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IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. 207/2013**
HOLDEN AT LUSAKA **SCZ/8/257/2013**
(Civil Jurisdiction)

BETWEEN:

EVERSON MUMBA (SUING IN HIS CAPACITY AS SENIOR CHIEF KALINDAWALO) APPELLANT

AND

ATTORNEY GENERAL RESPONDENT

CORAM: **Mwanamwambwa D.C.J., Kajimanga and Musonda J.J.S.,**
On 19th May, 2016 and 12th October 2017

For the Appellant: *Mr. S. Zulu SC, of Messrs. Zulu and Company*
For the Respondent: *Major. C. Hara, Principal State Advocate, appearing with Mr. F. A. Mwale, Senior State Advocate - Attorney General's Chambers*

J U D G M E N T

Mwanamwambwa D.C.J., delivered the Judgment of the Court.

Legislation Referred to:

1. ***(1)*** **Sections 4 and 5 of the Chiefs Act, Chapter 287 of the Laws of Zambia**
2. ***(2)*** **Order V, rules 17 and 18 of the High Court Rules, Chapter 27 of the Laws of Zambia**
3. ***(3)*** **Article 127 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia**
4. ***(4)*** **Rule 49 (4) of the Supreme Court Rules, Chapter 27 of the Laws of Zambia**

Cases Referred to:

1. **Council of Civil Service Union and Others v Minister for Civil Service (1984) 3 ALL ER 935**
2. **Victor Namakando Zaza v Zambia Electricity Supply Corporation Ltd (2001) ZR 107**

3. **Nyampala Safaris (Z) Ltd and Others v Zambia Wildlife Authority and Others (2004) ZR 49**
4. **Fredrick Jacob Titus Chiluba v Attorney General (2003) ZR 153**
5. **Sablehand Zambia Ltd v Zambia Revenue Authority (2005) ZR 109**
6. **Samuel Miyanda v Raymond Handahu (1994) ZR 39**
7. **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) Z.R. 138**
8. **Zambia Revenue Authority v Hitech Trading Company Limited (2001) Z.R. 17**
9. **Godfrey Miyanda v The High Court (1984) ZR 62**
10. **William Harrington v Dora Siliya and Attorney General (2011) 2 ZR 253**

Work Referred to:

1. **Black's Law Dictionary, 8th Edition**

This appeal is against a High Court decision, dismissing the appellant's application for judicial review.

The appellant sought judicial review of the President's decision made on 16th November 2012, to withdraw his recognition, as Senior Chief Kalindawalo of the Nsenga people of Petauke District in the Eastern Province. The President withdrew the appellant's recognition on the ground that he was satisfied, after due inquiry, that the appellant had ceased to be entitled, under African customary law, to hold the office of Senior Chief Kalindawalo. In his application for judicial review, the appellant was seeking the following reliefs:-

(a) An order of Certiorari to move into the High Court for the purposes of quashing the decision of the President of the Republic of Zambia to, withdraw the recognition of the appellant, as Senior Chief Kalindawalo which said withdrawal was done under Chiefs (withdrawal of recognition) Order 2012 (Statutory Instrument No. 77/2012;),

(b) An order of mandamus directed to the President of the Republic of Zambia, to re-instate the appellant's recognition as Senior Chief Kalindawalo of the Nsenga people of Petauke;

(c) An order of prohibition to restrain the Republican President from exercising his jurisdiction by recognising or appointing a new Senior Chief Kalindawalo contrary to African customary law and the decisions of the High Court and Supreme Court of Zambia under Cause No. 1998/HP/2180 and Appeal No. 78/2002 respectively;

(d) Costs

The grounds on which the appellant was seeking these reliefs were that:

(1) The President acted illegally by withdrawing the appellant's recognition as Senior Chief Kalindawalo contrary to the provisions of sections 4 and 5 of the Chiefs Act, Cap. 287 and decisions of the High Court and Supreme Court;

(2) The President acted illegally, irrationally and unreasonably by withdrawing the appellant's recognition as Senior Chief Kalindawalo and directing the Minister of Chiefs and Traditional Affairs to convene a meeting with all Nsenga Chiefs to choose the new Senior Chief Kalindawalo;

(3) There was procedural impropriety by the President in withdrawing the appellant's recognition, without affording him the right to be heard and without appointing a person or persons to inquire into the question relating to the withdrawal of the appellant's recognition.

