THE SUPREME COURT OF ZAMBIA **APPEAL NO. 60/2016**
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

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

AND

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

AND

IN THE MATTER OF: THE PARLIAMENTARY AND MINISTERIAL CODE OF CONDUCT ACT, CAP 16 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF: THE SYLVIA MASEBO TRIBUNAL

BETWEEN:

WILLIAM HARRINGTON **APPELLANT**

AND

ATTORNEY GENERAL **RESPONDENT**

CORAM: MAMBILIMA CJ, KAJIMANGA AND KABUKA JJS;
On 5th March 2019 and 11th March 2019

For the Appellant	**:**	**No appearance**
For the Respondent	**:**	**Mr. F. Imasiku - Acting Chief State Advocate, with Mr. C. Mulonda, Senior State Advocate, of the Attorney General's Chambers**

JUDGMENT

MAMBILIMA, CJ, delivered the Judgment of the Court.

CASES REFERRED TO:

1. NYAMPALA SAFARIS (Z) LIMITED AND OTHERS V ZAMBIA WILDLIFE AUTHORITY AND OTHERS (2004) ZR 49
2. WILLIAM HARRINGTON V DORA SILIYA AND ATTORNEY GENERAL (2011) 2 ZR 253
3. ASSOCIATED PROVINCIAL PICTURE HOUSES LTD. V. WEDNESBURY CORPORATION (1948) 1 KB 223
4. COUNCIL OF CIVIL SERVICE UNION V. MINISTER FOR THE CIVIL SERVICE (1984) 3 WLR 1174
5. RE W (1971) AC 682
6. R V INDEPENDENT TELEVISION COMMISSION, EXP TSW BROADCASTING LIMITED (1992) THE TIMES, 30 MARCH 1992
7. BODDINGTON V BRITISH TRANSPORT POLICE (1998) 2 ALL ER 203
8. DERRICK CHITALA (SECRETARY OF THE ZAMBIA DEMOCRATIC CONGRESS) V ATTORNEY GENERAL (1995-1997) ZR 91
9. ATTORNEY GENERAL V LAW ASSOCIATION OF ZAMBIA (2008) 1 ZR 21

LEGISLATION REFERRED TO:

1) THE PARLIAMENTARY AND MINISTERIAL CODE OF CONDUCT ACT, CHAPTER 16 OF THE LAWS OF ZAMBIA
2) THE PUBLIC PROCUREMENT ACT NO. 12 OF 2008
3) THE ZAMBIA WILDLIFE AUTHORITY ACT, CHAPTER 201 OF THE LAWS OF ZAMBIA

WORKS REFERRED TO:

(1) PETER BIBBY, EFFECTIVE USE OF JUDICIAL REVIEW, TOLLEY, 1995
(2) RULES OF THE SUPREME COURT (RSC) WHITEBOOK 1999 EDITION ORDER 53/14/19
(3) HALSBURY'S LAWS OF ENGLAND, VOLUME 1(1), 4TH EDITION REISSUE, PARA 24

This is an appeal from a Judgment of Mulenga J, as she then was, delivered on the 9th of October, 2015 following an application for Judicial review, through an Originating Notice of Motion filed on 4th of April, 2014.

The facts and circumstances under which the Motion was filed are common cause and can be distilled from the notice of application to apply for judicial review. These are that in 2013, the Appellant petitioned the then Acting Chief Justice of the Republic of Zambia to establish a tribunal to probe the Respondent, Hon. Sylvia Masebo, then Minister of Tourism and Arts, under whom the portfolio of the Zambia Wildlife Authority (hereinafter referred to as 'ZAWA') fell. On 15th November, 2013, the Acting Chief Justice established the Tribunal, pursuant to section 13(3) of the **PARLIAMENTARY AND MINISTERIAL CODE OF CONDUCT ACT**[1] *(hereinafter referred to as "THE CODE OF CONDUCT").* It consisted of the Honourable Lady Justice Roydah Kaoma, Chairperson; the Honourable Mr. Justice Ernest N. Mukulwamutiyo, Member; and the Honourable Mr. Justice F.R. Mchenga, Member. Its terms of reference were to:-

(a) **investigate allegations in the print media of the interference and abuse of office by Hon. Sylvia Masebo M.P., the then Minister of Tourism and Arts, in the tender process by ordering the withdrawal of the list of successful bidders for hunting concession licences in breach of the PUBLIC PROCUREMENT ACT (2);**
(b) **investigate alleged removal of senior Zambia Wildlife Authority (ZAWA) management officials from employment by the Minister in breach of the CODE OF CONDUCT(1);**
(c) **investigate the alleged breach of the ZAMBIA WILDLIFE AUTHORUTY ACT(3) by the Hon. Masebo when she gave verbal instruction to ZAWA officers to hunt wildlife without issuing a special licence;**
(d) **investigate allegations of corruption by Hon. Masebo in ZAWA Management in the handling of the tender for hunting concession licences;**
(e) **investigate whether Hon. Masebo was in breach of the state security by failing and/or neglecting to report to government wings that foreign registered aircrafts were violating Zambian airspace to uplift out of Zambia some wildlife species or government trophy; and**
(f) **recommend to the government appropriate corrective action based on the findings of the investigations.**

The Tribunal inquired into the allegations and submitted its findings to the President of the Republic of Zambia on 26th March, 2014. The Appellant was aggrieved with the Tribunal's decision. He commenced judicial review proceedings against the Respondent to challenge its findings.

