

REC

IN THE CONSTITUTIONAL COURT OF ZAMBIA  
HOLDEN AT LUSAKA  
(CONSTITUTIONAL JURISDICTION)

2018/CCZ/009

IN THE MATTER OF:

ARTICLE 28 OF THE  
CONSTITUTION OF ZAMBIA  
ACT (BY THE CONSTITUTION  
OF ZAMBIA ACT NO. 18 OF  
1996), CHAPTER 1, VOLUME 1  
OF THE LAWS OF ZAMBIA

IN THE MATTER OF:

ARTICLE 42 OF THE  
CONSTITUTION OF ZAMBIA (BY  
ACT NO. 2 OF 2016) THE  
CONSTITUTION OF ZAMBIA  
CHAPTER 1 VOLUME 1 OF THE  
LAWS OF ZAMBIA



IN THE MATTER OF:

ARTICLE 43(2)(a) OF THE  
CONSTITUTION OF ZAMBIA (BY  
THE CONSTITUTION OF  
ZAMBIA (AMENDMENT) ACT  
NO. 2 OF 2016. THE  
CONSTITUTION OF ZAMBIA  
ACT, CHAPTER 1 VOLUME 1  
OF THE LAWS OF ZAMBIA

IN THE MATTER OF:

THE PROTECTION OF  
FUNDAMENTAL RIGHTS RULES  
1969, STATUTORY  
INSTRUMENT NO. 156 OF 1969

BETWEEN:

ACCESS BANK (ZAMBIA) LIMITED

PETITIONER





**AND**

**ATTORNEY GENERAL**

**RESPONDENT**

**CORAM:** Sitali, Mulenga, Mulembe, Mulonda and Musaluke, JJC on  
11<sup>th</sup> December, 2018 and 27<sup>th</sup> March, 2019

**For the Appellant:**

REPUBLIC OF ZAMBIA  
CONSTITUTIONAL COURT OF ZAMBIA  
27 MAR 2019  
REGISTRY 3  
P O BOX 30067 LUSAKA

**Mr. J. Jalasi, of Eric Silwamba,  
Jalasi and Linyama Legal  
Practitioners**

**For the Respondent:**

**Ms. C. Mulenga, Deputy Chief State  
Advocate - Attorney General's  
Chambers**

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### **JUDGMENT**

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**Musaluke, JC,** delivered the Judgment of the Court.

#### **Cases referred to:**

1. **Mulundika and 7 others v The People (1995 - 1997) Z.R. 20.**
2. **Zambia National Commercial Bank Plc. v Musonda and Others  
Selected Judgment No. 24 of 2018.**
3. **Leopold Walford (Z) Ltd v Unifreight (1985) Z.R. 203.**
4. **Henry Kapoko v The People Selected Judgment No. 43 of 2016.**
5. **Union of Refugee Women and Others v Director of The Private  
Security Industry Regulatory Authority and Others (2007) 2 LRC  
354.**
6. **CRDP Bank Tanzania Limited v TTCL and Another, Civil Appeal  
No. 63 of 2003 Cat at Dar es Salaam (Unreported).**
7. **Kenya Commercial Bank Limited v Kenya Planters Co-operative  
Union Civ. Application 85/2010 eKLR.**
8. **Major General David Tinyefuza v Attorney General (Constitutional  
Petition No. 1 of 1996) (1997) UGCC.**



9. **July Danobo (T/A Juldan Motors) v Chimsoro Farms Limited (2009) Z.R. 148.**
10. **NFC Mining Plc. v Techro Zambia Limited (2009) Z.R. 236.**
11. **Sikalangwe Luke v Chisha Sepherine and The Electoral Commission of Zambia Appeal No. 5 of 2016 (CC).**
12. **Micheal Kaingu v Sililo Mutaba Selected Ruling No. 9 Of 2018.**
13. **Godfrey Malembeka v The Attorney General and Electoral Commission of Zambia Selected Judgment No. 34 of 2017.**

