

IN THE HIGH COURT FOR ZAMBIA

2013/HP/0922

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF : ORDER 53 RULE 3 OF THE RULES
OF THE SUPREME COURT, 1999 EDITION (WHITE
BOOK)

AND

IN THE MATTER OF : AN APPLICATION FOR AN ORDER
FOR JUDICIAL REVIEW

IN THE MATTER OF : THE DECISION OF THE TRIBUNAL
ON THE SUPREME COURT AND HIGH COURT
JUDGES TO PROCEED WITH HEARING
AGAINST DR. PHILLIP MUSONDA AFTER
RESIGNATION

AND

IN THE MATTER OF : ARTICLES 14, 18, 21, 23, 98(3) AND
137 OF THE CONSTITUTION OF ZAMBIA,
CHAPTER 1 OF THE LAWS OF ZAMBIA

BETWEEN:

DR. PHILLIP MUSONDA

APPLICANT

AND

ATTORNEY GENERAL

RESPONDENT

CORAM: HONOURABLE LADY JUSTICE F. M. LENGALENGA
THIS 9TH DAY OF MAY, 2014 IN CHAMBERS

For the Applicant : Mr. M. Katolo - Messrs Milner
Katolo &

Associates

M. S. Sikota, SC - Messrs Central

Chambers

For the respondent : Mr. M. M. Lukwasa - Deputy Chief State
Advocate

J U D G M E N T

Cases referred to:

1. **DERRICK CHITALA (Secretary of the Zambia Democratic Congress) v ATTORNEY GENERAL (1995 - 1997) ZR 91**
2. **KITWE CITY COUNCIL v WILLIAM NG'UNI (2005) ZR (SC)**
3. **NKUMBULA v ATTORNEY GENERAL (1972) ZR 204**
4. **SHIPANGA v THE ATTORNEY GENERAL (1977) ZR 196**
5. **VODACOM v COMMUNICATION AUTHORITY - APPEAL No 98 OF 2008**
6. **WILLIAM HARRINGTON v DORA SILIYA & ATTORNEY GENERAL (2011) ZR 253 at 254**
7. **COUNCIL OF CIVIL SERVANTS UNION & OTHERS v MINISTER OF STATE FOR CIVIL SERVICE (1984) 3 ALL E R 935**
8. **R v CROWN COURT AT READING, Ex.p HUTCHINSON & ANOTHER (1998) 1 ALL E R 333**
9. **CHIEF CONSTABLE OF NORTH WALES POLICE v EVANS (1982) 3 ALL E R 141; (1982) 1 WLR 1155 at p. 1160**
10. **ANISMINIC LTD v FOREIGN COMPENSATION COMMISSION**

- (1969) 2 AC 147; (1969) 1 ALL E R 208**
11. ASSOCIATED PROVINCIAL PICTURE HOUSES LTD v
WEDNESBURY CORPORATION (1947) 2 ALL E R 680;
(1948) 1
KB 223

Legislation and Other Works

- 12. SUPREME COURT PRACTICE, 1999 EDITION (WHITE BOOK) -**
Order 53, Rules 3, 14 (19)(28A)
13. CONSTITUTION OF ZAMBIA, CAP 1 - Articles 14, 18, 21,
23, 91,
98(3)(b) and (5), 137
14. THE JUDICIAL CODE OF CONDUCT, ACT No 13 OF 1999 -
Sections 2, 25(2)
15. BLACK'S LAW DICTIONARY, 5th Edition

This application comes by way of originating notice of motion for judicial review pursuant to Order 53 Rule 3 of the Rules of the Supreme Court, 1999 Edition (White Book). It is brought by the applicant, Dr. Phillip Musonda and directed at the Attorney General, of the Republic of Zambia the respondent herein challenging the decision of the Tribunal on the Supreme Court and High Court Judges to proceed with hearing against Dr. Phillip Musonda after his resignation.

The reliefs that the applicant seeks are stated hereunder as follows:

- (1) An order of certiorari to move into the High Court for the purpose of quashing the decisions of the Tribunal set up to inquire in to the conduct of Judges delivered on 18th June, 2013 and 28th June,**

2013 as decides that the Tribunal will proceed with its hearing against Dr. Phillip Musonda notwithstanding the resignation from office as Supreme Court Judge.

- (2) An order of prohibition restraining the Tribunal from acting outside or in excess of its jurisdiction by proceeding against the applicant when the applicant is no longer a Judicial Officer within the terms of Article 98(3) of the Constitution of Zambia as read with the definition of Judicial Officer in section 2 of the Judicial Code of Conduct, Act № 13 of 1999.**
- (3) An order of stay restraining the Tribunal from in any way proceeding to hers and/or make any order directions or determinations against the applicant following his resignation as Supreme Court Judge.**
- (4) All further and consequential orders.**

The grounds for judicial review are premised on the following:

1. ILLEGALITY

- (i) The decision by the Tribunal to proceed with hearing against the applicant is illegal as the applicant has exercised his constitutional right to resign under Article 137 of the Constitution and which resignation has been accepted by the Appointing Authority. The applicant has ceased being a Judicial Officer within the meaning of section 2 of the Judicial Code of Conduct, Act № 13 of 1999 and the objective of the

inquiry under Article 98(5) has been achieved by the resignation and the jurisdiction of the Tribunal overridden.

- (ii) The decision of the Tribunal to proceed against the applicant is illegal in terms of Article 14 of the Constitution as it is tantamount to forced labour by assuming the applicant to be a serving judge when he has already effectively resigned and also violates Article 21 of the Constitution which guarantees freedom of association.
- (iii) The decision of the Tribunal to proceed against the applicant is illegal as it undermines the freedom of contract of employment between the Appointing Authority and the applicant and which contract has been terminated by resignation and which resignation has been accepted by the Appointing Authority.
- (iv) The decision of the Tribunal to proceed against the applicant is *ultra vires*. Article 98(3)(b) and (5) of the Constitution which presupposes that there must be a sitting judge against whom a recommendation has to be made whether to be removed from office or not.

