IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

APPEAL NO. 02/2019

(Civil Jurisdiction)

BETWEEN

ANTONIO VENTRIGLIA **1ST APPELLANT**

MANUELA VENTRIGLIA **2ND APPELLANT**

AND

FINSBURY INVESTMENTS LIMITED **RESPONDENT**

CORAM: MUSONDA, DCJ, MALILA AND KAOMA, JJS
On 15th July 2020 and 28th October, 2020

For the Appellants : Mr. V. Malambo, SC, appearing with Mr. C. Sianondo, both of Messrs Malambo & Co.; Mr. S. Sikota SC, appearing with Mr. K. Kanda both of Messrs Central Chambers; Mr. A. Siwila and Mr. S. Mambwe both of Messrs Mambwe, Siwila & Lisimba Advocates

For the Respondents : Mr. J.P Sangwa, SC, Messrs Simeza, Sangwa & Associates with Mr. M. Mundashi SC, appearing with Mr. D.Chakoleka both of Mulenga Mundashi & Associates, Mr. E. Silwamba SC, appearing with Mr. J. Jalasi both of Messrs Eric Silwamba, Jalasi & Linyama Advocates.

RULING

Musonda, DCJ, delivered the ruling of the Court

Cases referred to:

1. *JCN Holdings Limited v Development Bank of Zambia: (2013) 3 ZR 299*
2. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] KLR.19
3. *New Plast Industries Limited v The Commissioner of Lands and the Attorney-General [2001] ZR.51*
4. *Marandola and Others v Milanese and Others, Appeal No 130 of 2008.*
5. *University of Zambia v Calder: [1998] Z.R. 48*
6. *Zambia Telecommunications Co. Limited v Liuwa: SCZ No. 16 of 2002*
7. *John Mumba and 3 Others v Zambia Red Cross Society: [2006] ZR 137*
8. *Afritec Asset Management Company Limited & Another v The Gynae & Antenatal Clinic Limited and Kenneth Muuka: Selected Judgment No. 11 of 2019.*
9. *Puma Energy Zambia Plc v Competition and Consumer Protection Commission, Appeal No. 172 of 2015*
10. *Savenda Management Services Limited v Stanbic Bank Zambia Limited, Appeal No. 002 of 2016*
11. *Investrust Bank Plc v Build It Hardware Limited & Yousuff Essa: Appeal No. 003/2013*
12. *Hang'andu & Company v Mulubisha (2008) 2 ZR 82*
13. *Muimui v Chanda SCZ No. 50 of 2000*
14. *Kaole Contracting and Engineering Company Limited -v- Mindeco Small Mines Limited, (1980) Z.R 91*

Legislation referred to:

1. *The Constitution of Zambia (Amendment) Act No. 2 of 2016*
2. *The Court of Appeal Act, No. 7 of 2016*
3. *The Re-Denomination of Currency Act, No. 8 of 2012*
4. *The Court of Appeal Rules, 2016*
5. *The Supreme Court Rules, Cap. 25*

Other works referred to:

1. *Halsbury's Laws of England, Vol. 26, 4th edition, paragraph 504*
2. *Zuckerman, A,* ***Zuckerman on Civil Procedure: Principles and Practice*** *(2013: Sweet & Maxwell: London)*

1.0 INTRODUCTION

1.1 On 18th May, 2018, the High Court of Zambia (Nkonde, J) pronounced a judgment in terms of which that Judge determined that the appellants were the only legitimate and bonafide share owners in a private limited company known as Zambezi Portland Cement Limited ("ZPC").

1.2 The learned Judge further announced in his judgment that any purported ownership of shares in ZPC by the respondent, irrespective of the manner that such purported ownership might have arisen, had been tainted with fraud and that, in any event, the respondent's failure to demonstrate that it had paid property transfer tax, which could have attended any legally viable purchase of shares by it in ZPC, only served to reinforce the first limb of the Judge's pronouncement as adverted to above.

2.0 THE APPEAL TO THE COURT OF APPEAL

2.1 The entry of Nkonde, J's judgment triggered an immediate challenge by the respondent which set out to contest the same in the Court of Appeal on seven (7) grounds. That contest, as

we announce shortly, ended in a positive outcome in favour of the respondent.

2.2 On 31st January, 2019, the Court of Appeal, comprising Lengalenga (presiding), Siavwapa and Majula JJA, resolved the appeal in favour of the respondent and set aside Nkonde, J's judgment. In proceeding in the aforementioned manner, the Court of Appeal discounted the trial Court's finding of fraud and determined that shares totalling 580 million and representing 58% of ZPC's total shareholding had been consensually transferred to, but had not been paid for, by the respondent.

2.3 Arising from the matters in 2.2, the Court of Appeal ordered the respondent to pay the sum of Five Hundred and Eighty Million Kwacha to the appellants for the 580 million shares which had been transferred to it (the respondent). The Court also ordered the respondent to pay interest on the said amount at (Bank of Zambia's) short term fixed deposit rate from the date when the relevant Writ of Summons in this matter was issued up to the date of the judgment and,

thereafter, at the rate of two percentum (2%) per annum until final payment.

3.0 ORDER EMBODYING THE JUDGMENT OF THE COURT OF APPEAL

3.1 Following the delivery of the Court of Appeal Judgment, the respondent's counsel proceeded to draft an order embodying the said judgment into an Order pursuant to Order 10, rule 23 (2) of the Court of Appeal Rules, Statutory Instrument No. 65 of 2016 which counsel sought to have the appellants' counsel approve.

3.2 When it became clear to counsel for the respondent that they and counsel for the appellants could not agree on the terms of the draft order referred to in 3.1 as had been crafted by counsel for the respondent, the former, by summons dated 21st February, 2019, proceeded to apply, pursuant to Order 10, rule 23 (4), of the Court of Appeal Rules, to have the Court of Appeal itself embody its Judgment into an Order.

3.3 Given the level of attention which Order 10, rule 23, of the Court of Appeal Rules received both in the Court below and in

this Court, it is necessary that we pause here to project the wording of this Order:

> ***"23. (1) A judgment of the Court shall be embodied in an order.***
> ***(2) The party who is successful in the appeal shall prepare without delay a draft order and submit it for the approval of the other parties to the appeal.***
> ***(3) Where the draft order is approved in accordance with sub-rule (2), it shall be submitted to the presiding judge or any other judge who sat at the hearing as the presiding judge may direct.***
> ***(4) If the parties do not agree upon the form of the order, the draft shall be settled by the presiding judge or by any other judge who sat at the hearing as the presiding judge may direct, and the parties shall be entitled to be heard thereon if they so desire.***
> ***...***
> ***(6) This rule applies to the preparation of interlocutory orders."***

3.4 The application for an embodiment order was allocated to Siavwapa, JA, who had been a member of the panel which had handed down the Court of Appeal judgment.

3.5 It is worthy of immediate note that before Siavwapa, JA, could even proceed to hear the application for the embodiment of the judgment in question into an order, he was confronted with

two preliminary applications, which were of the nature of objections, at the instance of the appellants contesting both the substantive as well as the procedural competence of the embodiment application.

3.6 On the substantive front, the appellants sought to thwart the embodiment application on the basis that, as the subject matter of the application, namely, the Court of Appeal judgment, was not of the nature of an interlocutory Order, the same was not amenable to the operation of Order 10, rule 23 of the Court of Appeal Rules.

3.7 Turning to the procedural front, the appellants' counsel questioned the competence of having the embodiment application heard by a judge other than the judge who had sat as presiding Judge in relation to the judgment concerned (Lengalenga, JA).

3.8 In his ruling delivered on 27th February, 2019, Siavwapa JA dismissed the two preliminary objections and proceeded to hear the parties on the respondent's application for an order to embody the Court's Judgment into an order.

