IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE

SCZ/8/162/2014
Appeal No. 143/2014

(Civil Jurisdiction)

B E T W E E N:

KANSANSHI MINING PLC **APPELLANT**

AND

ZAMBIA REVENUE AUTHORITY **RESPONDENT**

Coram: **Hamaundu, Malila and Kaoma, JJS**
on 3rd November, 2015 and 24th June, 2016

For the Appellant:	Mr. S. Chisenga of Messrs Corpus Legal Practitioners
For the Respondent:	Mrs. D. B. Goramota, In-house, Counsel, Zambia Revenue Authority

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JUDGMENT

Malila, JS, delivered the judgment of the Court.

Cases referred to:

1. *Anderson Kambela Mazoka v. Levy Patrick Mwanawasa (2005) Z.R. 138 (S.C.).*
2. *Ampene v. Zambia Revenue Authority (2010) Z.R. 259.*
3. *Matilda Mutale v. Emmanuel Munaile (2007) Z.R. 118 (S.C).*
4. *Minister of Information and Broadcasting Services and Another v. Chembo and Others SCZ Judgment No. 11 of 2007.*
5. *Chikuta v. Chipata Rural Council (1974) Z.R. 241.*
6. *New Plast Industry v. Commissioner of Lands and the Attorney General (2001) Z.R. 51.*
7. *Sata v. Chimba and Others(2010/HP/1282 Unreported).*
8. *Zambia National Holdings Limited and UNIP v. The Attorney General (1994) S.J. 22 (S.C.).*
9. *M v. Attorney General (Unreported, C.A 29 May 1997) 3.*

10. *Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) Z.R. 172 (S.C.).*
11. *Sentor Motors Limited and 3 Other Companies(1996) S.J. (S.C.) S.C.Z Judgment No. 9 of 1996.*
12. *John Chisata v. Attorney General (S.C.Z. Judgment No. 3 of 1992).*
13. *B.P. Zambia Plc v. Zambia Competition Commission Total Aviation and Export Limited Total Zambia Limited1[3] (S.C.Z. Judgment No. 22 of 2011).*

Legislation referred to:

1. *Order 6 of the Rules of the High Court.*
2. *The Income Tax Act, Chapter 323 of the Laws of Zambia.*
3. *The Zambia Revenue Authority Act, Chapter 321 of the Laws of Zambia.*
4. *The Revenue Appeals Tribunal Act No. 11 of 1998.*

This appeal raises a procedural issue regarding commencement of proceedings in contesting a tax assessment where the Revenue Appeals Tribunal was, for any reason, disfunctional. It challenges a ruling of the High Court given on 15th July, 2014 in favour of the respondent.

The appellant, in seeking to challenge the respondent's assessment of tax payable to the respondent, commenced an action before the High Court by writ of summons, accompanied by a statement of claim, claiming for the following relief:

1. **a declaration that the respondent wrongfully assessed the taxes that the appellant was due to pay;**

2. **a declaration that the respondent wrongfully imposed penalties on the appellant;**

3. **an order for the stay of execution of the assessment pending the hearing of the action;**
4. **an order to set aside the disputed assessment;**
5. **damages for the inconvenience occasioned; and**
6. **costs.**

Meanwhile the appellant sought an order for stay of execution of the assessment, and accordingly filed into court an *ex parte* summons under Order 3, Rule 2 of the High Court Rules, chapter 27 of the laws of Zambia.

The respondent entered conditional appearance and took out summons to set aside the writ of summons and statement of claim for irregularity, contending that the matter should have been commenced by way of judicial review. It was argued that according to section 109 of the Income Tax Act, chapter 323 of the laws of Zambia, a party aggrieved by an assessment undertaken by the respondent ought to appeal to the Revenue Appeals Tribunal, (now the Tax Appeals Tribunal as we shall elaborate anon) but since the Tribunal had not yet been established at the time of institution of the proceedings, and considering that the appellant was seeking an order against the

decision of a public body, the appellant ought to have applied for judicial review.

The appellant opposed the application, stating that since the Tribunal had not been constituted, the appellant could not be denied its right to challenge the decision of the respondent and that since by Article 94 of the Constitution, chapter 1 of the laws of Zambia, the High Court had original and inherent jurisdiction, the mode of commencement was the general one provided under Order 6 of the High Court Rules, chapter 27 of the laws of Zambia.

The court below found that it was not in dispute that the Revenue Appeals Tribunal had not been constituted and that, therefore, the appellant was entitled to commence proceedings before the High Court. The only issue to be determined, in the court's view, was whether the mode of commencement was correct.

The court below found that the mode of commencement was provided for under Section 109, which was by way of an appeal to the High Court and not by way of writ of summons.

