IN THE CONSTITUTIONAL COURT OF ZAMBIA **2022/CCZ/006**
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

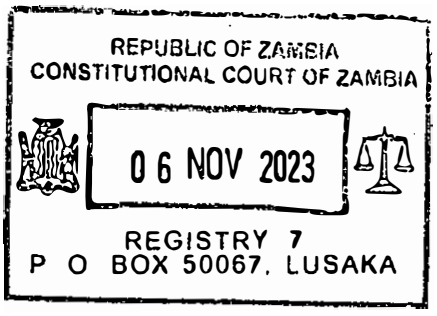
IN THE MATTER OF: **THE CONSTITUTION OF ZAMBIA, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: **ARTICLES 1 (S), 128, 173 (1) (a), (c), (g), 180 (7), 216 (c) AND 23S (b) OF THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: **THE STATE PROCEEDINGS ACT, CHAPTER 71, VOLUME 6 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: **SECTION 8 OF THE CONSTITUTIONAL COURT ACT, 2016**

BETWEEN



MILINGO LUNGU **PETITIONER**

AND

THE ATTORNEY GENERAL **1st RESPONDENT**

ADMINISTRATOR GENERAL **2nd RESPONDENT**

Coram: Shilimi, DPC, Mulonda, Musaluke, Chisunka, Mwandenga, Kawimbe and Mulife JJC on 12th October, 2023 and 6th November, 2023

For the Petitioner: Mr S. Sikota, SC of Messrs Central Chambers and Mr M. Chitambala of Lukona Chambers

For the 1st Respondent: Mr. M. Nkunika and Mr C. Ngoma of Simeza Sangwa Associates

For the 2nd Respondent: Mr. K. M. Kalumba, Acting Assistant Administrator General

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RULING

Cases Referred to:

1. Magill v Porter (2002) 2 AC 357
2. Michael Mabenga v The Post Newspaper Limited (Appeal No. 069/2012) [2015] ZMSC 20 (21 May 2015)
3. R v Sussex Justices, Ex Parte McCarthy (1924) 1 KB 256, [1923] ALL ER Rep 233
4. President of the Republic of South Africa v The South African Rugby Football Union & Others, Case CCT16/98
5. JCN Holdings v Development Bank of Zambia, Appeal No. 87/2012, at 494
6. Human Rights case No. 14959-K of 2018
7. John Kasanga and Another v Ibrahim Mumba and two others, Appeal No. 21 and 24 of 2005 (2008) ZMSC 45
8. South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Bongani Masuku and Others, Case CCT 14/19
9. Council of Review, South African Defense Force and Others v Monnig and Others (610/59) (ZASCA 64; (1992) 4 All SA 691
10. Bernett v ABSA Bank Ltd 2019 (3) SA 92(CC)
11. Garuba v Omokhodion (2011) 15 NWLR (Pt. 1269)

Legislation Referred to:

1. The Constitution of Zambia (Amendment) Act No. 2 of 2016
2. The Constitutional Court Rules, S.I. No. 37 of 2016
3. The Judicial (Code of Conduct) Act No. 13 of 1999

Works Referred to:

1. Black's Law Dictionary, Eighth Edition

1.0 Introduction and background

[1.1] When we heard this application, we sat with our brother Justice Mwandenga who is currently out of jurisdiction and so the Ruling is by the majority

[1.2] This is a Ruling on a Notice of Motion filed on the 7th June, 2023 (the Motion) by the Petitioner for an Order for Recusal of Honourable Justice A. M Shilimi, Honourable Justice M.Z Mwandenga and Honourable Justice K. Mulife made by the Petitioner pursuant to Order 9 Rule 20 (1) of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 (CCR) as read with Sections 6 and 7 of the Judicial Code of Conduct Act, No. 13 of 1999 (JCCA). The Motion was accompanied by an affidavit in support sworn by the Petitioner together with a list of authorities and skeleton arguments dated 7th June, 2023.

