IN THE SUPREME COURT OF ZAMBIA **SCZ/8/52/2014**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N :

ACCESS BANK (ZAMBIA) LIMITED **APPELLANT**

AND

GROUP FIVE /ZCON BUSINESS PARK JOINT VENTURE **RESPONDENT**
(Suing as a firm)

Coram: **Mambilima, CJ, Hamaundu and Malila, JJS**
on 13th January, 2016 and 26th February, 2016

For the Appellant: Mr. E. S. Silwamba, SC and Mr. J. Jalasi of Messrs Eric Silwamba, Jalasi and Linyama

For the Respondent: Mr. N. K. Mubonda and Mr. C. K. Bwalya of Messrs D. H. Kemp & Company

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J U D G M E N T

Malila, JS delivered the judgment of the court.

Case referred to:

1. *Shoprite Holding Limited, Shoprite Checkers (PTY) Limited v. Lewis Chisanga Mosho - SCZ Judgment No. 40 2014*
2. *Zambia Revenue Authority v. Jayesh Shah [2001] ZR 63*
3. *Leopold Walford (Zambia) Limited v. Unifreight [1985] ZR 203*
4. *Zambia Revenue Authority v. T. G. Transport [2001] ZR 13*
5. *Costellow v. Somerset County Council [1993] ALL ER 952*
6. *July Danobo (T/A Juldan Motors) v. Chimsoro Farms Limited [2009] ZR 148*

7. *Finsbury Investments Limited and Another v. Anthony Ventrigria - Appeal No. 11 of 2009*
8. *Barclays Bank v. Jeremiah Njovu - Appeal No. 107 of 2012*
9. *Banda v. The People [1986] ZR 105*
10. *R. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex-Parte Pinochet Ugarte [No. 2] [1999] 1All ER 577 (HL)*
11. *Chibote Limited and Others v. Meridien Biao Bank (Zambia) Limited (In liquidation) [2003] ZR 76*
12. *Access Bank (Zambia) Limited v Group Five/Zcon Business Park Joint Venture - SCZ/8/52/2014*
13. *Alan Mulemwa Kandala v. Zambia National Commercial Bank and Others - Appeal No. 19 of 2014 (unreported)*
14. *Standard Chartered Bank Zambia Plc v. Wisdom Chanda and Another - SCZ Judgment No. 18 of 2014 (unreported)*
15. *Nkhuwa v. Tyre Services [1977] ZR 43*
16. *Bonar Travel Limited v. Susa [1993/1994] ZR 98*
17. *Moobola v. Harry Muweza [1990/1992] ZR 38*
18. *Stanley Mwambazi v. Morester Farms Limited [1977] ZR 108*
19. *Water Wells Limited v. Jackson [1984] ZR 98*
20. *Ram Auerbach v. Alex Kafwata - Appeal No. 65 of 2000*
21. *Jamas Milling Company Limited v. Imex International Limited [2002] ZR 79*
22. *NFC Mining Plc. V. Techpro (Zambia) Limited [2009] ZR 236*
23. *Zambia Revenue Authority v. Charles Walumweya Muhau Masiye - Appeal No. 56 of 2011*
24. *Ravindranath Morargi Patel v. Rameshbhai Jagabhai Patel - SCZ Appeal No. 37 of 2012.*
25. *Peter David Lloyd v. J. R. Textiles Limited - Appeal No. 137/2011 SCZ8/201/2011*
26. *Socotec International Inspection (Zambia) Limited v. Finance Bank - Appeal No. 149 of 2011*
27. *Stanley Mwambazi v. Morester Farms Limited [1977] ZR 108*
28. *Attorney General v. Kang'ombe [1973] ZR 114*
29. *Nahar Investments Limited v. Gridlays Bank International Limited*

Legislations referred to:

1. *Supreme Court Rules, chapter 25 of the laws of Zambia*
2. *Order 59/1/151 of the Rules of the Supreme Court (White Book 1999 Edition)*

