

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

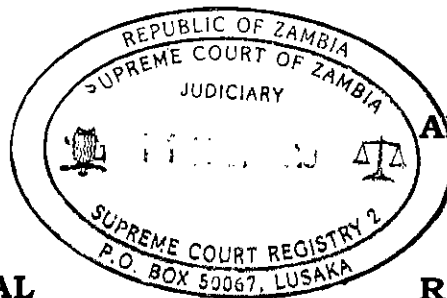
Appeal No.80/2016

BETWEEN:

KENNETH NCHIMA

AND

THE ATTORNEY GENERAL



APPELLANT

RESPONDENT

CORAM: Mambilima CJ, Kajimanga and Kabuka, JJS

On 5th March 2019 and 11th March 2019

For the Appellant: No Appearance

For the Respondent: Mr. F. Imasiku, Acting Deputy Chief State Advocate
and Mr. C. Mulonda, Senior State Advocate

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. Nkhata and 4 Others v Attorney General (1966) Z.R. 12
2. Goodwin Mungala v Kaleya Small Holdings Company Ltd - Appeal No. 29/2013
3. Marcus Kampumba Achiume v Attorney General (1983) Z.R. 1
4. Kedrick Sikazwe v Proxy Limited and Dana Holdings Ltd - Appeal No. 111/2013
5. Wilson Masauso Zulu v Avondale Housing Project Ltd (1982) Z.R. 172

6. **Attorney General and Another v Akashambatwa Mbikusita Lewanika and 4 Others (1993-1994) Z.R. 144**
7. **Nothman v Barnet Council (1978) 1 W.L.R. 220**
8. **Resident Doctors Association of Zambia and Others v Attorney General (2003) Z.R. 88**
9. **Matilda Mutale v Emmanuel Munaile (2007) Z.R. 118**
10. **Shilling Bob Zinka v Attorney General (1990-1992) Z.R. 73**
11. **R v Chancellor of the University of Cambridge (1723) 1 Str 557**
12. **General Medical Council v Spackman [1943] A.C. 627**
13. **May Vijaygiri Goswami v Dr Mohamed Anwar Essa and Commissioner of Lands (2001) Z.R. 3**
14. **Antonio Ventriglia and Manuela Ventriglia v Eastern and Southern African Trade and Development Bank (2010) Z.R. 486**

Legislation and other works referred to:

1. **Animal Health Act No. 27 of 2010, Sections 6, 22, 23 and 72**
2. **Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia, Section 48**
3. **Supreme Court Rules Chapter 25 of the Laws of Zambia, Rule 58(2)**

Introduction

1. This appeal arises from a judgment handed down by the High Court (Sharpe-Phiri, J) on 8th October 2015. By that judgment, the appellant's appeal against the decision of the Minister of Agriculture and Livestock ("the Minister") dated 8th October 2015, to award the appellant the sum of K388,124.00.00 as compensation for the destruction of his pigs by the Ministry's

Department of Veterinary Services following an outbreak of the African Swine Fever (“ASF”), was dismissed.

2. In the main, the appeal discusses whether there is a requirement under the Animal Health Act No. 27 of 2010 (“the Act”) for owners of animals to be given prior notice of the destruction of their animals by the Department of Veterinary Services, where such destruction is conducted for the purpose of preventing and controlling the spread of animal diseases.

Background

3. On 18th November 2013, the Ministry of Agriculture and Livestock (“the Ministry”) under the Department of Veterinary Services issued Gazette Notice No. 807 of 2013 notifying the public in general and the farming community in particular, that there was an outbreak of African Swine Fever (ASF) in Chilanga and Lusaka Districts of Lusaka Province. By the said notice, the Department requested members of the public to co-operate with the measures being implemented by the Ministry to control and eradicate the disease.

4. A sensitization meeting was held on 20th November 2013 to discuss the spread of ASF to Kanakantapa area and to inform the community of the need to destroy all pigs within a radius of 1km of the area declared positive for ASF. Pigs in and within the areas declared positive for ASF, including the appellant's, were destroyed. At that time, a consultative meeting was held between the Ministry, representatives from the Farmers Union, the Pig Growers Association and the Anti-Corruption Commission where compensation was agreed at K13 per kg for live weight.
5. On 19th December 2013, the appellant wrote to the Director of Veterinary Services ("the Director") alleging procedural impropriety in the manner in which the slaughter of his pigs was conducted as he was not given prior notice of the slaughter and, therefore, denied of the opportunity to appeal against the decision to slaughter his pigs as allowed under section 72(1) of the Act. The Director, in a letter dated 23rd December 2013, indicated that the destruction of pigs in an area infected with ASF was a necessary measure to contain the spread of the disease. He stated further that all the control measures implemented

during the ASF outbreak were above board and backed by the Act in its entirety and particularly by sections 22, 23 and 72(2).

6. Displeased with this response, the appellant lodged an appeal with the Minister on 26th December 2013 which was supplemented by a letter dated 2nd January 2014. In responding to the appeal, the then Minister, Mr. Robert Sichinga, adopted the views of the Director regarding the appellant's complaint. He added that farmers and the public were duly notified of the control measures being implemented during the ASF outbreak through Gazette Notice No. 807 of 2013, the media and a Ministerial Statement issued in Parliament. He further informed the appellant that a compensation mechanism had been worked out and agreed upon by the relevant stakeholders.
7. In a subsequent letter dated 30th September 2014, authored by Mr. Wylbur Simuusa who later took up the office of Minister, the appellant was urged to accept the sum of K388,124.00 as compensation for the slaughter of his pigs, calculated at the approved rate of K13 per kg.