**Legislation referred to:**

1. **The Constitution of Zambia (Amendment) Act No. 2 of 2016.**
2. **The Supreme Court of Zambia Rules, Chapter 25 of the Laws of Zambia.**
3. **The Protection of Fundamental Rights Rules 1969, Statutory Instrument No. 156 of 1969.**
4. **The Constitution of the United Republic Of Tanzania, 1977.**
5. **The Constitution of the Republic of Kenya, 2010.**
6. **The Constitution of the Republic of Uganda, 1995.**

**Works referred to:**

1. **Black's Law Dictionary, 5<sup>th</sup> Edition, (1979) West Publishing Company.**

At the hearing of this matter, our brother Justice Mulonda sat with us. He is currently on leave and therefore, this is a Judgment of the majority.



This matter came before us by way of a Petition filed on 27<sup>th</sup> August, 2018. The Petition was made pursuant to the provisions of Articles 28, 42 and 43 (2) (a) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (henceforth referred to as 'the Constitution') as well as the Protection of Fundamental Rights Rules Statutory Instrument No. 156 of 1969.

The Petition before us seeks to challenge the Supreme Court judgment of 26<sup>th</sup> February, 2016 that dismissed the Petitioner's appeal for filing a defective record of appeal. The Petitioner contends that in dismissing its appeal, the Supreme Court violated Article 118 (2) (e) of the Constitution by paying undue regard to procedural technicalities.

The background to this Petition is that in 2010, Group Five ZCON Business Park Joint Venture (henceforth referred to as 'Group Five'), instituted proceedings before the High Court against Access Bank (Zambia) Limited (the Petitioner herein) for contractual breach of duty. The matter was heard by the High Court and judgment was rendered on 26<sup>th</sup> February, 2014 in favour of Group Five. Dissatisfied with that outcome, the Petitioner appealed against the High Court judgment to the



Supreme Court by filing a notice of appeal with an accompanying memorandum of appeal on 27<sup>th</sup> February, 2014. On 28<sup>th</sup> April, 2014 the Petitioner filed a record of appeal together with heads of argument.

On 5<sup>th</sup> August, 2014 Group Five as Respondent in the appeal before the Supreme Court filed a notice of intention to raise a preliminary objection to the record of appeal on grounds that certain pages of the record of appeal were illegible. The Supreme Court sustained the preliminary objection and in its ruling of 28<sup>th</sup> November, 2014 dismissed the entire Petitioner's appeal. Aggrieved by this turn of events, the Petitioner on 23<sup>rd</sup> December, 2014 took out a motion in the Supreme Court and sought to set aside the Supreme Court's ruling sustaining the preliminary objection on the basis that the grounds upon which the appeal was dismissed were merely procedural and curable. The Supreme Court dismissed that motion in a judgment delivered on 26<sup>th</sup> February, 2016.

It is against this backdrop that the Petitioner seeks a determination that the Supreme Court judgment of 26<sup>th</sup> February, 2016 was unconstitutional and prejudiced its rights as enshrined in the Constitution. The Petitioner alleges that the

Supreme Court's decision was not premised on the merits of the case but was premised on the Petitioner's failure to comply with a procedural step contrary to the provisions of Article 118(2) (e) of the Constitution.

The Petitioner, thus, seeks from this Court the following reliefs:

- a) A declaration that the judgment delivered by the Supreme Court under cause Number SCZ/8/52/2014 and Appeal No 76/2014 is unconstitutional as it is contrary to the provisions of Article 118(2) of the Constitution;**
- b) An Order that the Petitioner be at liberty to re-open its Appeal in the Supreme Court so that the same is determined on the merits;**
- c) Such declaration and Orders as this Court may deem fit; and**
- d) Costs of and incidental to the Petition.**

In the Petitioner's affidavit verifying facts and deposed to by Joana Bannerman its Managing Director, it was averred that



the defective pages that were found to be impossible to read by the Supreme Court in its ruling of 28<sup>th</sup> November, 2014 namely pages 131 to 147, 150 to 157 and 162 to 214 of the record of appeal had no detrimental impact on the Petitioner's substantive claim and therefore that the judgment of the Supreme Court delivered therein prejudiced its rights as enshrined under the Constitution and as such must be set aside.