3. *Sections 23, 25 and 25(1)(b) of the Supreme Court Act*
4. *Section 20(4) of the Interpretation and General Provisions Act, chapter 2 of the laws of Zambia*
5. *Article 118(2)(e) of the Constitution of Zambia (Amendment) At No. 2 of 2016*

By notice of motion taken out under Rules 48 and 75 of the Supreme Court Rules, chapter 25 of the laws of Zambia, and Order 59/1/151 of the Rules of the Supreme Court (White Book 1999 Edition), and also under the inherent jurisdiction of the Supreme Court, the applicant which was the appellant in an appeal dismissed by this court, brought the present application urging this court to set aside its ruling made on 28th November, 2014 by which the appeal was dismissed. The application was supported by an affidavit sworn by Oladele Dopemu, the Managing Director of the appellant bank.

The ruling of the 28th November, 2014 which occasioned considerable grievance to the applicant, was sequel to a preliminary objection to the appellant's record taken out by the learned counsel for the respondent. Having given due notice pursuant to Rule 19(1) of the Supreme Court Rules, chapter 25 of the laws of Zambia, the respondent's learned counsel raised issue with regard to various

aspects of the record of appeal prepared and filed on behalf of the appellant. In particular, the respondent's counsel pointed out that some specified pages were illegible contrary to the requirements under Rule 10(1) of the Supreme Court Rules. Furthermore, some portions of the evidence tendered in the court below had been omitted from the record before the court, and there were pagination mistakes evident on the face of the record. The respondent's learned counsel submitted that as a result of the record being defective, the respondent could not file the heads of argument as there was, in effect, no record.

The learned counsel for the appellant readily acknowledged the defects detected but contended that those defects were curable by submission of a supplementary record of appeal which the respondent's advocates could have done rather than object to the record in the manner they did. He offered to take corrective action.

Upon assessment of the preliminary objection and the arguments advanced to us in support of the respective parties' position, we came to the conclusion that the record was defective in material respects and that the defects were so fundamental that they completely negated the rules on preparation of records of appeal. We accordingly dismissed the appeal. It is that dismissal of the appeal that provoked the current motion.

In the supporting affidavit, it was averred that the applicant's appeal was not heard and determined on the merits, but rather dismissed on a procedural point regarding omissions and other defects affecting the record which were, in any case, curable.

The respondent opposed the motion through an affidavit in opposition sworn by the respondent's Head of Finance in Group Five (Zambia) Limited, Michael Patrick Kelly, in which the background facts were recapitulated.

In supporting and opposing the motion, detailed heads of argument and lists of authorities were filed by the parties' respective advocates. Reliance was subsequently placed on these heads of argument.

The applicant advanced four grounds of argument in support of the motion. The first of these was that the appeal before the court was not determined on its merits and in finality and that there is a serious question to be determined affecting the respective rights of the parties.

The learned counsel for the applicant proceeded from the stand point that the right of appeal is donated by statute and cannot be fettered or whittled down by subsidiary legislation. Reference was made to section 23 of the Supreme Court Act, chapter 25 of the laws of Zambia, which provides for the right of appeal, as well as to section 24 of the same Act which contains restrictions subject to which that right is exercisable. The learned counsel then adverted to section 25(1)(b) of the Supreme Court Act on the powers of the Supreme Court on hearing an appeal.

It was the argument of the learned counsel for the applicant that a combined reading of section 23 and section 25 of the Supreme Court Act reveals that the paramount intent of the Act is the furtherance of justice between the parties. In his view, the Supreme Court as the final court of appeal, ought to take the interests of justice as cardinal in its treatment of the parties at the hearing. In the present case, it was clear to the court that some pages of the record were illegible and the appellant readily conceded this fact and sought the leave of the court to make amends, and yet the court declined this request on the basis of the rules. In so doing, according to the learned counsel, the court placed the rules on a higher pedestal than the substantive provision of the Act, being sections 23 and 25.