One of the Tribunal findings which aggrieved the Appellant and on which he sought relief, was that the former Minister of Tourism and Arts did not breach the provisions of Section 4(c) of the **CODE OF CONDUCT**[1], in that she did not acquire pecuniary

advantage or assist another person to acquire pecuniary advantage. The Appellant referred the lower Court to an excerpt in the Tribunal's report containing the finding. It stated that:-

> **"Although we have found that the Minister dismissed the officers and that she had no power to dismiss them, there is no evidence before us to show that her conduct resulted in her acquiring pecuniary advantage or assisted another person to acquire pecuniary advantage. While we accept that the new officers were entitled to remuneration, we find that their remuneration is not the kind of pecuniary advantage envisaged under section 4 (c). There is no evidence before us that the dismissals were specifically for the purpose of creating vacancies for the new officers to be employed. Consequently, we find that the Minister did not breach Section 4(c) of the MINISTERIAL CODE OF CONDUCT ACT."**

The Appellant also raised issues with the manner in which the Tribunal dealt with the fourth term of reference. Under this term, the Tribunal was tasked to "**investigate allegations of corruption by Hon. Masebo in ZAWA Management in the handling of the tender for hunting concession licences."** He further alleged that in determining this term of reference, the Tribunal made an erroneous and misconceived finding that the former Minister did not breach the **CODE OF CONDUCT**[1] when she ordered a ban on hunting in Zambia. He contended that the Tribunal took into account extraneous considerations outside or beyond the scope of the terms of reference. In support of this

allegation, he drew the attention of the Court below to an excerpt of the Tribunal's report, which stated that-

> **"We find no wrong doing on the part of the Minister in relation to this allegation. Consequently, we find that the Minister did not breach Part 2 of the Ministerial and Parliamentary Code of Conduct Act."**

The other allegation made by the Appellant was that the Tribunal further made an erroneous finding in its report, in that despite its correct finding that the former Minister erred in cancelling the tender, it concluded that the cancellation of the tender was not in breach of the **CODE OF CONDUCT(1)**. To substantiate this allegation, he drew the attention of the Court to another excerpt from the Tribunal's report, where the Tribunal stated that-

> **'Furthermore, although we find that the Minister cancelled the tender in contravention of the Public Procurement Act and Regulations, we find no evidence that she acquired any pecuniary advantage or assisted any other person to acquire pecuniary advantage when she cancelled the tender. We find that she did not breach the Parliamentary and Ministerial Code of Conduct Act."**

The Appellant therefore sought the following reliefs:-

> **(a) a declaration that the Tribunal acted unreasonably when it held that the remuneration of the new senior ZAWA officers was not the kind of pecuniary advantage envisaged under section 4(c) of the CODE OF CONDUCT1);**
> **(b) an order of certiorari to remove into the High Court for the purpose of quashing the Tribunal's decision that the former Minister did not breach Section 4(c) of the CODE OF**

CONDUCT[1)] and that she did not acquire any pecuniary advantage or assist another person to acquire pecuniary advantage, and further that the pecuniary advantage in this case is not the sort envisaged under Section 4(c) of the CODE OF CONDUCT[1)]; and

(c) an order of mandamus that appropriate recommendations be made since the Tribunal found as a fact that the Minister contravened provisions of the law thereby, inter alia, abusing her authority of office.

The grounds for judicial review on which the reliefs were sought were illegality, irrationality and procedural impropriety.

In respect of illegality, the Appellant contended that the decision of the Tribunal went beyond the terms of reference in that despite finding that the new officers who filled the positions previously held by the five senior officers were entitled to remuneration; the Tribunal went ahead to find that the new officers' remuneration was not the kind of pecuniary advantage envisaged under Section 4 (c) of the **CODE OF CONDUCT[1)]**. That the Tribunal made the finding without stating the kind of pecuniary advantage envisaged under Section 4 (c) of the **CODE OF CONDUCT[1)]**.

He argued that according to Section 4(c) of the **CODE OF CONDUCT[1)]**, Hon. Sylvia Masebo assisted the interim senior management to acquire pecuniary advantage when she exerted

improper influence in their appointment to replace the five officers whom she relieved of their duties. He submitted that consequently, the Tribunal's finding was illegal as it contravened or exceeded the terms of reference. That all that the Tribunal was required to find was whether the Minister had acquired any significant pecuniary advantage or had assisted in the acquisition of pecuniary advantage by another person. That the Tribunal was not required to delve into or create classes of pecuniary advantage and decide which ones did not run foul of section 4(c) of the **CODE OF CONDUCT**[1].

The Appellant further argued that the Tribunal's decision was illegal because it pursued an objective other than that for which the power to make the decision was conferred. That since the Tribunal found that the former Minister dismissed the officers when she had no power to do so, the consequent result should have been to find that the former Minister had breached the code of conduct. According to the Appellant, if a Minister has exerted improper influence in appointing, promoting or disciplining, or removing a public officer from his or her position which position is later filled by another officer, it logically entails

that the Minister has assisted the new officer in acquiring pecuniary advantage to the detriment or disadvantage of the dismissed officer. This, in his view, amounts to a breach of the **CODE OF CONDUCT**[1].

With respect to irrationality, the Appellant argued that the Tribunal's finding; that the remuneration of the new officers was not the kind of pecuniary advantage envisaged under Section 4 (c) of the **CODE OF CONDUCT**[1], without stating the kind of advantage envisaged by the section; was unreasonable in the Wednesbury sense. He stated that by finding that the remuneration of the new officers was not the kind of pecuniary advantage envisaged under Section 4 (c) of the **CODE OF CONDUCT**[1], the Tribunal took into account irrelevant considerations.

