

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**

APPEAL No. 24/2021

(Civil Jurisdiction)

B E T W E E N:

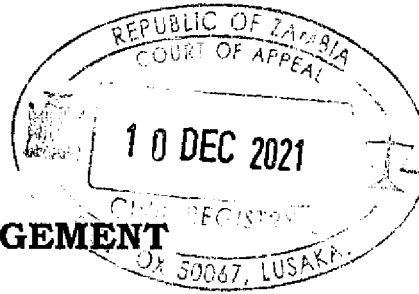
**WATER RESOURCES MANAGEMENT
AUTHORITY**

AND

CHIMSORO FARMS LTD & 18 OTHERS

APPELLANT

RESPONDENTS



***Chishimba, Majula and Siavwapa, JJA
On 21st October 2021 and 10th December, 2021***

For the Appellant : Mr. C. Ngaba—In House Counsel

For the Respondents : Mrs. M.M. Harawa of MC Mulenga & Company

JUDGMENT

Majula JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Newplast Industries vs The Commissioner of Lands & Attorney-General (SCZ Judgment No.8 of 2005).*
- 2. Kansanshi Mining Plc vs Zambia Revenue Authority (SCZ Appeal No.143 of 2014).*
- 3. Mohandes Issardas vs. A.N. Sattanathan Air Capital 1955 Bom 113.*
- 4. Micheal Mabenga vs Sikota Wina and 2 others (SCZ Judgment No.15 of 2003).*
- 5. Sanhe Mining Zambia Ltd vs Andrew Mazimba & Tirumala Balaji (Z) Ltd*

(CAZ Appeal No.83/2017).

6. *African Banking Corporation Zambia vs Mubende Country Lodge* (SCZ Appeal No.116/2016).
7. *Newsdiggers Mukosha Funga vs Given Lubinda, Jean Kapata, Tasila Lungu* (SCZ Appeal No. 77/2020).
8. *Vengelato & Others vs Metro Investments Ltd* (SJ No. 5 of 2016).

Legislation referred to:

Water Resources Management Act, No 21 of 2011

1.0 BACKGROUND

- 1.1 On 5th November 2019, the respondents (the plaintiffs in the court below) issued a writ of summons against the appellant over a water permit that was issued to Chobe Agrivision Company Limited. Among the reliefs sought was an order that the water permit be surrendered and cancelled by the appellant on account of the fact that it was erroneously and irregularly granted to Chobe Agrivision Company Limited.
- 1.2 The appellant reacted by filing a conditional memorandum of appearance and applied to dispose the matter on a point of law. It based its application on the premise that the lower court did not have jurisdiction to hear and determine the action at first instance owing to the fact that the Board of the appellant was mandated to determine appeals from any person aggrieved with the decision of the Director General. That the appeal process was in accordance with the provisions of

section 157 of the Water Resources Management Act, No. 21 of 2011.

2.0 DECISION OF THE COURT BELOW

- 2.1 The lower court considered the issues before it and formed the opinion that at the time the water permit was granted to Chobe Agrivision Company Limited, the Board of the appellant had not been constituted. Judge R. Chibbabbuka was of the considered view that it was therefore illogical for the respondents to have appealed to a non-existent Board. The learned Judge consequently dismissed the appellants' claims and held that the High Court had jurisdiction to determine the action.

3.0 GROUND OF APPEAL

- 3.1 Discontent with the decision of the lower court, the appellant graced the doors of this court proffering three grounds of appeal set out below:

"1. That the Honourable trial Court erred in law in its reference to the Water Board and the savings and transitional provisions under section 180 subsection 2(1) and (2) of the Water Resources Management Act No. 21 of 2011 ("the Act") as opposed to the Board of the Authority as constituted under section 11 of the Act.

2. The Honourable trial Court erred in law and in fact when it held that the plaintiff could not have appealed to the Board as provided for in the Act due to its nonexistence.

2. The Honourable trial Court erred in law and fact when it dismissed the appellant's application to dispose the matter on a

point of law despite the mandatory provisions of the Act relating to the appeal procedure under it.”