The learned counsel submitted, with indomitable faith, that the subsidiary legislation in the form of rules cannot overrule the provisions of the principal statute. We were, in this connection, referred to section 20(4) of the Interpretation and General Provisions Act, chapter 2 of the laws of Zambia, which is to the effect that provision of the Statutory Instrument cannot override the

provisions of the statute pursuant to which they are made. The learned counsel ended his submissions on this limb of the argument by asserting that the court ought to consider the importance of the question to be tried between the parties and the need to clarify the law. In this particular case, the chief question to be determined was the effect of the set off clauses in a loan agreement on the rights of the parties. It was essential that the court made a firm pronouncement on the effect, scope and enforceability of the same for the sake of developing jurisprudence in the area of the banking law in this jurisdiction.

As regards the second of the four limbed-arguments, the learned counsel submitted that the grounds upon which the appeal was dismissed were procedural and curable, and if cured, would not have caused prejudice to the respondent. Quoting the case of **Shoprite Holding Limited, Shoprite Checkers (PTY) Limited v. Lewis Chisanga Mosho**[1], the learned counsel submitted that if defects in a record of appeal were curable, then the court could, as was held in the **Mosho** case[1], exercise its discretion and allow the appeal to be heard on the merits. The learned counsel submitted that the

holding in the **Mosho** case[1] was consistent with the position maintained by this court that matters should be decided on their merits unless the defect affects the validity of the process as was held in the case of **Zambia Revenue Authority v. Jayesh Shah**[2].

Counsel for the applicant further posited that although the court took the position that the fact that certain lines of particular pages in the record of appeal were illegible affected the validity of the appeal process, that holding was a departure from the position taken by the court in the case of **Leopold Walford (Zambia) Limited v. Unifreight**[3] where the court stated that breach of a regulatory rule which is curable is not fatal to the court process. Rule 68(2) relied upon by the court to dismiss the appeal is permissive and not directory, thus calling for the court's use of discretion. According to the learned counsel for the applicant, the court had several options to ensure that the rights of the parties were determined by finding on the merits of the case. For example, the court could have allowed the appellant to file a supplementary record of appeal pursuant to provisions of section 25 of the Supreme Court Act. The court could also have allowed the respondent to file a record of

appeal pursuant to section 59(1) of the Supreme Court Rules, or indeed it could have ordered the amendment of the record of appeal on its own motion pursuant to Rule 68(2), subject to an order for costs.

Counsel argued that the only breach that would be un-curable and, therefore, fatal in the context of the appeal before the court is an appeal filed in contravention of section 24 of the Supreme Court Act, which sets out mandatory restrictions of hearing of an appeal in a civil matter, such as the filing of an appeal without leave as was held in **Zambia Revenue Authority v. T. G. Transport**[4]. Although the court has wide discretion to determine whether a matter should be heard on the merits, notwithstanding defects identified in the appeal documentation, that discretion ought to be exercised judiciously and with utmost equanimity when faced with an application to dismiss the appeal for irregularity.

Counsel further submitted that the objective of the court is to decide the rights of the parties and not to punish them for omissions in the conduct of their cases unless such omissions are fraudulent or, intended to overreach. The learned counsel cited the

case of **Costellow v. Somerset County Council**[5] and quoted passages from that judgment extensively. He also reproduced, copiously, the judgment of the court in the case of **July Danobo (T/A Juldan Motors) v. Chimsoro Farms Limited**[6] which he sought to distinguish from the present case in that in the **Juldan Motors** case[6] the conduct of counsel for the applicant was found by the court to be deplorable as counsel acted in a less than forthright manner by not telling the court the whole truth about his inability to file his record of proceedings. According to the learned counsel, the same was not the case in the present case. It was, therefore, counsel's position that reliance by the court on the judgment in the **Juldan Motors** case[6] was inappropriate. Counsel ended by urging us to exercise our discretion in favour of the appellant and allow the appeal to be heard on the merits.

As regards the third limb of the argument, counsel for the applicant argued, in the alternative, that the court has power to alter its decision before its order has been perfected and that there are grounds in the present case that warrant the alterations of the court's decision.

