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THE SUPREME COURT OF ZAMBIA **APPEAL NO. 214/2013**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

BANK OF ZAMBIA (AS LIQUIDATOR OF CREDIT AFRICA BANK LIMITED IN LIQUIDATION) **APPELLANT**

AND

AL SHAMS BUILDING MATERIALS COMPANY LIMITED **RESPONDENT**

CORAM: MAMBILIMA, CJ, KAOMA AND MUTUNA, JJS
On 10th May, 2016 and 19th July, 2016.

For the Appellant: **Mr. N. Nchito, SC, of Messrs. Nchito and Nchito;**

For the Respondent: **Ms. A. D Theotis and Ms. J. R Mutemi, of Theotis Mataka and Sampa Legal Practitioners.**

RULING

MAMBILIMA, CJ, delivered the Ruling of the Court.

CASES REFERRED TO-

1. **GRAFTON ISAACS V. EMERY ROBERTSON, PRIVY COUNCIL APPEAL NO. 2 of 1983;**
2. **HADKINSON V. HADKINSON (1952) 2 ALL ER 567;**
3. **CHUCK V. CREMER (1846) 1 COOP TEMP COTT 338;**
4. **FIRST MERCHANT BANK LIMITED (IN LIQUIDATION) AND THE ATTORNEY-GENERAL V. AL SHAMS MATERIALS COMPANY LIMITED AND JAYESH SHAH, SCZ/8/258/2009;**
5. **STANDARD CHARTERED BANK V. WISDOM CHANDA AND CHRISTOPHER CHANDA, SCZ JUDGMENT NO. 18 OF 2014;**
6. **THE MATTER OF W (A CHILD) V. H (CHILDREN), NEUTRAL CITATION NUMBER: (2013) EWCA CIV 1177;**
7. **PHILIP MUTANTIKA AND MULYATA V. KENNETH CHIPUNGU, SCZ JUDGMENT NO. 13 OF 2014;**

8. **JULY DANOBO (T/A JULDAN MOTORS) V. CHIMSORO FARMS LIMITED (2009) ZR 148;AND**
9. **ACCESS BANK ZAMBIA LIMITED V. GROUP FIVE/ZCON BUSINESS PARK JOINT VENTURE (SUING AS A FIRM), SCZ/8/52/2014.**

LEGISLATION REFERED TO-

(i) **THE BANKING AND FINANCIAL SERVICES ACT, CHAPTER 387 OF THE LAWS OF ZAMBIA;**
(ii) **THE BANK OF ZAMBIA ACT, CHAPTER 360 OF THE LAWS OF ZAMBIA;**
(iii) **THE RULES OF THE SUPREME COURT, 1999 EDITION (WHITE BOOK); AND**
(iv) **THE SUPREME COURT RULES, CHAPTER 25 OF THE LAWS OF ZAMBIA.**

This is a Ruling on a Notice of Intention to Raise Preliminary Issues which was filed by the Respondent on 27th April, 2016. To put the application to raise preliminary issues into its proper context, we will reproduce the brief facts of what led to the appeal in which the preliminary issues have been raised.

The main appeal is from a Ruling of the High Court, delivered on 18th June, 2010. The Ruling followed an application by the Respondent, as judgment creditor, against the Appellant, in its capacity as the liquidator of the Credit Africa Bank Limited (In liquidation), to settle fiduciary functions. The background to this case is that on 3rd December, 1998, the Respondent sued Credit Africa Bank Limited (In liquidation)(hereinafter referred to as "the

Bank") by way of a Writ of Summons and Statement of Claim. The Respondent pleaded that on 1st October, 1997, it entered into an agreement with the Bank whereby it lent a sum of US$350,000.00 to the Bank. The loan was secured by a floating charge created over 23 motor vehicles which were listed on a schedule attached to the Writ of Summons. The parties agreed that the loan would attract interest in the sum of US$73, 500.00. According to the Respondent, the Bank failed to repay the loan as agreed.

In its defence, the Bank stated that there was no record evidencing receipt of the loan amount by the Bank. In the alternative, it contended that the agreement referred to in the statement of claim was repudiated by the Receiver of the Bank in accordance with the **BANKING AND FINANCIAL SERVICES ACT**[(i)].

