployed in presenting and arguing the motion before us. These arguments and indeed the documents presented by counsel, form the basis of my consideration in determining this motion.

5.2 It is not in dispute that the provisions of Section 15(1) of the ***Tax Appeals Tribunal Act*** are in conflict with the provisions of Section 22 of the ***Court of Appeal Act*** and Article 131 of the ***Constitution*** to the extent that the former prescribes appeals from the Tribunal to lie with this Court and the latter, Court of Appeal. Counsel for both parties did acknowledge this conflict.

5.3 It is also not in dispute that Article 125 (2)(b) of the ***Constitution***, as amended, invites this Court to look

beyond the ***Constitution*** to *"other laws"* in determining its jurisdiction.

5.4 The issue that arises from what I have said in the two preceding paragraphs is: what is the effect of the conflict between Section 15(1) of the ***Tax Appeals Tribunal Act*** and Section 22 of the ***Court of Appeal Act*** and Article 131 of the ***Constitution***? A sub issue is, to what extent are *"other laws"* relevant in determining the jurisdiction of this Court in relation to appeals from the Tribunal. The answer to this latter question explains the effect of Article 125(2)(b) and rationale for Section 6 of the ***Constitution of Zambia Act***.

5.5 Mr. Chiteba has argued quite forcefully in relation to the effect of the conflict in the provisions of the ***Tax Appeals Tribunal Act*** and the ***Court of Appeal Act***. He has cited a number of authorities, local and foreign on the doctrine of implied repeal. I agree with the arguments he has advanced that a later Act

which is in conflict with an earlier Act is presumed to have repealed the earlier one to the extent of the conflict.

5.6 The doctrine of implied repeal has, not only been articulated in the cases Mr. Chiteba has referred us to, but also the learned author Francis Bennion in the text ***Statutory Interpretation*** which states as follows at pages 214 to 215:

> **"If a later Act cannot stand with an earlier, Parliament (though not said so), is taken to intend an amendment of the earlier. This is a logical necessity, since two inconsistent texts cannot both be valid without contravening the principle of contradiction."**

5.7 Our High Court, whose decisions are not binding on us but persuasive, quoted the foregoing passage with approval in the case of ***Konkola Copper Mines Plc v Copper Field Mining Services Limited***[8]. In that case, sitting as a High Court Judge, I found that since Order XLV rule 13 of the ***High Court Act*** is in conflict

with Section 17 of the ***Arbitration Act*** (a later Act), the provisions of the ***Arbitration Act*** prevail over those of the ***High Court Act***. The extent of the conflict there was in relation to the grounds upon which an arbitral award may be set aside. I have no reason to disagree with my earlier reasoning and, therefore, embrace it.

5.8 My brothers have said in the majority judgment that the ***Court of Appeal Act***, though later in time cannot prevail over the ***Tax Appeals Tribunal Act*** because the ***Tax Appeals Tribunal Act*** contains specific provisions. That is to say, it is the primary Act over the matters that are in dispute in this appeal.

5.9 I do indeed agree that the ***Tax Appeals Tribunal Act*** contains specific or special provisions. However, these provisions relate to practice, and procedure in the Tribunal and other matters related to tax. It does not contain provisions specific to the matters before us being, the hierarchy and levels of appeals.

These are contained in the ***Court of Appeal Act*** which, as a result, is the primary Act.

5.10 Coming to the conflict between the ***Tax Appeals Tribunal Act*** and the ***Constitution***, I will begin by dealing with the argument by Mr. Chibwe that in determining the jurisdiction of this Court we should look beyond the provisions of the ***Constitution*** and see what *"others laws"* say. I agree that Section 15(1) of the ***Tax Appeals Tribunal Act*** directs intending appellants to appeal to this Court against any judgment of that Tribunal. To this extent that Act prescribes the jurisdiction of this Court.

5.11 However, with the enactment of the ***Constitution*** as amended, and in so far as the ***Tax Appeals Tribunal Act***, is part of *"other laws" or "existing laws" (as defined by section 6 of the* ***Constitution of Zambia Act****), it* (the ***Tax Appeals Tribunal Act***) survives only to the extent that it is not in conflict with the ***Constitution*** as amended. The saving provision

which I have referred to at paragraph 4.12 of this ruling which is Section 6 of the ***Constitution of Zambia Act***, states that the *"existing laws"* will only continue to be in force after the new ***Constitution*** in *"... so far as they are not inconsistent with the Constitution as amended ..."* (Underlining is mine for emphasis only) Section 15(1) is inconsistent with the ***Constitution*** as amended. It cannot, therefore, survive.

5.12 Notably, Parliament deemed it fit to enact Section 6(2) which provides for harmonization of old laws with the new ***Constitution*** for the simple reason that it anticipated conflicts in the laws as the one under discussion here.

