Library.

R1

IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 51/2010**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

FIRST MERCHANT BANK ZAMBIA LIMITED **1ST APPLICANT**
(In Liquidation)
THE ATTORNEY-GENERAL **2ND APPLICANT**

AND

ALSHAMS BUILDING MATERIALS LIMITED **1ST RESPONDENT**
JAYESH SHAH **2ND RESPONDENT**

CORAM: MAMBILIMA, CJ, HAMAUNDU AND MALILA, JJS;
On 10thFebruary, 2016 and 14th October, 2016.

For the 1stApplicant:	**Mr. B. Mutale, SC, and Ms. M. Mukuka, of Messrs. Ellis and Company.**
For the 2nd Respondent:	**Mr. L. Kalaluka, SC, and Mr. L. Lukwasa, Deputy Chief State Advocate, Attorney-General's Chambers.**
For the Bank of Zambia:	**Dr. L. Kalinde, Director- Legal Services, Bank of Zambia and Mr. C. Sikazwe, Legal Counsel, Bank of Zambia.**
For the 1stRespondent:	**Dr. R. Chongwe, SC, of Messrs. RMA Chongwe and Company.**
For the 2nd Respondent:	**In person.**

RULING

MAMBILIMA, CJ, delivered the Ruling of the Court.

CASES REFERRED TO-

1. **MORELLE LIMITED V. WAKELING (1955) 1 ALL ER 709;**

2. **CORPUS LEGAL PRACTITIONERS V. MWANANDANI HOLDINGS LIMITED, APPEAL NO. 134/2010;**
3. **WILLIAMS V. FAWCETT (1986) 1 QB 604;**
4. **RICHARDS V. RICHARDS (1989) 3 WLR 748;**
5. **THE ATTORNEY GENERAL AND DEVELOPMENT BANK OF ZAMBIA V. GERSHOM MOSES BURTON MUMBA (2006) ZR 77;**
6. **BANK OF ZAMBIA V. JONAS TEMBO AND OTHERS (2002) ZR 103;**
7. **HENDERSON V. HENDERSON (1843-1860) ALL ER 378;**
8. **DAVIS JOKIE KASOTE V. THE PEOPLE (1977) ZR 75;**
9. **MATCH CORPORATION LIMITED V. DEVELOPMENT BANK OF ZAMBIA AND ATTORNEY- GENERAL (1999) ZR 13;**
10. **BARCLAYS BANK ZAMBIA PLC V. ERZ AND OTHERS, APPEAL NO. 71/2007;**
11. **R. V. BOW STREET METROPOLITAN STIPENDIARY MAGISTRATE AND OTHERS EX-PARTE PINOCHET UGARTE (1999) 1 ALL ER 577; AND**
12. **BANK OF ZAMBIA (AS LIQUIDATOR OF CREDIT AFRICA LIMITED IN LIQUIDATION) V. AL SHAMS BUILDING MATERIALS COMPANY LIMITED, APPEAL NO. 214/2013.**

LEGISLATION REFERRED TO-

1. **SUPREME COURT RULES, CHAPTER 25 OF THE LAWS OF ZAMBIA;**
2. **RULES OF THE SUPREME COURT, 1999 EDITION (WHITE BOOK); AND**
3. **RULES OF THE SUPREME COURT, 1965 EDITION.**

This Ruling follows Notices of Intention to Raise Preliminary Issues filed by the 1st and the 2nd Respondents, respectively. In order to put the said Notices into their proper context, we will recite a brief history to the main matter.

The brief facts of the main matter are that the 1st Applicant was a registered commercial bank. The 1st Respondent opened an account with the 1st Applicant. The 2nd Respondent was a partner in the 1st Respondent and a signatory to its account.

On 16th January, 1998, the Drug Enforcement Commission seized the 1st Respondent's account. At the time of seizure, the account had a balance of **US$1,013,973.91**.

Later on, the 1st Applicant went into receivership and eventually it was liquidated. In the meantime, the 1st Respondent and the 2nd Respondent challenged the seizure of their account in the lower Court. In its judgment delivered on 12th October, 1999, the lower Court held that the seizure was unlawful and illegal. The Court went on to hold that the status of the 1st Respondent and the 2nd Respondent had changed from that of depositors and that they were, therefore, entitled to be paid their money in preference to other creditors. The lower Court ordered the 1st Applicant to return to the 1st Respondent and the 2nd Respondent the seized amount of US$1,013,973.91 plus interest at the Dollar lending rate from 16th January, 1998, being the date of the seizure, until the date of the judgment and thereafter statutory interest until full settlement.

The 1st Applicant and the 2nd Applicant appealed to this Court against the Judgment of the lower Court. In our judgment of 2nd November, 2000, we upheld the decision of the trial Court. We

stated, among other things, that from the date of seizure of the account the money in question was paid into a suspense account.

