SCZ Judgment No. 40/2014

IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 86/2013**

HOLDEN AT LUSAKA

(Civil jurisdiction)

BETWEEN:

SHOPRITE HOLDINGS LIMITED **1st Appellant**

SHOPRITE CHECKERS (PTY) LIMITED **2nd Appellant**

AND

LEWIS CHISANGA MOSHO **1st Respondent**

LEWIS NATHAN ADVOCATES (sued as a firm)
2nd Respondent

Coram: Mwanamwambwa, Ag. DCJ, Muyovwe and Wood, JJS.

On 10th July, 2014 and 22nd August, 2014

For the Appellants: Mr. William Boli Nyirenda, SC-Messrs William Nyirenda & Co.

For the 1st Respondent: Ms. L. Kasonde– Messrs Mulenga Mundashi & Company.

For the 2nd Respondent: Mr. K. Chenda-Messrs Simeza Sangwa &

Associates.

JUDGMENT

Wood, JS, delivered the Judgment of the Court.

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Cases referred to:

1. **Philip Mutantika & Mulyata v Kenneth Chipungu, SCZ Judgment No. 13 of 2014 (unreported).**
2. **July Danobo T/A Juldan Motors v Chimsoro Farms Limited (2009) Z.R.148.**
3. **Leonard Mungabangaba v The Attorney General (1981) Z.R. 183.**
4. **Jefferson Limited v Bhetcha (1979) ALL ER. 1108.**
5. **Regina v British Broadcasting Corporation, Ex parte Lavelle (1983) 1 All ER 241.**
6. **Versailles Trade Finance Limited (In Administrative Receivership) v Clough [2001] EWCA Civ 1509, LS Gaz r 34.**
7. **Law Society of the Cape of Good Hope v M.W Randel (341/2012)[2013] ZASCA 36.**
8. **Mususu Kalenga Building Limited & another v Richmans Money Lenders Enterprise (1999) Z.R. 27.**
9. **Walsh Securities Inc v Cristo Property Management, Ltd., et als, 7F Supp 2d, 523.**
10. **Securities and Exchange Commission v Dresser Industries and others, 628 F.2d.**
11. **Mote v Secretary of State for Work and Pensions & Chichester District Council (2007) EWCA Civ 1324.**
12. **In Micro-financial Inc. v Premier Holidays Intern. Inc, 385 F.3d 72, 77 (1st circuit 2004).**

13. Landis v North American Co., 299 U.S. 248 (1936).

14. The Attorney General for Zambia v Meer Care & Desai and 19 others (2006) EWCA Civ 390.

15. Akcine Bendrove Bankas Snoras v Antonov and another (2013) EWHC 131 (Comm).

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LEGISLATION REFERRED TO:

1. **The Supreme Court Act, Cap 25 of the Laws of Zambia.**
2. **The Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia.**
3. **White Book, 1999 Edition, Volume 2.**

OTHER WORKS REFERRED TO:

Halsbury's Laws of England, 4th Edition Reissue, Volume 37.

For convenience we shall refer to the appellants as the plaintiffs and to the respondents as the defendants, which is what they were in the court below. The 2nd defendant raised a preliminary issue prior to the hearing of this appeal. When this appeal was argued, we had indicated that we would deliver a single judgment covering the preliminary issue raised and the appeal itself. We now do so. We propose to deal firstly with the preliminary issue.

On 27th May, 2014, the 2nd defendant filed a notice to raise a preliminary issue pursuant to **Rule 19(1) and (2) of the Supreme Court Rules, Cap 25 of the Laws of Zambia**. The question raised in the notice was whether this appeal was properly before this

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Court in view of the plaintiffs' non-compliance with the provisions of **Rule 58(4) (h) and (i) of the Supreme Court Rules**.