3.9 It is worth calling to mind here that, in crafting the draft Order embodying the judgment in question on the faith of Order 23(2) of the Court of Appeal Rules (which the appellants' counsel declined to consent to), Counsel for the respondent had proceeded on the basis that the order in the judgement directing the respondent to pay K580,000,000.00 to the appellants for the 580,000,000 shares had to be understood within the context of the rebased Zambian Kwacha following the enactment of the Re-Denomination of Currency Act, No. 8 of 2012, which came into force on 1st January, 2013. In this sense, it was contended on behalf of the respondent that the K580,000,000.00, which the Court below had announced in its judgment as the amount which the respondent was liable to pay to the appellants, had to be understood as a reference to Five Hundred and Eighty Thousand Kwacha (K580,000.00), the latter being the amount which the former yielded after the same had been divided by a multiplicand of One Thousand (1,000) as directed by section 4(2) of the Re-Denomination of Currency Act.

3.10 Notwithstanding the appellants' counsel's refusal to approve and execute the draft embodiment Order which the respondent's counsel had drafted, the respondent proceeded to pay the K580,000:00 together with interest as had been determined by the Court of Appeal into Court on 6th February, 2019.

3.11 During the hearing of the embodiment application which had subsequently ensued, it became clear to the dealing Court (Siavwapa JA) that the real disagreement between the parties revolved around the amount which the Court had announced as having been payable to the appellants for the 580,000,000 shares which they transferred to the respondent between 2006 and 2007 as had been found by the full Bench of the Court of Appeal in its Judgment of 31st January, 2019.

3.12 The appellants, for their part, chose to keep things simple. It was argued on their behalf that, in its Judgment, the full Bench of the Court of Appeal had determined that the amount which was payable to them (i,e, the appellants) on account of the 580,000,000 shares was Five Hundred and Eighty Million Kwacha (K580,000,000.00) adding that, once the Court had

pronounced its Judgment to the said effect, the doctrine of *functus officio* precluded that Court, let alone, a single Judge of the Court, from altering the Judgment in any way.

3.13 In his Ruling dated 29th March, 2019, Siavwapa JA agreed with Counsel for the appellants' contention that the embodiment order envisaged under Order 10 rule 23 of the Court of Appeal Rules,

"is not intended to add or subtract anything that would have the effect of changing the intendment of the Judgment [but rather] *is intended to give effect to the Judgment for the purpose of effective enforcement so as to allow the successful party to enjoy the fruits thereof".*

3.14 The learned judge went on to reveal that he was alive to the fact that, in its judgment, the Court of Appeal had ordered the respondent to pay Five Hundred and Eighty Million Kwacha (K580,000,000.00) for the 580,000,000 shares which were transferred to it in 2007, this amount being the representation of the value of the said shares at a par value of K1.00 per share.

3.15 The Judge further noted that, although the full Court had referred to the amount payable to the appellants as Five

Hundred and Eighty Million Kwacha (K580,000,000), the Court had expressed the amount in figures as K580,000.00, the latter being a representation of the Court's computation of the K580,000,000 in the light of the Re-Denomination of Currency Act No. 8 of 2012.

3.16 Having regard to his lordship's understanding of the meaning and effect of the currency re-denomination statute which we momentarily referred to above, the learned Judge came to the conclusion that, with effect from 1st January, 2013 (being the date when the Re-Denomination of Currency Act No. 8 of 2012 came into force), any amounts which were reflected in the un-rebased kwacha in such documents or legal instruments as share certificates or certificates of incorporation were automatically re-based or re-denominated by operation of the law pursuant to the Re-Denomination of Currency Act No. 8 of 2012.

3.17 Adverting to the specific issues with which he had been confronted, Siavwapa, JA noted that, as a consequence of the Kwacha re-denomination, the amount which was payable to

the appellants for the 580,000,000 shares, which had been transferred to the respondent in 2007, was K580,000.00. On the basis of this conclusion, the learned Judge proceeded, pursuant to Order 10 rule 23 (4) of the Court of Appeal Rules, to settle the order embodying the Judgment of the Court by way of adopting the Draft Order which had been exhibited to the affidavit which the respondent had filed in support of its embodiment application and which had been expressed in the following terms:

> "***UPON JUDGMENT of the Court of Appeal dated 31st January, 2019, to whom was referred the cause between FINSBURY INVESTMENTS LIMITED against ANTONIO VENTRIGLIA and MANUELA VENTRIGLIA, that the Court of Appeal had heard Counsel on 30th October, 2018 and 31st January, 2019, upon the Notice of Appeal of FINSBURY INVESTMENTS LIMITED appealing against the entire Judgment of the Honourable Mr. Justice S.B. NKONDE, S.C. delivered in the High Court at Lusaka on the 18th day of May, 2018, in cause 2008/HPC/366***
>
> ***IT IS ORDERED and ADJUDGED, by the Court of Appeal that:***
>
> ***(a) the Appellant's appeal is allowed and the Judgment of the High Court dated 18th day of May, 2018 is set aside;***

(b) the register of members of ZPC shall accordingly be restored, if any changes have been made, to show that the Appellant holds 58% of the shares of ZPC and Ital Terrazzo Limited holds 42% of the shares;

(c) the Appellant shall within ninety (90) days from the date of the Judgment pay to the Respondents the sum of Five Hundred and Eighty Thousand Kwacha (K580, 000) in the Re-denominated Currency (as defined in section 3 of the Re-denomination of Currency Act No. 8 of 2012) for the Five Hundred and Eighty Million shares transferred to the Appellant;

(d) the sum of Five Hundred and Eighty Thousand Kwacha (K580, 000) in the Re-denominated Currency shall attract interest at the short-term fixed deposit rate from date of the writ until Judgment and, thereafter, at two (2) per centum until final payment.

AND IT IS FURTHER ORDERED that the Respondents shall pay the Appellant the costs of and occasioned in the proceedings in the High Court and the Court of Appeal."

4.0 LEAVE TO APPEAL

4.1 Following the delivery, by Siavwapa, JA, of his Ruling of 29th March, 2019 and the embodiment, by this Judge, of the earlier judgment of the full Bench of the Court of Appeal into an Order, the appellants took out two new

motions before a freshly constituted Court of Appeal panel comprising Mulongoti, Sichinga and Lengalenga, JJA. The first of those motions was for leave to appeal against its (the Court of Appeal's) Judgment of 31st January, 2019 as settled in the order of Siavwapa, JA in his Ruling of 29th March, 2019 while the second sought to secure a stay of execution of the said judgment.

4.2 The appellants' basic contention in their first and primary motion was that Siavwapa, JA's Ruling of 29th March, 2019 and his embodiment, in that Ruling, of the judgment of the full bench of 31st January, 2019 into an order, fundamentally changed the complexion of the Court of Appeal judgment of 31st January, 2019. This change, the appellants contended, raised a novel issue which was without precedent in our jurisdiction thereby making it eminently suitable for interrogation by this Court so that an appropriate and lasting

pronouncement can flow from this Court of last resort on the matter.

4.3 At the hearing of the motion for leave, Mr. V.B. Malambo, SC, on behalf of the appellants, maintained that the amount found to have been due to the appellants by the full Bench of the Court of Appeal was K580,000,000.00, and not K580,000.00 as was stated in the embodiment order settled by Siavwapa JA.

4.4 The appellants' counsel fervently contended that the issues which the appellants had raised, through the relevant supporting Affidavit, encapsulated matters of law of public importance within the meaning of section 13 (3) of the Court of Appeal Act, for which they were entitled to leave to appeal to this Court against the Judgment of the Court below.

4.5 On 3rd April, 2019, and, by way of reacting to the appellants' twin motions for leave to appeal and for an order to stay execution on the Court of Appeal judgment earlier identified, the respondent's counsel filed a Notice of Motion to dismiss the appellants'

applications on the ground, among others, that the said applications had been made outside the 14-day period stipulated by section 13 (2) of the Court of Appeal Act and that, in consequence, the Court of Appeal lacked the requisite jurisdiction to entertain the same.

4.6 For completeness, the respondent's counsel posited that the reckoning of the relevant time for the filing of the subject applications was not and could not be determinable by reference to the embodiment Order because this order did not arise nor exist independently of the main judgment. Consequently, counsel argued, the 14-day period could not be reckoned from the date of the embodiment Order but that of the main judgment.

