APPEAL No. 088/2012
SCZ/8/185/2012

IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

THE ATTORNEY-GENERAL **APPELLANT**

AND

NIGEL KALONDE MUTUNA (MALE) **1ST RESPONDENT**

CHARLES KAJIMANGA (MALE) **2ND RESPONDENT**

PHILLIP MUSONDA (MALE) **3RD RESPONDENT**

Coram: Chibesakunda, Ag. CJ., Mumba, Ag. DCJ, Mwanamwambwa, Chibomba, Phiri, Wanki, Muyovwe, JJS.

On 18th September, 2012 and 9th May, 2013

For the Appellant :

1. Mr. Mumba Malila, SC., Attorney-General
2. Mr. Musa Mwenye, SC., Solicitor-General
3. Mrs. M. C. Kombe, Principal State AdvocaDCte
4. Mr. Mark Ndhlovu, State Advocate

For the 1st Respondent:

1. Mr. A. Shonga, SC. of Messrs Shamwana and Co.
2. Mr. S. M. Lungu of Messrs Shamwana & Co.

For the 2nd respondent:

1. Mr. Eric Silwamba,SC of Messrs Eric Silwamba & Co.

2. Mr. J. Jalasi of Messrs E. Silwamba and Co.
3. Mr. L. Linyama of Messrs E. Silwamba and Co.

For the 3rd respondent : 1. Mr. S. Sikota SC of Messrs Central Chambers
2. Mr. M. Katolo and
3. Mr. P. G. Katupisha of Messrs Milner Katolo & Associates

JUDGMENT

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

Cases referred to:-

1. Frederick Jacob Titus Chiluba v Attorney-General (2003) ZR 153
2. R v National Federation of Self-Employed and Small businesses Ltd (1981)2 ALLER 93
3. Inland Revenue Commission v National Federation of Self-Employed and Small businesses Ltd (1982) 2 ALL ER 92 P106 (1982) AC 617 P643
4. R v Secretary of State for the Home Department Exp, Herbage (No. 2) (1987) 1 ALLER 324
5. Mususu Kalenga Building Limited, Winnie Kalenga and Richman Money Lenders Enterprises (1999) ZR 27
6. Kasai Mining and Exploration Ltd v Attorney General, SCZ Appeal No. 195 of 2006
7. Derrick Chitala v Attorney General (1995/97) ZR p91
8. Re Mumba (1984) ZR P38
9. European Commission on Human Rights in Axelssone v Sweden Application No. 119 60/86 July 13th 1990
10. Attorney-General v Kang'ombe (1973) ZR 114
11. Katongola v the People (1972) ZR P81
12. Schmidt v Secretary of State for Home Affairs(1609) 10 Co. Re. 1399
13. Communication Authority v Vodecom (2009) ZR 196
14. Shilling Bob Zinka v Attorney-General – (1990 – 92) ZR P. 73
15. C and S Investments Limited Ace Car Hire Limited, Sunday Maluba v Attorney-General Judgment No. 24 of 2004

16. Council of Civil Servants Union v Minister for Civil Service (1985) AC 407
17. JNC Holdings Limited, Post Newspaper Limited and Mutembo Nchito v Development Bank Zambia SCZ 8/132/2012
18. Dean Namulya Mung'omba Bwalya Kanyata Ng'andu and Anti-Corruption v Peter Machungwa, Golden Mandandi and Attorney General (2003) ZR 17 P17
19. Kang'ombe v the Attorney-General (1973) ZR 114
20. R V Secretary of State for the Home Department, Ex parte Chelblak (1991) 1 WLR 890 AT 091 C-D
21. Nkongolo Farms Vs ZNCB (2007) ZLR at P. 149
22. Attorney-General v Roy Clarke (2008) ZR P. 38
23. Aaron Chungu and Faustin Kabwe vs. Attorney-General 2008 ZR 159
24. Mpulungu Harbour Management Limited v Attorney General (1995: 97)ZR at p. 152)
25. Communication Authority Vs. Vodacom (2009) ZR 196
26. Caltonia Ltd v Commissioner of Works and Others (1943) 2 All ER p534
27. Bongopi v Chairman of the Council of State, Ciskei (1992) (3) SA 25 CK at page 265
28. Bophuthat Swana vs Segale 1990 10SA 434 BA
29. Godfrey Miyanda v Attorney-General (2009) 2 ZR p. 76
30. Nyampala Safari (Z) Limited and Others v Zambia Wildlife Authority and others (2004) ZR 49.
31. Ridge V Baldwin 1964
32. Kabimba vs Attorney-General and Lusaka City Council (1995/1997) Z.R. 152
33. Samuel Miyanda V Raymond Handahu SCZ No. 5 of 1994
34. Roy Clarker v Attorney-General

Legislation referred to:

1. Constitution of the Republic of Zambia Chapter 1 of the Laws of Zambia
2. Judicial Code of Conduct Act No. 13 of 1999
3. Supreme Court Act Cap 25 r 49(4)
4. High Court Act Cap 27 S10 as amended by Act No. 7 of 2011

Other Works

1. Rules of the Supreme Court 1999 Edition
2. Judicial Review by Michael Supperstone QC and James Goudie QC,
3. De Smith's Judicial Review
4. Halsbury Laws of England, Vol. 37,4th Edition

This is an appeal against a Ruling of the High Court delivered on the 14th May, 2012, in an application by the Appellant to discharge leave which was granted exparte to the 1st, 2nd and 3rd Respondents for Judicial Review of a decision announced by His Excellency the President of the Republic of Zambia on the 30th May, 2012 of appointing a tribunal to investigate the three Respondents.

The application by the Appellant was to discharge leave which was granted exparte on the 16th May, 2012, to the 1st,2nd and 3rd Respondents for Judicial Review of the decision announced by the President to appoint a tribunal to investigate the conduct of the three Judges, (the Respondents) with regard to the performance of their Constitutional duties in their respective roles as 1st and 2nd Respondents had been appointed puisne Judges of the High Court of the Republic of Zambia and the 3rd Respondent had been appointed Supreme Court Judge of the Republic of Zambia.

The facts and circumstances of the appeal, distilled from the notice of the application for leave and the supporting affidavit and the affidavit in support of the summons to discharge, are briefly that the three Respondents on the 30th May, 2012 received letters from His Excellency the President suspending them from performing their duties, for the 1st and 2nd Respondents as puisne Judges of the High Court and for 3rd Respondent as Supreme Court Judge pending the proceedings of the tribunal appointed pursuant to Article 98(5) of the Constitution of the Republic of Zambia.

The three (03) Respondents received letters from His Excellency the President pursuant to powers vested in him under Article 98(5) of the Constitution of the Republic of Zambia. The 1st Respondent's letter read as follows:-

"Secret:
Hon. Mr. Justice Nigel K. Mutuna
Lusaka High Court
Lusaka

Dear Hon. Justice Mutuna,

Re: SUSPENSION

Following the setting up of a tribunal to inquire into your conduct pursuant to Article 98(5) of the Constitution of the Republic of Zambia, I hereby order that you cease acting as High Court Judge till the Tribunal concludes its

business and the matter is disposed off in accordance with the Law.

Yours sincerely

M. C. Sata
PRESIDENT
REPUBLI OF ZAMBIA

The 2nd and 3rd Respondents' letters were similar in contents with that of the 1st Respondent.

In these letters, His Excellency did not state the reasons for the Judges' suspension. However, the President on the same day held a Press Conference at State House where he stated inter alia that:-

"He had received credible complaints against Justice Nigel Kalonde Mutuna, Justice Phillip Musonda and Justice Charles Kajimanga and have accordingly decided to appoint a tribunal to investigate allegations of misbehavior or incompetence of the said Judges pursuant to the powers vested in him under the Constitution of the Republic of Zambia. The said Judges will accordingly be suspended pending the recommendations of the tribunal".

The three Respondents' position is that at no time had these allegations lodged against them been made known to them or to the Judicial Complaints Authority as prescribed under the Judicial Code of Conduct Act No. 13 of 1999. Because of this position, the two Respondents (first and second Respondents) applied exparte for leave for Judicial Review of His Excellency's decision of appointing a tribunal and suspending them, attaching a Certificate of Urgency on the 15th May, 2012. The Notice Containing Statement in support of this exparte application for the two Respondents read as follows:-

"AND IN THE MATTER OF: A DECISION BY HIS EXCELLENCY THE PRESIDENT OF THE REPUBLIC OF ZAMBIA MADE ON THE 30TH DAY OF APRIL, 2012

BETWEEN:

NIGEL KALONDE MUTUNA (MALE) 1ST APPLICANT
CHARLES KAJIMANGA (MALE) 2ND APPLICANT

AND

THE ATTORNEY-GENERAL RESPONDENT

NOTICE CONTAINING STATEMENT IN SUPPORT OF AN EX PARTE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW PURSUANT TO THE PROVISIONS OF ORDER 53 RULE 3 OF THE RULES OF THE SUPREME COURT 1965 (WHITE BOOK), RSC 1999 EDITION VOLUME 1 AND VOLUME 2, FORM NO. 86A IN APPENDIX A (VOL. 2 SECTION 1A, PARAGRAPH 1A-88)

To: The Registrar of the High Court of Judicature for Zambia at the Principal Registry at Lusaka.

"(i) The 1st Applicant herein NIGEL KALONDE MUTUNA is a Puisne

Judge of the High Court of Judicature for Zambia having been appointed by His Excellency the President of the Republic of Zambia Pursuant to the provisions of Article 95 of the Constitution of Zambia, Chapter 1, Volume 1 of the Laws of Zambia and duly Constituted as such with the grant of Letters Patent dated the 16th day of April 2009.

(ii) The 2nd Applicant herein CHARLES KAJIMANGA is a Puisne Judge of the High Court of Judicature for Zambia having been appointed by His Excellency the President of the Republic of Zambia pursuant to the provisions of Article 95 of the Constitution of Zambia, Chapter 1 Volume 1 of the Laws of Zambia and duly Constituted as such with the grant of Letters Patent dated the 9th day of August 2002.

JUDGMENT, ORDER, DECISION OR OTHER PROCEEDINGS IN RESPECT OF WHICH RELIEF IS SOUGHT:

"In this regard I have received Credible Complaints against their Lordships Justices Phillip Musonda, Charles Kajimanga and Nigel Mutuna and have accordingly decided to appoint a tribunal to investigate allegations of misbehavior or incompetence of the said Judges pursuant to powers vested in me under the Constitution of the Republic of Zambia.

The said Judges will accordingly be suspended pending the recommendations of the tribunal:

Extract of letters dated 30th May, 2012 respectively:

"Following the setting up of a Tribunal to inquire into your conduct pursuant to Article 98(5) of the Constitution of the Republic of Zambia, I hereby order that you cease acting as High Court Judge till

the Tribunal concludes its business and the matter is disposed off in accordance with the law.

Yours Sincerely

M. C. Sata
PRESIDENT
REPUBLIC OF ZAMBIA

RELIEF SOUGHT:

(a) an Order of Certiorari to remove into this Honourable Court for the purpose of quashing the decision of His Excellency the President of the Republic of Zambia made on the 30th day of April, 2012 in so far as it purports to decide that a Tribunal be constituted to conduct an investigation of misbehavior or incompetence and also to purportedly suspend the Applicants without recourse to the provisions of Article 91 (2) of the Constitution of Zambia, Chapter 1 Volume 1 of the Laws of Zambia as read together with the provisions of the Judicial (Code of Conduct) Act No. 13 of 1999.

GROUNDS ON WHICH RELIEF IS SOUGHT:

A. ILLEGALITY

(i) The decision of His Excellency the President of the Republic of Zambia dated the 30th day of April 2012 in so far as it purports to appoint a Tribunal to investigate misbehavior or incompetence on the part of the Applicants is illegal, premature and consequently null and *void ab inito* as the exercise of powers vested in the President Pursuant to Article 98(2), (3 and (5) of the

Constitution of Zambia Chapter 1 volume 1 of the Laws of Zambia is premised on the provisions of Articles 91(2) as read with the provisions of the Judicial (Code of Conduct) Act No. 13 of 1999 which provide for a *sine qua* non for the exercise of the President's Jurisdiction to appoint a Tribunal;

(ii) His Excellency the President of the Republic of Zambia erred in Law and usurped the Statutory Powers of the Judicial Complaints Authority and those of the Chief Justice of the Republic of Zambia when he purported to assert the role of an Investigator on complaints against the Applicants who are Judicial Officers as that is the preserve of the Judicial Complaints Authority duly constituted pursuant to the provisions of the Article 91(2) of the Constitution of Zambia as read with the provisions of the Judicial (Code of Conduct) Act No. 13 of 1999; and

(iii) His Excellency the President of the Republic of Zambia erred in law and usurped the Constitutional functions of the Supreme Court of Zambia when he purported to appoint a Tribunal to investigate misbehavior or incompetence on the part of the Applicants when Appeal No. SCZ/8/132 of 2012 is pending in the Supreme Court of Zambia and the matter is effectively SUBJUDICE . In any event it is incompetent to appoint a Tribunal to investigate a Puisne Judge regarding a Judgment delivered in a Civil case when an Appeal is pending in the Supreme Court of Zambia.

B. PROCEDURAL IMPROPRIETY

(i) His Excellency the President of the Republic of Zambia made the purported decisions to constitute a Tribunal and suspend the Applicants while citing corruption actuated by *mala fides* without any reasonable good cause and without according the Applicants procedural fairness of being heard as dictated by the basic rules of natural justice;

(ii) Further the decision of His Excellency the President of the Republic of Zambia on the 30th day of April, 2012 by *modus operandi* of a Public address to the nation is and *mala fides* in bad faith as he proceeded to make pronouncements of the misbehaviour and corrupt disposition before an investigation was conducted are prejudicial to the Applicants and were designed to influence the subsequent decision of the purported Tribunal contrary to the provisions of the Judicial (Code of Conduct) Act No. 13 of 1999 which dictate that any complaint against a Judicial officer will be investigated and conducted in a confidential manner; and

(iii) The decision of His Excellency the President of the Republic of Zambia "to turn a Nelsonain Eye" to the Hierarchical system of Court in the Judicature of the Republic of Zambia and proceed to appoint a Tribunal to investigate the Applicants and subsequently suspend them is

premature and has subsequently rendered the appellate Jurisdiction of the Supreme Court of Zambia *otiose.*

C. IRRATIONALITY

The decision of His Excellency the President of the Republic of Zambia to appoint a Tribunal to investigate the Applicants and suspend them respectively was premised on improper motive and characterized by political consideration and actual bias without proper investigations but anchored on unsubstantiated reports made by persons that enjoy particular relationship with His Excellency the President of the Republic of Zambia. The applicants will demonstrate that the action taken by the President of the Republic of Zambia is WEDNESBURY UNREASONABLE.

(ii) Further Grounds as contained in the Affidavit filed herewith.

(iii) An Order for costs

(iv) AND that all necessary and consequential directions be given.

