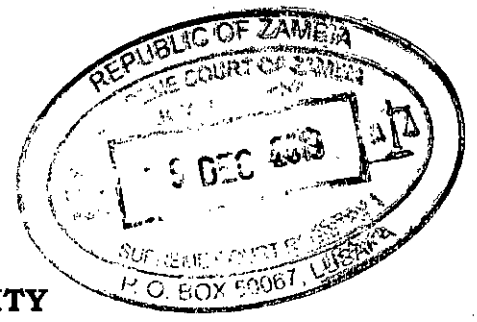
IN THE SUPREME COURT OF ZAMBIA **Appeal No. 01/2017**
HOLDEN AT NDOLA
(Civil Jurisdiction)



B E T W E E N :

ZAMBIA REVENUE AUTHORITY **APPELLANT**

AND

BALMORAL FARMS LIMITED **RESPONDENT**

Coram: **Mambilima, CJ, Malila and Kajimanga, JJS**
on 3rd December, 2019 and 9th December, 2019

For the Appellant: Mr. F. Chibwe, in-house counsel, Zambia Revenue Authority

For the Respondent: Mr. E. C. Mwansa, Messrs Mwansa Phiri, Shilimi & Theu

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J U D G M E N T

Malila, JS delivered the judgment of the court.

Case referred to:

1. *Attorney General v. Million Juma (1984) ZR1*
2. *Mutantika and Sheal v. Kenneth Chipungu (SCZ Judgment No. 13 of 2014)*

3. *Agro Fuel Investment Ltd. v. Zambia Revenue Authority (Appeal No. 187 of 2008)*
4. *Stallion Motors Ltd and African Cargo Services Ltd. v. Zambia Revenue Authority (Appeal No. 11 of 2012)*
5. *Atlas Copco (Z) Ltd. v. Andrew Mambwe (Appeal No. 137 of 2001)*
6. *Zambia National Commercial Bank Plc v. Joseph Kangwa (Appeal No. 54 of 2008)*
7. *Chomba Christopher Mulenga v. Kasama Municipal Council (SCZ Judgment No. 20 of 2003)*
8. *Celtel Zambia (Trading as Zain Zambia) v. Zambia Revenue Authority (2011) ZR 11*
9. *Jacob Mulenga v. Rucom Industries (1978) ZR 21*
10. *Indeni Petroleum Refinery Company Ltd v. G. Limited (SCZ Judgment No. 22 of 2007)*
11. *Barclays Bank Zambia Plc v. Patricia Leah Chatta Chipepa (Judgment No. 16 of 2017)*
12. *Filminera Resources Corporation v. Commissioner of Internal Revenue (CTA case No. 8528) 2014*
13. *Intel Technology Philippines, Inc v. Commissioner of Internal Revenue (April 27, 2007)*

Legislation referred to:

1. *Value Added Tax Act, Chapter 331 of the Laws of Zambia*
2. *Coffee Act, Chapter 228 of the Laws of Zambia*
3. *Companies Act, Chapter 388 of the Laws of Zambia*
4. *Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia*
5. *Gazette Notice No. 87 of 1996*
6. *Gazette Notice No. 27 of 2013*

1.0 Introduction

1.1 The present appeal concerns an area of tax administration that has increasingly become a fertile source of disputes:

Value Added Tax (VAT) refunds to taxable suppliers by the Zambia Revenue Authority (ZRA).

1.2 It implicates a nuanced interpretation of the Value Added Tax Act, chapter 331 of the Laws of Zambia and the rules made under it and seeks to situate the obligations of a tax payer claiming VAT refunds in respect of a tax payers' goods exported through a third-party entity, backed by statutory provisions.

2.0 Background facts

2.1 The coffee industry in Zambia is highly regulated with an entire Act, containing no less than 56 sections, devoted to it. The Coffee Act, chapter 228 of the Laws of Zambia creates the Coffee Board of Zambia. In terms of section 19 of the Act, no person is allowed to grow or cure coffee without a valid certificate issued under the Act. Under section 28 of the Act, on the other hand, no registered coffee grower shall sell or otherwise dispose of any cured coffee to any person other than through the Association. The Association is defined in

the Act as the Zambia Coffee Growers' Association Limited, a company limited by guarantee and registered under the Companies Act, chapter 388 of the Laws of Zambia. However, the functions of the Association are set out in section 18 of the Coffee Act.