4.7 Leaving aside their exertions around the belatedness of the appellants' search for leave to appeal, Counsel for the respondent drew the attention of the Court below to the fact that the Ruling of 29th March, 2019, which had aggrieved the appellants, was rendered by a single Judge of the Court of Appeal and, consequently, could only be challenged by moving the full Bench of that

Court for the purpose of seeking to have the same varied, reversed or set aside in accordance with section 9 of the Court of Appeal Act.

4.8 In his brief reply, learned counsel for the appellants, Mr. Malambo, SC, contended that the appellants' grievance lay, not with the Court of Appeal's main judgment of 31st January 2019, but rather, with the embodiment Order which had changed the judgment and effectively triggered the need to appeal.

4.9 On 8th April, 2019, the Court of Appeal granted the appellants' twin applications. In so doing, the Court dismissed the respondent's motion to dismiss the appellants' application for leave to appeal to this Court against the Judgment of 31st January, 2019. Of particular interest were the following pronouncements by the Court below which occur at page R8 of the said Ruling:

> **"We are of the considered view, as argued by Mr. Malambo, SC that when embodying the Judgment into an order, the single Judge was dealing with matters involving the appeal and not interlocutory matters. The**

order, as argued, is what prompted the appeal, as it appears to have changed the Judgment of 31st January, 2019. Time therefore began to run on 29th March, 2019, and so the application for leave to appeal was made within time, and we shall consider it."

4.10 In considering the application, the full Bench of the Court below observed that the appellants were alleging, in their proposed grounds of appeal, that the effect of the embodiment order settled by Siavwapa JA on 29th March, 2019 was that the same (i.e, the order) amended the Judgment of the full Court under the guise of Order 10, rule 23 of the Court of Appeal Rules.

4.11 On the strength of the criteria set out in section 13 (3) of the Court of Appeal Act, the Court came to the conclusion that the alleged amendment of its Judgment by Siavwapa JA's embodiment order was a compelling reason to have the law settled by this Court. In like manner, the Court opined that the issue as to how it (i.e the Court of Appeal) should be approaching challenges of the nature it had been confronted with following the settlement of its judgment into an order by

a single judge, was one of public importance warranting the final say and final word of this Court.

4.12 On the foregoing considerations, the Court of Appeal granted the appellants leave to appeal to this Court and stayed all further proceedings, including those touching upon the Court of Appeal judgment of 31 January, 2019.

5.0 APPEAL TO THIS COURT AND GROUNDS THEREOF

5.1 Having secured the requisite leave, the appellants proceeded to file their Notice of Appeal against the judgment as handed down by the Court of Appeal *"...on the 31st day of January, 2019 and changed, altered, amended and/or reversed on 29th March, 2019..."*. This was on the 12th day of April, 2019.

5.2 According to the Memorandum of Appeal which was simultaneously filed with the Notice of Appeal on 12th April, 2019, the following were the grounds which had inspired the appeal:

5.2.1 ***The Court of Appeal (Single Judge Ruling of 29th March, 2019) erred in law when it held that Order 10 Rule 23 of the Court of Appeal Rules was authority for the Court to settle Orders arising from a final, reasoned and sealed Judgment of the Court and not restricted to the settling of interlocutory and/or oral Judgments of the Court and that under the authority of the said order, the Court can amend, interpret, add or otherwise change the context and/or flavor of the original Judgment;***

5.2.2 ***The Court of Appeal erred in law when it held that non-compliance with and/or failure to observe the provisions of the Property Transfer Tax Act, Cap 340 of the Laws of Zambia has no effect on, and does not invalidate, the transfer of shares in a company incorporated in Zambia;***

5.2.3 ***The Court of Appeal erred both in fact and law when they rejected the Appellants' claim for US$60, 000, 000.00 (sixty million United States of America Dollars) for 8% of their equity in Zambezi Portland Cement against the uncontested evidence that the valuation of the said 8% was made by the respondent, as the cost price of the shares;***

5.2.4 ***The Court of Appeal misdirected itself when it held that the affixing of the appellants' signatures to the disputed share transfer forms by mechanical or electronic means by a party other than the appellants validated the transfer of shares from the appellants to the respondent, in the absence of any evidence of any agency and/or that the third party was authorised by the appellants to do so;***

5.2.5 ***The Court below erred both in law and in fact in failing or refusing to grant the remedy of rescission in the face of fraud and/or duress and having accepted the evidence that no consideration passed between the parties as the respondent had not paid for the shareholding held by the appellants and agreed to be transferred to the respondent and/or alternatively failing to direct that the share transfer would take effect only after the actual payment for the shares;***

5.2.6 ***The Court below erred in law and in fact when it held that the appellants' signing of the loan agreements had the effect of divesting the appellants of their shareholding in ZPC by consent and ignoring the evidence of the context of the negotiation of the loan agreement by DW1 (Dr. Rajan Mahtani) with PTA Bank and the respondent's proposal to acquire 58% of equity of Zambezi Portland Cement Limited;***

5.2.7 ***The Court below erred in law and in fact when it held that the issue of fraud is not tenable and/or had not been proved, in the face of:***

(a) the uncontroverted expert evidence of PW3 in the High Court that the Appellants did not execute the share transfer forms but that their signatures on the same were either electronically or mechanically transposed;

(b) the claim by the respondent that it had the original transfer forms;

(c) the respondent and/or their agents, Professional Services Ltd, are the ones who uttered the documents at PACRA;

(d) DW1's evidence relating to electronic signatures having earlier been expunged by the High Court for being speculative;

5.2.8 ***The Court below erred in law and in fact when it introduced assumptions and logic unsupported by evidence when it held on page J28 that "the most probable position, in our view, is that it was an accepted practice in business transactions between the parties to use electronically affixed signatures whenever it was convenient to do so";***

5.2.9 ***The Court below erred in law by ordering costs to be paid to the respondent in the Court of Appeal and in the High Court when the appellants' alternative remedy in the High Court was partially granted.***

5.3 Following the listing of this appeal for hearing, our attention was drawn to the following matters:

5.3.1. Firstly, that, on 27th April, 2020, the respondent filed a Preliminary Objection to the present appeal pursuant to Rule 19 of the Supreme Court Rules. The basis of this preliminary objection was that this Court did not have jurisdiction to hear and decide:

5.3.1.1. the appeal against the judgment of the Court of Appeal delivered on 31st

January, 2019 because the appellants' application pursuant to which the duo was granted leave to appeal to this Court was not made within 14 days from the date of the judgment as required by section 13(2) of the Court of Appeal Act and;

5.3.1.2. the appeal against the Ruling of the single judge of the Court of Appeal dated 29th March, 2019 on account of section 9 of the Court of Appeal Act.

5.3.2 Secondly, that a Motion cause-numbered SCZ/8/026/2019 had been filed by the respondent to the full Bench of this Court challenging the refusal, by a single judge of this Court, of an application in terms of which the respondent had unsuccessfully challenged the granting of

leave in favour of the appellants by the Court of Appeal which leave had opened the way to the filing and prosecution of the present appeal and;

5.3.3. Thirdly, that a second appeal, being No. 5/2018 involving the same parties to this appeal, had also been listed for hearing on the same day as the present appeal. In this (second) appeal, the appellants seek to have this Court set aside the judgment of the Court of Appeal the primary remedy of which involved the granting of injunctive relief in favour of the respondent during the pendency of the dispute the subject of the present appeal.

5.4 Upon pondering over the matters we have highlighted in 5.3.1 to 5.3.3 above, we formed the view that we would first proceed to hear and determine the Preliminary Objection which had been mounted to this appeal. We

also opined that our determination of the Preliminary objection would invariably define the manner in which we would approach the other matters related to this appeal as we momentarily revealed above.

5.5 At the hearing of this appeal, we indicated to counsel involved what our proposed approach to the three matters, which were before us, namely, the two appeals and the motion was. Upon securing counsel's agreement, we proceeded to hear the Preliminary Objection to this appeal.