Mr. Chenda, who was counsel for the 2nd defendant, firstly argued that the record of appeal must be in the prescribed form stipulated in **Rule 58(4) (h) and (i) of the Supreme Court Rules**. The relevant parts of **Rule 58 of the Supreme Court Rules** in so far as this preliminary issue is concerned read as follows:

> **"(4) The record of appeal shall contain the following documents in the order in which they are set out:**
>
> **(h) Copies of all affidavits read and all documents put in evidence in the High Court, so far as they are material for the purposes of**

this appeal……other documentary evidence shall be arranged in strict order of date, without regard to the order in which the documents were submitted in evidence;

(i) Such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant to the appeal."

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Mr. Chenda submitted that the use of the word "shall' in **Rule 58(4) of the Supreme Court Rules**, makes its provisions mandatory and relied on the case of **Philip Mutantika & Mulyata v Kenneth Chipungu[1],** in which we held as follows:

> **"…our response is that Rules 70(1) of the SCR and 58(5) as amended by Statutory Instrument No. 26 of 2012 are mandatory. Both provisions are couched in a mandatory manner as each uses the word "shall". The two Rules are therefore not regulatory as they do not give the Court discretionary power."**

He submitted that the consequence of non-compliance with a mandatory provision was that the appeal may be dismissed as

provided for in **Rule 68 (2) of the Supreme Court Rules**, which states that:

> **"If the record of appeal is not drawn up in the prescribed manner, the appeal may be dismissed."**

The case of **July Danobo T/A Juldan Motors v Chimsoro Farms Limited**[2] was relied upon in support of the argument that an appeal may be dismissed if the record of appeal is incomplete. We held as follows in that case:

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> **"As afore-stated, failure to compile the record of appeal in the prescribed manner is visited by sanctions under Rule 68(2) of the RSC. The sanction is that the appeal may be dismissed. In this case there is no doubt and as admitted by the learned counsel for the appellant that the record of appeal is incomplete as the record of proceedings in the Court below is missing. It follows that the record of appeal has not been prepared in the manner prescribed by the Rules of this Court. We therefore invoke the provision of Rule 68(2) and dismiss this appeal."**

Mr. Nyirenda, State Counsel, who was counsel for the plaintiffs, disagreed with Mr. Chenda's arguments and drew the

Court's attention to **Rule 19(1) of the Supreme Court (Amendment Rules) of 2012,** which requires a respondent to file a preliminary objection not less than seven days prior to the hearing of the appeal and give notice thereof to the other party to the appeal. The preliminary objection was filed on 27th May, 2014 and the appeal came up for hearing on 3rd June, 2014. He argued that time should be computed from the date of the occurrence and to this effect cited **Section 35(a) of the Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia** which states so. State Counsel also relied on the case of **Leonard Mungabangaba v**

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The Attorney General[3], in which it was held that the computation of time should be exclusive of the day on which the actual detention order was signed. His response to the mandatory nature of **Rule 58 (4) of the Supreme Court Rules** was that although the word "shall" as used in **Rule 58 of the Supreme Court Rules** is mandatory, the phrase should be construed as a whole and the word "shall" should not be construed in isolation.

State Counsel Nyirenda also submitted that the material facts in the affidavits to the effect that the 1st defendant was facing other criminal charges were not in dispute. In fact, the affidavits did not contain any factual issues that were in dispute. What was at the heart of the appeal was a legal argument, which argument as a matter of fact, could not be in the affidavits. To that extent, both affidavits alleged to have been left out were immaterial to the appeal at hand. The question at hand was, whether or not both a criminal and a civil case on the same facts, could proceed at the same time. Material facts were not in dispute hence irrelevant and thus their

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omission. He also relied on **Rule 59(1) of the Supreme Court Rules** which states that:

> **"If the Respondent is of the opinion that the record filed by the appellant is defective, he may, without prejudice to his rights, if any, under Rule 68, file five copies of a supplementary Record of Appeal containing copies of any further documents,**

which in his opinion are required for the proper determination of the appeal."

He submitted that **Rule 59 (1) of the Supreme Court Rules** makes no mention of an appellant filing a supplementary record where the record of appeal filed by the appellant is alleged to be defective. He contended that it was for a respondent, in his discretion as provided by the law, to file the supplementary record.