8. Aggrieved by the decision of the Minister, the appellant appealed to the High Court on the following grounds:

- 8.1 **The Honourable Minister erred both in law and fact when he decided not to address the fact that the Appellant was not served with an order or notice thereof informing him that his pigs were marked for slaughter as his farm was an in-contact farm with a farm infested with African Swine Fever.**
- 8.2 **The Honourable Minister erred both in law and in fact when he decided not to address the issue of procedural impropriety whereby the Appellant was not afforded an opportunity to appeal against the decision to slaughter his pigs, as provided for in Section 72(1) of the Animal Health Act No. 27 of 2010.**
- 8.3 **The Honourable Minister erred both in law and fact when he decided not to declare the slaughter of the Appellant's pigs as having been dented with procedural impropriety rendering the slaughter illegal.**
- 8.4 **The Honourable Minister erred both in law and fact when he decided not to overturn the decision by the then Hon. Minister of Agriculture and Livestock Mr. Robert K. K. Sichinga, MP to the effect that Section 72 (2) of the Animal Health Act No. 27 of 2010 did apply to the Appellant's case when in fact the Appellant's pigs were not infected with the African Swine Fever and neither [were] the Appellant's pigs kept nor transported contrary to the provisions [of] the Animal Health Act No. 27 of 2010 or any other law.**

- 8.5 The Honourable Minister erred both in law and fact when he suggested that the Appellant accepts the total amount of K388,124.00 as compensation for the Appellant's slaughtered pigs due to the African Swine Fever. The amount having been reached at using the rate of K13.00 per kg which was also offered to those farmers whose animals were considered to have been legally slaughtered. This rate was below the market price and did not take into account the loss of profit, loss of production and indeed the illegality in the slaughter of the Appellant's pigs, hence making it far from being adequate compensation.**
9. The appellant filed a record of appeal in support of his notice of appeal. In response, the respondent filed an affidavit which disclosed that ASF is a highly contagious virus with no known treatment or vaccine and that the only form of containment is by slaughter and destruction of infected pigs and those animals that may not be infected but are susceptible to infection. That current tests are not able to identify animals that are incubating the ASF disease and, therefore, even areas and farms which have had animals tested negative are declared infected to enable the veterinarians to get ahead of the disease and stop it from spreading.

10. The affidavit evidence also disclosed that following the issuance of the gazette notice, the appellant attended the sensitization meeting held on 20th November 2013 which discussed the need to destroy all positively tested pigs and those pigs in contact farms and the eventual compensation for the pig owners. Subsequently, a slaughter notice was taken to the appellant's farm by the District Veterinary Officer for Chongwe, one Dr. Francis Mwanza, who handed it to the appellant's brother in the company of the farm manager and their spouses. However, on the day of the slaughter, the appellant refused to have his pigs slaughtered because he was indisposed.
11. The affidavit further disclosed that even though the appellant's animals did not test positive for ASF, they fell within an area declared positive for ASF in the radius of 1km of the positively tested animals. That due to the swift and immediate need to control the disease, it was inexpedient to allow for appeals in such instances. Further, that in any event, the appellant was offered compensation in the sum of K388,124.00, which amount

was 30% above the market price and the appellant accepted payment on 16th November 2014.

Consideration of the appeal by the High Court

12. After considering the evidence and arguments of the parties, the learned judge in the court below began her determination of the appeal by observing that once a disease control zone has been declared, the Director is empowered under the Animal Health Act to take any steps to prevent, control or eradicate the disease including disposal of any animal in the quarantine area and that a veterinary officer is equally empowered to dispose of an animal within an infected area.

13. She found in respect to ground one that the only obligation placed on a veterinary officer is to notify the owner of the animal, in writing, within fourteen days after the disposal of the animal of the steps taken and the reasons for doing so. Therefore, the appellant's contention that he ought to have been notified of the intention to dispose of his animals prior to their destruction was flawed.

14. As regards grounds two and three of the appeal, the learned trial judge found that the appellant was put on notice of the need to slaughter pigs in and around the areas affected by ASF through the gazette notice; the meeting held in the area of which he was in attendance; the Ministerial Statement made in Parliament; and through the media. He, therefore, had an opportunity to lodge an appeal to the Minister against the decision to slaughter the animals.
15. On ground four, the learned trial judge found that the Minister did not have power under the Act to review or alter a decision made by his predecessor and that the appellant had failed to provide evidence to the contrary.
16. Concerning the fifth ground of appeal, the learned trial judge found that the Minister was on firm ground when he requested the appellant to accept the compensation sum of K388,124.00 as section 70(4) of the Act prohibits the inclusion of claims for loss of profit or production or other consequential losses when determining the compensation amount.

17. In view of the foregoing, the learned judge concluded that the appeal lacked merit and she accordingly dismissed it in its entirety with costs.

The grounds of appeal to this Court

18. The appellant has now appealed to this court against the decision of the High Court advancing six grounds as follows:

- 18.1 The Court below erred in law and in fact when it did not allow grounds 1 and 2 to succeed when the two grounds actually remained unchallenged.**
- 18.2 The Court below erred both in law and in fact when it proceeded to consider the Appellant's contention of prior notice based on Section 6(3) of the Animal Health Act No. 27 of 2010 as if the Appellant's pigs were slaughtered under subsection 6(2) when in fact not.**
- 18.3 The Court below erred both in law and in fact when it held that the Appellant's contention that he ought to have been notified of the intention to dispose of his animals prior to their destruction was flawed and further that there was no obligation at law for this notice to be given.**
- 18.4 The Court below erred both in law and fact when it held that the appellant was put on notice through the gazette notice, the meeting held in the area, the statement made in Parliament and through the media and that, therefore, he had an opportunity to lodge an appeal to the Minister**

against the decision to slaughter the animals and further that the Appellant had adequate notice through the various [fora].

18.5 The Court below erred both in law and fact when it found that there was nothing on record to show that an application was made to the Honourable Minister Mr. Simuusa to review the decision of the previous Minister of Agriculture and Livestock.

18.6 The Court below erred in law and in fact when it held that the Minister of Agriculture and Livestock was on firm ground when he requested the Appellant to accept the compensation sum of K388,124.00 calculated at K13 per Kg. This rate was below the market price and did not take into account the loss of profit, loss of production and indeed the illegality in the slaughter of the Appellant's pigs, hence making it far from being adequate compensation.

The arguments presented by the parties

19. In support of ground one, the appellant submitted that the question before the court below was whether the Minister had, in his response to the appellant's appeal letter, addressed the issue of the notice of the slaughter of the appellant's pigs being served on the appellant prior to the slaughter. Further, that whether the Minister addressed the issue of procedural

impropriety, raised in the appellant's letter of appeal, whereby the appellant was not afforded an opportunity to appeal against the decision to slaughter his pigs as provided for in section 72(1) of the Act.

