IN THE HIGH COURT OF ZAMBIA 2013/HP/0674
HOLDEN AT KABWE
(Civil Jurisdiction)

IN THE MATTER OF: ORDER 53 OF THE RULES OF THE SUPREME COURT 1965, (WHITE BOOK), RSC, (1999 EDITION) VOLUME 1 AND VOLUME 2

AND IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF: THE RULES OF NATURAL JUSTICE

AND IN THE MATTER OF: THE DECISION OF HIS EXCELLENCY THE PRESIDENT OF THE REPUBLIC OF ZAMBIA MADE ON THE 30TH DAY OF MAY 2012

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

AND IN THE MATTER OF: ARTICLE 11 OF THE CONSTITUTION OF ZAMBIA, CONSTITUTION OF ZAMBIA ACT, CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA

AND IN THE MATTER OF: ARTICLE 18 (9), 18 (10) AND 18 (11) OF THE CONSTITUTION OF ZAMBIA, CONSTITUTION OF ZAMBIA ACT CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA AS READ WITH THE PROVISIONS OF THE JUDICIAL (CODE OF CONDUCT)ACT NO 13 OF 1999 AS AMENDED

AND IN THE MATTER OF: ARTICLE 44 (1) OF THE CONSTITUTION OF ZAMBIA, CONSTITUTION OF ZAMBIA ACT CHAPTER 1 VOLUME I OF THE LAWS OF ZAMBIA

AND IN THE MATTER OF: ARTICLES 91 AND 92 OF THE CONSTITUTION OF ZAMBIA, CONSTITUTION OF ZAMBIA ACT CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA

AND IN THE MATTER OF: THE OFFICIAL OATHS ACT CHAPTER 5 VOLUME 2 OF THE LAWS OF ZAMBIA

AND IN THE MATTER OF: THE INQUIRIES ACT CHAPTER 41, VOLUME 4 OF THE LAWS OF ZAMBIA

AND IN THE MATTER OF: SECTION 12 OF THE STATE PROCEEDINGS ACT, CHAPTER 71, VOLUME, 6 OF THE LAWS OF ZAMBIA

AND IN THE MATTER OF: THE DECISIONS OF THE TRIBUNAL ON HONOURABLE MR. JUSTICE PHILIP MUSONDA, HONOURABLE MR. JUSTICE CHARLES KAJIMANGA AND HONOURABLE MR. JUSTICE NIGEL KALONDE MUTUNA MADE AND PUBLISHED BY WAY OF NOTICE IN THE MEDIA DATED 14TH DAY OF MAY, 2013, 15TH DAY OF MAY 2013 AND 16TH DAY OF MAY 2013

AND IN THE MATTER OF: RULES OF PROCEDURE, TRIBUNAL ON ALLEGED PROFFESSIONAL MIISCONDUCT OF HONOURABLE MR. JUSTICE PHILIP MUSONDA, HONOURABLE MR. JUSTICE CHARLES

KAJIMANGA AND HONOURABLE MR. JUSTICE NIGEL KALONDE MUTUNA MAY 2013

BETWEEN:

NIGEL KALONDE MUTUNA (male)	**1ST APPLICANT**
CHARLES KAJIMANGA (male)	**2ND APPLICANT**
AND:	
THE ATTORNEY GENERAL	**RESPONDENT**

CORAM: **SIAVWAPA J**

FOR THE APPLICANTS:	MR. A. SHONGA SC OF MESSRS SHAMWANA & CO
	MR. J. JALASI OF MESSRS SILWAMBA, JALASI AND LINYAMA LEGAL PRACTIONERS
FOR THE RESPONDENT:	MR. F. IMASIKU - SENIOR STATE ADVOCATE

J U D G M E N T

The applicants in this matter are both judges of the High Court who were suspended from office following the appointment of a tribunal to investigate their alleged professional misconduct by His Excellency the President of the Republic of Zambia on 30th May 2012. The history of the matter, whose facts are not in dispute, is that the applicants sought

leave of court to apply for judicial review pursuant to order 53 of the Rules of the Supreme Court 1999 edition which was granted ex parte. The respondent applied to have the leave to apply for judicial review discharged pursuant to Order 53/14 of the Rules of the Supreme Court 1999 edition. The application was dismissed by the High Court and the respondent appealed to the Supreme Court. By its judgment dated 20th May 2013, the Supreme Court allowed the appeal.

On 20th May 2013, the applicants made a fresh application for leave to commence judicial review following the Supreme Court's judgment. I granted them ex parte leave to commence judicial review on 5th June 2013 which was also challenged by way of an application to discharge leave by the respondent. I dismissed the application on 4th October 2013 and thereafter, on 4th April 2014, the applicants' advocates filed skeleton arguments in support of the Originating Notice of Motion for Judicial Review for orders of Certiorari, Prohibition, Mandamus and Declaration.