2.2 The respondent was a coffee grower and a member of the Association and thus conducted its coffee growing and marketing activities within the auspices of Coffee Act and the Association.

2.3 Sometime in 2013, the Association exported some coffee on behalf of its members including the respondent. Subsequent to that export, the respondent lodged a claim for input Value Added Tax, also known as VAT refund with the appellant.

2.4 The appellant disallowed the VAT refund claim lodged by the respondent on the ground that the respondent did not furnish the appellant with all documents constituting proof of export as required under the Value Added Tax General Rule No. 18 (VAT Rule 18) as amended by Gazette Notice No.

27 of 2013 made pursuant to section 53 of the Value Added Tax Act.

2.5 VAT Rule 18 requires businesses to provide the documents listed under that rule, being:

(a) Copies of export documents for the goods, bearing a certificate of shipment provided by the Authority.

(b) Copies of import documents for the goods, bearing a certificate of importation into the country of destination provided by the Customs Authority in that country.

(c) Tax invoices for the goods exported.

(d) Proof of payment made by the customer for the goods.

(e) Documentary evidence, proving that payment for the goods has been made by the customer into the exporter's bank account in Zambia; and

(f) Such other documentary evidence as the authorized officer may reasonably require.

2.6 The respondent was unhappy with the decision of the appellant and thus appealed to the Tax Appeals Tribunal (the Tribunal) against the appellant's decision.

2.7 On hearing the appeal and examining the relevant evidence, the Tribunal found for the respondent against the appellant,

holding, among other things, that the respondent, as a producer of coffee, did not sell or export its coffee granted that the marketing of coffee was the preserve of the Association. It followed that the respondent could not issue a tax invoice to the Association or indeed to any overseas buyer as the power to sell the coffee was, by statute, reposed in a separate entity, the Association. The Tribunal concluded that it was incongruous with the provisions of the VAT Rule 18 as amended of the Value Added Tax Act, to treat the respondent as a supplier of a taxable supply when the respondent, or indeed anyone in a similar position, could not in fact even issue a tax invoice. It held that the VAT Rule 18 was inconsistent with the Coffee Act. The Tribunal further held that it was unreasonable for the respondent to be expected to produce the documents enumerated in VAT Rule 18. The Tribunal thus ordered a refund of VAT to the respondent.

3.0 Appeal to this court and the grounds of appeal.

3.1 The appellant was beleaguered by the decision of the Tribunal and has thus appealed on the following three grounds:

1. **Having found that the respondent is not an exporter within the meaning of Rule 18 of the VAT Rules, the Tribunal erred in law when it ordered the appellant to refund the respondent input VAT.**

2. **The Tribunal erred in law when it held that VAT Rule 18 is inconsistent with the Coffee Act.**

3. **The Tribunal erred in law when it ordered the appellant to refund the respondent input VAT with interest at the average short-term deposit bank rate from the 21st August, 2013 when the VAT return was filed with the appellant to the date of judgment.**

3.2 In support of the foregoing grounds of appeal, the appellant filed heads of argument complete with authorities. The respondent, in opposing the appeal, equally filed heads of argument along with opposing authorities.

4.0 The issue for determination on appeal

4.1 The learned counsel for the appellant correctly, in our view, identified the issue for determination in this appeal, namely whether the appellant properly disallowed the respondent's claim for input VAT refund.

4.2 We could also add a subsidiary issue, namely whether VAT Rule 18 as structured was consistent with the legislation governing the export of coffee.

5.0 The appellant's arguments in support of the appeal

5.1 In arguing the appeal, grounds 1 and 2 were considered together.

5.2 Counsel quoted verbatim VAT Rule 18 before submitting that the rule places the onus of furnishing the required documentation on a taxable supplier claiming that a supply is zero-rated under the Second Schedule of the VAT Act. Counsel added that a taxable supplier making a claim must produce documentary proof in the nature of a certificate of importation into the country of destination confirming that

the goods have been exported. A supplier who fails to do so does not qualify to claim input VAT. Observing that VAT Rule 18(1) imports a mandatory obligation through its use of the word 'shall,' the learned counsel submitted that the effect and meaning of a provision couched in mandatory terms should be as per interpretation given by this court in **Attorney General v. Million Juma**[1]. There we stated as follows:

> **The distinction between mandatory and directory provisions applies in the case of constitutions as in the case of ordinary statutes. The distinction is that while a mandatory enactment must be obeyed or fulfilled 'exactly,' it is sufficient if a directory enactment be obeyed or fulfilled substantially. Secondly, if a provision is merely directory, penalty may be incurred for its non-compliance, but the act or thing done is regarded as good notwithstanding such non-compliance; if, on the other hand, a requirement is mandatory, non-compliance with it renders the act invalid.**

5.3 The learned counsel also referred us to our case of **Mutantika and Sheal v. Kenneth Chipungu**[2], where we explained that the word 'shall' indicates a mandatory requirement that does not give any discretion. He maintained that the use in Rule 18 of the VAT Rules of the word 'shall' implies that a taxable

supplier seeking to claim input VAT ought without option to furnish the documents listed in that rule.

5.4 Our attention was further drawn to the case of **Agro Fuel Investment Ltd. v. Zambia Revenue Authority**[3] where we stated that VAT Rule 18 (as amended then by Gazette Notice No. 87 of 1996) applied to all taxable suppliers who claim that a particular supply was zero-rated and that the rule stated what ought to be done – production of documents. More purposely perhaps the learned counsel for the appellant cited the case of **Stallion Motors Ltd and African Cargo Services Ltd. v. Zambia Revenue Authority**[4] where we upheld the High Court, in overruling the Tribunal, holding that the appellant as exporter was obliged to produce export documents stamped by the customs authority of the country of destination of the goods to enable the appellant claim VAT for zero-rated supplies in accordance with VAT Rule 18.

5.5 Counsel submitted that as the respondent itself confirmed, it did not comply with VAT Rule 18 because compliance "was

and still remains beyond our ability to comply with as our coffee buyers do not issue such documents."

5.6 The appellant's counsel disagreed with the Tribunal's holding that there was a conflict between VAT Rule 18 and the Coffee Act, insisting that the two pieces of law dealt with two different matters with the one governing the zero-rating of exports while the other dealt with growing and marketing of coffee; that the Tribunal misapprehended the issue that it was called upon to determine and that the basis upon which the Tribunal distinguished the case before this court from the **Stallion Motors**[4] case, namely that the Coffee Act took the respondent outside VAT Rule 18 was a misapprehension.

5.7 We were thus urged to uphold grounds one and two of the appeal.

5.8 Ground three challenged the Tribunal's order that the appellant refunds the respondent's VAT with interest at the overage short-term deposit rate from the 21st August, 2013 when the VAT return was filled with the appellant to date of

judgment. Counsel relied on our decision in **Atlas Copco (Z) Ltd. v. Andrew Mambwe**[5] where we stated that:

> **We have repeatedly said that interest up to date of judgment should be at the average short-term deposit rate and after judgment at the average lending rate as determined by the Bank of Zambia.**

This position was restated in **Zambia National Commercial Bank Plc v. Joseph Kangwa**[6].

5.9 Counsel ended by reiterating that the Tribunal misapprehended the law. He implored us to uphold ground three too and prayed that the whole appeal be allowed with costs.

6.0 The respondent's arguments in opposition to the appeal

6.1 In the heads of argument filed on its behalf, the respondent maintained that there was no error on the part of the Tribunal in holding that respondent is not an exporter within the meaning of VAT Rule 18.

6.2 After defining what VAT as a consumption based tax is and when it is claimable, counsel for the respondent submitted

that the respondent supplied coffee grown by it to its agents – the Zambia Coffee Growers Association in terms of the requirements of the Coffee Act for the latter to sell and export the coffee. In the process of producing the coffee, the respondent paid VAT which is claimable. This much the appellant did not dispute; the reason for declining to effect a refund is failure by the respondent to comply with VAT Rule 18. Counsel maintained that in terms of the Coffee Act, it is the Association which is the sole exporter of coffee and which would ordinarily procure and be expected to have export documentation.

6.3 According to counsel for the respondent, once a coffee grower submits a request to the appellant for a VAT refund, it should be the duty of the appellant, if it wishes to query the request for a refund, to demand from the Association the provision of the required information and documentation relating to the coffee export. To ask, as the appellant did, the coffee grower to provide such information, is to circumvent the clear

provisions of the Coffee Act and a reluctance by the appellant to refund VAT to an entitled coffee grower.

