**IN THE SUPREME COURT OF ZAMBIA** **APPEAL NO. 7/2020**
**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**B E T W E E N:**

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| **JONATHAN VAN BLERK** | **APPELLANT** |
| **AND** | |
| **THE ATTORNEY GENERAL** | **1ST RESPONDENT** |
| **THE LUSAKA CITY COUNCIL** | **2ND RESPONDENT** |
| **LEGACY HOLDINGS LIMITED** | **3RD RESPONDENT** |
| **KWIKBUILD CONSTRUCTION LIMITED** | **4TH RESPONDENT** |
| **BANTU CAPITAL CORPORATION LIMITED** | **5TH RESPONDENT** |
| **NATIONAL PENSION SCHEME AUTHORITY** | **6TH RESPONDENT** |

**Coram:** **Wood, Malila and Kabuka, JJS**

**On 6th October, 2020 and 27th October, 2020**

**For the Appellant** : **Mr. S. Mbewe-Messrs Keith Mweemba Advocates**

**For the 1st Respondent** : **Mr. M. K Mwale - Principal State Advocate, The Attorney General's Chambers**

**For the 2nd Respondent** : **Mrs. Y. Mulenga Muwowo - Council Advocate**

**For the 3rd Respondent** : **No Appearance**

**For the 4th Respondent** : **Mr. R. M. Simeza Sangwa SC with Mr. L. Mwamba–Messrs Simeza Sangwa & Associates**

**For the 5th Respondent** : **Mr. S. Sikota SC with Mr. K Kanda - Messrs Central Chambers & Mr M. Sitail - Messrs Ellis & Company**

**For the 6th Respondent** : **Mr. E.C. Banda SC with Mr. H. Zulu - Messrs ECB Legal Practitioners**

## RULING

WOOD, JS, delivered the ruling of the Court.

**Cases referred to:**

1. *Elias Tembo v Florence Chiwala Salati, the Attorney, Lusaka City Council Appeal No. 200/2016*
2. *Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited SCZ Judgment No.20 of 2011*
3. *Philip Mutantika & Mulyata v Kenneth Chipungu SCZ Judgment No.13 of 2014/Appeal No. 94 of 2012*
4. *Access Bank v Group Five/ZCON Business Park Joint Venture Appeal No. 76 of 2014*
5. *Madison General Insurance Company Limited v Avrill Cornhill and Michael Kakoma Appeal No. 19 of 2017*
6. *Barclays Bank Zambia Plc v Njovu and Others (2015) 2 ZLR 260*
7. *Shoprite Holdings Limited and Another v Lewis Mosho and Another (2014) 3ZLR 25*
8. *Cropper v Smith*
9. *Mauthoor v THF Delap and Associates Limited [1995] EWCA Civ 5*
10. *Kette v Hansel Properties Ltd [1987] AC 189*
11. *Lenard Kanyanda v Ital Terrazzo Limited (in receivership) appeal No. 125/2016*

**Legislation referred to:**

1. *Rule 58 (2) of the Supreme Court Rules Chapter 25 of the Laws of Zambia*
2. *section 14 (1) of the Lands Acquisition Act, 1970*
3. *Rule 58 of the Supreme Court Rules*

[1] On 8th, 14th, 29th September, 2020, the fifth, fourth and sixth respondent filed notices to raise preliminary objections to the hearing of this appeal on the following grounds:

1.1 The grounds of appeal in their current form are narrative and argumentative and offend the provisions of rule 58 (2) of the Supreme Court Rules Chapter 25 of the Laws of Zambia;

1.2 The record of appeal in its current form is incompetently before this honorable Court as the same is incomplete as it does not contain the record/transcript of the proceedings of the appeal hearing that took place on the 21st day of November, 2018 and therefore offends rule 58 (4) (j);

1.3 No leave was obtained from and granted by the Court of Appeal extending to what the subsidiary grounds of appeal filed herein envision and therefore the subject grounds of appeal offend section 13(3)(a) of the Court of Appeal Act No. 7 of 2016 and as such are incompetently before this Honourable Court.