The Appellant further submitted that the cancellation of the tender was a consequence of the information that the former Minister obtained in the course of her official duty and which information was not generally available to the public. That as such, the former Minister illegally and irrationally acted on the said information thereby breaching Section 4 (a) of the **CODE OF**

CONDUCT[1] and disadvantaged the successful bidders and advantaged the unsuccessful bidders.

When it came to the ground of procedural impropriety, the Appellant argued that the decision of the Tribunal went beyond the terms of reference in that in determining the fourth term of reference; it made an erroneous and misconceived finding that the Minister did not breach the **CODE OF CONDUCT**[1] when she ordered a ban on hunting in Zambia. That meanwhile, the fourth term of reference required the Tribunal to investigate allegations of corruption on the part of Hon. Masebo in the handling of the tender for hunting concession licences.

The Appellant complained that the Tribunal took into account extraneous considerations outside or beyond the scope of some of the terms of reference. In aid of his argument, the Appellant drew the attention of the Court below to the finding by the Tribunal that although the former Minister allowed the Advisory Committee to review the bidding document, there was no evidence to show that her actions resulted in her acquiring any pecuniary advantage or that the Committee assisted another person to acquire pecuniary advantage.

He also argued, in the alternative, that should the Court find no impropriety regarding the decision of the Tribunal to take the aspect of the Advisory Committee into account, then the Court should hold that the Tribunal erred when it failed to make an appropriate recommendation pursuant to the **CODE OF CONDUCT**[1]; in that the Advisory Committee was an ad hoc illegal body composed of people who had an interest to protect in the tender process and safari hunting industry, which people were unilaterally hand-picked by the former Minister.

The Attorney-General, in response, denied the Appellant's allegations. Through an affidavit in opposition, sworn by the Hon. Mr. Mathew L. Zulu, the then Acting Registrar of the High Court of Zambia, the Respondent disputed that the Tribunal went beyond its terms of reference, on the basis that one of its terms of reference was to investigate the alleged removal of senior officers from employment by the Minister, in breach of the **CODE OF CONDUCT**[1)]. He said the question for the Tribunal was to consider whether the former Minister was in breach of the provisions of the **CODE OF CONDUCT**[1)] when she dismissed the

officers on allegations of corruption during the evaluation of the tender. That therefore, it did not exceed its terms of reference.

Hon. Zulu further deposed that the terms of reference did not bar the Tribunal from giving reasons for its findings and that the statement alleged to be illegal was in fact the reasoning behind its finding. He stated that the Tribunal's explanation was that the Minister did not breach the **CODE OF CONDUCT**[1)] because Section 4 (c) could not be breached by the mere fact that the Minister dismissed the officers when she had no power to do so. Hon. Zulu denied the allegation of procedural impropriety on the part of the Tribunal stating that its decision was, in fact, within the terms of reference.

After considering the evidence on record and the submissions of Counsel, the Court below found that the Tribunal did not exceed its power but operated within its terms of reference to investigate whether the alleged removal of officers contravened the **CODE OF CONDUCT**[1)]. The learned trial Judge declined to give a detailed consideration of the Appellant's contention that the Tribunal should have simply found that the Minister assisted the new officers in obtaining pecuniary

advantage by their remuneration because in her view, such a detailed consideration would have entailed her delving into the merits of the case, which was not the essence of judicial review.

The Judge found that the reliefs sought by the Appellant appeared to seek to substitute the decision of the Tribunal with that of the Court. That the Appellant wanted the court to delve into the merits of the Tribunal's findings, an action which was outside the scope of judicial review as stated in the case of **NYAMPALA SAFARIS (Z) LIMITED AND OTHERS V ZAMBIA WILDLIFE AUTHORITY AND OTHERS**[1]. In her view, making a legal finding as to the interpretation of section 4 (c) of the **CODE OF CONDUCT**[1)] with regard to the types of pecuniary advantage envisaged in the said provision would entail delving into an appellate function and determining the merits of the Tribunal's finding. She held that the Tribunal did not exceed the terms of reference as it was tasked to find out if the Minister breached Section 4 of the **CODE OF CONDUCT**[1)]. She went on to state that the Tribunal made its finding which seems to have aggrieved the Appellant, but that that was not a proper forum to address the grievance. She, therefore, dismissed the ground of illegality.

Regarding the ground of irrationality, the Appellant argued that the Tribunal's finding, that the officers' remuneration was not the kind of pecuniary advantage envisaged under Section 4(c) of the Act, without stating the kind envisage by Section 4, was unreasonable in the Wednesbury sense. The Judge then formulated the issue to be decided thus-

> **"The question I have to consider is whether this decision, that the Officer's remuneration was not the kind of pecuniary advantage envisaged without going ahead to outline the kinds envisaged, is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided would have arrived at it."**

She found that it was not unreasonable for the Tribunal to find that the new officers' remuneration was not the kind of pecuniary advantage envisaged under Section 4(c) of the **CODE OF CONDUCT**[1]. She reasoned that, it was not for the Court to interpret Section 4 (c) of the **CODE OF CONDUCT**[1] as to whether there were classes of pecuniary advantage envisaged under Section 4(c), or whether the Tribunal's finding was correct that the pecuniary advantage found was not the kind envisaged by the Section. To support her decision, she relied on the case of **WILLIAM HARRINGTON V DORA SILIYA AND ATTORNEY GENERAL**[2], where we held that:

> **"The learned trial Judge erred in law when he proceeded to interpret Article 54 (3) of the Constitution. In doing so, he delved into the merits of the matter; he substituted his opinion for that of the Tribunal. Such a move was clearly outside the scope of judicial review."**

She stated that the Tribunal gave a basis for its finding, which was that there was no evidence before it to show that the dismissals were specifically for the purpose of creating vacancies for the new officers to be employed. She thus concluded that the decision of the Tribunal was not outrageous in its defiance of logic as it apparently, applied its mind to the facts at hand. Consequently, she found that the Tribunal's decision was not Wednesbury unreasonable.