20. According to the appellant, the Minister failed to address either of the two issues. That there was nothing in the respondent's affidavit and oral submissions in the court below which challenged the same. Referring us to paragraph 13 of the respondent's affidavit in opposition in the court below where the respondent stated that "it was inexpedient to allow for appeals in such instances", the appellant contended that irrespective of whether or not it was inexpedient to allow for appeals during the slaughter of animals occasioned by the ASF outbreak, section 72(1) of the Act dictated that an aggrieved person should be allowed to appeal.
21. In arguing ground two, the appellant submitted that his main contention in the court below was that the Director did not follow the dictates of section 72(1) and not of section 6(3) of the

Act. He argued that section 6(3) only applies to actions taken under section 6(2) in the course of an inspection but the evidence before the court below showed that the appellant's pigs were not destroyed or disposed of in the course of an inspection. Therefore, the appellant contended, it was a misapprehension of the facts for the court below to have anchored its decision on section 6(3) when deciding whether there was an obligation on the part of the veterinary officer to give notice to the appellant prior to the destruction of his pigs. Relying on the cases of **Nkhata and 4 Others v Attorney General**,¹ **Goodwin Mungala v Kaleya Small Holdings Company Ltd**,² **Marcus Kampumba Achiume v Attorney General**,³ **Kedrick Sikazwe v Proxy Limited and Dana Holdings Ltd**⁴ and **Wilson Masauso Zulu v Avondale Housing Project Ltd**⁵, the appellant urged this court to reverse the decision of the court below.

22. In arguing ground three, the appellant referred us to section 72 of the Act which provides that:

“(1) A person aggrieved with any decision made by an officer or Director under this Act may, within seven days of the date

of the decision, lodge with the Minister an appeal against the order.

- (2) There shall be no right of appeal against-
- (a) an order for the destruction or disposal of an animal, animal product or animal by-product declared by a veterinary officer to be infected with a disease;
 - (b) an order for the destruction or disposal of an animal, animal product or animal by-product kept or transported contrary to the provisions of this Act or any other law; or
 - (c) an order for the disposal of animal feed imported, compounded, mixed, manufactured or used contrary to the provisions of this Act.
 - (d) an order for the disposal of animal feed imported, compounded, mixed, manufactured or used contrary to the provisions of this Act.
- (3) An appeal lodged under subsection (1) shall be in writing and shall specify in detail the grounds upon which it is made.
- (4) A person aggrieved with a decision of the Minister may appeal to the High Court within thirty days of receiving the decision."

23. He submitted that the purpose of section 72(1) of the Act is to provide for an aggrieved person to lodge with the Minister, within seven days from the date of the decision or order, an appeal against the decision or order of an officer or Director.

This purpose, according to the appellant, may only be accomplished if the affected party is notified of the decision or order prior to its execution, which execution should only take place after the expiration of seven days from the date the affected party is notified of the decision or order if the affected party does not appeal.

24. It was the appellant's contention that to dispense with the requirement of prior notice under section 72(1) of the Act would give rise to an absurdity and unjust situation as it would mean that an aggrieved person may only know about the decision or order at the time of execution, thereby rendering the appeal procedure ineffective or an academic exercise as was the situation in the present case. The appellant argued that the court below should have adopted the purposive approach in the interpretation of section 72(1) of the Act by possibly reading into the section words to the effect that:

“(1) A person aggrieved with any decision made by an officer or Director under this Act may, within seven days of the date of being notified of the decision, lodge with the Minister an appeal against the order.” [Emphasis added]

25. He submitted that it is only with such an approach that the purpose of section 72(1) of the Act of providing for an appeal procedure, may be realised, thereby remedying the absurdity and injustice that might be caused by dispensing with the requirement of prior notice. The cases of **Attorney General and Another v Akashambatwa Mbikusita Lewanika and 4 Others**,⁶ **Nothman v Barnet Council**,⁷ **Resident Doctors Association of Zambia and Others v Attorney General**⁸ and **Matilda Mutale v Emmanuel Munaile**⁹ were cited as authority on the need for courts to adopt a purposive approach in the interpretation of statutory provisions.
26. The appellant also contended that the slaughter of his pigs deprived him of his livelihood and property rights and caused serious pecuniary loss without notice or opportunity to be heard and further, that sections 72(2) and 6(3) of the Act clearly indicate instances when the legislature intended the exclusion of the *audi alteram partem* rule. He relied on the cases of **Shilling Bob Zinka v Attorney General**,¹⁰ **R v Chancellor of the University of Cambridge**¹¹ and **General Medical Council**

v Spackman.¹² He concluded by contending that, his argument that he ought to have been notified of the intention to dispose of his animals prior to their destruction was not flawed and that there was an obligation at law for this notice to be given.

27. In support of ground four, the appellant referred us to the gazette notice on record and submitted that the same was clearly intended for the information of the public in general and the farming community in particular, that there was an outbreak of ASF. That it did not amount to a notice to him as an individual farmer in Chongwe District upon which he could be expected to lodge an appeal against the slaughter of his pigs because the notice did not state explicitly or otherwise that the appellant's pigs were marked for slaughter.

28. The appellant, therefore, contended that the court below misapprehended the facts and evidence before it and he urged us to reverse its finding that the appellant was put on notice through the gazette notice. According to the appellant, other than the attendance list for the sensitization meeting on which

the appellant's name is even misspelled, there was no evidence before the court below of the minutes of the said meeting, the statement made in parliament and the media adverts concerning the slaughter of animals. Consequently, the finding by the court below that the appellant was put on notice through the meeting held in the area, the statement made in parliament and through the media and also that he had an opportunity to lodge an appeal to the Minister against the decision to slaughter his animals, was highly speculative and not supported by any evidence and should be reversed by this court.