After our decision of 2nd November, 2000, the lower Court delivered a reserved ruling in March, 2004. In the reserved ruling, the learned trial Judge held that the Bank of Zambia, as liquidator of the 1st Applicant, had a fiduciary statutory duty to pay all the amounts that stood unpaid on the full judgment sum to the 1st Respondent and the 2nd Respondent. The 1stApplicant and the 2nd Applicant appealed to this Court. In our judgment of 28th March, 2006, we upheld the judgment of the trial Court.

The 1st Respondent and the 2nd Respondent then made an application for an account of monies due and owing to them from the Bank of Zambia. On 13th February, 2008, the learned Deputy Registrar delivered a judgment on assessment. The Deputy Registrar made the following holdings:

1. **the dollar lending rate to be applied between 16th January, 1998 and 12th October, 1999, should be 25.5% net;**
2. **the pre-judgment rate of 25.5% net should apply as post-judgment interest until full settlement;**
3. **the computation of interest should be done on simple interest basis;**
4. **the amount should be net of tax; and**
5. **the costs should be for Al Sham and Jayesh Shah.**

After the Deputy Registrar's judgment on assessment, the matter went back to the learned trial Judge. On 24th July, 2009, the learned trial Judge delivered a decision which he referred to as a "Ruling after referral to the Deputy Registrar". The learned trial Judge overturned certain aspects of the Deputy Registrar's Assessment and ordered as follows:

1. **that the Respondents [(FMB) and the Attorney-General)] through the Bank of Zambia should pay the judgment debt at 24% rate of interest net of withholding tax until full settlement;**
2. **the lending rate in (1) above should also be applied as post judgment rate of interest instead of what was previously referred to as 'statutory';**
3. **interest shall be compounded with monthly rests; and**
4. **all costs are to be paid by the Bank of Zambia as awarded.**

The Bank of Zambia sought leave to appeal, to this Court, against the learned trial Judge's ruling of 24th July, 2009. The learned trial Judge granted the Bank of Zambia leave subject to a condition that it pays the judgment sum into court before filing the appeal. On 11th November, 2009, Bank of Zambia applied for leave to appeal against the grant of conditional leave.

On 13th November, 2009, Bank of Zambia filed a notice of appeal in the Supreme Court against the ruling of the lower Court of 24th July, 2009. Following the filing of the notice of appeal, on 23rd November, 2009, the 1st Respondent and the 2nd Respondent

applied to the lower Court, ex-parte to dismiss Bank of Zambia's intended appeal. The learned trial Judge dismissed Bank of Zambia's appeal to this Court for want of prosecution.

The Bank of Zambia appealed against the ruling of the learned trial Judge, dismissing its appeal for want of prosecution. On 28th January, 2010, the learned trial Judge signed an order by which he granted Bank of Zambia leave to appeal against the ex-parte order dismissing its appeal for want of prosecution. The learned trial Judge also granted leave to appeal against the condition that required Bank of Zambia to pay the judgment sum into Court before lodging its appeal.

On 13th December, 2010, the 1st Respondent and the 2nd Respondent applied to the Court below to examine the judgment debtor (Bank of Zambia) on its assets and means. Bank of Zambia objected to the application on the ground that the learned trial Judge had become *functus officio* since Bank of Zambia had already appealed to this Court.

In his ruling of 28th July, 2011, the learned trial Judge set aside the portion of his order that gave Bank of Zambia leave to appeal against the grant of conditional leave to appeal.

The Bank of Zambia appealed to a single Judge of this Court who allowed the appeal. On appeal by the 1st Respondent and the 2nd Respondent to the full Court, this Court held, on 31st December, 2012, that the learned trial Judge had become *functus officio.* That, therefore, the purported dismissal of Bank of Zambia's appeal was incompetent for want of jurisdiction. That the appeal made on 13th November, 2009 was, therefore, still effective contrary to the single Judge's holding that there was nothing that could be dismissed by this Court.

We, however, went on to hold that it was clear from the affidavit evidence and submissions before the single Judge that, Bank of Zambia did not fulfill the condition set in the conditional leave to appeal before entering the appeal on 13th November, 2009. Consequently, we dismissed that appeal.

The Bank of Zambia had also filed Appeal No. 51 of 2010, which was an appeal against the conditional nature of the leave to appeal and the dismissal of the leave to appeal. In our Judgment of 2nd May, 2014, we dismissed Bank of Zambia's appeal. We came to the conclusion that the questions raised by that appeal had been

adequately determined and settled in our judgment in SCZ/8/2009 delivered on 31st December, 2012.

Following the above various judgments in this matter, the 1st Applicant and the 2nd Applicant have filed a Notice of Motion in which they have contended that they, together with Bank of Zambia, were subjected to an unfair procedure because some of the issues in the previous judgments were decided *per incuriam*. They have specifically submitted that the judgments in Appeal No. 33 of 2000 and Appeal No. 112 of 2004 held, *per incuriam*, that the Bank of Zambia was in a fiduciary relationship with the Respondents. That this holding was based on the erroneous finding by this Court that the monies which were taken from the Respondents' account with the 1stApplicant were placed in a suspense account. They have also argued that the judgments delivered by this Court on 31st December, 2012 and 2nd May, 2014, were rendered *per incuriam*.