5.6 In making our decision to prioritise and give precedence to the hearing and determination of the Preliminary Objection to this appeal, we reminded ourselves that where a jurisdictional objection is mounted against having a Court proceed with a matter, it is imperative and incumbent upon the Court concerned to resolve or determine the issue before proceeding to deal with any other issue in the matter before it. In this regard, we call to mind the lasting observations which we made in the case of ***JCN Holdings Limited v Development***

Bank of Zambia[1], when we said, via Chibesakunda, A/CJ:

> **"It is clear from the Chikuta and New Plast Industries cases that if a court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to that matter."**

5.7 In taking the position which we have articulated above, we were not highlighting anything new nor, indeed, saying anything peculiar to our jurisdiction. In Kenya, a common law jurisdiction like our own, that country's Court of Appeal put the matter in somewhat more compelling terms when it announced, in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited**[2] that:

> **"[I]t is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...A court of law downs tools in respect of the matter before**

it the moment it holds the opinion that it is without jurisdiction....

Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing..."

5.8 Having guided ourselves in the manner we have just adumbrated above, it stands to reason that the outcome of the inquiry which we have been invited to undertake vis-a-vis our jurisdictional competence to entertain this appeal will, as earlier noted, define the direction which our next step in this appeal will take.

6.0 THE PRELIMINARY OBJECTION AND THE ARGUMENTS BY THE PARTIES

6.1 The preliminary objection by the respondent was mounted on 27th April, 2020. It was founded on Rule 19 of the Supreme Court Rules, Chapter 25 of the Laws of Zambia which permits a respondent who is desirous of taking a preliminary objection to any appeal to give reasonable notice of such desire to this Court. The applicant's Notice of its preliminary objection was supported by three sets of Skeleton Arguments.

6.2 For their part, the opposing parties (the appellants) also filed Arguments of their own, stoutly contesting the preliminary objection.

6.3 For convenience and, for the purpose of this preliminary objection and the remainder of this ruling, the respondent, as the party which had mounted the application shall conveniently be referred to as **"the applicant"** while the appellants in the appeal, who are contesting the preliminary objection, shall be referred to as **"the respondents".**

6.4 A point which has been projected, upfront, in the first set of the Applicant's Skeleton Arguments and which learned counsel for the Applicant reinforced by referring us to the passages in the cases of ***JCN Holdings Limited v Development Bank of Zambia***[1] and **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited**[2] which we quoted a short while ago and which is worth acknowledging at this early stage of the ensuing discourse, is that a preliminary objection founded on want of jurisdiction should be decided

promptly either on the Court's own motion or upon being appropriately prompted by a party to the relevant proceedings.

6.5 The Applicant's counsel further posited that such a preliminary objection founded on an alleged want of jurisdiction must be decided ahead of any other issue or issues in the matter before the Court. In the context of this appeal, the Applicant's counsel has insisted that the hearing of the main appeal on merit must be suspended until after the Applicant's preliminary objection founded on this court's jurisdictional competence to hear and determine the appeal has been resolved or decided. In the words of the Applicant's counsel:

> **"Jurisdiction is key and, without it, the Supreme Court cannot entertain this appeal..."**

6.6 Counsel for the applicant also informed us that the Arguments which had been filed on the Applicant's behalf (as Respondent in the main appeal) in response

to the Respondents' (as the Appellants) Arguments in support of the appeal had been filed without prejudice to the Applicant's right to mount and prosecute its preliminary objection and that the same should only be considered in the event that we reject the Applicant's objection and determine that we do, indeed, have the authority to hear and determine the appeal.

THE APPLICANT'S ARGUMENTS

6.7 As earlier intimated, three sets of Skeleton Arguments were filed on behalf of the applicant in support of the preliminary objection. The first two sets were of the nature of supporting Arguments while the third were filed by way of the applicant's response to the respondents' opposing Arguments.

6.8 The ringing and overarching contention advanced in the Applicant's first set of its Skeleton Arguments filed in support of the preliminary objection is that this Court has no jurisdiction to hear and determine the appeal against the Court of Appeal judgment dated 31st

January, 2019 and the ruling of the single judge of the Court of Appeal dated 29th March, 2019. This contention rides on and is buoyed by two primary arguments which have been canvassed by the Applicant's counsel and which we have highlighted below.

6.9 The applicant contends, firstly, that the appellate jurisdiction which article 125(1)(a) as read with article 131(2) of the Constitution of Zambia (Amendment) Act No.2 of 2016 vests in this Court (the Supreme Court of Zambia) over appeals from the Court of Appeal is subject to the securing of leave to launch the relevant appeal by the prospective appellant. In the absence of leave, so the contention went, a decision of the Court of Appeal cannot be amenable to consideration by this Court.

6.10 With regard to the procedure for seeking or securing the leave in question, the Applicant's counsel posited that this is prescribed in section 13 of the Court of Appeal Act which provides that a party who desires to appeal to

this Court against a decision of the Court of Appeal must apply for leave to appeal *"...within 14 days of the judgment"*. In the words of the Applicant's counsel:

> **"It is mandatory [under section 13(2) of the Court of Appeal Act] for any person [who is] aggrieved by the decision of the Court of Appeal to seek leave to appeal against the decision to the Supreme Court within 14 days from the date of the judgment [sought to be appealed against].The language is in mandatory terms and there is no authority for either the Court of Appeal or this Court to entertain an application [for leave to appeal] outside the 14-day period from the date of the judgement".**

6.11 Turning to the present appeal, the Applicant's counsel argued that this Court has no jurisdiction to entertain and determine the appeal against the judgment of the Court of Appeal of 31st January, 2019 because the Respondents did not comply with section 13(2) of the Court of Appeal Act adding that although leave to appeal against the judgment in question was granted by the Court of Appeal, the relevant application for

leave was made outside the 14-day period prescribed by statute.

6.12 Citing our decisions in **New Plast Industries Limited v The Commissioner of Lands and the Attorney-General**[3] and ***JCN Holdings Limited v Development Bank of Zambia***[1], the Applicant's counsel went on to argue that, where the assumption of jurisdiction over a matter by a court is subject to compliance with some statutory provision, the Court will not assume authority or jurisdiction over the matter unless the relevant statutory provision has been complied with. Referring specifically to our decision in ***JCN Holdings Limited v Development Bank of Zambia***[1], the Applicant's counsel drew our attention to the following passages from that judgment:

> **"It is clear from the *Chikuta* and *New Plast Industries Limited* cases that if a Court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to that matter.**
> **[Accordingly] we hold that since this matter was improperly before Mutuna, J, he had no**

jurisdiction to hear and determine it. Also, he had no jurisdiction to make any order or grant any remedy.

Consequently, the judgment and ruling he delivered, which are the subject of this appeal, are null and void".

6.13 In regard to the present matter, counsel for the Applicant submitted that the Court of Appeal did not have the jurisdiction to consider the Respondents' application for leave to appeal to the Supreme Court against its (ie, the Court of Appeal's) judgment of 31st January, 2019 because the application for leave was launched well after the mandatory 14-day period had expired. In this regard, counsel reminded us that, instead of applying for leave by the 14th February, 2019 (that is to say, 14 days from 31 January, 2019), the respondents' application for leave was only lodged with the Court of Appeal on 29th March, 2019 (that is to say, 57 days after the delivery of the relevant judgment and 43 days after the time to apply for leave to appeal to this Court had long expired).

6.14 According to the Applicant's counsel, the irregular granting of leave to appeal to this Court in favour of the Respondents by the Court of Appeal did not, *ipso facto,* operate to confer authority on this Court to consider and decide the present appeal. Once again, we turn to counsel's own words:

> **"Since the Court of Appeal [did] not have the power to entertain an application for leave outside the 14-day period, it could not equally confer authority on the Supreme Court to consider and decide the appeal".**

6.15 In the Applicant's estimation, section 13(2) of the Court of Appeal Act is cast in imperative terms and does not permit or authorize the Court of Appeal or this Court to entertain an application outside the 14-day period stated therein. To buttress this argument, Counsel for the Applicant referred us to, among other decisions of this Court, our decision in ***Marandola and Others v Milanese and Others***[4]. That was a case in which we upheld the High Court's position that the provisions of section 17 (3) of the Arbitration Act No. 19 of 2000 are

mandatory and give the Court no discretion to extend the period for making an application to set aside an arbitral award.

