SCZ. JUDGMENT No. 22/2013

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IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 87/2012
HOLDEN AT LUSAKA
SCZ/8/132/2012
(Civil Jurisdiction)

BETWEEN:

JCN HOLDINGS LIMITED	**1ST APPLICANT**
POST NEWSPAPERS LIMITED	**2ND APPLICANT**
MUTEMBO NCHITO	**3RD APPLICANT**
AND	
DEVELOPMENT BANK OF ZAMBIA	**RESPONDENT**

Coram: Chibesakunda, Ag. CJ, Chibomba, JS, and Kaoma, Ag. JS, On 17th July, 2012, 11th October, 2012, 7th February, 2013, 12th February, 2013 and 18th December, 2013

For the 1st and 2nd Appellants:	Mr. N. Nchito and Mr. F. Mmembe of Nchito and Nchito
The 3rd Appellant:	In person
For the Respondent:	Mr. B. Gondwe of Buta Gondwe and Associates

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J U D G M E N T

Chibesakunda, Acting CJ., delivered the Judgment of the Court.

Cases referred to:

1. ***Zambia Revenue Authority and T and G Transport SCZ No. 2 of 2007;***

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2. ***Zambia National Holdings Limited and United National Independence Party (UNIP) v. The Attorney-General (1994) S.J. 22 (S.C.);***
3. ***Chikuta v. Chipata Rural Council (1974) ZR 241 (S.C);***
4. ***New Plast Industries v. The Commissioner of Lands and The Attorney-General, (2001) ZR 58;***
5. ***Giannarelli v. Wraith, (1988) 165 CLR 543 at 556-7; and***
6. ***Rondel v. Worsley, (1966) 3 WLR 950.***

Legislation referred to:

1. ***High Court Act, Chapter 27 of the Laws of Zambia;***
2. ***The Judicial (Code of Conduct) Act No. 13 of 1999; and***
3. ***The Legal Practitioners Act, Chapter 30 of the Laws of Zambia.***

This is an appeal against the ruling and judgment of the High Court. The said ruling and the judgment were both delivered on 19th April, 2012. This followed an action commenced by the Respondent by way of a Writ of Summons accompanied by a Statement of Claim. The Respondent filed the said process on 6th May, 2009, claiming the following reliefs:

1. **the sum of K14 Billion;**
2. **interest at the contractual rate;**

3. **in the alternative, for an order that Mr. Mutembo Nchito executes a guarantee or be deemed to have executed the**

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guarantee under clause 8.6 of the Syndication Loan Agreement;

4. **an order that Mr. Mutembo Nchito pays the sum of US$3.0 million under the Personal Guarantee;**
5. **such order as the Court may deem just and equitable; and**
6. **costs of the action.**

The Statement of Claim shows that the Respondent is a development bank established pursuant to the Development Bank of Zambia Act, Cap 363 of the Laws of Zambia. That the first Appellant is an investment company incorporated in Zambia and was, at the material time, a shareholder in a company called Mine Air Services Limited, trading as Zambian Airways (hereinafter referred to as “the Company”). That the second Appellant is a company incorporated in Zambia and engaged in the business of publishing newspapers. That the second Appellant also, at the

material time, held shares in the Company. That the third Appellant held 50% shares in Zambian Airways Limited and was described, by

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the parties to the Syndication Loan Agreement, as the Key Promoter of the Company.

The Respondent's case, as can be gathered from the Statement of Claim, is that sometime in 2007, the Company approached Investrust Bank Plc (hereinafter referred to as "Investrust") to syndicate a loan facility in favour of the Company, in the sum of US$5.5 million. As lead Bank, Investrust put up a consortium of Banks comprising itself, Intermarket Banking Corporation Zambia Limited (hereinafter referred to as "Intermarket"), and the Respondent Bank. These Banks agreed to provide a syndicated loan, up to the aforesaid amount, to be secured by-

(1) a fixed debenture of two (2) Boeing Aircraft Registration No. 9CJ JCN and 9CJ JOY;

(2) subordination of shareholders loans to the lenders;

(3) assignment of Receivables duly executed;

(4) Personal Guarantee of Mr. Mutembo Nchito for the full value of US$5.5 million; and

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(5) Key Man Insurance of the key promoter Mr. Mutembo Nchito for the period provided for in the various offer letters from the Banks party to the transaction.

The Respondent's portion of the loan was US$3.0 million, which, at that time, was equivalent to K14 billion. The lenders agreed to share the securities *pari pasu*. To this extent, the Company and the other lenders executed a Security Sharing Agreement.

The Statement of Claim also discloses that by mid-2008, it became clear that, in spite of the injection of US$5.5 million into

the Company, the Company was still facing serious liquidity problems. That the Company was in arrears in the repayment of both interest and principal on the sum advanced to it by the Respondent.

The Statement of Claim further shows that pursuant to clause 8.6 of the Syndication Loan Agreement, the third Appellant was supposed to give a personal guarantee for the repayment of the loan facility for the full value of US$5.5 million. That the third Appellant

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executed the Syndication Loan Agreement on behalf of the Company but he did not execute the personal guarantee envisaged under the said agreement. That, therefore, the Respondent suffered a diminution in the security offered by the Company for the repayment of the loan.