The Court below also dismissed the Appellant's arguments relating to the ground of procedural impropriety. The Court expounded on the concept of impropriety; that it is concerned with failure to observe not only the rules of natural justice but also failure to comply with procedural rules expressly laid down in the applicable law. The Appellant's argument was that the Tribunal went beyond the terms of reference and made an erroneous and misconceived finding to the effect that the Minister did not breach the Act when she ordered a ban on hunting in the country when **the 'question should have been**

'to investigate' allegations of corruption by Hon. Masebo' with regard to the tender for hunting concession licences. The Appellant had also contended that the Tribunal took into account extraneous matters which were beyond the scope of the terms of reference.

The Court dismissed the Appellant's contention that the Tribunal took into account extraneous considerations outside the scope of its terms of reference. The Court took the view that the findings of the Tribunal were based on the evidence which was before it. The learned trial Judge also found that there was evidence to support the finding of the Tribunal that although the former Minister allowed the Advisory Committee to review the bidding documents, there was no evidence to show that her actions resulted in her acquiring any pecuniary advantage or assisting another person to do so. That in fact, the finding of the Tribunal, which the Appellant was complaining about, was based on the evidence adduced, including that of the Appellant and his witnesses.

Having found that the findings and recommendations of the Tribunal were based on the evidence adduced before it under the respective terms of reference, the Judge did not find any procedural impropriety in this regard and consequently dismissed the Appellant's argument that the Tribunal took into account extraneous considerations, outside the scope of the terms of reference.

The Court below further dismissed the Appellant's contention that in determining the fourth term of reference, the Tribunal formulated its own question, outside the established terms of reference and made an erroneous and misconceived finding that the former Minister did not breach the **CODE OF CONDUCT**[1], when she ordered a ban on hunting in Zambia. The fourth term of reference required the Tribunal to:

> **"investigate allegations of corruption by Hon. MASEBO in ZAWA management in the handling of the tender for hunting concession licences."**

The Tribunal stated the fourth question as :

> **"Fourth Question**
>
> **We have considered whether the Minister of Tourism and Arts was in breach of the Ministerial and Parliamentary Code of Conduct Act when she ordered a ban on hunting in Zambia."**

The Court observed that the fourth question as stated in the findings of the Tribunal was different from the fourth term of reference. According to the Judge, however, it was apparent that the fourth issue as stated in the terms of reference was covered under the first term of reference or the first question which dealt with the issues regarding the tender and hunting concessions in relation to the breach of the Act. The Court further observed that even though a Tribunal normally has terms of reference, it does not necessarily have to deal with them strictly in the order in which they were listed or outlined, **"so long as the issues in the terms of reference are appropriately dealt with".**

After finding that the fourth question as stated in the findings was different from the one set out in the terms of reference, the Court posed the question as to whether this would amount to procedural impropriety. The Court found that in this case, there was no procedural unfairness or failure to observe procedural rules or denial of natural justice. According to the Court, the question as framed and the findings under it were all based on evidence adduced by the parties.

The learned trial Judge ultimately refused to grant the reliefs sought by the Appellant and dismissed the action. It is against this decision of the Court below that he has now appealed to this Court, advancing the following three grounds of appeal: –

1. **that the learned trial Judge erred in law and fact when she held that the Roydah Kaoma Tribunal did not exceed its powers under the terms of reference establishing the Tribunal when the said Tribunal found that the Respondent's assistance of new officers of ZAWA to acquire pecuniary advantage, was not the kind of pecuniary advantage envisaged under Section 4 (c) of the CODE OF CONDUCT;**

2. **that the learned trial Judge erred in both law and fact when she held that the decision of the Roydah Kaoma Tribunal to find that the remuneration of the senior ZAWA officers was not the kind of pecuniary advantage envisaged under Section 4 (c) of the CODE OF CONDUCT was not Wednesbury unreasonable and that it was not outrageous in its defiance of logic because the Tribunal had apparently applied its mind to the facts at hand; and**

3. **that the Court's ruling that there was no procedural impropriety when the Tribunal, in determining the fourth term of reference formulated its own question outside the established terms of reference, was perverse and was made contrary to the terms of reference.**

In support of these grounds of appeal, learned Counsel for the Appellant, filed written heads of argument on behalf of their client. Counsel were not in attendance at the hearing of the appeal as they had filed a Notice of Non-Attendance.

In support of the first ground of appeal, Counsel for the Appellant submitted that the decision for which judicial review was sought, was the Tribunal's failure to find that the former Minister was in breach of the **CODE OF CONDUCT**[1)] and that she assisted another person to acquire pecuniary advantage. The thrust of his argument was that the Tribunal exceeded its powers when it delved into or created classes of pecuniary advantage and decided which ones did not fall under Section 4 (c) of the **CODE OF CONDUCT**[1)]. According to Counsel, the Tribunal's decision was illegal as it contravened or exceeded the terms of the powers which authorized the making of the decision. That all that the Tribunal was required to find was whether the former Minister had acquired any significant pecuniary advantage or assisted another person to do so.