At the hearing of the matter both parties relied entirely on the filed written heads of argument.

In its heads of argument, the Petitioner began by spelling out the jurisdiction of this Court as outlined under Article 128 (1) (a) (b) and (c) of the Constitution. The Petitioner also made reference to Article 128 (2) which mandates courts in this jurisdiction to refer to this Court where a question relating to the Constitution arises; Article 128 (3) which allows any person who alleges a contravention of any provisions of the Constitution to petition this Court and Article 128 (4) which provides that a decision of this Court is not appealable to the Supreme Court.

The substratum of the Petitioner's arguments, however, sought to challenge the judgment of the Supreme Court on

grounds that the judgment contravened the provisions of the Constitution, citing in particular Article 118 (2) (e) which enacts as follows:

*“118 (2) In exercising judicial authority, the courts shall be guided by the following principles:*

*(e) justice shall be administered without undue regard to procedural technicalities”*

In advancing this argument, the Petitioner submitted on the supremacy of the Constitution arguing that it is the supreme law of the land and any legislation inconsistent with its provisions is to be rendered unconstitutional and invalid. It was argued that this position was espoused in the case of **Mulundika and 7 others v The People**<sup>1</sup> which rendered unconstitutional and invalid, legislation which offended the provisions of the Constitution. In addition, the case of **Zambia National Commercial Bank Plc. v Musonda and others**<sup>2</sup> was cited in which we held inter alia that:

*“In determining the matter before us we are mindful of the principles applicable to the interpretation of the Constitution.*

*As a starting point, we observe that the Constitution is the*



*Supreme law in Zambia in terms of Article 1 of the Constitution. It therefore ranks above all other laws and any law that is inconsistent with the Constitution is void to the extent of the inconsistency.....”*

Applying the above authorities to the present case, it was argued that the judgment of the Supreme Court which in part stated that: “*All we can say is that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts of law,*” was inconsistent with the provisions of Article 118(2) (e) of the Constitution in that the interest of justice could not be overshadowed by curable procedural technicalities.

It was the Petitioner’s argument that the provisions of Article 118 (2) (e) of the Constitution were put in place to enable substantive justice to be carried out by ensuring that each case is determined on its merits. The Petitioner further submitted that Article 118 (2) (e) exists to safeguard the interest of justice in the face of unavoidable procedural lapses. In buttressing this argument, the Petitioner called to aid the case of **Leopold Walford (Z) Limited v Unifreight<sup>3</sup>** in which the Supreme Court stated as follows:

*“As a general rule, breach of a regulatory rule is curable and not fatal”*

The Petitioner also cited the case of **Kapoko v The People**<sup>4</sup> where we held as follows:

*“Article 118(2) (e) is not intended to do away with existing principles, laws and procedures, even where the same constitute technicalities. It is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality”.*

The Petitioner therefore, submitted that the failure by the Supreme Court to proceed with a matter on the premise that a defective record of appeal was filed was an example of a court placing undue regard on a procedural technicality more so because the Petitioner had expressed willingness to correct the defect by the filing of a supplementary record of appeal. A portion of the Supreme Court Judgment was cited in which the Supreme Court stated as follows:

*“The Learned Counsel for the Appellant readily acknowledged the defects detected but contended that those defects were curable by submission of a supplementary*



*record of appeal which the Respondent's advocates could have done rather than object to the record in the manner they did. He offered to take corrective action"*

The Petitioner submitted that the Supreme Court contravened the provisions of the Constitution by denying the Petitioner a right to a fair hearing as guaranteed under Article 18(9) of the Constitution.

The Petitioner argued that administration of justice requires that the substance of all disputes be investigated and decided on the merits and that procedural errors and lapses should not unnecessarily debar litigants from the pursuit of their right to be heard. The South African case of **Union of Refugee Women and Others v Director of the Private Security Industry Regulatory Authority and Others**<sup>5</sup> was cited in support of this position.

The Petitioner referred to various constitutional provisions in other jurisdictions namely; Tanzania, Uganda and Kenya which are couched in similar terms as Article 118 (2) (e) of the Constitution and also cited authorities on how the courts in these jurisdictions have interpreted these provisions.