[1.3] The Petitioner seeks a determination by this Court of the following questions as to whether:

a. **Honourable Justice Mr. Arnold Mweetwa Shilimi, Honourable Justice Mr. Kenneth Mulife and Honourable Justice Mr. Mudford Zachariah Mwandenga can continue to sit on the panel to determine this matter in light of the fact that the Petitioner is involved as an Advocate in the matter under cause number 2023/CCZ/005 wherein the appointment of the said Judges is questioned.**

b. **Honourable Justice Mr. Arnold Mweetwa Shilimi, Honourable Justice Mr. Kenneth Mulife and Honourable Justice Mr. Mudford Zachariah Mwandenga can continue to sit on the panel to determine this matter in light of the fact that the panel comprising Justice Mrs. A. Sitali, Justice Mrs. M.S. Mulenga, Justice Mr. P. Mulonda, Justice Mr. M. Musaluke and Justice Mr. Chisunka that sat and continued to sit had not recused themselves or put an order on the file to show why they will not continue to sit in this matter.**

[1.4] In the affidavit filed in support of the Motion, it was deposed that the Petitioner commenced this matter in 2022 challenging the revocation of the indemnity agreement between himself and the Director of Public Prosecutions (DPP). That the said matter had a panel of Judges that comprised of Honourable Justice Mrs. A. Sitali, Justice Mrs. M.S. Mulenga, Justice Mr. P. Mulonda, Justice Mr. M. Musaluke and Justice Mr. M.K. Chisunka. It was deposed that Honourable Justice M. M. Munalula was also part of the panel but that she had recused herself.

[1.5] That during the period of hearing the Petition, new Judges were to be appointed and promoted to this Court by the Republican President.

[1.6] That upon appointment of the new Judges a new panel of Judges was constituted to hear his matter. That the new panel comprised of Honourable Justice Mr. Arnold Mweetwa Shilimi, Honourable Justice Mr. Kenneth Mulife and Honourable Justice Mr. Mudford Zachariah Mwandenga.

[1.7] It was deposed that the deponent was advised by his advocates on record and that he verily believed the same to be true that the changes in composition of the panel of judges was not sanctioned by any order, recusal or disqualification of the previous panel.

[1.8] That the three new Judges in question were a subject of a Petition between **Isaac Mwanza and Maurice Mutale [sic] v The Attorney General 2023/CCZ/005** where the appointment of the said Judges was being challenged and the Petitioner was one of the Advocates representing the 2nd Petitioner in that matter.

[1.9] It was deposed that the Petitioner was advised by his appointed advocates on record and that he verily believes the same to be true and correct that the new panel cannot continue to sit on the panel to determine this matter because the Petitioner was involved in the matter bearing cause No. 2023/CCZ/005.

[1.10] Further, that the Petitioner was advised by his advocates on record and that he verily believes the same to be true and correct that there is a reasonable apprehension that the said Judges will not decide this matter with impartiality and hence they should not continue to sit on the panel to determine this matter.

[1.11] It was the Petitioner's position that he had further been advised by his appointed advocates on record and he verily believes to be true and correct that there was a risk of violating a cardinal guarantee of the Constitution, that is the right to a fair trial, if the said Judges did not recuse themselves.

[1.12] It was deposed that the Petitioner's Advocates on record reiterated their advice to the Petitioner that this Court is undoubtedly cognizant of its oath of office to do justice to all in accordance with the law and without fear or favour and dutifully be impartial thus by avoiding sitting and hearing the matter when their suitability is called in question would save the interest of justice.

[1.13] It was added that to refuse this application would ground definable judicial misconduct on the part of the Judges whose suitability to determine this matter is in question.

[1.14] In the Petitioner's written submissions, it was contended that this application was competently before this Court as it had been made by way of Notice of Motion pursuant to Order 9 Rule 20 (1) of the Constitutional Court Rules which provides that:

> **Any interlocutory application made under the Act shall be made by summons or notice of motion, as the case may be.**

[1.15] The Petitioner proceeded to address the recusal of the Judges in question by citing sections 6 and 7 of the Judicial (Code of Conduct) Act No. 13 of 1999 which provides that:

> **6. (1) Notwithstanding section seven, a Judicial officer shall not adjudicate on or take part in any consideration or discussion of any matter in which the officer or the officers' spouse has any personal, legal or pecuniary interest whether directly or indirectly.**
>
> **(2) A judicial officer shall not adjudicate or take part in any consideration or discussion of any proceedings in which the officer's impartiality might reasonably be questioned on the grounds that -**
>
> ***(a)*** **the officer has a personal bias or prejudice concerning a party or a party's legal practitioner or personal knowledge of the facts concerning the proceedings;**
>
> ***(b)*** **the officer served as a legal practitioner in the matter;**
>
> ***(c)*** **a legal practitioner with whom the officer previously practiced law or served is handling the matter;**
>
> ***(d)*** **the officer has been a material witness concerning the matter or a party to the proceeding;**
>
> ***(e)*** **the officer individually or as a trustee, or the officer's spouse, parent or child or any other member of the officer's family has a pecuniary interest in the subject matter or has any other interest that could substantially affect the proceeding; or**
>
> ***(f)*** **a person related to the officer or the spouse of the officer**
>
> **(i) is a party to the proceeding or an officer, director or a trustee of a party;**
>
> **(ii) is acting as a legal practitioner in the proceedings**
>
> **(iii) has any interest that could interfere with a fair trial or hearing; or**
>
> **(iv) is to the officer's knowledge likely to be a material witness in the proceeding.**
>
> **7. (1) A judicial officer disqualified under section *six* shall, at the commencement of the proceedings or consideration of the matter, disclose the officer's disqualification and shall request the parties or the parties' legal representatives to consider, in the absence of the officer, whether or not to waive the disqualification.**

> **(2) Where a judicial officer has disclosed an interest other than personal bias or prejudice concerning a party to the proceedings, the parties and the legal representatives may agree that the officer adjudicates on the matter.**
> **(3) A disclosure or an agreement made under subsection (2) shall form part of the record of the proceedings in which it is made.**

[1.16] It was submitted that the above provisions are built into the test that now enjoys universal application, which is firstly, that in considering an application for recusal, this Court presumes that judicial officers are impartial in adjudicating a particular dispute, and secondly, when the reasonable basis for requesting a Judge(s) to recuse themselves exists, the application for recusal has to be made. It was added that the import of sections 6 and 7 cited above, was that a judicial officer shall not sit and adjudicate on a matter where there is a real possibility of bias. The case of **Magill v Porter**[1] was cited where the test for recusal was stated to be as follows:

> **Whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Judge was biased.**

[1.17] The Petitioner proposed to adopt the above test in this application as it was the universally accepted test for recusal of Judges and further argued that the impartiality and independence of the said Judges is questionable given the circumstance highlighted in the Petitioners'

affidavit in support of the Notice of Motion. In emphasising the test on recusal, the Petitioner proceeded to call into aid the case of **Michael Mabenga v The Post Newspapers Limited**[2] where the Supreme Court opined as follows:

> **That the Judge in the Court below should have recused herself because there was a likelihood that she would be biased against the appellant. The Court stated: '[T]he learned judge should not have handled a matter in which the lawyer appearing before her was prosecuting the judge in a different matter.**

[1.18] It was added that the Supreme Court in the above matter reasoned that counsel cannot prosecute a judge in one case and at the same time appear before that judge in another proceeding. That the Supreme Court went on to hold that "***any party to an action is entitled to transfer a matter from one Judge to another Judge where a Judge's impartiality may be reasonably questioned.***" It was submitted that in re-echoing the principle that a Judge should not place themselves in a position where their impartiality may be reasonably questioned, the Supreme Court drew from the English case of **R v Sussex Justices, Ex Parte McCarthy**[3] where it was held that:

> **Not only must justice be done; it must also be seen to be done.**

[1.19] It was the Petitioner's submission that any fair-minded person would conclude that the Honourable Justices in question would be biased towards the Petitioner as he is one of the advocates representing the 2nd Petitioner in another matter that questions the appointment of the said Judges. That the Petitioner, in the discharge of his duties as counsel in that matter, may have submitted or said certain things that may be received by the said Justices as a personal affront, that therefore it is in the interest of justice that they recuse themselves from this matter.