Counsel submitted that at the time of the filing of the motion, the order of the court had not been perfected in terms of Rule 75 of the Supreme Court Rules. According to the learned counsel, Order 59/1/151 of the White Book clothes the Court of Appeal of England with jurisdiction to change its decision before its order has been perfected. Rule 75 of the Supreme Court Rules, on the other hand, makes it mandatory for a party in whose favour a decision has been made to prepare a draft order for the approval of the other parties and the court. Counsel further submitted that at the hearing of the appeal, the Supreme Court proceeded on the basis that the defects in the record of appeal were fatal. If the court had examined the affected pages of the record of appeal in the context of the issues that fell to be determined, it could not have concluded that the appeal should be dismissed. According to counsel this is a proper case for the court, in its discretion, to alter its decision and have the appeal heard on the merit.

The final point taken by the learned counsel for the applicant was equally in the alternative. He urged that the court reinstates the appeal as it has inherent justification to reopen an appeal in the

circumstances where the interest of justice so demand, even where an appeal has been determined in finality on the merits. The learned counsel contended that even if the court were to take the position that notwithstanding the fact that its order of dismissal had not been perfected, the decision was still final, the court has inherent discretion to rehear the matter even if it had been finally been determined on the merits. The learned counsel cited as authority for this proposition, the judgment in **Finsbury Investments Limited and Another v. Anthonio Manuela Ventrigria**[7] where it was stated among other things as follows:

> **"Clearly, as the forgoing authorities established, this court has unfettered inherent jurisdiction and in appropriate cases, it can reopen its final decisions and rescind or vary such decisions...in our reconsidered view the power of the court to reopen its decision can only be invoked in exceptional circumstances where the interest of justice demand that to be done....This court can only invoke its unfettered inherent jurisdiction where the interests of justice demand that to be done; where the interest of justice outweigh the equally essential principles of finality and *functus officio.*"**

It was counsel's submission, therefore, that as in the present case, the matter had not been decided on the merits, it was just to reopen and rehear the matter. Counsel urged us to uphold the motion on this basis.

At the hearing of the motion, Mr. Silwamba, SC, briefly supplemented the applicant's heads of argument with oral submission. He reiterated that this court has consistently upheld the position that matters must be heard on the merits. He cited the case of **Barclays Bank v. Jeremiah Njovu**[8] for the submission that the court could allow, as it did in that case, an appellant to withdrawal the record of appeal and file a corrected one. Although in the present case there was no application to withdraw the record, the learned counsel who responded to the preliminary objection had indicated his desire to correct the record. The court could exercise its discretion and allow the appellant to withdraw the record with a view to correcting it.

The learned State Counsel also made reference to Article 118(2)(e) of the Constitution of Zambia (Amendment) Act No. of 2016 which states so far as is material that:

"In exercising judicial authority, the courts shall be guided by the following principles:

(e) justice shall be administered without undue regard to procedural technicalities."

The learned State Counsel urged us to uphold the motion.

The respondent's learned counsel, in addition to relying on the affidavit in opposition, also relied on the heads of argument filed on the 8th of June, 2015.

The first point taken by counsel for the respondent was that there was no case shown by the applicant for the setting aside or revocation of the Ruling of the full court given on the 28th November, 2014. Counsel argued that the motion calls into question the principle of finality of litigation and the need for the certainty in the decisions of this court. Counsel then went on to trace the history of the Zambian Court of Appeal, predecessor to the Supreme Court, and explained the effect of the appeals envisaged in the law prior to 1973 and pointed to the essential differences between the Court of Appeal in England and the Supreme Court in Zambia in regard to finality of their decisions. According to the learned counsel, this court has made it clear time and again that

the principle of finality to litigation is cardinal as it engenders certainty and predictability. The learned counsel referred us to the case of **Banda v. The People**[9] and quoted a passage from the judgment of Chomba, JS where he emphasized the need for certainty in the decisions of the court and the undesirability of routinely revisiting and altering court judgments.