The Statement of Claim goes on to reveal that at the request of the Company, and in light of the Company’s failure to meet its debt obligations, the Respondent agreed to participate in the

restructuring of the capital of the Company. That this was done in consideration of the Appellants executing equity buy-back guarantees in favour of the Respondent. That the restructuring was a condition precedent to the Company accessing further loans from Finance Bank to fund its working capital. That the terms of the restructuring were that-

(1) the Respondent should convert its portion of the loan to the Company into Common Stock Equity in the Company;

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(2) the Common Stock Equity should be in the sum of K14 billion redeemable at the discretion of the Respondent, with interest calculated at the current 182 Government of the Republic of Zambia Treasury Bill rate (at the material time at 16% per annum) plus 8% margin or a floor rate of 20% per annum, whichever is the higher;

(3) the first and second Appellants would jointly and/or severally guarantee the repayment to the Respondent of the sums referred to in paragraph 2 above; and

(4) the Respondent would, in consideration of Finance Bank lending the Company the sum of US$3.0 million, relinquish its interest in the securities offered by the Company for the loan, in favour of Finance Bank.

The Statement of Claim also shows that in consideration of the Respondent converting its loan to the Company into Common Stock Equity and releasing its security to Finance Bank, the first and second Appellants executed irrevocable undertakings to buy back the Common Stock Equity.

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The Statement of Claim further discloses that on or about 10th January, 2009, the Company informed the Banks that its Board had resolved to suspend its operations. That by a letter dated 13th January, 2009, the Respondent, considering the suspension of the Company's operations as an event of default, made a demand for the full repayment of the loan. That the

Appellants failed to comply with the demand prompting the Respondent to institute legal action in the Court below.

In response to the Respondent's Writ of Summons and Statement of Claim, the first and the second Appellants filed a joint Defence while the third Appellant filed a separate Defence.

The first and second Appellants denied the claim by the Respondent that it agreed to convert its debt facility into equity. They stated that all documents signed by the parties were signed, as evidenced in writing, subject to negotiations. That the said negotiations were never concluded up to the time the Respondent instituted this action. Further, that the Respondent's shareholder(s)

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and/or agents or representatives of its shareholders, made unequivocal pronouncements in Parliament that they had rejected the offer to convert the debt facility into equity/shares. That, therefore, the debt owed by the Company to the Respondent was never converted to equity. That consequently, the Respondent

could not ask the first and second Appellants to buy-back the equity which it never had. That in the circumstances, the Respondent was supposed to pursue Mine Air Services Limited for the recovery of its debt.

Coming to the third Appellant, he contended that the obligation to sign the personal guarantee was a conditional one. That by the terms of clause 8.6 of the Syndication Loan Agreement, it was agreed that his obligation to execute the personal guarantee would fall away if the Company raised a minimum of US$4.0 million in fresh equity capital. That in fact, the Company raised at least US$6.0 million in fresh equity capital after the Syndication Loan Agreement. He denied the allegation that he caused the

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Respondent to suffer a diminution in the security it held in respect of the loan it advanced to the Company.

It is of great relevance to note that this matter was commenced before Wood, J. He adjourned it to 29th and 30th

August, 2011, for continued cross-examination of PW4. In the meantime, on 22nd August, 2011, Mutuna, J, issued notices of hearing returnable on 25th August, 2011. When the parties appeared before Mutuna, J, on that date, the learned trial Judge informed them that following the recusal by Wood, J, the matter had been transferred to him. The Appellants questioned the manner in which this matter had moved from Wood, J, to Mutuna, J. They wanted to know the reasons for Wood, J's, alleged recusal and the law pursuant to which the matter was transferred to Mutuna, J.

Mutuna, J, ruled that the issues raised by the Appellants lacked merit. That he had jurisdiction to hear and determine this matter. He then adjourned the matter to the 18th and 20th October, 2011.

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On 19th September, 2011, Counsel for the Appellants appeared before the learned trial Judge with an application for leave to appeal against his ruling on the transfer of the matter

from Wood, J. The learned trial Judge refused to grant leave on the ground that the intended appeal had no merit.

On 26th March, 2012, when the matter came for continued hearing, the Appellants applied for an adjournment on the basis that they had moved the Minister of Justice to inquire into the circumstances that led to the matter being reallocated to Mutuna, J. Mutuna, J, however, refused to hear that application on the ground that the Appellants had not made a formal application for the adjournment. Consequently, the third Appellant, and Counsel for the first and second Appellants, asked the learned trial Judge to excuse them from the proceedings and they walked out of the courtroom.

The learned trial Judge proceeded to hear the matter in the absence of the Appellants and their legal representatives. The

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Respondent called four witnesses, namely Musenga Andrew Musukwa (PW1); Abraham Mwenda (PW2); Cephas Habasonda (PW3); and Simulonda N. Beyani (PW4). Because of the approach

we have taken in this matter, we do not see it necessary to reproduce the evidence of these witnesses. Suffice to reiterate that these witnesses were not cross-examined, on behalf of the Appellants, because the Appellants and their lawyers had excused themselves from participating in the proceedings. Also no witnesses testified on behalf of the Appellants.

On 19th April, 2012, the learned trial Judge entered judgment in favour of the Respondent in the sum of K14 billion with interest as agreed in the undertakings, calculated at 182 days GRZ Treasury Bill rate, plus 8 per cent margin or a floor rate of 20 per cent per annum, whichever was higher, from the date of the writ to the date of the judgment. Thereafter, at the current bank lending rate as determined by the Bank of Zambia.