- (v) The decision of the Tribunal to proceed against the applicant after resignation is illegal in terms of Article 23 of the Constitution and amounts to discrimination as in similar cases Judge Kabazo Chanda and the then Director of Public Prosecutions (DPP) Meebelo Kalima (deceased), the proceedings of the Tribunals set up against the aforesaid individuals terminated after the resignation of the concerned individuals.
- (vi) The decision of the Tribunal to proceed against the applicant is illegal and contrary to Article 18 of the Constitution as it violates the applicant's fundamental right to a fair trial in the light of an order for stay of proceedings granted to Mr. Justice Kajimanga and Justice Mutuna who are jointly charged with the applicant. The applicant and Justice Kajimanga have been jointly charged and have a joint defence and the decision to proceed against the applicant alone is discriminatory and deprives the applicant of the benefit of Judge Kajimanga's evidence.

2. EXCESS OF JURISDICTION

- (i) The Tribunal is acting in excess of jurisdiction by insisting to proceed against the applicant when the mandate of the Tribunal has already been achieved

through the resignation of the applicant which has been accepted by the Appointing Authority.

- (ii) The Tribunal is acting in excess of jurisdiction by inviting unknown persons to come to the Tribunal and testify against the applicant on matters that are outside the knowledge of such unknown persons as the allocation of cases is an internal matter within the Judiciary.

3. **UNREASONABLENESS**

- (a) The decision of the Tribunal to proceed against the applicant is so unreasonable as the Tribunal wants to determine a matter that has already been determined through a resignation and which resignation has been duly accepted by the Appointing Authority rendering the Tribunal hearings otiose.
- (b) The decision of the Tribunal to proceed against the applicant is so unreasonable in the Wednesbury sense in that the Tribunal is determined to spend huge sums of tax payers' money on an academic exercise whose outcome shall not be implementable following the resignation of the applicant and is contrary to the Government prudent fiscal measures of reducing expenses.

- (c) The decision of the Tribunal to proceed against the applicant is so unreasonable as it ignores and runs contrary to the Supreme Court's wise and timely advice of not to proceed with the Tribunal hearings as there were constitutional issues involved in the matter and the decision to proceed is not only unreasonable but disrespectful to the Supreme Court which is the highest Court in the land.

The notice of originating motion for judicial review is supported by affidavit verifying facts relied on for leave to apply for judicial review, further affidavit in support of notice of originating motion for judicial review and affidavit in reply. All these three affidavits were sworn by the applicant, Dr. Phillip Musonda.

In the affidavit verifying facts relied on for leave to apply for judicial review, filed into court on 3rd July, 2013, Dr. Phillip Musonda deposed that he is a former Judge of the Supreme Court of Zambia having been appointed as such on 3rd May, 2011 as indicated in the copy of his letters patent exhibited as **"PM2."** He deposed further that by 30th April, 2012, His Excellency the President of the Republic of Zambia, Mr. Michael Chilufya Sata suspended him from his office as Supreme Court Judge pending hearing by the Tribunal set up to investigate alleged professional misconduct. He stated further that on 9th May, 2013, the Supreme Court of Zambia delivered a judgment wherein the Court

advised against the Tribunal proceeding with the hearing on the ground that the appeal by Justices Charles Kajimanga and Nigel Kalonde Mutuna who are appearing in the Tribunal with the applicant, raised serious constitutional issues. The applicant deposed that notwithstanding the said advice, the Tribunal decided to proceed against him on the ground that he was not covered by the stay of proceedings granted earlier by the Ndola High Court to Justices Kajimanga and Mutuna.

He deposed further that by a letter dated 13th May, 2013, he instructed his advocates to write to the Secretary of the Tribunal raising preliminary issues for Justices T. K. Ndhlovu and N. W. Mwanza to recuse themselves on grounds of alleged impartiality and bias. A copy of the said letter was exhibited as **"PM3."** He stated that on 28th May, 2013, the Tribunal heard the preliminary issues and the two named Judges refused to recuse themselves without offering any reasons for such refusal. The applicant further deposed that following the refusal of Justices Ndhlovu and Mwanza to recuse themselves, it became apparent to him that he would not get a fair hearing from the Tribunal. Therefore, on 4th June, 2013, he wrote a letter to His Excellency the President of the Republic of Zambia informing him of his decision to resign from the Supreme Court and he exhibited as **"PM4,"** a true copy of the said letter. Dr. Phillip Musonda stated that following the aforesaid letter, he instructed his advocates to write to the Tribunal Secretary informing her that since he had resigned from

his position as Supreme Court Judge and he was no longer a Judicial Officer, the Tribunal should not proceed against him. He exhibited a copy of the said letter dated 7th June, 2013 as **“PM5.”** He stated that, however, the Secretary to the Tribunal wrote to his advocates advising them to raise the issue formally before the Tribunal for consideration at the next hearing. A copy of the said letter was exhibited as **“PM6.”** The Tribunal ruled that it would proceed with the hearing against him because it was of the view that his letter of 4th June, 2013 was a mere request to be retired in the national interest and not an effective resignation.

The applicant deposed further in paragraph 16 of his affidavit that following the said ruling, he wrote another letter dated 18th June, 2013 to the Republican President informing him of his unequivocal decision to resign from his position as Supreme Court Judge. He stated that his resignation was accepted by the Acting Chief Justice as Chairperson of the Judicial Service Commission acting for and on behalf of the President. He exhibited as **“PM7”** and **“PM8,”** respectively true copies of his letter and the reply dated 19th June, 2013 from the Acting Chief Justice.

By a letter dated 21st June, 2013 the applicant’s advocates advised the Tribunal through the Secretary that it lacked jurisdiction to proceed against him because the applicant had

effectively resigned. A copy of the said letter is exhibited as **“PM9.”**

He stated that despite the fact there was clear evidence that he had resigned and was no longer a judicial officer, on 28th June, 2013 the Tribunal ruled that it still has jurisdiction to proceed against him. The applicant stated that he reasonably believes that the Tribunal is acting unreasonably, illegally and in excess of jurisdiction by insisting on proceeding with the hearing against him when its jurisdiction has been supplanted and/or overridden by the exercise of his constitutional right to resign under Article 137 of the Constitution and the acceptance of that resignation by the appointing authority.