[2] When this matter came up for hearing on 5th October, 2020, counsel for the appellant informed the Court that while he

conceded that the intended preliminary objections that were being raised by the fourth, fifth and sixth respondents were valid, the defects complained of were nevertheless curable and as such applied for leave to withdraw the appeal and to amend the offending defects so that the appeal could be heard on the merits as it was raising matters of public importance involving the effect of section 14 (1) of the Lands Acquisition Act, 1970.

[3.1] Counsel for the appellant proposed to delete the narrative in what is termed the main ground of appeal to exclude the words "Granted the underlying justification for compulsory land acquisition in a free market and democratic environment that Zambia is, namely, good faith, transparency and public interest" so that the one and only ground of appeal should read:

***"It was a misdirection for the lower court to hold that a compulsory acquisition of privately owned land premised on misrepresentation and fraud cannot be assailed on account of the finality envisioned in section 14 (1) of the Lands Acquisition Act, 1970."***

[3.2] The second proposal made by counsel for the appellant is to abandon the two subsidiary grounds of appeal on the basis that the Court of Appeal had not granted leave to appeal.

[3.3] The third proposal made by counsel for the appellant is to include the missing proceedings so as to have a complete record.

[4] The first and second appellant did not file any notice to raise a preliminary objection and left it to the Court to decide on the application that was being made. They however informed the Court that they had filed their arguments in relation to the appeal itself.

[5] The common position taken by the fourth fifth and sixth respondents was that it was too late in the day for the application to be raised and that the appeal should be dismissed. State Counsel Simeza pointed that in addition to the objection which had been conceded to by the appellant, numerous pages in the record of appeal were illegible and that this did not comply with rule 58 of the Supreme Court Rules.

[6] State Counsel Simeza submitted that two issues had to be considered. The first is the competence of the record itself. If a record is not competent, then the grounds of appeal should not be considered as there is no substratum for doing so. The second issue is the competence of the grounds of appeal. The respondents referred us to a number of authorities in which we dismissed appeals on the ground that the records of appeal did not comply with rule 58 and emphasized the need for this Court to be consistent and predictable in its decisions. Dismissing the appeal would mean that this Court was being consistent and predictable in its decisions.

[7] State Counsel Sakwiba Sikota concurred with State Counsel Simeza's submission. In addition, he submitted that there was need for consistence in the judgments of this court. He then referred us to the case of *Elias Tembo v Florence Chiwala Salati, the Attorney, Lusaka City Council*[1] in which we had dismissed the entire appeal because of defects in the record of appeal and urged us to do the same in this case.

[8] Counsel for the appellant in his short reply reiterated the need for allowing the application to withdraw and amend the record of appeal so that all defects could be cured.

[9] Counsel's response to the case of *Elias Tembo*[1] was that the real issue in that case related to the filing of handwritten notes and that this court dismissed the appeal on the ground that the irregularities went to the root of the appeal. In this case, the missing proceedings did not go to the core of the determination of the appeal.

[10] We have considered the arguments for and against advanced by the parties. The starting point as we see it is whether or not an appellant who has realized his mistake in relation to the preparation of the record can apply to withdraw and amend it and if so in what circumstances.

[11] Rule 68 of the Supreme Court Rules which generally deals with amendment and default stipulates as follows:

> **"68. (1)** ***The Court or a judge thereof may at any time allow amendment of any notice of appeal, or respondent's notice, or memorandum of appeal, or other part of the record of appeal on such***

***terms as the Court or such judge thinks fit, and may likewise make any such amendment of its own motion."***

[12] It can be seen from this rule that it is quite wide both in terms of time and what can be amended. It even gives power to this Court to make any amendment on its own motion.

[13] Rule 59 (1) allows a respondent who is of the opinion that the record filed by the appellant is defective, without prejudice to his rights if any under rule 68, to file a supplementary record of appeal.