On 5th August, 2015, the 1st Respondent and the 2nd Respondent also filed a Cross-Motion in which they are asking this Court to vary, discharge or reverse the ruling by WANKI, JS, delivered on 24th July, 2015. They have argued that WANKI, JS, erred when he found that the 1st Applicant is not a contumelious

defaulter, despite the fact that the 1stApplicant had not paid the judgment debt into Court. Further, that the Judge erred when he found that if their application was upheld, it would constitute a multiplicity of orders; without considering that the relief they wanted was for the 1st Respondent not to be allowed to seek intervention of this Court until it complied with the order to pay the judgment debt into court.

On 13th August, 2015, Counsel for the 1st Respondent filed a Notice of Intention to Raise Preliminary Issues pursuant to Rule 19 of the **SUPREME COURT RULES, CHAPTER 25 OF THE LAWS OF ZAMBIA** and Orders 14A and33, Rules 3 and 7of the **RULES OF THE SUPREME COURT 1999 EDITION**. The 1st Respondent's preliminary issues are as follows:

1. **whether or not the Appellant's Notice of Motion filed pursuant to *inter alia* the provisions of Order 8 of the Rules of the Supreme Court of England and Wales (1999 edition) Volume 1 and Rules 48(5) and 78 of the Supreme Court Rules Chapter 25 is properly before this Honourable Court by reason of the fact that:**

(a) **the doctrine of per incuriam is not applicable to judgments rendered without reference to relevant evidence before the Supreme Court which if referred to would have the Court decide otherwise and, the judgments in Appeal number 33 of 2000 and Appeal number 112 of 2004 were not rendered in ignorance or forgetfulness of any authority binding on the Supreme Court;**

(b) **the Notice of Motion is founded on an attempt by the Applicants to have a third bite at the cherry (the second bite**

was under appeal number 112 of 2004 appearing at page 77 of the Record of Motion) by again asking this Honourable Court to consider issues that are Res Judicata having already been adjudicated on in the Judgments of this Court sought to be re-opened:

(i) whether or not the Respondents ceased to be depositors upon seizure of their money by the Drug Enforcement Commission;

(ii) whether or not the monies seized formed part of the liquidation process; and

(iii) whether or not the Bank of Zambia as Liquidator of the 1st Applicant has a fiduciary duty and statutory obligation to pay the Respondents."

In support of the Notice of Intention to Raise Preliminary Issues, Counsel for the 1st Respondent filed written arguments which they augmented with brief oral submissions in Court. With regard to the preliminary issue relating to *per incuriam*, Counsel submitted that this Court can only decline to follow its previous decision under that doctrine where that decision was given in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding on the Court and not because certain evidence was not placed before it. In support of these arguments, Counsel cited, among other authorities, the case of **MORELLE LIMITED V. WAKELING**[1], where the Court of Appeal stated that-

> **"as a general rule, the only cases in which decisions should be held to have been given 'per incuriam' are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned; so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong."**

Counsel also referred us to the case of **CORPUS LEGAL PRACTITIONERS V. MWANANDANI HOLDINGS LIMITED**[2], where we said the following:

> **"Looking at the decision in the Van Zyl Brothers Limited Case and the provisions of both Section 24(1)(d) of the Supreme Court Act as well as the 1999 Edition of the Rules of the Supreme Court, we take the view that our decision in the Richard Nsofu Mandona Case was arrived at per incuriam as the provisions on the requirement for leave to appeal on costs, as stated in the authorities we have referred to above, are very clear that such leave is required in cases where the appeal is solely on costs."**

Counsel conceded that the definition of *per incuriam* is not exhaustive. Nevertheless, he relied on, among other authorities, the case of **WILLIAMS V. FAWCETT**[3], for the contention that the Court is only justified in refusing to follow one of its own previous decisions in rare and exceptional cases if it is satisfied that the decision involved a manifest slip or error.

Counsel also cited the case of **RICHARDS V. RICHARDS**[4], where Lord DONALDSON, MR stated that-

> **"In previous cases the Judges of this Court have always refrained from defining this exceptional category and I have no intention of departing from that approach save to echo the words of Lord Greene and Sir Raymond Evershed MR and to say that they will be of the rarest occurrence. Nevertheless some general considerations are relevant. First, the preferred course must always be to follow the previous decision, but to give leave to appeal in order that the House of Lords may remedy the error. Second, certainty in relation to substantive law is usually to be preferred to correctness, since this at least enables the public to order their affairs with**

> **confidence. Erroneous decisions as to procedural rules affect only the parties engaged in the relevant litigation. This is a much less extensive group and accordingly a departure from established practice is to that extent less undesirable. Third, an erroneous decision which involves the jurisdiction of the Court is particularly objectionable, either because it will involve an abuse of power if the true view is that the Court has no jurisdiction or a breach of the Court's statutory duty if the true view is that the Court is wrongly declining jurisdiction. Such a decision, of which this case provides an example, is thus in a special category. Nevertheless, this Court must have very strong reasons if any departure from its own previous decisions is to be justifiable."**