It was also submitted that the Supreme Court does indeed possess power and discretion to rescind or vary its earlier decisions. Such power should be exercisable only in appropriate cases. The fact that a decision was wrong is not a sufficient reason to do so. The case of **R. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex-Parte Pinochet Ugarte**[10] was adverted to by the learned counsel for the respondent to fortify this argument. Counsel also quoted a passage from our judgment in the case of **Chibote Limited and Others v. Meridien Biao Bank (Zambia) Limited**[11] regarding the court's unfettered inherent jurisdiction to vary or rescind its decisions. The learned counsel also referred to the decision of a single judge of this court in **Access Bank (Zambia) Limited v Group Five/Zcon Business Park Joint Venture**[12] where the learned judge

warned of the danger posed to finality of litigation by applications to set aside or reverse the court's decision, if lightly entertained. It was counsel's submission that the principle of finality to litigation is so critical that the court must approach any request to set aside its decision with utmost circumspection.

The learned counsel for the respondent went further to argue that although the court does have inherent jurisdiction to rescind or vary its decisions in appropriate cases, there is nothing in Rule 48 or Rule 75 of the Supreme Court Rules Cap 25 that invests this court with power to rescind or vary its decisions and that it was not the intendment of those Rules to give the court such powers.

Counsel further argued that the inherent jurisdiction of the court to rescind or vary a decision can only be exercised in exceptional circumstances where a party, through no fault of his own, has been subjected to unfair procedure, and reiterated that the mere fact that the decision is later thought to be wrong is not sufficient. In the present case, the applicant, according to the counsel for the respondent, was not subjected to any unfair process through no fault of its own. The applicant's advocates readily

admitted that the record of appeal was incompetent and thus excluded that possibility of unfairness in the process. The application for leave to file a supplementary record of appeal was, according to counsel, properly refused. The learned counsel further submitted that where a court makes a decision taking into account a party's concession or admission, that party cannot later be heard to say the court did not properly exercise its discretion.

Counsel for the respondent made reference to the case of **Alan Mulemwa Kandala v. Zambia National Commercial Bank and Others**[13], where we started that under Rule 59 of the Rules of the Supreme Court it is only open to the respondent to file a supplementary record of appeal; it is not mandatory for the respondent to do so. Counsel argued that the application for leave to file the supplementary record of appeal by the appellant was therefore misconceived. To support the proposition that a defect in the court document cannot be cured by legal arguments, the learned counsel for the appellant cited the case of **Standard Chartered Bank Zambia Plc v. Wisdom Chanda and Another**[14] where we stated among other things:

> **"We have stated in a plethora of cases that, any reason, no matter how well articulated, cannot of its own, cure a defect. The party concerned must take out an appropriate application seeking to cure a defect; and that the court has no mandate to choose to ignore the defect and, of its own motion, proceed as if the defect never existed."**

It was contended that the applicant in the present motion cannot bring itself within the parameters justifying the reopening of the decision of the court dismissing the appeal.

In supplementing the written heads of argument Mr. Mubonda maintained that the breaches which were apparent from the record were so substantive that they went to the root of the whole appeal process and that the solution which the appellant offered was not available at law. Mr. Mubonda also reiterated that Rules 48 and Rule 75 do not provide a pathway for the kind of application which the applicant in this motion made. He emphasized that although inherent jurisdiction could be relied upon, the applicant must meet the threshold that was set in the case of **Chibote v. Meridien Biao Bank (Zambia) Limited and Others**[10]. We were also reminded of the warning we made to practitioners who fail to comply with procedural requirements in the case of **Nkhuwa v. Tyre Services**[15].

The learned counsel argued that the provisions of Article 118(2)(e) of the Constitution which was quoted by the learned counsel for the applicant has no room in the present motion as the amendment to the Republican Constitution, which brought that provision into effect, was made long after this action had been commenced. That provision, therefore, cannot apply retrospectively.

Mr. Bwalya, co-counsel for the respondent, also augmented the argument regarding Article 118(2)(e) of the Constitution stating that the use in that Article of the word 'undue regard' imports excessive regard to technicalities. He submitted that the court should have regard to technicalities but should not be excessive in its regard to those technicalities. According to Mr. Bwalya, the Supreme Court decision being assailed through the present motion still satisfied the requirements of Article 118(2)(e).