5.13 Another point to note is that the prescription of looking to *"other laws"* in ascertaining the jurisdiction of this Court is contained in Article 125(2)(b) of the new ***Constitution***, which was enacted after the ***Tax Appeals Tribunal Act***. It is,

therefore, only applicable after 2016, with the coming into effect of the new ***Constitution*** and can only apply to *"other laws"* made after 2016. To say that these other laws include the ***Tax Appeals Tribunal Act*** is to suggest that the Article has retrospective effect.

5.14 Further, even assuming that Section 15(1) were not caught up by the provisions of Section 6 of the ***Constitution of Zambia Act***, it is still defeated by the doctrine of supremacy of the ***Constitution*** as we explained it in the ***Funjika***[5] case, that it is void to the extent of its inconsistency with the ***Constitutional*** provision prescribing appeals from the Tribunal to lie to the Court of appeal.

5.15 In addition, I am inclined to agree with Mr. Chiteba that if indeed Parliament intended to allow the continuation of appeals from the Tribunal to lie to our Court, it would have specifically said so as is the

case with appeals from the local government elections tribunals expressed in Article 131.

5.16 Coming to the decision by the majority decision on the need to continue on the path we took of assuming jurisdiction in the cases of ***African Life Financial Services Limited v Zambia Revenue Authority***[27], ***Zambia Revenue Authority v Balmoral Farms***[28] and ***Mopani Copper Mines v Zambia Revenue Authority***[29]. In these cases, we proceeded to hear the appeals from the Tribunal and assumed jurisdiction. My two brothers have said we should continue in this manner for purposes of *"predictability and consistency"*.

5.17 Before I comment on the sentiments expressed by my brothers as captioned in the preceding paragraphs, I wish to point out that in all those three matters, the issue of jurisdiction was not raised. We, therefore, proceeded on the premise that we had jurisdiction based on the practice that was in force before the

Constitution (as amended). We did not interrogating the question of jurisdiction.

5.18 The question I would like to pose is, should we as a Court, for the sake of predictability and consistency continue to err? I think that the answer to this question is in the negative and precedent set by the Court agrees with me. Last year in the cases of ***Afritec Asset Management Company Limited and CDP Properties Limited v The Gynae and Ante-nantal Clinic Limited and Kenneth Muuka***[9] we overturned our decision in the case of ***Manal Investment Limited v Lamise Investment (2001) ZR***. In doing so we held that the practice of interlocutory appeals against an order of injunction made by a High Court Judge lying to the full bench of our Court (now the Court of Appeal) was wrong. We accordingly, directed that all such appeals will now lie to a single judge of the Court of Appeal.

5.19 Earlier, in 2017 in the case of ***Zambia National Commercial Bank Plc v Geoffrey Muyamwa and 88 others***[10] we reversed our earlier decision in the case of ***Zambia National Commercial Bank v Kalaluka and Mwiinga***, Appeal number 33 of 2014. The reversal related to the mode of computation of terminal benefits of the Respondents in that appeal. We acknowledge the misdirection we made in the earlier appeal which we said arose from our glossing over the arguments advanced by counsel for the appellant in that appeal.

5.20 The position we took in those two cases is not unique to Zambia because in Nigeria (a Commonwealth jurisdiction like Zambia) the apex Court took a similar position in the case of ***Adegoke Motors Limited v Adesanya***[11]. The question that stood for determination was, *"does the Supreme Court possess the power to review its earlier decision?"*

5.21 Justice Oputa, in delivering the judgment of the Court, considered the powers of the Supreme Court as the final Court in the land and said the following at page 275A:

> **"We are final not because we are infallible; rather we are infallible because we are final. Justices of this Court are human-beings, capable of erring. It will certainly be short sighted arrogance not to accept this obvious truth. It is also true that this Court can do inestimatable good through its wise decisions. Similarly, the Court can do incalculable harm through its mistakes. When, therefore, it appears to learned counsel that any decision of this Court has been given *per incuriam*, such counsel should have the boldness and courage to ask that such a decision be over-ruled. This Court has the power to over-rule itself (and has done so in the past) for it gladly accepts that it is far better to admit an error than to persevere in error."**

I agree entirely with the opinion of Justice Oputa which, as I have shown earlier, is in keeping with how this Court has proceeded where we have discovered that we erred.

5.22 Appealing to our humanity and human conscious, Mr. Chiteba has, as his professional duties to this Court compel him to do, alerted us to an error we have been making. Yes, he has been complicit, but he has still found it fit to look within himself and admit the error. We, on the other hand, refuse to rise to the occasion and correct our errors of the past. We have chosen, by the majority decision, to, and using the words of Justice Oputa, *"...persevere in error"*.

6) **Conclusion**

6.1 The result of my consideration is that the motion has merit and I would allow it. The appeal before us would, in my view, be incompetent for want of jurisdiction and I would dismiss it with costs.

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N. K. Mutuna

SUPREME COURT JUDGE