IN THE SUPREME COURT FOR ZAMBIA SCZ Appeal No. 60/2011 HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

SCRIROCCO ENTERPRISES LIMITED APPELLANT

AND

KAFUE DISTRICT COUNCIL 1ST

RESPONDENT

THE ATTORNEY GENERAL 2ND

RESPONDENT

CORAM: CHIRWA. Ag. DCJ, MUYOVWE AND MUSONDA, JJS.
On 20th March 2012 and 3RD AUGUST 2012.

For the Appellant: Mr. A. Chewe of Nchito and Nchito
For the 1st Respondent: Mr. C. Nhari of Nhari Mushemi & Associates
For the 2nd Respondent: Captain M. Nzala – State Advocate

J U D G M E N T

Musonda, JS, delivered the Judgment of the Court.

Cases Referred To:

1. ***Chikuta V Chipata Rural Council (1974) ZR 24.***
2. ***New Plast Industries Commissioner of Lands and Attorney General (2001) ZR 51 at page 55.***
3. ***Council of Civil Service Unions V Minister of State for Civil Service (1981) AC 363.***

4. Re Holloway (ex p. Pallister 1844) 2 QB 163.

<u>Works Referred To:</u>

Rules of the Supreme Court 1999 Edition Order 7.

This is an appeal against the refusal to grant various reliefs prayed for in an action commenced by originating summons under Order 6 of the High Court Rules. Of the six reliefs, the appellant was unsuccessful in first four reliefs and was successful in the fifth and sixth relief.

The appellant in the court below prayed for:

(i) ***An order that Regulations 2, 3 and 4 of the Kafue District Council (sand levy) By-Laws 2007 which imposes a sand levy on crushed stones is ultra vires Section 69 (1) of the Local Government Act, Chapter 281 of the Laws of Zambia.***

(ii) An order that the inclusion of crushed stones in the definition of sand under Regulation 2 of the Kafue District Council (sand levy) By-Laws, 2007 is unreasonable and ultra vires Section

69 (1) of the Local Government Act Chapter 281 of the Laws of Zambia.

(iii) An order that Regulation 6 (1) of the Kafue District Council (sand levy) By-Laws 2007, which criminalizes default in the payment of sand levy is ultra vires Section 69 (2) (4) of the Local Government Act, Chapter 281 of the Laws of Zambia and therefore null and void.

(iv) A declaration that the imposition of sand levy on crushed stones under Regulation 3 of the Kafue District Council (sand levy) By-Laws, 2007 amounts to double-taxation as the plaintiff already pays tonnage fees and mineral royalties on the said product to the Ministry of Mines.

(v) A declaration that neither Section 69 of the Local Government Act Chapter 281 nor the Kafue District Council (sand levy) By-Laws, 2007 authorize the Kafue District Council to impound trucks belonging to a person who fails or refuses to pay sand levy and that any attempts to impound the trucks belonging to the plaintiff will be ultra vires Section 69 of the Local Government Act.

(vi) An order of injunction to restrain the first defendant whether by itself, its employees or

agents from impounding or in any way interfering with the plaintiff's trucks or motor vehicles until final determination of this matter.

When the matter came up for hearing in the court below a direction that the parties proceed by way of written submissions was made, after the parties consented.

There was affidavit evidence before the trial court. The deponent for the appellant was the Managing Director. He stated that, the appellant trades under the name of Oriental Quarries and is holder of small-scale mining licence number SML 241. The licence is issued by the Mines Development Department of the Ministry of Mines. Pursuant to this licence, the appellant is licenced to mine limestone from which crushed stones are derived. The appellant quarry, mines ore which is then processed by crushing, grinding, sizing, screening and classification.

The crushed stone is the final product, which is sold to the general public for various uses which include road construction and the building industry. The appellant's mining operations at

the quarry were regulated by the Mines and Minerals Act and the Regulations made thereunder. Pursuant to the legislation the appellant paid various taxes such as area charges, tonnage fees and mineral royalties.