6.16 On the basis of the foregoing contentions and submissions, counsel for the applicant concluded the first limb of his arguments in support of the applicant's preliminary objection to the respondents' appeal.

6.17 The second limb of the Applicant's arguments in support of the preliminary objection focused on the aspect of the appeal which dealt with the Ruling of Siavwapa JA rendered on 29th March, 2019 which culminated in the settlement, by that judge, of the judgment of the full Court (i.e the Court of Appeal) dated 31st January, 2019 into an order embodying the same.

6.18 According to learned counsel for the Applicant, when Siavwapa, JA undertook the task, which has been alluded to in the preceding paragraph, he did so as a

single Judge, whose decisions cannot be appealed to this Court.

6.19 In this regard, counsel for the Applicant drew our attention to Article 132 of the Constitution of Zambia as Amended by Act No. 2 of 2016, whose import, according to counsel, is that in all instances, decisions of the Court of Appeal are made by the Court constituted by an uneven number of not less than three Judges. Counsel further contended that the authority of a single Judge of the Court of Appeal is limited to hearing and determining interlocutory matters or matters ancillary to the main appeal.

6.20 In counsel for the Applicant's estimation, the order which Siavwapa JA settled pursuant to Order 10 rule 23 (4) of the Court of Appeal Rules did not represent a decision of the Court of Appeal and was, therefore, not a final decision. This being the case, counsel contended, Siavwapa JA's decision cannot be the subject of an appeal to this Court but can only be correctly challenged pursuant to section 9 of the Court

of Appeal Act which allows the full Bench of the Court of appeal to vary, discharge or reverse any decision of a single judge made in exercise of the authority invested in such Judge under that section.

6.21 Learned counsel for the Applicant further contended that, even if, *'for argument's sake'*, this Court had jurisdiction to hear and decide an appeal against the decision of the single judge of the Court of Appeal, such jurisdiction can only be properly invoked if it is preceded by the grant of leave to proceed to the Supreme Court by the Court of Appeal which leave must, in any event, be secured within 14 days from the date of the decision which would be the subject of the intended appeal.

6.22 The first set of the Applicant's Skeleton Arguments closed with a prayer by which we were invited to uphold the preliminary objection and dismiss the Respondents' appeal with costs for want of jurisdiction.

6.23 As intimated earlier in this judgment, the Applicant's advocates filed further arguments to support the

Applicant's preliminary objection to the appeal. Having reviewed those arguments, we are of the view that they largely represent a repetition of the arguments by Mr. Sangwa, SC, the applicant's lead counsel, which we reviewed early on in this ruling. For this reason, we propose to restrict our review of the applicant's further arguments only to those aspects which have not been covered by the applicant's lead counsel

6.24 One argument of note, which the applicant's further arguments reveal is that the powers of a single judge, be it in this Court or the Constitutional Court or the Court of Appeal, and the statutory provisions which regulate them are identical and that this fact is borne out by the jurisprudence which has been developed around those powers through various case law such as **University of Zambia v Calder[5], Zambia Telecommunications Co Limited v Liuwa[6], John Mumba and 3 Others v Zambia Red Cross Society[7], and Afritec Asset Management Company Limited &**

Another v The Gynae & Antenatal Clinic Limited and Kenneth Muuka[8].

6.25 Turning to the subject of embodying a judgment of a Court into an Order, the Applicant's counsel quoted elaborate passages from our decisions in **Puma Energy Zambia Plc v Competition and Consumer Protection Commission**[9], and **Savenda Management Services Limited v Stanbic Bank Zambia Limited**[10], to demonstrate that the subject of embodying a judgment into an order was neither new nor novel and that the same had been authoritatively pronounced upon before in the cases we have just cited above.

6.26 Counsel for the Applicant then went on to invite us to note that section 9 of the Court of Appeal Act is expressed in the same terms as section 4 of the Supreme Court of Zambia Act, Cap 25 of the Laws of Zambia, in the sense that the two statutory provisions invest power in a single judge of the Court concerned to deal with any matter which is interlocutory in nature.

6.27 On the basis of the reasoning in the preceding paragraph, the Applicant's counsel reiterated the point that if, as had appeared to have been the case in this matter, the Court of Appeal was in agreement with the respondents' contention that Siavwapa JA's judgment of 29th March, 2019 had changed the complexion of the full Court's judgment of 31st January, 2019, the full court should have guided the Respondents to invoke the provisions of section 9(b) of the Court of Appeal Act, No.7 of 2016 for the purpose of properly moving the Court of Appeal to vary, discharge or reverse the order of Siavwapa JA.

6.28 According to the Applicant's counsel, the Court of Appeal's failure to proceed in the manner we have indicated in the preceding paragraph constituted a naked abdication of its responsibility adding that the Court of Appeal was the only proper forum to examine the Order which the single judge had settled by way of a renewed application as opposed to an appeal. Learned counsel for the Applicant drew our attention to Order

10 rule 2(8) of the Court of Appeal Rules, being Statutory Instrument No. 65 of 2016 and our decision in **Investrust Bank Plc v Build It Hardware Limited & Yousuff Essa**[11] to support the above contention.

6.29 The last argument of note, which the Applicant's counsel canvassed in aid of the preliminary objection was that, contrary to the view which the Court below had taken, none of the draft or proposed grounds of appeal which the respondents had projected, raised a point of law of public importance for the purpose of meeting the qualifying criteria or threshold set by statute via section 13 (3) of the Court of Appeal Act for the purpose of escalating appeals from the court below to this court. Counsel cited numerous decisions from jurisdictions such as England, Kenya and Uganda to demonstrate that the respondents' grounds of appeal fell short of meeting the qualifying criteria for the purpose of mounting an appeal to this Court. Accordingly, we were urged to uphold the preliminary

objection and consequentially dismiss the Respondents' appeal with costs.

6.30 The Respondents (who are the appellants to the appeal), opposed the Applicant's Preliminary Objection and filed Skeleton Arguments to that effect.

6.31 The Respondents' Skeleton Arguments opened with some background narrative around the genesis of the present appeal which we earlier recounted. In that background narrative, the Respondents recounted the entry of the Court of Appeal judgement on 31st January, 2019 and the subsequent alteration, amendment and/or reversal of that judgment by a ruling of a single Judge of that Court on 29th March, 2019 which ruling had 'purported' to settle the subject judgment into an order embodying the same (i.e, the Court of Appeal judgment).

6.32 The background narrative further highlighted the steps which the Respondents (now Appellants) took in the way of mounting an application for leave to appeal against the Court of Appeal judgment as subsequently

altered, amended, changed and/or reversed by a Ruling of a single judge and for an Order staying execution of the Court of Appeal judgment.

6.33 The Respondents' counsel further noted in their background narrative that, instead of opposing the Respondents' twin applications before the Court of Appeal as adverted to earlier in this ruling, the Applicant proceeded to file a Notice of Motion seeking to have the Court of Appeal dismiss those applications. Counsel went on to remind us that the Applicant's bid was, however, unsuccessful as borne out by the Court of Appeal Ruling of 8th April, 2019, in terms of which that Court dismissed the Applicant's Preliminary Motion of 3rd April, 2019 but granted the Respondents leave to appeal to this Court together with an Order staying execution.

6.34 Moving away from the background narrative, the Respondents' counsel opened their substantive reaction to the Applicant's Preliminary Objection to the appeal with a proposition which questioned the propriety of

employing Rule 19 of the rules of this Court for the purpose of challenging a substantive decision rendered by the Court of Appeal.

6.35 According to counsel for the Respondents, the issues which had been raised by the Applicant in its Preliminary Objection related to substantive findings which had been made by the Court of Appeal. Learned counsel noted, in particular, that the respondent was unhappy with the Court of Appeal's finding that, so far as the Respondents' appeal to this Court was concerned, the 14-day period which section 13(2) of the Court of Appeal Act prescribes for the purpose of securing leave to appeal began to run on 29th March, 2019 (being the date when the order embodying the judgment of the Court of Appeal was settled by Siavwapa JA), and not 31st January, 2019 (being the date when the Court of Appeal had pronounced its judgment).