A further affidavit in support of notice of originating motion for judicial review was filed into court on 16th August, 2013. Dr. Phillip Musonda deposed therein that following his letter of 4th June, 2013 to the President of the Republic of Zambia, the Attorney General of the Republic of Zambia, Mr. Mumba Malila, SC was reported in the Post Newspaper of 10th June, 2013 as saying that his resignation had pre-empted the purpose of the Tribunal. He exhibited a copy of the Post newspaper extract as **“PM2.”** The applicant deposed further that since the publication of the aforesaid article, he had never seen or read any other article where the Attorney General has challenged or refuted the words

attributed to him in the article: **“Musonda has pre-empted Tribunal.”**

He stated further that following the publication of the said article, he had a legitimate expectation that all proceedings against him in the Tribunal would be dropped in accordance with the reasoned opinion of the learned Attorney General. The applicant further stated that he was extremely saddened when the learned Attorney General proceeded to prosecute him in the Tribunal contrary to his well stated position in the aforesaid article.

The applicant stated that he reasonably believes that having resigned from his position as Supreme Court Judge, he is no longer a judicial officer within the meaning of section 2 of the Judicial (Code of Conduct) Act № 13 of 1999 and cannot be amenable to the jurisdiction of the Tribunal which was set up to probe the conduct of judicial officers. Further, with reference to charges 1 to 5 contained in the statement of allegations served on him through his advocates, he stated that he reasonably believes that they are illegal in terms of the provisions of section 25(2) of the Judicial (Code of Conduct), Act № 13 of 1999. As regards charge no. 6, he stated that it is equally illegal on two grounds:

- (a) **It is outside the terms of reference given to the Tribunal and as such, is in excess of jurisdiction**
- (b) **The allegations in the charge are outside the ambit of the offence of judicial misconduct as defined by the Judicial (Code of Conduct) Act No 13 of 1999. Dr. Phillip Musonda further deposed that he reasonably believes that there are extraneous matters being taken into consideration such as the judgment he delivered in the case of TEDWORTH PROPERTIES INC v THE ANTI-CORRUPTION COMMISSION (2003/HP/0428). He exhibited a copy of the said judgment as “PM8.”**

On 23rd August, 2013, the respondent filed into court an affidavit in opposition to summons for leave to apply for judicial review. It was sworn by one Mumba Malila, Attorney General of the Republic of Zambia. He responded to paragraph 4 of the applicant's affidavit in support by stating that the applicant confirmed that the Appointing Authority for Supreme and High Court Judges is the President of the Republic of Zambia. He further deposed that the President legally suspended the applicant from office as Supreme Court Judge and appointed a Tribunal to inquire into the applicant's alleged misconduct as a Judge at the time the applicant held office. He stated that the Tribunal's mandate is *inter alia*, to investigate the alleged

professional misconduct of the applicant as a judicial official, and thereafter advise/recommend to the appointing authority on a set of findings/facts. The Attorney General stated further that he verily believes that while the applicant may have resigned, the complaint of alleged misconduct is not automatically extinguished by such resignation as the mandate of the Tribunal appointed is to ascertain the facts and make recommendations which may help the President to deal with similar situations in the future. He deposed that the Supreme Court in its judgment of 9th January, 2013, held that the President properly exercised his powers under Article 98 of the Constitution and merely stated that **"it would be advisable for the Tribunal not to proceed."** The said Mumba Malila deposed further that mere advice from the Supreme Court is not legally binding especially in view of the finding that the Tribunal was legally constituted.

The deponent further stated that it is regrettable that the applicant could believe and rely on newspaper reports when the proper record of what he said and did is properly recorded in the Tribunal proceedings. He added that it was not his wish to produce or rely on newspaper articles which alleged impropriety on the party of the applicant while he served as a Judge and which articles the applicant did not publicly refute. He stated further that the applicant's advocates were present during the hearings and had the opportunity to follow the proceedings

instead of expecting the Tribunal to avail them transcribed rulings for purposes of obtaining instructions from him.

The applicant filed into court on 30th August, 2013 an affidavit in reply whose contents are mostly arguments and contrary

.....
.....

Therefore, I will not dwell on it as I believe that the same would be best addressed in the arguments or submissions. This also applies to the supplementary affidavit filed into court on 23rd September, 2013. With respect to the affidavit in opposition to the applicant's supplementary affidavit filed into court on 9th October, 2013, the deponent Mumba Malila, Attorney General of the Republic of Zambia, stated that further to the provisions of Articles 91 and 98 of the Constitution, Article 91(2) in particular regulates conduct of the judicial officers through the provisions of the Judicial Code of Conduct Act, 1999 where complaints against judicial officers are tabled through the Judicial Complaints Authority.

The applicant filed into court on 16th September, 2013 heads of arguments in support of the Notice of Originating Motion for judicial review. He stated therein that he filed for judicial review claiming the following reliefs namely:

- (i) An order of certiorari to remove into the High Court for purposes of quashing the decisions of the Tribunal to proceed with the hearing against the applicant when the applicant has ceased being a Judicial Officer within the meaning of section 2 of the Judicial Code of Conduct Act No. 13 of 1999 by way of resignation.**
- (ii) An Order of Prohibition directed at the Tribunal set up to investigate the conduct of Judges Musonda, Kajimanga and Mutuna restraining such tribunal from proceeding against the Applicant for lack of jurisdiction following the resignation of the Applicant as Supreme Court Judge.**
- (iii) An Order of Stay restraining the Tribunal from in any way proceeding to hear and/or make any order directions or determinations against the Applicant following his resignation as Supreme Court Judge.**
- (iv) That all necessary and consequential directions be given.**

The grounds upon which the judicial review application is premised are as follows;

1. ILLEGALITY:

- (i) The decision by the Tribunal to proceed with hearing against the Applicant is illegal as the Applicant has exercised his constitutional right to resign under Article 137 of the Constitution and which resignation has been accepted by the Appointing Authority. The Applicant has ceased being a Judicial Officer within the meaning of Section 2 of the Judicial Code of Conduct Act No. 13 of 1999 and the objective of the Inquiry under Article 98(5) has been achieved by the resignation and the jurisdiction of the Tribunal overridden.**

- (ii) The decision of the Tribunal to proceed against the Applicant is illegal in terms of Article 14 of the Constitution as it is tantamount to forced labour by assuming the Applicant to be a serving Judge when he has already effectively resigned and also violates Article 21 of the Constitution which guarantees freedom of association.**

- (iii) The decision of the Tribunal to proceed against the applicant is illegal as it undermines the freedom of contract of employment between the Appointing Authority and the Applicant and which contract has been terminated by resignation and which resignation has been accepted by the appointing authority.**
- (iv) The decision of the Tribunal to proceed against the Applicant is *ultra vires* Article 98(3)(b) and (5) of the Constitution which presupposes that there must be a sitting judge against whom a recommendation has to be made whether to be removed from office or not.**
- (v) The decision of the Tribunal to proceed against the Applicant after resignation is illegal in terms of Article 23 of the Constitution and amounts to discrimination as in similar cases of Judge Kabazo Chanda and the then DPP Mebeelo Kalima (deceased), the proceedings of the Tribunals set up against the aforesaid individuals terminated after the resignation of the concerned individuals.**
- (vi) The decision of the Tribunal to proceed against the Applicant is illegal and contrary to Article**

18 of the Constitution as it violates the Applicant's fundamental right to a fair trial in the light of an Order for Stay of Proceedings granted to Mr. Justice Kajimanga and Justice Mutuna who are jointly charged with the Applicant. The Applicant and Justice Kajimanga have been jointly charged and have a joint defence and the decision to proceed against the applicant alone is discriminatory and deprives the applicant of the benefit of Judge Kajimanga's evidence.