The learned counsel also submitted that the practice and procedure of the Court of Appeal in the United Kingdom cannot be taken literally; they must be adapted to local circumstances. The

interests of justice do not, according to Mr. Bwalya, require the reopening of an appeal, and the fact that there may be a colossal sum of money involved in the current dispute is not sufficient to justify the alterations of the decision of this court.

Mr. Jalasi, co-counsel for the applicant, briefly responded that Article 118(2)(e) applies to the present case. He referred us to our decision in the case of **Bonar Travel Limited v. Susa**[16] and that in **Moobola v. Harry Muweza**[17] where it was held that the rule against retrospectivity does not apply to matters dealing with procedure.

We have carefully considered the rival arguments of the learned counsel for the parties in this case. We have also considered the affidavit evidence as well as our own Ruling of the 28th November, 2014. The question requiring determination is whether there is a compelling case made out in the present application for us to reopen a final decision of this court with a view to altering or varying it. The short point made by the learned counsel for the applicant is that, such a compelling case has been established on the facts as presented, and that it is in the interest

of justice for the court to accede to the application under consideration.

The respondent's learned counsel on the other hand deny most emphatically that there is any justification whatsoever in reopening the final decision of this court in order to accommodate the applicant's grievances.

The first issue perhaps that we need to consider is whether the motion taken out under Rules 48 and 75 of the Supreme Court Rules chapter 25 of the laws of Zambia, as well as Order 59/1/151 of the Rules of the Supreme Court (White Book 1999 Edition) and the inherent jurisdiction of the Supreme Court, is competent.

It was strenuously argued on behalf of the respondent that Rule 48 and 75 of the Rules of the Supreme Court do not provide any pathway for seeking the kind of relief that the applicant in the present motion seeks and further that the finality of the decisions of this court should not be equated with that of the Court of Appeal in England.

Given that the respondent's learned counsel has readily agreed that the inherent jurisdiction of this court could be invoked to consider the applicant's complaint in this motion, it is clear to us that the argument whether or not Rules 48 and 75 of the Supreme Court rules could properly be invoked to obtain the relief the applicant is seeking has been rendered moot. By taking as we do, an inherently formal view of the real issues in contest in the present motion, vital elements of jurisprudential significance in regard to the invocation of Rules 48 and 75 of the Supreme Court Rules, inevitably now fall into second place.

The learned counsel for the applicant has argued under the first ground of arguments that it is desirable for cases to be determined on the merits and that in the present case, there were serious questions to be determined touching on the rights of the parties.

We have in many cases consistently held the view that it is desirable for matters to be determined on their merits and in finality rather than on technicalities and piece meal. The cases of **Stanley Mwambazi v. Morester Farms Limited**[18], and **Water Wells Limited**

v. Jackson[19] are authority for this position. We reaffirm this position. Matters should, as much as possible, be determined on their merits rather than be disposed of on technical or procedural points. This, in our opinion, is what the ends of justice demand. Yet, justice also requires that this court, indeed all courts, must never provide succor to litigants and their counsel who exhibit scant respect for rules of procedure. Rules of procedure and timeliness serve to make the process of adjudication fair, just, certain and even-handed. Under the guise of doing justice through hearing matters on their merit, courts cannot aid in the bending or circumventing of these rules and shifting goal posts, for while laxity in application of the rules may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.