29. On the strength of the cases of **Nkhata**¹, **Kedrick Sikazwe**⁴ and **Wilson Masauso Zulu**⁵ referred to earlier, the appellant argued that this is a proper case in which the appellate court should reverse the finding of the court below as it was clear that in accepting, assessing and evaluating the evidence before it, the court below misdirected itself and took into account matters which it ought not to have taken into account.
30. In support of ground five, the appellant submitted that the court

below misevaluated the evidence before it when it held that there was nothing on record to show that an application was made to Mr. Simuusa to review the decision by the previous Minister that section 72(2) of the Act did apply to the appellant's case. It was his contention that there was evidence on record in the form of a letter dated 22nd April 2014, written to Mr. Simuusa requesting him to respond to the letter dated 11th March 2014 tendered to the previous Minister and, therefore, the finding by the court below that there was nothing on record must be reversed.

31. In ground six, the appellant submitted that he sought adequate compensation for the slaughter of his pigs which he contended was dented with illegality by way of procedural impropriety. According to the appellant, the Minister ought to have first determined the question of illegality and procedural impropriety before suggesting on the amount of compensation due to him. He argued that there were two possibilities as regards the compensation criteria in this case: (i) whether the appellant's animals were slaughtered in full conformity with the dictates of

the Act, in which case the compensation procedure would be as outlined in section 70 and; (ii) whether the slaughter was dented with illegality and procedural impropriety in which case the appellant ought to be awarded adequate compensation which would include taking into account loss of profits; loss of production; and damages incidental to the loss of the animals.

32. According to the appellant, it was, therefore, cardinal for the Minister to have made the determination on the appellant's contention that the slaughter of his animals was dented with illegality and procedural impropriety so that the right compensation criteria would be adopted. This, he contended, the Minister did not do but merely suggested that the appellant should accept the compensation sum of K388,124.00 which rate was below the market price as conceded by the Minister, in his letter dated 27th February 2014, when he stated that:

“While farmers were inconvenienced and suffered loss of animals and profits, the compensation was a way of ameliorating such losses, and not a full benefit compensation.”

33. As such, the appellant contended, the Minister could not be said

to have been on firm ground when he requested the appellant to accept the compensation sum of K388,124.00 calculated at K13 per kg when he had not established or revealed the basis of him suggesting so. That the court below was, therefore, in error to have held that the Minister was on firm ground as he ought to have first determined the appellant's contention of illegality and procedural impropriety in the slaughter of his pigs before suggesting the compensation.

34. Relying on the case of **May Vijaygiri Goswami v Dr. Mohamed Anwar Essa and Another**,¹³ the appellant argued that our constitution does not countenance the deprivation of property belonging to anyone without adequate compensation. He emphasized that the slaughter of his animals was not done in full conformity with the dictates of the Act, particularly section 72(1) and that the slaughter was tainted with illegality and procedural impropriety in which case the appellant ought to have been awarded adequate compensation which should have taken into account loss of profit, loss of production, and damages incidental to the loss of animals.

35. In response to ground one, Mr. Imasiku submitted, on behalf of the respondent, that the issue that arose for consideration in the first ground in the court below was an obligation on the part of the veterinary officer to give notice to the appellant prior to the destruction of his pigs. In addressing this ground, the court below correctly made reference to section 6(3) of the Animal Health Act which requires a veterinary officer to notify the owner of any animal destroyed. The respondent contended that since the slaughter notice was served on the appellant's premises, the requirement for its service was not breached.
36. Regarding ground two in the court below, it was submitted that the issue that arose for determination in that ground was whether there was procedural impropriety when the appellant was not afforded an opportunity to appeal against the slaughter of his pigs. In addressing this ground, the court below correctly referred to section 72(1) of the Animal Health Act which gives an opportunity to an aggrieved person the right to appeal to the Minister on decisions made under the Act within seven days. Counsel argued that the appellant had notice of the slaughter

of his pigs before the actual slaughter through the gazette notice, the sensitization meeting and sensitization messages carried out in the media. Thus, he had available to him an opportunity to appeal to the Minister against the slaughter of his pigs.

37. In response to ground two in the appeal before us, counsel submitted that the appellant had misapprehended the judgment of the court below in that there was no part of it which stated that a determination on the appellant's argument relating to prior notice was based on section 6(3) alone. It was argued that sections 6(1)(a) and 6(2)(a) were considered because the slaughter of the appellants pigs was conducted by the District Veterinary Officer for Chongwe District and not the Director. As such, the action fell within the provisions of the said sections.

38. As to the contention that the appellant's pigs were not slaughtered in the course of inspection as envisaged in sections 6(2) and 6(3) to be applicable, it was submitted that the slaughter was only determined after an inspection of his farm

as evidenced by the respondent's affidavit evidence in the court below. That even in the event that the pigs were found not to have been slaughtered under section 6(2), the slaughter is still covered by the provisions of sections 22(1) and (2), and 23 of the Act under which the gazette notice was enacted and subsequently published.

39. As regards ground three, counsel for the respondent submitted that the lower court's decision was made after determining that the appellant had adequate notice of the slaughter of his pigs and that in any event, there was no obligation on the part of the veterinary officer to give notice to the appellant.
40. Coming to the issue of absurdity arising from the interpretation of section 72 of the Act, it was argued that section 72(1) and (2) ought to be interpreted in line with the purpose of the Act which, according to its preamble, is to provide for the prevention and control of animal diseases. As such, due to the deadly ASF disease that broke out at the time of the slaughter of the appellant's pigs, section 72(1) ought to be considered subordinate to section 72(2). Therefore, to fulfil the purpose of

the Act, section 72(2) ought to take precedence. In this regard, there was no absurdity in the interpretation of section 72 as alleged by the appellant. Counsel contended that prior notice under section 72(1) was not dispensed with by the court below but rather, that the court had found that the appellant had adequate notice. That as such, no absurdity arises from the interpretation of section 72(1). The case of **Re Marr and Another (Bankrupts)** was cited in support.

41. In response to ground four, it was submitted that under section 48 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia, the production of a copy of a gazette containing any notice purporting to be printed by the Government Printer is sufficient evidence of the intention of such notice before the courts and for all other purposes whatsoever. That Gazette Notice No. 806 of 2013 published on 18th November 2013 falls within the notices envisaged by section 48, thus, by reason of the gazette being published notice was automatically imputed on the appellant.

