

**IN THE COURT OF APPEAL FOR ZAMBIA Appeal No. 57/2020**

**HOLDEN AT LUSAKA**

**CAZ/08/33/2020**

*(Civil Jurisdiction)*

**BETWEEN:**

**YOGESH KUNTAWALA** (*Suing as* **APPELLANT**  
*Secretary of Trackers Association of Zambia*)

**AND**

**CHIRUNDU DISTRICT COUNCIL**

**RESPONDENT**

***Coram: Makungu, Sichinga and Banda-Bobo, JJA***

***17<sup>th</sup> June 2021 and 29<sup>th</sup> April 2022***

*For the Appellants: Mr. M. Chiteba and Mr. M. Nalishuwa of Messrs Mulenga  
Mulenga Mundashi Legal Practitioners*

*For the Respondent: Mrs. Y. Mulenga-Muwowo- Director Legal Services,  
Luanshya Municipal Council*

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## **JUDGMENT**

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**Sichinga JA**, delivered the Judgment of the Court.

**Legislation referred to:**

- 1. Local Government Act, Chapter 281 of the Laws of Zambia*
- 2. Tolls Act No. 14 of 2011*
- 3. Rules of the Supreme Court, 1965, White Book, 1999 Edition*
- 4. The Constitution of Zambia Act, Chapter 1 of the Laws of Zambia (As amended by Act No. 2 of 2016)*

**Cases referred to:**

1. *Bank of Zambia v Tembo and Others* 2002 Z.R. 103
2. *Muyawa Liuwa v Attorney General* SCZ Judgment No. 38 of 2014
3. *Chama Mutambalilo v Attorney General* 2019 CCZ 008
4. *Zambia National Commercial Bank PLC v Musonda and 58 Others* SCZ selected Judgment No. 24 of 2018
5. *The People v Director of Public Prosecutions (Ex-parte Rajan Mahtani)* SCZ Selected Judgment No. 21 of 2019
6. *Christine Mulundika and 7 Others v The People* (SCZ Judgment No. 25 of 1995) [1996] ZMSC 26
7. *BP Zambia Plc v Interland Motors Limited* (2001) ZR 37

**Other works:**

1. *Patrick Matibini, Zambian Civil Procedure- Commentary and Cases* (2017) Lexis Nexis

**1.0 Introduction**

- 1.1 This is an appeal against the Ruling of the High Court (*Yangailo J*) dated 14<sup>th</sup> January 2020, pursuant to which the learned Judge in the court below dismissed the action for want of prosecution as a result of a determination on a preliminary issue raised by the respondent.

**2.0 Background**

- 2.1 The appellant commenced this action on 30<sup>th</sup> January, 2019 by originating summons against the Attorney-General and twenty other district councils, mainly claiming the following reliefs:

- a) A declaration that the imposition of transit, motor vehicle, cargo and product levies by the councils on the appellant's members is *ultra vires section 69 of the Local Government Act<sup>1</sup>* and therefore null and void.
- b) A declaration that the imposition of the toll levies by the councils on the appellant's members is *ultra vires section 6 of the Tolls Act<sup>2</sup>* and therefore null and void.

2.2 The record shows that between 29<sup>th</sup> January, 2019 and 15<sup>th</sup> May, 2019 the Attorney-General and some of the other respondents in the court below filed notices to raise preliminary issues pursuant to *Orders 33 Rule 3 and 14A of the White Book<sup>3</sup>*. On 25<sup>th</sup> June 2019, the learned Judge in the court below delivered a Ruling dismissing all but the Attorney-General's preliminary issues for incompetence. The said issues were particularised as follows:

- i) Whether this court has jurisdiction to entertain this matter on grounds that the applicant is trying to move the court to declare null and void by-laws duly confirmed by the Minister without first comprehensively engaging the Minister in charge and showing convincing proof that such efforts have failed to yield positive fruit and it has now become necessary to move this court by way of Originating Summons to declare null and void *By-Laws 13.1 to 13.22* referred to in the affidavit of Robert Mtonga.