4.0 APPELLANT’S ARGUMENTS

- 4.1 The gist of the appellant’s submission in relation to ground one was that the respondents prematurely commenced an action before exhausting the available administrative procedures provided for in the Act. Mr. Ngaba, counsel for the appellant pointed out that the cause of action arose from the decision of the Acting Director General of the appellant to grant the 1st defendant a water permit. He asserted that any person aggrieved by the decision of the Director General may appeal to the Board in terms of section 157(i)(b) of the Water Resources Management Act.
- 4.2 He noted that the Board referred to in section 157 is the one constituted under section 11 of the Act as opposed to the Water Board established under the repealed Water Act. It was contended that it was therefore a misdirection for the court below to rely on savings and transitional provisions and the second schedule which refers to the Water Board.
- 4.3 Pertaining to grounds two and three, counsel submitted that the court below had no jurisdiction to determine the dispute before it on the basis that the matter was wrongly commenced. That in terms of section 157 of the Act the correct forum for the respondents’ complaints was the Board and not the High

Court. We were referred to the case of ***Newplast Industries vs The Commissioner of Lands & Attorney-General***¹ where it was held:

“The mode of commencement of any action is generally provided for by the relevant statute and where a statute provides for the procedure of commencing an action, a party has no option but to abide by that procedure.”

- 4.4 Further recourse was made to the case of ***Kansanshi Mining Plc vs Zambia Revenue Authority***² where similar sentiments were made regarding the mode of commencement.
- 4.5 It was Counsel’s contention that the Court below misdirected itself in law and fact when it failed to follow basic principles dealing with the case before it. The correct procedure which ought to have been adopted was the one set out in the Water Resources Management Act of appealing to the Board. We were accordingly urged to allow the appeal.

5.0 RESPONDENT’S ARGUMENTS

- 5.1 On 6th March 2021, Mrs. Harawa, the respondent’s counsel filed heads of arguments and the summary was as follows:
- 5.2 In relation to ground one, it was submitted that the lower court was on firm ground since it based its final decision on the current functions and authority of the Board of the Water Resources Management Act not the defunct Water Board.

- 5.3 It was submitted that the reference to the defunct Water Board and the Transitional provisions were obiter dictum which cannot form the basis of a ground of appeal. To support this proposition our attention was drawn to an Indian case of ***Mohandes Issardas vs. A.N. Sattanathan Air***³ where Chagla CJ drew a distinction between *ratio decidendi* and *obiter dictum* when he opined as follows:

“.... an obiter dictum is an expression of opinion on a point which is not necessary for the decision of a case. This very definition draws a clear distinction between a point which is necessary for the determination of a case and a point which is not necessary for determination of the case. But in both cases points must arise for the determination of the Tribunal. Two questions may arise before a court for its determination. The court may determine both although only one of them may be necessary for the ultimate decision of the case. The question which was necessary for the determination of the case would be the ‘**ratio decidendi**’; the opinion of the Tribunal on the question which was not necessary to decide the case would be only an ‘**obiter dictum**’.”

- 5.4 Counsel argued that for purposes of the *ratio decidendi* the lower court correctly interpreted section 11 of the Act which established the Board and section 157 which recognizes the appellate authority of the Board. The court subsequently rejected the appellant’s position and held that it was illogical for the respondents to appeal to a non-existent Board.

Counsel chose to ride on the coat tails of the case of ***Micheal Mabenga vs Sikota Wina and 2 Others***⁴ where it was held:

“We declined to allow the application because that remark by the learned trial Judge was an obiter dictum that did not go to the root of the Judgment.”

- 5.5 The thrust of the respondent’s contention in relation to ground two was that the water permit which is the subject of the proceedings in the court below was in fact issued under the authority of the Permanent Secretary as opposed to the Director General. There was therefore no conflict between the mode of commencement and the matter herein in view of the fact that the Permanent Secretary is not one of the officers listed in section 157 of the Act whose decision may be appealed to the Board. The case of ***Sanhe Mining of Zambia Ltd vs Andrew Mazimba & Tirumala Balaji (Z)***⁵ was cited as authority for her proposition.
- 5.6 On the issue of jurisdiction, learned counsel argued that the absence of a statutory provision for appeal from a decision of a Permanent Secretary justifies recourse to the High Court since it has unlimited and original jurisdiction. It was submitted that a decision by the Acting Director General could still be validly challenged in the High Court owing to the non-constitution of the Board.
- 5.7 Pertaining to ground three, counsel for the respondent asserted that the lower court was on firm ground when it held

that the matter revealed triable and contentious issues which require full determination as opposed to mere disposal on a point of law.