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On the same day, 19th April, 2012, before delivering his judgment, the learned trial Judge made a ruling on an application by the Appellants to stay proceedings. In that application, the

Appellants asked the trial Court to stay proceedings pending investigations into how this matter had moved from Wood, J, to the learned trial Judge. The learned trial Judge ruled that there could be no stay of proceedings for the purpose of facilitating investigations by the Minister of Justice or indeed the Executive as a whole.

The ruling also dealt with the Respondent's application, filed on 18th April, 2012, to discontinue the action. The learned trial Judge refused to grant the application on the ground that the notice for discontinuance was not preceded by an application to arrest the ruling and the judgment and also on the ground that the notice contravened Order 21(2) of the Supreme Court Practice (Whitebook) which, according to the court below, required any discontinuance, made after 14 days of service of defence, to be made with the leave of the court.

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It is against the aforementioned ruling and judgment that the Appellants have brought this appeal. They have filed two

memoranda of appeal containing 6 grounds and 3 grounds, respectively, as follows:

Memorandum of Appeal at pages 4-6 of the record of appeal

1. **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.**
2. **The learned trial Judge misdirected himself in law and fact when in the judgment of 19th April 2012 he dealt with the evidence of all the four (Respondent's) witnesses as though it had not been subjected to cross examination when in his own Ruling of 25th August, 2011 (wherein he had ruled that he would hear the matter *de novo*) he had stated the (Respondent's) witnesses who had already testified could not give testimony that was inconsistent with their earlier testimony thereby acknowledging that**

the record of proceedings showing their cross examination before Judge Wood formed part of their evidence.

3. **The learned trial Judge erred in law and fact when he held the 3rd Appellant liable to the (Respondent) for the sum of K14 billion premised on misrepresentation, a matter that had not been pleaded and concerning which no evidence was led by the (Respondent).**

4. **The learned trial Judge misdirected himself when, contrary to both the *viva voce* and documentary evidence that was before him he made a finding that the 3rd Respondent had arranged and orchestrated the procurement of funds by Mine Air Services t/a Zambian Airways from the (Respondent) when he knew or ought to have known the company could not pay back.**

5. **The learned trial Judge erred in law and fact when he held the 3rd Appellant liable to the (Respondent) for the sum of K14 billion in his personal capacity as Director of Mine Air Services t/a Zambian Airways without properly addressing his mind to the law on piercing of the corporate veil and the fact that the (Respondent) had neither pleaded nor led evidence to**

show that the circumstances that give rise to piercing the corporate veil had arisen.

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6. **The learned trial Judge erred in law and fact when he held the 1st and 2nd (Appellants) liable on the share buyback guarantees when the evidence on record shows that the contract between the parties was frustrated and as such the (Respondent) could only recover its debt from Mine Air Services t/a Zambian Airways which was the recipient of the K14 billion.**

Memorandum of Appeal at pages 7 and 8 of the record of appeal

1. **The learned trial Judge erred in law and fact when he chose to ignore the Notice of Discontinuance that had been filed by the (Respondent) on 18th April, 2012 on the ground that the said Notice had not been filed in accordance with Order 21(2) of the Rules of the Supreme Court (1999) when in fact the filing of the Notice had been in compliance with Order 17(1) of the High Court Rules Cap 27 of the Laws of Zambia which takes precedence in application in this jurisdiction.**

2. **The learned trial Judge erred in law and fact when he proceeded to determine the matter as he did after the Notice of Discontinuance was filed.**

3. **The learned trial Judge misdirected himself in law and fact when he refused to stay the proceedings in this**

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matter to allow for the conclusion of investigations on how the matter was transferred from Judge Wood to him.

In support of the foregoing grounds of appeal, Counsel for the first and second Appellants filed written heads of argument which they augmented with oral submissions. The third Appellant also filed his own written heads of argument which he supplemented with oral submissions.

Counsel for the first and second Appellants argued grounds 1, 2 and 6 as well as all the grounds of appeal against the ruling. The third Appellant dealt with grounds 3, 4 and 5.

In their written heads of argument, on ground one, Counsel for the Appellants contended that the learned trial Judge erred in law when he heard this matter when it was not properly

before him as the alleged transfer of the matter from Wood, J, was *void ab initio* for having been done contrary to the law. That it is trite law that in order to transfer a matter, the Judge that intends to effect the transfer should make an order to that effect and the receiving Judge is required to give consent to that transfer. Counsel relied on

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section 23 of the High Court Act, Cap 27, to buttress their arguments.

Counsel went on to submit that when a need arises to transfer a case from one High Court Judge to another, on account of recusal, a specific procedure is provided under sections 6 and 7 of the Judicial (Code of Conduct) Act No. 13 of 1999. That section 6 sets out the circumstances under which a Judge is disqualified from hearing a matter. That subsections (1) and (2) of section 7 provide the circumstances under which a disqualification set out in section 6 can be waived by the parties to the proceedings.

Counsel contended that if any circumstance arose that could have necessitated Wood, J's recusal, section 7(1) required him to notify the parties about his disqualification to continue hearing the matter.