[1.20] It was further submitted that to refuse this application would result in a violation of a cardinal constitutional guarantee, that is, the right to a fair trial, upon which the entire judicial edifice is built. It was added that allowing the said Judges to sit in this matter would also violate Article 18 of the Constitution which guarantees a fair trial by an independent and impartial Court. The Petitioner agreed with the Constitutional Court of South Africa in the case of the **President of the Republic of South Africa v The South African Rugby Football Union & Others**[4] where it was held as follows:

> **At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable counsel must advance the grounds without fear. On the part of the Judge whose recusal is sought, there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront.**

[1.21] In addressing the argument that the changes made to the panel were not sanctioned by any Court order or previous recusal, the Petitioner relied on the case of **JCN Holdings v Development Bank of Zambia**[5] where the Supreme Court stated that a transfer of a matter from one Court to another must be sanctioned by the order of the Court. It was contended that this Court ought to allow this application as the change of the panel was not sanctioned by any Court order neither did the panel that handled this matter previously, recuse themselves or advance any reasons for the change.

[1.22] It was highlighted that the order of recusal sought in this matter was meant to protect the efficacy of the proceedings and the Petitioner's right to a fair trial. It was emphasised that a refusal of this application risked this matter being adjudicated upon by an impartial Court and

would also ground this Court in definable judicial misconduct. It was prayed that the order of recusal of the Judges in question be granted.

[1.23] In orally augmenting the written submission, the Petitioner submitted that, the issue for determination was whether there was a proper and legal reconstitution of the panel previously constituted by the President of the Court to hear and determine the Petition filed by the petitioner. The reconstitution referred to was said to have happened in two phases, firstly by the substitution of some of the judges initially selected by the Court President to hear and determine the petition by the judges that were newly appointed by the Republican President and ratified by the National Assembly. That the second limb involved the decision of the President of the Court to further reconstitute the bench to hear this Petition by enlarging the bench from five judges to eleven.

[1.24] It was argued that the President of the Court having executed her administrative function of constituting the initial panel under Section 4 (2) of the Constitutional Court (CCA) Act was *functus Officio* and did not have any further administrative function to perform. That any further changes to the duly constituted panel would have had to follow the exercise of a judicial function, which requires that an order of the

court is generated either through an application by the parties or by the court and that in this matter there is no such Order and neither is there any application on record made by either of the parties to the matter requesting for enlargement of the bench to include the judges referred to in the notice of motion before this Court. In support of his argument, the Petitioner referred this Court to the Pakistan Supreme Court decision in **Human Rights case**[6] where the Court in considering the provisions of Order XI of the Supreme Court rules of 1980, decided that once a bench has been constituted, cause list issued, and the bench is assembled for hearing cases, the Chief Justice cannot reconstitute the bench except in cases of recusal by any member of the bench or unavailability to sit due to prior commitments, illness or where the rules require a three-member bench instead of two.

[1.25] The Petitioner further submitted that although this was the first time such a matter was coming up before this Court, a similar matter which they contended is on all fours **with this case, namely the case of Micheal Mabenga v The Post Newspapers**[2] where it was held that the learned judge should not have handled a matter in which a lawyer appearing before her was prosecuting the judge in a different matter

referred to above was considered by the Supreme Court and that, that decision is the law as it stands.

2.0 Respondents case

[2.1] Both the 1st and 2nd Respondents did not file affidavits in opposition and skeleton arguments. The 1st Respondent submitted on points of law and the 2nd Respondent adopted the 1st Respondent's submissions.

[2.2] The 1st Respondent submitted that the practice and procedure in this Court is as provided for under section 9 of the CCA which provides that:

> **9. The jurisdiction vested in the court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Rules.**

[2.3] Reference was also made to Section 4 (2) of the CCA which clearly provides that the power to constitute and reconstitute panels is reposed in the President of the Court.

[2.4] It was the 1st Respondent's further submission that there is no requirement in either the CCA or the Rules for a Court order for reconstitution of a panel and that reliance on the Pakistan Supreme

Court decision, whose practice and procedure is different does not aid the Petitioner.