The appellant filed an affidavit in support of his application for judicial review. Briefly, his evidence was that on 24th March 2006, he was recognised by the late President Levy P. Mwanawasa SC, as Senior Chief Kalindawalo. This was after the President withdrew the recognition of Michael Nsangu as Senior Chief Kalindawalo, following our Judgment in **Appeal No. 78/2002**, in which we dismissed an appeal by Michael Nsangu and others. The appellant testified that since then, Michael Nsangu was one of the persons who organized and agitated that he should be removed from the throne, so that

Michael Nsangu is re-instated. That those agitating for his removal were wrongfully arguing that the appellant should not pay homage and be subordinate to Paramount Chief Kalonga Gawa Undi, who is Chewa by tribe while Kalindawalo is Nsenga by tribe.

He stated that on 16th November 2012, the President withdrew his recognition as Senior Chief Kalindawalo. He deposed that he had been advised by his advocates that under the **Chiefs Act**, the President may withdraw the recognition of a Chief after a due inquiry, that the person has ceased to be entitled under African Customary law to hold the office of Chief, provided the President appoints a person or persons to inquire and report and make recommendations to him. The appellant was not aware that the President appointed any person or persons to inquire into the question of withdrawal of his recognition, as Senior Chief Kalindawalo. He stated that if there was any inquiry, he was not given any opportunity to appear at such inquiry, to defend himself. That natural justice was denied to him. It was his evidence that the President did not appoint any person or persons to inquire into the matter and no person made any report and recommendations to him.

The appellant's action was opposed by the respondent. On behalf of the respondent, Mr. Chibbonta, the then Permanent Secretary at the Ministry of Chiefs and Traditional Affairs, swore an affidavit in opposition. His evidence was that the President withdrew the recognition of the appellant as Senior Chief Kalindawalo, upon

being satisfied, after due inquiry, that from the time the appellant was recognised as Senior Chief Kalindawalo, he had not been accepted by his subjects, and that other Chiefs in the district had refused to attend any meeting and/or ceremony called by the appellant. He stated that in withdrawing the appellant's recognition as Chief, the President was exercising his executive function in accordance with the discretionary powers vested in him under the **Chiefs Act**. He deposed that in the exercise of the said powers, there was no requirement for the appellant to be informed or made aware of the inquiry.

In the judgment appealed against, the Court below refused to grant the reliefs the appellant was seeking, after finding that all three grounds of judicial review, namely; **illegality**, **irrationality** and **procedural impropriety** failed. The learned trial Judge noted that both the recognition and the withdrawal of recognition of the appellant as Senior Chief Kalindawalo, were made pursuant to the provisions of the **Chiefs Act**. That section 3 of the **Chiefs Act** deals with recognition of Chiefs while section 4 deals with the withdrawal and suspension of recognition. He further noted that Section 5 deals with inquiries relating to recognition and withdrawal of recognition of Chiefs.

The trial Judge observed, in relation to the ground of **illegality**, that the appellant had argued that the President acted contrary to sections 4 and 5 of the **Chiefs Act**. That the President should have

appointed a person or persons to inquire into the withdrawal of the appellant's recognition and such person or persons should have held a public inquiry at which the appellant should have been given an opportunity to be heard. In the view taken by the trial Judge, section 4 of the **Chiefs Act** does not suggest an inquiry in the manner that the appellant suggested. He found that under **section 4(2)** of the **Chiefs Act**, the President may either inquire himself or cause an inquisition to be made. He stated that section 5 of the **Chiefs Act,** which gives the President discretion to appoint a person or persons to inquire into the recognition or withdrawal of the recognition of a Chief, should be seen from a situation where the President has decided not to inquire himself but to cause an inquiry to be made. He took the view that if the President in this case did not choose to cause an inquiry to be made, it could not be said that the President acted contrary to sections 4 and 5 of the **Chiefs Act**, because section 4 allows the President himself to inquire. Therefore, he found that the President did not act without or in excess of his jurisdiction and his decision was not illegal.