On the basis of the above, Counsel submitted that in this case there was no manifest slip or error in the judgments in Appeal No. 33 of 2000 and Appeal No. 112 of 2014. In support of this argument, Counsel cited the case of **THE ATTORNEY GENERAL AND DEVELOPMENT BANK OF ZAMBIA V. GERSHOM MOSES BURTON MUMBA**[5], where 'clerical error' was defined as-

> **"an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record and not from judicial reasoning or determination."**

With regard to the second preliminary issue, Counsel for the 1st Respondent contended that the Applicants' Notice of Motion was improperly before this Court because the Motion is founded on an attempt by the Applicants to have a third bite at the cherry. According to Counsel, the second bite was under Appeal No. 112 of 2004. Counsel, therefore, argued that the issues raised in the

Applicants' Motion are *res judicata*. Counsel contended that the issue of the suspense account which the Applicants seek to re-litigate was dealt with by both the lower Court and this Court.

Counsel submitted that it was clear from the evidence of DW1 before the lower Court, that the seizure of the money by Drug Enforcement Commission placed the money in what Counsel referred to as 'no man's land'. According to Counsel since DW1 testified that the account was frozen and the money in the account was not earning any interest, the word 'frozen' was similar to 'suspended'.

Counsel went on to submit that the judgments in Appeal No. 33 of 2000 and Appeal No. 112 of 2004 also effectively dealt with the issues raised in the Applicant's Motion including the issue of the suspense account.

Counsel further submitted that the principle of *res judicata* applies in situations where the claims handled by a Court of competent jurisdiction are truly the same with claims in another action and the legal rights and obligations of the parties have been concluded. For these submissions, Counsel referred us to the case

of **BANK OF ZAMBIA V. JONAS TEMBO AND OTHERS**[6], where this Court held that-

> **"In order that a defence of res judicata may succeed, it is necessary to show that the cause of action was the same, but also that the plaintiff had an opportunity of recovering and but for his own fault might have recovered in the first action that which he seeks to recover in the second.**
>
> **A plea of res judicata must show either an actual merger or that the same point had been actually decided between the same parties."**

Counsel also cited the case of **HENDERSON V. HENDERSON**[7]. In that case, it was held that-

> **"where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires that the parties to that litigation bring forward their whole cases, and will not, except in special circumstances, permit the same parties to open the same subject of litigation, in respect of the same matter which might have been brought forward as part of the subject in content, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies except, in special cases, not only to points on which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."**

In her oral submissions, Ms. Theotis contended that her understanding of the doctrine of *per incuriam* was that it was an exception to the legal principle of *stare decisis*. She asked this Court to address the question as to what the effect of this Court finding a judgment *per incuriam* is on the parties to that judgment.

According to her, the effect of holding that a judgment was rendered *per incuriam* is that that judgment ceases to be binding on the lower Court. In support of her submissions, she cited the case of **DAVIS JOKIE KASOTE V. THE PEOPLE**[8],where it was held that-

> **"The principle of stare decisis is essential to a hierarchical system of courts. Such a system can only work if, when there are two apparently conflicting judgments of the Supreme Court, all lower courts are bound by the latest decision."**

On the same day, 13th August, 2015, the 2nd Respondent also filed his Notice of Intention to Raise Preliminary Issues pursuant to Rule 19 of the **SUPREME COURT RULES**, **CHAPTER 25 OF THE LAWS OF ZAMBIA** and Order 14A of the **RULES OF THE SUPREME COURT, 1999 EDITION**. The 2nd Respondent's preliminary issues are as follows:

1. **"whether or not, it is manifestly irregular for the 1st Applicant to challenge matters of evidence without this Court being availed a copy of the 1999 transcript of the trial proceedings;**
2. **whether or not the Applicant's Notice of Motion is properly before this Court by reason of the fact that the same fact relates to Appeal No. 51 of 2010, which appeal was dismissed by this Court in their judgment delivered on 2nd May, 2014 on account of the Applicant's failure to meet the condition to pay the judgment debt into Court and to date, the Applicants have still not paid the judgment debt into Court;**
3. **whether or not the issue of the suspense account having been dealt with by**
   (a) the High Court in the 5th July, 2000 ruling (page 20 of the supplementary record of appeal);
   (b) the Supreme Court in their Judgment Appeal No. 33 of 2000 – (page 52, line 3 to 5);

(c) the High Court reserved Ruling dated 17th March, 2004 (page 63 of the record of motion, line 10 to 12);

(d) Appeal No. SCZ/8/63/04, dated the 26th of March, 2004 was against the "WHOLE RULING" (2nd Supplementary Record of Motion page 3, line 12) and by Judgment No. 17/2006- at page 70 of the Record of Motion this Court dismissed Appeal the 1st Applicants Appeal;

the Applicants are estopped and or bound by the principles of res judicata and cannot ask this Court to make a further determination on suspense account."(*sic*)