On 16th September, 1999 after evaluating the evidence before it, the lower Court delivered its judgment. It found as a fact that on 6th November, 1997, the parties executed a written agreement for a loan of US$350,000.00 with interest at 21% per year. It further found that the loan was secured by a charge on 23 motor vehicles belonging to the Bank. Accordingly, it held that the Respondent had

proved its case. The Bank appealed to this Court. On 21st September, 2001, this Court upheld the judgment of the High Court.

On 8th June, 2009, the Respondent filed an application for an order against the Appellant, as liquidator of the Bank, to settle fiduciary functions. On 18th June, 2010, the lower Court ordered the Appellant to settle its fiduciary function by honouring the lower Court's final judgment of 16th September, 1999. On 1st December, 2010, the lower Court delivered a Ruling dismissing an application for leave to appeal to this Court against the Court's Ruling of 18th June, 2010. The Court further ordered Counsel for the Appellant to bear the costs for the dismissed application. On 2nd May, 2013, the Appellant filed a notice of appeal to the Supreme Court against the Ruling of the lower Court dated 18th June, 2010. That is the appeal now before this Court. The Appellants have appealed to this Court on the following grounds of appeal:

1. **that the Court below erred in law and fact when it handed down its Ruling on 18th June, 2010 without affording the Appellant an opportunity to be heard, thereby infringing on the Appellant's right to natural justice;**

2. **that the Court below erred in law and fact when it followed the decision in Supreme Court Judgment No. 17 of 2006 Bank of Zambia (First Merchant Bank Zambia Limited in liquidation) between the**

Attorney-General and Al shams Building Materials Company Limited and Jayesh Shah whose circumstances are different from the present case;

3. **that the Court below erred in law and fact when it held that the Bank of Zambia had been a party to the proceedings prior to the application that culminated in the Ruling of 18th June, 2010.**

On 27th April, 2016, the Respondent filed the Notice of Intention to Raise Preliminary Issues. The Notice seeks this Court's determination of the following issues:

1) **whether the Appellant's Notice of Appeal filed on 6th August, 2013, is a valid Notice of Appeal considering the fact that the Appellant has failed, refused and or neglected to comply with a specific conditional Court Order dated 17th October, 2002 granting leaved to appeal on condition that the Judgment sum be paid into court;**

2) **whether or not this Honourable Court can entertain the Appellant's appeal following the Appellant's failure to comply with 3 previous peremptory Orders of the High Court –**

   a. **dated 28th March, 2002 ordering the Appellant to provide-**

      i. **list of creditors of the defendant bank whether preferential or otherwise and the amounts and securities held by those creditors;**
      ii. **specific names of persons who bought the 23 motor vehicles and how much was realized from the sale;**

   b. **the order of the High Court dated 30th September, 2002 ordering the Appellant to pay the judgment sum together with interest and costs to the Respondent from monies held in the Appellant accounts at Citi Bank and Zambia National Commercial Bank;**

   c. **the Ruling of the High Court dated 1st December, 2010 ordering the Respondent's advocates to bear costs of the dismissed application for leave to appeal;**

3) **whether the Appellant's appeal filed into court on 6th August, 2013 should be dismissed by reason of the fact that the Record of Appeal filed into Court on 8th November, 2013 is defective as the same has not**

been prepared in compliance with Rule 10(5) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia and Rule 58(4) (h) and (i) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia.

In support of the Notice of Intention to Raise Preliminary Issues, the learned Counsel for the Respondent, Ms. Theotis and Ms. Mutemi, filed written heads of argument which they supplemented with oral submissions.

Counsel combined their arguments on the first and second preliminary issues. They argued that the facts on record showed that the Appellant had been a contumelious defaulter as it had failed to comply with peremptory orders of the High Court issued in relation to this matter. That it is trite law that orders of the Court must be complied with. In support of these arguments, Counsel referred us to the case of **GRAFTON ISAACS V. EMERY ROBERTSON**[1], where the Court held that-

> **"Orders made by a court of unlimited jurisdiction in the course of contentious litigation are either regular or irregular. It is misleading to seek to draw distinctions between orders that are 'void', in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders which are 'avoidable', in the sense that they may be enforced until set aside, since any order must be obeyed unless and until it is set aside and there are no orders which are void ipso facto without the need for proceedings to set them aside."**

Counsel went on to cite the words of ROMER, LJ, in the case of **HADKINSON V. HADKINSON**[2], where he said that-