Counsel concluded their written arguments on ground one by submitting that since this matter moved from Wood, J, to Mutuna, J, in breach of legal provisions dealing with recusal and

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transfer of matters, Mutuna, J, had no jurisdiction to hear and determine the matter. That consequently, the judgment and the ruling he delivered on 19th April, 2012, are void *ab initio.*

In response to the arguments advanced by Counsel for the Appellants, on ground one, Counsel for the Respondent submitted that after the matter moved from Wood, J, to Mutuna, J, on 25th August, 2011, the Appellants raised the issue of whether or not this matter was properly before Mutuna, J. That Mutuna, J, made a ruling that the matter was properly before him. That since the Appellants did not appeal, within 30 days, against Mutuna, J's

ruling, they are estopped from raising issues relating to the said transfer.

Counsel, therefore, contended that the issue of whether Mutuna, J, was properly seized with the conduct of this matter is improperly before this Court. Counsel cited this Court's decision in ***Zambia Revenue Authority and T and G Transport*** [(1)]**,** in support of this argument.

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Counsel further contended that the issue of whether Wood, J, voluntarily recused himself or not is a matter of evidence which only Wood, J, could attest to.

In reply to Counsel for the Respondent's arguments on ground one, Counsel for the Appellants contended that the lack of jurisdiction on the part of Mutuna, J, followed him up to the date of the judgment and could, therefore, be a ground of appeal at this point.

When the matter came before us on 12th February, 2013, for oral submissions, Counsel for the Appellants contended that it

would be unfair, to the litigants and to the Court below, to have a result that would entail sending this matter back to the High Court for retrial. So Counsel prayed that in as much as the Appellants believed that their alternative arguments relating to the jurisdiction of Mutuna, J, have merit, they would like this Court to only deal with the arguments that relate to the merits of Mutuna, J's judgment.

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We have carefully examined Counsel for the Appellants' contention. Counsel are, in effect, inviting this Court to turn a blind eye to the alleged absence of jurisdiction on the part of Mutuna, J.

We have decided to deal with the issue of Mutuna, J's jurisdiction because we hold the view that it is a cardinal point. It is our firm opinion that before considering this matter on its merits, it is important that this Court is satisfied that the court below was properly vested with this matter. We can only consider this matter on its merits once we are satisfied that the judgment and ruling appealed against, arose from proceedings conducted

by a Judge with jurisdiction to hear and determine this matter. We would set a very bad precedent if we accepted that this Court can gloss over this fundamental point.

We will, therefore, decide on the issues raised in ground one of this appeal before considering the grounds of appeal that have attacked the merits of the learned trial Judge's judgment.

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We have painstakingly examined what transpired in the court below. In particular, we have studied how this matter moved from Wood, J, to Mutuna, J. In this regard, we have had a look at both the record of appeal filed herein as well as the High Court file of **Development Bank of Zambia v. JCN Holdings Limited, Post Newspapers Limited and Mutembo Nchito, 2009/HPC/0322.** We have also considered the arguments advanced by Counsel for both parties on ground one.

The question we have to decide is whether or not this matter was transferred from Wood, J, to Mutuna, J, in accordance with the

law relating to the transfer of matters between High Court Judges. It is clear from Mutuna, J's ruling, delivered on 25th August, 2011, that this matter moved from Wood, J, to Mutuna, J, because Wood, J, allegedly recused himself from handling it.

Counsel for the Respondent has argued that the issue of whether Wood, J, voluntarily recused himself or not is a matter of evidence which only Wood, J, would attest to.

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That in the absence of such attestation, it would be wrong to base any decision on unproved facts. We do not agree with this contention. In our view, the question of whether Wood, J, recused himself or not must be determined on the basis of what is on the record. It is trite law that a recusal by a High Court Judge should form part of the record of the matter in which it is made.

The law relating to recusal by a High Court Judge is found in sections 6 and 7 of the Judicial (Code of Conduct) Act No. 13 of 1999, while the law relating to transfer of a matter from one High

Court Judge to another is contained in section 23(1) of the High Court Act, Cap 27.

Section 6 of the Judicial (Code of Conduct) Act deals specifically with disqualifications from adjudication. It outlines circumstances under which a judicial officer should not adjudicate on a given matter. The said section provides that-

7. (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's spouse

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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-

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(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;

(i) has any interest that could interfere with fair trial or hearing; or

(ii) is to the officer's knowledge likely to be a material witness in the proceeding.

Section 7 of the Judicial (Code of Conduct) Act, deals with waiver of the disqualifications contained in section 6. Section 7 provides that-

> **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.**

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> **(3) A disclosure or an agreement made under subsection (2) shall form part of the record of the proceedings in which it is made.**

Evidently, section 7 obliges a Judge, who is disqualified under section 6, to disclose his or her disqualification at the commencement of the proceedings. The requirement placed on a Judge by section 7, to disclose a disqualification, is a mandatory requirement; section 7(1) uses the word **“shall”** as opposed to **“may”**. Section 7(1) also mandatorily obliges the Judge to request the parties or their legal representatives to decide on whether or not to waive the disqualification. Section 7(3) makes it obligatory that the disclosure of the disqualification or the agreement to waive the disqualification should form part of the record of the proceedings.