42. It was also contended that from the contents of the notice, it was evidently clear that its intention was to inform the general public and the farming community of the outbreak of ASF. According to counsel, the appellant fell within the class of people that the notice intended to inform and, therefore, the gazette notice was sufficient notice of the outbreak of ASF in Lusaka Province and that measures would be undertaken to control the spread of the disease. Further, the sensitization meeting held on 20th November 2013 was an added avenue of reaching out to the pig farmers in the affected area. Additionally, a slaughter notice was taken to the appellant's farm on 22nd November 2015. Counsel concluded, therefore, that the court below was on firm ground when it held that the appellant was put on notice through the various fora.
43. In response to ground five, counsel submitted that the court below made its determination on this ground after establishing the availability of legal provisions that empowered the Minister to review or alter a decision made by his predecessor. Our attention was drawn to section 72 of the Act, particularly

subsection (4) which provides that appeals against a decision of the Minister under the Act lies to the High Court. It was contended, therefore, that the appellant had failed to provide legal backing that a Minister has power under the Act to review or alter the decision of a predecessor.

44. In responding to ground six, counsel referred us to section 70 (2) and (3) of the Act which provides that the compensation to be made under the Act does not in any way take into consideration any consequential losses or allowances for loss of profit occasioned by breach or loss of production. It was the respondent's argument that the compensation given to the farmers whose animals were destroyed during the ASF outbreak, who included the appellant, was arrived at after consultative meetings between the relevant stakeholders to ensure the interest of affected farmers was safeguarded. Following these meetings, counsel contended, the compensation offered to the appellant was K388,124.00 at the rate of K13 per kg for live weight which amount was above the

market price and was duly accepted by the appellant on 16th November 2014.

45. Counsel accordingly submitted that the appeal lacked merit and should be dismissed with costs to the respondent.
46. We have considered the record of appeal, the judgment appealed against and the parties' heads of argument.
47. Ground one alleges that the court below misdirected itself when it did not allow grounds 1 and 2 of appeal against the Minister's decision to succeed as the two grounds remained unchallenged. The argument here is that there was nothing in the respondent's affidavit and oral submissions in the court below which challenged the two grounds of appeal. Grounds 1 and 2 of the appellant's appeal to the lower court against the Minister's decision were couched in the following terms:

“1. The Hon. Minister erred in law and in fact when he decided not to address the fact that the Appellant was not served with an order or notice thereof informing him that his pigs were marked for slaughter as his farm was an in-contact farm with a farm infested with African Swine Fever.

2. The Hon. Minister erred both in law and in fact when he decided not to address the issue of procedural impropriety whereby the Appellant was not afforded an opportunity to appeal against the decision to slaughter his pigs, as provided for in section 72(1) of the Animal Health Act No. 27 of 2010.”

48. At page J10 of the judgment, the trial judge stated as follows:

“In relation to ground 1, the Appellant contended that the Minister erred by failing to consider the fact that the Appellant was not served with an order or notice that the pigs were marked for slaughter as his farm was in contact with a farm infected with African Swine Fever. The Respondent contended on the other hand that adequate notice was given to the Appellant in particular through Gazette Notice No. 807 of 2013 and by notice of 22nd November, 2013... The issue that arises here is whether there is an obligation on [the] part of the veterinary officer to give notice to the Appellant prior to the destruction of the [animals]”. [Emphasis added]

49. The respondent’s affidavit filed in the court below stated in relevant paragraphs as follows:

“7. That on 18th November 2013 the Government notified the Appellant and the general public of the outbreak of African Swine Fever through Gazette Notice No. 807 of 2013. There is now produced and shown to me an exhibit marked “JJS1” as copy of the Gazette Notice.

8. That on 20th November 2013 a sensitization meeting was held in Kanakantapa area facilitated by Camp Agricultural

Assistant Mr. Sianyawuka and the Appellant was part of the meeting which discussed the spread of African Swine Fever to Kanakantapa and the need to destroy all positively tested pigs and those pigs in contact farms and the eventual compensation for the pig owners. There is now produced and shown to me an exhibit marked "JJS2" and "JJS3" a copy of the invitation to [the] sensitization meeting and a copy of the attendance list of the sensitization workshop respectively.

9. That the slaughter notice was taken to the Appellant's farm by District Veterinary Officer for Chongwe Dr. Francis Mwanza and was handed to the Appellant's brother in the company of the farm manager and their spouses. There is now produced and shown to me an exhibit marked "JJS4" a copy of the slaughter notice dated 22nd November 2015.

10. That I am reliably informed by the Camp Agricultural Assistant Mr. Sianyawuka that after the slaughter notice was delivered the Appellant through his farm manager showed the Camp officer the site where the destruction of pigs would be done and the Appellant's wife visited the Provincial Veterinary Officer to request that their farm be spared from the slaughter of pigs."

50. The record of appeal also shows that at the hearing on 3rd March 2013 Mrs. Kawimbe, the then Deputy Chief State Advocate submitted as follows in respect of ground 1:

"Adequate notice was issued to the general public through government gazette notice 807 of 2013. Also exhibit "JJS2"

shows that special notice was given to the farming block in Kanakantapa area on 20th November 2013. Further, "JSS3" shows the persons who attended the meeting and includes Mr. Kenneth Nchima."

51. After considering the affidavit evidence and oral arguments of both parties the trial judge concluded as follows at page J11 of the judgment:

"Therefore, the Appellant's contention that he ought to have been notified of the intention to dispose of his animals prior to their destruction is flawed. There is no obligations at law for this notice to be given. This ground, therefore, fails."

52. In respect of ground 2, the trial judge stated at page J11 of the judgment as follows:

"The appellant contended... that he was not afforded an opportunity to appeal against the decision to slaughter his pigs as provided for in section 72(1) of the Animal Health Act No. 27 of 2010. He argued further that the Minister erred in failing to declare that the slaughter was dented with procedural [impropriety]. The Respondent contended on the other hand that the Director [of Veterinary Services] is empowered to declare any area an infected area pursuant to section 13 of the Act and that pursuant to sections 72(2) of the Act, there is no right of appeal against the decision to slaughter the animals".

[Emphasis added]

53. The respondent's affidavit filed in the court below stated in paragraph 13 that:

"13. That due to the swift and immediate need to destroy the animals that tested positive and those that tested negative which were within the declared positive area, it was inexpedient to allow for appeals in such instances."