ii) That the applicant has not exhausted his opportunity to engage the Minister so that he can comprehensively elucidate on how the 21 By-Laws have specifically affected him and his association or made proposals of changes or adjustments that can be made to assist his association. The result of the applicant's failure or neglect to comprehensively engage the Minister is that the Minister in charge has not been given an opportunity to cogently appreciate the applicant's needs and ascertain a solution which the applicant can point to as being dissatisfied with.

iii) Without showing or proving that the efforts to engage the Minister in charge have failed, the applicant through this action is trying to move this court to usurp the powers of the Minister in charge to declare null and void duly confirmed By-Laws instead of seeking for amendment or exemptions where the applicants qualify.

2.3 In summation, the Attorney-General applied for the dismissal of the originating summons for want of jurisdiction, prematurity and incompetence.

2.4 In a Ruling dated 25<sup>th</sup> June, 2019 (the first ruling), the lower court found that the applicant's engagement of the Permanent Secretary for the Ministry of Local Government was sufficient effort to engage the Minister concerning toll fees and levies charged by the respondent councils. She held

that the High Court has jurisdiction to hear the matter as the appellant's process was rightly before court.

2.5 The record shows further that on 8<sup>th</sup> July, 2019, the Attorney-General took out summons for review of the lower court's decision of 25<sup>th</sup> June, 2019. On 9<sup>th</sup>, July, 2019 the respondent herein filed a notice of motion to raise issues *in limine*. The said motion raised the following issues:

- i) Whether the court should dismiss the action because the applicant and the members of his association have been paying for the various levies to the respondent councils from the year 2000 to date and as such, the action is statute barred;*
- ii) Whether the court should dismiss the action because constitutionally, the issue of charging toll fees is a duty of the Local Authority and therefore, any other institution does not need to appoint the respondent councils to charge the same if at all they are levying the said charge;*
- iii) Whether the court should dismiss the action because the respondent councils have been conferred with an exclusive duty for toll fees constitutionally, any other institution charging toll fees may be acting inconsistently with the Constitution<sup>4</sup> and therefore the acts of any such institution should be declared null and void;*
- iv) Whether the court should dismiss the action because this court has no jurisdiction to hear a matter that relates to*

*the Constitution, as toll fees are an exclusive function of the local authorities provided.*

### **3.0 Decision of the court below**

3.1 The learned Judge in the court below delivered the Ruling that is the subject of this appeal on 14<sup>th</sup> January, 2020 (the second ruling), and made the following determinations:

i) The cause of action is not statute barred because it continues to accrue each time a member of the association is levied, as that is a continuing act.

ii) The imposition of levies that the appellant challenged is a constitutional matter as the respondent councils are mandated in this function by *the Constitution*. Pursuant to *Article 128(3)*, these issues are determinable only by the Constitutional Court, which is vested with original and final jurisdiction. It should therefore have been commenced in the Constitutional Court.

iii) The preliminary issues are meritorious and they succeed. This matter can be safely disposed of on a point of law as per *Order 14A of the Rules of the Supreme Court of England*.

3.1 The learned Judge then proceeded to dismiss the appellant's action on account of want of jurisdiction.

### **4.0 The appeal**

4.1 Displeased with the Judgment of the lower court, the appellant lodged this appeal, citing the following grounds:

- i) *The learned Puisne Judge erred in fact when she dismissed the appellant's Originating Summons for want of jurisdiction, contrary to her Ruling on 25<sup>th</sup> June, 2019 on the issue of jurisdiction and against the settled principle of res judicata.*
- ii) *The learned Puisne Judge erred in law and fact when she held at page R13 that the High Court lacked jurisdiction to hear the appellant's Originating Summons on the basis of Article 128(3) of the Constitution, when the appellant was not challenging the constitutionality of any piece of subsidiary legislation or action by the Respondent as envisaged by the said Article 128(3).*
- iii) *The learned Puisne Judge erred in law when she came to the conclusion that the jurisdiction of the High Court to hear the appellant's originating summons was ousted by Article 146 of the Constitution, without taking into account the absence of subsidiary legislation empowering the respondent to impose levies, tariffs and tolls.*