From the foregoing, we are of the view that the argument, by Counsel for the Respondent that the question as to whether Wood, J, recused himself or not can only be decided if Wood, J, gave evidence, is not supported by sections 6 and 7 of the Judicial (Code of Conduct) Act. This is so because section 7 requires the recusal

done under section 6 to form part of the record. So whether Wood, J, recused himself or not is an issue that should be ascertainable from the record.

The question then is: ‘how does a High Court Judge, who has complied with sections 6 and 7 of the Judicial (Code of Conduct) Act, transfer the matter from himself or herself to another Judge?’

In the court below, Counsel for the Appellants submitted that the transfer of a matter from one High Court Judge to another should be done in compliance with section 23 of the High Court Act. Counsel has maintained this argument before this Court. The learned trial Judge, however, rejected Counsel’s contention. In its ruling, delivered on 25th August, 2011, the Court below held that Part VI of the High Court Act, under which section 23 falls, applies to criminal matters only. The learned trial Judge’s ruling was as follows:

“The procedure as regards recusal is not governed by sections 23 and 26 of the High Court Act but rather

section 6 of the Judicial Code of Conduct Act. The sections i.e. 23 and 26 as Counsel for the (Appellants) has quite rightly argued refer to transfer of cases from one Judge to another not recusal. Further, the sections and indeed the whole part VI of the High Court Act which makes provision for the transfer of cases are applicable only to criminal matters or cases. Section 22 of the said part states in this respect as follows…"the provisions of this part as to transfer of cases and matters shall apply to criminal cases only

Emphasis is on the words 'criminal cases' only."

It is our firm opinion that this was a very serious misconception of the law on the part of the learned trial Judge. Clearly, the court below chose to misunderstand section 22 of the High Court Act by not quoting the section in full. The language used in that section is so clear that it is difficult to conceive the reasons that made the learned trial Judge to arrive at the decision that Part

VI of the High Court Act applies to criminal cases only. In fact, from the heading of that Part, it is clear that it deals with all transfers of matters between High Court Judges. That Part is headed **“Powers of Transfer”**; it is not headed **“Powers of Transfer of Criminal Matters”**. According to the marginal note to section 22, that section addresses additional requirements relating to **“transfers in criminal cases”**. For the sake of clarity, we have reproduced section 22, in full, which is as follows:

> **22. The provisions of this Part as to the transfer of causes and matters shall apply to criminal causes only so far as the same are not inconsistent with the provisions of the Criminal Procedure Code relating to the transfer of such causes.**

In our view, if the intention of the drafters of the High Court Act was to dedicate the whole Part VI of that Act to transfers of criminal matters, they could have appropriately stated so in the heading of that Part. Our interpretation of section 22 is that, although Part VI applies to all transfers of matters, when it comes to transfer of criminal matters, the provisions of that Part only

apply if they are not inconsistent with provisions of the Criminal Procedure Code, Cap 88, relating to transfer of criminal matters. Section 22 was included in Part VI because the Criminal Procedure Code contains some provisions on transfer of criminal matters. For instance, sections 77-79 of the Criminal Procedure Code provide for transfer of matters between Magistrates.

Accordingly, the answer to the question: ‘how does a High Court Judge, who has complied with sections 6 and 7 of the Judicial (Code of Conduct) Act, transfer the matter from himself or herself to another Judge?’, in our view, is found in section 23(1) of the High Court Act. Section 23, as a whole, provides for transfer of matters between High Court Judges. In particular, subsection (1) of that section provides that-

> **23. (1) Any cause or matter may, at any time or at any stage thereof, and either with or without the application of any of the parties thereto, be transferred from one Judge to another Judge by an order of the Judge before whom the cause or matter has come or been set down:**

Provided that no such transfer shall be made without the consent of the Judge to whom it is proposed to transfer such cause or matter.

Clearly, section 23(1) deals with all transfers, of matters between Judges, regardless of the reasons necessitating such transfer. The ruling by the learned trial Judge, that section 23 deals with transfer of cases and not recusal, erroneously overlooked the fact that once a Judge recuses himself or herself from handling a matter, that matter would inevitably have to be transferred to another Judge.

Administratively, the practice in Zambia is that the Judge who has recused himself or herself must handover the matter to the Judge-in-Charge for reallocation to another Judge. For the Commercial List, the handover is supposed to be made to the Deputy Judge-in-Charge, who is the Judge-in-Charge of the Commercial List.

In our view, the provisions relating to transfer of matters presuppose that there should be reasons necessitating the transfer.

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One such reason, in our considered opinion, could be recusal which, as we have already adjudged, is dealt with by sections 6 and 7 of the Judicial (Code of Conduct) Act.

The question, then, is: was the transfer of this matter, from Wood, J, to Mutuna, J, done in accordance with the relevant law on transfer of matters between High Court Judges?

As can be seen from section 23(1) of the High Court Act, which we have already reproduced in this Judgment, it is incontestable that, at any stage of the proceedings, a matter may be transferred from one High Court Judge to another High Court Judge. That where circumstances requiring a matter to be transferred from one Judge to another arise, the transfer can be initiated by the Judge himself or herself. The transfer can never, however, be instigated by a receiving Judge even if that Judge is a Judge-in-Charge.