54. In her oral submissions Mrs. Kawimbe submitted that:

"We insist that there was no procedural impropriety on the part of the Minister. We are [fortified] by S.13(2) and S.72 (2)(a).

In S.72(2) there shall be no right of appeal against an order for destruction or disposal of an animal declared by a veterinary officer to be [infected] with a disease. Thus the Minister was on firm ground when he relied on the advice of the Director."

55. After considering the contentions of the parties, the trial judge concluded at page J13 of the judgment as follows:

"...Therefore, the Appellant was aware or ought to have been aware of the disease and the plan of action to eradicate it. He was put on notice and, therefore, had an opportunity to lodge an appeal to the Minister against the decision to slaughter the animals... I find that the 2nd... argument that he was not availed an opportunity to lodge an appeal in untenable."

56. It is quite plain to us from the passages quoted in the preceding

paragraphs that contrary to the appellant's contention, grounds 1 and 2 of the appeal launched by the appellant in the court below were opposed by the Respondent, by way of evidence and submissions. For this reason, we disagree with the appellant that the lower court erred when it did not allow grounds 1 and 2 to succeed as they remained unchallenged. Consequently, there can be no basis for us to interfere with the lower court's findings of fact. We, therefore, find no merit in the first ground of appeal and accordingly dismiss it.

57. In ground two, the appellant alleges error on the part of the court below in considering the appellant's contention of prior notice based on section 6(3) of the Act as if the appellant's pigs were slaughtered under section 6(2) when in fact not. The kernel of the appellant's argument under this ground is that in arriving at the finding that there was no obligation at law for the appellant to be given prior notice of the slaughter of his pigs, the court below anchored its decision on section 6(3) of the Act, a provision which, according to the appellant, is only applicable to animals slaughtered in the course of an inspection.

58. In sum, the position of the respondent is that nowhere in the lower court's judgment did it state that a determination on the appellant's contention relating to prior notice was solely based on section 6(3) of the Act. According to the respondent, sections 6(1)(a) and 6(2)(a) were also considered. Further, that a slaughter is still covered by sections 22(1) and (2), and 23 of the Act pursuant to which the gazette notice was published, if it was found that the pigs were not slaughtered under section 6(2) of the Act.

59. The subsections of section 6 of the Act relevant to the issue under consideration are as follows:

"6. (1) A veterinary officer may-

- (a) apply or order the application of measures which are necessary or prescribed for the control or prevention of the spread of a disease;**
- (b) destroy or order the destruction at any time of any animal, animal product, animal by-product, article or animal feed which is diseased, moved or used contrary to the provisions of this Act;**
- (c) order the adoption of measures prescribed to ensure the welfare of animals; and**
- (d) seize or order the seizure of a conveyance carrying an animal, animal product, animal by-product,**

article or animal feed in contravention of this Act or any other law.

(2) A veterinary officer may, in the course of an inspection carried out under this section-

(a) seize, re-call, destroy, detain, treat or otherwise dispose of any animal, animal product, animal by-product, article or animal feed, or order that any such action be taken, at the expense of the owner;

(b) ...

(c) ...

(d) ...

(e) ...

(3) Where a veterinary officer detains, treats, disposes of or destroys an animal, animal product, animal by-product, article or animal feed under sub section (2), the veterinary officer shall within fourteen days of the detention, treatment, disposal, or destruction, of the animal, animal product, animal by-product, article or animal feed, notify in writing, the owner of the animal, animal product, animal by-product or article of the steps taken and the reasons therefor."

60. The issue for consideration by the trial court in ground one of the appeal before it was whether there was an obligation on the part of the veterinary officer to give notice to the appellant prior to the destruction of his pigs. After considering the provisions of section 6(3) of the Act, the trial judge found that the only

obligation placed on a veterinary officer is to notify the owner of the animal in writing, within fourteen days after the disposal of the animal, of the steps taken and the reasons for doing so. The trial judge then concluded that the appellant's contention that he ought to have been notified of the intention to dispose of his animals prior to their destruction is flawed. That was the context in which the trial judge anchored her decision on the provisions of section 6(3) of the Act, in concluding that there was no obligation at law for the appellant to be given prior notice of the slaughter of his pigs.

61. The contention by the appellant is that the trial judge should have anchored her decision on section 72(1) and not section 6(3) which, according to him, is only applicable to animals slaughtered in the course of an inspection. Section 72(1) is reproduced in paragraph 22 above. That section clearly shows that it deals with appeals to the Minister against decisions made by a veterinary officer or Director which should be made within seven days of the date of the decision. It is not relevant to the issue the trial court was dealing with namely, whether there was

an obligation on the part of the veterinary officer to give notice to the appellant prior to the destruction of his pigs.

62. The appellant contends that the trial judge should not have anchored her decision on section 6(3) because his pigs were not slaughtered in the course of an inspection as envisaged in section 6(2) of the Act. It is our considered view that section 6(3) does not stand alone but is linked to the preceding section 6(1) and (2). Section 6(1) sets out the general powers of a veterinary officer. Section 6(2) provides how such powers can be exercised by a veterinary officer in the process of carrying out an inspection. As subsections 6(1), (2) and (3) are interlinked, we determine that the slaughter of the appellant's pigs was a continuum of the inspection conducted at his farm. In other words, the slaughter of the appellant's pigs could not be separated from the inspection. We, therefore, reject the appellant's narrow interpretation that the trial judge should not have anchored her decision on section 6(3) of the Act because his pigs were not slaughtered in the course of an inspection. Accordingly, we find no merit in this ground of appeal.

63. In ground three, the appellant assails the lower court's finding that the contention that the appellant ought to have been notified of the intention to dispose of his animals prior to their destruction was flawed and further, that there was no obligation at law for this notice to be given. The main argument here being that to dispense with prior notice under section 72(1) would give rise to an absurdity and that, therefore, the trial court should have adopted the purposive approach in the interpretation of this section by possibly substituting the words "**... within seven days of the date of being notified of the decision**" with "**... within seven days of the date of the decision.**" In other words, the appellant's preference is that the affected person must be notified before the decision or order is carried out.
64. The respondent's argument is that section 72(1) and (2) should be interpreted in line with the purpose of the Act which is given in its preamble as being to provide for the prevention and control of animal diseases. Further, that there was no absurdity in the lower court's interpretation of this section.