The applicants seek the following reliefs;

(a) An Order of Certiorari to remove into court for the purpose of quashing the decision of His Excellency the President of the Republic of Zambia made on the 30th day of April 2012 and the decision of the Tribunal on the Honourable Justices Musonda, Kajimanga and Mutuna published in the media on the 14th day of May, 2013 in so far as it purports to decide that the Tribunal can legally be constituted to conduct an inquiry and / or investigation with respect to matters complained of which are pending appeal before the Supreme Court and as such sub judice and prejudicial

(b) An Order of Certiorari to remove into this court for the purpose of quashing the decision of His Excellency the President of the Republic of Zambia made on the 30th day of April 2012 to appoint and administer oaths to the members of the Tribunal namely justices Lovemore Chikopa, Naboth Mwanza and Thomas K. Ndhlovu contrary to the rules of natural justice

(c) An Order of Certiorari to remove into this court for the purpose of quashing the decision of the Tribunal on Honourable Justices Musonda, Kajimanga and Mutuna published in the media on the 14th day of May 2013 in so far as it purports to state that it has formulated its own method of inquiry without the promulgation of a legal framework anchored on a legislative instrument consistent with the applicants' constitutional rights

(d) An Order of Certiorari to remove into this court for the purpose of quashing of the decision of the Tribunal on Justices Musonda, Kajimanga and Mutuna published in the media on the 14th day of May 2013 in so far as it purports to formulate its own method of inquiry which lacks legislative instrument falls short of the rules of natural justice and minimum standards set out in Articles 11, 18 (9) and 18 (10) of the Constitution of Zambia, chapter 1 volume 1 of the Laws of Zambia without the promulgation of a legal frame work anchored. Particulars of the breach include but are not limited to the following;

i. Failure to give adequate notice of proceedings to enable the applicants prepare adequately and exercise their constitutional right to protection of law

ii. Failure to personally and formally charge and/ or bring to the attention of the applicants the charges against the applicants and the issues to be determined

iii. Failure to separate the investigative and adjudicative process of the Tribunal proceedings

iv. Failure to disclose the complainants

v. Failure to comply with basic tenets of the rules of natural justice with respect to a fair hearing and

vi. Failure to heed to the directive of the Supreme Court of Zambia that the circumstances dictate that the Tribunal should not proceed

(e) An Order of Certiorari to remove into this court for the purpose of quashing the decision of the Tribunal on Honourable Justices Musonda, Kajimanga and Mutuna published in the media on the 14th day of May 2013 in so far as it purports to decide that its terms of reference are global and not limited to the scope of matters /allegations announced by His Excellency the President during his press conference held on 30th April 2012

(f) An Order of Certiorari to remove into this court for the purpose of quashing the decision of the Tribunal on Honourable Justices Musonda, Kajimanga and Mutuna published in the media on the 14th day of May 2013 in so far as it purports to decide that it has decided to invite any persons interested and intending to testify and/ or make submissions; its terms of reference are global and not limited to the scope of the matters/allegations announced by His Excellency the President during his press conference held on 30th April 2012

(g) An Order of Certiorari to remove into this court for the purpose of quashing the decisions of the Tribunal on Honourable Justices Musonda, Kajimanga and Mutuna published in the media on the 14th day of May 2013 in so far as it purports to commence proceedings contrary to the order of the Supreme court in its decision dated 9th May 2013 wherein it stated thus;

> ***"Before we end, we want to state that although we agree that the President in exercising the powers vested in him under Article 98 has unfettered discretion under the said Article, we nonetheless believe that it would be advisable, considering the circumstances of this matter for the Tribunal not to proceed."***

(h) An Order of Certiorari to remove into this court for the purpose of quashing the decision of the Tribunal on Honourable Justices Musonda, Kajimanga and Mutuna published in the media on the 14th day of May 2013 in so far as it purports to decide that the attendance to the proceedings of the Tribunal should be restricted through the use of an accreditation process

(i) An Order of Mandamus to compel His Excellency the President and the Tribunal on Honourable Justices Musonda, Kajimanga and Mutuna to comply with the order of the Supreme Court of Zambia dated 9th May 2013 not to proceed with the proceedings of the Tribunal

To avoid going back and forth, I will deal with the grounds seriatim and conclusively before moving to the next ground. The grounds upon which relief is sought are **Illegality, Procedural Impropriety** and **Excess of Jurisdiction/Error on the Law and record.**

With regard to Illegality, the applicants have advanced five arguments as follows;

(a) That the President's decision to appoint a Tribunal on 30th April 2012 to investigate the applicants was illegal in so far as it purports to investigate matters which were subject of appeal in the Supreme Court of Zambia