6.36 According to the Respondents' counsel, when Siavwapa JA settled the Order embodying the Court of Appeal's Judgment, he was not dealing with interlocutory

matters but matters involving the appeal which was before that Court. Consequently, counsel maintained, time only started to run on 29th March, 2019 as opposed to 31st January, 2019 as had been contended by the Applicant.

6.37 In counsel for the Respondents' estimation, the finding alluded to in the two preceding paragraphs of this ruling was a considered position by the Court of Appeal and, therefore, constituted a substantive decision or holding by that Court which cannot be properly challenged by way of a Preliminary Objection under Rule 19 of the Rules of this Court. The proper course, they argued, should have been for the Applicant to appeal against that decision by the Court of Appeal pursuant to section 13 of the Court of Appeal Act on the basis that this section permits an appeal from a judgment of the said Court given that the statute itself defines the word *'judgment'* as including a *'decision'* of the Court of Appeal.

6.38 Turning to the Applicant's argument that this Court lacks jurisdiction to entertain an appeal against a ruling of a single Judge of the Court of Appeal, the Respondents' reaction to this contention was that, as with the decision earlier canvassed, the Court of Appeal made a substantive decision when it found, in its Ruling of 8th April, 2019, as follows:

> **"We are of the considered view, as argued by Mr. Malambo, SC, that when embodying the judgment [of the Court of Appeal] into an order, the single judge was dealing with matters involving the appeal and not interlocutory matters. The Order, as argued, is what prompted the appeal, as it appears to have changed the judgment of 31st January, 2019. Time, therefore, began to run on 29th March, 2019 and so the application for leave was made within time...".**

6.39 According to Respondents' counsel, what has been quoted above from the Ruling of the Court of Appeal dated 8th April, 2019 constituted substantive decisions which cannot be properly assailed or disposed of via a

Preliminary Objection pursuant to Rule 19 of the rules of the Supreme Court.

6.40 The Respondents' counsel further protested that, in fact, quite apart from mounting this Preliminary Objection on the faith of Rule 19 of the Rules of this Court, the Applicant also mounted another challenge, which is also currently pending before this Court, in the nature of a motion by which the Applicant is challenging the refusal by a single Judge of this Court to grant the Applicant leave to appeal against the Court of Appeal's decision granting the respondents leave to appeal against its Judgment of 31st January, 2019.

6.41 The Respondents' counsel accordingly complained that the Applicant was effectively abusing the process of this court and urged us to dismiss the Applicant's Preliminary Objection on that score.

6.42 With respect to the Applicant's counsel's contention that the jurisdiction of this Court to hear an appeal stemming from a Judgment of the Court of Appeal is only exercisable where the prospective appellant has

obtained prior leave of the Court to appeal, the Respondents' counsel maintained that the Respondents did, infact, seek and was duly granted leave to appeal adding that for the said purpose time began to run on 29th March, 2019, being the date of Siavwapa JA's Ruling which, counsel insisted, materially altered, changed or amended the reasoned and final Judgment of the Court of Appeal sitting as a full court.

6.43 The respondents' Counsel further sought to dispel the notion projected by the Applicant's counsel that the Respondents' appeal appeared to have been separately attacking the full court's Judgment of 31st January, 2019 and the single judge's Ruling of 29th March, 2019. According to the respondents' counsel, there was only one appeal before this Court, namely, the appeal against the judgment of the Court below, as amended by the aforesaid Ruling and the embodiment order of the same date.

6.44 Counsel for the respondents further reminded us that the full Bench of the Court of Appeal, in its Ruling

granting the respondents leave to appeal, had made a finding that the embodiment order of 29th March, 2019 appeared to have changed the judgment of the full court of 31st January, 2019 and that time, therefore, began to run on 29th March, 2019, being the date when the judgment was altered or changed.

6.45 Learned Counsel for the respondents insisted that Siavwapa JA, through the embodiment order, substantially altered the judgment of the Court below by ordering that:

(a) the register of members of ZPC Limited should reflect that Ital Terrazzo Limited holds 42 per cent of the shares of ZPC Limited; and

(b) the correct amount payable to the appellants by the respondent was K580, 000, contrary to the Judgment of the full Court that the sum payable was K580, 000, 000.

6.46 With regard to the applicant's counsel's contention, founded on our decisions in ***Puma*** [9] and ***Savenda*** [10], to the effect that there was nothing novel about orders embodying judgments in Zambia, counsel for the respondents took the position that Order 10 Rule 23 of

the Rules of the Court of Appeal is different and is styled to be applied differently from Rule 75 of the Rules of this Court.

6.47 We pause here to mention that, having regard to the conclusion which we have reached in this Ruling, we would refrain from delving any further into the parties' debate around the substantive reasons which would define the direction of an application for leave to appeal to this Court from the court below.

6.48 The respondents' counsel also argued that once the Court of Appeal had delivered its final Judgment on 31st January, 2019, it became *functus officio*, such that the respondents could not lay their grievance against the 29th March, 2019 ruling and the embodiment order before the same Court. According to the respondents' counsel, the recourse which was available to the respondents was to approach this Court adding that this was the basis on which leave to appeal was duly granted to them by the Court below.

6.49 With regard to the question whether this Court has power to entertain an appeal against the decision of Siavwapa JA, in his capacity as a single Judge of the Court of Appeal, Counsel for the respondents reminded us that Siavwapa JA himself disclosed in his Ruling that he had been directed by the Presiding Judge (Lengalenga JA) to deal with the application for an order embodying the judgment of the Court. Having regard to the foregoing, counsel contended that Siavwapa, JA did not deal with the application for an embodiment order as an interlocutory matter but exercised the power of the full Court of Appeal, on its behalf, by varying the substance of the judgment of the full Court of 31st January, 2019. Such a decision, according to the respondents' counsel, could not have been the subject of further proceedings before the full Court, which became *functus officio* upon delivering its reasoned judgment. Accordingly, we were urged to dismiss the preliminary objection with costs.

7.0 CONSIDERATION OF THE PRELIMINARY OBJECTION AND DECISION

7.1 We have considered the arguments of Counsel on either side of the preliminary objection as mounted by the Applicant and commend Counsel involved for their respective and very helpful exertions.

7.2 It is perhaps fitting and appropriate to begin our reflections around the pre-emptive action which the respondent has mounted in relation to this appeal by reminding ourselves that, under the statutory scheme which governs appeals from the Court of Appeal to this court, no appeal to this court can be launched without the leave of the Court of Appeal or, where such leave is refused by the Court of Appeal, the leave of this court. In this regard, and, in fairness to counsel involved, neither side to the objection we have been called upon to inquire into suggested anything we would consider inconsistent with the position we have just set out above.

7.3 We must also acknowledge, at once, that the Applicant's Counsel was very clear as to what it is that

had prompted the Applicant's double-barrelled objection.

7.4 The first limb of the Applicant's objection is simply this, that this court has no jurisdiction to entertain the present appeal by the respondents against the judgment of the Court of Appeal which was delivered on 31st January, 2019 because the application pursuant to which the respondents were granted leave to appeal was not made within 14 days from the date of the judgment under appeal as required by section 13(2) of the Court of Appeal Act.

7.5 It is fairly clear and plain from the first limb of the Applicant's objection identified above that the Applicant has not necessarily taken issue with the fact of the leave in question not having been granted or secured. Rather, the kernel of the Applicant's protest is that, although the requisite leave was, in point of fact, granted by the Court of Appeal, the *purported* granting of that leave was wholly ineffectual, futile and a complete nullity by reason of the fact that its granting

was done in complete violation of a mandatory requirement of the law as prescribed in section 13(2) of the Court of Appeal Act.

7.6 Before we proceed any further, we must, indeed, pause here to locate the applicant's Counsel's exertions around the first limb of the objection in question in its constitutional and statutory context.

7.7 Article 125(2)(a) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 provides that:

> **"The Supreme Court has (a) appellate jurisdiction to hear appeals from the Court of Appeal..."**

7.8 On the other hand, section 13 sub-sections (1) and (2) of the Court of Appeal Act enacts as follows:

(1) "An appeal from a judgment of the Court [of Appeal] shall lie to the Supreme Court with leave of the Court [of Appeal]'

(2) An application for leave to appeal, under sub section (1), shall be made within fourteen days of the judgment".