2. EXCESS OF JURISDICTION

- (i) The Tribunal is acting in excess of jurisdiction by insisting to proceed against the Applicant when the mandate of the Tribunal has already been achieved through the resignation of the Applicant which has been accepted by the Appointing Authority.**

- (ii) The Tribunal is acting in excess of jurisdiction by inviting unknown persons to come to the Tribunal and testify against the Applicant on matters that are outside the knowledge of such unknown persons as the allocation of cases is an internal matter within the Judiciary.**

3. UNREASONABLENESS

- (a) The decision of the Tribunal to proceed against the Applicant is so unreasonable as the Tribunal wants to determine a matter that has already been determined through a resignation and which resignation has been duly accepted by the Appointing Authority rendering the Tribunal hearings otiose.**

- (b) The decision of the Tribunal to proceed against the Applicant is so unreasonable in the Wednesbury sense in that the Tribunal is determined to spend huge sums of tax payers' money on an academic exercise whose outcome shall not be implementable following the resignation of the Applicant and is contrary to the Government prudent fiscal measures of reducing expenses.**

- (c) The decision of the Tribunal to proceed against the Applicant is so unreasonable as it ignores and runs contrary to the Supreme Court's wise and timely advice of the not to proceed with the Tribunal hearings as there were constitutional issues involved in the matter and the decision to proceed is not only unreasonable but**

disrespectful to the Supreme Court which is the Highest Court in the Land.

Thereafter, learned Counsel for the applicant, Mr. Milner Katolo proceeded to analyse each of the grounds relied on with the help of decided cases and to clearly demonstrate how each of the grounds applies to the facts of this case.

With regard to the ground of illegality he referred this court to the case of **DERRICK CHITALA (Secretary of the Zambia Democratic Congress) v ATTORNEY GENERAL**¹ in which the Supreme Court at page 96 opined with regard to illegality as follows:

“By ‘illegality’ as a ground for judicial review, I mean that

the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellent a justifiable question to be decided, in the event of dispute by those persons, the judges, by whom the judicial power of the State is exercisable.”

In the instant case, learned Counsel for the applicant submitted that the Tribunal failed to understand correctly the provisions of

Article 98(3)(b) of the Constitution which empowers them to hear a matter against a serving judge with a view to making a recommendation whether to have such Judge removed or not. He argued that there is no provision under the Constitution for the Tribunal to proceed against a judge who has removed himself from office by way of resignation. He submitted that Article 137 of the Constitution is very clear to that effect and provides:

“137(1) Any person who is appointed or elected to any office

established by this Constitution may resign from that office by writing under his hand addressed to the persons or authority by whom he was appointed or elected.

(2) The resignation of any person from any office established by the Constitution shall take effect when the writing signifying the resignation is received by the person or authority to whom it is addressed or by any person authorised by that person or authority to receive it.

Mr. Milner Katolo further relied on the case of **KITWE CITY COUNCIL v WILLIAM NG’UNI**² where it was held *inter alia*:

“Section 32 of the Local Authorities Superannuation Fund Act

provides that if a member is dismissed from the service for his grave misconduct, dishonesty or fraud, or if he is allowed to resign or retire in order to avoid such dismissal, he shall receive a lump sum equal to the amount of the contributions paid by him and for purposes of this section any resignation tendered by a member during an inquiry into his conduct and before the result of such inquiry is announced shall be deemed to be any resignation in order to avoid dismissal.”

It was submitted further by learned Counsel for the applicant that the applicant’s resignation before the Tribunal could commence hearing witnesses created a juridical impossibility for the Tribunal to proceed against him in terms of their powers under Article 98(3) of the Constitution. It is further contended that the Tribunal’s decision to proceed against the directive in the Supreme Court judgment is illegal. Mr. Milner Katolo submitted that the Supreme Court in its judgment advised that the Tribunal should not proceed because of the Constitutional issues raised in the appeal. He likened that judgment to advisory opinions of the Judicial Committee of the Privy Council. He referred this Court to the case of **NKUMBULA v ATTORNEY GENERAL**³ in which Baron DCJ (as he then was) observed:

“It is not the function of the Court to advise Government, but that of the Attorney General. The function of the Court is to adjudicate disputes between individuals and between individual and government.”

Learned Counsel for the applicant also referred the Court to **SHIPANGA v THE ATTORNEY GENERAL**⁴ wherein Silungwe, CJ (as he then was) commented on the State’s failure to make a return to the writ of habeas corpus as follows:

“The Government cannot be heard to say they cannot obey the Court judgment in the interest of the liberators’ struggle.”

In the instant case, Mr. Milner Katolo also dealt with the issue of legitimate expectation. He submitted that the protection of expedition is bound up with the protection of equality and that past experience is generally crucial in the formulation of expectations and information about specific past behaviours. He submitted further that discriminatory conduct will thus necessarily thwart expectations. He further submitted that laws forbidding discrimination protect expectations of equal treatment which is a significant dimension of the right to equality. It is the applicant’s

contention in the statement on the *ex-parte* application for leave to apply for judicial review that the decision to proceed against him after he resigned is discriminatory and illegal in terms of Article 23 of the Constitution of Zambia. He based his argument on the ground that similar cases of the tribunals set up to probe Judge Kabazo Chanda and Meebelo Kalima (deceased) abated when the said individuals resigned from their positions.