(b) That it was illegal for the Tribunal to purport to promulgate procedural rules without an enabling legal framework pursuant to an Act of Parliament or a Statutory Instrument allowing the Tribunal to make procedural rules and that the act is inconsistent with the applicants' right to protection of the law under Article 18 of the Constitution

(c) That the rules of procedure purportedly formulated by the Tribunal, apart from lacking the enabling enactment or regulation for their promulgation, also fall short of meeting the minimum requirements of the tenets of the rules of natural justice under Articles 11, 18 (9) and 18 (10) of the Constitution of Zambia

a. That the Tribunal's decision to publish a notice in the media making a global invitation to the world to present any allegations against the applicants was in excess of its jurisdiction and outside its terms of reference or scope of matters/ allegations particularized and/ or directed to it by His Excellency the President

b. That it was illegal for the Tribunal to commence proceedings against the order of the Supreme Court not to proceed

In their effort to ground the argument for illegality, the applicants have referred me to the statement of Lord Diplock in the case of **Council for Civil Service Union v Minister for the Civil Service.**[1] The said

[1] [1984] 3 All E.R. 935

statement was recited with approval by the Supreme Court of Zambia in the cases of **Derrick Chitala (Secretary of the Zambia Democratic Congress) v the Attorney General**[2] and **Frederick Jacob Titus Chiluba v the Attorney General.**[3] **Lord Diplock** stated as follows;

> ***"By "illegality" as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."***

There is also authority from the case of Chiluba v Attorney General (supra) that acting without or in excess of jurisdiction by an inferior court or public authority or indeed failure to comply with rules of natural justice makes such a decision liable to quashing in an application for judicial review. It is therefore, the applicants' argument that His Excellency the President of the Republic of Zambia acted illegally when he constituted the Tribunal to investigate a matter which was subject of appeal to the Supreme Court for being sub judice.

In this regard, it has been submitted that the grounds of appeal in the case of **Development Bank of Zambia v JNC Ltd, Post Newspapers Ltd and Mutembo Nchito**[4] and the allegations levelled against the applicants by His Excellency the President upon constituting the Tribunal are similar.

It is not in dispute that the basis upon which His Excellency the President of the Republic of Zambia constituted the Tribunal which is the

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[2] (1995/1997) Z.R. 91
[3] (2003) Z.R. 153
[4] (2012) Z.R. vol. 2 & 3 393 & 137

subject of this judicial review was the manner in which the case of Development Bank of Zambia (supra) moved from Mr. Justice Albert Mark Wood, then High Court Judge to the 1st applicant in this case. This is evident from the applicants' affidavits in support of an ex parte summons for leave to apply for judicial review as set out at pages J12 to J21 of the Judgment of the Supreme Court in the case of **The Attorney General V Nigel Kalonde Mutuna, Charles Kajimanga and Philip Musonda** appearing as Appendix 3 in the applicants' List of Authorities.

It is common cause that the defendant in that matter lodged an appeal to the Supreme Court with two of the nine grounds in the two memoranda of appeal directly challenging the propriety of the circumstances under which the matter moved from Judge Wood to the 1st applicant. For avoidance of doubt, I reproduce the two relevant grounds of appeal as per the memoranda of appeal;

Ground 1in first memorandum of appeal

> ***"The learned Judge in the court below erred in law when he heard the matter when it was not properly before him as the alleged transfer of the matter from Judge Wood or recusal was void ab initio for having been done contrary to the law and rules of procedure"***

Ground 3 in second memorandum of appeal

> ***"The learned trial Judge misdirected himself in law and fact when he refused to stay the proceedings in this matter to allow for the conclusion of investigations on how the matter was transferred from Judge Wood to him"***

Appendix 1 is the Supreme Court Judgment upholding the appeal declaring that the 1st applicant in this matter did not have jurisdiction to

hear and determine the matter for the reason that the matter was not properly transferred from Judge Wood to him.

It is in the light of the above circumstances that the applicants have strongly argued that the Tribunal had no authority to commence its proceedings on issues that were pending adjudication by the Supreme Court at the time.

In response to the ground on illegality, the respondent has raised two defences namely, the doctrine of res judicata and that of time bar in so far as His Excellency the President's decision to appoint the Tribunal is concerned. The defence of res judicata has been espoused on the basis that the Supreme Court of Zambia conclusively dealt with the question whether or not His Excellency the President of the Republic of Zambia had authority to appoint the Tribunal pursuant to Article 98 of the Constitution of Zambia.