In support of his Notice of Intention to Raise Preliminary Issues, the 2nd Respondent filed written arguments which he augmented with oral submissions before us. On the first preliminary issue, the 2nd Respondent argued that although the Applicants have asked this Court to vary its judgment No. 33 of 2000, they have deliberately withheld the High Court transcript of proceedings. According to him, the record is, therefore, incomplete as it contravenes Rule 58(4)(j) of the **SUPREME COURT RULES, CHAPTER 25 OF THE LAWS OF ZAMBIA**. He has also argued that the Applicants have deliberately withheld the lower Court's Ruling dated 5th June, 2000.

The 2ndRespondent has submitted that there is no Affidavit deposed to by Mr. Arthur NDHLOVU (DW1) to show that he never testified that the money in dispute was put in a suspense account. Further, that Gladys MAPOSHA, who has deposed to the Affidavit in

support of the Notice of Motion, has not stated how she knows, in the absence of the trial transcript, that Mr. NDHLOVU never testified at trial to the effect that the said money was placed in a 'suspense account'. According to the 2nd Respondent, the only assumption to be drawn from this fact was that Ms. MAPOSHA has read the transcript and deliberately decided not to exhibit it.

For the above reasons, the 2nd Respondent stated that Ms. MAPOSHA's Affidavit cannot be relied upon without subjecting her to cross-examination.

The 2nd Respondent further submitted that in its judgment of 2nd November, 2000, this Court found that the Respondents' money was put in a suspense account. According to him, that holding was in accordance with section 25 of the **SUPREME COURT OF ZAMBIA ACT, CHAPTER 25 OF THE LAWS OF ZAMBIA**, which allows this Court to give such judgment as the case may require.

Coming to the second preliminary issue, the 2nd Respondent submitted that in Appeal No. 51 of 2010, this Court reaffirmed its earlier decision in SCZ/8/258/2009 where this Court dismissed the Applicants' appeal filed on 13th November, 2009 for failure to meet the condition to pay the judgment debt into Court. He submitted

that, up to the time they filed the Notice of Motion, the Applicants had not paid the judgment debt into Court.

With regard to the third preliminary issue, the 2nd Respondent contended that the issue of the money being in a suspense account was *res judicata*. According to him, this issue was raised and determined by the lower Court in its ruling of 5th July, 2000 and, on appeal, by this Court in its judgment in Appeal No. 33 of 2000. That the issue was again dealt with by the lower Court in its reserved ruling of 17th March, 2004 and the Applicant's appeal to this Court was dismissed. In support of his arguments, the 2nd Respondent cited, among other authorities, the case of **BARCLAYS BANK ZAMBIA PLC V. ERZ AND OTHERS**[9], where this Court said that-

> **"The doctrine of res judicata has been defined by Black's Law Dictionary as: 'An issue that has been definitively settled by judicial decision. ...An affirmative defence barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties restatement."**

In his oral submissions, the 2nd Respondent basically amplified what is contained in his written arguments.

In opposing the Notices of Motion to Raise Preliminary Issues, the learned Counsel for the Applicants and for the Bank of Zambia filed written arguments which they supplemented with oral submissions before us.

Counsel contended that the Notice to Raise Preliminary Issues had been brought pursuant to Rule 19 of the **SUPREME COURT RULES**, **CHAPTER 25**, which applies only to preliminary objections to appeals. That, therefore, the said Notice was wrongly before this Court.

Further, Counsel submitted that the Notice to Raise Preliminary Issues has wrongly been grounded under Order 14A, Rule 1(a) of the **RULES OF THE SUPREME COURT OF ENGLAND, 1965**, which can only be used in an action pending trial and not in a matter before an appellate Court when trial has already been concluded.

In the alternative, Counsel submitted that having taken fresh steps by filing heads of argument in opposition to the Applicants' Motion on the merits, the Respondents have waived their right to object to any irregularities. Further, Counsel relied on the Affidavit

of Mr. Bonaventure Chibamba MUTALE, SC, filed on 15th September, 2015. The gist of the said Affidavit is that the firm of Ellis & Co. did engage staff in the High Court Principal Registry and the Supreme Court Registry in an effort to locate the notes of the trial proceedings but the same could not be found. That the said notes have never been placed before this Court and not even the record of appeal filed in Appeal Number 33 of 2000 included the transcript of the trial proceedings.

On the second preliminary objection, Counsel argued that this preliminary issue is misconceived because it was not the Applicants who assigned the Motion with cause number 'Appeal No. 51 of 2010' but the Registry Staff. That to sanction the Applicants for an error committed by the Registry Staff would constitute grave injustice. Secondly, Counsel contended that the question as to whether the Applicants had paid the judgment debt into Court is one fit to be determined at the hearing of the main Motion on its merits.