We are grateful to counsel for the submissions in connection with the preliminary issue raised. We have also perused the record of appeal before us and considered the submissions in connection with the preliminary issue. There is no dispute that certain material documents, namely a summons, an affidavit in support of the application to stay proceedings and an affidavit in opposition

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pertaining to this appeal, were omitted from the record of appeal. These documents, according to Mr. Chenda, formed the basis of

this appeal. This point, although valiantly denied by the plaintiffs, was conceded to in the affidavit in opposition by Mr. Kennedy Bota on 9th June, 2014, showing that the transgression had been rectified. This, however, was not enough to assuage Mr. Chenda who, when the matter was heard, submitted that the interlocutory summons that gave rise to the ruling was missing yet again. The issue that arose as a result of these glaring lapses on the part of the plaintiffs was whether or not the appeal should be dismissed.

Mr. Chenda's argument that we should follow our decision in the case of **July Danobo T/A Juldan Motors v Chimsoro Farms Limited**[2] is an attractive one, but a close reading of that case shows that it can be distinguished on the facts alone. In that case, the record of appeal was so incomplete that it was not possible to make any meaningful sense out of it. The supplementary record of appeal was equally incomplete. We held, in that case, that the sanction is

that the appeal may be dismissed for filing an incomplete record of appeal. In the case at hand, the plaintiffs substantially complied with **Rule 58 of the Supreme Court Rules** when they filed an affidavit in opposition.

The question, however, is whether or not this appeal should be dismissed for non-compliance. **Rule 68 (2) of the Supreme Court Rules** uses the word **“may”** which gives the Court discretion to dismiss the appeal if it is not drawn up in the prescribed manner. Our view is that the exercise of this discretion depends upon the facts as presented. While we agree with State Counsel Nyirenda that **Rule 59 of the Supreme Court Rules** allows a respondent to file a supplementary record of appeal, our view is that it does not take away a respondent’s right to apply to dismiss the record of appeal for non-compliance with **Rule 58 (4) of the Supreme Court Rules**. It is therefore not entirely correct, as was argued by State Counsel Nyirenda, that the 1st defendant should have filed a supplementary record of appeal if he thought that there was non-compliance on the

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part of the plaintiffs. The primary duty is on an appellant to file a record of appeal which complies **with Rule 58 (4) of the Supreme Court Rules**. A supplementary record is filed by a respondent, if the respondent feels that the original record of appeal is incomplete in so far as a particular issue is concerned. The preliminary issue raised by Mr. Chenda, particularly in respect of this appeal was important because as a Court, we needed to know what the facts leading to the appeal were. We do not, therefore, accept the argument by State Counsel Nyirenda that the missing affidavits were immaterial and what was material in them was in the ruling. A properly compiled record of appeal is of assistance to the parties and the court, as this aids in the proper and orderly administration of justice. We are, however, of the view that this is not an application in which we can exercise our discretion in favour of the 2nd defendant as the breach is curable and was in fact cured for the purposes of this appeal. The preliminary issue is therefore dismissed, with costs to the plaintiffs.

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We will now deal with the main appeal. The appeal is against a decision of the High Court staying civil proceedings pending the determination of concurrent criminal proceedings against the 1st defendant who is a legal practitioner in the 2nd defendant law firm. It is necessary to give a brief background leading to this appeal. On 1st September, 2011, the plaintiffs commenced an action against the defendants over alleged breaches by the defendants, of instructions given to them by the plaintiffs. The plaintiffs were concerned about the manner the defendants had executed instructions regarding the plaintiff's shares that were listed on the Lusaka Stock Exchange (LuSE) both as transfer agents and as resident director of the 1st plaintiff company. The plaintiffs alleged that the defendants had not accounted for all sales and dealings in the plaintiff's shares. The plaintiffs wanted an order that an account be rendered by the defendants and that payment be made to them of whatever was found to be due to them. In the record of appeal before us, there is no indication of any defence

having been filed by the defendants to the amended statement of claim filed on 31st

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January, 2012. The record of appeal is, however, replete with interlocutory applications.