In support of his argument, Counsel referred to Peter BIBBY's book on **EFFECTIVE USE OF JUDICIAL REVIEW**, which states that an administrative decision is flawed if it is illegal. That a decision is illegal if:-

a) it contravenes or exceeds the terms of the power which authorizes the making of the decision;
b) or b) it pursues an objective other than that for which the power to make the decision was conferred.

It was their view that in this case, the Tribunal's decision was illegal because it pursued an objective other than that for which the power to make the decision was conferred.

Counsel further submitted that the Court below should have taken into account that in terms of Section 4(c) of the **CODE OF CONDUCT**[1)], the former Minister assisted the new officers to acquire pecuniary advantage when she exerted improper influence in their appointment to replace the officers whom she relieved of their duties. In Counsels' view, the fact that a Minister exerts improper influence in appointing, promoting or disciplining or removing a public officer, logically entails that the Minister assisted the new officers in acquiring pecuniary advantage and this in itself constituted a breach of Section 4(c) of the **CODE OF CONDUCT**[1)].

In respect of the second ground of appeal, Counsel submitted that irrationality is a ground used in judicial review proceedings for challenging the quality of a decision by reference to the reasoning behind it. That guidance was given in the case of **ASSOCIATED PROVINCIAL PICTURE HOUSES LTD. V.**

WEDNESBURY CORPORATION[3], when determining irrationality or unreasonableness. That it was stated in that case, that decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings, where the Court concludes that the decision is such that no reasonable person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.

Counsel went on to submit that the concept of Wednesbury unreasonableness was reconsidered by the House of Lords in the case of **COUNCIL OF CIVIL SERVICE UNION V. MINISTER FOR THE CIVIL SERVICE (4)**, where Lord Diplock said that:

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

He further referred us to the case of **RE W**[5], in which the House of Lords held that two reasonable men can perfectly well come to opposite conclusions about something without either forfeiting a claim to reasonableness. But that unreasonableness in administrative law sense has been taken to mean that which no other ordinary individual or body would

do. Further that it is not enough for a judge to conclude that there exists a more reasonable way of acting in the circumstances.

Counsel submitted that the Tribunal, in this case, found that the former Minister was in breach of most of the provisions of the **CODE OF CONDUCT**[1)], but it went on to say that the remuneration of the new ZAWA officers was not the kind of pecuniary advantage envisaged under Section 4 (c) of the **CODE OF CONDUCT**[1)]. This reasoning of the Tribunal, according to Counsel, was unreasonable in the Wednesbury sense because it did not state the kind of pecuniary advantage envisaged by Section 4 (c) of the **CODE OF CONDUCT**[1)]. He contended that unreasonableness includes bad faith, dishonesty, giving attention to extraneous circumstances and failure to take into account relevant considerations. It was his submission that the Tribunal, in this case, took into account irrelevant considerations when it found that the remuneration was not the kind of pecuniary advantage envisaged under Section 4(c) of the **CODE OF CONDUCT**[1)].

Counsel went on to argue that the Tribunal made an irrelevant consideration when it further relied on the fact that there was no evidence adduced to prove that the Minister indeed acquired pecuniary advantage or assisted another person to acquire pecuniary advantage. He argued that while the former Minister may not have acquired pecuniary advantage, she did assist other persons to acquire such advantage. He further contended that the Tribunal, instead, opted to ignore the fact that the cancellation of the tender was a consequence of the benefit from information obtained by the former Minister in the course of her official duty, which information was not generally available to the public. That as such, the former Minister illegally and irrationally acted on the said information thereby breaching Section 4 (a) of the **CODE OF CONDUCT**[1] and thus disadvantaging successful bidders and, advantaging the unsuccessful bidders in one way or another.

Counsel referred to PETER BIBBY's book titled **EFFECTIVE USE OF JUDICIAL REVIEW**, which states at page 1 that:–

> **"Judicial review will be granted only if the failure complained of is unlawful. A body exercising public power inevitably has a range of discretion. The proper exercise of such discretion is not unlawful. The lawful range of discretion in the exercise of public power is wide. The court will not intervene unless the exercise of discretion is so unreasonable that no reasonable person could ever have exercised the discretion in the way complained of. That wide discretion is the basis for the frequent stated position that judicial review is not concerned with the merits of the decision made in the exercise of public power, instead it is only concerned with procedure."**

Counsel went on to refer to the case of **COUNCIL FOR CIVIL SERVANTS UNION AND OTHERS V MINISTER OF STATE FOR CIVIL SERVICE**[4], in which it was stated that:-

> **"A decision under judicial review must have consequences which affect some person or body of persons other than the decision maker although it may affect him too."**

It was his contention that in this case the decision maker knew very well that its decision will affect the officers that were fired as a result of the former Minister's illegal actions. Counsel argued that the aim of judicial review in cases where a public body has made a decision is to protect the persons that are to be affected by such a decision and to ensure that the given arm of government is made to account for its decision and exercise of power.