The applicant submitted through Counsel that the learned Attorney General of the Republic of Zambia, as the Chief Legal Advisor to the Government took cognisance of that past practice upon the applicant's resignation when he announced that the applicant's resignation had pre-empted the Tribunal. He submitted further that that statement as reported in the Post Newspaper exhibited as "**PM2,**" was the correct interpretation of the Tribunal's jurisdiction under Article 98(5) of the Constitution. He observed that, however, later he decided to prosecute and he argued that under the doctrine of legitimate expectation he is estopped or barred from doing so. Counsel for the applicant submitted that apart from the Attorney General making a pronouncement his office has been consistent by not prosecuting all those who have resigned and, therefore, the applicant expected that policy to apply to him as it applied to Judge Kabazo Chanda and Mr. Meebelo Kalima (late former DPP).

Learned Counsel for the applicant argued that the doctrine of legitimate expectation is binding on the learned Attorney General and the High Court as it has been adopted in the Zambian administrative law jurisprudence by the Supreme Court in the case of **VODACOM v COMMUNICATION AUTHORITY**⁵ where the Court stated as follows:

“Legitimate expectation arises where a decision maker has led

someone to believe that they will receive or retain a benefit or advantage including that a hearing will be held before a decision is taken.....The protection of legitimate expectation is at the root of the constitutional principle of the rule of law, which requires regularity, predictability and certainty in government dealings with the public. The doctrine of legitimate expectation derives from justification from the principle of allowing the individual to rely on assurances given, and to promote certainty and consistent administration.”

It was submitted that the case referred to is binding on the Attorney General and the High Court and that to proceed with the Tribunal hearing would be an abuse of power, unconstitutional and undermine the Supreme Court’s adjudicatory supremacy.

Learned Counsel for the applicant also dealt with the issue of the allegations levelled against the applicant. He submitted that the allegations ought to have been examined to determine if they were *intra vires* the conduct regulated under the Judicial Code of Conduct, Act № 13 of 1999. He contended that to lay charges of misconduct outside the Judicial Code of Conduct, such as in this case violates the Constitution and undermines Parliament's legislative supremacy under article 62 of the Constitution. It was further contended that the charges are illegal, unconstitutional and highly prejudicial as he would be defending illegal charges at a cost and would be embarrassed. Mr. Katolo submitted that any decision outside the terms of reference and the Judicial Code of Conduct will be quashed as in the case of **WILLIAM HARRINGTON v DORA SILIYA AND ATTORNEY GENERAL**⁶ where it was held:

“The Tribunal’s jurisdiction was confined to investigating the 1st respondent’s alleged breach of Part II of the Parliamentary and Ministerial code of Conduct Act. The Tribunal was not asked to investigate the 1st respondent for the alleged breach of the Constitution.....The Tribunal exceeded its jurisdiction when it pronounced itself on breach of Constitution....”

In the instant case, on the issue of excess of jurisdiction by the Tribunal, learned Counsel for the applicant submitted that when the applicant resigned his action was consented to by the Appointing Authority that is superior to the Tribunal. He added that His Excellency the President is the Appointing Authority of both the applicant and the Tribunal. He argued that if the Tribunal is allowed to proceed it will be violating Article 98(5) of the Constitution which restricts the power of the Tribunal to recommend removal or not of a Judge. He submitted that in this case, there is no one against who removal or otherwise lies by exceeding its jurisdiction.

Mr. Milner Katolo further submitted that the Tribunal has exceeded its jurisdiction by inviting unknown persons to go and testify against the applicant on matters outside the knowledge of such persons, as the allocation of cases is an internal matter within the Judiciary. He contended that the Tribunal exceeded the terms of reference and as such violated the Judicial Code of Conduct and Article 91(2) of the Constitution by undertaking a 'global inquiry.'

The respondent filed submissions opposing the originating notice of motion for judicial review for an order for certiorari, prohibition and declaration. He restated the reliefs sought by the applicant and the grounds upon which the reliefs are sought.

It is submitted that the proceedings by the applicant before this Court are premised on the applicant's understanding that upon resignation as Judge of the Supreme Court for Zambia, any investigation by whatever name, instituted against him ceased upon his vacating the office.

The respondent submitted further that the applicant even alleges illegality on the part of the Tribunal for proceeding with the hearing since the applicant has exercised his constitutional right to resign under Article 137 of the Constitution. It is the respondent's contention that the applicant's resignation is not an issue before the Tribunal since the Tribunal was not asked to determine whether as a matter of law the Judge has resigned or not. The respondent submitted that the purpose of the Tribunal is to inquire into the alleged misconduct at the time the applicant held office as Judge. Further, that the Tribunal's investigation is intended to establish the veracity of the allegations. It is further submitted that if the allegation is proved, it will be treated as a relevant fact towards the advice or recommendation. The argument advanced is that what is sufficient is that the applicant was a Judge at the time facts giving rise to the complaint arose.

It is further contended that the applicant is labouring under a misconception that a resignation extinguishes an inquiry when it does not. The respondent submitted that it is incorrect to form an opinion that the Tribunal's objective is to remove the applicant

from office. It was submitted further that Article 98(3) and (5) presupposes that judicial conduct must be inquired into and a report preferred. Thereafter, advice or recommendations which include a removal may follow. The respondent argued that there is nothing to stop a Tribunal from inquiring even after a resignation and then proceeding to report, advise and/or recommend while at the same time consider the fact that the applicant is no longer a Judge. It was further submitted that the applicant's action of rushing to court to halt the investigations is premature. This argument was fortified by reliance on the case of **HARRY MWAANGA NKUMBULA v ATTORNEY GENERAL.**

The respondent referred the court to page 740 of **BLACK'S LAW DICTIONARY, 5th Edition** where the learned author defines "investigate" as:

"...to follow up step by step by patent inquiry or observation.

To trace or track; to search into, to examine and inquire into with care and accuracy; to find out by careful inquisition; examination etc."

It is contended that from this definition it is abundantly clear that a decision that can be subject to judicial review must be the kind that is final in nature or one that is made after all issues have been considered by the Tribunal.

The respondent submitted that the Tribunal has made no such decision and relied on the case of **COUNCIL OF CIVIL SERVANTS UNION & OTHERS v MINISTER OF STATE FOR CIVIL SERVICE**⁷. In that case it was observed that a decision under judicial review must have consequences which affect some person or body of persons other than the decision maker although it may affect him too. Further, in the case of **R v CROWN COURT AT READING, Ex.p. HUTCHINSON AND ANOTHER**⁸, Lloyd, L J stated that judicial review is not to be used as a means for obtaining a decision on a question of law in advance of the hearing. In the present, it is contended that this is precisely what the applicant is attempting to do by seeking to challenge the statements. The respondent submitted that, therefore, the only recourse that the applicant has is to wait for the Tribunal hearing to be conducted for him to challenge the outcome, if necessary. They prayed that the application be dismissed with costs.