In the case of Tanzania, Article 107A of the Constitution of the United Republic of Tanzania was cited which enacts as follows:

*“107A. (1) The Judiciary shall be the authority with final decision in the dispensation of Justice in the United Republic of Tanzania.*

*(2) In delivering decisions in matters of civil and criminal matters in accordance with the laws, the court shall observe the following principles, that is to say –*

- (a) impartiality to all without due regard to ones social or economic status;*
- (b) not to delay dispensation of justice without reasonable ground;*
- (c) to award reasonable compensation to victims of wrong doings committed by other persons and in accordance with the relevant law enacted by the Parliament;*
- (d) to promote and enhance dispute resolution among persons involved in the disputes; and*



(e) to dispense justice without being tied up with technicality provisions which may obstruct dispensation of justice.”

It was submitted that the above provisions were interpreted by the Court of Appeal of Tanzania in the case of **CRDP Bank Tanzania Limited v TTCL and Another**<sup>6</sup> in which the court inter alia held as follows:

*“The door of court must always be left wide open and procedural technicalities must not be used to deny litigants the right to arguing their cases in court.....”*

The Petitioner also referred us to Article 159 of the Constitution of the Republic of Kenya which provides as follows:

*“159 (1) Judicial Authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.*

*(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –*

- (a) justice shall be done to all, irrespective of status;*
- (b) justice shall not be delayed;*

- (c) *alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*
- (d) *justice shall be administered without undue regard to procedural technicalities; and*
- (e) *the purpose and principles of this Constitution shall be protected and promoted.”*

The case of **Kenya Commercial Bank Limited v Kenya Planters Co-operative Union**<sup>7</sup> was cited in which the court held that adherence to technicalities of procedure would defeat the court's core business of acting justly.

In reference to Uganda, the Petitioner cited Article 126 of the Constitution of Uganda which provides as follows:

*“126(1) Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with the law and values, norms and aspirations of the people.*



*(2) In adjudicating cases of both a civil and criminal nature, the courts shall subject to the law, apply the following principles:*

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

The Petitioner submitted that the Ugandan courts have interpreted this article and cited in particular, the case of **Major General David Tinyefuza v The Attorney General**<sup>8</sup> where it was held as follows:

*"The case before us relates to the fundamental rights and freedoms of the individual like the Petitioner which are enshrined in and protected by the Constitution. In my opinion, it would be improper to deny him a hearing on technical or procedural grounds. I would even go further and say that even where the respondent objects to the Petition as in this case, the matter should proceed to trial on merit unless it does not disclose a cause of action. This court should readily apply the provisions of Article 126(2),(e) of the Constitution in a case like this one and administer justice without undue regard to technicalities"*

In light of the above authorities, the Petitioner submitted that courts in jurisdictions with similar provisions to Article 118 (2) (e) of the Constitution have not given undue regard to procedural technicalities. It was argued that the Supreme Court erred in its decision by placing undue regard to curable defects in the record of appeal lodged by the Petitioner and thereby going against an established norm in other jurisdictions with similar constitutional provisions.

The Petitioner drew a contrast between procedural and substantive law as provided for in the **Black's Law Dictionary** and submitted that whilst procedural law is concerned with prescribing methods for enforcing rights or obtaining redress for violation, substantive law creates, defines and regulates rights. The Petitioner argued that substantive law is fundamentally guaranteed by the Constitution and procedural rules are means adopted in achieving the main objective of pursuing justice and therefore in the event of a conflict, substantive law prevails. It was submitted that to the contrary, the decision of the Supreme Court by prioritising the procedural rules contained in Rule 58 of the Rules of the Supreme Court seem to imply that procedural law prevails over substantive law. It was contended that the



defective record of appeal lodged by the Petitioner was not fatal to warrant a dismissal of the entire appeal.

The Petitioner urged us to hold that the Supreme Court judgment contravened the provisions of Article 118 (2) (e) of the Constitution by preventing the Petitioner from exercising its constitutional right to a fair hearing.