[14] Rule 58 stipulates in great detail how a record of appeal should be prepared, what is contained in the record of appeal and it also states in rule 58 (2) that a ***"memorandum of appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively".*** Rule 58 (4)(j) on the other hand states that a record of appeal should contain ***"such other documents, if***

***any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant to the appeal;"***

[15] We have made reference to these rules in some detail to illustrate the point that these rules are not all mandatory and inflexible rules and that their application should in certain instances be with reference to other rules. For instance, a party can under rule 58 apply to have an appeal dismissed for failure to prepare a record of appeal in accordance with rule 58. However, an appellant can apply to cure the defect under rule 68 and this can be done at any time.

[16] A respondent can under rule 59 file a supplementary record of appeal which implies that a seemingly defective record of appeal, can without prejudice to the respondent's rights under rule 68, be relied on together with a supplementary record of appeal. It can also be seen from rule 58 (4) (j) that if certain parts of the record are missing, it is not automatically fatal for the appeal, because under this rule one only needs those documents which may be necessary for the proper

determination of the appeal and which may be directly relevant to the appeal. The rules therefore provide some latitude as to what to include in a record of appeal and they also provide for supplementary records to be filed. The tendency by litigants is not to take any risk by including all and sometimes irrelevant documents in records of appeal. This practice may be safer but only serves to increase costs unnecessarily, especially where a narrow point of law is concerned.

[17] Coming to this application to withdraw and amend the record of appeal we really see no difficulty in the appellant applying to do so as he has conceded that he needs to make amendments so as to fully comply with the rules.

[18] The argument has been made by the respondents that in *Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited*[2], *Philip Mutantika & Mulyata v Kenneth Chipungu*[3] *and Access Bank v Group Five/ZCON Business Park Joint Venture*[4] we adopted a strict application of the rules and dismissed the appeals for non-compliance with the rules.

[19] A distinction has to be made with those cases cited above. In the present case, the appellant has not crossed the Rubicon by proceeding to argue the appeal in the face of the hurdles presented by the preliminary objection, but has instead opted to withdraw the appeal so as to cure the defects. The cases of *Madison General Insurance Company Limited v Avrill Cornhill and Michael Kakoma*[5], *Barclays Bank Zambia Plc v Njovu and Others*[6] *and Shoprite Holdings Limited and Another v Lewis Mosho and Another*[7] all show that not every breach of a procedural rule should attract the ultimate sanction of dismissal of the appeal.

[20] The appellant has also referred us to some useful authorities such as *Cropper v Smith*[8] and the case of *Mauthoor v THF Delap and Associates Limited*[9] from which one can discern that courts do not exist for the sake of discipline but for the sake of deciding matters in controversy and the case of *Kette v Hansel Properties Ltd*[10] which emphasizes that whether an amendment should be granted is a matter for the discretion of the trial judge.

[21] We agree with the general argument by the respondents that this Court has to be consistent and predictable. We must however point out that the case of *Elias Tembo* which State Counsel Sakwiba Sikota referred us to hinged on the interpretation of *rule 48 of the Supreme Court Rules* and the issue was whether or not the application had been made within time. Similarly in *Lenard Kanyanda v Ital Terrazzo Limited*[11] which was decided on the same day as the case of *Elias Tembo*, we dismissed a motion for being filed out of time because this was in breach of *rule 48 (4) of the Supreme Court Rules*. These two cases should therefore be distinguished from the current appeal.

[22] A perusal of our decisions on rule 68 cited above shows that we have been consistent and predictable in its application. It should also be borne in mind that not all cases are similar. We invariably have to make decisions based on the particular facts of each case. In this case, the respondents have not shown that they would suffer any prejudice if the application to withdraw and amend is granted. An amendment would in our view bring to the fore the real dispute in issue. We

therefore allow the application as prayed and order the appellant to refile his record of appeal as amended within thirty days of the date of this ruling failing which the appeal shall stand dismissed. The parties shall bear their respective costs.

**A.M.WOOD**
**SUPREME COURT JUDGE**

**M.MALILA**
**SUPREME COURT JUDGE**

**J.K.KABUKA**
**SUPREME COURT JUDGE**