The 1st and 2nd Respondents' affidavits in support respectively read as follows:-

"AND IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF: A DECISION BY HIS EXCELLENCY THE PRESIDENT OF THE REPUBLIC OF ZAMBIA MADE ON THE 30TH DAY OF APRIL, 2012

BETWEEN:

NIGEL KALONDE MUTUNA (MALE) 1ST APPLICANT
CHARLES KAJIMANGA (MALE) 2ND APPLICANT

AND

THE ATTORNEY-GENERAL RESPONDENT

AFFIDAVIT IN SUPPORT OF AN EX PARTE SUMMONS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW PURSUANT TO THE PROVISIONS OF ORDER 53 OF THE RULES OF THE SUPREME COURT (RSC), WHITE BOOK (1999 EDITION) VOLUME 1 AND VOLUME 2

I, Nigel Kalonde Mutuna doth MAKE OATH and SAY as follows:

1. That my full names are Nigel Kalonde Mutuna

2. That I am a Zambian citizen ordinarily resident at House Number 20 Ngulube Road, Prospect Hill, Woodlands, Lusaka in the City of Lusaka in the Lusaka Province in the Republic of Zambia

3. That I am currently a Pusine Judge of the High of Judicature for Zambia ratified the 4th day of March 2009 having been dully appointed on the 3rd day of March, 2009 sworn on the 16th day of April 2009 and the Applicant herein as such competent to depose to this my Affidavit verily believing in the truth and veracity of the same. I am now shown a copy of my letters patent dated 16th April, 2009 marked "NKM1"

4. That the documents in support of this my application for leave to move for judicial review exceed 10 pages and I am advised by Advocates that I must lodge with the Principal Registry of the High Court of Judicature for Zambia an indexed and paginated Bundle of Documents. I will rely on the said Bundle of Documents as part of my evidence to this Honourable Court notwithstanding that the same are Public Documents.

5. That on the 30th day of April, 2012, I received a letter authored by His Excellency the President of the Republic of Zambia suspending me from performing my duties as a Puisne Judge serving in the High Court pending the proceedings of a Tribunal appointed pursuant to the provisions of Article 98(5) of the Constitution of the Republic of Zambia. I am now shown a copy of the letter dated 30th April, 2012 from His Excellency the President marked "NKM 2"

6. That on the same day His Excellency the President held a press conference at State House wherein he stated that he had received credible complaints against myself, the Second Applicant and Justice Philip Musonda and as a consequence had deemed it appropriate to appoint a Tribunal. The said proceedings of the press conference were reproduced verbatim in the Post Newspaper Edition No. 5674 of 1st May 2012 at pages 4 and 9 respectively under the heading "*Sata suspends three Judges".* A copy of the extract of Post Newspaper dated 1st May, 2012 is shown to me marked "NKM 3".

7. That while my letter of suspension does not state the reasons of my suspension, His Excellency the President during his press conference made public the following allegations:

a) that a general inquiry be conducted in the manner I presided over the case of Development Bank of Zambia Vs Post Newspapers Limited, JCN Holdings Limited and Mutembo Nchito;

b) that I had allegedly misbehaved and/or acted incompetently by proceeding to hear and determine the

matter without a formal order transferring the case from Judge Albert Mark Wood to my Court;

c) that I proceeded to hear the case of Development Bank of Zambia Vs Post Newspapers Limited, JCN Holdings Limited and Mutembo Nchito in alleged total disregard of the evidence made available to Justice Albert Mark Wood clearly demonstrating that independence had been interfered with in the course of the proceedings of Justice Albert Mark Wood;

d) that I allegedly misbehaved and acted incompetently when I proceeded to deliver judgment in a case where a plaintiff had filed a Notice of Discontinuance; and

e) that I allegedly misbehaved and/or acted incompetently when I allowed my impartiality to be compromised during the hearing of the case of Development Bank of Zambia Vs Post Newspapers Limited, JCN Holdings Limited and Mutembo Nchito.

8. That at no material times have the allegations leveled against me ever been lodged or made known to the Judicial Complaints Authority as prescribed by the Constitution of the Republic of Zambia as read together with the provisions of the Judicial (Code of Conduct) Act No. 13 of 1999. I am advised by Counsel and verily believe that His Excellency the President had prematurely invoked the provisions of the Constitution of the Republic of Zambia by establishing the Tribunal as the complaint authority of first instance.

9. That on 19th day of April, 2012 I delivered a ruling the case of Development Bank of Zambia Vs Post Newspapers Limited, JCN Holdings Limited and Mutembo Nchito on an application to stay proceedings by the Defendants. I am now shown a copy of the Ruling dated 19th April, 2012 marked NKM 4"

10. That on the 19th day of April, 2012, I delivered judgment in the case of Development Bank of Zambia Vs Post Newspapers Limited, JCN Holdings Limited and Mutembo Nchito. I am now shown a copy of the Judgment dated 30th April, 2012 marked "NKM 5"

11. That the Defendants have since filed appeals against both the ruling and the Judgment in the Supreme Court. That the appeal against the Ruling is dated 14th May, 2012, while the appeal against the Judgment is dated 20th April, 2012 in the case of Development Bank of Zambia Vs. Post Newspapers Limited, JCN Holdings Limited and Mutembo Nchito both under the same cause number SCZ/8/132/2012. I invite this Honourable Court to exercise its inherent jurisdiction to review the record in the Supreme Court wherein an appeal has been duly filed. I am now shown copies of the Notices of Appeal respectively dated 20th April, 2012 and 14th May, 2012 collectively marked "NKM 6".

12. That I did on the 15th May, 2012 cause to be served on the Learned Attorney General the requisite letter before action. I am now shown a copy of the letter dated 15th May, 2012 marked "MKM 7".

13. That I verily believe that the Respondent will not be prejudiced in any way if I am granted leave to apply for judicial review but conversely the interests of justice will be served so

that my intended application which I believe is possessed with the requisite merit is considered accordingly.

14. That the contents of this my Affidavit are true and correct to the best of my knowledge and belief.

SWORN by the said
Nigel Kalonde Mutuna
this …….. day of ……
2012 at Lusaka

Before me: ……
COMMISSIONER FOR OATHS

AND IN THE MATTER OF: **A DECISION BY HIS EXCELLENCY THE PRESIDENT OF THE REPUBLIC OF ZAMBIA MADE ON THE 30TH DAY OF APRIL, 2012**

BETWEEN:

NIGEL KALONDE MUTUNA (MALE) 1ST APPLICANT
CHARLES KAJIMANGA (MALE) 2ND APPLICANT

AND

THE ATTORNEY-GENERAL RESPONDENT

AFFIDAVIT IN SUPPORT OF AN EX PARTE SUMMONS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW PURSUANT TO THE PROVISIONS OF ORDER 53 OF THE RULES OF THE SUPREME COURT (WHITE BOOK) 1999 EDITION VOLUME 1 AND VOLUME 2

I, CHARLES KAJIMANGA doth MAKE OATH and SAY as follows:

1. That my full names are Charles Kajimanga

2. That I am a Zambian citizen ordinarily resident at Lot Number 7077 Lusaka West in the City of Lusaka in the Lusaka Province in the Republic of Zambia

3. That I am currently a Pusine Judge serving in the High of Judicature for Zambia having been recommended by the Judicial Service Commission, ratified by the National Assembly of Zambia on 6th August, 2002 and appointed by His Excellency the President on the 23 day of August, 2002 and duly sworn in on the 9th day of August 2002. That I am presently presiding as Deputy Judge in Charge at the Lusaka High Court since about December, 2009. I am the Applicant herein as such competent to depose to this my Affidavit verily believing in the truth and veracity of the same. I am now shown a copy of my Letters Patent dated 9th August, 2002 marked "CK 1"

4. That the documents in support of this my application for leave to move for judicial review exceed 10 pages and I am advised by Advocates that I must lodge with the Principal Registry of the High Court of Judicature for Zambia an indexed and paginated Bundle of Documents. I will rely on the said Bundle of Documents as part of my evidence to this Honourable Court notwithstanding that the same are Public Documents.

5. That on the 30th day of April, 2012, I received a letter authored by His Excellency the President of the Republic of Zambia suspending me from performing my duties as a Puisne Judge of the High Court pending the proceedings of a Tribunal purportedly appointed pursuant to the provisions of Article 98(5) of the Constitution of the Republic of Zambia. I am now shown a copy of the letter from His Excellency the President marked "CK 2"

6. That on the same day His Excellency the President held a press conference at State House where he stated that he had received credible complaints against myself, Justice Nigel Kalonde Mutuna and Justice Philip Musonda and as a consequence he had decided to appoint a Tribunal. The said proceedings of the press conference were reproduced verbatim in the Post Newspaper Edition No. 5674 of Tuesday, 1st May 2012 at pages 4 and 9 respectively under the heading *"Sata suspends three Judges".* I am now shown a copy of the extract of Post Newspaper dated 1st May, 2012 marked "CK 3".

7. That while my letter of suspension does not state the reasons of my suspension, His Excellency the President during his press conference made public the following allegations:

a) that I allegedly interfered in and illegally retrieved or caused the retrieval of the cases of Development Bank of Zambia Vs. Development Bank of Zambia Vs Post Newspapers Limited, JCN Holdings Limited and Mutembo Nchito and the case of Finsbury Investments Limited vs Antonio Ventriglia and Manuela Sebastiani Ventirgilia from Justice Albert Mark Wood

b) that I had allegedly misbehaved and/or acted incompetently together with Justice Phillip Musonda and conspired to pervert the course of justice by retrieving records of the aforementioned cases from Justice Albert Mark Wood consequently interfering with the impartiality and independence of Judge Mark Albert Wood in the course of his judicial functions;

c) that I allegedly jointly misbehaved with Justice Philip Musonda and/or acted incompetently when we retrieved or caused the retrieval of the case records of the cases of Development Bank of Zambia Vs Post Newspapers Limited, JCN Holdings Limited and Mutembo Nchito and the case of Finsbury Investments Limited Vs Antonio Ventrigilia and Manuela Sebastaini Ventrigilia based on unverified and undocumented complaints purportedly raised off the record; and

d) That I allegedly acted jointly with Judge Musonda owing to political considerations, exigencies and influence when I retrieved the records to the aforesaid cases.

8. That at no material times have the allegations leveled against me ever been lodged or made known to the Judicial Complaints Authority as prescribed by the Constitution of the Republic of Zambia as read together with the provisions of the Judicial (Code of Conduct) Act No. 13 of 1999. I am advised by Counsel and verily believe that His Excellency the President had prematurely invoked the provisions of the Constitution of the Republic of Zambia by establishing the Tribunal as the complaint authority of first instance.

9. That the Defendants have since filed an appeal in the Supreme Court in the case of Development Bank of Zambia Vs Post Newspapers Limited, JCN Holdings Limited and Mutembo Nchito under cause number SCZ/8/132/2012. I invite this Honourable Court to exercise its inherent jurisdiction to review the record in the Supreme Court wherein a Notice of Appeal has been duly filed.

10. That I did on the 15th of May, 2012 cause to be served on the Learned Attorney General the requisite letter before action. I am now shown a copy of the letter dated 15th May, 2012 marked "CK 4"

11. That I verily believe that the Respondents will not be prejudiced in any way if I am granted leave to apply for judicial review but conversely the interests of justice will be served so that my intended application which I believe is possessed with the requisite merit is considered accordingly.

12. That the contents of this my Affidavit are true and correct to the best of my knowledge and belief.

SWORN by the said
Charles Kajimanga
this …….. day of ……
2012 at Lusaka

Before me: ……
COMMISSIONER FOR OATHS

This application was granted on 16th May, 2012 ex-parte. The High Court Order reads as follows:-

'UPON HARING COUNSEL for the Applicants and READING the Affidavits of NIGEL KALONDE MUTUNA (MALE) AND CHARLES KAJIMANGA (MALE) respectively.

IT IS HEREBY ORDERED THAT THE Applicants be and are hereby granted leave to apply for Judicial Review.

AND FURTHER ORDERED THAT the Leave so granted shall operate as a Stay of the Decisions of His Excellency the President of the Republic of Zambia to appoint a Tribunal, to suspend the Applicants and any adverse measures against the Applicants who are citizens of the Republic of Zambia in relation to the performance of their Constitutional Duties as duly appointed puisne Judges serving in the High Court of Judicature for Zambia pending the full determination of this matter or until any further direction by this Honorable Court.

Dated at Lusaka this 16 day of May 2012'

(Signed)

THE HONOURABLE HIGH COURT JUDGE

Following this order, in favour of the 1st and the 2nd Respondents, the 3rd Respondent took out summons and applied to the Supreme Court to join as the 3rd Applicant (now the 3rd Respondent). The 3rd Respondent's affidavit reads:-

SCZ/8/185/2012

In the Supreme Court for Zambia
Holden at Lusaka
(Civil Jurisdiction)

BETWEEN:

The Attorney-General	**Appellant**
And	
Nigel Kalonde Mutuna (Male)	**1st Respondent**
Charles Kajimanga (Male)	**2nd Respondent**

AFFIDAVIT IN SUPPORT OF SUMMONS TO JOIN PROCEEDINGS

I, Phillip Musonda of 12 Sianjalika Road, Woodlands Lusaka in the Lusaka province of the Republic of Zambia make oath and say as follows:-

1. **That my full names are as stated above.**

2. That I am a Judge of the Supreme Court.

3. That I am a Zambian National.

4. That I reside at 12 Sianjalika Road, Woodlands Lusaka aforesaid.

5. That His Excellency the President Mr. Michael Chilufya Sata suspended me along with Judges Kajimanga and Mutuna by a letter dated 30th April, 2012 purportedly pursuant to Article 98(5) of the Constitution and appointed a tribunal.

6. That my two colleagues applied for Leave to apply for judicial review of the decision to appoint a tribunal and suspend us from performing our functions as Judges which application was granted and operated as a stay.

7. That the basis of the application was and is that the procedure laid down by the Judicial Code of Conduct, which statute was enacted pursuant to Article 91(2) of the Constitution was not followed.

8. That in a memo of 27th February, 2012 to the Chief Justice marked "PM 1". I had explained that in the case of Finsbury Investments Vs Antonio Ventriglia I received a complaint against Justice Wood, which I later passed to Justice Kajimanga as my deputy and Judge in Charge of the commercial list, who was also a close friend of Judge Wood to deal with and that was the end of my role.

9. That I did mention to him that in some cases that Judge Wood was handling some litigants alleged that some of the parties

were friends or acquaintances of the judge. Attached is one such complaint marked "PM2".

10. That with regards to the case of Development Bank of Zambia Vs. JCN Holdings, Post Newspaper Limited and Mutembo Nchito 2009/HPC/0322, I had no knowledge that the case was filed into Court nor did I discuss it with Judge Kajimanga or Judge Wood as both can vouch.

11. That in the correspondence to the Chief Justice I had raised the issue of complying with the judicial code of conduct on 27th February, 2012 and again raised this issue on 1st May 2012 immediately after our suspension when I wrote the Chairman of Human Rights Commission in my capacity as President of the Magistrates and Judges Association of Zambia which is hereto attached and marked as exhibit "PM3".

12. That I issued a statement through my lawyers when an impression was being created, that the President had no power to appoint a tribunal, that he had substantive power to set up a tribunal subject to compliance with the procedure.

13. That the issue has not been power to appoint the tribunal, but compliance with procedure laid down in the judicial code of conduct before the exercise of that power.

14. That any misconduct must be contrary to that statute before the disciplinary process can be set in motion.

15. That I am desirous of joining as respondent in opposition to the state's appeal as I am jointly charged with the two Respondents in order to avoid multiplicity of actions.

16. That I verily believe that receiving a complaint from a litigant and passing it on to my deputy who was in charge of the commercial List handling the matter can never be misconduct as in the case of Finsbury Vs Antonio Ventriglia.

17. That as regards the case of Development Bank of Zambia Vs JCN Holdings, Post Newspaper Limited and Mutembo Nchito 2009/HPC/0322, I did not know the matter existed for me to be able to conspire to transfer it as the terms of reference suggest.

18. That in any event there is a ruling in Musa Ahmed Adam Yousuf Vs Rajan Mhatani and Others 2011/HPC/0081 delivered on 9th May 2011 and National Airports Corporation Limited Vs Mines Air Services Limited T/A Zambia Railways 2009/HPC/2006 delivered on 20th July, 2011, both by Judge Mutuna and in favour of the complainants. There is now produced to me marked " PM4" and PM5" the two judgments.