In opposing the contents of the Petition, the Respondent filed an Answer, affidavit in opposition and the Respondent's heads of argument. The Respondent contended that the Petitioner's action before this Court is misconceived at law as the Constitutional Court and the Supreme Court rank *pari pasu* and that this Court cannot therefore set aside a judgment of the Supreme Court as it lacks the requisite jurisdiction to do so. The Respondent further contended that a judgment of the Supreme Court is final and cannot be said to infringe on a person's rights. In support of this argument, reliance was placed on Article 121 of the Constitution.

The Respondent urged us to consider the following questions in considering the case before us:

- i. Did the Supreme Court exceed its powers in deciding to dismiss the Petitioner's appeal in the wake of the defective record of appeal?
- ii. Given the defective state of the record of appeal, would it have provided a fair opportunity to influence the outcome of the court's decision and so ensure the decision's integrity?

The Respondent submitted that the position taken by the Petitioner that the Supreme Court judgment contravened the provisions of Article 118 (2) (e) of the Constitution was flawed. The Respondent posited that the responsibility of preparing a legible record of appeal fell on the Petitioner. It was argued that Rule 68 of the Supreme Court Rules was instructive to the extent that failure to prepare the record of appeal in the prescribed manner could be fatal as to result in the dismissal of an appeal. In support of this argument, the Respondent cited the case of **July Danobo (T/A Juldan Motors) v Chimsoro Farms Limited**<sup>9</sup> where the Supreme Court guided as follows:

*"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.”*

The Respondent also cited the case of **NFC Mining Plc. v Techro Zambia Ltd**<sup>10</sup> where the Supreme Court warned litigants that failure to comply with court rules could be fatal to their cases. The Court guided that rules of court were intended to assist in the proper and orderly administration of justice and as such must be strictly followed.

On the strength of the cited authorities, it was the Respondent's submission that the Supreme Court did not exceed its powers in dismissing the appeal. Further, that the Supreme Court acted within the provisions of the Supreme Court Rules hence there was no illegality or unconstitutionality in its decision.

As regards the second issue on the state of the defective record of appeal, it was the Respondent's submission that the Petitioner filed a record which was defective in all material aspects and as a consequence, the state of the record itself would not have afforded either party before the Supreme Court a fair opportunity to present their case.

The Respondent further submitted that as was correctly stated by the Supreme Court, Article 118 (2) (e) of the Constitution did not oust the obligations of litigants to comply with procedural imperatives as they seek justice from courts. It was posited that a record of appeal that is defective in all material aspects cannot be said to be a procedural technicality within the perimeter of what the Constitution envisages in Article 118 (2) (e) and therefore the decision of the Supreme Court was on *terra firma* and not unconstitutional as the record of appeal was incompetent and thus hindered the court from hearing the appeal.

We have carefully considered the Petition, the Answer, the affidavit in support of and in opposition to the petition and the arguments both for and against the petition by the learned Counsel for the respective parties.

As a starting point we note from the Petition and the reliefs sought therein that the Petitioner seeks from this Court a determination that the Supreme Court judgment of 26<sup>th</sup> February, 2016 was unconstitutional as it was contrary to Article 118 (2) (e) of the Constitution.



The Petitioner submitted essentially that the failure by the Supreme Court to hear the appeal on its merits on the premise that a defective record of appeal was filed was a clear example of the Supreme Court paying undue regard to a procedural technicality contrary to the provisions of Article 118 (2) (e) of the Constitution.

The Petitioner added that Article 118 (2) (e) of the Constitution was put in place to safeguard the interests of justice in the face of curable procedural short comings. It was the Petitioner's argument that the defective record of appeal it had filed in the Supreme Court was curable and that the Petitioner was willing to remedy the defect as was acknowledged by the Supreme Court in its judgment. The Petitioner therefore prays that this Court declares that the Supreme Court judgment dismissing the appeal is unconstitutional as it is contrary to the provisions of Article 118 (2) (e) of the Constitution and that we should make an order to allow the Petitioner to re-open its appeal in the Supreme Court so that the case is determined on its merits.