However, it is important to note that section 23(1) requires that the Judge transferring the matter should make an order to

that effect. Accordingly, in the instant case, there should have been a

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note from Wood, J, to the Judge-in-Charge to the effect that he had recused himself and he was consequently transferring the matter to the Judge-in-Charge for reallocation to another Judge. The said recusal, as already adjudged, should have been endorsed on the record. We must state that the Judge who is recusing himself or herself may not be required to state the details of the facts that have necessitated the recusal. This is because it may not always be in the interest of justice to place such details on the record. Nevertheless, it is mandatory that the record should show that the Judge has recused himself or herself from handling the matter in issue. This is even more so where, as in the instant case, the matter was so advanced that only cross-examination of the Plaintiff’s last witness had remained before the Plaintiff could close its case.

Further, the proviso to section 23(1) requires that the transfer should only be made with the consent of the Judge to whom it is proposed to transfer the matter.

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In the instant case, we are very certain that Mutuna, J, consented to having this matter reallocated to him. So the pertinent questions are: did Wood, J, recuse himself from handling this matter? Did Wood, J, make an order sending this matter to the Judge-in-Charge for reallocation to another Judge?

A close examination of the High Court case file, **2009/HPC/0322**, establishes that the matter was re-allocated to Mutuna, J, by Kajimanga, J, who, at the time, was the Deputy Judge-in-Charge for the Commercial List. A further study of the said file and the three volumes of the record of appeal, establishes that there is no endorsement to show that Wood, J, recused himself from handling this matter.

Additionally, a scrutiny of the said records establishes that, contrary to the requirements of section 23(1) of the High Court Act, there was no order by Wood, J, transferring this matter from himself to Kajimanga, J, for reallocation to another Judge. All the record of appeal shows is that on 9th June, 2011, Wood, J,

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adjourned this matter to 29th and 30th August, 2011, for continued cross-examination of PW4 (see page 769 of volume II of the record of appeal). That on 22nd August, 2011, Mutuna, J, issued a notice of hearing requiring the parties to appear before him on 25th August, 2011. That when the parties appeared before Mutuna, J, he explained to them that Wood, J, had recused himself from having conduct of this matter and the matter had been reallocated to him.

From the foregoing, we are of the view, firstly, that Wood, J, did not recuse himself from handling this matter. And secondly, that section 23(1) of the High Court Act was not complied with in transferring the matter from Wood, J, to Mutuna, J, as Wood, J, did not make an order to give legal effect to the transfer. So even

assuming Wood, J, had legally recused himself, the movement of this matter to Mutuna, J, did not still comply with the law.

We must state that the statutory provisions relating to recusal and transfer of matters between Judges are important provisions aimed at avoiding forum shopping and ensuring transparency in

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the dispensation of justice. So a breach of these provisions is not a mere breach of procedural rules but it is an infringement which goes to the jurisdiction of the court.

In the instant case, it is our firm view that Kajimanga, J, was legally enjoined to ensure that the handover of the matter from Wood, J, to him for reallocation, complied with the law. He was required to ascertain that the record reflected that Wood, J, had indeed recused himself. He was also required to ensure that the record contained an order from Wood, J, giving effect to the transfer, in accordance with section 23(1) of the High Court Act. In the absence of a note of recusal and an order of transfer from

Wood, J, it is difficult to comprehend how Kajimanga, J, moved this matter from Wood, J, to Mutuna, J.

As for Mutuna, J, to whom this matter was reallocated by the Deputy Judge-in-Charge, it is our view that he was not, *ipso facto*, required to inquire into the propriety of the transfer of the matter. However, it is our considered opinion that when Counsel for the

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Appellants questioned the legality of the transfer; this should have put Mutuna, J, on alert. He should have asked the parties to raise and settle those concerns with the Judge-in-Charge. He should have equally sought clarity from the Judge-in-Charge, on the said issues. The record does not show that this was done.

On the part of Wood, J, it is our firm opinion that he should have inquired into how the record moved from him. Since he had set a date for the continued hearing of the matter, when the parties did not appear before him on that date and the record was not in his Chambers, he should have inquired as to the whereabouts of the record.

In the circumstances of this case, we are of the considered view that the transfer of this matter from Wood, J, to Mutuna, J, was irregular as it did not comply with the law.

We, therefore, hold that Mutuna, J, did not have jurisdiction to hear and determine this matter.

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Our holding is well founded on a number of decisions of this Court. In ***Zambia National Holdings Limited and United National Independence Party (UNIP) v. The Attorney-General***[(2)], we held that the High Court is not exempted from adjudicating in accordance with the law including complying with procedural requirements. The brief facts of that case were that the Appellants brought a petition in the High Court to challenge the decision of the Respondent to acquire, compulsorily under the Lands Acquisition Act, the Appellants' land, being Stand number 10934 Lusaka, which was also known as the New UNIP Headquarters.