65. The trial judge stated at page J11 of the judgment as follows:

“As stated above, clearly the veterinary officers are empowered to implement, such measures as they deem appropriate to give effect to the purpose for which the Act was enacted to prevent and control the spread of animal diseases in Zambia. These powers include the destruction of an animal to control a disease... The only obligation placed on a veterinary officer is to notify the owner of the animal, in writing, within fourteen days after the disposal of the animal of the steps taken and the reasons thereof. Clearly, the requisite notice to be given to the owner is only after the disposal or destruction of the animal and not before.

Therefore, the Appellant’s contention that he ought to have been notified of the intention to dispose of his animals prior to their destruction is flawed. There is no obligation at law for this notice to be given...” [Emphasis added by the trial judge]

66. We cannot fault the lower court in concluding that the appellant’s contention that he ought to have been notified of the intention to dispose of his animals prior to their destruction is flawed. Indeed, there is no obligation at law whether under section 6(3), or for that matter, under section 72(1) of the Act which the appellant contends, of course wrongly, was the provision under which his pigs were slaughtered, for prior notice to be given to a farmer.

67. The appellant has argued, with emotional intensity, that the trial judge should have adopted the purposive approach in interpreting section 72(1) in a way that allows an affected farmer to be given prior notice before a decision or order to destroy his/her animals is carried out. The view we take is that there is no ambiguity in either section 6(3) or section 72(1) of the Act that can justify the interpretation preferred by the appellant. In the record of appeal, we note from the evidence deployed before the trial judge that ASF is a highly contagious disease with no known treatment or vaccine. We can only assume that in the wisdom of the legislature, it was intended that lack of prior notice would enable veterinary officers to implement control measures with maximum speed and free from hinderance, in order to prevent the spread of such diseases among the farmers and also to protect the general public from a looming epidemic.
68. As aptly argued by the respondent, the lower court's interpretation of these statutory provisions satisfies the objects of the Act as encapsulated in its preamble. We harbour no doubt that they were well intended to effectively provide an efficient

mechanism for the protection and control of animal diseases. We do not, therefore, see any absurdity arising from such an interpretation which should necessitate a purposive approach as wished by the appellant.

69. In this case, however, it is clear from the record of appeal that notwithstanding the provisions of the law we have referred to in the preceding paragraphs, the appellant in fact had notice before his pigs were slaughtered. The appellant's letter to the Director of Veterinary Services dated 19th December 2013 reveals that his pigs were slaughtered on 18th December 2013. Prior to that date, a SLAUGHTER NOTICE dated 22nd November 2013 was delivered at the appellant's farm. Moreover, the appellant also attended a sensitization meeting in Kanakantapa area which discussed the spread of ASF to the area on 20th November 2013. For the reasons stated above, we are satisfied that this ground has no merit.
70. The appellant's grievance in ground four is the lower court's finding that he was put on notice through the gazette notice, among others and, therefore, had an opportunity to appeal to

the Minister against the decision to slaughter his pigs. The appellant contends, however, that the gazette notice did not expressly provide that his pigs were marked for slaughter. Further, that there was no evidence before the court below of the minutes of the sensitization meeting, the statement made in parliament and media advertisements.

71. The respondent's contention is that the Gazette Notice No. 807 of 2013 which was published on 18th November 2013 falls within the notices envisaged by section 48 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia to be automatically imputed to the appellant. Further, that the appellant fell within the class of people that were intended to be notified by the gazette notice and other forums about the outbreak of ASF.

72. GAZETTE NOTICE No. 807 of 2013 stated in the relevant part as follows:

“GAZETTE NOTICE No. 807 OF 2013

**Animal Health Act
(Act No. 27 of 2010)**

**African Swine Fever (ASF) Outbreak Chilanga
and Lusaka Districts**

IN ACCORDANCE with the provisions of section 12, 22 and 23 of the Animal Health Act of 2010 of the Laws of Zambia, it is notified for the information of the public in general and the farming community in particular that there is an outbreak of African Swine Fever (ASF) in Chilanga and Lusaka Districts of Lusaka Province. In view of this occurrence, the under listed measures will apply in Lusaka Province with immediate effect until further notice:

- (1) No pig/s or pig products will be allowed into or outside Lusaka Province**
- (2) No pig/s will be allowed to be slaughtered within Lusaka Province**

To this effect, the Ministry of Agriculture and Livestock has instituted control measures and farmers and members of the public are requested to cooperate as these measures are being implemented.

Any person or persons found contravening the measures directly or indirectly will be prosecuted and any pigs or pig products involved will be destroyed without compensation."

73. We take the view that the gazette notice did not specify that the appellant's pigs were to be slaughtered but merely indicated the control measures which had been instituted by the Ministry and that farmers and members of the public were requested to cooperate during the implementation of the measures. As these measures did not include the slaughter of pigs, save in circumstances where measures (1) and (2) were contravened, the appellant could not have known that his pigs would be

slaughtered. The gazette notice, therefore, cannot be considered as a basis upon which the appellant could have been expected to have lodged an appeal against the slaughter of his pigs at the time it was issued. To the extent that the gazette notice did not expressly state that the slaughter of pigs was one of the measures to be carried out wholesomely, we do not think that section 48 of the Interpretation and General Provisions Act would be relevant and applicable to the appellant in such circumstances.

74. The ministerial statement and communications to the public were not adduced before the court below. As such, we are unable to support the lower court's finding that the appellant was put on notice through these fora.
75. Regarding the sensitization meeting however, the record of appeal shows that the respondent presented evidence in its affidavit in the lower court indicating that the appellant was part of this meeting which discussed, among other things, the need to destroy all positively tested pigs and pigs in contact farms. No affidavit in reply was filed by the appellant to rebut

this evidence and neither did he submit on it at the hearing of the appeal in the court below, with the result that the evidence given by the respondent stood uncontroverted.