When it came to the ground of **unreasonableness**, the learned trial Judge found that the President's decision that the appellant had ceased to be entitled under African customary law to hold the office of Chief was not unreasonable. He found that this was because the appellant did not dispute the respondent's evidence in the affidavit in opposition that, from the time the appellant was recognized as Chief he had not been accepted by his subjects and other Chiefs. He noted

that the appellant merely contended that he was entitled to be Chief whether his subjects and other Chiefs accepted him or not. Therefore, the trial Judge held that the President's decision was not unreasonable.

On **procedural impropriety**, the learned trial Judge noted that the appellant had argued that he was not afforded an opportunity to be heard before the President made his decision. The trial Judge dismissed this argument after he found that under sections 4 and 5 of the **Chiefs Act,** there is no requirement that the person whose recognition is being withdrawn should be heard before the decision is made; whether the President himself inquires or he causes an inquiry to be made. He, accordingly held that there was no procedural impropriety on the part of the President.

The trial Judge dismissed the appellant's action, since the three grounds of judicial review failed. Aggrieved by the Judgment of the Court below, the appellant appealed to this Court, advancing four grounds of appeal. These read as follows:-

1. **That the learned trial Judge misdirected himself by finding that the President of the Republic of Zambia did not act illegally under the provisions of sections 4 and 5 of the Chiefs Act, Cap 287 when he withdrew recognition of the appellant as Senior Chief Kalindawalo;**

2. **That the learned trial Judge misdirected himself by finding that the President did not act unreasonably by withdrawing the recognition of the appellant as Senior Chief Kalindawalo on the ground that the appellant had not been accepted by his subjects and other chiefs and therefore he has ceased under**

the customary law of his area to be entitled to hold the Office of Chief;

3. **That the learned trial Judge misdirected himself by finding that sections 4 and 5 of the Chiefs Act, Cap 287 do not require that the appellant be given an opportunity to be heard before his recognition as Senior Chief is withdrawn and that therefore there was no procedural impropriety;**

4. **That the learned trial Judge was wrong at law by failing to observe the maxim " justice must not merely be done but must also be seen to be done" when he failed to deliver the reserved Judgement with reasonable promptness, Notices of Hearing of Judgment having been issued five (5) times.**

The parties filed written heads of argument based on these grounds of appeal. For convenience's sake, we shall deal with grounds one and three together. The rest of the grounds will be addressed separately.

In support of the first ground, Mr. Zulu SC, on behalf of the appellant, submitted that the President acted illegally or contrary to the provisions of sections ***4(1) (a)*** of the **Chiefs Act**. He submitted that the learned trial Judge's finding that the President himself may inquire into the issue of recognition of a Chief or that he may appoint persons to make such inquiry was fair. He however, argued that the trial Judge misdirected himself when he held that if the President did not choose to cause an inquiry to be made, it cannot be said that the President acted contrary to sections 4 and 5 of the **Chiefs Act** because section 4 allows the President to inquire himself.

He contended that there was no credible evidence on record that there was an inquiry made by the President himself, let alone a due inquiry. He argued that the affidavit in opposition sworn by Mr. Chibbonta should not have been accepted by the Court below on the ground that it was hearsay evidence and that it contravened **Order V rules 17** and **18** of the **High Court Rules**. He argued that Mr. Chibbonta did not depose as to the source of his information that the President withdrew the appellant's recognition after due inquiry.

It was State Counsel's further submission that even assuming the President conducted the inquiry, he did not conduct a due inquiry. He referred us to **Black's Law Dictionary, 8th edition**, which defines the word **"due"** to mean just, proper, regular and reasonable. He argued that since the public did not know about the alleged inquiry conducted by the President himself, it cannot be said that a secret inquiry is just, proper, regular and reasonable. He argued that it cannot also be said that Parliament intended that a due inquiry should be a secret inquiry, hidden from the appellant who was adversely affected by the decision of the President. In support of his submissions, State Counsel referred us to the definition of *illegality* as was suggested by Lord Diplock in the case of **Council of Civil Service Union and Others v Minister for Civil Service**[1]. He argued that since there was no evidence that the President himself conducted an inquiry as implied by the trial Judge, the President's decision to withdraw the appellant's recognition was arbitrary and illegal, because he exceeded his powers. He submitted that an

inquiry is mandatory before the exercise of the power to withdraw the recognition of a Chief. It was State Counsel's argument that the President did not understand the law relating to the exercise of his power to withdraw recognition.