In support of the third ground of appeal relating to procedural impropriety, Counsel for the Appellant argued that

the Tribunal exceeded the terms of the power which authorized the making of the decision. In support of this argument, he referred us to the terms of reference and went on to argue that a public body will be open to challenge where it has acted unfairly by failing to observe basic rules of natural justice or failing to act with procedural fairness. According to Counsel, even where a person has not been denied natural justice, there may be a good challenge where the public body has failed to observe procedural rules expressly laid down by statute or delegated legislation. In support of his argument, he again relied on the case of **COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE**[4].

He went on to submit that the Tribunal, in the case in casu, went beyond the terms of reference in that when determining the fourth term of reference, the Tribunal made an erroneous and misconceived finding that the former Minister did not breach the **CODE OF CONDUCT**[1] when she ordered a ban on hunting in Zambia; and yet, the question that should have been determined was the fourth term of reference which required the Tribunal to investigate the

allegation of corruption against Hon. Masebo in the handling of the tender for hunting concession licences. According to Counsel, the Tribunal thereby took into account extraneous considerations outside or beyond the scope of the terms of reference. In support of this argument, he cited the finding of the Tribunal that although the former Minister allowed the Advisory Committee to review the bidding document, it found no evidence to show that her actions resulted in her acquiring any pecuniary advantage.

In opposing the appeal, the learned Counsel for the Respondent also filed written heads of argument on which he relied entirely at the hearing of the matter.

In response to the first ground of appeal, learned Counsel for the Respondent contended that the the learned trial Judge was on firm ground when she held that there was no illegality on the part of the Tribunal, when it found that the former Minister did not breach Section 4(c) of the **CODE OF CONDUCT**[1]. He argued that from the outset, the Tribunal was duty bound to find evidence against the former Minister based on the Appellant's allegations that the Tribunal had acted

illegally and against the terms of reference when it created types of pecuniary advantage envisaged under Section 4(c) of the Code of Conduct Act. He submitted that the Court below had established that the Tribunal carried out its duty as mandated and made its findings. In buttressing this submission, our attention was drawn to a portion of the judgment on page 27 of the record in which the learned trial Judge found that the Tribunal "did not exceed the terms of reference as it was tasked to find out if the Minister breached section 4 (c) of the Act and so made its finding."

It was further submitted that the House of Lords in the case of **COUNCIL OF CIVIL SERVICE UNIONS V MINISTER OF STATE FOR CIVIL SERVICE**[4], stated the principles of judicial review under the heads:- illegality, irrationality, procedural impropriety. Counsel stated that in the case of **R V INDEPENDENT TELEVISION COMMISSION, EXP TSW BROADCASTING LIMITED**[6], it was held that judicial review does not issue merely to vitiate an error. It will lie to vitiate the decision making process when one of the grounds is

established. That in this case, there was no error on which this Court was being called to vitiate.

With respect to the second ground of appeal, Counsel on behalf of the Respondent, submitted that the Tribunal was established to conduct an investigation into the allegations raised by the Appellant and it made its findings from the evidence which was before it. That it was clear from the said evidence that the new officers were entitled to remuneration. Counsel wondered how any person, properly directing themselves to the question, would reach a conclusion that by virtue of the new officers being promoted, the former Minister had breached the **CODE OF CONDUCT**[1]. In his view, there was no evidence to support such a conclusion. They submitted that the Court below was on firm ground and the second ground of appeal ought to be dismissed.

In opposing the third ground of appeal, Counsel drew our attention to the findings of the Court below when it dismissed the Appellant's argument that there was procedural impropriety. He referred us to the case of **NYAMPALA SAFARIS (Z) LIMITED AND OTHERS v ZAMBIA WILDLIFE**

AUTHORITY AND OTHERS[1], where we held that judicial review is not concerned with the merits of the decision but rather, the decision making process itself. Counsel pointed out that the Court below outlined the procedure which the Tribunal followed in its investigations and set out the evidence which it found in respect of the terms of reference. He submitted that the third ground of appeal is contrary to the spirit of judicial review and it should be dismissed for lack of merit.

We have carefully considered the evidence on record, the Judgment appealed against and the submissions of Counsel. The Appellant has, under the first ground of appeal, challenged the findings of the Tribunal on the ground of illegality. We must state at the outset, that we agree with counsel for the Appellant that a decision is illegal if it contravenes or exceeds the terms of the power which authorizes the making of the decision, or if it pursues an objective other than that for which the power to make the decision was conferred. A decision is also illegal if it is not authorized by any power. Lord Diplock in expounding the

grounds for judicial review stated, in the case of **COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE**[4], that:-

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

This means that when the court is reviewing a decision under the ground of illegality, it seeks to establish whether a decision-maker has acted within the purview of the law that regulates his decision-making power and has given proper effect to it. In this regard, the task of the court when evaluating whether a decision is illegal is essentially one of construing the content, and the scope of the instrument conferring the power upon the decision maker. This is meant to ensure that administrative bodies act within the *"four corners"* of the enabling instrument.

In light of these principles, we have considered whether the Tribunal exceeded its power as alleged by the Appellant in this case. We have looked at the content and scope of the terms of reference and considered whether the finding

complained of was within the purview of the power of the Tribunal. The finding of the Tribunal complained of, is that the remuneration of the new officers who were appointed was not the kind of pecuniary advantage envisaged under Section 4 (c) of the **CODE OF CONDUCT**[1]. Based on this finding, the Appellant has accused the Tribunal of having exceeded its powers in that it created or delved into classes of pecuniary advantage and decided which ones did not fall foul of Section 4 (c) of the **CODE OF CONDUCT**[1].