A fairly well established and consistent *corpus juris* on the effects of failure to comply with rules of court exists in this jurisdiction. In the case of **Ram Auerbach v. Alex Kafwata**[20], we pointed out that:

> **"litigants default at their own peril since any rights available as of course to a non-defaulter are usually jeopardized."**

Similar sentiments were strongly carried in the case of **Jamas Milling Company Limited v. Imex International Limited**[21] where we stressed that:

> **"While we agree that rules of procedure are meant to facilitate proper administration of justice, we do not accept that in all cases rules cannot be made mandatory, and that their breach cannot be visited by unpleasant sanctions against a party who breaches them ..... it is not in the interest of justice that parties by their shortcomings should delay the quick disposal of cases and cause prejudice and inconvenience to other parties."**

In the case of **July Danobo (T/A Juldan Motors) v. Chimsoro Farms Limited**[6], which was adverted to by the learned counsel for the applicant, we stated the following:

> **"As aforestated, failure to compile the record of appeal is the prescribed manner is visited by sanctions under Rule 68(2) of the Rules of the Supreme Court. The sanction is that the appeal may be dismissed. I this case, there is no doubt and as admitted by the learned counsel for the appellant that the record of appeal is incomplete as the record of proceedings of the court below is missing. It follows that the record of appeal has not been prepared in the manner prescribed by the rules of this court. We therefore invoke the provisions of Rule 68(2), and dismiss this appeal."**

In **NFC Mining Plc. V. Techpro Zambia Limited**[22] we warned that failure to comply with court rules by litigants could be fatal to their

case. We dismissed the appeal in that case on account of the appellant's failure to comply with the rules. We stated among other things that:

> **"Rules of the court are intended to assist in the proper and orderly administration of justice and as such must be strictly followed."**

Similarly, we dismissed the appeal under Rule 68(2) of the Rules of the Supreme Court in **Zambia Revenue Authority v. Charles Walumweya Muhau Masiye**[23] as the irregularities went to the root of the appeal.

The learned counsel for the applicant referred us to the decision in **Leopold Walford (Zambia) Limited v. Unifreight**[3] where we stated that breach of a regulatory rule which is curable is not fatal to the court process. We were also referred to the case of **Shoprite Holdings Limited, Shoprite Checkers v. Lewis Chisanga Mosho**[1].

Mr. Silwamba submitted that Rule 68(2) as formulated is not mandatory, so that not all breaches of procedural rule should suffer the same consequence. We see the force in this submission. That is why we stated in **Ravindranath Morargi Patel v. Rameshbhai Jagabhai Patel**[24] that:

"Rules of procedure must be followed. However, the effect of breach of the rules will not always be fatal, if the rule in question is merely directory or regulatory."

In the case of **Peter David Lloyd v. J. R. Textiles Limited**[25], where an appellant omitted from the record of appeal, an affidavit and transcript of proceedings, we held that on the facts of that case, the defect was curable and we allowed the appellant to amend the appeal accordingly. More recently in **Socotec International Inspection (Zambia) Limited v. Finance Bank**[26], we allowed the appellant whose record had omitted certain documents to amend the record. We stated in that case that:

"whether the appeal will be dismissed or not will depend on the peculiar circumstance of each case."

Although at first blush our decisions on when or when not to dismiss an appeal for failure to comply with rules of court appear to be contradictory, they are in truth not. In our estimation, the wording of Rule 68(2) is not a panacea for allowing all procedural shortfalls. It is plain that whether or not an appeal is to be dismissed under that rule is to be taken on a case by case basis. As counsel for the applicant has rightly submitted, this invariably

implicates the exercise of judicial discretion. Since facts of two cases are never always the same, a court cannot be bound by a previous decision to exercise discretion in a regimented way because that would be, as it were, putting an end to discretion.

The learned counsel for the applicant raised an important issue, namely, that rules made under a statute cannot, in the order of things, over-ride the provisions of the principal Act. We agree that this is indeed the correct position at law. Subsidiary legislation has to be in conformity with the enabling legislation. It cannot purport to prescribe or impose obligations on any party different or more onerous than those contemplated in the Act.

If we understood the submission of the learned State Counsel well on this point, the overall objective of sections 23, 24 and 25 of the Supreme Court Act, read together, is to oblige the court to do justice to the parties before it, yet rules of procedure made under the Act such as Rule 68(2) may have the opposite effect if interpreted the way we did in the Ruling now being assailed.