Delivering the judgment of this Court, Ngulube, C.J (as he then was), said the following on the jurisdiction of the High Court:

> **"The jurisdiction of the High Court …is unlimited but not limitless since the court must exercise its jurisdiction in accordance with the law…. [T]he High Court is not exempt from adjudicating in accordance with the law including complying with procedural requirements as well as substantive limitations…."**

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Also, it is settled law that if a matter is not properly before a court that court has no jurisdiction to make any orders or grant any remedies. This was the position we established in ***Chikuta v. Chipata Rural Council***[(3)]. In brief, the facts of that case were that the Appellant was the Secretary of the Chipata Rural Council. On the 28th August, 1972, he was convicted on two counts of forgery and uttering. Consequently, on the 5th October, 1972, the Council, by resolution, dismissed him from his employment with effect from the date of his conviction. He commenced an action in the High Court, by means of an originating summons, seeking a

declaration that he was still employed by the Council. The High Court refused to make the declaration on the ground that the Council had the power to dismiss him by reason of his conviction. On appeal to this Court, we held that-

> **"... for procedural reasons the appeal must in fact fail. The matter was brought before the court by means of an originating summons…. It is clear… that there is no case where there is a choice between commencing an action by a writ of summons or by an originating summons. The**
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> **procedure by way of an originating summons only applies to those matters referred to in Order 6, rule 2, and to those matters which may be disposed of in chambers. It is clear that these proceedings have been misconceived. <u>As the matter was not properly before him the judge had no jurisdiction to make the declarations requested even if he had been so disposed</u>." (Emphasis ours)**

We came to a similar conclusion in ***New Plast Industries v. The Commissioner of Lands and The Attorney-General***(4). In that case the High Court dismissed the Appellant's action on the

ground that it was commenced by way of Judicial Review when it should have been brought by way of an appeal from the decision of the Registrar of Lands and Deeds Registry. On appeal to this Court, we said the following:

> **"We therefore hold that this matter having been brought to the High Court by way of Judicial Review, when it should have been commenced by way of an appeal, the court had no jurisdiction to make the reliefs sought. This was the stand taken by this court in Chikuta v Chipata Rural Council (1) where we said that there is no case in the High Court where there is a choice between**
>
> **512**
>
> **commencing an action by a writ of summons. We held in that case that where any matter is brought to the High Court by means of an originating summons when it should have been commenced by a writ, the court has no jurisdiction to make any declaration. The same comparison is applicable here. Thus, where any matter under the Lands and Deeds Registry Act, is brought to the High Court by means of Judicial Review when it should have been brought by way of an**

appeal, the court has no jurisdiction to grant the remedies sought.” (Emphasis ours)

It is clear from the ***Chikuta***[3] and ***New Plast Industries***[4] ***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.

Affirming our decisions in the ***Chikuta***[3] and ***New Plast Industries***[4] ***Cases***, 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.

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

It is our hope that, in future, Judges of the High Court will adhere to the guidelines we have pronounced, in this judgment,

on the transfer of matters. Adherence to the said guidelines will avert the recurrence of what transpired in this case.

Coming back to arguments advanced on behalf of the Respondent, Counsel for the Respondent has argued that since the Appellants did not appeal, to this Court, within 30 days from the date when Mutuna, J, ruled on his jurisdiction, they must be deemed to have abandoned their objection to Mutuna, J's jurisdiction. Counsel has relied on the ***Zambia Revenue Authority Case***[(1)] to submit that this appeal is not properly before this Court.

We have thoroughly read the ***Zambia Revenue Authority Case***[(1)], and in our view, Counsel for the Respondent has misapprehended the issues we dealt with in that case. That case was an appeal against the judgment of the learned Deputy Registrar

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dated 29th July, 2003, on assessment of damages which the High Court, in its judgment of the 16th May, 2003, awarded to the

Respondent. At the time the appeal was scheduled to be heard by this Court, Counsel for the Respondent raised preliminary points that:

1. **the notice of appeal was filed without the leave of either the High Court or the Supreme Court, contrary to Rule 50 (1) of the Supreme Court Rules;**
2. **in accordance with Rule 55 of the Supreme Court Rules, failure to obtain leave before filing a notice of appeal is a default in lodging an appeal and merits a dismissal; and**
3. **the appeal was not properly before the court since no order granting leave to appeal had been filed.**

We accepted Counsel for the Respondent's preliminary points and held that that appeal was not properly before us.

Clearly, the issue in the ***Zambia Revenue Authority Case***[(1)], was that the Appellant filed the notice of appeal without the leave of either the High Court or this Court. That is why we said that the

decision of the learned Deputy Registrar was not properly appealed against. It is our view, therefore, that the issue raised by Counsel for the Respondent in the instant case is very different from the issue that made us decide that the appeal, in the ***Zambia Revenue Authority Case***[(1)], was not properly before us. There is no dispute, in this case, as to whether or not the Appellants obtained leave to appeal to this Court.

In the circumstances, the argument by Counsel for the Respondent that, because the Appellants did not appeal to this Court within 30 days of Mutuna, J's ruling, this appeal is improperly before this Court, is not tenable.

Having held that the proceedings before Mutuna, J, were a nullity and that his ruling and judgment are void *ab initio*, we do not see it necessary to deal with the other grounds of appeal which have attacked the merits of Mutuna, J's ruling and Judgment.

While we sympathise with the parties that ordering a retrial will lead to a further delay in the disposal of this matter, we are of

the considered view that this Court cannot cast a blind eye to the miscarriage of justice that occurred in the court below. The prayer by Counsel for the Appellants that this Court should decide this matter on its merits is, in effect, an invitation to this Court to endorse the miscarriage of justice aforesaid.

In fact, the record shows that because Counsel for the Appellants refused to subject themselves to Mutuna, J's proceedings, they walked out of the court room while Mutuna, J, was still sitting. They refused to be part of Mutuna, J's proceedings. Consequently, the witnesses that testified on behalf of the Respondent were not cross-examined by Counsel for the Appellants. Also the Appellants did not give their side of the story.