With regard to the third preliminary issue, Counsel submitted that prior to this Court's Judgment in Appeal No. 33 of 2000, no

finding of fact had been made to the effect that monies seized from the 1st Respondent had been placed in a suspense account. That the finding was made by this Court in its judgment of April, 2006, and not by the lower Court's ruling of 17th March, 2004. According to Counsel, the question as to how that finding was arrived at is a matter to be argued at the hearing of the Applicants' Motion and not as a preliminary issue. Counsel added that since a finding of this Court cannot be challenged in the High Court, it cannot reasonably be argued that the issue of the money having been put in a suspense account is *res judicata* on the ground that the Applicants had an opportunity to raise it in Cause Number 1998/HP/2097.

In his oral submissions, Mr. MUTALE, SC, contended that most of the issues that have been raised by the Respondents in their preliminary objections are issues that have been canvassed in the Applicants' Motion. He stated that to that extent, the said issues had been raised prematurely.

Counsel further submitted that the Respondents filed the Motion under Appeal No. 51 of 2010 because the Registry Staff

failed to locate the files for Appeal No. 33 of 2000 and Appeal No. 112 of 2004. He, therefore, contended that the filing of the Motion under Appeal No. 51 of 2010 was an administrative matter and not an attempt by the Applicants to challenge this Court's judgment in Appeal No. 51 of 2010.

With regard to the 6 paged exhibit which was attached to the 2nd Respondent's Affidavit, Mr. MUTALE, SC, argued that the said exhibit was not authentic. According to him, the said exhibit cannot be considered to be a transcript of proceedings because it did not comply with the Rules of this Court on how records of the Court are supposed to be prepared.

Supplementing the oral arguments by Mr. MUTALE, SC, the learned Attorney-General, Mr. KALALUKA, SC, stated that the issue of *per incuriam* was a matter to be heard at the hearing of the main Motion.

With regard to the non-availability of the transcript of the 1999 High Court proceedings, the learned Attorney-General admitted that there was indeed no transcript of proceedings on the record. He, however, stated that the learned trial Judge in the first

judgment ever delivered in this matter recounted extensively the relevant evidence.

In response to the 2nd Respondent's second preliminary issue, the Attorney-General relied on Order 2, Rule 2 of the **RULES OF THE SUPREME COURT, 1999 EDITION**, which provides that-

> **"2/2 2. —(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity."**

The Attorney-General submitted that the Respondents had taken a fresh step in the matter by making an application before a single Judge of the Supreme Court, under Cause Number 51 of 2010, to have the Applicants pay money into Court. That, having taken the said step, the 2nd Respondent cannot now be heard to advance an argument that there is no appeal under Cause Number 51 of 2010. That they should be deemed to have waived the irregularity.

As regards the 2nd Respondent's third preliminary issue, the Attorney-General argued that that issue goes to the merits of the main Motion. He contended that there are numerous authorities

which establish that this Court has jurisdiction to rehear or reopen an appeal in exceptional circumstances. He prayed that this Court allows the Applicants to show the Court the exceptional circumstances justifying the reopening of the appeals in issue.

In reply, Dr. CHONGWE conceded that this Court has jurisdiction to relook at its own decision to see if the decision was made *per incuriam*. He, however, questioned why the Applicants waited for fourteen years before bringing their Motion. He stated that if this Court reopened the cases after fourteen years, it would be opening a floodgate for similar applications to be made in relation to cases which this Court decided many years ago.

The 2nd Respondent's reply was that it was clear from a notice of appointment of advocates for the 1st Applicant, filed on 26th September, 2014, that the Applicants clearly intended to bring their Motion under Appeal No. 51 of 2010 in that, the said notice of appointment indicated the Cause number as Cause No. 51 of 2010. He stated that the notice of appointment was filed ten days before the Motion was filed, and, according to him, this clearly showed that the Applicants intended to file the Motion under Appeal No. 51

of 2010. He further submitted that there was no evidence before this Court that the Registry Staff faced challenges in locating the appropriate records where to put the Applicants' Motion. That Counsel cannot, therefore, be allowed to give evidence from the Bar in relation to the alleged challenges.

We have carefully considered the Notices of Intention to Raise Preliminary Issues and the arguments by Counsel, as well as the arguments by the 2nd Respondent. To start with, we do not agree with the argument by the Applicants, that the preliminary objections raised in this case are wrongly before this Court. Rule 19 of the Supreme Court Act states:-

> **"If the Respondent intends to raise a preliminary objection to any appeal, he shall, if practicable, give reasonable notice thereof to the Court and to the other parties to the appeal, and if such notice be not given the Court may refuse to entertain the objection or may adjourn the hearing and make such order as to the Court may seem just..."**

The Respondents in the case in casu, are raising issue with the Applicants' intention, through a Motion, to invite this Court to revisit appeals that were earlier determined by this Court. In our view, it is competent, in such circumstances for the party affected

to raise a preliminary objection under Rule 19 of the Rules of the Supreme Court.