## **5.0 Appellant's arguments**

5.1 In support of the appeal, the appellant filed written heads of argument dated 14<sup>th</sup> April, 2020. In support of the first ground of appeal, the appellant argued that the issues raised *in limine* by the respondent, which resulted in the second ruling that had the effect of dismissing the appellant's action, are the same issues in principle which the lower court had

already ruled on in its first ruling of 25<sup>th</sup> June, 2019. That as such, the court below overturned its own ruling, thereby abrogating the well settled principle of *res judicata*.

5.2 The appellant argued further that the court had become *functus officio* when it rendered the first ruling, and that the respondent therefore ought to have appealed against that decision. On the principle of *res judicata*, the appellant cited a number of cases, including ***Bank of Zambia v Tembo and Others***<sup>1</sup> and ***Muyawa Liuwa v Attorney General***<sup>2</sup>.

5.3 In support of the second ground of appeal, the appellant argued that the holding of the lower court to the effect that it lacked jurisdiction to determine the matter on the basis of *Article 128(3) of the Constitution* ought to be upset, as the appellant was not challenging the constitutionality of any piece of subsidiary legislation. That on the contrary, the appellant asserted that the statutory instruments listed in the affidavit in support of Originating Summons contravene *section 69 of the Local Government Act*<sup>1</sup> and *section 6 of the Tolls Act*<sup>2</sup>. That as such, this matter cannot be said to be one that falls exclusively within the jurisdiction of the Constitutional Court.

5.4 Our attention was drawn to the case of ***Chama Mutambalilo v Attorney General***<sup>3</sup> where the Constitutional Court held that:

***“The jurisdiction of this Court as stated in Article 128 of the Constitution as amended does not extend to the determination of allegations of violations of Acts of Parliament as these are matters reserved to the jurisdiction of the High Court.”***

- 5.5 In the third ground of appeal, the appellant challenged the lower court’s finding to the effect that since *Article 147(2)* as read with part C of its annex reserves the mandate to impose levies, tariffs and tolls to the respondent councils, *section 6 of the Road Tolls Act supra*, which empowers the Road Development Agency (RDA) to impose road tolls, is in contravention of *Article 147 of the Constitution*<sup>4</sup>. The appellant argued that the lower court was wrong to conclude that since a question of constitutionality was raised in these circumstances, the matter should have been commenced in the Constitutional Court.
- 5.6 To challenge this finding, the appellant argued that the lower court ought to have taken into consideration that there is no subsidiary legislation which has been promulgated to give effect to *Article 147 (2) of the Constitution* as to how the local authorities would impose the levies, fees and tolls, more so that this function is currently being performed by the Road Development Agency.
- 5.7 The appellant also referred to the case of ***Zambia National Commercial Bank PLC v Musonda and 58 Others***<sup>4</sup> where

the Constitutional Court guided that the transitional provisions under **section 6(1) of the Constitution of Zambia Amendment Act No. 2 of 2016** apply to the Industrial Relations Court until its specific rules of procedure are prescribed.

- 5.8 The case of ***The People v Director of Public Prosecutions (Ex-parte Rajan Mahtani)***<sup>5</sup> was also cited on the same principle. That *in casu*, the lower court ought to have taken a similar interpretation regarding the effect of *Article 147(2) of the Constitution*. We were urged to set aside the Ruling.