6.4 Quoting section 18(1) of the Value Added Tax Act, Chapter 331 of the Laws of Zambia, counsel submitted that the law on VAT is simply that VAT incurred on supplies received, such as purchases and expenses, is refundable and may be deducted from one's liability or can be credited to one's account in the prescribed accounting period. The Tribunal was, according to counsel for the respondent, on solid ground when it found that there was an inconsistency between the Coffee Act and VAT Rule 18. The appellant treated the respondent as a supplier of a taxable supply when it could not even issue a tax invoice, and the respondent is placed in the position of an exporter when there is a recognised legal entity entrusted with that responsibility.

6.5 Counsel maintained that it is the Association, as exporter, which must provide the requisite documentation to facilitate VAT refunds. A person who cannot export his coffee cannot

be expected to produce export documents. According to the respondent's counsel the appellant should thus have looked only to the Association to produce the documents.

6.6 Turning to ground two, counsel for the respondent submitted that the Tribunal was right to hold that VAT Rule 18 is inconsistent with the Coffee Act. He cited section 20(4) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia, which enacts that a provision of a statutory instrument which is inconsistent with an Act of Parliament, shall be void to the extent of the inconsistency. The case of **Chomba Christopher Mulenga v. Kasama Municipal Council**[7] was cited to illustrate the practical application of section 20(4) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia. Being subsidiary legislation, VAT Rule 18 cannot override the provisions of the Coffee Act. To the extent that the appellant sought to extend the application of VAT Rule 18 to the Coffee Act, the rule cannot hold and the provision of the Act must prevail.

6.7 Counsel for the respondent also cited the High Court case of **Celtel Zambia (Trading as Zain Zambia) v. Zambia Revenue Authority**[8] when the judge stated that:

> **A statute must not leave room for doubt, and that any doubt in the provisions of the law imposing tax should be construed in favour of the tax payer, and that it is a principle of legal policy that a person should not be penalized except under clear law.**

Counsel then submitted that the law under which coffee farmers export their coffee is clear and specific as to who the exporter is. The appellant does not have authority to circumvent the clear provisions of the Coffee Act.

6.8 In regard to ground three, the respondent's learned counsel submitted that the appellant has not challenged the figures the respondent was claiming in VAT refunds. The award of interest cannot thus be challenged either. Counsel cited the case of **Jacob Mulenga v. Rucom Industries**[9] where the court stated that the award of interest is at the trial judge's discretion. In the present case, the Tribunal exercised that discretion judiciously. As was held in **Indeni Petroleum**

Refinery Company Ltd v. G. Limited[10] the basis for an award of interest is that the defendant has kept the plaintiff out of his money and the defendant has had the use of it himself and so he ought to compensate the plaintiff accordingly.

6.9 The learned counsel pointed out that the appellant is not disputing payment of interest but rather the manner the interest has been ordered to be paid. He cited our judgment in the case of **Barclays Bank Zambia Plc v. Patricia Leah Chatta Chipepa**[11] and quoted a passage from there to the effect that:

> **We have stated in a number of cases that interest shall be awarded at the short-term bank deposit rate from date of writ to date of judgment, thereafter at the current lending rate as determined by Bank of Zambia from date of judgment to date of payment unless the parties have agreed otherwise.**

On the foregoing basis the respondent agreed with the appellant that the proper calculation of interest is as stated in the **Chipepa**[11] case as quoted above.

6.10 Counsel for the respondent prayed that the appeal be dismissed for lacking merit.

7.0 The appellant's reply

7.1 In responding to the respondent's opposition to the appeal, the appellant's learned counsel filed heads of argument in reply which were just as copious as the main heads of argument. Not only that, counsel also introduced new case authorities.

7.2 Counsel cited section 15 of the VAT Act, the purpose of which we assume, was to highlight the authority of the Minister to vary, add to, or replace the First Schedule to the Act which describes a supply of goods or services or an importation of goods exempt from taxation. He then went on to reproduce section 52 of the VAT Act, which empowers the Commissioner General to promulgate rules in relation to the administration of tax collection. He submitted that Rule 18 directly draws from the intention of the legislation as set out in section 52 of the VAT Act. More pertinently perhaps, counsel suggested that VAT Rule 18 does not distinguish between one claiming as an agent or one claiming as a

principal, in its direction for compliance being mandatory in any case.