With regard to the respondent's contention that owing to the non-existence of the Tribunal, the appellant ought to have applied for judicial review, the lower court found that judicial review was not the correct mode of commencement as there was no lacuna in the law to resort to Order 53 of the Rules of the Supreme Court, 1999 Edition (White Book). In the lower court's view, the change of forum had no bearing on the mode of commencement prescribed by statute. It held that it had no jurisdiction to entertain the application before it, as it was only clothed with jurisdiction to determine a dispute on appeal in accordance with section 6 of the Revenue Appeals Tribunal Act No. 11 of 1998 and section 111 of the Income Tax Act. The court accordingly set aside and dismissed the entire action for irregularity.

It is against this ruling of the High Court that the appellant has appealed, fronting three grounds of appeal framed as follows:

> **"1. That the learned Judge misconstrued the meaning of Section 109 of the Income Tax Act when he adopted the procedure of appealing to the Revenue Appeals Tribunal as the correct mode of commencement of this action before the High Court notwithstanding that Section 109 of that Act does not refer to the High Court.**
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> **2. That the learned Judge misdirected himself in law when he did not address the issue of whether or not it has jurisdiction and inherent jurisdiction on account of the**

Revenue Appeals Tribunal not being available to adjudicate on the appeal by the plaintiff.

3. **That the learned Judge misdirected himself when he dismissed the matter on a ground that was not brought to him by either the defendant or the plaintiff and not supported by any express legal authority."**

We must also state that the respondent had filed in a cross appeal which was subsequently withdrawn.

The appellant filed its heads of argument on 28th August 2014. The matter first came up for hearing before us on the 3rd of March 2015. Mr. Chisenga appeared for the appellant while Mrs. Goramota appeared for the respondent. However, the matter was not heard owing to the appellant's application to adjourn the matter for purposes of attempting an *ex curia* settlement. On 15th April 2015, when it came up again, we were informed by the parties that they had reached a settlement and were finalising the consent order to be filed before us. On this premise, the learned counsel for the appellant, sought for another adjournment.

On 3rd November, 2015, the matter proceeded on appeal as the parties had not reached agreement on the proposed settlement and had consequently not filed a consent order to that effect. The learned counsel for the appellant relied on the heads of

argument filed on 28th August 2014. The learned counsel for the respondent relied on the heads of argument in response which she filed on 7th April, 2015.

Under ground one, Mr. Chisenga, on behalf of the appellant argued that the learned Judge misinterpreted Section 109 of the Income Tax Act, in holding that the High Court only has jurisdiction to hear an appeal where a party desires to appeal to it against the decision of the Tribunal. It was contended that since the Revenue Appeals Tribunal was not constituted, there was no decision by it which would be subject of an appeal before the High Court, and as such the provisions of section 6 of the Revenues Appeals Tribunal Act and section 111 of the Income Tax Act could not be invoked.

Mr. Chisenga further argued that section 109 was unambiguous and did not require the use of other principles of interpretation other than the literal rule. The section, according to the learned counsel, could be interpreted literally, that is to say, it only provides for appeals from the decision of the Commissioner General to the Tribunal and not to the High Court. To support his argument he relied on the cases of **Anderson Kambela Mazoka v.**

Levy Patrick Mwanawasa[1], Ampene v. Zambia Revenue Authority[2], Matilda Mutale v. Emmanuel Munaile[3] and **Minister of Information and Broadcasting Services and Another v. Chembo and Others[4].**

The learned counsel submitted that the cases of **Chikuta v. Chipata Rural Council[5]** and **New Plast Industry v. Commissioner of Lands and the Attorney General[6]**, which the lower court referred to in its ruling, only applied where the statute is specific on the mode of commencement to be employed.

It was his further contention that the respondent's argument that the appellant ought to have commenced an action by way of judicial review was misconceived because the appellant was not challenging the Minister's decision but was disputing the assessment of taxes. He submitted that the non-functionality of the Tribunal did not entail a lacuna in the law to warrant a reference to Order 53 of the White Book. To buttress this point, he cited the High Court case of **Sata v. Chimba and Others[7].** We were urged to uphold this ground of appeal.

In response to the argument in support of ground one, Mrs. Goramota argued that under sections 109 and 111 of the Income Tax Act, and section 6 of the Revenue Appeals Tribunal Act, the

mode of commencement of an action concerning assessment of tax is by way of appeal to the Tribunal, and that if a party is dissatisfied with the decision of the Tribunal, that party ought to appeal to the High Court. It was the learned counsel's argument that the court was on firm ground in holding that there was no lacuna in the law to resort to judicial review because the non-appointment of the members to the Tribunal did not mean that the Tribunal was not in existence, so as to create a lacuna in the law. On the contrary, the Tribunal was already established under the Act; it is the non-appointment of members that created a lacuna. She urged us to dismiss this ground of appeal.