- 5.8 In the alternative, it was averred that the appellant did not comply with the legal pre-requisite to file a memorandum of appearance and defence as guided by the Supreme Court in the case of ***African Banking Corporation Zambia vs Mubende Country Lodge***⁶. The appellant only filed a conditional memorandum of appearance. We were accordingly called upon to provide guidance on the issue and consequently dismiss the appeal for lack of merit.

6.0 HEARING OF THE APPEAL

- 6.1 At the hearing of the appeal on 21st October 2021, counsel for the appellant Mr. Ngaba placed full reliance on his heads of arguments and reiterated his plea for the appeal to be allowed. On the other hand Mrs. Harawa on behalf of the respondent equally relied on her filed heads of arguments with brief augmentation. In relation to the third ground of appeal she called in aid the case of ***Newsdiggers Mukosha Funga vs Given Lubinda, Jean Kapata, Tasila Lungu***⁷. She hinged her argument on the fact that the appellant had never filed a memorandum of appearance and defence and therefore we had no jurisdiction to hear the application that was the subject of this appeal. She accordingly prayed that the appeal be dismissed with costs.

- 6.2 Mr. Ngaba in his short rebuttal stated that matters not raised in the court below could not be raised at this stage. Fortification for this argument was placed on the case of ***Vengelato & Others vs Metro Investments Ltd⁸***.

7.0 CONSIDERATION AND DECISION OF THIS COURT

- 7.1 In arriving at our decision, we have painstakingly examined the record, the ruling sought to be impugned and the spirited arguments by both parties, including the various authorities called in aid. There are three issues that we have been called upon to determine in this appeal. The first one is in relation to the reference to a repealed Act by the learned trial Judge. The second one relates to what was the correct mode of commencement. Thirdly, whether or not the court had the requisite jurisdiction to deal with the matter.
- 7.2 The argument in the first ground of appeal as we understand it is that the court erred by referring to the Water Board under the repealed Act as opposed to the Board of the authority constituted under section 11 of the Water Resources Management Act. The long and short of the appellant's arguments is that the court fell in error by using the wrong provisions and has strongly condemned it for so doing. According to the appellant, the correct provisions are enshrined in section 157(1) as read with (9) which provide for

hierarchy for appeal as well as timelines when appeals should be heard.

- 7.3 The contention on the part of the respondent is that the court's reference to the defunct water board and the transitional provisions were obiter dictum and could not form the basis of a ground of appeal. They have forcefully argued on the distinction between *ratio decidendi* and *obiter dictum* and have adverted to a number of cases to support their argument that the remarks were obiter dictum. Scrutiny of the opposing arguments and the judgment sought to be impugned, we are persuaded by the solidity of the arguments by Mr. Ngaba, learned counsel for the appellant. The court below did indeed err by referring to a repealed Act. The correct provisions as rightly pointed out by Mr. Ngaba are section 157(1) as read with (9) of the Water Management Act.
- 7.4 We do not agree that the remarks were obiter dictum for the simple reason that reference to the Water Board as opposed to the Board of the Authority is significant. The significance arises from what recourse the respondents would have. Therefore, the respondents cannot simply wish away the remarks of the Judge and consider them to be obiter dictum as they have a remarkable bearing on the process.
- 7.5 We therefore hold the view that there is merit in the first ground of appeal on the basis of what we have stated. We accordingly uphold it.

7.6 The second ground of appeal is attacking the mode of commencement. The appellant has criticized the court below for holding that the respondents could not have appealed to a non-existent board. The thrust of the argument by the appellant is that where there is a mode of commencement that has been prescribed by statute that is the one that should be used. In other words, a party ought to apply the procedure under the applicable statute. In relation to the appellant, the applicable provision is section 157 which stipulates the procedure that ought to be followed. For ease of reference section 157 of the Water Resources Management Act provides as follows:

*“157. (1) Where no specific provision is specified under this Act providing for an appeal or the process for appeal by **any person aggrieved by a decision of-***

- (a) a catchment council, sub-catchment council or a water users association, that person may appeal to the Director-General;*
- (b) **the Director-General, that person may appeal to the Board;***
- (c) the Board, that person may appeal to the Minister; or*
- (d) the Minister, that person may appeal to a court of competent jurisdiction.”*