The defendants had applied before the High Court that these proceedings should be stayed pending the determination of the criminal proceedings in the Subordinate Court at Lusaka, as the criminal proceedings were touching on the same issues as in this case. The affidavit in support of the application to stay the proceedings stated that the 1st defendant was, on 9th November, 2012, arrested and charged with eight counts of theft by agent and four counts of money laundering arising out of the same facts as those in the civil case. In respect of the eight counts of theft by agent, the particulars or statements of the offence alleged that the 1st defendant, on stated dates, being a resident director and transfer agent of the 1st plaintiff and a partner in the 2nd defendant law firm, who were the transfer secretaries to the 1st

plaintiff, stole certain sums of money through cheques drawn on the law firm's account at certain banks, which money the 1st defendant had received on account of the 1st plaintiff. With regard to the four

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counts of money laundering, the allegation against the 1st defendant was that he used the money stolen in the above incidents, which money was the proceeds of crime, to purchase certain properties.

The defendants contended that the criminal proceedings would prejudice their case before the High Court owing to the fact that the criminal proceedings would dwell greatly on the same evidence and facts to be raised before the High Court. The court below was invited to consider **Paragraph 20A-358 at page 1643, of the White Book, 1999 Edition, Volume 2** which reads as follows:

> **"Where there are concurrent civil and criminal proceedings against the same defendant arising out of the same subject matter, there is no principle of law that the plaintiff in the civil**

proceedings is to be debarred from pursuing the action in accordance with the normal rules merely because so to do would or might result in the defendant, if he wished to defend the action, having to disclose his defence by taking some necessary procedural step, and so give an indication of what his likely defence was likely to be in contemporaneous criminal proceedings, but the civil court has a discretion to stay the proceedings if it appeared to the court that justice between the parties so required, having regard to concurrent

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criminal proceedings arising out of the same subject matter and taking into account the defendant's "right of silence" in the criminal proceedings.

There was no overriding right based on the privilege against self incrimination, to have a civil action stayed pending the conclusion of the criminal proceedings. It was for a defendant to seek to avail himself of the privilege to take specific objection on an application at some point in the interlocutory stages of a civil action."

The court also considered the case of **Jefferson Limited v Bhetcha**[4] in which it was held that:

"An important factor to be taken into account by the court in deciding whether to grant a stay … was whether there was a real and not merely a potential, danger that the disclosure of the defence in the civil action would lead to a potential miscarriage of justice in the criminal proceedings."

The above case goes on to state at page 1113 that:

> **"… the burden is on the defendant in the civil action to show that it is just and convenient that the plaintiff's ordinary rights of having his claim processed and heard and decided should be interfered with. Of course, one factor to be taken into account, and it may well be a very important factor, is whether there is a real danger of the causing of injustice in the criminal proceedings."**

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Upon a further analysis of the affidavit evidence and the submissions that were before him, the learned trial Judge came to the conclusion that there was an obvious coincidence of parties. The 1st plaintiff was the proponent while the 1st defendant was the respondent in the civil proceedings, while the 1st plaintiff was the complainant and the 1st defendant the accused person in the criminal proceedings. He also relied on the similarities in dates relating to the issues in both the civil and criminal proceedings. He then reached the conclusion that the 1st defendant would be prejudiced in the criminal proceedings if the civil proceedings were allowed to proceed and the defendants were compelled to

file their defence which might disclose information that could be used against them in the criminal proceedings. The learned trial Judge allowed the application on the ground that there was likely to be self-incrimination which would be extremely unjust to the 1st defendant.

State Counsel Nyirenda, advanced three grounds of appeal on behalf of the appellants, but abandoned the first ground of appeal

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relating to **Section 10 of the High Court Act and Order 3 Rule 2 of the High Court Rules**.