76. We note from the heads of argument in support of the appeal before us that the appellant does not dispute the fact that he attended the meeting and neither does he dispute what was discussed at the meeting but he merely argues that there is no evidence on record of the minutes of the said meeting. We also observe that the absence of minutes of the meeting was never canvassed by the appellant in the court below. Time without number, this court has held that an issue that has not been raised in the court below cannot be raised on appeal. See, for example, the case of **Antonio Ventriglia Manuela and Ventriglia v Eastern and Southern African Trade and Development Bank**.¹⁴ The appellant is accordingly precluded from raising the issue pertaining to the minutes of the sensitization meeting at this stage of the proceedings.
77. In our view, the only reasonable inference that can be drawn from the failure by the appellant to rebut the respondent's

allegation as to what was discussed at the meeting is that the allegation is true. We are, therefore, satisfied that the appellant had notice of the slaughter of his pigs through the sensitization meeting held in his area. As we observed earlier, the evidence in the record of appeal shows that the meeting was held on 20th November 2013 whereas the slaughter of his pigs was conducted on 18th December 2013. We posit that there was sufficient time within which the appellant could have appealed against the decision to slaughter his pigs but he failed to do so. The appellant cannot now be heard to allege that he was denied the opportunity to appeal. We, therefore, agree with the finding of the lower court that the appellant was put on notice of the slaughter of his pigs. On that score, we find no merit in ground four.

78. In ground five, the appellant asserts that the court below erred when it found that there was nothing on record to show that an application was made to the then Minister, Mr. Simuusa, for him to review the decision of the previous Minister. The appellant contends that he wrote to Mr. Simuusa on 22nd April

2014 and that this letter amounted to an application by him to the Minister, for him to review the decision of the previous Minister. However, the respondent's contention is that the appellant had failed to provide legal backing that a Minister has power under the Act to review or alter the decision of a predecessor.

79. In determining the issues raised in this ground of appeal, it is necessary for us to examine the contents of the letter of 22nd April 2014 referred to by the appellant. This letter reads as follows:

"Dear Sir,

RE: SLAUGHTER OF PIGS IN DISREGARD OF THE LAW

Reference is made to my earlier letter dated 11th March 2014 on the above captioned subject.

Hon. Minister Sir, it is now one and half months from the date I delivered my earlier letter to your office and there has been no response at all. I am aware of the fact that there was change in personnel in your office just about after I tendered in my last letter, but even then I anticipated you could have responded to that letter by now. Hon. Minister Sir, you may wish to know that even the Permanent Secretary has not responded to my appeal in that letter to consider facilitating the payment of the compensation the Ministry was offering as a way of mitigating

my suffering during this appeal procedure.

Hon. Minister Sir, even though it is not my desire to have this straight forward matter to be resolved in the Court of law as provided for in Section 72(4) of the Animal Health Act No. 27 of 2010, your not responding to my concern of procedural impropriety in the manner your officers slaughtered my pigs, which concern I emphasised on in my letter dated 11th March 2014, leaves [me] with no option but to kindly request your good office to confirm whether I must proceed with an appeal to the High Court.

Hon. Minister Sir, your quick response on this matter will be greatly appreciated as the continued delay in this matter is exacerbating my suffering as my life largely depended on my pig enterprise.

Yours faithfully,

NCHIMA KENNETH” [Emphasis added]

80. Our understanding of this letter is that it was a mere request to Mr. Simuusa, for him to respond to the appellant’s letter earlier sent to his predecessor. The contents of the letter do not in any way suggest even remotely, that the appellant was seeking a review of the previous Minister’s decision. He was in fact informing the Minister that his (the Minister’s) failure to respond to the appellant’s concern of procedural impropriety in

the manner his officers slaughtered his pigs left him with no option but to appeal to the High Court. We, therefore, wholly concur with the lower court that there was nothing on record to show that an application was made to the Mr. Simuusa to review the decision of Mr. Sichinga. This ground consequently fails.

81. Ground six attacks the lower court's finding that the Minister was on firm ground when he requested the appellant to accept the compensation sum of K388,124.00 calculated at K13 per kg. In sum, he contends that the slaughter of his animals was not in conformity with section 72(1) of the Act; was dented with illegality and procedural impropriety; and consequently, he ought to have been awarded adequate compensation which should have taken into account loss of profit and damages incidental to the slaughter of his pigs. According to the respondent however, section 70(2) and (3) of the Act does not take into consideration consequential losses or loss of profit in the computation of compensation.

82. A reading of this ground in the memorandum of appeal, however, reveals that it is couched in form of an argument contrary to rule 58(2) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia which states that:

“The memorandum of appeal shall be substantially in Form CIV/3 of the Third Schedule and 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.” [Emphasis added]

For these reasons, we conclude that this ground of appeal must be struck out for being in contravention of the rules of this court. Even assuming that this ground had complied with rule 58(2) of the Supreme Court Rules, it was still doomed to fail because according to section 70(2) and (3) of the Act, loss of profit and other consequential damages are not taken into account when the Minister orders the payment of compensation. For completeness, subsections (2) and (3) of section 70 provide as follows:

“(2) Subject to the other provisions of this Act, the Minister may order the payment of compensation to the owner of an animal, animal product, animal by-product, article or animal

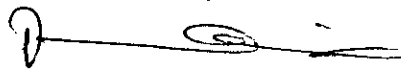
feed destroyed or disposed of, under the powers conferred by this Act, where physical evidence is provided that the animal, animal product, animal by-product, article or animal feed was destroyed or disposed of as a consequence of the exercise of powers conferred under this Act.

- (3) In determining the amount of compensation to be paid under this Act, no allowance for loss of profit occasioned by breach of contract or loss of production or any other consequential losses shall be made.” [Emphasis added]

83. On the basis of either rule 58(2) of the Supreme Court Rules or section 70(2) and (3) of the Act, therefore, ground six also suffers the same fate as other grounds.

Conclusion

84. All the grounds of appeal having failed, our inescapable conclusion is that this appeal is bereft of merit. It is accordingly dismissed. Costs follow the event and will be taxed in default of agreement.



I. C. Mambilima
CHIEF JUSTICE



C. Kajimanga
SUPREME COURT JUDGE



J. K. Kabuka
SUPREME COURT JUDGE