7.7 What emerges from the foregoing is that a person aggrieved by the decision of the Director General may appeal to the Board. After the Board, they can appeal to the Minister and it is only after the appeal from the Minister that the Court can entertain an appeal. A plethora of authorities were adverted to cement

the appellant's position namely: ***Newplast Industries vs Commissioner of Lands, Attorney General***¹; and ***Kansanshi Mining vs Zambia Revenue Authority***², which articulate the principle that where the mode of commencement has been provided for by the relevant statute, a party has to abide by that procedure.

- 7.8 The respondent's view is that the water permit was issued by Permanent Secretary and therefore she was not one of the officers in the contemplation of section 157 of the Act whose decision needed to be appealed to the Board.
- 7.9 Having pondered over these arguments, it is clear to us that the pertinent provision in the Water Resources Management Act is section 157 which outlines the procedure to be followed by a person aggrieved with the decision of the Director General. It is crystal clear that the statute has provided for a procedure and where a procedure has been stipulated, the parties should comply with that procedure. Fortification for this proposition can be found in the cases of ***Newplast***¹ and ***Kansanshi Mining***², among others. It was not up to the respondent to cherry pick what procedure to adopt. Travelling the route of the High Court under the guise of the High Court having original and unlimited jurisdiction cannot fly in the face of the ***Newplast***¹ case.
- 7.10 Mr. Ngaba is therefore sure-footed to rely on the ***Newplast***¹ case and state that the mode of commencement of an action is

not dependent on the relief sought, but on what the statute provides as a mode of commencing an action.

7.11 In light of the foregoing, we come to the inescapable conclusion that the court below misdirected itself in law and fact by dismissing the appellant's application to dispose of the matter on a point of law. The respondents having used a wrong mode of commencement, the court below was duty bound to dismiss the matter as it was not clothed with the requisite jurisdiction to deal with it. The matter was improperly before the court on account of wrong mode of commencement. In a nutshell, we conclude by stating that failure by the respondents to commence proceedings using the applicable statute that is the Water Resources Management Act pursuant to section 157, entailed that or the effect of that is that consequently, the High Court had no jurisdiction to determine the dispute. At the cost of being repetitive, the High Court in relation to section 157 of the aforecited Act only has appellate jurisdiction to entertain a matter brought by way of appeal from the Minister. The matter was incompetently before the court for want of jurisdiction. The non-existence of the board does not vitiate the provisions of the Act.

7.12 Reacting to the argument that the decision was made by the permanent secretary, our response is that it does not take away from the provisions of the law. We therefore, find merit in ground two.

7.13 Pertaining to the third ground of appeal which is on the question of jurisdiction, in our considered view, this is intertwined with the second ground of appeal. We say so on the basis that where a wrong mode of commencement was adopted by a party, the court has no jurisdiction to entertain the matter.

7.14 In light of the foregoing, we find merit in grounds two and three.

7.15 Before we conclude, we have noted that the respondent presented an alternative argument that the lower court was on firm ground when it dismissed the appellant's application for it did not comply with the legal pre-requisite to file a memorandum of appearance and defence. Counsel has stated that notwithstanding the fact that the lower court did not direct its mind and ruling on this point, it was her belief that we should provide guidance on the issue as per the Supreme Court holding in the case of ***African Banking Corporation Zambia vs Mubende Country Lodge***.⁶

7.16 Her contention was that the appellant ought to have filed a memorandum of appearance and defence. We are of the considered view that this is a matter which should have come by way of cross appeal if Counsel needed our determination. We are therefore of the view that it would be inappropriate for us to deal with this issue in the manner it has been brought through arguments in response.

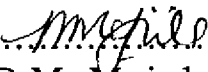
7.17 For the foregoing reasons we decline the invitation to provide guidance in this respect.


8.0 CONCLUSION

8.1 In sum we find merit in all three grounds of appeal.

8.2 Costs follow the event to be taxed in default of agreement.


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F.M. Chishimba
COURT OF APPEAL JUDGE


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B.M. Majula
COURT OF APPEAL JUDGE


.....
M.J. Siavwapa
COURT OF APPEAL JUDGE