> **"It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."**

Counsel further relied on the case of **CHUCK V. CREMER**[3], where Lord COTTENHAM, LC, stated that-

> **"A party, who knows of an order, whether null or void, regular or irregular, cannot be permitted to disobey it .... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or void – whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it exists, it must not be disobeyed."**

According to Counsel, the meaning of the above authorities was that court orders must be obeyed unless they have been discharged or set aside. She contended that since the Appellant failed to obey the four peremptory orders of the lower Court, their appeal to this Court should be dismissed. To reinforce these arguments, Counsel relied on, among other cases, the case of

FIRST MERCHANT BANK LIMITED (IN LIQUIDATION) AND THE

ATTORNEY-GENERAL V. AL SHAMS MATERIALS COMPANY LIMITED AND JAYESH SHAH[4], where we held that-

> **"Since it is clear from the affidavit evidence and submissions before the single Judge that, the Appellants did not fulfill the condition set in the conditional leave to appeal before entering the appeal of 13th November, 2009, we would grant the application and order that, the appeal filed on 13th November, 2009 is dismissed for failure to meet the condition to pay the judgment debt into court."**

Counsel further cited the case of **STANDARD CHARTERED BANK V. WISDOM CHANDA AND CHRISTOPHER CHANDA**[5], where we said the following:

> **"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 is our considered view that the Appellant failed to fully comply with the 'unless' order. Partial compliance with a court order also amounts to failure to comply with that order. The partial compliance with the Court order in this case could not have, of its own, made the appeal regular without formal restoration. Under Order 2 Rule 1 sub-rule 5 of the RULES OF THE SUPREME COURT (WHITE BOOK- 1999 EDITION), an irregular step remains irregular until an application is successfully made to the Court to correct it."**

Counsel went on to submit that the default by the Appellant, in obeying the four orders, was very serious because the Appellant is a public body. To augment this submission, they cited, among other authorities, the holding by Sir James MUNBY in **THE MATTER OF W (A CHILD) V. H (CHILDREN)**[6], that-

> **"Non-compliance with an order, any order, by anyone is bad enough. It is a particularly serious matter if the defaulter is a public body such as a local authority."**

Counsel accused the Appellant of having been hiding behind the immunity from execution contained in section 59 of the **BANK OF ZAMBIA ACT**[ii]. They argued that the same section imposes a statutory duty on the Appellant to settle amounts due under a judgment. Section 59 states as follows:

> **"59. Notwithstanding anything to the contrary contained in any written law, where any judgment or order has been obtained against the Bank, no execution or attachment, or process in the nature thereof, shall be issued against the Bank or against any property or asset of the Bank; but the Bank shall cause to be paid such amounts as may, by the judgment or order, be awarded against the Bank to the person entitled thereto."**

On the basis of the above authorities and submissions, Counsel stated that the appeal should be dismissed because the default by the Appellant, in complying with the four peremptory orders of the lower Court, signifies either that their appeal has no merit or that they have simply lost the desire to pursue the appeal. According to Counsel, if this Court allowed the Appellant to argue its appeal, it would be effectively endorsing and encouraging other litigants not to abide by court orders and still have their appeals heard. To reinforce their submissions, Counsel referred us to Order 25/L/3 (which we discovered should in fact have been Order

25/1/5) of the **RULES OF THE SUPREME COURT, 1999 EDITION**[iii], which states in part that-

> **"The exclusion from any further part in the proceedings of a party who deliberately disobeys a peremptory order of the Court is appropriate where there is a real risk that the default will render the fair trial of the action impossible and any judgments in favour of the defaulter unsafe ...."**

Coming to the third preliminary issue, Counsel submitted that the Record of Appeal filed by the Appellant has not been compiled in accordance with Rule 10(5) and Rule58 (4)(h) and (i) of the **SUPREME COURT RULES**[vi]**.** Rule 10(5) provides as follows:

> **"Every fifth line of every Record of Appeal shall be indicated by numbering in the unbound portion of the margin."**

Rule 58(4)(h) and (i) are to the following effect:

> **"58(4) The record of appeal shall contain the following documents in the order in which they are set out:**
>
> **(h) copies of all affidavits read and all documents put in evidence in the High Court, so far as they are material for the purposes of the appeal, and, if such documents are not in the English language, copies of certified translations thereof; affidavits, together with copies of documents exhibited thereto, shall be arranged in the order in which they were originally filed; other documentary evidence shall be arranged in strict order of date, without regard to the order in which the documents were submitted in evidence;**
>
> **(i) a list of exhibits, or schedule of evidence, as the case may be, indicating those items which are being forwarded to the Master and those which are being retained by a court below. ..."**

Counsel contended that the Appellant has not numbered every fifth line of the Record of Appeal as required by Rule 10(5). They

further submitted that the Record of Appeal is irregular because the Appellant has omitted some of the documents which were exhibited by the Respondent in its affidavit dated 9th June, 2009, in support of its application for the Appellant to settle its fiduciary functions.

Counsel expressed the view that the use of the word 'shall' in Rules 10(5) and 58(4) makes it mandatory for an Appellant to comply with the provisions of the said Rules. For this argument, Counsel referred us to our decision in the case of **PHILIP MUTANTIKA AND MULYATA V. KENNETH CHIPUNGU**[7], where we said the following:

> **"... our response is that Rules 70(1) of the SCR and 58(5) as amended by Statutory Instrument No. 26 of 2012 are mandatory. Both provisions are couched in a mandatory manner as each uses the word "shall". The two Rules are therefore not regulatory as they do not give the Court discretionary power."**

Counsel further submitted that Rule 58(5) of the **SUPREME COURT RULES**, as amended by Statutory Instrument No. 26 of 2012, requires that the Appellant should file copies of their heads of argument together with their record of appeal. According to Counsel, a review of the Appellant's heads of argument, in this case, shows that the arguments are in support of the notice of motion for leave to appeal and not the appeal. They, therefore,

submitted that, there are no heads of argument in support of the appeal.

Counsel stated that the consequence of non-compliance with a mandatory provision is that the appeal may be dismissed as provided by Rule 68(2) of the **SUPREME COURT RULES**[iv]. Rule 68(2) states that-

> **"68(2) If the record of appeal is not drawn up in the prescribed manner, the appeal, may be dismissed."**

Counsel went on to cite the case of **JULY DANOBO (T/A JULDAN MOTORS) V. CHIMSORO FARMS LIMITED**[8], where we said that-

> **"As aforesaid, failure to compile the Record of Appeal in 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."**

Counsel further referred us to the case of **ACCESS BANK ZAMBIA LIMITED V. GROUP FIVE/ZCON BUSINESS PARK JOINT VENTURE (SUING AS A FIRM)**[9],where we stated the following:

> **"... Justice also requires that this Court indeed all courts, must never provide succor to litigants and their Counsel who exhibit scant respect for the rules of procedure. Rules of procedure and timelines 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 of 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."

Counsel submitted that this was an appropriate case for this Court to exercise its discretion, under Rule 68(2) of the **SUPREME COURT RULES**[4], to dismiss the appeal with costs.

The learned Counsel for the Appellant, Mr. Nchito, SC, did not file written arguments in opposition to the Notice of Intention to Raise Preliminary Issues. He, however, made oral submissions when he appeared before us. With regard to the first and second preliminary issues, Counsel submitted that these issues were canvassed before, and decided upon by, this Court when the Appellant was obtaining leave to appeal. He argued that it was, therefore, not correct to raise the same issues before this Court as this Court granted leave to appeal fully aware of the said issues. He went on to argue that the orders that the Respondent allege have not been complied with were not made against the Appellant, as the Liquidator, but against the Bank.

With regard to the issue of the costs that the lower Court ordered the Appellant's Advocates to pay, Counsel argued that the

Respondents had neither demanded nor taxed the said costs. He, therefore, contended that there was no basis for stopping these proceedings because the Respondent had not taken steps to claim the costs awarded to them.

On the Respondent's contention that the Appellant had breached Rule 58(4) (h) and (i), State Counsel submitted that the rules of the Court allow a Respondent to file a supplementary record of appeal if the Respondent believes that something has been left out of a record of appeal. He submitted that in fact the Respondent in this case had already done this by filing the first supplementary record of appeal, on 1st August, 2014, and the second supplementary record of appeal, on 28th April, 2016. According to him, the supplementary records of appeal had cured the omissions of the exhibits from the record of appeal.