7.3 Counsel cited the Philippines case of **Filminera Resources Corporation v. Commissioner of Internal Revenue**[12] and reproduced long extracts from its judgment. Perhaps of immediate relevance to the appellant's argument were the holdings that:

(a) In an action for tax refund the burden of proof is on the tax payer to establish its right to refund.

(b) The tax payer must submit complete documents to substantiate its administrative claim for refund or else the authority will have reason to deny the claim.

(c) Claims for refund must be done within certain time frames.

7.4 The learned counsel for the appellant cited also another case from the Philippines: **Intel Technology Philippines, Inc v. Commissioner of Internal Revenue**[13] where the need to furnish complete documentary evidence of export was done and accepted. With typical repetition and circumlocution, the

learned counsel once again reproduced Rule 18(1) of the VAT Act (General Rules) and repeated the submission that the respondent did not comply with that Rule.

7.5 The learned counsel, by and large, rehashed the submissions already made in the initial heads of argument.

8.0 Analysis and decision of this court

8.1 The overarching issues for determination in this appeal are as posed at paragraph 4 of this judgment, for they in fact address almost perfectly the three grounds of appeal before us.

8.2 The appellant alleges that it was wrong for the Tribunal to have ordered the appellant to refund the respondent input VAT because the respondent did not satisfy the conditions precedent as set out in VAT Rule 18. The respondent's position is simply that it incurred all the cost and expenses in the process of producing its coffee and paid VAT which it is entitled to claim; that there is not only a legal hitch of it firstly, not being a seller of its coffee to the Association so as

to be obliged to raise an invoice, but there is also an even bigger legal and factual problem; it cannot produce some export documentation required under VAT Rule 18 because it is not the exporter of the coffee and thus did not deal with any importer.

8.3 And so, we have to determine which of these two conflicting positions is legally sound. We are in no doubt whatsoever about the source of the Minister's power to vary, add or replace the First or Second Schedule to the VAT Act, nor is there any misgiving as to the Commissioner General's authority to promulgate administrative rules by virtue of which VAT Rule 18 was made.

8.4 The issue is a deeper one of implementability of the law so as to achieve its purpose. The learned counsel for the appellant quite fairly quoted from **Filminera Resources Corporation v. Commissioner of Internal Revenue**[12] on the power to tax as the most effective means of raising the much needed revenues to finance and support an array of activities of the government

for the delivery of basic services essential to the promotion of the general welfare for the citizenry. We agree. Tax legislation has as its broad objective the noble purpose of raising resources needed by government to provide basic services to its people. Tax law must thus be implemented as much as possible.

8.5 We have on the other hand a tax payer who is shackled by another sector law to comply with that other law in the performance of its business. We have the Coffee Act which effectively circumscribes the manner in which those engaged in the coffee business must conduct their affairs. They cannot export the product they grow except through the Association. Section 28(1), which we have already referred to at paragraph 2 of this judgment states that a registered coffee grower shall not sell, deliver for sale or otherwise dispose of any cured coffee to any person other than to the Association.

8.6 Although indeed the Association exports the coffee on behalf of the growers and is thus in a very broad sense an agent of

the coffee grower, there is a statutory agency of an unusual kind. The agency is not assumed voluntarily, but is imposed on the parties the moment one opts to join the coffee industry as a grower. The terms of the relationship between the member and the association are not mutually agreed between the parties either. Many of them are prescribed in an Act of Parliament. It is not an ordinary agency to which the ordinary principal/agent rules apply.

8.7 In his oral submission at the hearing, Mr. Chibwe, learned counsel for the appellant, had suggested that the Latin maxim *qui facit per se facit per aluim* (he who can act for himself can act through an agent) applies to the agency between the coffee grower and the Association. We entirely disagree with that proposition. We have already pointed out that the obligations of the Association are statutory.