[2.5] With regard to the case of **JCN Holdings v Development Bank of Zambia**[5] cited by the Petitioner, in aid of its argument on the need for a court order for the transfer of a matter from one judge to another, it was the 1st Respondent's submission that the said case dealt with a specific provision under the High Court Act which deals with transfer and that this case is inapplicable in *casu* as there is no similar provision in the constitution, CCA, CCR or indeed the JCCA, that require an Order of reconstitution as suggested by the Petitioner.

[2.6] With regards to the issue of recusal of the judges listed in the notice of motion, the 1st Respondent referred the Court to the Supreme Court decision in the case of **John Kasanga and Another v Ibrahim Mumba and Others**[7] where the court stated as follows:

> **It is not the intention of the legislature in enacting the judicial (code of conduct) Act that any relationship between a judicial officer and Counsel representing any party should make a judicial officer disqualified from adjudicating in the matter.**

[2.7] It was argued that the **Micheal Mabenga**[2] case is distinguishable from the case at hand as the circumstances in the two matters are different and that the notice of motion has not specifically set out the actual ground upon which the Petitioner seeks the listed judges to recuse themselves.

[2.8] Finally, it was the 1st Respondent's submission that the arguments advanced in this case as the basis of recusal do not fall within any of the stipulated grounds under Section 6 of the JCCA as is required and as guided by the Supreme Court in the **John Kasanga**[7] case above.

3. Petitioner's reply

[3.1] In reply, the Petitioner, submitted that there was no argument that rules and Procedures are prescribed and that the 1st Respondent had failed to address the argument that the Pakistan case relates to an Order similar to Section 4(2) of the CCA. That Pakistan being a Commonwealth Country, invariably makes it's decisions of very high persuasive value. It was further argued that Section 4(2) of the CCA deals with constitution of panels and allocation of matters and not reconstitution.

[3.2] The Petitioner also submitted that the claim by the 1st Respondent that the **JCN Holdings**[5] and the **Micheal Mabenga**[2] cases are inapplicable to matters before the case at hand is unfounded. That the principles of law in the two cases resonate with circumstances of the current motion.

[3.3] It was further submitted in reply that the grounds upon which this motion is premised are clearly enumerated in the motion itself and the facts disclosed in the affidavit.

[3.4] Finally, it was the Petitioner's submission that the facts which have been set out in this matter are that the Petitioner took up a matter which touches personally on the Judicial officers in question and that the **Micheal Mabenga**[2] case states that, that kind of situation is a reasonable indicator that there may be some personal bias and that there is no need to show actual bias.

4. Determination and Decision

[4.1] We have considered the application, affidavit in support and skeleton arguments, submissions of learned Counsel in support of the application and the Respondent's submissions in opposition to the application.

[4.2] We shall first consider the issue of whether the three listed judges can continue on the panel to determine this matter in light of the fact that the Petitioner was involved as an Advocate in the matter under cause number 2023/CCZ/005.

[4.3] The law on recusal of a judge is well settled and was extensively discussed and laid out in our Ruling in this matter of 9th October, 2023. We shall however, once again endeavour to reiterate the basic principles of the law before applying the same to the facts as laid down in the application before us.

[4.4] Recusal is defined by **Black's Law Dictionary**, **Eighth Edition** as removal of oneself as a judge in a particular matter especially because of a conflict of interest. In broad terms, the requirement for recusal arises in cases where there is reasonable fear that a judge may not act impartially in the determination of a matter before them.

[4.5] There is however, a presumption of Judicial impartiality on the part of judicial officers. Impartiality is defined by the Royal Spanish Academy 2022 (https:/dte.rae.es/impartial) as follows:

> **Impartiality means an absence of prejudice or bias in favour of or against someone or something which makes it possible to judge or proceed with rectitude.**

[4.6] Further Article 122(1) of the Constitution, Act No. 2 of 2016 provides that:

> **(1) In the exercise of the judicial authority, the Judiciary shall be subject only to this Constitution and law and not be subject to the control or direction of a person or an authority.**

[4.7] As stated in our said previous Ruling on this matter, the presumption of impartiality under our law is critical for the legitimacy of a judge's performance of his or her constitutional and legal functions. It is anchored on the understanding that the oath of

office taken by judges coupled with their training and experience, equips them to make determinations based only on merit in all disputes before them.