I have carefully considered the application for judicial review, the affidavit evidence, submissions and authorities which have been of great assistance. The facts upon which the reliefs are sought by the applicant have already been elaborately stated and I, therefore need not restate them. The grounds relied upon to support the claims for which the reliefs are sought have also been sufficiently stated and I will deal with them later. However, before proceeding to consider the merits of the application for

judicial review, I would like to make brief reference to the basic principles underlying the process of judicial review. Under Order 53, Rule 14(19) of the Supreme Court Rules, 1999 Edition at page 902, the learned authors dealt with the nature and scope of judicial review which constitute the basic principles to be considered in granting the remedy of judicial review. They stated that the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself.

In **CHIEF CONSTABLE OF NORTH WALES POLICE v EVANS**⁹ at p. 143 Lord Hailsham L. C. summed the position as follows:

“It is important to remember in every case that the purpose of (the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the Judiciary or of individual Judges for that of the authority constituted by law to decide the matters in question.”

The learned authors stated further that a decision of an inferior court or a public authority may be quashed (by an order of certiorari on an application for judicial review) where that court or

authority acted without jurisdiction or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable or where there is an error of law on the face of the record, or the decision is unreasonable in the Wednesbury sense.

They stated further that the court will not, however, on a judicial review application act as a **“court of appeal”** from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment.

From the aforestated guidelines, this court will proceed to consider the respondent’s Tribunal’s decision-making process of proceeding with the hearing against Dr. Phillip Musonda after his resignation. The decision making process has been challenged on its decision to proceed with the hearing against the applicant after his resignation. The grounds for judicial review are premised on the following:

- (i) Illegality**
- (ii) Excess of jurisdiction**
- (iii) Unreasonableness**

I will proceed to consider each ground in relation to the evidence or facts before this court and the law.

On the ground of illegality, the applicant advanced a number of arguments to demonstrate the nature of the illegality alleged against the respondent's Tribunal's decision to proceed with the hearing against Dr. Phillip Musonda even in the face of his resignation as a Judge from the Judiciary. The same were already elaborated stated in the grounds for judicial review so I will not restate them to avoid being repetitive.

Lack of or excess of jurisdiction entails illegality in the exercise of the powers by the decision-making process. The applicant alleged that the Tribunal exceeded its jurisdiction by deciding to proceed with the hearing against the applicant after his resignation as a Judge.

In the case of **COUNCIL OF CIVIL SERVICE UNIONS v MINISTER OF STATE FOR CIVIL SERVICE**, Lord Diplock explained the meaning of illegality when he stated:

“By ‘illegality’ as a ground for judicial review I mean that the

decision maker must understand correctly the law that regulates his decision making power and must give effect to it.”

This was cited with approval by the Supreme Court of Zambia in the case of **DERRICK CHITALA (Secretary of the Zambia Democratic Congress) v ATTORNEY GENERAL.**

Based on the definition of illegality by Lord Diplock, it is the applicant's contention that the Tribunal set up to inquire into the conduct of three named Judges, failed to understand correctly the provisions of Article 98(3)(b) of the Constitution which empowers them to hear a matter against a serving Judge with a view to making a recommendation whether to have such removed or not. It was further submitted that there is no provision under the Constitution for the Tribunal to proceed against a Judge who removes himself from office by way of resignation. Learned Counsel for the applicant referred to Article 137 of the Constitution about resignation and when it becomes effective. He likened the instant case to that of **KITWE CITY COUNCIL v WILLIAM NG'UNI** where the Supreme Court held *inter alia* that under section 32 of the Local Authorities Superannuation Fund Act, if a member is allowed to resign or retire to avoid dismissal from service for his grave misconduct, dishonesty or fraud during an inquiry into his conduct and before the result of such inquiry is announced, it shall be deemed to be a resignation.

Article 98(3) of the Constitution of Zambia, Cap. 1 of the Laws of Zambia provides:

“(3) If the President considers that the question of removing

a judge of the Supreme Court or the High Court under this Article ought to be investigated, then -

(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 misbehaviour.”

Further in the applicant’s first ground for judicial review under the heading **“illegality,”** he stated that the objective of the inquiry under Article 98(5) of the Constitution has been achieved by his resignation and the jurisdiction of the Tribunal overridden. The said Article 98(5) provides as follows:

“(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.”

The applicant’s contention that the Tribunal’s decision to proceed against the applicant is *ultra vires* is further based on Article 98(3)(b) and (5)’s presupposition that there must be a sitting judge against whom a recommendation has to be made whether to be removed from office or not.

Upon consideration of the foregoing provisions of Article 98(3)(b) and (5) of the Constitution, I accept that the President’s purpose of appointing a tribunal to inquire into the conduct of the three named judges was to receive a report on the facts thereof and a recommendation on what action to take in terms of whether or not to have the judge removed for inability or for misbehaviour. Further under Clause 5 of Article 98, the President may suspend and remove a judge from office. By suspension it is clear that such judge should be a serving judge who may be

suspended and possibly removed from office. This also entails that this provision cannot be invoked or applied against a judge who has left his office by way of resignation as in the case of the applicant herein.

According to the affidavit evidence and exhibits before this court ("**PM7**" dated 18th June, 2013 being the letter of resignation to His Excellency the President of the Republic of Zambia and "**PM8**" dated 19th June, 2013 from the Acting Chief Justice accepting the resignation as Chairperson of the Judicial Service Commission acting for and on behalf of the President) the applicant ceased being a judicial officer when his resignation was accepted in accordance with the provisions of Article 137(2) of the Constitution.

In trying to fortify the applicant's argument on the ground of illegality of the Tribunal's decision to proceed with the hearing against the applicant, learned Counsel submitted that there is no provision under the Constitution for the tribunal to proceed against a judge who has resigned.

The respondent's contention, however, is that the tribunal's purpose is to inquire in to the alleged misconduct of the applicant at the time he held office as a Judge and to establish the veracity of the allegations and to make recommendations.