He contended, in respect of ground two, that the court below erred in law and in fact to hold that the defendants would be prejudiced in the criminal proceedings if the civil proceedings were allowed to proceed and the 1st defendant was compelled to file a defence that may disclose information which may be used against him in the criminal proceedings. Under ground 3, State counsel Nyirenda contended that the learned trial Judge erred in

law and in fact when he found that there was merit in the defendants' application and stayed the civil proceedings in the High Court pending the determination of the criminal proceedings in the Subordinate Court or until further order of the court. We propose to deal with grounds two and three of the appeal together as they raise similar issues.

State Counsel Nyirenda, relied on **Paragraph 20A-358 at page 1643 of the White Book, 1999 Edition** and submitted that the

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principle referred to therein was adopted in the case of **Jefferson Limited v Bhetcha**[4], which was accepted and quoted with authority in the matter of **Regina v British Broadcasting Corporation, Ex parte Lavelle**[5]**.** He was of the view that each case must be judged on its facts and that the burden was on the defendant in the civil action, to show that it was just and convenient that the plaintiff's ordinary rights of having his claims processed, heard and decided, be interfered with. This is in

addition to there being a real, and not merely notional, danger that the disclosure of the defence in the civil action would or might lead to a potential miscarriage of justice in the criminal proceedings.

State Counsel Nyirenda went on to submit that although the defendants were, from a procedural point of view, required to file a defence if they wished to contest the matter, the mere filing of such a defence did not give rise to a necessity on the part of the court to intervene and stay civil proceedings. He argued that the mere disclosure of a defence, which would have the result that the 1st defendant might be giving an indication of what his defence was

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likely to be in the contemporaneous criminal proceedings, should not debar the plaintiffs from pursuing that action in accordance with the normal rules for the conduct of civil actions. He contended that the requirement to file a defence in terms of civil procedure was not tantamount to a state of compulsion to

incriminate oneself. This was the view taken in the case of **Versailles Trade Finance Limited (In Administrative Receivership) v Clough**[6] when the court held as follows:

> **"The privilege against self-incrimination was against being 'compelled' and that had to mean being compelled by lawful authority or 'compelled on pain of punishment' to answer questions or produce documents or to produce evidence or information. So far as pleading a defence was concerned, there was no 'compulsion' to put in a defence, and even if anything was pleaded there was no compulsion to plead anything which provided information to a claimant. The claimant could be put to proof. So far as pre-trial proceedings were concerned, it was only if the claimant sought to 'compel' discovery and the production of a document or 'compel' an answer to an interrogatory in order to assist his case that the privilege would appear to arise. Where a claimant could establish his claim without reference to interrogatories or disclosure then a privilege against self-incrimination would not be relevant. Moreover, the issue whether a defendant would be entitled to a stay,**
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> **adjournment or postponement of an application for summary judgment was a matter for the discretion of the judge to be exercised in accordance with the normal rules for the conduct of civil actions. That discretion would only be exercised where there is real danger of causing injustice in the criminal proceedings and it would be difficult to see how, in putting**

forward material to rebut a claimant's contention that there was no real prospect of his being able to successfully defend a claim, a defendant would be in any danger of incriminating himself."

State Counsel Nyirenda also submitted that the learned trial Judge erred when he ordered the stay of the civil proceedings as there was no compellability in the present case. He contended that the defendants did not establish the likelihood of prejudice as required by law. He also stated that this matter is of public importance as the 1st defendant is an officer of the Court, whose position requires scrupulous integrity and honour. Further, that the learned trial Judge should have considered that this matter is of public concern, as it affects the shareholders rights to enjoy dividends. In support of his submissions, State Counsel Nyirenda

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relied on the case of **Law Society of the Cape of Good Hope v M.W Randel[7].**

Mr. Chenda contended, on the other hand, in respect of grounds two and three of the appeal, that none of the arguments advanced by the plaintiffs were canvassed in the court below whether in writing or *viva voce,* when the application came up for hearing on 22nd February, 2013. He pointed out that in the court below, the plaintiffs opposed the application on the ground that civil proceedings could not be stayed merely because of criminal proceedings on the same facts, as the two processes were entirely different and that there were no exceptional circumstances to support the application. He submitted that the plaintiffs were therefore stopped from raising issues not canvassed in the court below and to this effect, relied on the case of **Mususu Kalenga Building Limited & another v Richmans Money Lenders Enterprise[8],** in which we held that it is not competent for a party, on appeal, to raise issues that were not raised in the court below.