We do not agree with the learned State Counsel on this point. Our reading of Rule 68(2) of the Supreme Court does not show any conflict either in letter or spirit with the Supreme Court Act. The rule is, in our view, appropriately structured to further the objectives of the principle Act.

Regarding the second limb of the applicant's argument, we have to state that although indeed the defects detected in the record could be cured, we believe the decision we took in those particular circumstances was justified. Although the case of **Juldan Motors**[6] cited by the learned counsel for the applicant, is distinguishable on the facts, the principle of law therein stated applies with equal force to the motion before us. Having regard to discretion which always animates the making of the decision whether to dismiss or not to dismiss process for failure to comply with court rules, we do not see any contradiction between the decisions in **Leopold Walford (Zambia) Limited v. unifreight**[3], **Shoprite Holdings Limited, Shoprite Checkers v. Lewis Chisanga Mosho**[1] and the decision we made, now subject of this motion.

In our considered view, it is in the even-handed and dispassionate application of the rules that courts can give assurance that there is a clear method in which things should be done so that outcomes can be anticipated with a measure of confidence, certainty and clarity. This is regardless of the significance of the issues involved or questions to be tried. As we stated in **Saviour Chibiya v. Crystal Gardens Lodge and Restaurant Limited**[27]:

> **"We would be shirking in our responsibility as the last court of the land if we fail to stop parties who appear before us from using their own lapses and inefficiencies to contradict the spirit of expedition in the fair and just conclusion of appeals which is a core value of our justice system."**

The learned counsel for the applicant also argued that the court is under Rule 75 of the Supreme Court Rules entitled to alter or vary its decision before it is perfected and that the judgment of the court takes effect after perfection of the order. The respondent's counsel equally made long-winded arguments against this position.

We quite frankly do not think that the argument under this ground takes the applicant's case any further. All we can say is that we feel persuaded by the submissions of the learned counsel for the respondent on this issue that with or without an order of perfection envisaged in Rule 75, a judgment or decision of any court, once duly given, is effective and binds the parties. In any case, absence of an order would not exempt a judgment or decision from satisfying the strict requirements for reopening it as we set them out in the **Finsbury Investments Limited and Another v. Anthonio Manuela Ventrigria**[7] which we shall advert to anon.

The final point relates to the exercise of the inherent jurisdiction to reopen a case after a decision is passed.

It is common cause that this court does have the inherent power to, in very rare circumstances, reopen its final decision and rescind or vary such decision. This was our holding in the case of **Finsbury Investment Limited and Another v. Antonio and Manuela Ventrigria**[7] which both parties referred to in their submissions. The learned counsel for the respondent stressed the need for finality of

decision so as to enhance certainty, predictability and acceptability of these judgments.

As we emphasised in the **Finsbury Investments** case[7], reopening of the decision made by the full court will rarely ever be permitted. We, of course, realize that court decisions, by their very nature hardly ever give universal satisfaction to both parties to litigation. It is not infrequently the case that one party or the other, and sometimes both parties, would deprecate a judgment or decision when it is given. This does not a *priori* entitle the dissatisfied party to apply to reopen the matter. In our view, there is public interest in litigation being brought to a binding end. Apart from the narrow instances when the court will allow reopening of a matter, there is great good sense in bringing closure to court matters even if neither party is entirely satisfied.

We have in numerous cases such as **Attorney General v. Kang'ombe**[28] and **Nahar Investments Limited v. Gridlays Bank International Limited**[29] stressed that there ought to be finality to litigation. We agree with the submissions of counsel for the respondent on this point.

In conclusion, we are mindful that the issue regarding Article 118(2)(e) of the Constitution of Zambia was raised in passing by Mr. Silwamba, SC, and was not part of his written arguments before us. We do not intend to engage in anything resembling interpretation of the Constitution in this judgment. All we can say is that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts.

For the reasons we have given, this motion is bound to fail. We dismiss it with costs.

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I. C. Mambilima
CHIEF JUSTICE

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E. M. Hamaundu
SUPREME COURT JUDGE

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M. Malila, SC
SUPREME COURT JUDGE