The Respondent, on the other hand, has strongly opposed the Petition stating that the action is misconceived on the

premise that the Supreme Court and this Court rank *pari-pasu* and therefore we cannot review a judgment of the Supreme Court.

In addressing our minds to the issues raised, we have to look at the constitutional mandate of the Supreme Court. The starting point therefore is to look at the jurisdiction of the Supreme Court.

Article 125 of the Constitution gives the Supreme Court its jurisdiction as follows:

- "125. (1) Subject to Article 128, the Supreme Court is the final court of appeal.*
- (2) The Supreme Court has—*
- (a) appellate jurisdiction to hear appeals from the Court of Appeal; and*
  - (b) jurisdiction conferred on it by other laws.*
- (3) The Supreme Court is bound by its decisions, except in the interest of justice and development of jurisprudence."*

In order to give effect to the jurisdictional mandate of the superior courts, the Constitution further provides under Article 120 (3) (a) that the processes and procedures of the superior courts shall be prescribed. These processes and procedures come



in the form of court rules promulgated by the Chief Justice through statutory instruments. In terms of the Supreme Court specifically, these are Supreme Court Rules provided for in section 28 of the Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia which provides as follows:

*“28. The Chief Justice may, by statutory instrument, make rules of court for regulating generally the practice and procedure of the Court and with respect to appeals to or reviews by the Court including rules as to the time within which any requirement of the rules is to be complied with, as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein and generally in regard to any other matter which appears to the Chief Justice to be necessary or desirable.”*

Court rules are an integral part of the administration of justice in this jurisdiction. The importance of court rules was pre-eminently pronounced in the case of **NFC Mining Plc. v Techro Zambia Limited**<sup>10</sup> where the Supreme Court stated that rules of court are intended to assist in the proper and orderly administration of justice.

Supreme Court Rules, therefore, give a guide on how appeals that emanate from the lower courts are to be handled from filing to final hearing and sanctions that follow non-compliance. The preparation and filing of a record of appeal before the Supreme Court is provided for in the Supreme Court Rules so as to guide lawyers and litigants.

Rule 10 of the Supreme Court Rules prescribes how the record of appeal must be prepared including its numbering. The preparation of the record of appeal in accordance with the format provided in Rule 10 is emphasized in Rule 58 (1). Rule 58 (1) provides as follows:

*“58. (1) The record of appeal shall be prepared in accordance with rule 10 and shall include a memorandum of appeal and copies of the proceedings in the High Court and in any court below.”*

Rule 58 (1) therefore makes it mandatory to prepare the record of appeal in accordance with the format provided in Rule 10. If the record of appeal is not prepared in the prescribed manner, the court may in its discretion dismiss the appeal. This is provided for in Rule 68 (2) of the Supreme Court Rules which enacts as follows:



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

A perusal of the record of proceedings shows that the Petitioner had prepared a record of appeal which had defective pages that were impossible to read by the other party and the Supreme Court. It was on the basis of the defective record of appeal that the Supreme Court using its discretion dismissed the appeal. The Petitioner has argued that the dismissal of the appeal based on a defective record of appeal was a contravention of Article 118 (2) (e) of the Constitution by the Supreme Court.

We have read the judgment of the Supreme Court of 26<sup>th</sup> February, 2016 at the centre of this Petition. In that judgment, the Supreme Court stated as follows:

*“In conclusion, we are mindful that the issue regarding Article 118 (2) (e) of the Constitution of Zambia was raised in passing by Mr. Silwamba, SC and was not part of his written arguments before us. We do not intend to engage in anything resembling interpretation of the Constitution in this Judgment. All we can say is that the Constitution never means to oust*



*the obligation of litigants to comply with our procedural imperatives as they seek justice from the courts.”*

In our view, the sentiments expressed by the Supreme Court were made in obiter and do not in any way resemble an authoritative interpretation of the provisions of Article 118 (2) (e) of the Constitution.

We would firmly add that the dismissal of an appeal based on a defective record of appeal cannot be said to be a contravention of Article 118 (2) (e) of the Constitution. We have already pronounced ourselves on Article 118 (2) (e) of the Constitution.