Before we conclude this judgment, we want to comment on the conduct that was exhibited by the third Appellant and Counsel for the 1st and 2nd Appellants, when they appeared before Mutuna, J, on 26th March, 2012. What transpired in the Court below appears at pages 787-789 of Volume 2 of the record of appeal.

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The record shows that when the matter came up on the said date, the third Appellant applied to the trial Court for the matter to be adjourned. He indicated that the Appellants had moved the Minister of Justice to inquire into the circumstances that could have led to the matter being reallocated to Mutuna, J, from Wood, J. For clarity, here is an extract of what exactly happened following the third Appellant's application for an adjournment-

> **Mutuna, J**
>
> **Mr. Nchito, may I stop you there. This is an application for an adjournment. The rules of this court stipulate that the application for an adjournment should be filed 10 days before the hearing.**
>
> **You have not complied with those rules so I cannot entertain that application.**
>
> **Mr. NChito, S.C**
>
> **My Lord maybe if you hear me then you can rule.**
>
> **Mutuna, J**
>
> **Mr. Nchito, I cannot hear you in the absence of a formal application.**

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Mr. Nchito, S.C

My Lord these very sittings are an abrogation of the rules of justice and we are saying we have raised very serious issues before this Court….

Mutuna, J

Mr. Nchito I am making a ruling.

Mr. Nchito, S.C

My Lord, you have not heard me.

Mutuna, J

I can't hear you for the simple reason that you have made no formal application.

Mr. Nchito, S.C

My Lord then I have no reason to sit in this Court. My I be excused? You can do what you want.

Mutuna, J

Please feel free.

Mr. N. Nchito

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In the same vein my Lord we are seeking leave to leave the Court. This Court may proceed in the way that it deems appropriate.

Mr. F. Mmembe

It applies to ourselves my Lord. We cannot render ourselves under the execution of an axe willingly. It will be reckless on our part. Thank you.

(All three Counsel for the Defendant storm out of the Court room)"

The above episode shows a clear disregard for the decorum and integrity of the Court, on the part of the third Appellant and the two Advocates for the 1st and 2nd Appellants. Walking out of the Court, in protest, was very irregular and very contemptuous. It is conduct which we condemn in the strongest terms especially that it was exhibited by very senior lawyers. We expect senior lawyers to lead by example in the observance of the lawyers' paramount duty to the Court. According to section 85 of the Legal Practitioners Act, Cap 30, any person, who is duly admitted as a practitioner, is an officer of the Court and is subject to the jurisdiction thereof.

Lawyers, as officers of the Court are, therefore, expected to behave in a way that befits that status.

We must stress that no matter how wrong a Judge may be; no matter how angry a lawyer may be, walking out of the Court, in protest, is an inexcusable disregard of the authority of the Court. In the interest of upholding the dignity of the Court, lawyers should never openly show such kind of grave disrespect to a constitutionally constituted Court. It is in the public interest that the dignity of the Court should always be preserved. In ***Giannarelli v Wraith***[(5)], Mason CJ said that-

> **"The peculiar feature of counsel's responsibility is that he owes a duty to the court as well as to his client. His duty to his client is subject to his overriding duty to the court. In the performance of that overriding duty there is a strong element of public interest."**

In ***Rondel v. Worsley***[(6)]**,** Lord Denning underscored the fact that it is honourable for Counsel to observe his or her paramount duty to the Court. He said that:

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> **[An advocate] has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice….He must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline."**

In our considered view, walking out of Court was not in the interest of Appellants' right to be heard. Whereas a Court has a duty to ensure that a party is heard, the party also has a complimentary role to play in ensuring that he or she is heard. We hold the firm opinion that walking out of a constitutionally constituted Court did not favour the promotion of the Appellants' right to be heard.

We also wish to condemn Counsel for the Appellants' reference, of the issue relating to the transfer of this matter, to the Minister of Justice. Counsel applied for an adjournment on the

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basis that they had moved the Minister of Justice to inquire into the circumstances that led to this matter being transferred from Wood, J, to Mutuna, J. They wanted Mutuna, J, to stay the proceedings on that basis. In our view, this was very irregular and uncalled for.

We, therefore, condemn the conduct exhibited by the third Appellant as well as Counsel for the 1st and 2nd Appellants. Counsel should have found a better way of handling their displeasure, including by way of appeal to this Court. We hope we will not see this kind of contemptible misconduct again from members of the Bar.

Coming back to the appeal, we hold that in the interest of justice, this matter must be sent back to the High Court for retrial before another Judge. We are sending this matter for retrial

particularly because, as already adjudged in this judgment, the transfer of the matter from Wood, J, to the Judge-in-Charge was not done in accordance with sections 6 and 7 of the Judicial (Code of Conduct) Act as well as section 23(1) of the High Court Act.

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Mutuna, J, did not, therefore, have jurisdiction to hear and determine this matter.

We order each party to bear their own costs both for the annulled proceedings as well as for this appeal.

L. P. Chibesakunda
ACTING CHIEF JUSTICE

H. Chibomba
SUPREME COURT JUDGE

R. Kaoma
ACTING SUPREME COURT JUDGE