[4.8] Superior Courts in other jurisdictions have in a plethora of decisions applied their minds to this fundamental principle of law and our understanding of the law on this matter is indeed fortified by the jurisprudence emanating from these jurisdictions. In the South African case of **South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Bongani Masuku and others**[8], the Court stated as follows:

> **Courts have repeatedly recognised the presumption that officers of the judiciary will discharge their oath of office through the impartial adjudication of all disputes. In SARFU, this Court recognised this stating that –**
> **'In applying the test for recusal, Courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare judges for the often-difficult task of fairly determining where the truth may lie in a welter of contradictory evidence.**

[4.9] The Court went on to state that:

> **All this to say that the law does not suppose the possibility of bias. If it did, imagine the bedlam that would ensue. There is an assumption that judges are individuals of careful conscience and intellectual discipline, capable of applying their minds to the multiplicity of cases which will seize them during their term of**

> **office, without imparting their own views or attempting to achieve ends justified in feebleness by their own personal opinions.**
>
> **The presumption of impartiality has the effect 'that a judicial officer will not lightly be presumed to be biased' This was confirmed in the SACCAWU, where this court emphasised that, not only is there a presumption in favour of the impartiality of the court, but that this is a presumption that is not easily dislodged. (emphasis added)**

[4.10] We adopt the reasoning of the South African Constitutional Court in this matter as our own. The standard for recusal is not only an objective one, but is very high more so in a constitutional court due to the need to preserve the presumption of impartiality which is necessary for the effective functioning of courts of law and to prevent forum shopping.

[4.11] It is not enough to merely allege that there is a danger of bias without producing cogent evidence, neither is it enough for the person alleging to merely have suspicions or apprehensions. Thus, in the South African case of **Council of Review, South African Defence Force, and others v Monnig and Others**[9], it was held that:

> **The test for apprehended bias is objective and the onus of establishing it rests upon the Applicant. An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable bias for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that**

incorrect facts which were taken into account by an applicant must be ignored in applying the test. (emphasis added)

[4.12] In another South African Constitutional Court Authority, **Bernert v ABSA Bank Ltd**[10] it was stated that:

> **The presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer they will, have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial Officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As (it) has been rightly observed, judges do not choose their cases and litigants do not choose their judges. An application for recusal should not prevail, unless it is based on substantial grounds for contending a reasonable apprehension of bias. (emphasis added).**

[4.13] We have given all due consideration to this issue and we find that it is both a matter of fact and law. The brief facts are that the Petitioner filed a Petition, before this court Cause No. 2022/CCZ/006, sometime in 2022 seeking various reliefs in relation to his previous role as the provisional liquidator of Konkola Copper Mines PLC.

[4.14] On 17th March, 2023, the Petitioner through his law firm, knowing very well that he was already before this Court in the above stated

matter, put himself on record for the 2nd Petitioner in a petition, Cause No. 2023/CCZ/005 filed by two Zambian citizens against the Attorney General before this Court challenging the appointment of judges by the President of the Republic of Zambia. A perusal of the Court record shows that the Petitioner personally appeared once before a single judge on 23rd March, 2023 and thereafter, played no further role in the matter. The judgement of the Court in this matter also shows that a Mrs M. Musonda Mwape represented the Pertitioner's law firm.

[4.15] The Petitioner's Affidavit in support of Notice of Motion for an Order for recusal and in particular paragraphs 13, 14, 15, 16 and 17 clearly shows that the perceived apprehension of biasness is based on advice by his Advocates and not personal apprehension as required by law.

[4.16] The Petition in cause No. 2023/CCZ/005 which challenged the appointment of judges, including the three listed judges, was between two private citizens namely one Isaac Mwanza and Maurice Makalu and The Attorney General. The three listed judges were neither parties nor witnesses to the matter.