Under ground two, the learned counsel for the appellant alleged that the learned Judge, having rightly found that in the absence of a Tribunal, it was proper for the appellant to proceed to the High Court, erred in not further determining whether he had original and inherent jurisdiction to hear the matter, and to hold therefore, that the matter was properly before him. The learned counsel's argument was that since the court was moved by its original jurisdiction as provided for under Article 94 of the Constitution as opposed to its appellate jurisdiction, it was sitting as a court of first instance and ought then to have held that the

matter was properly before it. He relied on the case of **Zambia National Holdings Limited and UNIP v. The Attorney General**[8] and **M v. Attorney General**[9], to buttress his argument that the mode of commencement of actions before the High Court, where that court sits in its original jurisdiction, is by way of writ of summons and statement of claim as provided under Order 6 of the High Court Rules.

The learned counsel argued that the court had a duty to adjudicate on the matter before it. To support this submission, the learned counsel referred us to our decision in **Wilson Masauso Zulu v. Avondale Housing Project Limited**[10] were we stated that:

> **"I would express the hope that trial courts will always bear in mind that it is their duty to adjudicate upon every aspect of the suit between the parties so that every matter is controversy is determined with finality."**

He also referred to the case of **Sentor Motors Limited and 3 Other Companies**[11] where we held that:

> **"It was the duty of the court to adjudicate matters brought before it. That, the court in the present matter had abdicated its responsibility and this amounted to a denial of justice."**

From the foregoing authorities, the learned counsel submitted that due to its erroneous finding, the lower court failed

to exercise the duty to adjudicate every dispute brought before it. He prayed that this ground succeeds.

Mrs. Goramota on the other hand, contested ground two by arguing that the lower court did address the issue of jurisdiction when it held that it had no jurisdiction to hear a matter that was wrongly commenced before it. She urged us to dismiss this ground for lack of merit.

Under ground three, Mr. Chisenga attacked the lower court's ruling for being based on a ground that was not brought before it by the respondent. He submitted that the respondent's contention before the lower court was that the matter ought to have been commenced by way of judicial review. The court found that the application to dismiss the originating process had no merit, but went further to determine what mode of commencement was appropriate to employ. Mr. Chisenga contended that in proceeding as it did, the court effectively denied the appellant an opportunity to make representation as to why the mode of commencement should not have been by way of appeal. He called into aid our decision in **John Chisata v. Attorney General**[12], in which the lower court had intervened to make an order for amendment

where neither party had applied to amend. We said in that case that:

> **"the order should not have been made without calling upon counsel to comment on the proposed order."**

The learned counsel's further argument was that the lower court held that the change of forum has no bearing on the mode of commencement prescribed by statute, without citing any authority in support of this holding. In the learned counsel's opinion, forum is what determines jurisdiction. Citing **New Plast Industry v. Commissioner of Lands and the Attorney General**[6] and Order 6 Rule 1 of the High Court Rules, he reiterated the point that the mode of commencement of an action is generally provided by the relevant statute, but where the statute does not do so, the mode of commencement prescribed under Order 6 should be used. In this case, since the Tribunal had not been constituted, there was no statutory provision for commencement of that action. The only avenue available was by way of writ and statement of claim under Order 6 Rule 1 of the High Court Rules.

In response to ground three, learned counsel for the respondent argued that the lower court, having considered the

submissions by both parties before it, dismissed the matter and directed the parties as to what mode of commencement was proper. The court did so because of its inherent power to regulate proceedings before it. She contended that the case of **John Chisata**[12] was distinguishable from the case before us, as in that case the court made an amendment order, whereas in the case before us, the court had to make a determination or a ruling on whether it had jurisdiction on an application brought before it. Mrs. Goramota submitted that this ground had no merit and should, therefore, not succeed.

We have carefully considered the arguments and the submissions by both learned counsel. We have also closely perused the ruling appealed against. An examination of the grounds of appeal and the arguments advanced by learned counsel show that the question for determination is whether the mode of commencement of the proceedings was appropriate and, consequently, whether the lower court had jurisdiction to entertain the action before it.

The mode of commencement of actions under the High Court is generally provided for under Order 6 of the High Court

Rules, except where statute provides otherwise. In **Chikuta**[5] we held that:

> **"Under Order 6, rule 1, every action in the court must be commenced by writ, except as otherwise provided by any written law or the High Court Rules. Order 6, rule 2, states that any matter which under any written law or the Rules may be disposed of in chambers shall be commenced by an originating summons. Rule 3 provides for matters which may be commenced by an originating notice of motion. It is clear, therefore, that there is no case where there is a choice between commencing an action by a writ of summons or by an originating summons."**

The effect of our holding in that case was that, where statute provides for commencement of proceedings and a party adopts a route other than that provided by the statute in question, the court has no jurisdiction to entertain that matter. It also follows that where a matter ought to be commenced in the manner contemplated under Order 6 of the High Court Rules, and a party employs that route, the High Court has inherent jurisdiction to hear and determine such a matter.