With regard to the Respondent's submission that the Appellant had not filed heads of argument, Mr. Nchito, SC, told this Court that the Appellant filed its heads of argument on 8th November, 2013. He argued that there was no rule relating to what the heads of argument should contain. State Counsel, however,

conceded that there was a problem with the Appellant's heads of argument. He, nevertheless, maintained that it could not be said that there were no heads of argument.

Coming to arguments relating to rule 10(5), Mr. Nchito, SC, submitted that a perusal of the record of appeal shows that non-compliance with numbering the paragraphs was intermittent as the beginning of the record of appeal was numbered. He argued that the breach was not fatal. He applied to be allowed to withdraw and correct both the record of appeal as well as the heads of argument pursuant to Rule 68 as read with Rule 11 of the **SUPREME COURT RULES**[iv].

State Counsel submitted that the breach by the Appellant was not fundamental to warrant dismissal of its appeal. Consequently, he prayed that we grant him leave to withdraw the record of appeal and heads of argument and re-file corrected ones.

In her brief reply, Ms. Mutemi argued that in its determination of the application for leave to appeal, this Court did not pronounce itself on the issues raised in the preliminary issues now before us. According to her, although the issues raised in the Notice to Raise

Preliminary Issues were argued during the hearing of the application for leave to appeal, the single Judge refused to rule on them on the ground that the issues related to the substance of the appeal.

Ms. Mutemi opposed the application by Mr. Nchito, SC, to withdraw and correct the record of appeal and the heads of argument because, according to her, it had been made late in the day. She contended that since the documents were filed in 2013, State Counsel had enough time to make a formal application to withdraw the said documents instead of making the application by way of a response to the preliminary issues.

We have carefully considered the Notice of Intention to Raise Preliminary Issues and the arguments by Counsel. We will address the preliminary issues in the order they were argued by Counsel for the Respondent.

Under the first and second preliminary issues, Counsel for the Respondent has basically urged this Court to dismiss the appeal on the ground that the Appellant has failed to comply with four of the orders made by the lower Court. The said orders are-

i) **an order of 28th March, 2002, directing Credit Africa Bank Limited (In Liquidation) to, among other things, produce to the Court a list of creditors of that Bank, whether preferential or otherwise and the amounts and securities held by those creditors; and specific names of persons who bought the 23 vehicles and how much was realized from the sale;**

ii) **an order of 30th September, 2002, directing Credit Africa Bank (In Liquidation) to pay the full judgment sum of US$350,000.00 together with interest and costs from monies held in its accounts at Citi Bank and Zambia National Commercial Bank Limited;**

iii) **an order of 17th October, 2002, against Credit Africa Bank Limited (In Liquidation) to pay the judgment sum into Court as a condition for the grant of leave to appeal to this Court; and**

iv) **a Ruling dated 1st December, 2010, directing the Appellant's Advocates to bear costs.**

We have carefully studied the above four orders which the Respondent allege have not been complied with by the Appellant. We have noted that the first three orders were made by the lower Court in the year 2002. A cursory perusal of the record of appeal has established that at the time that the three orders were made, the Appellant had not become a party to the proceedings in the lower Court. In fact, a look at the said orders establishes that none of them was made against the Appellant; all the three orders were made against the Bank. Further, none of the three orders compelled the Appellant to settle the judgment debt. In addition, Counsel for the Respondent conceded that there was no order made

by the lower Court to make any of the three orders apply to the Appellant retrospectively. In so far as liability for the Judgment sum is concerned, the Appellant first came into the picture in the learned trial Judge's proceedings leading up to the Ruling of 18th June, 2010. That is the Ruling which is the subject of the appeal in this matter.

For the above reasons, we are of the firm view that the Appellant is not bound by orders made by the lower Court before it became a party to the proceedings.

In any case, the Appellant has appealed to this Court because it does not agree with the Ruling by the lower Court ordering it to perform its fiduciary functions by honouring the judgment sum. It would be unjust, therefore, to refuse to hear the Appellant's appeal purely on the ground that they have not complied with orders made against the Bank.

We, therefore, hold that the alleged breach by the Appellant of the three orders, cannot be used as grounds for dismissing the Appellant's appeal to this Court.

Coming to the Ruling of 1st December, 2010, we have noticed that the Judge in the lower Court specifically stated: **"I will order that costs of this application shall be borne by Messrs. MNB and not the Bank of Zambia."** Clearly, the order was made against Messrs. MNB and not the Appellant. It is, therefore, difficult to understand why the Respondent wants this Court to refuse to hear the Appellant's appeal on the basis that they have not complied with an order to pay costs ordered to be paid by their lawyers.