In considering the issue of illegality I also considered the Tribunal's mandate which was to inquire into the conduct of three judges as aforestated. By proceeding with the hearing against the applicant who has resigned, the question that arises is whether the tribunal would be acting *ultra vires* its powers under the mandate. Since there is no provision under the Constitution to proceed to make inquiry against a retired judge where would the Tribunal derive its authority to proceed its hearing against the applicant as a non judicial officer. As there is no provision of law to support the Tribunal's decision to proceed with the hearing against the applicant, I am inclined to accept that the Tribunal's decision to proceed against the applicant without provisions of the law to support such decision is illegal and I do so accept it.

I further accept that part of the objective of the inquiry under Article 98(5) of the Constitution has been achieved by the applicant's resignation and the Tribunal's jurisdiction overridden. Although the actual inquiry has not been carried out, thereby depriving those seeking answers the satisfaction of knowing the truth or veracity of the allegations against the applicant. The issue that arises, however, is for what purpose and at what and whose expense should this hearing proceed. The rationale of proceeding with the hearing against the applicant will be dealt with under irrationality or unreasonableness.

The applicant also alleged that the Tribunal's decision to proceed against him is illegal in terms of Article 14 of the Constitution as it is tantamount to forced labour by assuming the applicant to be a serving judge when he has already effectively resigned and also violates Article 21 of the Constitution which guarantees freedom of association. Since the applicant has not presented proof of forced labour by the respondent or violation of Article 21 with regard to his freedom of association, I find no illegality of the Tribunal's decision in this regard.

As regards the allegation of the Tribunal's decision being illegal for undermining the freedom of contract of employment between the Appointing Authority and the applicant I am not satisfied that the applicant has sufficiently proved this allegation. I find that this allegation is vague and ambiguous in its content and I cannot accept that the Tribunal's decision is illegal based on it.

Dr. Phillip Musonda also challenged the Tribunal's decision for illegality in terms of Article 23 of the Constitution on the basis of discrimination. He alleged that he was being treated differently in relation to similar cases of proceedings of tribunals set up against other individuals which were terminated after their resignation. He gave examples of Judge Kabazo Chanda, former High Court Judge and late Mr. Meebelo Kalima, former Director of Public Prosecutions. The example of the named individuals

together with the authority of **KITWE CITY COUNCIL v WILLIAM NG'UNI** supports the applicant's argument on discrimination. I am, however, of the considered view that the **KITWE CITY COUNCIL** case is similar only to the extent that the respondent was allowed to resign before the result of an inquiry is announced to avoid dismissal.

From the examples given, I accept that the Tribunal's decision to proceed with the hearing against the applicant is discriminatory based on past cases where constitutional office holders have been allowed to resign and Tribunal proceedings have been terminated or discontinued.

In view of the fact that the applicant has succeeded on most of his allegations under the ground of illegality of the Tribunal's decision to proceed against the applicant I, accordingly, accept that the decision by the Tribunal to proceed against the applicant is illegal for the reasons stated.

The applicant's second ground for judicial review is excess of jurisdiction based on the following allegations:

- (i) that the Tribunal is acting in excess of jurisdiction by insisting on proceeding with the hearing against the applicant when the mandate of the Tribunal has already been achieved**

through the applicant's resignation as Judge and which resignation has been accepted by the appointing Authority.

- (ii) The Tribunal is acting in excess of jurisdiction by inviting unknown persons to come and testify before the Tribunal against the applicant on matters that are outside the knowledge of such unknown persons as the allocation of cases is an internal matter within the Judiciary.**

According to the learned authors of the Supreme Court Practice, 1999 Edition, Volume 1 at page 906 under Order 53 Rule 14(28A) with reference to want or excess of jurisdiction, if an inferior court or tribunal or a public authority charged with a public duty acts without jurisdiction or exceeds its jurisdiction judicial review will lie. Based on the decision of the House of Lords in **ANISMINIC LTD v FOREIGN COMPENSATION COMMISSION**¹⁰ where the decision of an administrative authority or tribunal is founded, wholly or partly, on an error of law, the authority or tribunal has acted outside its jurisdiction and accordingly its decision is liable to be quashed. This means that a distinction must be drawn between errors of law which go to jurisdiction and errors of law which do not.

From the House of Lords' decision on want or excess of jurisdiction and its guidance for the need to draw a distinction between errors of law which go to jurisdiction and errors of law which do not, the question that arises is whether the Tribunal by deciding to proceed with the hearing against the applicant has exceeded its jurisdiction as alleged by the applicant.

The applicant based his allegation on the argument that the Tribunal's mandate has already been achieved through his resignation as a Judge. The other argument advanced by the applicant is that the Tribunal exceeded its jurisdiction by inviting unknown persons to go and testify against him on matters that are outside their knowledge.

With regard to the applicant's allegation that the Tribunal is acting in excess of jurisdiction by insisting to proceed against the applicant when the Tribunal's mandate has already been achieved through the applicant's resignation which has been accepted by the appointing Authority this court has to determine whether or not the Tribunal's mandate has been achieved against the applicant. The Tribunal's mandate is to inquire into the conduct of three named judges and to submit a report with recommendations whether to suspend or remove the judges. In the applicant's case he opted to resign in order to avoid the inquiry amid allegations that the Tribunal's composition which included two retired Zambian judges would not afford him a fair

and just hearing as the two retirees Zambian judges had had differences with him in the past. He decided to follow the example of Judge Kabazo Chanda, former High Court Judge who opted to resign to avoid a Tribunal inquiry of his conduct. He was allowed to resign.

Dr. Phillip Musonda also referred to the late Mebeelo Kalima's resignation as Director of Public Prosecutions to avoid a Tribunal inquiry and he was allowed to resign. The contention by the applicant that the Tribunal has already been achieved through the applicant's resignation has been rejected by the respondent who argued that the applicant's resignation does not extinguish the inquiry. The respondent argued that there is nothing to stop a Tribunal from inquiring even after a resignation and then proceed to report, advise and/or recommend while at the same time consider the fact that the applicant is no longer a judge. They also submitted that the application for judicial review is premature as the decision being challenged is not the final decision of the Tribunal.

I am of the considered view that the issue of finality of the Tribunal's decision does not arise in this case because it is not the final decision that is in contention but the decision relating to the process being adopted by the Tribunal that is being challenged.