In the **New Plast**[6] case, which the learned judge relied on in his decision, we held that:

> **"It is not entirely correct that the mode of commencement of any action largely depends on the reliefs sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute."**

Thus, where statute provides for a particular procedure to be adopted where a party is unsatisfied with a decision, that party ought to apply the procedure provided for under the applicable statute.

In the matter before us, it is undisputed that the issues leading to this appeal arose from the decision of the respondent which was exercising its power under the Zambia Revenue Authority Act. Therefore, the starting point in determining the procedure which ought to have been adopted by the appellant, is to consider what procedure is provided for under the Zambia Revenue Authority Act or any other relevant statute.

The learned judge in the lower court found that he only had jurisdiction to hear a dispute concerning an assessment of tax if a party appealed under Sections 6 of the Revenue Appeals Tribunal Act and section 111 of the Income Tax Act, and that section 109 of the Income Tax Act prescribes for the mode of commencement of any action which seeks to challenge an assessment.

Section 6 of the Revenue Appeals Tribunal Act provided as follows:

> **"6. (1) Either party to an appeal to the Tribunal may appeal to the High Court from the decision of the Tribunal on any question of law or question of mixed law and fact but not a question of fact alone.**
>
> **(2) The High Court shall hear and determine any such appeal and may refer the matter back to the Tribunal for rehearing, confirmation, reduction, increment or annulment of the assessment or decision determined by the Tribunal and may make such further or other order on such appeal, whether as to costs or otherwise, as the High Court may deem fit."**

For good measure and for completeness we must point out that this appeal was filed in August, 2014. At that point, the Revenue Appeals Tribunal Act was operational. This Act has since been repealed and replaced by the Tax Appeals Tribunal Act No. 1 of 2015. This, however, does not subtract from the contestation of the parties in this appeal.

Sections 109 and 111 of the Income Tax Act, on the other hand, provides as follows:

> **"109. (1) If a person assessed is dissatisfied with the Commissioner-General's decision concerning his objection to the assessment, that person may, by written notice to the Chairperson, within thirty days of the date of service of the written notice of the Commissioner-General's decision, appeal against the assessment to the tribunal and shall send a copy of the notice to the Commissioner-General.**

111. (1) Either party to an appeal to the court may appeal to the High Court from the decision of the tribunal on any question of law or question of mixed law and fact but not on a question of fact alone.

(2) The High Court shall hear and determine any such appeal and may confirm, reduce, increase or annul the assessment determined by the court and make such further or other order on such appeal, whether as to costs or otherwise, as to the High Court may seem fit.

(3) An appeal from a decision of the High Court under this section shall lie to the Supreme Court as it lies in the case of and as though it were a judgment of the High Court made in the exercise of its original civil jurisdiction."

The provisions outlined above do not at all present to an aggrieved party, any discretion on the type or nature of the dispute that person may commence by way of appeal or otherwise. To the contrary, it provides only for the appeal procedure to be adopted when one is not satisfied with a decision on assessment. The provisions clearly stipulate that the High Court has only appellate jurisdiction to entertain the matters referred to it. We do not, therefore, agree that a person who is aggrieved by the decision of the respondent arising out of the exercise of its power, can apply any other mode of commencement of an action other than by way of appeal.

The argument by the appellant that the Tribunal had not yet been constituted, and hence there was no decision upon which the appellant could appeal to the High Court, does not, in our considered view, justify commencing an action by writ of summons under Order 6, or any other mode other than that prescribed by statute. We, therefore, reiterate our decision in the **New Plast[6]** case that the mode of commencement of an action is not dependant on the relief sought, but on what the statute provides as a mode of commencing an action. The High Court only has jurisdiction if a matter is correctly commenced before it.

In **B.P. Zambia Plc v. Zambia Competition Commission Total Aviation And Export Limited Total Zambia Limited[3]** following our decision in the **New Plast[6]** case we concluded that:

> **"where any matter under the Lands and Deeds Registry Act, is brought to the High Court by means of judicial review when it should have been brought by way of an appeal, the court has no jurisdiction to grant the remedies sought. And of course, this is with the substitution of the Lands and Deeds Registry Act, with the Competition and Fair Trading Act."**

On that ground alone the appeal could not succeed.

From the foregoing we, therefore, cannot fault the lower court's decision to dismiss the action, as the matter was not

properly before it. The court had no jurisdiction to make any orders as to the reliefs sought, even if it had been so disposed.

The sum total of our finding is that this appeal has failed and is dismissed with costs to follow the event and the same are to be taxed in default of agreement.

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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M. MALILA, SC	**R. M. C. KAOMA**
SUPREME COURT JUDGE	**SUPREME COURT JUDGE**