On behalf of the respondent, Major Hara and Mr. Mwale opposed ground one of this appeal. They referred us to sections 4 and 5 of the **Chiefs Act** and submitted that the trial Judge correctly interpreted these provisions literally since there is no ambiguity in the way the statute is worded. They submitted that the **Chiefs Act** gives the President discretion to withdraw the recognition of title, provided that he or she is satisfied that the person holding the office of Chief at the time, has ceased under African Customary law, to be entitled to hold the position of Chief. They argued that the Court below properly found that the President was not obligated to inquire into any question relating to the recognition accorded to any person. Counsel submitted that the Judgment shows that the Court below properly addressed its mind to the meaning of the word *"may"* in both provisions. They argued that there was no obligation on the President to make an inquiry anywhere in the **Chiefs Act**.

On the appellant's contention that the Court below relied on hearsay evidence from the affidavit sworn by Mr. Chibbonta, Counsel submitted that the appellant was ably represented in the Court below but his advocates failed to bring up this issue at the appropriate time but they now wanted to bring evidence that was not in issue in the

Court below. Major Hara and Mr. Mwale contended that the affidavit which contains the paragraphs that the appellant was now taking issue with, was filed and served on him on time, and he had ample opportunity at that stage to apply to have the offending paragraphs expunged. They submitted that it seemed that the appellant was attempting to persuade this Court to interfere with findings of the Court below by raising new issues. Counsel submitted that this Court rightly guided in the case of **Victor Namakando Zaza v Zambia Electricity Supply Corporation Limited**[2] that findings made by a trial Court should not be lightly interfered with. It was Counsel's submission that the appellant should have made the appropriate applications in the Court below.

Submitting on ground three, Mr. Zulu referred us to Lord Diplock's definition of the term procedural impropriety in the case of **Council of Civil Service Union and Others v Minister for Civil Service**[1]. He reiterated his earlier submission in ground one, that the President did not comply with the requirement in section ***4(1)*** of the **Chiefs Act**, which empowers him to withdraw recognition on one of the two grounds only if, he was satisfied after a due inquiry. He submitted that on the evidence on record, there was no such inquiry and the principle of procedural impropriety applied to this case. He argued that the President failed to observe basic rules of natural justice which amounted to procedural impropriety. In support of his submission, he cited a note under the phrase *"natural justice"* in **Black's Law Dictionary**, which states that the expression is confined

to something glaringly defective in the procedural rule of foreign law. That in other words, what the courts are vigilant to watch is that the defendant has not been deprived of an opportunity to present his side of the case.

Mr. Zulu, SC went on to submit that all the authorities state that the purpose of judicial review is to ensure that an individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the Judiciary or of individual judges for that of the authority constituted by law to decide the matter in question. To support his submission, he referred us to the following authorities:

1. **Nyampala Safaris (Z) Ltd and Others v Zambia Wildlife Authority and Others**[3]
2. **Fredrick Jacob Titus Chiluba v Attorney General**[4]
3. **Council of Civil Service Union and Others v Minister for Civil Service**[1]
4. **Order 53/14/19 of the Rules of the Supreme Court, 1999 Edition.**
5. **Sablehand Zambia Ltd v Zambia Revenue Authority**[5]

He contended that sections 4 and 5 of the **Chiefs Act**, do not state that the person affected by the President's decision should not be given an opportunity to be heard, otherwise there would be no recourse to judicial review against the President's decision under the Act. He argued that the finding by the trial judge that there is no requirement under the Act for a person affected by the President's decision to be heard, goes directly against all the authorities he had cited and it was not acceptable in a democratic governance like

Zambia. It was his submission that the interpretation of the words *"due inquiry"*, is that the person affected should be afforded an opportunity to be heard at the inquiry. He further argued that this Court has inherent jurisdiction to do justice and to interpret the **Chiefs Act** in such a way as to check the President's arbitrary exercise of his powers.

On the other hand, Major Hara and Mr. Mwale opposed ground three. They supported the decision of the Court below that there was no procedural impropriety in the manner the President came up with his decision to withdraw the appellant's recognition as Senior Chief Kalindawalo. Counsel cited sections 4 and 5 of the **Chiefs Act** and argued that the provisions were clear. That there was no requirement to hear the Chief, whose recognition is withdrawn.