19. That if as Judge in Charge I was interfering against the complainants' cases why didn't I interfere with them. As Judge in Charge for Lusaka, Eastern and Western province I could try any matter if I wanted, but I exercised that power judiciously so as not to interfere in other Judges' work as that could be contemptuous and undermine the independence of the Judges.

20. That I depose to the facts in this affidavit from facts within my personal knowledge verily believing the same to be true.

21. That I pray that I be allowed to join the Respondents in opposition to the states appeal as I have more than sufficient interest and the outcome has bearing on me and such order granting me leave to join the proceedings should enjoin me to the Order granting leave to commence Judicial Review and act as a stay of the decision to appoint a tribunal against me and my suspension from performing my duties as Judge of the Supreme Court.

Sworn at Lusaka by the said]
Justice Philip Musonda]

Before me……
COMMISSIONER OF OATHS

On 31st May, 2012, this application was granted. The Order which was granted by the Supreme Court to 3rd Respondent was couched in the following manner:-

“ORDER TO JOIN PARTY TO PROCEEDINGS

THAT UPON reading the affidavit of PHILLIP MUSONDA and UPON HEARING COUNSEL it is HEREBY ORDERED THAT the said PHILLIP MUSONDA

be added as the 3rd RESPONDENT to this appeal and that he be enjoined to the Order granting leave to apply for Judicial Review granted by the High Court and that such leave is to act as a stay of the decision to appoint a tribunal against the 3rd Respondent and that his suspension from performing his duties as Judge of the Supreme Court is also hereby stayed pending further Order. IT IS FURTHER ORDERED that the costs of this application be in the cause.

DATED THE 31st DAY OF MAY 2012

Signed

HON. JUDGE OF THE SUPREME COURT"

The Appellant then on 17th May, 2012 took out summons to discharge leave granted ex-parte to the Respondents pursuant to Order 53/14/4 and Order 54/14/62 of the rules of the Supreme Court 1999 edition on the following grounds that the substantive application was going to clearly fail in view of the Provisions of

Article 98(3) of the Constitution of the Republic of Zambia and particularly:-

a. That His Excellency the Republican President acted within his express constitutional powers as contained in Article 98(3) of the Constitution of the Republic of Zambia when he decided to appoint a tribunal to inquire into the conduct of the Applicants. The decision of the Republican President was therefore *intra vires* his express constitutional powers.

b. That there is no procedural impropriety whatsoever on the part of the Republican President as Article 98(3) of the Constitution does not require the President to hear the applicants before he decides that the question of removing them ought to be investigated. Article 98(3) (a) and 98(5) mandate the Tribunal to be the medium through which the Respondents would be heard. The Respondents had, therefore come to court prematurely contrary to the provisions of the Constitution.

c. That further to the above, the Judicial (Code of Conduct) Act No. 13 of 1999 is subsidiary to the provisions of Article 98(3) of the Constitution and cannot be used to fetter the Republican President's power under the Constitution.

d. That the decision of the Republican President to suspend the Applicants and to appoint a tribunal to inquire into their conduct

was not unreasonable in the Wednesbury sense or at all and the Respondents had not displayed anything to exhibit unreasonableness in the Wednesbury sense.

e. That the power to appoint a Tribunal by the Republican President was a Constitutional check on the Judiciary and the Judiciary could not hear a matter touching on the check on its power at the time and in the manner suggested in the application because it would become a judge in its own cause endangering the well established principle of **nemo judex in sua causa** or no man should be a judge in his own cause.

The learned Solicitor-General deposed in an affidavit in support of these summons that the application for Judicial Review was going to clearly fail on the basis of the law and authorities cited. This application for the leave to be discharged was heard by the High Court on the 17th May, 2012.

Briefly the arguments by the Appellants, before the High Court, augmenting the points in the summons quoted supra, were that the lower court has powers to grant leave ex parte. At the initial stage, the court is only required to grant leave if satisfied that there are points fit for further investigations, having considered the facts and the Law. That where the court harbored

a doubt, then the Court ought not grant leave ex-parte. It was further argued that after granting leave to a litigant the next stage was where the defendant sought an order to discharge that leave granted ex-parte. At that stage, it was argued that leave granted could only be discharged if the defendant clearly showed that the substantive application was clearly going to fail (see Order 53/14/4). That is the law.

The learned Solicitor-General, in augmenting his arguments before the lower court, firstly submitted that they were going to rely on the grounds listed in the summons and on his brief affidavit filed in support. He then argued that in this case as leave was already granted and as this was an application to discharge that leave granted ex parte, the stage now next, therefore, was to consider whether or not leave granted can be discharged. The Appellant's position was that at this stage, the Appellant was obliged to delicately delve into the merits of the main application to establish that that application was going to fail at the main hearing. The Solicitor-General argued that in this case before the court the main application was going to fail because of the following reasons:-

i. That as Article 98(2) provides that disciplinary proceedings against a Judge emanating from His Excellency the President, shall only be in accordance with Article 98. That the Constitution has declared that, in as far as His Excellency's powers are concerned, Article 98 is complete in itself in as far as the disciplinary proceedings against the Judges of the High Court, Industrial Relations Court and those of Supreme Court are concerned. As regards the argument advanced by the Respondents that His Excellency's exercise of power under Article 98(5) was limited by Article 91 as read with the Judicial Code of Conduct Act No. 13 of 1999, the Solicitor-General quoted Article 98 and referred to Article 98(5) which mandates His Excellency to suspend a judge pending disciplinary proceedings to be conducted through an appointed tribunal. He compared Article 97 with Article 98 and argued that had the legislators wanted to subject the provisions of Article 98 to Article 91, they would have couched Article 98 in the same way as Article 97 which states:-

"(1) <u>Subject to clause (2),</u> a person shall not be qualified for appointment as a judge of the Supreme Court, a puisne judge or Chairman or Deputy Chairman of the Industrial Relations Court" (emphasis ours)

(ii) That there was nothing in the Constitution that expressly or even implicitly limited the powers of the President under Article 98. The provisions of Article 98 were very clear and unambiguous, see the **Chiluba** case[1]

(iii) On the Respondents' allegation of procedural impropriety grounded on the fact that the Respondents were never given a hearing before the Tribunal was appointed, the Solicitor-General argued that the discretion given by the Constitution to appoint a tribunal to inquire into the conduct of Judges is placed solely in the person of His Excellency. He is under no obligation under the Constitution to give the Respondents a hearing before he appoints a tribunal to inquire into their conduct. Citing the case of **Shilling Bob Zinka v Attorney-General[14]**, he argued that where there is clear discretionary powers given by the Law, there is clear indication of the absence of an obligation to act judiciously In augmenting this point, the Solicitor-General cited the **Chiluba case[1]** afore-cited where this court emphasized that the absence of express provisions in the Constitution regarding the National Assembly to give the Applicant a hearing, indicated that Parliament did not intend that there

was to be a right to be heard to the former head of State before lifting his immunity. The Solicitor-General, therefore, urged the High Court to hold that there was no procedural impropriety in view of the clear provisions in Article 98 and the authorities cited. To buttress this point, the learned Solicitor-General pointed to another factor that the tribunal was going to receive evidence from both sides subjected to cross examination. This proved that His Excellency had not decided to discipline the three Respondents without giving them a chance to be heard. His Excellency by appointing the tribunal followed the laid down procedure in the Constitution which ensured that the Respondents were going to be heard through the tribunal. The provisions in article 98(3) did not provide for a judge to be heard before establishing a tribunal. Also according to the Solicitor-General, the words in Article 98 (3) established that Judicial Review process would give the Respondents a chance to be heard. Citing **CS Investigations Limited v Car Hire Limited[15], Sunday Maluba v Attorney- General[19]** and the case of **A. Chungu and Faustina Kabwe v Attorney-General[23]**, it was argued that as the tribunal proceedings were investigative by nature, it was, therefore, not tenable at law for anybody to employ judicial review process to curtail these investigations.

(iv) On the alleged ground of irrationality (unreasonableness), the learned Solicitor-General argued that to succeed on this

ground, there should have been evidence by the Respondents establishing that His Excellency's decision was so devoid of reasons in that it was so outrageous in its deficiency of logic or acceptable moral standards that no reasonable person in the position of His Excellency, applying his mind, would have decided as His Excellency did. So the Solicitor-General invited the Court to rule whether or not that was so that no reasonable President who had received what he called "Credible complaints", would have constituted a process of investigations of the 3 Respondents in the manner His Excellency did. On this point, the Solicitor-General contended that His Excellency, in his capacity as the President, receives information from different sources which information is not in the public domain. He also argued that the High Court, sitting as Judicial Review Court, was not an appeal court. Its role was just to declare whether the decision making process was unreasonable in the Wednesbury sense, see the **Chiluba[1] case**. The Solicitor-General further pointed out that if the court accepted that His Excellency holds a high and unique position in Zambia and that by virtue of that position, he can be seized with credible information that is not in the public domain, the court could not then conclude that his decision was tainted with illegality. So he urged the High Court to discharge the Leave order granted. Citing the case of **Chitala and Vs Attorney-General[7],** the learned Solicitor-General argued that had the learned trial Judge taken proper assessment of the

facts as presented and the authorities cited, she would not have granted leave.

The Respondents, in response, opposed the application to discharge leave obtained ex-parte. Mr. Shonga, State Counsel, for 1st and 2nd Respondents argued that the decisions by His Excellency fell within the scope of those capable of being inquired into by way of Judicial Review. This law is well settled; see the case of **Godfrey Miyanda v Attorney-General[31], Ridge v Baldwin[33] and Council of Service Union v Minister of Civil Service.** He argued that those authorities established that yes the decision of the Republican President can be investigated through Judicial Review process. Mr. Shonga SC argued that it was settled law that when a Court gives a Stay in Judicial Review process, it is not an injunction, see **Kabimba[32]** case. It does not offend the State Proceedings Act, see ***Mpulungu Harbour Management Limited v Attorney General[24] and Kabimba vs Attorney-General[32].***

Mr. Shonga, SC., in his further arguments observed that the Appellant only dealt with three issues raised in the summons leaving 2 grounds (i.e ABD leaving C & E) before the High Court.

We note however, that the learned Solicitor-General indicated at p168 in his submissions that **“we rely on the grounds listed in the summons and also on the affidavit filed in support”**, so they were relying on all allegations stated in the summons.

Further, Mr. Shonga, SC pointed out that the appellant’s submissions were responses to the main Judicial Review issues. He pointed out that at this stage, the issues presented should have been carefully confined to the consideration of granting the Respondents leave. According to State Counsel, at this stage the central issue for consideration was whether or not the court had a basis for holding that a prima facie case had been made out based on the evidence and law before it. The evidence, therefore, that a party had to bring at the leave stage would not be as detailed as what one had to bring at a full interparte hearing. See the case of ***Inland Revenue Commission v National Federation of Self Employed and Small Business Limited[3] and Mpulungu Harbar v Attorney General[24].***

According to State Counsel, citing ***Kasai Mining & Equipment Limited v Attorney General[6],*** even at this stage of applying to discharge the ex-parte leave, according to the provisions of Order 53/14/62, the hearing should have been confined to the question whether or not the court was right to have granted ex parte leave. In his view, the court was on firm ground to have granted leave on the affidavit evidence and the law presented to it.

Mr. Shonga, State Counsel, further submitted that whereas it is correct that leave obtained ex-parte can be challenged in accordance with the provisions of Order 53/14/4, the party so challenging the ex-parte order must not say that the application is likely to fail but must say that the Applicant's application is certainly going to fail. According to State Counsel, a party so challenging the leave order must show absolutely that there is nothing for the court to further investigate at the full inter-parte hearing. Conversely, State Counsel Shonga submitted, a party defending the application to discharge must show to court that there were still issues to be investigated at the main hearing. He told the Court that at this stage, his clients needed to show therefore that there were issues still to be investigated at full

trial. His further submissions were that all they had to show to the Court at that stage was that they had brought to the Court table matters fit for investigations. He told the Court that at this stage the Respondents needed not to satisfy the Court that they were going to succeed at the full hearing but that they had brought to Court legitimate issues which required answers.

On the ground of illegality, State Counsel posed questions which he argued remained without answers. The following are the questions:-

1. Is Article 98 (3), a stand- alone clause in the Republican Constitution?

2. If the powers under Article 98 (3) of the Constitution are not subject to any other clause why is this Article not expressed in terms akin to the words employed in Article 98 (1) which starts with the words subject to the provisions of this article? (sic)

3. Is article 98 (3) intended to be read together with Article 91 (2)?

4. What bearing do the provisions of Article 139 sub articles 7 and 8, have on Article 98 (3) 2.

5. Is there a connection between Article 91 (2) and the Judicial Code of Conduct Act No. 13 of 1999?

6. Does the Judicial Code of Conduct present itself as an essential ingredient or sine qua non, as the President exercises his jurisdiction to appoint a tribunal?

7. Is there more that must happen before the President appoints a tribunal?

8. Has the President lawfully and properly exercised his jurisdiction to appoint a tribunal?

9. Has the question of removing the applicants from office arisen?

10. When and how would the question of removing the applicants from office arise?

11. Was it lawful for His Excellency to appoint a tribunal to investigate misbehaviour or incompetence on the part of the applicants when there are two appeals pending in the Supreme Court? Under the second ground, the following are some of the question that arise. Do the rules of natural justice apply given the facts of this case?

12. Should the applicant have been heard through the Judicial Complaints Authority before the tribunal was set?

13. Was there bad faith exhibited by the Republican President when he made pronouncements of misbehaviour and corrupt disposition before an investigation was undertaken? What bearing does the provision in the Judicial Code of Conduct Act requiring that any complaint against a Judicial officer shall be investigated and conducted in a confidential manner have on this matter? On the third ground these are some of the questions that will arise.

14. Is the decision by the Republican President to appoint a Tribunal to investigate the applicants premised on

political considerations?

15. Is the decision or are those decisions unreasonable in the Wednesbury sense?

So all these questions according to State Counsel remained unanswered, and as such, could only have been responded to at a full inquiry.

Mr. Jalasi only made two points. These are:

1. On the distinction between the case before the court and the ***Chiluba case***[1], he argued that the court, in the **Chiluba case**[1], only dealt with the interpretation of Article 43 of the Constitution whereas in the current case, the court has to deal with the interpretation of two articles, Articles 91 and 98 of the Constitution. So the **Chiluba case**[1] was not applicable.

2. On the distinction between criminal investigations and those relating to other investigations and the Solicitor General's submission that the principle established in ***C & S Investments Limited***[15] that it is not possible for any litigant to employ Judicial Review proceedings to curtail investigations of any kind, his argument is that this principle was not applicable to this case.

In response, the learned Solicitor-General, SC argued that under Article 91 (2) there is a prescription of how Judicial officers must conduct themselves, and that that Article does not relate to His Excellency's powers. According to the Solicitor-General, Article 91 relates solely to the Judicial officers as defined in the Judicial Code of Conduct Act, whereas Article 98 relates to His Excellency's powers of checking on the Judges.

He further argued that the **Chiluba Case**[1] enunciated the principle that courts should not gloss over clear constitutional provisions and should not allow interpolations to be applied to express provisions of a Constitution. So he urged the Lower Court to discharge Leave.

The Lower Court ruled that there were issues fit for further investigation and that at the main inquiry the court had to decide whether or not there was an interplay between Article 98 (a) and Article 91 of the Republican Constitution and the Judicial Code of Conduct Act No. 13 of 1999. So the High Court refused to discharge leave.

Dissatisfied with the ruling of the learned Judge, the Appellant has appealed to this court raising nine grounds of appeal. These are that:

"1. The learned Judge in the court below misdirected herself by purporting to prescribe a condition precedent for the President's exercise of his constitutional power under Article 98(3) of the Constitution of the Republic of Zambia ('The Constitution').