[4.17] Taking into account the above, it is our considered view that the three listed judges' recusal is not tenable either in fact or law. The Petitioner has failed to produce cogent evidence of alleged perceived bias against the listed judges sufficient to dislodge the presumption of impartiality. It is not enough to merely allege that

because of a peripheral role he played in a matter between the State and two private citizens, then the listed judges who were neither parties nor witnesses in the matter are likely to be biased. The high standard required to dislodge the presumption of impartiality has clearly not been met. Further, in any collegial system where the court consists of a number of judges, there is even less ground for objection.

[4.18] The Petitioner heavily relied on the **Micheal Mabenga**[2] Case. It is our considered view that this case is distinguishable from the **Micheal Mabenga**[2] case. The impugned judge in that case was a party to the proceedings before a tribunal in which there was an appeal pending against the judge, in which Counsel for the Appellant was still representing the complainant when the matter came before the same judge. In *casu,* not only did the Petitioner play an insignificant role in the proceedings before this court, but the listed judges were not parties to the proceedings. The matter has also since been concluded and closed.

[4.19] Having weighed the facts on record and the law on recusal, we are of the firm view that the presumption of impartiality enjoyed by the three listed judges has not been rebutted. For the foregoing reason we find that the application for the three judges to recuse themselves has no merit and is therefore, dismissed.

[4.20] We now move to the second issue of whether the three listed judges can continue to sit on the panel to determine this matter in light of the fact that the panel comprising Justices A. Sitali, M. S. Mulenga, P. Mulonda, M. Musaluke and M. Chisunka that sat and continued to sit had not recused themselves or put an order on record to show why they will not continue to sit in this matter.

[4.21] This issue was also exhaustively dealt with by this Court's Ruling of 9th October, 2023. We wish to reiterate and restate that the reconstitution of the panel is an administrative function of the President of the Court. Reconstitution is done routinely as necessary. The function is clearly provided for by Section 4(2) of the CCA which provides that:

> **Subject to the provisions of this Act, the Court shall, at any sitting be composed of such judges of the Court as the President may direct. (emphasis added)**

[4.22] The "President" is defined by section 2 of the CCA and means the "President of the Court appointed under Article 127 of the Constitution." Article 138 (2) further provides that:

> **The President of the Constitutional Court shall be responsible for the administration of the Constitutional Court under the direction of the Chief Justice.**

[4.23] It is our considered view that the decision to constitute and reconstitute panels is purely administrative and based on the

authority of the Nigerian case of **Garuba v Omokhodion**[11], administrative decisions are not judicial decisions.

[4.24] Reliance was put by the Petitioner on the decision of the Supreme Court of Pakistan in the Human Rights Case which it was argued was of persuasive value. It is our considered view that where there is an explicit statutory provision providing for the constitution and reconstitution of the panels as per section 4(2) of the CCA, this authority is of no relevance.

[4.25] Reliance on the **JCN Holdings**[5] case does also not help the Petitioner as that matter dealt with provisions of the High Court Act in transfer of matters, provisions that are not applicable to this Court.

[4.26] Our firm view therefore, remains that the composition of the Court for purposes of hearing an application or substantive matter is an administrative function that rests upon the President of the Court. A challenge to the composition of the Court outside the purview of a recusal process is therefore untenable.

[4.27] Finally, our orders are as follows:

1. The application for the recusal of Honourable Justice Arnold M. Shilimi, Honourable Justice Kenneth Mulife and Honourable Justice

Mudford Z. Mwandenga from cause number 2022/CCZ/006 is hereby dismissed for want of merit.

2. The constitution and reconstitution of panels is an administrative function of the President of the Constitutional Court and Honourable Justice Arnold M. Shilimi, Honourable Justice Kenneth Mulife and Honourable Justice Mudford Z. Mwandenga shall continue to sit on the panel as constituted by the President.

3. We make no order as to costs.

A. M. SHILIMI
DEPUTY PRESIDENT – CONSTITUTIONAL COURT

P. MULONDA
CONSTITUTIONAL COURT JUDGE

M. MUSALUKE
CONSTITUTIONAL COURT JUDGE

M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE

M. M. KAWIMBE
CONSTITUTIONAL COURT JUDGE

K. M. MULIFE
CONSTITUTIONAL COURT JUDGE