In deciding the issue, we have noted that the finding complained of was made pursuant to the second term of reference which gave power to the Tribunal to investigate the alleged dismissal of officers from employment by the Minister in breach of the **CODE OF CONDUCT**[1]. The power was exercised in the context of Section 4 (c) of the **CODE OF CONDUCT**[1], which states that:

"A Member shall be considered to have breached the code of conduct if he knowingly acquires any significant pecuniary advantage, or assists in the acquisition of pecuniary advantage by another person, by-
(a) ...
(b) ...
(c) exerting any improper influence in the appointment, promotion, or disciplining or removal of a public officer;

(d)...
(e)..."

The Tribunal made its finding that the remuneration which the new officers were entitled to was not the kind of pecuniary advantage envisaged under section 4 (c) of the **CODE OF CONDUCT**[1] when giving reasons for holding that the former Minister did not assist the new officers to acquire pecuniary advantage. The Tribunal said that it did not find any evidence to show that the dismissals were specifically for the purpose of creating vacancies so that the new officers could be employed. The learned trial Judge found that the Tribunal did not exceed its powers when it decided that the remuneration obtained by the new employees was not the pecuniary advantage envisaged by Section 4(c) of the Code of Conduct. That the Tribunal operated within its terms of reference to investigate whether the alleged removal of senior officials contravened the Code of Conduct. She desisted from delving in greater detail on this point out of fear that she may stray into the merits of the Tribunal findings. We cannot therefore fault the trial Court for deciding as it did on this

point. **Order 53 of the RSC (WHITE BOOK, 1999 EDITION)** lays down the law, practice and procedure in judicial review. In Rule 53/14/19 it provides, inter alia, that:-

> **"...The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. 'It is important to remember in every case that the purpose of [the remedy of judicial review] is to ensure that the individual is given fair treatment by the authority to which he has been subject 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 matters in question.' The court will not, however, on a judicial review application act as a 'court of appeal' from the body concerned; nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power, be guilty itself of usurping power..."**

These principles demonstrate that it was not for the Court to consider whether the finding of the Tribunal was right or wrong; or to entertain an appeal from the Tribunal or to substitute the Court's decision for that of Tribunal; as to whether the former Minister breached Section 4 (c) of the **CODE OF CONDUCT**[1]. We must reiterate that the purpose of judicial review is to ensure that the 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 matters in question.

In view of this position of the law, we have no doubt that the Judge, in the Court below properly directed herself when she declined to interrogate the issue as to whether the Tribunal was right to find that the remuneration of the employees who replaced those who were relieved of their duties was not the one envisaged by the Act, for fear of delving into the merits of the case. We agree with her that such a consideration would result in the Court substituting its own decisions for that of the Tribunal and this is not the essence of judicial review. We therefore find no merit in the first ground of appeal. We hereby dismiss it.

The second ground of appeal, more or less, echoes the first ground except that the Appellant now contends that the decision of the Tribunal that the remuneration of the Senior ZAWA officers was not the kind of pecuniary advantage envisaged under Section 4(c) of the Act, was irrational or

Wednesbury unreasonable. He argues that it was unreasonable for the Tribunal to find that the remuneration which the new officers were entitled to was not the kind of pecuniary advantage envisaged under Section 4 of the **CODE OF CONDUCT**[1], without stating the kind of pecuniary advantage envisaged by Section 4 (c).

We agree with Counsel for the Appellant 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. A decision is unreasonable if it is 'so absurd that no sensible person could ever dream that it lay within the powers of the authority' and that 'no reasonable body could have come to it'. This principle was explained in the case of **ASSOCIATED PROVINCIAL PICTURE HOUSES LIMITED V. WEDNESBURY CORPORATION**[3], in which Lord Greene MR stated that:

> **"... a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v Poole Corpn (1926) Ch 66, 134 LT 110 gave an example of the**

> **redhaired teacher dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into another..."**

The principle was further expounded by Lord DIPLOCK in the case of **COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE**[4], who said:-

> **"It 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."**

The principle of irrationality takes the courts further from reviewing the procedures by which a decision has been made and testing its legality. It considers whether the power under which the decision-maker acts, a power normally conferring a broad discretion, has been improperly or is insufficiently exercised. Thus, the Court engages in the review of the substance of the decision or its justification. In **BODDINGTON V BRITISH TRANSPORT POLICE**[7], Lord STEYN opined that the:-

> **"...question is whether the decision was within the range of reasonable decisions open to a decision-maker."**

Against this backdrop, we have considered whether the lower Court was on firm ground when it found that the

decision of the Tribunal complained against was not outrageous, in defiance of logic and was not Wednesbury unreasonable. The Judge reasoned that the Tribunal applied its mind to the facts and the decision was arrived at based on the evidence which was before it. We find no basis on which to impugn the decision of the lower Court when it found that the decision of the Tribunal was not outrageous in its defiance of logic or that it was Wednesbury unreasonable.