2. It was misdirection of a serious kind for the learned Judge in the court below to hold that the Republican President can only invoke his constitutional powers under Article 98(3) of the Constitution, upon the advice of the Chief Justice given under subsidiary legislation passed later than the Constitution, namely the Judicial Code of Conduct Act No. 13 of 1999.

3. It was serious misapprehension of constitutional provisions and consequently a misdirection for the learned Judge below to suggest, as she did, in her Ruling that there was an interplay between Article 91 (2) of the Constitution and the Judicial Code of Conduct Act on one hand and Articles 98 (2), (3) and (5) of the Constitution on the other.

4. The learned Judge in the court below grossly misdirected herself by interpreting Article 98(1) of the Constitution in a manner inconsistent with the current meaning (i.e. the time of adoption and passage of the Constitution) of the words used in that Article.

5. By failing to construe the text of the Constitution according to its original understanding – that is, the way the text was understood by the people who drafted and ratified it, the learned Judge in the court below departed significantly from basic principles of constitutional interpretation and thereby fell into grave error.

6. The learned Judge in the court below erred when she held that Presidential powers given under Article 98(3) of the Constitution were assailable on the basis of Article 91 (1) and 91(2) of the Constitution.

7. The learned Judge in the Court below misdirected herself in law and in fact in finding as she did that on the facts and the arguments advanced there was a *prima facie* and arguable case sufficient to justify refusal to discharge the *ex-parte* order granting leave for judicial review.

8. By issuing an order staying the decision of the Republican President, which order was couched in

mandatory terms and thus effectively reversing rather than merely staying the Presidential decision, the learned Judge fell into grave error.

9. It was a travesty of Justice for the learned Judge below to have adopted an approach in her Ruling which effectively prejudged the issues that should have been properly reserved for the main judicial review hearing.

Before the hearing of the appeal, the 3rd Respondent applied to the Supreme Court to be joined as one of the applicants in the main Judicial Review. This application was granted by a single Judge of this court. So this appeal is against the three Respondents.

At the hearing of this appeal, counsel for the 1st and 2nd Respondents filed a notice to raise three preliminary objections. These are:-

(i) why ground 8 of the appeal should not be expunged from the record because the Appellant had not sought leave to amend memorandum of appeal to exclude ground 8. Ground 8 of the appeal reads:-

“By issuing an order staying the decision of the Republican President, which order was couched in mandatory terms and thus effectively reversing rather than merely staying the Presidential decision, the learned Judge fell into grave error.”

It was argued for the 1st and 2nd Respondents that this ground was incompetent as it was being canvassed by the Appellant for the first time in the Supreme Court which is an appellate forum and, consequently, this court was wanting in jurisdiction as the matter was not canvassed in the High Court.

(ii) that grounds 1,2,3,4,5,6 and 9 as the grounds of appeal purported to delve into arguments against substantive issues fit for further investigation at Judicial Review hearing and hence incompetent.

(iii) that the record of appeal had not been prepared in the manner prescribed by the Supreme Court Rules, Statutory Instrument No. 70 of 1975 (as amended) of the Supreme Court of Zambia Act, Chapter 25 (this objection was abandoned during the hearing. So we will not make any comments on it in this judgment).

On the first objection, State Counsel Silwamba first made general observations as an introduction to their first preliminary

objection. He went on to argue that the memorandum of appeal had 9 grounds of appeal and since it is trite law that an Appellant has to be restricted to the grounds of appeal in the memorandum, the introduction in the memorandum had no bearing to the appeal. State counsel Silwamba cited a number of cases as authority:-

Kearney and Company V Taw International Leasing Corporation (1978) ZR 329, Josephat Mlewa V Eric Wightman (1995/1997) ZR 171, Jonathan W. M. Kalonga and Zambia Printing Company Limited vs Titus Chisamanga and Joyce Vinkumba (1988-1989) ZR 52 and Friday J. Ngwira Vs Zambia National Brokers Limited SCZ judgment No. 9 of 1999.

and argued that the Appellant, having not applied to amend the memorandum, should not argue Ground 8 as it was being canvassed for the first time before this court. State Counsel's argument was that the argument about the Order of "stay" attached to the Order of "leave", even on cursory perusal of record, revealed that this ground was being raised for the first time on appeal. As it had not been canvassed in the High Court, therefore, it was misconceived. He referred to the portion where State Counsel Shonga attempted to raise it in the court below. He

cited the case of **Mususu Kalenga Building Limited, Winnie Kalenga and Richmans Money Enterprises**[5] and made reference to page 176 of the record where according to State Counsel, the learned Solicitor-General objected to the submissions by Mr. Shonga, State Counsel, on the **"Order of Stay"** to the lower court. The court ruled in favour of the Appellant resulting in the ousting of all submissions on the effect of that order of stay granted by the High Court ex-parte. State Counsel, making reference to the court's own remarks in the Ruling, argued that even the remarks in the Ruling by the court, were made *orbiter dictum.* Citing Order 53/14/4 and Order 53/14/62, Counsel argued that a discharge of leave granted to an applicant can only be granted if the litigant, attacking the leave order establishes that the Judge's decision, that the case was fit for further consideration, was plainly wrong. So State Counsel asked this court to expunge ground 8 from the record.

The second preliminary objection, State Counsel raised was that grounds 1,2,3,4,5,6 and 9 of the grounds of appeal in the memorandum of appeal delved into the merits of the substantive Judicial Review. These grounds read as follows:-

"1. The learned Judge in the court below misdirected herself by purporting to prescribe a condition precedent for the President's exercise of his constitutional power under Article 98(3) of the Constitution of the Republic of Zambia Volume of the Laws of Zambia ('The Constitution').

2. It was misdirection of a serious kind for the learned Judge in the court below to hold that the Republican President can only invoke his constitutional powers under Article 98(3) of the Constitution, upon the advice of the Chief Justice given under subsidiary legislation passed later than the Constitution, namely the Judicial Code of Conduct Act No. 13 of 1999.

3. It was serious misapprehension of constitutional provisions and consequently a misdirection for the learned Judge below to suggest, as she did, in her Ruling that there was an interplay between Article 91 (2) of the Constitution and the Judicial Code of Conduct Act on one hand and Articles 98 (2), (3) and (5) of the Constitution on the other.

4. The learned Judge in the court below grossly misdirected herself by interpreting Article 98(1) of the Constitution in a manner inconsistent with the current

meaning (i.e. the time of adoption and passage of the Constitution) of the words used in that Article.

5. By failing to construe the text of the Constitution according to its original understanding – that is, the way the text was understood by the people who drafted and ratified it, the learned Judge in the court below departed significantly from basic principles of constitutional interpretation and thereby fell into grave error.

6. The learned Judge in the court below erred when she held that Presidential powers given under Article 98(3) of the Constitution were assailable on the basis of Article 91 (1) and 91(2) of the Constitution.

9. It was a travesty of Justice for the learned Judge below to have adopted an approach in her Ruling which effectively prejudged the issues that should have been properly reserved for the main judicial review hearing.

State Counsel canvassed the view that at an application for leave stage, the court is not concerned with the question of whether or not there is merit in the application for judicial review but rather with the question whether or not an applicant has presented

before the court an arguable case. State Counsel referred to the learned Authors of **Micheal Supperstone QC and James Goudie QC[2],** in the celebrated and widely recognized book known as **Judicial Review**, where they aptly explain the process as:-

"As far as the substantive merits are concerned, it is equally apparent that the court will normally only carry out a brief preliminary examination. The test is whether or not there is an arguable case."

State Counsel's view is that all these grounds of appeal dealt with substantive issues and as such, are incompetent because the learned trial Judge did not make a final decision on the legal questions raised but merely held that the Respondents had established a *prima facie* case which warranted further investigations. State Counsel cited a portion of the Ruling at page 30 lines 12 to 13 and page 21 of the submissions. Citing the case of **R V Secretary of State for the Home Department, Ex parte Chelblak[20]**, State Counsel submitted that the extended arguments by the Appellant inviting the court to examine substantive matters at leave stage was a gross misconception

and flew in the teeth of established principles of a sieving process of judicial review. To support this proposition, he cited the case of **IRC V National Federation of self employed and small businesses Ltd[3],** where the House of Lords had occasion to mull over principles in play during an application for judicial review and where it was held that:-

"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If on a quick perusal of the material then available, the court thinks that it discloses what might turn out to be an arguable case in favour of granting the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief."

Counsel further argued that the role of the court even at this stage of applying for discharge was not to delve into the main matters but to determine whether, on the evidence before it, the applicant had presented an arguable case fit for further investigation. So he urged this court to hold that grounds 1 to 6 and nine were misconceived.

Against that background, according to State Counsel, the only proper ground filed by the Appellant was ground 7 which states:-

“The learned Judge in the Court below misdirected herself in law and in fact in finding as she did that on the facts and the arguments advanced there is a *prima facie* and arguable case sufficient to justify refusal to discharge the ex-parte order granting leave for judicial review.”

Mr. Sikota, SC, when invited to make any submissions declined but endorsed Mr. Silwamba, SC’s, submissions.

Mr. Katolo, Counsel for the 3rd Respondent when invited by the court to make any submission, only endorsed the arguments by the 1st and 2nd Respondents on those objectives raised by 1st and 2nd Respondents.

The Appellant’s response to the second preliminary objection was that all the points raised in the appeal arose from the Ruling of the court below. According to the learned Solicitor-General, the learned trial Judge in the Ruling made a number of findings and conclusions that gave rise to grounds 1 up to 6 and 9. The

learned Solicitor-General, citing Section 23 of Cap 25, argued that any appeal in a civil case or matter, has to be based primarily on the Judgment/Ruling/Order the litigant is appealing against. According to the Solicitor-General, all the issues raised in these grounds of appeal actually arose from the Ruling of the court below. The learned Solicitor-General made references to the pages in the Ruling where each of the grounds was covered and argued that as these issues were covered in the Ruling of the court below, they were, therefore, properly before this court on appeal.

As regards the first preliminary objection, the learned Solicitor-General argued that the order granting leave which is at page 110 of the record of appeal, indicated that the leave granted had acted as a stay. However, the Solicitor-General conceded to the argument that the issues relating to the effect of the stay order had not been substantively canvassed before the court because of the objection which he raised on which the learned trial Judge made a ruling in the Appellant's favour. The learned Solicitor-General however went on to argue that the effect of the order of stay was implicitly raised in the final ruling by the court.

As indicated at the hearing of this appeal, we undertook to make a ruling on these two preliminary objections before proceeding to the main appeal. Firstly, we will not deal with the third objection as the Respondents had rightly abandoned this preliminary objection upon acceptance that in principle, all triable issues must be allowed to proceed to trial to be decided on merit. We, therefore, acknowledge the gesture by State Counsel Silwamba, acting for the Respondents when he accepted this position.

On the first objection which says that ground 8 of the grounds of appeal be expunged as it was not canvassed by the Appellant before the High Court and that it was being canvassed for the first time in the Supreme Court, we agree that it is settled principle of law that issues not canvassed before the High Court cannot be raised at the Supreme Court level. A plethora of authorities for example **Mususu Kalenga**[5] and others has put this question beyond doubt. The only exception to this general principle is what was said in the **Levy Mwanawasa** presidential petition case, echoed in **Nkongolo Farms**[21], that is that where a

litigant raises an issue in court which may not have been pleaded and the other side raises no objection to raising such an issue, it is trite law that the court is obliged to deal with such an issue. So in relation to the issue which has been raised on Ground 8, we have looked at the memorandum of appeal. We have also looked at the proceedings in the court below where State Counsel Shonga wanted to introduce this issue relating to the grant of **"stay"**. He said:-

"Secondly, when the High Court grants a stay against the State or the decision of the State in judicial review proceedings, does that order my lady amount to an injunction and does it offend the State Proceedings Act, we submit that it does not. We refer the court to the Supreme Court decision of AG vs Mpulungu Harbour Management Ltd Appeal No. 100 of 2006. The Court said that the order staying the decision did not amount to an injunction. We would also refer the Court to the case of Wynter Kabimba vs AG 1995/97 ZLR P. 152.

S.G: I seek the Court's guidance that we did not submit on whether or not the Court had jurisdiction to grant a stay. In these proceedings the application is to discharge leave.

J. SHONGA: I see nothing wrong in raising the issue that I have particularly that what is in issue before you is the question of whether or not leave granted by this court should be discharged. Appended to the order granting leave is a stay and so I felt it prudent to address the court on this issue as part of our submissions. There is no prejudice to the State. I so submit.

COURT: I observe that the learned Solicitor General did not
address the issue of whether or not the leave granted amounted to an injunction. His silence on the point suggests that he had no issue to raise on the point. That being the case, the argument advanced by the learned State Counsel for the applicant may not be necessary at this stage. But it is my considered opinion that it does not prejudice the State. I however guide that State Counsel Mr. Shonga leaves the uncontested issues and proceeds to submit on the contested issues."

We note that the learned trial Judge ruled in favour of the Appellant. In other words, the submissions on the effect of the order of "stay" were halted. The court was not further addressed on this subject matter. Even the Respondents have conceded to this argument. So this matter was put to rest.

However, it was argued by the learned Solicitor-General before this court that the subject of "stay" was implicitly introduced by the ruling of the learned trial Judge. Although we accept that the learned trial Judge in her Ruling made references to this order of stay, nonetheless, we accept State Counsel Silwamba's argument that this was *orbiter dictum*. We accept that argument because in our view, even in those remarks, the learned trial Judge did not deal with the subject matter as to whether or not the granting of the stay would affect the powers of the President or restrict the powers of the President in dealing with his powers of checking on Judges. We accept that her remarks were made in relation to the Hon. Minister of Justice's remarks about the ex-parte order of leave which had been granted. On the seminal question whether a party can raise a ground of appeal based on an issue which is brought in by the court on its own motion in a judgment, our view is that pursuant to Section 23 Cap 25, a party has a right to challenge any portion of the judgment. However, it is trite that an *orbiter dictum* is not part of the decision or *ratio decidendi* of the court. So coming back to this particular objection, we find merit on the 1st objection. This court has no jurisdiction, therefore, to deal with Ground 8.

Coming to the second objection relating to in-depth reference to pages of the record of Appeal and citations which have been advanced by the Appellant, resulting in these grounds 1,2,3,4,5,6 intensively dealing with findings which mainly covered issues said to be fit for the main Judicial Review inquiry, we have mulled over the arguments advanced and citations presented to this court by both sides. It is beyond dispute that the procedure and the law to all extent applicable to Judicial Review process in Zambia, falls under the principle of *cassus omissus*. Therefore, the rules of procedure applicable in Zambia are the rules and procedure applicable in United Kingdom elucidated in the White Book 1999 edition, (see section 10 of Cap 27 High Court Act as amended by Act No. 7 of 2011). In other words, in Zambia, we apply the procedure laid down in Order 53 of the Rules of the Supreme Court 1999th Edition (White Book) because our High Court rules do not have provisions stipulating the rules and procedure in Judicial Review process. We are, therefore, in total agreement with the Respondents' argument that the first stage of the Judicial Review is a stage of applying for leave. At that stage and this is common ground that it is a filter

stage. The applicant is only required to present sufficient evidence for the court to be satisfied that the issues raised require further investigations. In other words, the applicant has to establish a *prima facie* case or present arguable issues or present issues fit for further investigations. We also agree that at that stage, the court is concerned not with the merit but rather with the question of the process of reaching the decision being challenged. The authorities on this principle are plethora for instance cases such as **IRC V National Federation of Self Employed and Small Businesses[3].**

However, it is common ground that the Ruling which is being challenged before this court is not on granting of leave, what is being challenged is the next stage which is what the Appellant applied for, a discharge of the exparte leave order granted under order 53/14/4 which says:-

"Discharge of Leave – It is open to respondent (where leave to move for judicial review has been granted ex parte) to apply for the grant of leave to be set aside (see paras 53/14/62 to 53/14/14/64, below); <u>but such applications are discouraged and should only be made where the respondent can show that the substantive application will clearly fail</u>" (our own emphasis)

Order 53/14/62 says

“Application by a Respondent seeking discharge of the grant of leave to move for judicial review-
In R v Secretary of State for the Home Departement, ex p. Rukshanda Begum (1990) C.O.D 107 CA, the court of Appeal dealt with two cases where leave to move for judicial review had initially been granted by the High Court judge ex parte, and then, on the application of the Respondent and after an inter parte hearing, the grant of leave to move for judicial review was set aside...”