They submitted that the President's decision was not procedurally improper because the basic procedure of withdrawing the recognition of a Chief was followed. They argued that the **Chiefs Act** does not specify the mode of inquiry and there is no requirement that the findings of the inquiry be published. They submitted that the President deemed it fit to withdraw the appellant's recognition as Senior Chief Kalindawalo, on the basis that the subjects did not accept the appellant as Chief. They argued that there was no unfairness or prejudice to the appellant. The President's decision was never made in bad faith. It reflected the fact that he was giving effect to the law without any malice or prejudice to the rights and

entitlements of the appellant. They also referred us to the case of **Fredrick Jacob Titus Chiluba v Attorney General**[4], which Mr. Zulu SC, cited.

We have considered the issues raised in grounds one and three of this appeal. In ground one, the appellant is alleging illegality. And in ground three, he is alleging procedural impropriety. It must be noted that in the case of bodies exercising statutory powers such as the President in this case, the underlying principle is that the powers may only be exercised in the way in which Parliament intended. Therefore, we take the view that both grounds one and three hinge on the construction of sections 4 and 5 of the **Chiefs Act**.

There is no dispute that under the two provisions, the President of Zambia is vested with power to withdraw the recognition of a Chief upon **due inquiry**. From the arguments of the parties in both grounds one and three, the fundamental issues which need to be determined in grounds one and two are:

Firstly, whether the due inquiry which the President is required to conduct must be a *public inquiry* and the President should make known to the person whose recognition is being withdrawn, the report of the inquiry; secondly, whether on the wording of sections 4 and 5 of the **Chiefs Act**, the appellant was entitled to be given an opportunity to be heard.

In our view, the determination of these issues rests on the proper construction of sections 4 and 5 of the **Chiefs Act**, being the source of the President's power to withdraw the recognition of a Chief. Section 4 of the **Chiefs Act** stipulates that:

> **"4. (1) The President may, by statutory order, withdraw the recognition accorded to any person under this Act if, after due inquiry, he is satisfied that-**
>
> **(a) the person has ceased to be entitled under African customary law to hold the office in respect of which recognition was accorded; or**
>
> **(b) the withdrawal of the recognition accorded to the person is necessary in the interests of peace, order and good government.**
>
> **(2) Where the President deems it expedient to inquire or cause inquiry to be made into the question of the withdrawal of the recognition accorded to a person under this Act, he may, by statutory order, suspend the recognition so accorded until such time as the inquiry has been completed and the President has made a decision on the question.**

Section 5 of the **Chiefs Act** provides that:

> **"5. The President may appoint a person or persons to inquire into any question relating to the recognition of any person under this Act or the withdrawal of the recognition accorded to any such person and, on the completion of the inquiry, to report and make recommendations thereon to the President."**

In our considered view, the language used in both sections 4 and 5 of the **Chiefs Act** is plain and simple. They need literal or plain interpretation. As we said in the case of **Samuel Miyanda v Raymond Handahu**[6]:

> **"It is not what the legislature meant to say or what their supposed intentions were with which the court would be concerned; the court's duty is to find out the expressed intention of the legislature. When the language is plain and there is nothing to suggest that any words are used in technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on grounds such as of**

policy, expediency, justice or political exigency, motive of the framers, and the like."

In this case, it is abundantly clear that the **"due inquiry"** envisaged in sections 4 and 5 of the **Chiefs Act**, is not a public inquiry. There is also no requirement that the inquiry or the report of the inquiry should be made known to the person whose recognition is being withdrawn. Neither is there a requirement that the appellant should be given an opportunity to be heard. If Parliament intended to provide for a public inquiry or that the report of the inquiry should be made known to the person whose recognition is being withdrawn, it would have expressly provided for that procedure.

We also think that the framers of the **Chiefs Act** never intended that on the withdrawal of the recognition of a Chief, the person whose recognition is being withdrawn should be heard. Otherwise, they would have expressly provided for that right. This was the approach we adopted in the case of **Frederick Jacob Titus Chiluba v the Attorney-General** [4], where we stated as follows:

"But after looking at the provisions of Article 43(3), we find nothing in these provisions which suggest to us that before lifting the immunity of a former President, the National Assembly should give a former President an opportunity to be heard... We are satisfied that the framers of the Constitution never intended that on removal of immunity, a former President should be heard... Above all, it is not in all cases where rules of natural justice are always applicable."