The deponent on behalf of the appellant received a letter from Kafue District Council drawing his attention to the By-Laws imposing a levy on river sand, building sand and crushed stones. The deponent had difficulty in comprehending how crushed stones could be classified as sand. He wrote to the Director of Mines, seeking intervention as he believed that the tax imposed by the By-Laws would result in double taxation. On 23rd May 2008, he received a letter from the first respondent demanding payment of the levy. The failure to pay would result in a criminal prosecution and the appellant's trucks being impounded.

The affidavit in opposition was deposed to by the Acting Council Secretary in the Ministry of Local Government and Housing. He stated that local authorities are empowered under the law to impose levies on persons, activities, property and

commodities by virtue of the Local Government Act. Pursuant to that power, the first respondent issued Statutory Instrument No. 88 of 2007, by which it imposed a levy on sand. Acting on the advice of the first respondent, he believed that the Statutory Instrument was intra vires the Act. In response to the allegation of double taxation, the deponent stated that, that does not arise because the payment made to the Department of Mines related to the licence issued by that authority. The first respondent's threats to the appellant of criminal prosecution and impounding of vehicles was appropriate.

Three grounds of appeal were filed on behalf of the appellant. For the appellant it was argued in the first ground that the court below erred in dismissing 4 out of the 6 reliefs sought.

Ground one, was that the learned trial Judge erred in law and in fact when he found that Regulations 3 and 4 of the Kafue District Council (sand levy) By-Law 2007 were not ultra vires Section 69 (1) of the Local Government Act, Chapter 281.

Ground two was that the trial Judge erred in law and in fact when he held that Regulation 2 of the Kafue District Council (sand levy) By-Laws 2007 that defined sand include crushed stones was not unreasonable. While in ground three, it was argued that the trial Judge erred in law and in fact when he held that no double taxation arose in respect of the crushed stone upon which the appellant paid levies and royalties under the Mines and Minerals Act.

In ground one it was submitted that, in dealing with the mode of commencement of the proceedings, the court held that the mode of commencement of the proceedings for the relief sought was erroneous and proceeded to examine the merits. The court proceeded to hold that the inclusion of crushed stones in the definition of sand under Regulation 2 of the Kafue District Council (sand levy) By-Laws 2007 was reasonable and the first respondent was acting within the ambit of Section 69 (2) of the Local Government Act. The court did not have jurisdiction as the mode of commencement was wrong.

In ground two, it was submitted that the learned High Court Judge erred in law and fact when he held that Regulation 2 of the Kafue District Council (sand levy) By- Laws 2007, that defined sand to include crushed stones was not unreasonable. The holding having been in respect of the sand relief prayed for in the originating summons and the court having correctly held that, that mode of commencement was erroneous, the court had no jurisdiction to consider the point further.

It was argued that we held in ***Chikuta V Chipata Rural Council***[(1)] that:

> ***"Where any matter is brought to the High Court by means of an originating summons when it should have been commenced by writ, the court has no jurisdiction to make any declaration"***

The position was further explained in the case of ***New Plast Industries V The Commissioner of Lands and The Attorney General***[(2)] where this court held following ***Chikuta supra*** that:

"Where any matter under the Lands and Deeds Registry Act, is brought to the High Court by means of Judicial Review when it should have been brought by the way of an appeal, the court has no jurisdiction to grant the remedies sought"

It was submitted that the lower court misdirected itself in proceeding to consider the point further and its holding that the inclusion of crushed stones in the definition of sand under Regulation 2 of the impungned sand levy By-Law is therefore null and void for want of jurisdiction. The appellant herein is therefore not precluded from pursuing the matter again in the High Court under the correct procedure, if he so desires.

In ground three, it was contended that the learned trial Judge erred in law and fact when he held that no double taxation arose in respect of the crushed stone upon which the appellant paid levies and royalties under the Mines and Minerals Act.

The appellant being holder of a small-scale mining licence, all its activities are now regulated under the Mines and Minerals

Act No. 7 of 2008. Under the said Mines and Minerals Act 2008, the appellant has rights and obligations for instance under Section 133 (1) of the said Act, the appellant is required to pay a mineral royalty and in addition, the appellant is subjected to other fees such as tonnage fees.