I do not wish to discuss that position further because that is the correct position. The only question I may venture to touch on however, in that regard is whether or not His Excellency the President of the Republic of Zambia acted legally when he appointed the tribunal to inquire into matters that were subject of appeal before the Supreme Court. I take the liberty to briefly discuss this issue because it was not placed before the Supreme Court in the appeal referred to by the respondent and therefore, the Supreme Court did not pronounce itself on it.

In this application for Judicial Review under the ground of illegality, the applicants have sought to have the decision of His Excellency the President quashed on the basis that it was illegal for him to appoint a tribunal to inquire into matters that were pending before the Supreme

Court. This therefore, has no bearing on the Supreme Court's judgment that the President had unfettered powers under Article 98 of the Constitution to constitute a tribunal. This did not however, in my view, take away the powers of the court to question the manner in which that power is exercised in an application for judicial review. To that extent, the res judicata doctrine does not apply.

What is in issue, however, is not whether or not the President acted illegally in appointing the tribunal but whether or not the tribunal acted illegally by commencing its proceedings despite there being an appeal pending before the Supreme Court to determine matters which were the subject of its inquiry.

Since a tribunal is an administrative body whose actions are subject to judicial control vial judicial review, it makes logical sense that where a tribunal that has been legally constituted is called upon to inquire into a matter or matters that are subject of judicial interpretation, the tribunal's proceedings ought to be deferred until the judicial process is concluded. It is therefore, my considered view that the tribunal, in this case, had no jurisdiction to inquire into matters that were subject of determination by the Supreme Court.

The question that remains is whether the tribunal can be said to have made a decision that would consequently be subject to judicial review and I will leave that question to the end after I have considered all the grounds raised by the applicants. I further find that in view of my earlier finding that the appointment of the Tribunal by His Excellency the President is not the subject for my determination, it follows that the

defence of time bar falls away as the same does not apply to the activities of the tribunal.

The next limb of the argument on illegality attaches to the tribunal's decision to promulgate its own rules of procedure to the violation of the applicants' right to a fair hearing as enshrined in the Republican Constitution. What is at the core of this ground is that the tribunal promulgated its rules of procedure without any enabling piece of legislation or Statutory Instrument. Article 18 (9) has been given special reference in so far as it provides for the establishment of all courts or adjudicating authorities by law.

The argument is therefore, that a tribunal cannot give itself jurisdiction as the same ought to derive from elsewhere. In support of that argument, a passage from the learned authors of Michael Superstone, James Goudie and Sir Paul Walker on Judicial Review 4th edition page 108 has been referred to and it is couched in the following terms;

> ***"The term 'jurisdiction' in public law denotes both the authority of the reviewing court and the extent of the powers possessed by the inferior body which is subject to review (whether minister, lower court, tribunal or any other). In the former sense it is a dynamic concept responsive to the conditions of the times, and judges' perceptions of the requirement of the supervisory power. In the latter sense, however, it is on the face of it a static concept no reviewable body has the lawful power to fix the reach of its own jurisdiction; its jurisdiction is conferred aliunde (from elsewhere) usually by statute."***

In another passage from the learned authors of De Smith's judicial review 6th edition at page 242, it is stated as follows;

> ***"The rule of law as a fundamental constitutional principle will be considered in chapter 11. Of the common law presumptions, the most***

influential in modern administrative law is one based on the rule of law, namely, that the courts should have the ultimate jurisdiction to pronounce on matters of law. Accordingly, only the most exceptional circumstances will construe statutory language so as to endow a public body with exclusive authority to determine the ambit of its own powers....."

It is without any doubt that the above extracts from the learned authors put the law on the jurisdiction of reviewable bodies into perspective in so far as how their jurisdiction attains legitimacy and one thing is made clear; that is, the jurisdiction is not self-conferred. It must be conferred by an external source which in most cases is a statute.

In response, the respondent has argued that the applicants acquiesced to both the legality of the tribunal and to its promulgated rules of procedure by having taken steps to comply with its rules. This argument is anchored on the explanatory note pursuant to Order 2/2/4 of the Rules of the Supreme Court 1999 edition which note state as follows;

"a fresh step for the purpose of this rule is one sufficient to constitute a waiver of the irregularity.....Thus steps taken with knowledge of an irregularity, either with a view to defending the case on the merits etc will waive irregularities in the institution or service of proceedings, since they could only usefully be taken on the basis that the proceedings were valid."

So the main issue here is whether the tribunal had authority to promulgate the rules to govern its procedure and the conduct of the parties. Article 98 of the Constitution has been brought into view and it is not in dispute that the tribunal was appointed pursuant to Article 98 (3) of the Constitution of Zambia and without reproducing the Article, it is common cause that it does not cloth any tribunal appointed pursuant thereto with power to formulate its own rules of procedure. It is therefore, a matter of drawing a reasonable inference that in the

circumstances, the President, upon constituting a tribunal under Article 98 (3) of the Constitution is also expected to provide the legal framework and the modus operandi of the tribunal for its inquiry.