The application of Rule 19 of the **SUPREME COURT RULES** cannot therefore, be restricted to a preliminary objection to an appeal; it would also apply to a preliminary objection to a Notice of Motion. In view of this holding, we find it otiose to consider whether Order 14A, Rule 1(a) of the **RULES OF THE SUPREME COURT OF ENGLAND, 1965**, is also appropriate for raising a preliminary objection against a Notice of Motion.

Coming to the Notices of Intention to Raise Preliminary Issues, we will deal with the said Notices together. The Notices have essentially raised four issues for our determination, namely-

1. **whether the doctrine of *per incuriam* is applicable to the Applicants' Notice of Motion;**
2. **whether the issues raised in the Applicants' Notice of Motion are *res judicata*;**
3. **whether it is regular for the 1st Applicant to challenge matters of evidence without availing this Court with a copy of the 1999 transcript of the trial proceedings; and**
4. **whether the Applicants' Notice of Motion is properly before this Court having been filed under Appeal No. 51 of 2010, which was dismissed by this Court on 2nd May, 2014.**

With regard to the first issue, the gist of the submissions by Counsel for the Respondents is that this Court can only decline to

follow its previous decision where that decision was given in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding on the Court. According to Counsel, this Court cannot decline to follow its previous decision purely on the ground that in arriving at that decision certain evidence was not placed before it.

The kennel of the response by Counsel for the Applicants is that the issue of *per incuriam* is the subject of the Applicants' Notice of Motion. That, therefore, it should be dealt with at the hearing of the Applicants' Notice of Motion.

Having carefully studied the Applicants' Notice of Motion, we agree with Counsel for the Applicants that the issue of the judgments of this Court, in Appeal No. 33 of 2000 and Appeal No. 112 of 2014, having been rendered *per incuriam*, is the subject of the Applicants' Notice of Motion. That issue has been dealt with under the second and third grounds of the Applicants' Notice of Motion. Therefore, in our view, the preliminary issue has been raised prematurely.

Coming to the second issue, that is, **whether the issues raised in the Applicants' Notice of Motion are *res judicata***, Counsel for the Respondents have submitted that the said issues have been previously decided upon by this Court in the judgments that the Applicants seek to have reopened. That, therefore, the said issues are *res judicata*. In particular, Counsel has argued that this Court has already decided on the following:

1. **whether the Respondents ceased to be depositors upon the seizure of their money by the Drug Enforcement Commission;**
2. **whether the monies seized formed part of the liquidation process;**
3. **whether the Bank of Zambia, as Liquidator of the 1st Applicant, has a fiduciary duty and a statutory duty to pay the Respondents; and**
4. **whether the seized money was put in a suspense account.**

The gist of the response by Counsel for the Applicants is that this Court has got jurisdiction to reopen and rehear an appeal in exceptional circumstances. They have contended that this Court should give them an opportunity to show the Court the exceptional circumstances that justify the reopening of this Court's judgments in Appeal No. 33 of 2000 and Appeal No. 112 of 2004. They have argued that if the Motion is preliminarily dismissed, the Applicants will be denied an opportunity to show the Court the exceptional circumstances which they are relying on.

We have carefully considered the arguments on this issue. In our view, the doctrine of *res judicata* is not an absolute bar to this Court reopening an appeal. It is trite law that in exceptional circumstances, an appellate Court can reopen and review its final decision. A case on point in this regard is the celebrated case of **R. V. BOW STREET METROPOLITAN STIPENDIARY MAGISTRATE AND OTHERS EX-PARTE PINOCHET UGARTE**[10] Delivering the judgment of the House of Lords on its jurisdiction to reopen its final decisions, Lord Browne-WILKINSON said the following:

> **"As I have said, the respondents to the petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment, that concession was rightly made both in principle and on authority.**
>
> **In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Cassell & Co Ltd v Broome* (No 2) [1972] 2 All ER 849, [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address arguments on the point.**
>
> **However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong."**

Taking a leaf from the **PINOCHE UGARTE**[10] case, we are of the view that in exceptional cases, this Court can reopen its final decision. In our view, the decision to reopen the appeals in issue in this case can only be made after hearing the Applicants on the circumstances which they claim warrant the reopening of the appeals.

We now come to the third issue, that is, **whether it is irregular for the 1st Applicant to challenge matters of evidence without availing this Court with a copy of the 1999 transcript of the trial proceedings**. In brief, the 2nd Respondent has argued that the Applicants cannot raise the argument of *per incuriam* in relation to the issue of the suspense account without availing this Court with the 1999 trial transcript of proceedings of the lower Court. He has contended that in the absence of the transcript of proceedings, this Court cannot make a fair determination on the issue of the suspense account. In response, Counsel for the Applicants have conceded that the said transcript of proceedings is not available before this Court. They have, however, contended that

in the 1999 judgment, the learned trial Judge extensively recounted the relevant evidence.