8.8 Arising from what we have stated at paragraph 8.6 it follows that although the Association acted on behalf of the growers of coffee when it exports coffee, it does not do so as an agent,

in the conventional way, of the growers of coffee. It performs some statutory functions as principal in its own right. For example, section 29 of the Coffee Act provides that:

> **The Association or its authorized agents shall be the sole exporter of coffee.**

To us, two points arise from this provision. First, the Association is designated as the sole exporter – not the growers or members. Second, the Association may engage agents to export coffee on its behalf.

8.9 We agree with the respondent's learned counsel's submission that the exporter of the coffee is, in these circumstances, the Association and not the grower of coffee. The Association negotiates all the prices of Zambian coffee on the international market and decides who and where to sell it. We accept the submission of the respondent's learned counsel that it is inconceivable to expect a coffee grower to provide import and export documentation when it is not involved in the process of exporting the coffee. It is indeed in all circumstances, the exporter Association that is better

placed to show proof of the export of the coffee and the country or countries to which it is exported.

8.10 Mr. Chibwe pressed the point that the VAT Rule 18 is regular in itself and the only question for the court to preoccupy itself with should be whether the respondent complied with it or not. He made the submission that the wording of Rule 18 has the effect that the grower who is unable to produce the listed documentation may apply to the appellant's Commissioner General for waiver to produce such documents. We think that these are decent arguments to make. We, however, are of the considered view that the fact that the difficulties created for a taxable supplier directly flow from the law itself, the solution lies in attending to that law rather than giving the Commissioner General an extra window to exercise discretion to waive a provision of the VAT Rule 18. Thus, in our view, it is as undesirable to the unquestionable need for predictability of the law as it is unnecessary. We believe the law should not, through

technicalities, be unimplementable with objectivity and certainty.

8.11 The learned counsel for the appellant in his oral supplementation of the heads of argument referred us to two of the cardinal interpretational principles of tax legislation, namely that the charging section of the tax legislation must be clear in its provisions, and second, that courts must strictly assess any claim to entitlement by a tax payer to tax exemptions, waivers or reliefs. While we agree with this position, we must point out that in the circumstances that the provisions of the Coffee Act presently stand vis-à-vis the VAT Rule18, clarity of the law is compromised.

8.12 Talking about certainty and objectivity in the application of the law, before the Tribunal the evidence of Nanette Loraine Kennedy, the Livestock Manager and Bookkeeper of the respondent, was that the respondent had been claiming VAT on coffee production costs and the respondent had been honouring these claims. The evidence of the General Manager

of the Association, Mr. Joseph Taguma was to the same effect. Counsel for the appellant agreed that indeed the requests for tax refunds had been honoured on the basis of documentation furnished not in strict compliance with VAT Rule 18, but that no waiver could be set up against a statute and that some anomalies are only discovered after audits.

8.13 Our view is that such administration lapses or discretion or selective application of the law – especially tax legislation and rules is not a desirable situation to allow to go on unabated for it makes the law enforceable or waivable at the discretion of an implementing agency. This is an indictment on the uniform enforcement of the law. It also speaks to clarity of the law for purposes of enforcement.

8.14 Our view is that there is clearly a disconnect between the VAT Rule 18 and the Coffee Act. While the latter prescribes what coffee growers, who are taxable suppliers, should and cannot do, the latter presupposes that such taxable supplier can in fact do what the Act does not allow them to do. We are here

talking about obtaining an invoice for coffee delivered to the Association where there cannot be a sale, or obtaining export and import documentation when the taxable supplier cannot legally export.

8.15 Given what we have stated in the foregoing paragraphs we come to the inevitable conclusion that the Tribunal cannot be faulted in its holding. There is absolute need to harmonise the Coffee Act and the VAT Rule 18 so as to give the right of taxable suppliers to VAT refunds realizable in all circumstances as opposed to it being enjoyed at the discretion of the appellant. Grounds one and two are thus bound to succeed and we uphold them.

8.16 As regards ground three relating to the computation of interest, we note that the parties are now in agreement that interest should be calculated at the short-term bank deposit rate from the date of the VAT 100 return was filed by the appellant namely 21st August, 2013 to date of this judgment,

thereafter at current lending rate as determined by the Bank of Zambia.

8.17 On the whole the appeal fails and is dismissed with costs.

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I. C. Mambilima

CHIEF JUSTICE

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M. Malila

SUPREME COURT JUDGE

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C. Kajimanga

SUPREME COURT JUDGE