It is noteworthy that the other commissions for carrying out inquiries into matters of public interest are those issued pursuant to the Inquiries Act chapter 41 of the Laws of Zambia. It is further to be noted that the only other provision for the constitution of a tribunal is to be found under the Parliamentary and Ministerial Code of Conduct Act chapter 16 of the Laws of Zambia. It is noted that both pieces of legislation provide the legal framework under which the commissioners would operate. It is noted for instance that section 2 of the Inquiries Act provides as follows;

> ***"Every commission shall specify the subject, nature and extent of the inquiry concerned, and may contain directions generally for the carrying out of the inquiry and in particular may contain directions as to following matters;***
>
> ***(a) The manner in which the commission is to be executed***
> ***(b) The appointment of a chairman***
> ***(c) The constitution of a quorum***
> ***(d) The place and time where and within which the inquiry shall be made and the report thereof rendered***
> ***(e) Whether or not the proceedings shall, in whole or in part, be held on public***
>
> ***In the absence of a direction to the contrary in the commission concerned, an inquiry shall be held in public, but the commissioners shall nevertheless be entitled to exclude the representatives of the press or any or all other persons if they consider it necessary so to do for the preservation of order, for the due conduct of the inquiry or for any other reason"***

This provision therefore, gives the appointing authority, the President, power to issue a commission in terms that enable the commissioners to

function efficiently without which their appointment would be redundant as they would have no power to do anything.

Similarly, under section 14 of the Parliamentary and Ministerial Code of Conduct Act, the Chief Justice is empowered to issue a Commission. It also provides for other powers the tribunal is clothed with. Further, sub section 10 of section 14 makes sections seven, eleven, thirteen, fourteen, fifteen and seventeen of the Inquiries Act applicable to a tribunal appointed under that act. Worthy-noting about the applicable sections is that they confer additional powers and general jurisdiction upon the tribunal.

In the case at hand, the Republican President has unfettered powers under Article 98 (3) of the Constitution to constitute a tribunal as held by the Supreme Court in the Case of the **Attorney General V Nigel Mutuna and others**. It is therefore, further his duty, upon constituting such a tribunal to also cloth it with the extent of its jurisdiction as the same does not follow the event of constituting the tribunal.

It is my considered view that since the President is clothed with unfettered powers of constituting a tribunal, he equally has unfettered powers to give it powers if he so wishes, to formulate its own rules of procedure consistent with the objectives set out by Article 98 (3) of the Constitution. The President may also issue an instrument pursuant to Article 98 (3) to make the provisions of the Inquiries Act applicable mutatis mutandis.

There is nothing to suggest that on issuing the terms of reference to the tribunal, His Excellency the President of the Republic of Zambia also gave power to the tribunal to formulate and promulgate its own rules of

procedure. Since that power is neither expressly nor impliedly provided under Article 98 (3), only the Republican President can expressly grant that authority. The tribunal was therefore; born without ability to execute its mandate and it cannot do so without it.

The respondent's argument for acquiescence does not apply because the issue is not about an irregularity in procedure but that the said rules of procedure were null and void ab initio as the tribunal did not have jurisdiction to formulate and promulgate the rules it purported to operate under when it embarked upon its mission. Acquiescence cannot give effect to an illegality. This limb of the argument on illegality is not about the legality or otherwise of the tribunal as suggested by the respondent but that of the rules it formulated.

Having found that the rules of procedure formulated and promulgated by the tribunal were null and void ab initio, I do not find it necessary to deal with the limb for illegality based on the alleged non-compatibility of the said regulations with Article 18 (9), (10) and (11) of the Constitution except to state that the argument by the respondent is valid and as conceded to by the applicants the allegations of infringement of Articles 11 to 26 of the Constitution are to be brought to court by way of a petition and all the cited authorities apply.

It would, nonetheless, be worthy of consideration, if indeed, as argued by the applicants, it would not be an abuse of court process and a multiplicity of actions if the applicants were to separate their grievances with regard to the alleged infringement of their rights under the bill of rights from this application and file a petition rather than have the matters considered under one court process. I would take the view that

in this type of circumstance, it would be in the interest of justice to allow the matters to be heard in one action as a special case rather than separate the two. I think that what is expressly prohibited is to commence an action which is solely meant to seek a particular type of relief by a wrong process. It is clear that the complaints relating to the alleged violations of the said Articles of the Constitution are an offshoot of the activities of the tribunal and as such, they cannot be detached from the application for judicial review seeking to quash its decisions.