The Respondents have argued in gist that the learned trial Judge made no findings of fact and since there were no findings of fact, grounds in 1,2,3,4,5,6 and 9 are incompetent. Citing a number of authorities, they have argued that these grounds offend the basic rules.

We entirely agree with the learned Solicitor-General that at this stage of applying for discharge, the applicant has the onus to prove to the court on the balance of probability that the main application for judicial review will certainly fail at the hearing of substantive issues. It is required of the person challenging the order of leave to be able to show to the court that infact the main matters will certainly fail. In other words, the High Court should not have granted leave had it looked at the law and the facts before it. The Respondents have argued in gist that the learned trial Judge made no findings of fact. Although we see that

grounds, 1,2,3,4,5,6 and 9 indeed raised substantive issues, what the Appellant is canvassing is that the learned trial Judge at this stage should have looked at the law and should have instead of leaving questions to be responded to at the main judicial review inquiry, responded to those questions taking into account the affidavit evidence and the legal arguments which the Appellant presented to the court. This was a defining case in that serious seminal constitutional issues had been raised. So leave to proceed to the main judicial inquiry ought not to have been allowed. What the Appellant was canvassing was that had the learned trial Judge examined and assessed the law and the facts before her, she would have settled the legitimacy of the application before her and she would have decided whether the main issues would certainly fail. We agree with the Appellant that the learned trial Judge by agreeing with the Respondents that there were issues to be inquired into at the main judicial inquiry made decisions which are covered in grounds 1,2,3,4,5,6 and 9. We agree with the Appellant that the learned trial Judge failed to arrive at conclusions captured in those grounds even when she was sufficiently addressed on the law and facts, sufficiently for her to have arrived at the conclusions. This is why the Appellants

in their arguments ingenuously kept saying had the learned trial Judge done so she would have concluded that the application to discharge had merit. So we find no merit on the second ground of the objection.

We are alive to the fact that objection No. 2 of the Respondents, although a preliminary issue, inevitably touches on the main issues in the Appeal. We will revisit these issues in the main appeal.

We now must proceed to deal with the objections raised in the notice to raise preliminary objections by the 3rd Respondent. This was in a form of a question whether this court should not stay the hearing of this matter pending the hearing of appeal number 87/2012 that is **JNC Holdings Limited, Post Newspaper Limited and Mutembo Nchito v Development Bank Zambia[17]**. It was argued that there was nexus between the two cases, as according to the 3rd Respondent, the allegations of impropriety leveled against the Respondents stemmed from the performance of their official duties in Cause No. SCZ 8/132/2012.

Mr. Katolo, arguing on behalf of the 3rd Respondent, argued that the happenings in connection with the hearing of the case of **JNC Holdings Limited, Post Newspaper Limited and Mutembo Nchito v Development Bank Zambia**[17] and **Finsbury Investments Limited vs Antonio Ventrigilia and Manuela Sebastaini Ventrigilia** cited *supra,* led to the setting up of the tribunal.

This court ruled that although the happenings in connection with the hearing of this matter of **JNC Holdings Limited, Post Newspaper Limited and Mutembo Nchito v Development Bank Zambia**[17] and **Finsbury Investments Limited vs Antonio Ventrigilia and Manuela Sebastaini Ventrigilia** led to the setting up of a tribunal, there was no *nexus* between the proceedings in the case of **JNC Holdings Limited, Post Newspaper Limited and Mutembo Nchito v Development Bank Zambia**[17] and the current proceedings. The court ruled that it was going to proceed with the hearing of the main appeal.

Now coming to the main appeal, the learned Attorney-General, augmenting the filed heads of arguments, argued that in dealing with this application to discharge leave granted ex-parte, the learned trial Judge had to inevitably deal with merits of the main judicial review application. So his argument was that her treatment of that particular issue was erroneous in that the basis on which she dismissed the Appellant's contention before her was contrary to the established authorities. He went on to argue that her determination of the application to discharge the leave order did not take into account a proper assessment of all the issues that were brought before her.

The learned Solicitor-General continued these arguments on behalf of the Appellant by arguing that besides relying on his filed heads of argument, he wanted to make oral submissions mostly on ground 7 which the Respondents had accepted as the only valid ground of appeal. It reads:-

"The learned Judge in the Court below misdirected herself in law and in fact in finding as she did that on the facts and the arguments advanced there was a *prima facie* and arguable case sufficient to justify

refusal to discharge the *ex-parte* order granting leave for judicial review."

On this ground, the Solicitor-General argued that had the learned trial Judge directed her mind to at least four considerations, she would have reached an inescapable conclusion that there was no *prima facie* case established and that the application to discharge the leave order was meritorious. These considerations were:-

(i) The nature of claims advanced by the Respondents and also to the nature of the application in the court below.

The learned Solicitor-General referred to pages 32 to 37 pointing to the statement in support of the ex-parte application for leave particularly the reliefs sought at page 34 and argued that the reliefs sought demonstrated that they were anchored on the claim that the powers of the President in Article 98(3) were diluted by the provisions of article 91(2) and the provisions in the Judicial Code of Conduct Act 13 of 1999. The learned Solicitor-General's argument was that had the learned trial Judge directed her mind to the true consideration of the provisions upon which the

Respondents' case was founded, she would have concluded that the provisions of Article 98(3) could not have been diluted by the interpolations and glosses. She would have then concluded that there was no *prima facie* case made by the Respondents requiring further considerations. The learned Solicitor-General invited the court to look at the provision of Article 91(2) which says:-

"The Judges, members, magistrates and justices, as the case may be, of the courts mentioned in clause (1) shall be independent, impartial and subject only to this Constitution and the law and shall conduct themselves in accordance with a code of conduct promulgated by parliament"

Comparing it with Article 98 (3), the Solicitor-General argued that had the legislature wanted to subject the provisions of Article 98(3) to Article 91(2), it would have made similar provisions as in Article 97 which says:-

"(1) **Subject to clause (2), a person shall not be qualified for appointment as a judge of the Supreme Court, a puisne judge or Chairman or Deputy Chairman of the Industrial Relations Court unless_"**

He argued that had she addressed her mind to this difference, she would have reached an inescapable

conclusion that as the provisions of Article 98(3) infact were clear and unambiguous, as was held in the **Chiluba case**[1], these provisions had to be given literal meaning without being diluted by any glosses and/or interpolations.

(ii) The nature of the application before her. It was the Solicitor-General's argument that the matter had gone beyond the granting of leave. The application before her was for the court to discharge the leave granted under Order 53/14/4 of the Rules of the Supreme Court, White Book, 1999 Edition. The Solicitor-General's argument is that indeed, at the stage of granting leave, the learned trial Judge had to consider whether or not the applicants (now the Respondents) had made out a prima facie case or whether or not the applicants had established arguable issues. Now at the next stage, before the High Court, the question was whether or not to discharge leave. At this stage, the learned Judge had to deal with issues as to whether or not the leave which was granted ex-parte should not have been granted, whether or not with the law and facts presented, the application to discharge

leave was meritorious. The Solicitor-General's contention is that under order 53/14/4, the onus is placed on the applicant to establish that the main application for judicial review was certainly going to fail. So under Order 53/14/4, the applicant seeking to discharge leave granted ex-parte had the duty of attacking the cogency of the evidence adduced to support the granting of the leave in order to prove that the main inquiry would certainly fail. The learned Solicitor-General argued that the learned trial Judge acknowledged this when in her Ruling noted and remarked on the merits of the main application for judicial review. This is why the learned Solicitor-General submitted that at the stage of applying for discharge of leave, had the learned trial Judge diligently delved into the merits of the main application and looked at the law and authorities, she would inevitably have come to the conclusion that the law applicable would have made it inevitable for her to hold that this application to discharge the leave order had merits.

(iii) The nature of the powers vested in the President under Article 98(3). According to the Solicitor-General, had the learned trial Judge addressed her mind to the nature of the powers vested in His Excellency, she would have inescapably concluded that the Respondents had not made out a prima *facie case*. The Appellant's contention was that the court below in deciding whether there was a prima facie case should have directed its mind as to whether or not the power under 98(3) was executive or quasi Judicial in nature. The Solicitor-General's point is that in exercising executive powers, the discretion to reach a conclusion is given without any need of consultation. Article 98(3) has vested such powers in His Excellency. Therefore, the provisions of the Judicial Code of Conduct and the need to go to Judicial Complaints Authority would not have exercised her mind when dealing with the application to discharge the leave granted.

Citing the case of **Shilling Bob Zinka vs Attorney-General**[14], he argued that articles or clauses that are

couched in wide expressional terms, exclude the need to act judiciously (see also **Caltonia Ltd v Commissioner of Works and Others**[27]). He argued that His Excellency, in exercising powers under Article 98(3) was not exercising Quasi Judicial Powers. So there was no need to resort to the Judicial Complaints Authority.

(iv) On weighty public policy considerations, the Solicitor-General argued that had the learned Judge addressed her mind to this issue, she would have come to an inescapable conclusion that there was no prima facie case made out by the Respondents and that the application to discharge leave obtained ex parte had merit. He pointed to the fact that in construing the provisions of the Constitution, public policy considerations have to be borne in mind. He submitted that this was so because the Constitution is a social contract between the people and the governors. It declares public policies on the way the people are being governed. Therefore, the learned trial Judge ought to have directed her mind to public policy which is that opening stable doors to diversion of clear

constitutional provisions by subsequent statutory amendments or acts would set a dangerous indicator that would threaten the very principle of constitutionality.

He argued that the total fabric of the Respondents' case was under-pinned by the paragraph at page 34 which is that power vested upon the President in Article 98(3) was limited by the provisions of Article 91 and the provisions of the Judicial Code of Conduct Act No. 13 of 1999. The Solicitor-General argued that Article 98(3) had been in existence before 1999 when the Judicial Code of Conduct Act came into existence. So to allow an ordinary Act to impliedly amend the Constitution either expressly or impliedly, would be setting up a dangerous principle. The effect of such an approach would mean that any Government would, at any slight excuse, amend the Constitution by passing subsidiary legislation. He argued that such an approach would permit Governments or executives to amend the constitutional provisions through subsidiary and Parliamentary acts. His argument was anchored on the cardinal principle of the sanctity of the

Constitution which has to be guarded jealously. The learned Solicitor-General argued that had the learned Judge directed her mind to these considerations that her approach would amount to implying that the Judicial Code of Conduct placed limitations on the constitutional provisions of Article 98(3) and thus impliedly amended Article 98, she would have not concluded that the Respondents had established a *prima facie* case. So he urged this court to uphold the appeal.

In his written arguments, the learned Solicitor-General emphasized the different stages in the application for judicial review. He argued that stage 1 was for applying for leave. The requirement provided in the law for such application to be granted is that the party applying has to establish a *prima facie* case. This law is settled. Stage 2 of this application is when the litigant affected by the Order of leave granted ex-parte now has to challenge that order by applying to discharge it as one option. Then such a litigant has to attack the cogency of the main application. He quoted Order 53/14/4 and argued that

this is the only time that merits of the judicial review applications have to be advanced in order to convince the court that the main application would fail. He attacked the citation of **Kasai Mining Limited vs the Attorney-General, Zamaglo Prospecting Limited and Equinox Minerals Limited**[6] and submitted that this case cannot be used as an authority for the argument that the merits of the matter may not be advanced at the stage of applying for a discharge of an ex-parte leave order. He submitted that the case of **Kasai**[6] did not deal with an application to discharge leave. This case cannot be used as authority for the argument that the merits of a case may not be deliberated upon at any stage prior to the substantive hearing by the court. He argued that the court in that case dealt with whether or not leave can be challenged in an application for discovery in judicial review proceedings.

The Solicitor-General went on to submit that the Appellant taking all these points into consideration had demonstrated that the Respondents' case would fail at the

substantive hearing. He argued that the Respondents had tried to show that the President's exercise of his powers was illegal. He cited a paragraph of the learned trial Judge's ruling at pages 24 to 25 where she stated that :-

> **"At the outset, it must be stated that the substantive application for judicial review herein is premised on the interpretation or construction of Articles 98(2), (3) and (5) as well as Article 91 (2) of the Constitution of the Republic of Zambia. The Applicants claim that the two Articles have to be read together and not in isolation. That the provisions of the Judicial Code of Conduct Act No. 13 of 1999 provide for sine qua non (condition precedent) for the exercise of the President's Power in issue. In other words they claim that the Judicial (Code of Conduct) Act is an essential element or condition for the President's power under Article 98(3)."**

He submitted that the Respondents based their case on the arguments that the questions whether the provisions of Article 98(2), (3) and (5) had to be read together with the provisions of Article 91 as read with the Judicial Code of Conduct Act No. 13 of 1999 were a matter to be determined at the substantive hearing

of the main action. The Respondents had argued that the questions such as:

(i) whether Article 98(3) was a stand alone Article,

(ii) whether there was interplay between Article 91(2) as read together with the Judicial Code of Conduct Act No. 13 of 1999 and Article 98(5) on the other hand,

(iii) whether the question of removing the Respondents from office had in fact risen, were matters to be decided at the main trial and that they were questions to be fully inquired into at the substantive hearing.

The learned Solicitor-General had canvassed the view that the learned Judge misdirected herself when she accepted these arguments and even concluded that on that basis, the application to discharge the leave order had no merit. The Solicitor-General had argued that had the learned addressed her mind to the fact that Article 98 of the Constitution is plain and unambiguous and that it stands alone, she would have inescapably held that she did not have to wait for arguments to be addressed to her at the substantive hearing of the matter for her to interpret these provisions. And that a fair and objective

reading of the Constitution would have shown her that the framers of the Constitution intended that a Judge can also be removed in accordance with the provisions of Article 98 in addition to the route through Judicial Complaints Authority and that there is nothing in the provisions of Article 91 or the Judicial (code of conduct) Act that limits the provisions of the powers vested in the President and that the President legally exercised his powers. Against that background, she would have held that the application to discharge the leave had merit.

The learned Solicitor-General also attacked the conclusion by the learned trial Judge that the question whether this case could be distinguished from the **Chiluba**[1] case in its interpretation of the Constitutional provisions was another question to be fully investigated at the main hearing. The Solicitor-General pointed out that in the case before this court, the only provision which had to be construed was Article 98 of the Constitution. So the legal principle enunciated in the **Chiluba**[1] case which was that when interpreting the Constitutional provisions, the court should not gloss over clear constitutional provisions or allow interpolations to be applied to express provisions of the

Constitution, was applicable to this case. Citing the **Chiluba**[1] case, the Solicitor-General argued that had the learned trial Judge followed the clear precedents set by this Court, she would not have misdirected herself in construing Article 98(3) of the Constitution. The learned Solicitor-General further went on to argue that the case of **C.S Investments Limited V Car High Ltd**[15]**, Sunday Maluba and Attorney General**[19] cannot be distinguished from this case. Judicial Review process cannot be used to stop any investigations.

In conclusion, he argued that had the learned trial Judge placed the correct interpretation on Article 98 of the Constitution, it would have been clear to her that the three Respondents' application for judicial review was bound to fail at the substantive hearing and therefore the Appellant's application to discharge leave was meritorious.