For the above reasons, we hold that the first and second preliminary issues have no merit.

The Respondent's third preliminary issue has two limbs. The first limb is that the Appellant has not prepared the record of appeal in accordance with Rule 10(5) of the **SUPREME COURT RULES**, which requires that every fifth line of a record of appeal must be indicated by numbering in the unbound portion of the margin. The second limb is that the Appellant omitted to include, in the record of appeal, four of the documents which were exhibited in the Respondent's affidavit filed before the lower Court on 9th June, 2009.

With regard to the first limb, it is not in dispute that the Appellant has not complied with Rule 10 (5) of the **SUPREME COURT RULES**. A perusal of the record of appeal establishes that only certain portions of the paragraphs of the record of appeal are numbered. Rule 10(5) provides that–

> **"10(5) Every fifth line of every record of appeal shall be indicated by numbering in the unbound portion of the margin."**

The question, therefore, is whether the sanction for this irregularity is dismissal of the appeal. Counsel for the Respondent have spiritedly contended that this is an appropriate case for this Court to exercise its discretion to dismiss the appeal. On the other hand, State Counsel Nchito has submitted that the irregularity is not grave and can be cured by the Appellant withdrawing the defective copies of records of appeal and re-filing copies that would comply with Rule 10(5).

In our view, it is not every breach of a procedural rule that should attract the ultimate sanction of dismissal of an appeal. This is because there are levels of gravity in the non-compliance with rules of procedure. Subject to an order for costs, some breaches of rules of procedure can be remedied with very minimal

appeal. We, therefore, hold that the first limb of the Respondent's third preliminary issue has no merit.

Coming to the second limb of the third preliminary issue, we are also of the view that it is not a sufficient ground to warrant dismissal of the appeal. It is trite law that where a Respondent feels that the Appellant has omitted to include, in the record of appeal, certain documents which are important for the determination of the appeal, the Respondent can file a supplementary record of appeal. This is prescribed in Rule 59(1) which provides that-

> **"59. (1) If the respondent is of the opinion that the record filed by the appellant is defective he may, without prejudice to his rights, if any, under rule 68, file five copies of a supplementary record of appeal containing copies of any further documents which in his opinion are required for the proper determination of the appeal."**

Invoking this provision, the Respondent did file two supplementary records of appeal on 1st August, 2014, and 28th April, 2016, thus curing the defect that the Respondent is complaining about. It follows that the second limb of the third preliminary issue must also fail. The entire third preliminary issue cannot, therefore, be upheld. We dismiss it and order the Appellant to rectify the record of appeal by complying with Rule 10(5), subject to costs for the Respondent.

The Respondent raised another preliminary issue from the Bar; this is that the Appellant's heads of argument filed with the record of appeal relate to a Notice of Motion for leave to appeal. This preliminary issue is not contained in the Notice of Intention that was filed on 27th April 2016. This is a contravention of Rule 19(1) of **THE SUPREME COURT RULES**[iv] which requires that a notice to raise a preliminary issue must be given not less than seven days before the hearing of the appeal. The consequence of a failure to give such notice is that the Court may refuse to entertain the objection or may adjourn the hearing. Mr. NCHITO, SC, did respond to the issue viva voce and submitted that the law does not dictate the substance of what should be contained in the heads of argument. We are of the view that this preliminary issue was raised as an afterthought, more so that the said heads of argument were filed in accordance with Rule 58(5) of the **SUPREME COURT RULES,** together with the record of appeal. We find no basis upon which to order Mr. NCHITO, SC, to withdraw the heads of argument as it will be up to the Court to consider whether they are relevant to the issues raised in the appeal.

On the totality of the issues, we hold that the Respondent's Notice to Raise Preliminary Issues lacks merit. We dismiss it and as indicated above, we allow the Appellant to effect corrections to the record of appeal and re-file it. In view of the default by the Appellant to comply with Rule 10(5) of the Supreme Court Rules, costs shall be for the Respondent, to be taxed in default of agreement.

I.C. Mambilima
CHIEF JUSTICE

R.M.C. Kaoma
SUPREME COURT JUDGE

N.K. Mutuna
SUPREME COURT JUDGE