## **6.0 Respondent's arguments**

- 6.1 On 12<sup>th</sup> May, 2020, the respondent filed heads of argument in response to this appeal. It was submitted therein that the two rulings in question were premised on preliminary issues that raised different issues. The appellant contended that whereas the ruling of 25<sup>th</sup> June, 2019 was centred on the applicant exhausting the administrative procedure available under the Ministry of Local Government, the issues raised in the ruling of 14<sup>th</sup> January, 2020 related to the jurisdiction of the High Court to try and determine issues of a constitutional nature.
- 6.2 Counsel argued further that the plea of *res judicata* does not arise, as the circumstances of this case do not satisfy the material elements. We were again referred to the holding of the Supreme Court in ***Bank of Zambia v Tembo and Others supra*** as follows:

***“A plea of res judicata must show either an actual merger or that the same point has been actually decided between the same parties, which is the case here.”***

- 6.3 On this premise, counsel submitted that seeing as the issues raised in the preliminary issue that culminated into the two rulings were different, one cannot hold out that the second ruling was against the principle of *res judicata*.
- 6.4 In response to the second ground of appeal, the respondent submitted that the fact that the appellant did not specifically state in its Originating Summons that the action was one of a constitutional nature does not preclude the court from taking into account the nature of the matter. Counsel argued that the appellant’s action was centred on the imposition of levies by the respondents and by virtue of them drawing their mandate from *the Constitution*, the act of imposing levies is constitutional in nature. That in addition, the appellant, by submitting that the matter be stayed and referred to the Constitutional Court, effectively conceded that the matter was one of a constitutional nature.
- 6.5 Responding to the third ground of appeal, counsel for the respondent submitted, on the basis of the supremacy of *the Constitution*, that *section 6 of the Tolls Act supra* contravenes *Article 147 of the Constitution* and is therefore void. The case of ***Christine Mulundika and 7 Others v The People***<sup>6</sup> was cited to this effect.

## 7.0 **Appellant's arguments in reply**

- 7.1 In reply to the respondent's argument drawing a distinction between the issues addressed by the lower court in its first and second ruling, the appellant argued that in principle, at the core of both rulings was the issue of jurisdiction. Reference was made to the portion of the first ruling where the lower court held that the applicant's process was rightly before court and it had the jurisdiction to determine the issue raised therein.
- 7.2 Further, that even in the 1<sup>st</sup> respondent's notice raising the preliminary issue in respect of the first ruling, the 1<sup>st</sup> respondent applied that the matter be dismissed for want of jurisdiction, prematurity and incompetence. On this premise, counsel submitted that it is not surprising that the lower court went on to pronounce itself on the issue of jurisdiction, as it was raised by the 1<sup>st</sup> respondent.
- 7.3 In reply to the respondent's response to ground two, the appellant maintained that determinations of inconsistencies between two Acts of Parliament are reserved for determination by the High Court. That the crux of the reliefs sought by the appellant was that *section 6 of the Tolls Act No. 14 of 2011* was *ultra vires section 69 of the Local Government Act Cap 281*, and not *ultra vires the Constitution*. As such, the proceedings should not have been brought within the contemplation of *Article 128(3) of the Constitution*.

7.4 As regards the respondent's assertion that the appellant had conceded that this matter raised a constitutional issue, the appellant contended that what it sought to refer to the Constitutional Court for determination was in response to an issue raised by the respondent in its motion to raise issues *in limine* regarding the constitutionality of *section 6 of the Tolls Act*, which was not to say that the reliefs sought in the Originating Summons were of a constitutional nature. That on the contrary, the remedies sought by the appellant related to violations by the respondent local authorities of Acts of Parliament, thus falling within the preserve of the High Court.

7.5 Replying to the third ground of appeal, the appellant contended that their argument was not as regards the supremacy of the Constitution, but the failure of the lower court to take into consideration *Article 272 of the Constitution* which empowers Parliament to enact legislation to give effect to a constitutional provision such as *Article 177(2)* as read with *Part C* of its annex. That essentially, the appellant's submission is not whether *section 6 of the Tolls Act* is *ultra vires the Constitution*, but rather whether Parliament has enacted legislation that gives effect to *Article 147(2)* and its annex, within the context of ***Zambia National Commercial Bank PLC v Musonda and Others***<sup>4</sup>, such that there exists no legislation to provide for how the local authorities would impose levies, tariffs and tolls. Counsel reiterated the submissions made in the appellants heads of argument and

urged us to allow the appeal and set aside the ruling of the lower court.