On the claim by the Respondents that there was procedural impropriety, the Appellant's argument was that the lower court wrongly distinguished the **Chiluba**[1] case from the instant case. It was argued that Articles 98(3) of the Constitution is very clear

and that there is no obligation on the part of the Republican President to give the Respondents a hearing before he satisfies himself that an inquiry had to be conducted. In other words, the learned Solicitor-General, citing the case of **Shilling Bob Zinka v Attorney-General**[14] , which he argued was instructive, made references to the **Chiluba**[1] case and further urged this court to hold that there was no procedural impropriety in the way the President exercised his discretion in appointing a tribunal. He argued that the arguments advanced by the Appellant on the procedural impropriety were sufficient to show that the Respondents' case, on the ground of procedural impropriety was bound to fail at the substantive hearing. He cited the case of **Council of Civil Servants Union v Minister for Civil Service**[16], in which Lord Diplock at pages 950 – 951 held that sometimes reference to procedural impropriety was failure to observe basic rules of natural justice or failure to be fair towards the person who was to be affected by the decision. In this case, it was argued that appointing a tribunal was meant to give a chance to the three Respondents to be heard by the tribunal. In that way the Rules of natural justice or being fair to these three Respondents was going to be observed.

On the allegation of unreasonableness, the learned Solicitor-General argued that looking at the arguments advanced by the Appellant above, it would have been the duty of the Respondents to show that the President's decision, to set up a tribunal, was so outrageous in its defiance of logic or accepted moral, standards that no sensible person in the position of His Excellency applying his mind to the question to be decided would have arrived at the decision that the President did. It was the submission of the Appellant that this ground would not have succeeded at the hearing of a substantive matter in view of the constitutional provisions and authorities cited by the Appellant. Again reference was made to **Council of Civil Servants Union v Minister for Civil Service**[16] where Lord Diplock stated that:-

> **"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see Associated Provincial Picture Houses Limited v Wednesbury Corporation) (6). It applied to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who hand applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there**

would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards (Inspector of Taxes) – v- Bairstow (1955) 3 ALL ER 48, (1956)AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. 'irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review."

He argued that in that case, this is a well established principle that an application for judicial review is not concerned with merits of a decision but the process of making that decision. Therefore, taking into account the Constitutional provisions which vests executive powers in the President to appoint a tribunal, as the President gets certain information which may not be in the public domain and the authorities cited, as argued by the Solicitor-General, there was no doubt that the decision making process as envisaged in Article 98 (3) of the Constitution could have been said to have been outrageous in its defiance of logic or of accepted moral standards.

In the final argument, the learned Solicitor-General argued that grounds 1,2,3,4,5,6 and 9 as exhibited before the court

were based on the judgment of the lower court. Looking at these grounds, one can conclude that the learned trial Judge made several findings and conclusions that gave rise to grounds 1 to 6 and 9. He referred to Section 23 of the Supreme Court Act, Chapter 25 which provides that an appeal in any civil cause or matter shall lie to this honourable court from any judgment of the High Court. In addition, he referred to rule 49(4) of the Supreme Court Rules which provides:-

"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."

He, therefore, urged this court to up-hold the appeal.

Mr. Shonga, SC in response, relied on his heads of argument filed in the court on the 18th September, 2012. He also orally augmented these filed Heads of Argument. In the filed heads of argument, he made reference to the brief history of this matter and the deposed facts before the lower court when leave was being sought. He submitted that according to the record, the only facts which were before the court were the facts advanced

by the Respondents. He submitted that the Appellants had a chance to revisit any of the grounds deposed in the affidavit by the three Respondents. They chose not to. He also in his general remarks referred to the press conference held on the 30th April, 2012 in which, according to him, the President made a number of allegations against the 1st, 2nd and 3rd Respondents.

Mr. Shonga, SC, then went on to pose a question as to whether or not the court was wrong to find that the Respondents had a *prima facie* case and arguable case sufficient to justify refusal to discharge leave. According to him, to respond to this question, one had to deal with the law relating to application for leave to apply for judicial review because in dealing with the issues raised by the Appellant, one had to begin by saying that the court that granted leave should not have done so in the first place. Citing the cases of **Dean Namulya Mung'omba, Bwalya Kanyata Ng'andu and Anti-Corruption Commission v Peter Machungwa, Golden Mandandi and Attorney-General**[18] where the court held that:-

> **"It is accepted that there is no rule under the High Court Rules under which judicial review proceedings can be instituted and conducted and by virtue of**

> **section 10 of the High Court Act, Cap 27, the court is guided as to procedure and practice to be adopted. Having accepted that there is no practice and procedure prescribed under our Rules, we follow the practice and procedure for the time being observed in England in the High Court of Justice. The practice and procedure in England is provided for in Order 53 of the Rules of the Supreme Court (RSC). Order 53 is very detailed."**

He went on to argue that all applications for judicial review must commence with an application for leave. He argued that in the application for judicial review, there are only two stages. The first stage is an application for leave and the second one is the main substantive hearing. He argued that at the leave stage, the court is not concerned with the merits of the matter but rather with the question of whether or not the applicant has presented before court a *prima facie* case or an arguable case fit for further investigation. He referred to the learned authors of **Micheal Supperstone QC and James Goudie QC**[2] in their celebrated and widely recognised book simply called **Judicial Review** where they aptly explain the first stage this way:-

> **"As far as the substantive merits are concerned, it is equally apparent that the court will normally only**

carry out a brief preliminary examination. The test is whether or not there is an arguable case."

He cited the case of **R v Secretary of State for the Home Department, Ex parte Cheblak[20]** where Lord Donaldson M R held also that:-

"The requirement that leave be obtained before a substantive application can be made for relief by way of judicial review is designed to operate as a filter to exclude cases that are unarguable. Accordingly, an application for leave is normally dealt with on the basis of summary submission, if an arguable point emerges, leave is granted and extended arguments ensue upon the hearing of the substantive application."

He also referred to the case of **Judith Chilufya v The Attorney-General and Ministry of Works and Supply Appeal No. 76/2006 SCZ No. 8/122/06**, in which this court embraced the same principles. He, therefore, argued that the extended arguments raised by the Appellant inviting this court to examine substantive matters at leave stage was grossly misconceived and flew in the teeth of the established principles of a sieving process of judicial review. He cited the case of **IRC v National Federation of Self Employed and Small Businesses[3]** where the House of Lords also held the same view that the leave stage is

a sieving process to eliminate any frivolous and unarguable cases to be presented for main judicial review. He argued that it is settled that the role of the court at leave stage is not to delve into the main matter but to determine whether, on the evidence before it, the applicant has raised an arguable case or *prima facie* case.

On the application for discharge, his argument was that indeed, under Order 53/14/4 and Order 53/14/62 of the White Book, it is open to a respondent, where leave to move for judicial review has been granted ex-parte, to apply to the court to set aside such leave granted. But such applications are discouraged and are only made where the Respondent can show that the substantive application will clearly fail. He referred to the case of **R V Secretary for the Home Department and Another, ex p Herbage**[4] and argued that the appropriate procedure for challenging leave granted ex-parte was by an application under the inherent jurisdiction of the court to do that. According to him, even at that point, the leave can only be set aside where the Judge is satisfied that there was absolutely no arguable case. He also referred to **Supperstone QC and Goudie QC**[2] in their

book called **Judicial Review** and argued that the authorities so far make it apparent that the right afforded to apply to discharge leave granted to apply for judicial review is not unqualified. It is capped by caveats, carved in a most instructive manner as follows:-

"(a) The first is that such applications can only be made where

the Respondent can show that the substantive application will clearly fail, or where the applicant's case is unarguable

(b) The second qualification, of course, is that applications to discharge leave are discouraged by the courts and should only sparingly be made and only in the most exceptional of circumstances.

In the case of **Kasai Mining and Exploration Ltd v Attorney General[6],** according to Mr. Shonga, State Counsel, the court in his view was saying that the merits of the judicial review application could only be advanced at the substantive hearing. It is only at that stage that the merits in the application for judicial review would then be entertained. He further maintained that arguments by the Appellant were incorrect. He argued that as

already submitted, Lord Diplock, in **IRC v National Federation of Self Employed and Small Businesses Ltd**[3] stated that:

"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court has in exercising at this stage is not the same as that which it is called on to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."

He argued that the court should not preoccupy itself with any argument touching on the merits neither should it be led on such a path because if it did that, then there would be nothing for the court below to further inquire into in the event that this court agreed that the learned Judge in the court below was on *terra firma* in refusing to set aside the leave. He argued that the Appellant did not demonstrate that the Respondents' case would

fail at the substantive hearing. He argued that looking at the arguments, they did not advance any facts to convince the court that the matter would fail at the substantive hearing. He posed a question as to whether or not this court would be convinced that on the facts of this case, each and every ground relied upon by the Respondents at the leave stage would at the main judicial review hearing be not arguable or would fail.

He went on to advance arguments on the allegation of illegality. He submitted that the Respondents had anchored their case on the argument that there was an interplay between Article 98(2)(3) and (5) of the Constitution and Article 91(2) as read with the provisions of the Judicial Code of Conduct Act No. 13 of 1999 and that looking at the fact that the Respondents had asked to fully investigate their allegations that the President of the Republic of Zambia had usurped the statutory powers of the Judicial Complaints Authority and those of the Chief Justice when he purported to act as an investigator on the complaints made against them and the allegation that the President of the Republic of Zambia usurped the Constitutional functions of the Supreme Court of Zambia when he purported to appoint a Tribunal to

investigate the alleged misbehavior and incompetence on the part of three Respondents when there was an appeal pending. He further argued that all these issues could not be said to have been settled at the stage of applying for the discharge of the leave granted by the Appellant. He argued that the questions he had posed before the lower court had remained unanswered even at the stage of applying for discharge.

Over the other arguments by the Appellant before the lower court, that Article 98 is a stand alone Article, State Counsel Shonga contended that Article 98 cannot be said to be a stand alone article. According to him, this question of whether or not Article 98 is a stand alone was still arguable. The Respondents had submitted to the court below that they would at the substantive hearing deal with this question whether or not that is the position. According to State Counsel Shonga, delving any deeper into these questions however would have meant having argued the whole case at the stage of the application to set aside leave, a situation quite contrary to the authorities presented to the court. Another question yet to be answered is whether or not

the court below was wrong in distinguishing the **Chiluba[1]** case from the case at hand.

Mr. Sikota, State Counsel, for the 3rd Respondent adopted Mr. Shonga, State Counsel's, arguments. Mr. Katolo, learned counsel for the 3rd Respondent augmented Mr. Shonga, State Counsel's arguments by arguing in addition that most of the questions raised in the lower court by the Respondents at page 24 of the record had not been dealt with. In other words, the Appellant had not established that there was:

"i. Serious material non-disclosure;

ii. An alternative remedy available but not used by the Respondent e.g an appeal;

iii. Undue delay on the Respondent's part;

iv. Whether the proceedings are not properly constituted;

v. There was failure to demonstrate an arguable case;"

According to Mr. Katolo, for leave to have been discharged, this court should have looked at paragraph 4 of the affidavit filed in support of the summons to discharge leave at page 121. According to Counsel, this paragraph contained the Appellant's

main statement which did not bring out any facts on which the court below was going to base its discretion to discharge leave obtained. Counsel argued that it is trite law that any discretion exercised by any court had to be based on material facts. Counsel's argument was that looking at the affidavit in support of the application, the Appellant had failed to meet those prerequisites, the lower court had indicated at page 24, (these are as quoted at J87). In Counsel's view, this amounted to accepting that the Appellant failed to demonstrate within the confines of the law that there was a basis for discharging leave obtained. Mr. Katolo also relied on his written arguments. These were in summary that the Appellant should have restricted its argument to whether or not the court was on firm ground to have refused to discharge the leave obtained ex-parte. According to counsel, a careful perusal of the grounds of appeal showed that no single ground addressed the issue of how the court misdirected itself either in law or fact in refusing to discharge leave obtained ex-parte.

On the constitutional issues raised in the appeal, counsel in his written arguments submitted that our own Constitution is under-pinned by the doctrine of constitutional supremacy.

Counsel further argued that our Constitution accords a viable role to the Judiciary to review actions of government and legislation to ensure that government operates within the framework of the Constitution. So the state is enjoined not to ignore the supremacy of the Constitution and laws made there under. The President is equally enjoined to protect and to execute the Constitution. The President is the torch bearer. So the tribunal appointed to investigate the conduct of the three Judges was in violation of the Judicial Code of Conduct Act No. 13 of 1999 as no complainant had complained to the statutory body, Judicial Complaints Authority. Counsel cited the case of **Katongola v The People**[11] where Doyle CJ held that:-

"(i) Where statutory provisions are laid down for the dismissal of a servant, it is possible for a court to make a declaration relating to his status.

(ii) A civil servant may only be disciplined in accordance with the set out in the Public Service Regulations.

(iii) Where the Public Service Commission acts without jurisdiction, a court has power to intervene.

(iv) The Public Service Commission acted outside its jurisdiction by not following provisions set out in the Public Service Regulations."

Counsel further argued that the President having appointed a tribunal acted *utra vires* the provisions of the Judicial Code of Conduct. Counsel went on to argue that this court has to adopt the approach of Pictaral CJ in the case of **Bongopi v Chairman of the Council of State, Ciskei[28]** in which he said:-

> **"This court has always stated openly that it is not the maker of laws. It will enforce the law as it finds it. To attempt to promote policies that are not found in the law itself or to prescribe what it believes to be the current public attitudes or standards in regard to these policies is not its function."**

According to counsel, had the procedure laid down in the Judicial Code of Conduct Act been followed, the steps His Excellency took would not have been *utra vires.* The explanation as to how the case moved from one Judge to the other and how the 3rd Respondent had nothing to do with these movements, would have been taken into account. According to counsel, failure to follow procedure laid down in the Judicial Code of Conduct Act brought about injustice to the 3rd Respondent. In Counsel's view, the legislature in its own wisdom interposed the Judicial Complaints Authority and the Judicial Service Commission in order to ensure that apart from the Chief Justice dealing with the matter where there is a complaint against a Judge, there were independent

institutions, the Judicial Complaints Authority and Judicial Service Commission. This interposition of these institutions were permissible under Article 33(2) of the Constitution. Article 33(2) says:-

"The executive power of the Republic of Zambia shall vest in the President and, subject to the other provisions of this Constitution, shall be exercised by him either directly or through officers subordinate to him"

Counsel further argued that Article 91(2) was in consonance with Article 33(2) in that the Judicial Code of Conduct gave the duty of investigating any judicial misconduct to the Judicial Complaints Authority and the Judicial Service Commission. In this context, therefore, it imposed on the Chief Justice the duty to receive information and to pass that information to the Judicial Service Commission. In addition, the initiative of inquiry is placed in the Judicial Complaints Authority and these institutions act on behalf of the President. So to report to the President directly without going through these institutions was procedurally wrong.

He further pointed out that in this case, the Chief Justice was the Chairman of the Judicial Service Commission and he had

started an inquiry which was responded to and was acting on behalf of the President. So to report, therefore, to the President directly was unprocedural.