7.9 The highpoint of the applicant's lead Counsel, Mr. J.P Sangwa, S.C's contention was that this court cannot

entertain the present appeal because the respondents did not comply with the statutory provisions which we have highlighted above to the extent that, instead of applying for leave to appeal within the mandatory 14-day period which statute prescribes, they only did so after a period of 57 days, that is to say, way beyond the legally permitted period of 14 days.

7.10 The applicant's Counsel cited our decision in **JCN Holdings limited -v- Development Bank of Zambia**[1] to make the point that although the Court of Appeal had proceeded to grant the respondents leave to appeal, that court had no jurisdiction to entertain the relevant application for leave because it was only filed on 29th March, 2019 instead of 14th February, 2019, the latter date having fallen within the legally permitted period of 14 days from the date of the judgment which was the subject of the appeal (i.e, 31st January, 2019).

7.11 Having regard to the matters in 7.10, Mr. Sangwa S.C accordingly submitted that whatever the Court of Appeal purported to do in the way of granting leave to

the respondent to appeal was of no moment as it was illegal, a complete nullity and wholly incapable of conferring the necessary authority upon this court to entertain, let alone, decide the appeal in question.

7.12 To buttress his argument, Mr. Sangwa drew our attention to our decision in **Marandola and others**[4] in which we reinforced the notion that a court has no power or discretion to extend a mandatory period which statute prescribes for the purpose of doing something or carrying out an act.

7.13 Mr. Malambo, SC, the respondent's lead Counsel's substantive reaction to the first limb of the Applicant's objection to the appeal was plainly that the objection and its statutory foundation had been misapprehended because the matters which had formed the basis of the objection had been the subject of a *substantive* determination by the Court of Appeal and were, therefore, not amenable to challenge via a pre-emptive objection founded on Rule 19 of the Rules of this court.

7.14 According to learned Counsel for the respondents, in granting leave to appeal to the respondents and announcing that the respondents had filed the relevant application with the Court of Appeal within the legally permitted period, the Court of Appeal had made a substantive decision which could only be challenged by way of an appeal pursuant to section 13 of the Court of Appeal Act and not a mere preliminary objection.

7.15 Learned State Counsel, Mr. Malambo, recalled that the approach of the Court of Appeal to the application for leave was that the relevant date for the purpose of reckoning of time to appeal was the 29th March, 2019, adding that this was the date when the single Judge changed or altered the full court's judgment of 31st January, 2019. For completeness, Mr. Malambo indicated in his oral augumentation that the respondents had been happy with the Court of Appeal judgment until it was altered or changed by the single Judge and had no reason to desire to appeal until then.

7.16 We must say that we have anxiously reflected on the contentions of the two sides in relation to the first limb of the applicant's objection and do find the applicant's position inestimably compelling even in the face of learned Counsel for the respondents' visibly ingenious exertions.

7.17 In taking the position we have announced in the preceding paragraph, we have proceeded from the premise, well addressed in relation to the second limb of the preliminary objection, that the applicable period for reckoning the time within which the respondents ought to have launched their appeal to this Court was 14 days from the date of the Court of Appeal judgment (i.e, 31st January, 2019) and not when the judgment in question was changed (29th March 2019).

7.18 The high point of learned Counsel for the respondents' arguments relative to the first limb of the preliminary objection was that what the Court of Appeal did, when it granted leave to appeal in favour of the respondents, constituted a substantive decision which was not open

to challenge by way of a preliminary objection founded on Rule 19 of the Rules of this court but could only be appealed against to this Court.

7.19 With great respect, we would not go along with the respondents' Counsel's reasoning as projected in paragraph 7.18. The question that we would rather sharply ask ourselves is whether, having regard to the fact that the respondents had *purported* to apply for leave to appeal at a time when the applicable period within which they could have lawfully done so had long expired, the decision, or, to borrow State Counsel Malambo's own words, the substantive decision or outcome of that purported application could possibly stand.

7.20 Our unequivocal answer to the question we have posed in 7.19 above is that, the purported decision, however one would choose to package it, cannot stand.

7.21 In reaching the conclusion we have reached in 7.20, we would adopt the English translation of the latin expression ***'out of nothing, comes nothing'*** or the

latin maxim *nihil dat qui non habet* (***He gives nothing who has nothing).***

7.22 To put it plainly, what the Court of Appeal did in proceeding to hear the respondents' twin applications in the circumstances we have highlighted above amounted to nothing, that is to say, from the standpoint of both the means (i.e, *the process*) and the end (i.e, *the outcome*).

7.23 Granted, therefore, that what transpired before the Court of Appeal in the way of that court's reaction to the respondents' search for leave to appeal having amounted to nothing, it does follow that the necessary *sine qua non* which the Court of Appeal Act prescribes for the purpose of clearing the way for the launching of the present appeal to this court was not attained.

7.24 Therefore, not only do we agree with the Kenyan Court of Appeal's observation in the case of ***Owners of the Motor Vessel "Lilians"*** [2] that,

> ***"jurisdiction is everything [and that] without it, a court has no power to make one more step",***

we also totally share that court's further observation in the same case that:

> ***"Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing..."***

7.25 What the Kenyan Court of Appeal was saying, as we have just quoted above, is precisely what we said in ***JCN Holdings Limited v Development Bank of Zambia***[1], when we observed that:

> **"It is clear from the Chikuta and New Plast Industries cases that if a court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to that matter."**

7.26 In relation to the respondents' pending appeal, we are in agreement with Mr. Sangwa, SC's rather potent argument that we have no jurisdiction to entertain this appeal in the light of the legally flawed circumstances which characterised its launching before this court.

7.27 Having reached the conclusion we have reached in 7.26, we decline to go along with learned counsel for the respondents' suggestion that the Applicant should have appealed against what counsel described as the Court of Appeal's *substantive determination* of the respondents' application for leave as opposed to assailing the same through a preliminary objection under Rule 19 of the Rules of this court.

7.28 In our view, the applicant proceeded correctly or appropriately when it invoked Rule 19 to pre-empt and thwart the further progress of the respondents' ill-fated appeal. In saying this, we are acutely alive to the fact that the basis of the Applicant's objection went to the root or foundation of a court's adjudicative function.

7.29 Perhaps we should also stress, contrary to learned counsel for the respondents' disposition, that a preliminary objection founded on Rule 19 of the Rules of this court is, in the relevant statute's formulation, intended to target "***any appeal***" which, by necessary

extension, should mean any aspect of the appeal, be it of a procedural character or a substantive genre.

7.30 We also feel encouraged to mention, as a necessary footnote, that Rule 19 serves the useful purpose of saving scarce or limited judicial resources in circumstances such as the present appeal found itself in.

7.31 As we close our reflections around the first limb of the Applicant's objection, we feel tempted to reiterate the observations by the Kenyan Court of Appeal in **Owners of the Motor Vessel "Lillians"**[2] which we quoted at paragraph 5.7 of this judgement found exceptionally compelling and adopt them with much alacrity.

Needless to say, we are enthused by the above observations and adopt them with much alacrity.

7.32 Perhaps, we should also take this opportunity to stress that when a preliminary objection is taken by a party seeking to have a court refrain from taking a particular course of action in relation to a matter, particularly

where such an objection is of the nature of a jurisdictional challenge, such an objection must be dealt with at once. There is no option for the court to choose to defer the revelation of its mind upon the objection to the main judgment or ruling, unless, of course, such deference is only for the purpose of giving the reasons for having discounted the objection in question. We are, indeed, of the firm and settled view that proceeding in any other way would be defeating the very purpose for which the preliminary objection will have been taken.

7.33 The meaning and effect of the preceding discourse is that the first limb of the applicant's preliminary objection succeeds.

7.34 The second limb of the Applicant's objection to this appeal is founded on the respondents' contention that they were prompted to launch their appeal against the Court of Appeal judgment of 31st January, 2019 because this judgment was changed or altered or amended and/or reversed by a single judge of the

Court of Appeal following this single judge's determination of the applicant's application to settle an order embodying the said judgment of the full court pursuant to the provisions contained in order 10 Rule 23 (4) of the Court of Appeal rules.