The next argument advanced by the applicants is that the tribunal exceeded its terms of reference. This argument is premised on the notices issued by the tribunal purporting to invite the world at large to submit to the allegations against the applicants. It has been submitted that both the notices and the rules of procedure go beyond the boundaries of the terms of reference issued by the President and as such an affront to the applicants' right to a fair hearing.

The respondent has argued, in response, that the notice caused to be published by the tribunal did not amount to a decision by the tribunal and reliance was placed on the definition of 'decision' as rendered by Black's Law Dictionary 9th edition which states as follows;

> ***"a judicial or agency determination after consideration of the facts and law; especially, a ruling, order or judgment pronounced by a court when considering or disposing of a case"***

On the basis of that definition, it was submitted that the notice published in the print media at the instance of the tribunal did not qualify to be called a decision to be subjected to judicial review. I was further referred to the case of **Council of Civil Servants Unions and**

others v Minister for Civil Service[5]. As stated earlier in this judgment, I will comment on this matter later.

The next argument for illegality is the alleged failure by the respondent to comply with the directive of the Supreme Court of Zambia. The said directive in the case of the **Attorney General v Nigel Kalonde Mutuna and two others** is couched in the following terms;

> ***"Before we end, we want to state that although we agree that the President in exercising the powers vested in him under Article 98 has unfettered discretion under the said Article, we nonetheless believe that it would be advisable, considering circumstances of this matter, for the tribunal not to proceed"***

The applicants have understood that statement to have the force of an unequivocal directive of the court for the tribunal not to proceed.

The respondent's response is that an order of mandamus does not lie against the State and further that the Supreme Court's statement is not part of the ratio decidendi of the judgment but gratuitous advice directed at His Excellency the President and not directory.

After carefully considering the statement by the Supreme Court of Zambia, I cannot but come to only one conclusion as the respondent has submitted that it was merely advisory to His Excellency the President of the Republic of Zambia. This is so because, the word 'advice', in its ordinary meaning, does not attract any sanctions if not acted upon. Although in certain instances it may carry the sense of an instruction or directive, judicial orders are not meant to sound advisory unless they are intended to be.

[5] [1984] 3 All E. R. 935

I must however, hasten to state that I may not be competent to interpret the statement of the Supreme Court other than to state what I understand it to mean on the face of it. It being the court of final recourse in the land, only the Supreme Court itself can properly interpret its judgments and I would therefore, advise the applicants to seek the interpretation of that statement from the Supreme Court itself if not satisfied with this position.

But even assuming that it is true that the statement carries the force of a directive, the directive was probably against the tribunal and not the Republican President in which case the directive would be unenforceable and courts are not in the habit of making unenforceable decisions.

The second ground upon which the applicants seek relief is Procedural Impropriety and the argument is that the tribunal is a nullity for being wrongly constituted. This ground attacks the administration of the oaths to the members of the tribunal by His Excellency the President of the Republic of Zambia as being contrary to the law and in contravention of the rules of natural justice.

My attention has been drawn to the fact that the tribunals that were constituted to investigate two named former Ministers took oath before the Acting Chief Justice pursuant to section 6 of the Inquiries Act.

My attention was further drawn to the fact that members of the tribunal that was constituted to inquire into the alleged misconduct of a former Director of Public Prosecutions, who enjoys the same security of tenure as judges and whose removal procedure is similar to that governing the judges took oath before the Chief Justice and not the President.

The respondent's response to this ground is that it was not subject to judicial review for being time barred as the oaths were administered to the tribunal members more than a year prior to the commencement of the action. The other limbs of argument in opposition are that the administration of the oaths by the President did not alter or adversely affect the rights or legitimate expectations of the applicants, that the President has authority to administer oaths to tribunal members, that two of the tribunal members were retired judges and therefore, not judicial officers in terms of section 2 of the Judicial (Code of Conduct) Act No 13 of 1999 and that the tribunal was investigative in nature as held by the Supreme Court in the case of the Attorney General v Mutuna & others.

It is not in dispute that His Excellency the Republican President did administer oaths to the members of the tribunal on 30th April 2012 and the application for leave to apply for judicial review in this case was filed on 20th May 2013. Leave was subsequently granted on 5th June 2013. In terms of Order 53 rule 4 of the Rules of the Supreme Court 1999 edition, an application for leave to apply for judicial review shall be made promptly and within three months of the grounds first arising.

The Order however, gives room to the judge to extend that time for good reasons. In terms of paragraph (2) of the said Order and rule, time begins to run from the date of the event giving rise to the application occurring. It is therefore, without doubt that in this case, time started to run on the 30th April 2013 when the President administered the oaths to the members of the tribunal. In that regard, leave should have been sought by not later than 31st July 2013 unless an extension was granted by the court.