Ordinarily, the circumstances in which the courts will intervene to quash decisions on grounds of irrationality or Wednesbury unreasonableness are very limited. In the case of **DERRICK CHITALA (SECRETARY OF THE ZAMBIA DEMOCRATIC CONGRESS) V ATTORNEY GENERAL[8],** we cautioned that the principle of irrationality should be applied with circumspection. Delivering the Judgment on behalf of the Court, Ngulube CJ, as he then was, stated that:

> **"In law, a decision can be so irrational and so unreasonable as to be unlawful on "Wednesbury" grounds-see *Associated Provincial Picture House LTD v Wednesbury Corporation(6).* The principle can be summarised as being that the decision of a person or body performing public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no such person or body properly**

directing itself on the relevant law and acting reasonably could have reached that decision. This principle should be applied with circumspection. In this regard, the words of Lord Ackner in *Reg v Home Secretary, Ex.p. Brind(7)* are rather apt. He said-

> **'There remains however the potential criticism under the Wednesbury grounds expressed by Lord Greene M.R. (1948) 1 K.B. 223, 230 that the conclusion was "so unreasonable that no reasonable authority could ever have come to it." This standard of unreasonableness, often referred to as "the irrationality test," has been expressed in terms that confine the jurisdiction exercised by the judiciary to a supervisory, as opposed to an appellate, jurisdiction. Where Parliament has given to a minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its, the judicial view, on the merits and on that basis to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister has exceeded his powers and thus acted unlawfully and the court in the exercise of its supervisory role will quash that decision. Such a decision is correctly, though unattractively, described as a "perverse" decision. To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the minister has made is to invite the court to adjudicate as if Parliament had provided a right of appeal against the decision that is, to invite an abuse of power by the judiciary."**

Courts will therefore sparingly 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. Again, it is our view that the learned Judge in the Court below properly directed herself on the issues raised under the second ground of appeal. We equally find that the second ground of appeal has no merit and it is hereby dismissed.

Coming to the third ground of appeal, we have considered the evidence and the submissions of Counsel in respect of this ground of appeal. The Appellant is basically alleging procedural impropriety. The gravamen of his argument was that the Tribunal went beyond the terms of reference, in that in determining the fourth term of reference, it made an erroneous and misconceived finding that the former Minister did not breach the **CODE OF CONDUCT**[1] when she ordered a ban on hunting in Zambia. Yet the fourth term of reference required the Tribunal to investigate allegations of corruption on the part of Hon. Sylvia Masebo in the handling of the tender for hunting concession licences.

It is trite that an administrative decision can be susceptible to judicial review under the ground of procedural impropriety, where the administrative tribunal fails to observe

procedural rules expressly laid down in the legislative instrument by which its jurisdiction is conferred. Paragraph 24 of **HALSBURY'S LAWS OF ENGLAND, VOL.1[1], FOURTH EDITION REISSUE**, states that:-

> **"One of the grounds upon which actions may be reviewed in administrative law is that of procedural impropriety. The impropriety may consist either of the failure to follow a procedure expressly provided for by a statute or by some other instrument having the force of law, or a breach of natural justice, or it may arise out of the failure to satisfy a legitimate expectation."**

We have scrutinised the terms of reference and considered whether the Tribunal did not follow the procedure under the terms of reference. In our considered view, the terms of reference merely conferred power on the Tribunal and did not expressly provide for the procedure which it ought to have followed. The Tribunal was therefore at liberty to decide the order and structure in which it was to present its findings based on the terms of reference. What was cardinal was for the Tribunal to conduct the investigations in accordance with its mandate under the terms of reference. The said power was not absolute or unfettered. It could only be exercised within

the confines of the terms of reference and to advance the purpose for which it was conferred.

We, therefore, entirely agree with the Court below that even though the Tribunal had terms of reference, it did not necessarily have to strictly deal with them in the order in which they were listed, as long as the issues in the terms of reference were appropriately dealt with. The Appellant's argument that the Tribunal took into account extraneous considerations outside the scope of the terms of reference has no merit. We agree with the lower Court's view that, the fact that the fourth question as stated in the findings of the Tribunal was different from the one set out in the fourth term of reference and did not amount to procedural impropriety.

An administrative action will not be held to be invalid merely by reason of an ostensibly trivial departure from the rules governing procedure and form, unless it is shown that the error has caused the individuals affected to suffer substantial detriment. The trial Judge stated on page 31 of the record of appeal that:-

> **"In the light of the fact that the fourth question as stated in the findings is different from the one set in the terms of reference the question I have to answer is whether this amounts to procedural impropriety. I am of the view that it does not. There is no procedural unfairness or failure to observe procedural rules or denial of natural justice."**

We agree entirely with the reasoning of the Judge and find that there is no merit in the third ground of appeal and it is accordingly dismissed.

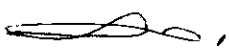
Al the grounds of appeal having collapsed, it follows that this appeal has no merit. In fact, this case has been overtaken by events and the launching of this appeal was a mere academic exercise. It is a notorious fact that the Hon Sylvia Masebo is no longer the Minister of Tourism and Arts, and the issues pertaining to the investigations of her alleged misconduct by the tribunal, are now history. Even though the Appellant was to succeed in this appeal, we would have granted reliefs which would not have served any useful purpose. In the case of **ATTORNEY-GENERAL V LAW ASSOCIATION OF ZAMBIA**[9] we stated that:-

> **"It is a notorious fact that the elections are since gone. Even if the Petitioner was to be successful on the cross-appeal, it is quite clear that the order would serve no purpose apart from being unnecessary academic exercise. This Court frowns upon making academic orders."**

In our considered view, it is an abuse of the Court process for a party to engage in hopeless and vexatious litigation as the Appellant did. In the circumstances we order the Appellant to pay costs of this appeal to be taxed in default of any agreement. The order of costs given by the lower Court is not disturbed.

I.C. Mambilima
CHIEF JUSTICE

C. Kajmanga
SUPREME COURT JUDGE



J.K. Kabuka
SUPREME COURT JUDGE