What is important under sections 4 and 5 of the **Chiefs Act**, is that the President should conduct a due inquiry which should satisfy him that: (a) the person has ceased to be entitled under African

customary law to hold the office in respect of which recognition was accorded; or (b) the withdrawal of the recognition accorded to the person is necessary in the interests of peace, order and good governance. In this case, the President was satisfied, after due inquiry, that the appellant had ceased to be entitled under African customary law to hold the office of Senior Chief Kalindawalo.

As proof that an inquiry was conducted, Mr. Chibbonta, who was Permanent Secretary at the Ministry of Chiefs and Traditional Affairs, deposed that from the time the appellant was recognised as Senior Chief Kalindawalo, he had not been accepted by his subjects. And that other Chiefs in the district had refused to attend any meeting and/or ceremony called by the appellant. The fact that the appellant did not dispute the Permanent Secretary's evidence that he had not been accepted by his subjects and other Chiefs, shows that the appellant was indeed not accepted by his subjects. In our considered view, it was through a due inquiry that it was established that the appellant was not accepted by his subjects and other Chiefs. The evidence of the Permanent Secretary was a clear demonstration that there was a due inquiry.

Although State Counsel Zulu argued that the evidence of Mr. Chibbonta was hearsay and the Court below should not have considered it, we note that Counsel for the appellant did not object when that evidence was adduced. Therefore, the Court below was not precluded from considering it. As we stated in the case of **Anderson**

Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others[7], where any matter not pleaded is let in evidence and not objected to by the other side, the court is not and should not be precluded from considering it. Similarly, we cannot at this late stage exclude evidence which was adduced and allowed in the Court below, without objection.

After all, the Ministry of Chiefs and Traditional Affairs falls under the Executive arm of government which is headed by the President. And a Permanent Secretary under that Ministry is best suited to give evidence on issues falling under his Ministry. We have no doubt that the President acted within the law when he withdrew the appellant's recognition as Senior Chief Kalindawalo. We, therefore, take the view that there was neither illegality nor procedural impropriety, in the manner the President exercised his power.

In the case of **Frederick Jacob Titus Chiluba v Attorney-General** [4], we held that:

> **"The Court will not... on a judicial review application act as "a court of appeal" from the body concerned, nor will the court interfere in any way in the exercise of any power, discretion which had been conferred on that body unless it has been exercised in a way which is not within that body's jurisdiction".**

In this case, we cannot interfere with the President's decision on grounds of either illegality or procedural impropriety; because it has not been shown that the President exercised his discretionary power

in a way which was not within his jurisdiction under the Act. Accordingly, we hereby dismiss grounds one and three, for lack of merit.

We shall proceed to deal with ground two.

On ground two, Mr. Zulu SC, on behalf of the appellant referred us to the definition of irrationality, as suggested by Lord Diplock in the case of **Council of Civil Service Union and Others v Minister for Civil Service**[1]. He submitted that the appellant had deposed that from the time when he was recognized by the President as Senior Chief Kalindawalo, Michael Nsangu was one of the persons who organized and agitated that the appellant be removed so that Michael Nsangu is re-instated as Chief. That those who wanted the appellant removed argued that the appellant should not pay homage, and be subordinate, to Paramount Chief Kalonga Gawa Undi, who is Chewa by tribe. That Kalindawalo is Nsenga by tribe. State Counsel Zulu submitted that this was not disputed by the respondent. He argued that since the respondent did not dispute the reason why the subjects and other Chiefs did not accept the appellant, the Court below should have found that the subjects and the Chiefs did not accept the appellant because he paid homage to Paramount Chief Kalonga Gawa Undi. He submitted that this Court in **Appeal No. 78/2002** and the High Court in **Cause No. 1998/HP/2180**, found as a fact that the Kalindawalo Chieftainship was created by Undi.