In the circumstances of this case, it is a matter of public knowledge that the applicants did seek and they were granted leave to apply for judicial review in an earlier matter which culminated into Appeal No. 088/2012. However, since that matter was conclusively dealt with by the Supreme Court, all issues therein are now res judicata. No judicial review would lie relating to any matter disposed of therein and it is for that reason that any subsequent application for leave for judicial review would only be competent on matters that arose after the Supreme Court judgment.

For the above stated reasons, and since no extension of time was granted to apply for leave to apply for judicial review in respect of the action of His Excellency the President to administer the oaths to the members of the tribunal, I dismiss the ground based on Procedural Impropriety in that respect for being brought out of time. It is immaterial that leave was granted as the application for leave included grounds that met the time requirement.

The final ground is that the tribunal acted in excess of its jurisdiction/Error on the Law and record. This ground is sufficiently covered under the ground of illegality as it seeks to impugn the tribunal for making an invitation to the world at large to make submissions at its hearings. In so far as the ground attacks the tribunal's actions pursuant to the rules of procedure it gave itself, my earlier finding applies as the said rules are of no effect.

It is however, significant to note, as argued by the respondent, that in so far as the terms of reference are concerned, the Republican President, acting pursuant to Article 98 (3) (b) of the Constitution, can

empower the tribunal to conduct its inquiry in a manner that will enable it to meet the objectives envisaged by the Article.

A perusal of the terms of reference which also have the semblance of charges does not show that they were ultra vires the powers conferred upon the Republican President by Article 98 (3) of the Constitution. The only missing link, as already determined, is the authority to define the modus operandi of the tribunal which only the Republican President has authority to define in express terms.

Having dealt with each of the grounds raised, I now return to consider the issue of whether or not the actions undertaken by the tribunal can be said to be decisions amenable to judicial review. A tribunal is fundamentally different from an administrative body or authority in that it is set up on an ad hoc basis to deal with matters stipulated in its terms of reference after which it is dissolved.

This is of course in exception of tribunals established by Statute. This means that once it is set up or constituted, it will take certain steps that will affect those to be probed. The respondent has submitted in that regard that such preliminary activities of the tribunal do not meet the criteria to be called decisions for the purposes of coming into the purview of judicial review.

As I stated earlier, the respondent has sought reliance on the definition of decision as provided by the 9th edition of Black's Law Dictionary stating it as a determination after consideration of facts and law. That definition was advanced in relation to the notice issued by the tribunal through the print media on stated dates. The case of **Council of Civil**

Service Unions and others V Minister for the Civil Service[6] was referred to particularly with regard to its holding as follows;

> ***"An aggrieved person was entitled to invoke judicial review if he showed that a decision of a public authority affected him by depriving him of some benefit or advantage which in the past he has been permitted to enjoy and which he could legitimately expect to be permitted to continue to enjoy either until he was given reasons for its withdrawal and the opportunity to comment on those reasons or because he had an assurance that it would not be withdrawn before he had been given the opportunity of making representations against the withdrawal."***

As submitted by the applicants in their skeleton arguments in reply, the respondent seems to have missed the bone of contention about the notice published in the print media on the stated dates. It is not the notice per se but its publication at the behest of the tribunal and which called upon the world at large to submit which is in issue. It can therefore, be safely stated that the tribunal did make a decision to and did publish the notice and to that extent, the tribunal did make a decision amenable to judicial review.

I would however, also add that judicial review should not be restricted to the orthodox definitions of terms used to disadvantage people whose rights have been adversely affected by administrative bodies. I think that the proper way to give judicial review its proper scope is to accept that any step, action or omission at the instance of an inferior court or indeed an administrative body that adversely or threatens to adversely affect a person can be legitimately probed on an application for judicial review. The orders of certiorari, mandamus, prohibition and injunction all under the umbrella of judicial review can deal with most

[6] [1984] 3All E.R. 935

circumstances and provide relief where successfully argued by the applicant.

With regard to the rules of natural justice, the argument is whether or not they applied to the applicants at that stage when the rules of procedure were formulated. In advancing their arguments in that regard, the applicants have taken the position that there are certain provisions in the rules formulated by the tribunal that are unfair as they infringe upon the rules of natural justice. The respondent on the other had has argued that the actions by the tribunal were merely preparatory and therefore, not subject to the rules of natural justice. The case of **Wiseman v Borneman**[7] was called into aid of this argument.