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In the alternative, Mr. Chenda submitted that on the issue of compulsion, it was a practical reality on the part of the 1st

defendant that failure to file a defence would result in a default judgment which would possibly lead to the defendants' bankruptcy. He contended that the 1st defendant would be prejudiced as it was possible that whatever would be raised in the 1st defendant's civil proceedings, would most likely be used in the criminal proceedings, directly or indirectly, thereby eroding the privilege against self-incrimination. Mr. Chenda further pointed out that there was an alleged breach and failure to account for the sums of K3,276,189.33 and K46,300,443.19 (rebased). He contended that as such, the defendants were practically compelled to defend themselves as the consequences of default included a default judgment and enforcement.

Additionally, Mr. Chenda argued, there was no evidence brought before the Court to show that the plaintiffs would suffer any prejudice if the proceedings were stayed. Instead, all the lower court was faced with was evidence from the 1st defendant to the

effect that in the absence of a stay of proceedings, he would suffer prejudice as he would have to settle a defence in the civil case which could be used against him in the criminal proceedings. He also submitted that the plaintiffs had not demonstrated that there were any safeguards that could have practically worked, and how so, given the circumstances presented by the 1st defendant to the lower Court.

He also argued that the mere fact that the 1st defendant was a legal practitioner did not deprive him of the right to a fair criminal trial, and no authority had been advanced to canvass the argument that where a legal practitioner is facing criminal charges, the public interest in prosecuting him immediately, outweighed the risk of any prejudice occasioned to him, if the prosecution was done concurrently with civil proceedings arising from the same circumstances. It was also contended that the argument raised by the appellant in relation to the position of shareholders enjoying dividends as a matter of public concern was not supported by any authority and there was no determination that a party would not be

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able to exercise the right to dividends or other shareholders' entitlements.

Ms. Kasonde on behalf of the 1st defendant submitted *viva voce.* She relied heavily on the authorities she cited and in particular, on the American case of **Walsh Securities Inc v Cristo Property Management, Ltd, et als**[9] in which the United States District Court of New Jersey granted a motion to stay proceedings pending the outcome of related criminal investigations. We must, however, state that this case should be distinguished from the current appeal as the criminal proceedings have gone beyond an investigation and are currently in the subordinate court. Further in that case, the stay was for a specific period while in this appeal, the defendants have obtained an open ended stay. Ms. Kasonde also relied on the case of **Securities and Exchange Commission v Dresser Industries and others**[10]**,** which was another case involving an investigation. This case, however, recognises that civil and regulatory laws of the

United States frequently overlap with criminal laws, creating the possibility of parallel civil and criminal

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proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under the American jurisprudence.

We are indebted to counsel for the submissions in respect of this appeal. With regard to the argument that State Counsel Nyirenda has raised new issues that were not canvassed in the lower court, we wish to state at once that Mr. Chenda has adopted a very restrictive interpretation of our judgment in **Mususu Kalenga Building Limited & another v Richmans Money Lenders Enterprise**[8]. An issue at law is a point in dispute between two or more parties. It is a single, certain material point arising out of the allegations and contentions of the parties; it is a matter affirmed on one side and denied on the other. The issue raised in the Court below was whether, on the given facts, criminal and civil proceedings could proceed

concurrently. The facts before us are still the same and the issues surrounding those facts are still the same. What has changed are not the facts and the issues, but the legal

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interpretation of these facts and issues. A number of authorities that were not raised in the fog of the legal battle in the court below have now been raised before this Court. In our view, there would be no point in appealing if an appeal was only a rendition of the arguments in the court below without any room for developing an argument on the same set of facts and issues. Our considered view is that nothing new is being raised or added to this appeal. This argument must, therefore, fail.