We have carefully considered the arguments on this issue. We agree with the 2nd Respondent that Rule 58(4)(j) of the **SUPREME COURT RULES, CHAPTER 25 OF THE LAWS OF ZAMBIA**, requires that the record of appeal should contain, among other documents, a copy of the notes of the hearing at first instance in the lower Court or, if the hearing was recorded by shorthand or by means of a recording apparatus, a copy of the transcript of the hearing. The question, however, is whether the Applicants' Motion should be dismissed on the ground that the record does not contain a transcript of the proceedings of the lower Court.

The effect of failing to comply with Rule 58 of the **RULES OF THE SUPREME COURT** is provided for under Rule 68(2) of the same Rules. Rule 68(2) provides that-

> **"68(2) If the record of appeal is not drawn up in the prescribed manner, the appeal, <u>may</u> be dismissed."**(Emphasis by underlining ours).

It is settled law that it is not in all cases that this Court will dismiss a matter on the ground of failure to comply with Rule 58.

The use of the word "**may**" in Rule 68(2) means that this Court has discretion to decide whether to dismiss a matter for failure to comply with Rule 68(2). The decision to dismiss or not to dismiss a matter will depend on the circumstances of the cases. If the breach is not very serious, this Court may simply order the defaulting party to rectify the record of appeal and, where necessary, condemn that party in costs. This was the position we established in the case of **BANK OF ZAMBIA (AS LIQUIDATOR OF CREDIT AFRICA LIMITED IN LIQUIDATION) V. AL SHAMS BUILDING MATERIALS COMPANY LIMITED**[12]. We specifically said the following in that case:

> **"In our view, it is not every breach of a procedural rule that should attract the ultimate sanction of dismissal of an appeal. This is because there are levels of gravity in non-compliance with rules of procedure. Subject to an order for costs, some breaches of rules of procedure can be remedied with very minimal inconvenience and without unfairness or prejudice to the opposing party's case. It is for these reasons that Rule 68(2) of the Rules of the Supreme Court gives this Court discretion to decide whether to dismiss an appeal where the record of appeal is not drawn up in the prescribed manner."**

In the instant case, it is not clear whether the Respondents raised any objection to the absence of the transcript of proceedings when Appeal No. 33 of 2000 came before this Court. In any case, Rule 59(1) of the **SUPREME COURT RULES** allows a Respondent to

file a supplementary record of appeal if the Respondent feels that the Appellant has omitted to include, in the record of appeal, certain documents which are important for the determination of the appeal. Evidently, the Respondents in the instant case did not file a supplementary record of appeal in Appeal No. 33 of 2000 to incorporate the missing transcript of proceedings.

Notwithstanding the above, we are of the view that the evidence relating to the issue of the suspense account was sufficiently reproduced by the lower Court in its judgment of 1999. We do not, therefore, agree with the argument by the 2nd Respondent that this Court cannot fairy adjudicate on the Applicants' Motion without the actual transcript of proceedings.

The last issue for our determination is- **'whether the Applicants' Notice of Motion is properly before this Court having been filed under Appeal No. 51 of 2010, which was dismissed by this Court on 2nd May, 2014.'** The gist of the arguments by the 2nd Respondent on this issue is that the Applicants' Motion is not properly before this Court because it relates to Appeal No. 51 of 2010, which was dismissed by this Court

in our judgment of 2nd May, 2014. Counsel for the Applicants have conceded that indeed Appeal No. 51 of 2010 was dismissed by this Court. They have, however, submitted that the Motion was filed under Appeal No. 51 of 2010 because Registry Staff could not locate the records for Appeal No. 33 of 2000 and Appeal No. 112 of 2004. They have further submitted that, in any case, the Respondents waived their right to raise this objection. That this was because the Respondents made an application before a single Judge of this Court under Appeal No. 51 of 2010. They have cited Order 2, Rule 2of the **RULES OF THE SUPREME COURT, 1999 EDITION**, for these arguments.

The Respondents have not disputed the fact that they made an application under Appeal No. 51 of 2010. The question, therefore, is whether the Respondents have waived their right to challenge the regularity of bringing the Applicants' Motion under Appeal No. 51 of 2010. Order 2, Rule 2(1) of the **RULES OF THE SUPREME COURT, 1999 EDITION** provides that-

> **"2/2 2. (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made**

within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity."

It is evident from Order 2, Rule 2(1) that an application to set aside for irregularity can only be allowed if a party applying has not taken any fresh step after becoming aware of the irregularity. In this case, the Respondents took a fresh step by filing an application before a single Judge of this Court under Appeal No. 51 of 2010.

We, therefore, hold that the Respondents waived their right to challenge the regularity of filing the Applicants' Motion under Appeal No. 51 of 2010.

All in all we find no merit in the Respondents' Notices to Raise Preliminary Issues. We dismiss the said Notices with costs.

I.C. Mambilima
CHIEF JUSTICE

E.M. Hamaundu
SUPREME COURT JUDGE

M. Malila
SUPREME COURT JUDGE