I must however, state that after reading the dicta of their Lordships in that case, I find nowhere, where anyone of them states that preparatory activities of a tribunal are not subject to the rules of natural justice. Their Lordships, on the other hand, seem to be unanimous on the fact that the rules of natural justice demand for fair rules by a tribunal. They further seem to agree that even where the enabling statute provides otherwise, the court has the discretion to ensure that fairness is accorded to the applicants. This is evident in the following statement by Lord Reid at page 277;

> ***"Natural justice that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard and fast rules."***

Further, at page 278, Lord Morris of Borthy-Y-Gest put it as follows;

[7] [1971] A.C. 297/ [1969] 3 All E.R. 275

"My Lords, that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of law.----------But any analysis must bring into relief rather their (rules of natural justice)spirit and their inspiration than any precision of definition or precision as to application."

Clearly, their Lordships espoused the views that a tribunal's procedure should be fair in all circumstances and all its stages and that to me, includes, as earlier stated, any steps taken by the tribunal that adversely, or has the potential to adversely affect the applicant. Restricting the applicability of the rules of natural justice to definitions would be to limit its scope and do violence to its very spirit and essence.

The applicants have made the following prayers;

1. Setting aside the applicants' suspension
2. Damages
3. Costs

In justifying their argument for the setting aside of their suspensions, the applicants have cited a rather lengthy passage from the learned authors of De Smiths at pages 142 and 143. The gist of the passage is that the court has the discretion to determine the consequences of failure to observe the manner of performing a duty as prescribed by Parliament. In exercising that discretion, the court will be guided by determining whether the breached rules of procedure are mandatory or directory and that if it determines the former, the act done is void or voidable and if it is the latter, then the disobedience is an irregularity not affecting the validity of the act.

I wish to acknowledge that the case of **Barnwell v the Attorney General**[8], upon which the applicants have placed heavy reliance for this prayer, makes profound pronouncements with regard to the need for the observance of the rules of natural justice. It also unequivocally holds that failure to observe them renders the decision void. It is however, to be noted that throughout this judgment, I have endeavoured to demonstrate that the tribunal lacks the legal capacity to function and whatever it did is null and void ab initio. I have not questioned the appointing authority's power to appoint the tribunal. It is therefore, not possible to grant this prayer on the basis of the Barnwell case as the decision to appoint has not been found wanting.

Since I have already declared the rules formulated by the tribunal as null and void ab initio, it follows that whatever steps were taken by the tribunal pursuant to the rules is void. The same is however, not correct with regard to the President's act of constituting the tribunal as that was firmly validated by the judgment of the Supreme Court in the case of Mutuna and others v the Attorney General.

In the circumstances, the prayer to set aside the applicant's suspension can only be considered with regard to the tribunal's incapacity to execute its mandate for want of rules of procedure. In essence, the tribunal is incapacitated because the appointing authority did not provide it with the necessary legal capacity by way of rules of procedure. I think that this position, by necessary implication, produced a tribunal which was still born by reason of which it will never have the capacity to discharge its mandate. Consequent upon that, the tribunal's

[8] [1994] 3 L.C.R.

decision to formulate its own rules of procedure is illegal and I quash it accordingly and the said rules are of no effect.

What then is the effect on the suspension of the applicants? I think it will be grossly unjust and unfair to the applicants if the suspensions were allowed to remain in force when the tribunal to which the question of their removal has been referred has no capacity to inquire into the matter. The most logical outcome of this scenario, in my view, is that the suspensions of the applicants cease to have effect by reason of the tribunal's lack of capacity to inquire into whether or not the applicants should be removed from office.

In coming to this conclusion, I have considered Clause (5) of Article 98 which states as follows;

> ***"If the question of removing a judge of the Supreme court or of the High Court from office has been referred to a tribunal under clause (3), the President, may suspend the judge from performing the functions of his office, and any such suspension may at any time be revoked by the President and shall in any case cease to have effect if the tribunal advises the President that the judge ought to be removed"***

It is fully acknowledged that under normal circumstances, only the President has the power to revoke the suspension and that the suspension ceases upon advice by the tribunal that the judge should be removed from office. None of the two situations has arisen and as such the applicants' fate cannot remain hanging indefinitely as that would not be less than inhuman treatment.

Having come to the above stated conclusion, and for avoidance of any doubt, I hereby declare and order that the suspensions of the applicants cease to have effect forthwith by reason of the tribunal's incapacity to

carry out its mandate. The applicants are therefore, at liberty to resume their duties.

As regards the prayer for damages, after considering the arguments by both sides, I have to come to the conclusion that this is not an appropriate case for which damages should be awarded because the same were not specifically requested in the originating summons. I however, allow the prayer for costs as shall be agreed by the parties or taxed in default of agreement.

As for the fate of the tribunal, I leave it to the Republican President, the appointing authority to determine although it is my considered view that the most logical thing to do in the circumstances would be to dissolve it.

DELIVERED AT KABWE THIS 23RD DAY OF DECEMBER 2014 IN OPEN COURT

J.M. SIAVWAPA
JUDGE