7.35 To put it very plainly, the position which learned Counsel for the applicant has canvassed around this second limb of the objection is that the decision, which the single judge made on the faith of order 10, rule 23(4), of the Court of Appeal Rules, was interlocutory in character and did not, under article 132 of the Constitution of Zambia as amended by Act No. 2 of 2016, constitute a final decision of the court which could be appealed against to this court but represented an interlocutory decision, which could not be correctly contested through an appeal to this court but by way of a motion to the full Bench of the Court of Appeal for the purpose of varying, reversing or discharging the single judge's decision in accordance with section 9 of the Court of Appeal Act.

7.36 The applicant's Counsel further insisted that a decision of a single judge of the Court of Appeal could only be appropriately corrected pursuant to order 10, rule 2(8) of the Court of Appeal Rules, which allows for the renewal of any application which had been pronounced upon by a single judge of the Court of Appeal before the full court in the same way that a decision of a single judge of this Court made pursuant to section 4 of the Supreme Court Act, Cap. 25 can only be challenged before a full bench of this court via a renewed application duly launched under section 4(b) of the same statute.

7.37 The gist of the Respondents' counsel's reaction to the second limb of the Applicant's preliminary objection is three-fold.

7.37.1 Firstly, the Respondents' counsel contended that the ruling of Siavwapa JA (dated 29th March, 2019) relative to the Applicant's application to have the judgment of the Court of Appeal of 31st January, 2019 embodied in an order represented a decision

of the Court of Appeal by reason of the fact that Siavwapa JA merely did what he was asked to do on behalf of the full court. Under these circumstances, the Ruling of Siavwapa, JA including the order which he had settled, represented decisions of the Court of Appeal which could only be properly challenged by way of an appeal to this court because the former court had become *functus officio* and was incompetent to deal with the respondents' grievances relative to the said ruling and embodiment order.

7.37.2 Secondly, the Respondents' counsel posited that the role which Siavwapa JA performed in relation to the applicant's embodiment application was final and not interlocutory in character because it related to an activity which Siavwapa JA had undertaken on behalf of the full court.

7.37.3 Thirdly, the respondents' counsel contended that it was wrong for the applicant to treat the respondents' appeal as constituting separate

attacks against the judgment of the Court of Appeal dated 31st January, 2019 and that of the single judge of the same court dated 29th March, 2019 when, in fact, only one appeal had been launched against that court's judgment as amended by the Ruling of the single judge and the embodiment order.

7.38 We have enthusiastically pondered over the parties' rival contentions we have highlighted above and must start our reflections by making the point that, an embodiment application of the nature envisaged under Rule 75 of the Rules of this court and order 10 Rule 23 of the Court of Appeal Rules can either relate to a final judgment or an interlocutory judgment.

7.39 We should also add here that, as the learned editors of ***Halsbury's Laws of England,*** 4th edition, Volume 26, have said at paragraph 504 on the strength of several decisions by the Court of Appeal of England:

> **"... a judgment or order may be final for one purpose and interlocutory for another, or final as to part and interlocutory as to part.**

It is impossible to lay down principles about what is final and what is interlocutory ..."

7.40 Arising from our observation in the preceding paragraph, although the judgment of the Court of Appeal of 31st January 2019 was final as a decision of that court and for the purpose of Article 132 of the Constitution of Zambia as amended by Act No. 2 of 2016, it remained interlocutory to the extent envisaged by Order 10, Rule 23, of the Court of Appeal Rules, 2016.

7.41 When, therefore, Siavwapa JA entertained the embodiment application pursuant to the provisions contained in order 10, Rule 23 of the Court of Appeal Rules, he did so in the exercise of jurisdiction which was potentially final (in the event of the arising decision not being challenged). However, the learned judge's decision remained open to challenge because:-

7.41.1 It did not represent a decision of the full court; and

7.41.2 It purportedly conflicted and went beyond the scope of the decision of the full court which the learned judge had been called upon to embody into an order.

7.42 In our view, the role which Siavwapa JA performed on the faith of Order 10, Rule 23 of the Court of Appeal Rules did not represent an intervention of the full court and, therefore, remained amenable to be contested pursuant to section 9 of the Court of Appeal Act for the purpose of varying, reversing or discharging the same as opposed to having the same appealed against to this court. For the avoidance of any doubt, the approach which we have just adverted to was adopted in ***Puma***[9] and ***Savenda***[10]. The meaning of this conclusion is that we are in total agreement with Counsel for the Applicant that the court below erred and abdicated its responsibility when it opted to grant the Respondents leave to appeal against Siavwapa, JA's ruling to this Court instead of dealing with it on the basis of the provisions contained in section 9(b) of the Court of

Appeal Act (which represents a virtual replication of section 4(b) of the Supreme Court of Zambia Act).

7.43 As to the issue of whether or not the Respondents' appeal represented one appeal or an appeal against two decisions, namely, the Court of Appeal judgment of 31st January, 2019 and Siavwapa JA's Ruling of 29th March, 2019, our view is that, although the Notice of Appeal which the Respondents had filed announced that the appeal targeted the Court of Appeal judgment of 31 January, 2019 as allegedly changed, altered, and/or reversed on 29 March, 2019, by Siavwapa, JA's Ruling, in effect the appeal targeted two decisions, namely, the main judgment of the Court of Appeal and Siavwapa, JA's judgment as a single judge. This fact is borne out or evidenced by the first ground of appeal in the memorandum of appeal relating to the appeal in question.

7.44 As regards the issue relating to the effective date of the judgment in question for the purpose of any prospective appeal, Professor Adrian Zuckerman, the

learned author of the leading text entitled ***Zuckerman on Civil Procedure: Principles and Practice*** has suggested that:

> **"judgments and orders take effect on the date on which they are given. Therefore, time begins to run from that date and not the date on which reasons for the decision are given or the order is perfected..."**

7.45 In the Zambian High Court decision of **Kaole Contracting and Engineering Company Limited -v- Mindeco Small Mines Limited[14],** Moodley, J made the following observation:

> **"The effective date of judgment would be the date it was pronounced subject to any directions given by the master or ... the District Registrar..."**

7.46 In relation to the matter at hand, we are in no difficulty to announce that the date of the main judgment against which the Respondents had launched their ill-fated appeal remained the 31st January, 2019 notwithstanding that the grievances which prompted

their desire to appeal only emerged on 29th March, 2019 when the judgment in question was altered or changed consequent upon the single judge's intervention as earlier discussed.

7.47 The meaning and effect of the preceding discourse is that the second limb of the objection must also succeed. In reaching this conclusion, we affirm that, although the Respondents' counsel had purportedly secured leave to appeal to this Court against the judgment of the Court of Appeal earlier identified, that exercise was a complete nullity and had not properly yielded its desired outcome because it was undertaken in a manner which did not comply with the law.

7.48 For the removal of any doubt, the leave which the Respondents were purportedly granted by the Court of Appeal would only have been valid and legally recognizable if the relevant application leading to the same had been launched within 14 days from 31st January, 2019, this being the date when the judgment which had been targeted for attack was pronounced. In

this regard, it mattered nothing that the grievances which had birthed the Respondents' desire to appeal only arose long after the expiry of the said 14-day period following the amendment or modification of the judgment in question on 29th March, 2019.

8.0 CONCLUSION

8.1 The inevitable conclusion which we have reached is that the preliminary objection has succeeded on both grounds which had inspired the same. This conclusion means that we cannot touch the appeal in question because, in the eyes of the law and, for all intents and purposes, its purported escalation to this Court amounted to nothing as we have elaborately explained in this ruling. It accordingly follows that the appeal in question, in the circumstances that it was purportedly launched, stands dismissed with costs to be taxed if not agreed save that the same are to be limited to one state counsel and one senior advocate only.

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M. MUSONDA
DEPUTY CHIEF JUSTICE

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M. MALILA
SUPREME COURT JUDGE

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R.M.C KAOMA
SUPREME COURT JUDGE