Mr. Chenda also argued that the mere fact that the 1st defendant was a legal practitioner does not deprive him of the right to a fair criminal trial. We agree with this argument because a legal practitioner, like any other citizen, has a constitutional right to a fair criminal trial. However, State Counsel Nyirenda's reference to the 1st defendant being an officer of the court and to

the scrupulous integrity and honour to be exhibited by a legal practitioner does not mean that a legal practitioner should be deprived of a fair criminal trial by virtue of their profession.

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We now turn to the decision by the learned trial Judge to stay the civil proceedings. It is quite apparent from the authorities cited that a defendant cannot simply raise the issue of concurrent criminal proceedings and hope to obtain a stay. The threshold for a stay of civil proceedings due to concurrent criminal proceedings is quite high. This is evident even from the authorities cited by Ms. Kasonde. The authorities cited all state that a party is not debarred by virtue of the fact that there are ongoing criminal proceedings. This position is supported by paragraph 20A-358 of the **White Book Volume 2, 1999 Edition referred to above.** Further, Paragraph 858 of **Halsbury's Laws of England, 4th Edition Reissue, Volume 37,** states the following on an application to stay a claim where there are related criminal proceedings:

“The evidence in support of the application must contain an estimate of the expected duration of the stay and must identify the respects in which the continuance of the civil proceedings may prejudice the criminal trial.”

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It is therefore cardinal for an applicant to establish that he would be prejudiced by the continuance of the civil proceedings as there is no right to silence in the context of civil proceedings. In addition, if a defendant has a positive defence, the criminal law expects him to adumbrate it at an early stage if there is to be a danger of adverse inferences being drawn so that disclosure of a defence in civil proceedings is unlikely to disadvantage a defendant in criminal proceedings.

Further, on the issue of compulsion, there is nothing in the record of appeal before us which indicates that the defendants were under compulsion or that coercive means were to be employed in the civil proceedings. The evidence of the 1st defendant in his affidavit in opposition to an injunction and a

freezing order shows that certain payments were made in cash to a T. Van Tonder. This is in itself, indicative of a possible defence available to the defendants. We, therefore, accept the reasoning in **Mote v Secretary**

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of State for Work and Pensions & Chichester District Council[11], where it was stated as follows:

> **"First, there was no right to silence in the context of civil proceedings. Second, if a defendant had a positive defence, the criminal law now expected him to adumbrate it at an early stage if there was to be a danger of adverse inferences being drawn or adverse comment made; so that disclosure of a defence in civil proceedings was unlikely to disadvantage a defendant in criminal proceedings. Third, it was legitimate to start from the position that a positive defence was likely to exculpate rather than incriminate; and the judge was entitled to take into account that the defendant had chosen not to provide any answer to the claimant's allegations. The reasoned judgment would be available to the prosecuting authorities, but the suggestion that they might use it was fanciful; no reliance could be placed on it in the criminal trial so as to prove the guilt of the defendant, and the fact of**

judgment did not take them any further than the assertions in the points of claim."

It seems to us that the learned trial Judge relied heavily on the fact that the plaintiffs in the civil proceedings were also the complainants in the concurrent criminal proceedings. While this is a factor to be taken into consideration when determining whether or

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not to stay proceedings, it is not the only factor. There has to be a balancing act as was decided in the case of **Jefferson Limited v Bhetcha[4],** between the competing interests of the parties and the 'right of silence' of an accused person. **In Micro-financial Inc. v Premier Holidays Intern. Inc[12],** the first circuit provided some common sense guidance as to when a stay should be granted, when it stated that:

"The touchstone of course, is that a district Court's discretionary power to stay civil proceedings in deference to parallel criminal proceedings should be invoked when the interests of justice, counsel in favour of such a course. The determination is highly nuanced. The decision to grant or deny a stay involves competing interests. Balancing these interests is a situation specific task,

and an inquiring Court must take a careful look at the idiosyncratic circumstances of the case before it. Notwithstanding that each instance is *sui generis*, the case law discloses five factors that typically bear on the decisional calculus:

i. **The interests of the civil plaintiff in proceeding expeditiously with the civil litigation, including the avoidance of any prejudice to the plaintiff should a delay transpire,**
ii. **The hardship to the defendant, including the burden placed upon him should the cases go forward in tandem,**
iii. **The convenience of both the civil and criminal Courts,**

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iv. **The interests of third parties; and**
v. **The public interest."**

We agree with State Counsel Nyirenda that the learned trial Judge should have taken into consideration the competing interests before arriving at a decision to stay proceedings**.** Our view is that equally, there was no balancing act of such competing interests. In the case of **Landis v North American Co[13],** the Supreme Court stated that:

> **"The power to stay proceedings is incidental to the power inherent in every Court to control the disposition of the causes on its dockets with economy of time and effort for itself, for counsel and for litigants. How this can best be done calls for**

the exercise of judgment, which must weigh competing interests and maintain an even balance… True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward…"

Further, in the case of **Attorney General for Zambia v Meer Care & Desai and 19 others**[14] it was held that proceedings should not be stayed if safeguards can be imposed in respect of the civil proceedings which provide sufficient protection against the risk of injustice. The trial Court, in trying to balance the competing

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interests and in refusing a stay of civil proceedings stated as follows:

"There is a short way to deal with this as I indicated in argument. It is to ring fence the English proceedings [civil proceedings]. Thus the proceedings take place in private and an order is made that none of the evidence adduced by the defendants can be used against them in criminal proceedings nor any of the documents disclosed by them in these proceedings be used in the criminal proceedings, unless they agree or the Court otherwise orders. The result would, therefore, be that there could be no possible abuse of the

criminal proceedings and the defendants' right to silence and the way in which they conducted their criminal defences."

Similarly, in the case of **Akcine Bendrove Bankas Snoras v Antonov and another**[15], the commercial Court declined an application to vary a worldwide freezing injunction and stay of civil proceedings generally, pending the outcome of connected extradition proceedings on the basis that the prejudice that would be suffered by the bank and its creditors by delaying the opportunity to pursue an action to recover funds, outweighed any inconvenience or prejudice to the applicant from the continuation of

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the civil proceedings. Gloster J. did, however, impose certain safeguards to protect the applicant from the risk of self-incrimination or other prejudice in any criminal proceedings. These safeguards included the provision that no statement of case could be used by the Lithuanian authorities in any subsequent criminal proceedings.

We have stated above that there is no complete bar to civil and criminal proceedings involving the same parties proceeding concurrently. However, a court must guard against the real danger of a potential miscarriage of justice in the criminal proceedings if the court did not intervene. A notional danger is not enough. We are of the view that the 1st defendant will suffer no serious injustice by the continuance of the civil proceedings as there will be no danger of incriminating himself. We are, however, of the view that a sensible approach to take in this matter is to adopt the reasoning in **Attorney General for Zambia v Meer Care & Desai and 19 others[14],** and ring fence the civil proceedings. We therefore order

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that none of the evidence adduced by the defendants in the civil proceedings can be used against the 1st defendant in criminal proceedings, nor can any of the documents disclosed by him in the proceedings in the court below be used in the criminal proceedings, unless the 1st defendant agrees or the court orders

otherwise. The order staying the proceedings is set aside and the appeal is allowed. Costs be to the plaintiff, to be taxed in default of agreement.

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M.S.MWANAMWAMBWA
ACTING DEPUTY CHIEF JUSTICE

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E.N.C.MUYOVWE	A.M.WOOD
SUPREME COURT JUDGE	**SUPREME COURT JUDGE**