## 8. **Our decision**

- 8.1 We have carefully considered the Ruling of the court below, the grounds of appeal, and the submissions by learned counsel for both parties. Our understanding of the summary of the appellant's contention in this appeal is that by delivering the second Ruling, the lower court pronounced itself on issues that it had already determined earlier, thereby abrogating the principle of *res judicata*.
- 8.2 The respondent, on the other hand, asserts that the issues for determination in the two rulings were distinct, and that this matter in fact raises issues of a constitutional nature and as such, it ought to have been commenced in the Constitutional Court.
- 8.3 We will now address the first ground of appeal. Going by the guidance of the Supreme Court in the case of ***Bank of Zambia v Tembo and Others supra*** to the effect that a plea of *res judicata* must show that the same point has been actually decided between the same parties, the question we are confronted with as we seek to determine the first ground of appeal is whether both rulings determined the question of jurisdiction.
- 8.4 For ease of analysis, we will delve more into the jurisdictional issue, if any, arising from the issues that culminated into

first the ruling, seeing as there is no dispute that the second ruling was as a result of the lower court's determination of a question relating to its competence to determine an issue of a constitutional nature, which went to jurisdiction. If we find that the first ruling determined an issue relating to jurisdiction, then it will follow that the question of jurisdiction was indeed raised and determined twice.

- 8.5 An examination of the notice to raise preliminary issues drawn by the Attorney General dated 15<sup>th</sup> May, 2019 reveals that the respondent applied that the appellant's originating process be dismissed for want of jurisdiction, for being premature and incompetent. Having addressed the issues raised, the learned Judge in the court below concluded at page R14 that:

***“I therefore find that the Applicant's process is rightly before this Court which has the jurisdiction to determine the issues raised therein. The 1<sup>st</sup> respondent's preliminary issues thus fail and are hereby dismissed.”***

- 8.6 In our jurisdiction, given the wealth of precedents regarding the principle of finality to litigation, one can hardly discuss this principle without sounding repetitive. Justice Patrick Matibini, learned author of ***Zambian Civil Procedure- Commentary and Cases***, states at page 1135 that:

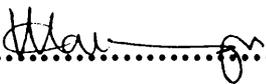
***“As a matter of general principle, once a judgment or order has been made, the court is***

***functus officio and no longer has jurisdiction over the matter in controversy”.***

- 8.7 The Supreme Court stated in the case of ***BP Zambia Plc v Interland Motors Limited***<sup>7</sup> that a party with a dispute with another over a particular subject cannot be allowed to deploy his grievances in piecemeal in scattered litigation and keep on hauling the same opponent over the same matter.
- 8.8 Applying these authorities to this case, it is clear to us on a reading of the Attorney-General’s notice to raise preliminary issue and the lower court’s first ruling that the question of jurisdiction was raised and determined in the first ruling. Even though the issue of the appellant not having exhausted administrative channels seemed prominent in the preliminary issues upon which the first ruling was premised, the collective effect of the questions raised went to jurisdiction. As such, we are inclined to agree with the appellant to the extent that the lower court became *functus officio* as regards the question of jurisdiction when it rendered the first ruling.
- 8.9 In the circumstances, the lower court, upon perusal of the second notice to raise preliminary issues and on realization that the respondent once again raised an issue of jurisdiction, should have declined to entertain the application on the basis that the issue of jurisdiction had already been determined. Having decided in her first ruling that she had jurisdiction, it was a misdirection to find that

she had no jurisdiction in a subsequent ruling. The respondent ought to have appealed against the first ruling instead of raising a similar issue on jurisdiction. On this basis, we find merit in the first ground of appeal and accordingly allow it.

8.10 In view of the foregoing reasons, the other grounds of appeal become otiose. As a consequence we quash the second ruling of the lower court and remit the case back for hearing of the originating summons, which is herein reinstated. We make no order as to costs.

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*C.K. Makungu*

**COURT OF JUDGE APPEAL**

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*D. L. Y. Sichinga/SC*

**COURT OF APPEAL JUDGE**

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*A. M. Banda-Bobo*

**COURT OF APPEAL JUDGE**