For the first respondent, Mr. Nhari did not specifically respond to each ground. He sharply focused on the issue of jurisdiction. We were invited to consider the appellant's submission in the court below, wherein they argued that the lower court had jurisdiction to hear the matter and that the mode of commencement employed by the appellant in the court below was the correct one. The appellants cannot now turn around and advance an argument that the lower court had no jurisdiction.

It was argued that the court below firstly agreed with the appellant that matters such as the reliefs sought before the lower court could be brought as suggested by the appellant. There was nowhere in the record where the lower court suggested that, had the matter been commenced by judicial review then the court

would have awarded the relief sought by the appellant. It was contended that the appellants were seeking to have a second bite at the cherry by using this appeal to have their prayer on appeal that they be allowed to commence judicial review proceedings, which is tantamount to a new trial, after discovering that they employed the wrong mode of commencement in the court below.

We were referred to Order 59/11/4 of the Supreme Court Practice 1999 Edition at page 107, where it is stated that:

> ***"Where the trial was by Judge alone whether in the High Court or country court, if notwithstanding that the Judge misdirected himself his decision of the case was the right one, a new trial will not be ordered"***

The Supreme Court Practice cited has gone further to state that, "there must be a substantial miscarriage of justice that is to say that the applicant must have lost a chance of success which was fairly open to him upon a substantial part of the case".

It was argued that there was no substantial miscarriage of justice that would warrant the appellant to say that they lost a chance of success, assuming that the court misdirected itself.

The holding that the inclusion of crushed stones in the definition of sand was not unreasonable was within the provisions of Section 69 (2) (a) of the Local Government Act, which stipulates that:

> ***"By-Laws imposing levies may make different provisions with respect to different classes of property or premises, different classes of commodities"***

The above provision authorized the 1st respondent to levy on activities or commodities falling within its jurisdiction.

For the 2nd respondent it was argued that Statutory Instrument No. 88 of 2007 was intra vires Section 69 (1) of the Local Government Act which provides that:

A Council may, make by-laws imposing all or any of the following levies:

(a) A levy on leviable persons owning or occupying property or premises situated within the area of the council;

(b) A levy on leviable persons carrying on a business, trade or occupation within the area of the council;

(c) A levy on the purchase or sale of a commodity within the area of the council.

Regulations 3 and 4 of Statutory Instrument No. 88 of 2007 states that:

3 A person or company shall mine or prospect sand within the area of the council for whatever purpose, shall pay to the council a sand levy at the rate of one thousand kwacha per ton.

4 No person or company shall mine or prospect sand within the area or export from the area for which no sand levy has been paid.

In response to ground two, it was argued for the 2nd respondent that the definition of sand by Section 2 of the Kafue District Council (Sand Levy) By-Laws 2007 is unreasonable. Sand is defined as:

> ***"Building sand, river sand and crushed stones, in small particles matter of which shall be used in the construction of any nature of building"***

We were referred to the case of ***Council of Civil Service Unions V Minister of State for Civil Service***[3] in which Lord Diplock elucidated the concept of unreasonableness by stating that:

> ***"By irrationality means what can be succinctly referred to as wednesbury unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it"***

In response to the third ground of appeal, the 2nd respondent submitted that local authorities are empowered under the Local Government Act, to raise revenue for the running of councils by way of an imposition of levies. It was, therefore, within the confines of the law for them to charge a levy for commodities pursuant to Section 69 (1) of the Act. Regulation 4 of Statutory Instrument No. 88 of 2007 more specifically provides that:

> ***"No person or company shall mine or prospect sand within the area or export from the area for which no said levy has been paid"***

The licence obtained from the Department of Mines under the Ministry of Mines, before engaging in the prospecting or mining of a mineral, such a person is required to comply with such provision as well as those of a local authority. The payment of the sand levy is to a local authority. The two payments are totally different and should not be considered as paying the same tax twice.