Counsel further argued that as there are appeals pending before the Supreme Court in the case which brought about these proceedings, to allow this appeal would amount to circumventing the laid down procedure. Counsel also submitted that the Respondents are just demanding compliance with the 'Open Justice Principle' and the law. Counsel pointed out that the Appellant would suffer no damage if the matter was allowed to go to a full hearing of the judicial review, see the case of **Nyampala Safari (Z) Limited and Others v Zambia Wildlife Authority and others[32].** According to counsel, this lack of concern for the rule of law should not manifest itself. He, therefore, urged this court to reject this appeal as the action by the President was not done in accordance with the laid down procedure. Furthermore, Counsel pointed out that this matter is so complex in the country's legal history that such cannot be decided on a technicality, where procedural rights have been thrown out of the window because that would lead to a denial of fundamental

rights. Counsel submitted that this court should take judicial notice of the fact that the Appellant (the Attorney-General) signed the bill of Judicial Code of Conduct for presentation to the National Assembly. This same bill which became Judicial Code of Conduct bill became an act which was subsequently signed by the President into an Act. So one can argue that the Appellant enacted the law to effectuate judicial accountability. That is that the members of the public for the first time were given an institution to report misconduct of judicial officers. This was transparency at its best. The seminal question is if there was no *mala fides,* why is the Respondents' case being handled in the opaque manner. Has the government unlawfully repealed Act No. 13 of the 1999 thus abolishing the Judicial Code of Conduct through the back door. Counsel pointed out that the authority is still functioning, receiving complaints and investigating them. So the Attorney-General as the Appellant cannot avoid that procedure.

In response to grounds 1 to 6 of the Appellant's argument that the learned trial Judge prescribed a condition precedent on the President's exercise of the powers vested in him under Article

98(3), counsel argued that this argument was constitutionally, legally and factually incorrect because Article 44(1) of the Constitution provides that the President shall protect, administer and execute all the laws without exception. That includes Act No. 13 of 1999 as the law defined in Article 139 which must be obeyed and followed by everybody in this country including the President. Article 91 (2) mandated parliament of which the President is part, to exercise its sovereign legislative authority to enact Act No. 13 of 1999 which law regulates the conduct of Judges. So it must be obeyed until it is repealed. According to counsel, the President's powers given under Article 98(3) are valid if exercised in accordance with his primary functions under Article 44 as read with Articles 33 and Article 91(2) and Article 98(2) to (5). According to counsel, the Constitution must be read as a whole not by pick and mix basis. So Articles 1(3),(23)(44), (62), (91) are superior to Article 98. To deny the existence of Article 91 and Act No. 13 of 1999 is to violate the Constitution.

In response to grounds 4 and 5, counsel argued that the learned Judge was on firm ground in the way she handled these issues covered in grounds 4 and 5. Counsel on Ground 4 quoted

the portion of the ruling of the lower court and argued that the learned trial Judge did not determine the issues in question.

On ground 5, counsel argued that contrary to the argument which has been advanced by the Appellant, the learned Judge left the determination of the issues she listed to the full inquiry to determine. These are questions about the interplay between Article 91 and the Judicial Code of Conduct No. 13 of 1999 and Article 98 of the Constitution. According to Counsel, the references by the learned trial Judge to Article 91 and Article 98 was only intended to show that there were yet serious issues fit for further inquiry at the main Judicial Review hearing. According to counsel, he accepted as correct what was stated in the **Chiluba**[1] case echoing what the court said **Bophuthat Swana vs Segale**[29] that:-

"For the reasons we have given above, we hold the view that the provisions of Article 43(3) are very clear. We cannot imply anything in these provisions. Nor can we bring into the interpretation of these provisions glosses and interpolations derived from doctrine or case law. None of the numerous cases cited to us gives identity and visibility to any principle of law which persuades and entitles us to imply anything in a Constitutional provision which is very clear"

He accepted that where the provisions of the Constitution are clear and unambiguous literal interpretation of the words used has to be invoked. However, since the President is duty bound to protect the law, the Judicial Code of Conduct Act No. 13 of 1999 is law, which the state through the Attorney-General is constitutionally obliged to protect, administer and execute. The President, therefore, in appointing the tribunal abrogated this law. Counsel pointed out that Section 20 of the Judicial Code of Conduct Act creates a complaints committee. Section 24 defines the functions of the Authority which are to receive any complaint and to see that the Judicial Complaints Authority investigates that on behalf of the President before it is submitted to the Chief Justice for the Chief Justice to forward it to the President. This procedure was not followed in Counsel's view. Therefore, the suspension of the 3rd Respondent was in total breach of the provisions of the Judicial Code of Conduct Act by circumventing the procedure laid down. In counsel's further view, the enactment of the Judicial Code of Conduct Act was intended to guarantee the security of tenure of judicial officers. Failing to observe the laid down procedure would amount to diminishing procedural fairness. Citing the **European Commission on**

Human Rights in Axelsson v Sweden[9], Counsel submitted that this conduct by the Appellant illustrates the danger of diminishing procedural fairness and consequently security of tenure and judicial independence.

On grounds 7 and 9, counsel repeated the same arguments as on grounds 1,2,3 and 4 on the supremacy of the Constitution. His main argument is that courts have powers to set aside, or reverse any act of the President and the legislature if those are construed to be against the Constitution, see the case of **Mumba**[8]

According to counsel, these are the issues yet to be determined at the main trial, that is:- Violation of the Supremacy of the Constitution Article 1 (3), the discrimination in Article 33(2), dealing with delegated executive functions of the President, Article 44, legislative sovereignty, Article 62, violation of Article 91(2) and 98(3), the violation of the Judicial Code of Conduct, the effect of the denial of procedural justice (see the case of **Attorney General v Kang'ombe**[10] **and Katongola v the The People**[11].

On the point that granting leave for Judicial Review proceedings was intended to curtail investigations, counsel submitted that **C.S Investments Limited Car High Limited, Sunday Maluba V Attorney General[15] and Aaron Chungu and Faustina Kabwe v Attorney General[23]** were cases cited out of context because the Judicial Code of Conduct Act has empowered the authority to investigate and make recommendations for presentation to the Chief Justice. The authority has more investigative powers than the tribunal. In counsel's view, like in **Kang'ombe v the Attorney General[10]** case, serious allegations were made to the President pre the appointment of the tribunal. So based on these allegations which were not brought to the attention of the Respondents, nor was the 3rd Respondent given a chance to respond, a tribunal was appointed. Had the 3rd Respondent been given chance to respond, he would have given the explanation he gave to the Chief Justice that he had no role to play in the movement of cause No. 2009/HPC 0322. Also as per the decision in the **Kang'ombe[10]** case, the 3rd Respondent had legitimate expectation of being given a chance to respond before the President appointed a tribunal. So his rights were violated. He, the 3rd Respondent, had

been led to believe that he will be given a fair hearing or that he will be given an opportunity to be heard before being suspended. Counsel made reference to the case of **Schmidt v Secretary of State for Home Affairs**[12] in which briefly the facts were that the Respondents who were students had entered the country as "students of scientology", an order was made for them to leave. They challenged the decision of the Home Office after their leave to stay had expired. Leave for Judicial Review was granted on the ground that they had legitimate expectation that they would be allowed to make representation to the Ministry of Home Affairs before they were denied an order of stay. So counsel urged this court to dismiss the appeal.

In conclusion, counsel argued that as the cardinal principle is that people elect Parliamentarians and the President, these two constitute Parliament, which enact laws which reflect the will of the people, to violate those laws is to assail the authority of the people. So counsel asked this court to dismiss the appeal as it lacked merit.

The Solicitor-General in response briefly repeated moreless the arguments he had advanced urging this court to up-hold the appeal. These were the arguments before the court in this case.

We have considered the arguments raised in this appeal with much thought, taking into account the weighty and seminal constitutional issues which have been raised in this Appeal. These issues are unprecedented. It is self evident that these issues need thorough reflection on the law and facts. This appeal indeed has raised some very soul searching issues. However, we trust that the end result of this appeal will underscore the supremacy of the Constitution in our democracy. In our democracy, our Constitution reflects our national soul, it captures the identification of ideals and aspirations of our nation, it articulates our values bonding us as a people and disciplining us as a nation. It is our endeavour in this judgment, to highlight all these constitutional values. The end result will enhance the rule of law which underpins our cardinal values as a nation. This judgment will also underscore the doctrine of the separation of powers.

Coming to the issues raised in this appeal, it is common ground that in the letters written to the three Respondents, His Excellency the President anchored his authority to set up a tribunal on the provisions of Article 98 (3) and (5) which say:-

" (3) If the President considers that the question of removing a judge of the Supreme Court or of the High Court under this Article ought to be investigated, then (our own emphasis)

(a) he shall appoint a tribunal which shall consist of a Chairman and not less than two other members, who hold or have held high judicial office;

(b) The tribunal shall inquire into the matter and report on the facts thereof to the President and advise the President whether the judge ought to be removed from office under this Article for inability as aforesaid or for misbehavior.

(5) If the question of removing a judge of the Supreme Court or of the High Court from office has been referred to a tribunal under clause (3), the President may suspend the judge from performing the functions of his office, and any such suspension may at any time be revoked by the President and shall in

any case cease to have effect if the tribunal advises the President that the judge ought to be removed from office.

It is also common ground that this appeal lies against the Ruling in an application to discharge an order for leave granted exparte on 16th May, 2012. The application to discharge leave was brought under Order 53/14/4, which says:-

"it is open to a respondent (where leave to move for judicial review has been granted ex parte) to apply for the grant of leave to be set aside; but such applications are discouraged and should only be made where the respondent can show that the substantive application will clearly fail." (our own emphasis)

As already stated in our judgment supra, the Rules of Procedure applicable are pursuant to Section 10 of the High Court Act as amended, Act No. 7 of 2011. These are known as cassus *omissus* of our own Rules of Practice and Procedure, see the case of **Derrick Chitala as Secretary General of Zambia Democracy Congress vs. Attorney-General**[7].

Now coming to the main grounds of appeal, we will deal with all the grounds together as they are intertwined. In ground 7, the Appellant has argued that the court below misdirected itself in law and in fact in finding that on the facts and arguments advanced, there was a *prima facie* case and an arguable case sufficient to justify refusal to discharge the ex-parte leave order granted for judicial review. In dealing with this ground, one inevitably has to deal with grounds 1,2,3,4,5,6 and 9 which in gist challenge the lower court's treatment of the application to discharge leave obtained exparte.

Firstly, it is common ground that according to the provisions of Order 53, there are two stages in any application for judicial review. In the first stage, there is a mandatory requirement of applying for leave, a filter procedure meant to remove unarguable applications or frivolous and vexatious applications from matters before the court. At that stage, the applicant is duty bound to bring material available which on quick perusal, the court would see that it discloses what might on further consideration turn to be an arguable case or raise arguable issues fit for further investigations. In some jurisdiction such as Australia and

Canada, the stage of applying for leave has been removed to reduce on costs. The approach in those jurisdictions is to allow parties to apply straight for judicial review. So the weeding out of unnecessary litigation is done in the course of hearing the main application.

The next stage in the application for judicial review is the full investigation stage at which the party seeking the court's intervention has to establish either that the process of reaching the decision by the authority concerned was not fair in that the rules of natural justice were not observed where applicable (procedural impropriety) or that the decision arrived at was unreasonable by **Wednesbury**'s standards (irrationality) or that the decision arrived at was tainted with illegality, that is that the decision was *utra vires*. The development of the law on Judicial Review in Zambia has developed to bring in the doctrine of proportionality, see the case of **Roy Clarke vs Attorney-General.**

The Appellant has argued that although generally speaking in the application for Judicial Review, there are only two stages, in

exceptional cases, in accordance with Order 53/14/4 and Order 53/16/4, an applicant can seek to discharge an order for leave granted ex-parte if he or she can establish that the granting of that leave had no basis and the main Judicial Review hearing will certainly fail. In those exceptional circumstances, the court is called upon to decide that there are no arguable issues given the arguments on the law and facts established before the court for the matter to proceed to the main inquiry. We hold the view that at that stage, the court is invited to examine substantive matters to decide whether or not the matter can proceed to the main inquiry. We are, therefore, satisfied that under Order 53/14/4, the route the Appellant took of applying before the lower court to discharge an ex parte order for leave is tenable at law. We do not agree with the arguments by the Respondents that at this stage, the arguments advanced by the Appellant of inviting the court to delve into the merits of the main judicial review was a misdirection. In our view, it was proper for the Appellant to attack the cogency of the evidence given in support of the application for leave, in particular, to canvass the law applicable.

The next question is whether, after the arguments and the law presented at this stage in this matter before us, there was a *prima facie* case or were there still questions which the court ought to have held were fit for further inquiry. Looking at pages 32 and 37 of the record, we are satisfied that the reliefs sought by the Respondents demonstrated that these reliefs were anchored on the Respondents' claim that the powers vested in His Excellency the President under Article 98(3) were diluted by the provisions of Article 91(2) as read with the provisions of the Judicial Code of Conduct Act No. 13 of 1999. In other words, the main argument by the Respondents was premised on the preposition that the in exercising the powers provided in Article 98, the provisions of Article 91(2) as read with provisions of the Judicial Code of Conduct Act No. 13 of 1999 were *sine qua* to the provisions in Article 98(3). As the learned Judge put it in her Ruling:-

"The questions first presented to my mind at the time I considered and found the suggested interplay between Articles 91(2), 98(2)(3) and (5), which persuaded me that there was an arguable case fit for further investigation at a substantive application for judicial review remain unaddressed after the Solicitor General's attempt to persuade the Court to discharge the Exparte Order for leave to Move for Judicial Review. In view of the unresolved questions on my mind, I am not satisfied at

this stage that Article 98 is a stand alone Article and must be interpreted as such.
In the absence of a full hearing with arguments from both sides, it would be premature to uphold the Solicitor General's argument that Article 98(2) (3) and (5) is complete and self contained when this has not been clearly established."

In tackling this proposition, we hold that this would lead to considering arguments in ground 1, 2,3,4,5,6,7 and 9 which arguments ingist are on the interpretation of Article 98(3) and Article 91(2) as read with Judicial Code of Conduct Act No. 13 of 1999. The learned Solicitor-General in arguing ground 7 in particular argued that had the learned trial Judge taken into account the four considerations he presented, she would have reached an inescapable conclusion that there was no *prima facie* case established and the application to discharge leave was meritorious. The four considerations are:-

(a) The nature of the claim advanced by the Respondents and also the nature of the application in the court below;

(b) The fact that the application was to discharge leave granted ex parte and the nature of the case before the court being exceptional and as such, falling under the exceptions to the general rule of discouraging applications to discharge leave; Order 58/14/4

(c) The nature of the powers vested in the President under Article 98(3) being executive in nature as

compared to quasi judicial powers and that with such powers in exercising such executive powers, the discretion given to decide is given without any need for consultation;

(d) The weighty public policy considerations for constitutional issues bearing in mind that the issues raised in this appeal have never been raised in any court of law. The interpretation of Article 98 has never been subjected to litigation and that the court below should have addressed its mind to the public policy that this matter has raised in members of the public's mind in particular the consideration that constitutional provisions are not easily amendable and that they can never be amended or diluted by subsequent statutory enactments or acts.

We have examined these considerations; we agree with the Appellant that had the learned trial Judge considered all these issues, in particular the sensitivity and the centrality of the constitutional issues raised, she would have concluded not only that this case fell within the ambit of Order 53/14/4 but also that the application for discharging the leave order was meritorious. On the main argument that the learned Judge made certain conclusions that the question of the interplay between Articles 91 and 98 (2) (3) and (5) was a question yet to be decided at the main inquiry hearing, we hold that looking at the provisions of Article 98 and the arguments which had been advanced before her on the law as it is, she should have at that stage decided

whether or not there was an interplay between Article 91(2) as read with the Judicial Code of Conduct Act on one hand and Article 98(2)(3) and (5) on the other hand. She should have decided on this main question the legitimacy of the whole application because of the provisions of Order 53/14/4. She should also have decided whether or not Article 98 is a stand alone Article. She should have decided whether or not the question of removing the three Judges had arisen at the time when His Excellency appointed a tribunal to investigate. Had the learned trial Judge addressed her mind to these issues against the background of the facts and law presented to her at this stage, she would have realized that she had a duty to decide and there were sufficient arguments presented before her for her to make up her mind to decide on all these questions. It was a misdirection for her not to decide. She elected not to decide on these issues. She could have decided on whether the decision by His Excellency was tainted with illegality *ultra vires* or it was tainted with procedural impropriety (*audi alterem partem)* or irrationality (Wednesbury's unreasonableness). Order 53/14/4 provides so.