He referred us to section ***10(1)(a)*** of the **Chiefs Act,** which provides that a Chief shall discharge the traditional functions of his office under African customary law, in so far as the discharge of such functions is not contrary to the Constitution or any written law and is not repugnant to natural justice or morality. He submitted that one of the functions of Senior Chief Kalindawalo is to pay homage to Undi (*Kulamba*), the creator of his Chieftainship. State Counsel submitted that it was unreasonable for the President to withdraw the recognition of the appellant on the ground that he was ruling according to Nsenga custom and tradition. He contended that there was no evidence on record that if the appellant pays homage to Paramount Chief Gawa Undi, then he ceases to be entitled to continue to perform as Senior Chief under the Nsenga custom and tradition.

He argued that if there were grounds that the conduct of the appellant in the performance of his traditional functions was threatening peace, order and good government, the President would have had power to withdraw the recognition under section ***4(1)(b)*** of the **Chiefs Act**. Mr. Zulu SC, argued that on the facts, the President used the wrong section of the **Chiefs Act** and for the wrong reasons.

Ground two of this appeal was countered by Major Hara and Mr. Mwale. They submitted that Article ***127(1)*** of the **Constitution of Zambia**, (before the 2016 amendment), or provided that the Institution of Chief shall exist in any area of Zambia in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies. They argued that the President's

decision was not irrational as he gave effect to the provisions of the **Chiefs Act** and the **Constitution of Zambia**. They submitted that the appellant's assertion that the Chieftaincy was withdrawn on grounds that the appellant paid homage to Kalonga Gawa Undi, was speculative as it was not a ground upon which the withdrawal was made.

It was Counsel's further submission that it was common knowledge that a Chief is installed to serve the aspirations and wishes of his people. Once the wishes and aspirations of his people are not served, then the Chief ceases to be a Chief under customary law and that this was exactly with the appellant in this case. They submitted that the substantive ground was that the appellant had ceased to be Chief under Customary law because he was not recognized by his subjects. This meant that the President did not make a decision in a manner which rendered the same irrational in the *"Wednesbury sense"*. Counsel argued that ground two should fail because it lacks merit.

We have considered the issues raised in ground two. The issue for determination under this ground is whether the President's decision to withdraw the appellant's recognition was unreasonable.

It is trite law that a decision of a tribunal or other body exercising a statutory discretion can be quashed for irrationality, or as is often said, for *Wednesbury* unreasonableness. Lord Diplock in

the case of **Council of Civil Service Union and Others v Minister for Civil Service**[1], held that irrationality:

> **"applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."**

In other words, a decision is irrational if it is so perverse that no reasonable person properly directing himself as to the law to be applied could have reached such a decision. In determining irrationality, the consideration is not whether the decision was a reasonable one, but whether the decision was made in circumstances in which a reasonable body could have made it. In this regard, the Courts will not quash a decision merely because they disagree with it; or consider that it was founded on a grave error of judgment; or because the material upon which the decision maker could have formed the view he did was limited. The underlying principle is that the Court exercises a supervisory, and not an appellate, jurisdiction. Accordingly, it will not substitute its view for that of the body charged by Parliament with exercising a particular discretion.

On the facts of this matter, we take the view that the President's decision was not irrational. The ground on which the President withdrew the appellant's recognition was that the appellant had ceased to be entitled under African customary law, to hold the office of Senior Chief Kalindawalo. There was evidence from the Permanent Secretary for the Ministry of Chiefs and Traditional Affairs, that the President was satisfied, after due inquiry, that from the time the

appellant was recognised as Senior Chief Kalindawalo, he had not been accepted by his subjects and other Chiefs. Given these circumstances, we take the view that a reasonable body could have made this decision. Therefore, the President's decision was not unreasonable.

State Counsel Zulu, in his arguments essentially invited us to review the merits of the President's decision. This we cannot do. We have repeatedly indicated in our previous decisions that the remedy of judicial review is concerned not with the merits of the decision, in respect of which the application for judicial review is made, but the decision making process itself. The purpose of judicial review is to ensure that an individual is given fair treatment by the authority to which he has been subjected. Ground two has no merit. We hereby dismiss it.

We shall now proceed to deal with ground four.