In the case of **Henry Kapoko v The People**<sup>4</sup> we held as follows:

*“While the facts and law in each case will vary the principle laid out by this Court on the meaning and application of Article 118 (2) (e) remains constant. The court’s word is clear. Article 118 (2) (e) is not intended to do away with existing principles, laws and procedures, even where the same constitute technicalities. It is intended to avoid a situation*



*where a manifest injustice would be done by paying unjustifiable regard to a technicality”*

We added that each court is required to determine whether *“in the circumstances of the particular case, what is in issue is a technicality and if so whether compliance with it will hinder the determination of a case in a just manner.”* This is what the Supreme Court did.

In the case of **Sikalangwe Luke v Chisha Sepherine and the Electoral Commission of Zambia**<sup>11</sup> we made it clear that an Appellant cannot hide behind Article 118 (2) (e) of the Constitution for his failure to comply with the rules of court in preparing and compiling the record of proceedings or appeal and we sounded a warning to litigants who choose to ignore the rules of court that they do so at their own peril and risk the appeal being dismissed.

In the case of **Micheal Kaingu v Sililo Mutaba**<sup>12</sup> this Court in fact dismissed the Appellant’s election petition appeal on account of an incomplete and defective record of appeal.

We reiterate our position that Article 118 (2) (e) of the Constitution does not oust regard to procedural technicalities but

only prohibits undue regard to technicalities that would otherwise prevent or inhibit a just hearing.

In view of what we have stated above, the Supreme Court was well within the law and its jurisdictional mandate when it dismissed the Petitioner's appeal as rules of court are intended to assist in the orderly administration of justice and as such must be strictly followed. Parties who choose not to comply with the rules do so at their peril. Parties must not hide behind Article 118 (2) (e) of the Constitution to flout the rules of procedure with impunity and expect to get away with it.

The Petitioner has not proved that the Supreme Court judgment was inconsistent with Article 118 (2) (e) of the Constitution or was unconstitutional. We therefore, hold that the judgment delivered by the Supreme Court under cause Number SCZ/8/52/2014 and Appeal No 76/2014 to dismiss the Petitioner's appeal was not contrary to the provisions of Article 118(2) (e) of the Constitution.

The Petitioner has also prayed that we order that it be at liberty to re-open its Appeal in the Supreme Court so that the same is determined on the merits. This prayer flowed from the



first issue. We have determined that the dismissal of the Petitioner's appeal by Supreme Court was not contrary to the provisions of Article 118(2) (e) of the Constitution. That being the case this issue has become otiose and falls off.

The Petitioner in its arguments further submitted that the judgment of the Supreme Court infringed its constitutional right to a fair hearing as guaranteed under Article 18 (9) of the Constitution. This Court has already guided in the case of **Godfrey Malembeka v The Attorney General and Electoral Commission of Zambia**<sup>13</sup> where we held as follows:

*"In terms of Article 28 (1) of the Constitution, the jurisdiction to enforce the provisions of Part III of the Constitution under which Article 18 and Article 23 fall is vested in the High Court. This Court, in terms of Article 128 (1), has no jurisdiction to enforce the provisions of Articles 11 to 26 of the Constitution, which falls under Part III of the Constitution. We have previously guided that actions relating to the enforcement of the rights and freedoms contained in Part III of the Constitution must be commenced in the High Court."*

We emphasize that this Court does not have the requisite jurisdiction to entertain applications relating to a violation of individual rights guaranteed under Part III of the Constitution. It follows that the Petitioner's claims that fall under Article 18 (9) of the Constitution are incompetently before this Court and we cannot entertain them. The claims are therefore dismissed.

In sum, we find that the Petition is misconceived and improperly before this Court. We dismiss it with costs to the Respondent to be taxed in default of agreement.

Dated the 27<sup>th</sup> day of March, 2019



.....  
**A. M. SITALI**  
**Constitutional Court Judge**



.....  
**M.S. MULENGA**  
**Constitutional Court Judge**



.....  
**E. MULEMBE**  
**Constitutional Court Judge**



.....  
**M. MUSALUKE**  
**Constitutional Court Judge**