We hold the view that at this stage, it was open to the litigant challenging the grant of leave to either bring evidence or argue on points of law or fact or both dictates to show that the main application was certainly going to fail. We, therefore, do not agree with the Respondents that the Appellant's delving into the merits of the main inquiry was misconceived. We agree with the Appellant that the litigant at this stage is supposed to tackle the argument on the issue of whether or not there was a *prima facie* case and to show that the main application was going to fail either on the facts or on the law.

Dealing with spiritedly the issues raised by Mr. Katolo before this court on the supremacy of Article 1, Article 33(2), (44) and (62) on the supremacy of the Constitution and those raised by Mr. Shonga, SC, on the possible interplay between Articles 91 and 98 and whether or not Article 98 is a stand alone Article, we are of the view that all these issues are tied to the issues raised in grounds 1,2,3,4,5, 6 and 9. That is on the interpretation of Articles 98 and 91.

We are alive to the fact that there are a number of schools of thought on the legal interpretation of legal contexts. The first school of thought provides that the legal interpretation of a legal context is totally dependent on the nature of that legal context. This school of thought provides for example that the system of interpretation which applies to the Constitutional interpretation is different from the system of interpretation which applies to other legal documents such as wills, contracts, deeds etc. The other school of thought is known as the purposive system which is that there is a general approach of interpreting all legal documents. Incorporated in this system is the recognition of the uniqueness of each legal context. According to a plethora of authorities in Zambia, our approach has been to apply the first school of thought which is that the legal context of the documents dictates the method of interpretation. So constitutional documents are interpreted differently from contracts or wills etc.

It is, therefore, common cause, as demonstrated by well celebrated cases, that the Zambian courts have applied literal rule of interpretation to constitutional texts, see the cases of **Miyanda v Handavu[34], Chiluba vs Attorney General[1],**

Mazoka Vs Mwanawasa. According to this approach, the primary rule of interpretation applicable in construing the Constitution is that the words should be given the ordinary grammatical and natural meaning and that it is only where there is ambiguity in the natural meaning of the words used that the court may resort to purposive interpretation of the Constitution.

So applying this literal meaning in this context, we hold that looking at the preamble of the Judicial Code of Conduct Act, it is absolutely clear that the Judicial Code of Conduct No. 13 of 1999 was enacted pursuant to Article 91. The preamble says:-

“An Act to provide for the Code of Conduct for officers of the Judicature pursuant to article ninety-one of the Constitution and for matters connected with or incidental to the foregoing”

So the Judicial Code of Conduct Act is a creature of Article 91. Other than Section 24 of the Judicial Code, there is no reference to Article 98. Section 24 of the Judicial Code of Conduct says:-

(2) In this Part, “appropriate authority” means-

(b) In the case of a Judge, the Chief Justice, who may admonish the Judge concerned and in the case of a breach requiring removal under subsection (2) of article ninety-eight of the Constitution, the Chief Justice shall inform the President”

In our view, this provision categorically provides that in cases where the question of removing a Judge arises pursuant to Article 98, the Chief Justice moreorless has under Article 91, a duty to inform the President. In our view, this provision establishes that where the legislators took cognisance of the fact that besides the route provided in Article 91, Article 98 provides another route of checking on the Judges.

So coming to the arguments by the Appellant in grounds 1-6 which read as follows:

"1. The learned Judge in the court below misdirected herself by purporting to prescribe a condition precedent for the President's exercise of his constitutional power under Article 98(3) of the Constitution of the Republic of Zambia ('The Constitution').

2. It was misdirection of a serious kind for the learned Judge in the court below to hold that the Republican President can only invoke his constitutional powers under Article 98(3) of the Constitution, upon the advice of the Chief Justice given under subsidiary legislation passed later than the Constitution, namely the Judicial Code of Conduct Act No. 13 of 1999

3. It was serious misapprehension of constitutional provisions and consequently a misdirection for the learned Judge below to suggest, as she did, in her Ruling that there was an interplay between Article 91 (2) of the Constitution and the Judicial Code of Conduct Act on one hand and Articles 98 (2), (3) and (5) of the Constitution on the other.

4. The learned Judge in the court below grossly misdirected herself by interpreting Article 98(1) of the Constitution in a manner inconsistent with the current meaning (i.e. the time of adoption and passage of the Constitution) of the words used in that Article.

5. By failing to construe the text of the Constitution according to its original understanding – that is, the way the text was understood by the people who drafted and ratified it, the learned Judge in the court below departed significantly from basic principles of constitutional interpretation and thereby fell into grave error.

6. The learned Judge in the court below erred when she held that Presidential powers given under Article 98(3) of the Constitution were assailable on the basis of Article 91 (1) and 91(2) of the Constitution.

we are satisfied that the procedure for removing judges from office is provided for in both Articles 91 and 98. In Article 91, judicial officers, as defined in Article 91(2), are expected to comply with the provisions of the Judicial Code of Conduct Act No. 13 of 1999. Failure to which the procedure laid down in the Judicial Code of Conduct Act would then be triggered. Judicial officers are defined under Article 91(2) as:

“The Judges, members, magistrates and justices, as the case may be, of the courts mentioned in Clause (I) shall be independent, impartial and subject only to this

constitution and the law and shall conduct themselves in accordance with the code of conduct promulgated by Parliament”.

Under that provision of Article 91, members of the public may complain against the adjudicators of the judicature. This Article in our view covers all judicial officers and this article provides a channel through which members of the public can keep check on the judicial officers of all ranks (Judges of all ranks, Magistrates of all ranks). The second method of providing checks on Judges is through Article 98 which deals with checks specifically prescribed for Judges only emanating from the President in his or her capacity as Head of State. Article 98(2) specifically limits this check to the Judge of the Supreme Court, High Court, Chairman or Deputy Chairman of the Industrial Relations Court. It specifies the basis upon which such office bearers may be removed. Article 98(3) gives powers to the President to deal with those office bearers exclusively. It does not include any other classes of adjudicators neither does it include any other judicial officers or officers of judicature as defined by the Judicial Code of Conduct Act. Against that background, Article 98(3) gives power to the President who may receive reports on the conduct of a Judge,

Chairman or Deputy Chairman of the Industrial Relations Court from any other sources which may not be in the public domain, may not even be through the Judicial Complaints Authority, to appoint a tribunal. In this Article, the legislators intended to lay down procedures of making it possible for the President as Head of State to deal with that exclusive class of adjudicators without recourse to the Judicial Complaints Authority.

It is also worth mentioning that through the appointment of a tribunal, those Judges mentioned to be the subject of investigations, are given a chance to be heard through the tribunal because it is an investigation not a prosecution. So there is compliance with open justice principles.

We further more agree with the Appellant that, as was held in the case of **C and S Investments Limited Ace Car Hire Limited, Sunday Maluba v Attorney-General**[15]**,** since the tribunal process is investigative in nature, Judicial Review cannot be used to curtail these investigative processes. It should also be noted that the President appoints a tribunal. The tribunal is independent, it investigates and advises the President. It is not

the President who decides, the President acts on the advice of the tribunal. Article 98(4) says:-

“Where a tribunal appointed under clause (3) advises the President that a judge of the Supreme Court or of the High Court ought to be removed from office for inability, or incompetence or for misbehavior, the President shall remove such judge from office”.

Thus, the President must act on the advice of the tribunal, without discretion.

We hold the view that the provisions of Article 98 being very clear and unambiguous have to be interpreted using the literal interpretative method. The provisions of Article 98 being very clear and unambigous, no court has any mandate to amend them through interpretation. We adopt the words we used in the Chiluba case which are:-

“For the reasons we have given above, we hold the view that the provisions of Article 43(3) are very clear. We cannot imply anything in these provisions. Nor can we bring into the interpretation of these provisions glosses and interpolations derived from doctrine or case law”.

None of the cases spiritedly cited to us have given identity nor visibility to principles of law which can persuade us or entitle us to

imply anything in this constitutional provision which is very clear. We are bound to construe Article 98 in its ordinary sense. We also adopt what we said in **Akashambatwa** case which was:-

"As we have pointed out in a number of cases in the past – for example in Samuel Miyanda v Raymond Handahu S.C.Z Judgment No. 6 of 1994 – the fundamental rule of interpretation of all enactments to which all other rules are subordinate is that they should be construed according to the intent of the parliament which passed the law. Such intent is that which has been expressed and when the language used is plain and there is nothing to suggest that any words are used in a 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, political exigency, motive of the framers and the like; see also Capper v Baldwin ((1965)2 Q>B> 53 by Lord Parker, C.J., at page 61".

So we hold a firm view that the framers of Article 98 must have crafted Article 98 in order to bring this point that if it is in the public interest to enshrine this constitutional and democratic tenet of the separation of three arms of government (Judiciary, Legislature and Executive) and to be maintained, it must be an equally democratic tenet to enshrine in the Constitution the limited checks on the Judiciary by the Head of State through the establishment of tribunals where the President receives credible

information. Therefore, we do not accept that His Excellency the President breached the Constitution by not following the procedure laid down in Article 91. He acted *intra vires* within the provisions of Article 98(3) and (5). We are satisfied that the powers vested in His Excellency under Article 98(3) can not be assailed on the basis of Article 91(2).

Our conclusion, therefore, is that there is no provision in the Constitution which suggests an interplay between Article 91 and the Judicial Code of Conduct Act No. 13 of 1999 on one hand and Article 98 of our Constitution on the other hand. These Articles of the Constitution stand alone otherwise had the crafters of the Constitution wanted an interplay between Articles 91 and 98, they would have couched Article 98 as Article 97 of our Constitution which says:-

"(1) Subject to clause (2), a person shall not be qualified for appointment as a judge of the Supreme Court, a puisne judge or Chairman or Deputy Chairman of the Industrial Relations Court"

We hold the view that constitutional clauses or articles that are couched in wider expressional terms exclude the need to act

judiciously, see the case of **Shilling Bob Zinka v Attorney-General**[14], **Caltonia Ltd v Commissioner of Works and Others**[27]. We also hold the view that His Excellency was not exercising quasi judicial powers. We hold the view that conferment of wider discretionary power vested in His Excellency are indicative of the absence of His Excellency acting judiciously, see the case of **R vs Governor of Brixton**.

Our conclusion on this point is even buttressed by a cardinal principle that in protecting the fundamental principle of Constitutionalism, no legislation can amend provisions of the Constitution either expressly or by implication and thus dilute the provisions of our Constitution. In order to guard jealously the sanctity of our Constitution, we cannot give Constitutional provisions a meaning that may impeach the explicit, implicit and clear language used. Also and what is very important, we cannot accept the arguments by both Mr. Shonga, State Counsel, and Mr. Katolo that Article 91 as read with the Judicial Code of Conduct Act enacted in 1999 would have a bearing on the interpretation of Article 98 which has been in existence for long time before the enactment of the Judicial Code of Conduct Act. That would

indirectly endorse a very dangerous and unconstitutional tendency of eroding our supreme law by subsidiary acts enacted later. Article 91 gave birth to the Judicial Code of Conduct Act and actually to the Judicial Complaints Authority. So the powers vested in His Excellency by virtue of Article 98 cannot be premised on the provisions of Article 91(2) as read with the provisions of Judicial Code of Conduct Act as providing the condition precedence (*sine qua)* to His Excellency's exercise of his powers under Article 98(3 and 5) as the Judicial Code of Conduct is a subsidiary law. In order to guard the sanctity of our Constitution, the Constitution itself has prescribed the method of amending it making the amendment process very difficult.

It has been argued by the Respondents that Article 41 is superior to the other articles. We find no authority for such a proposition. In our view, the language used in Article 98 addressed a precise need in our law. We are of the firm view that caution has to be exercised in interpreting the Constitution so as to preserve the limits of our Constitution by interpreting the language used. The language used in our Constitution must be

instructive to bring out the intentions of the framers and founders of our Constitution.

Mr. Katolo has argued spiritedly that the President, being a torch bearer in upholding the supremacy of our Constitution, is enjoined to protect it. We agree entirely. However, as already stated in our judgment, we see none of the cited cases and arguments persuading us or entitling us to imply anything in the Constitution that the powers vested in the President in Article 98 are subject to Article 91. We are satisfied that the framers of our Constitution never intended for the powers vested in the President to be diluted through the route of the Judicial Code of Conduct Act or through the Chief Justice. We agree that Article 33(2) has mandated His Excellency to exercise executive powers either directly or through other persons. But being wide powers, these are not quasi judicial powers, they are executive powers, see **Shilling Bob Zinka v Attorney-General**[14]. We are satisfied that the President did not usurp the constitutional powers of the Judicial Complaints Authority neither did he usurp the powers of the Chief Justice nor those of the Supreme Court. We are on firm ground on this as we hold that this court when dealing with the

appeal No. SCZ/8/185/2012 will not deal with any of the issues which if the tribunal proceeds will make inquiries in. As we have said in our preliminary ruling, we see no nexus. We view the powers vested in the President under Article 98(3) as being checks on the Judiciary. It cannot be said that to create these mechanisms would be an encroachment on the independence of the Judiciary because it is a constitutional good which must balance with the other equally cardinal and constitutional principle of the independence of the Judiciary. In our view, this provision of vesting this power in His Excellency would instill a sense of accountability in the Judiciary. It is a response to the question of who guards the guards.

On the argument that the Judiciary cannot deal with questions relating to its own conduct *nemo judex insua causa,* in our view like in contempt of court cases, the court has jurisdiction to hear matters touching on its own conduct.

In conclusion, we hold the view that looking at the provision of Article 98, there were sufficient arguments and law presented before the lower court for the lower court to have held that there

was no illegality as the powers vested in the President under Article 98 (2)(3) and (5) supported the exercise by the President. On the allegation of procedural impropriety, we hold the view that there was sufficient law presented to the court and facts tabulated which dispelled the Respondents' argument that the President's decision of establishing a tribunal to investigate the Respndents' alleged misconduct without giving them a hearing was tainted with procedural irregularity. The wider discretional powers vested in His Excellency in the public interest is indicative of the absence to act judiciously, see the case of **Shilling Bob Zinka v Attorney-General**[14]. On the ground of irrationality, which is referred to as Wednesbury unreasonableness, we are satisfied that bearing in mind the authoritative position of His Excellency, it would be illogical and unreasonable to hold that he did not receive credible information as President for him to act as he did. He is the overall authority on everything. His sources are exclusive to the public domain and must be impeccable. Also it was not established that the President's decision was outrageous in its defiance of logic or of accepted moral standards that no reasonable person in his position could have acted in the way he did.

In sum total, we hold the view that there is merit in the appeal. We hold the view that every article in our Constitution has to be interpreted so as to align itself with what is regarded as the cardinal principle underpinning our Constitution. It is trite that one may apply a purposive construction of the Constitution only where there is ambiguity. Our conclusion, therefore, is that there was no condition precedent to the President exercising powers vested in him under Article 98(2)(3) and (5). Provisions in Article 91 cannot dilute the provisions in Article 98. We are satisfied that His Excellency exercised his powers vested in him pursuant to Article 98(3) and (5) in accordance with his primary functions as Head of State under Article 44 as read with Article 33. We hold, therefore, that it was a misdirection to hold or even suggest that there were questions still to be responded to at the main judicial review inquiry. We hold that the President did not usurp the powers of the Judicial Complaints Authority nor those of the Chief Justice. We, therefore, find merit in the appeal.

Before we end, we want to state that although we agree that the President in exercising the powers vested in him under Article

98 has unfettered discretion under the said Article, we nonetheless believe that it would be advisable, considering circumstances of this matter, for the tribunal not to proceed.

We order no costs in this matter as this matter has raised major constitutional issues.