On the fourth ground, Mr. Zulu SC, submitted that the trial Judge was at pains to deliver the judgment by which he dismissed the appellant's case. State Counsel submitted that on instructions of the appellant, he had approached the then Acting Deputy Chief Justice on 31st July 2013, to intervene through the Judge-in-charge, so that judgment could be delivered. Mr. Zulu SC, outlined the four occasions when the trial Judge set dates for delivery of Judgment, but failed to do so. He submitted that on all the four occasions, the

appellant had travelled from Petauke to the Lusaka High Court but judgment was not delivered.

He submitted that Judgment was only delivered on 8th August 2013, after the intervention of the Acting Deputy Chief Justice on 31st July 2013. He argued that it was not possible to tell whether judgment would have been delivered on 8th August 2013, if there was no such intervention. He submitted that the perception of the appellant was that the failure by the trial judge to deliver judgment on four occasions, after notice was given to the parties, showed some bias against the appellant, particularly that on each occasion he had to make a round trip of just over 800 km from Petauke to the Lusaka High Court.

Ground four was opposed by Major Hara and Mr. Mwale. They submitted that this ground came as a new issue which was not part of the findings of the Court below. They argued that it was a totally new ground which was strange to the respondent and also foreign to the Judgment appealed against. To support their argument, counsel referred us to the case of **Zambia Revenue Authority v Hitech Trading Company Limited**[8]. Their submission was that ground four was misplaced and cannot be said to have arisen from the law that was in contention or the facts that were in issue in the lower Court.

Major Hara and Mr. Mwale argued that the issues raised under this ground fell within the ambit of issues that were raised in **Godfrey Miyanda v The High Court**[9], where this Court guided that the

remedy of mandamus is not available against the Judges of the superior courts of Zambia in the event of an alleged failure to perform their judicial functions. They argued that this simply meant that the trial Judge was not compelled to deliver the Judgment as complained of by the appellant. It was their further argument that in any event, the delay in delivering Judgments by the High Court Judge cannot be a ground of appeal against the decision. They submitted that this appeal lacks merit and it should be dismissed with costs.

We considered the issues raised in ground four. We note that the appellant's complaint in this ground is that the trial Judge delayed to deliver the Judgment in this matter. It has nothing to do with substantive issues arising from the Judgment of the Court below. In our considered view, complaints such as this one are purely administrative and cannot be subject of appeals. Appeals are meant to challenge decisions of lower Courts on procedural issues and, the merits. This can be gleaned from Rule ***49 (4)*** of the ***Supreme Court Rules,*** which provides that:

> **"Any appellant may appeal from the whole or any part of a decision and the notice of appeal shall state whether the whole or part only, and what part, of the decision is complained of."**

We have no doubt that ground four is incompetent. It is raising an issue which cannot be subject of an appeal under the rules. We urge litigants to pursue complaints such as delays in delivering Judgments, through the available administrative channels. In this case, State Counsel Zulu, lodged a complaint with the then Acting Deputy Chief Justice and Judgment was delivered. This should have

been the end of the issue. We are however, left to wonder what the appellant and his Advocate seeks to achieve by raising the issue in this appeal. What is unfortunate is that he has gone so far as to impute bias against the trial Judge, saying the appellant had a perception that the trial Judge was biased against him. We find this unacceptable. Like we stated in **William Harrington v Dora Siliya and Attorney General**[10]:

> **"There is an increasing tendency by litigants and their advocates to make unwarranted personal imputations of bias against judges, when they lose cases. Judges are not in a position to reply to such imputations. We strongly disapprove of this practice. In our view, imputations of bias should not be lightly made against a judge. There should only be made in clear situations..."**

It is clear in this case that the appellant made imputations of bias purely because he lost his case. The allegations are without basis. Advocates and their clients should desist from making these unwarranted allegations against Judges. It is contemptuous because it unnecessarily puts the name of the Court into disrepute. Delays in delivering judgments, by any stretch of imagination, do not amount to bias.

In any event, the delay being complained of in this matter was very short. The Judge only delayed to deliver his Judgment for slightly over three months. We do not think that this was inordinate. Ground four is incompetent and totally frivolous. It is accordingly dismissed.

On the whole, this appeal is hereby dismissed for lack of merit. We order the parties to bear their respective costs.

M.S MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

.....
C. KAJIMANGA
SUPREME COURT JUDGE

.....
M.C MUSONDA, SC.
SUPREME COURT JUDGE