We were referred to the definition of “double taxation” in Black’s Law Dictionary by Bryan A Garner as:

> ***“The imposition of two taxes on the same property during the same period and for the same taxing purpose. The imposition of two taxes on one corporate profit”***

It was submitted following the dictionary definition that there was no double taxation as the nature of the taxes and the receiving entities were different.

We have considered the submissions by the appellant’s and respondent’s advocates. We will deal with all grounds of appeal simultaneously. The issues in this appeal as we digest them are:

(i) Was originating summons the proper mode of commencement of all the reliefs the appellant was seeking in the court below;

(ii) By the appellant in the court below seeking an order to determine that Regulation 2 of the Kafue District Council (Sand Levy) By-Laws 2007 was unreasonable and ultra vires

Section 69 (1) of the Local Government, could that be said to have been sufficient ground to commence the action by way of judicial review;

(iii) By paying mineral royalties to the Department of Mines and paying sand levy to the Council amounted to double taxation?.

This was an action to construe statutory provisions. The philosophy underlying the commencement of proceedings by originating summons was stated in ***Re Holloway***[4], in which case the Court of Appeal stated that:

> ***"The procedure had its origins in the Court of Chancery and was invented for the purpose of quickly determining simple points without pleadings"***

We are of the view that the issues to be determined by the court below needed no pleadings. The learned Judge was required to construe statutory provisions which required no pleadings, which would have necessitated commencing the action by a writ of summons.

We wish to point out here, that there is a distinction, where a statute enacts the mode of commencement, the courts should follow that procedure, otherwise the 'Will' of the legislature is thwarted. This was the tenor of our judgment in ***New Plast Industries V Commissioner of Lands and Attorney General supra***. This authority was cited out of context.

We note that the argument that judicial review would have been the appropriate mode to commence these proceedings was premised on the use of the word 'unreasonable' in the second relief sought before the court below. 'Unreasonable' is a commonly used word and it does not mean wherever it is used the proceedings ought to be began by judicial review.

The mining licence fees are paid to a national entity, the Ministry of Mines and are surrendered to the Treasury for use at national level. The legislature in its wisdom realizing that local governments bear a brunt in the provision of social services had to confer **'revenue raising powers'** on the local governments.

This was intended to supplement the grants from central government which are always inadequate. This is why Section 68 is followed by Section 69 as they are complimentary.

In our view, it may be a fact that some '**revenue raising measures**' may be onerous to businesses and individuals in the local government area. The legislature has empowered the minister to amend and revoke such by-laws under Section 83 which is couched in these terms:

> ***(1) Subject to the provisions of this Section, the Minister may, by statutory order, amend or revoke any by-law by a council under this Act;***
> ***(2) Before exercising the powers conferred by subsection (1) the Minister shall give the Council reasonable notice of his intention and shall afford the council an opportunity of making representation to him thereon***

We are of the opinion that powers conferred on the Council are quite wide. These are democratic institutions making policy decisions, which courts should not routinely interfere with. The

legislature has interposed, the Minister to intervene before litigation, to whom in our view representations should have been made first, before coming to court. The appellants purposefully availed themselves to the jurisdiction of the local government area by engaging in economic activity in that area, they cannot deny that local government area the authority to tax them.

The argument of unreasonableness by the company is untenable because crushed stones produced by the company from whatever means of processing are mined in the jurisdiction of the council. Under Section 69 (2), the By-Laws imposing levies may make different provisions to different classes of commodities. The Council is empowered to tax crushed stones as a commodity on its own without including it in the definition of sand. The section is expansive rather than restrictive. Even if the definition could be said to be wrong, the Council has power to levy any commodity produced in its local government area.

The mining of crushed stones will cause environmental degradation, for which the local authority will have to mitigate,

with the same revenue the appellant is resisting to pay. We see no merit in the jurisdiction, ultra vires and double taxation arguments.

For the reasons we have given, there is no merit in all the three grounds of appeal and we accordingly dismiss them with costs to be agreed or taxed in default of agreement.

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D. K. CHIRWA	E. N. C. MUYOVWE
SUPREME COURT JUDGE	**SUPREME COURT JUDGE**

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P. Musonda
SUPREME COURT JUDGE