Whilst I accept that the resignation does not extinguish the inquiry or the allegations levelled at the applicant, it is the Tribunal's insistence to proceed with the inquiry not so much to establish the veracity of the allegations but to make a recommendation which would serve no purpose in terms of Article 98(3) and (5) of the Constitution that is questionable. By the applicant's resignation from his position as a Supreme Court Judge, he usurped the power of the Tribunal to make a recommendation for his removal if the need had arisen.

Even though I accept that the applicant's resignation does not extinguish the allegations or charges against him and that it would have been desirable to establish the veracity of the allegations or to have the applicant clear his name, his option to resign ought to be respected. The question that begs an answer is what purpose proceeding with the hearing against the applicant would serve at great expense of using tax payers' money.

I am further of the considered view that it is unfair and unjust to use this Tribunal as an example against would-be future misconduct as has been suggested by the respondent. Each case must be treated according to the facts and its own merits at any given time and therefore, the applicant's case should be dealt with according to its own unique nature.

In conclusion, I find that the Tribunal's mandate has already been achieved only to the extent that the applicant has pre-empted the Tribunal's recommendation by removing himself from office by way of resignation. However, in terms of the actual inquiry, I am of the view that the same can be considered to have been frustrated by the resignation in that at the end of the inquiry, the Tribunal's recommendation for the lifting of the suspension or removal from office would be ineffective as against the applicant.

Therefore, on the ground of the Tribunal acting in excess of jurisdiction by insisting to proceed against the applicant, I am persuaded by the applicant's arguments that the applicant's resignation from his office as a Supreme Court Judge placed him outside the Tribunal's jurisdiction under Article 98(3) of the Constitution. How can the applicant be investigated as a private individual under that provision that relates to judges? On that first part of the ground, I find that the Tribunal is acting in excess of its jurisdiction by insisting on proceeding against the applicant.

The second part of this ground relates to the issue of the Tribunal acting in excess of jurisdiction by inviting unknown persons to go and testify against the applicant before the Tribunal on internal matters pertaining to allocation of cases within the Judiciary. Had the proceedings against the applicant gone ahead, this would have been a matter for the Tribunal to determine

whether such persons were competent witnesses whose testimonies should be taken seriously based on how they came to be in possession of such knowledge. In other words, these are matters that relate to the merits of the case or inquiry and is not for this court. I, therefore, find that the Tribunal did not act in excess of jurisdiction in that regard.

The applicant's third ground for seeking judicial review is that of unreasonableness or irrationality in the exercise of the power or decision-making by the Tribunal to proceed with the hearing against the applicant. Therefore, this court has to determine whether the procedure or process used to arrive at the said decision was irrational or unreasonable as alleged by the applicant. The standard for determining irrationality or unreasonableness as a ground for judicial review was enunciated in the case of **ASSOCIATED PROVINCIAL PICTURE HOUSES v WEDNESBURY CORPORATION**¹¹ and later espoused by Lord Diplock in the case of **COUNCIL OF CIVIL SERVICE UNION v MINISTER OF STATE FOR CIVIL SERVICE** when he stated:

“..... By irrationality I mean what can now be succinctly

referred to as Wednesbury unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that

no sensible person who had applied his mind to the question to be decided could have arrived at it.”

In the present case the Tribunal set up to investigate the conduct of three named judges including the applicant, decided to proceed with the hearing against the applicant after he resigned and ceased being a judicial officer within the meaning of section 2 of the Judicial Code of Conduct, Act № 13 of 1999. The applicant alleged that the Tribunal’s decision to proceed against him is so unreasonable in the Wednesbury sense based on the following reasons:

- (a) that the Tribunal wants to determine a matter that has already been resolved or determined through the applicant’s resignation, and thereby rendering the tribunal hearings otiose;**
- (b) that the Tribunal is determined to spend huge sums of tax payers’ money on an academic exercise whose outcome shall not be implementable following the applicant’s resignation; and**
- (c) that the Tribunal’s decision disregards and is contrary to the Supreme Court’s advice for the**

Tribunal hearing not to proceed in view of constitutional issues involved in the matter.

I will proceed to deal with each of the issues raised under this third ground that the Tribunal's decision to proceed against the applicant is so unreasonable in the Wednesbury sense.

The first reason advanced for challenging the Tribunal's decision for being Wednesbury unreasonable is that the Tribunal wants to determine a matter that has already been resolved or determined through the applicant's resignation, and thereby rendering the Tribunal hearings otiose. The issue of the matter relating to the applicant having already been resolved or determined has already been dealt with. Although the actual inquiry was not carried out so as to resolve or determine the matter, by the applicant's resignation from office as a Supreme Court Judge entailed that the Tribunal cannot make a recommendation for his removal even if the hearing proceeded.

Further, the applicant contends that the Tribunal is determined to spend huge sums of tax payers' money on an academic exercise whose outcome shall not be implementable following the applicant's resignation. The applicant is therefore questioning the rationale behind the Tribunal's decision to proceed with hearings against him at great expense only to come up with a recommendation for either the lifting of the suspension

or removal from office. Either recommendation would serve no purpose at this stage since the applicant already left office by way of resignation. I, therefore, accept that this academic exercise would not be implementable and thereby end up being a mere waste of tax-payers' money.

Considering the aforestated reasons advanced by the applicant to support his third ground for judicial review, I am of the considered view that the reasoning is sound enough to support the ground of the Tribunal's decision being so unreasonable in the *Wednesbury* sense.

Further, under the same ground of *Wednesbury* unreasonableness, I turn to the contention that the Tribunal's decision disregards and is contrary to the Supreme Court's advice for the Tribunal hearing not to proceed in view of constitutional issues involved in the matter. Although the applicant has labelled the Tribunal's decision as *Wednesbury* unreasonable for disregarding the Supreme Court's advice for the Tribunal hearing not to proceed, I agree with the respondent that the advice is not legally binding on the Tribunal. As such, the Tribunal decision not to follow the said advice cannot be said to be unreasonable in the *Wednesbury* sense.

Finally, on the totality of the evidence and the law relating to the grounds for judicial review and the reliefs sought by the

applicant, he succeeds on all three grounds with the exception of a few issues resolved in the respondent's favour.

The applicant seeks reliefs for orders of certiorari and prohibition. I hereby grant the orders sought as follows:

- (i) an order of certiorari quashing the decisions of the Tribunal delivered on 18th June, 2013 and 28th June, 2013 respectively for the Tribunal to proceed with its hearing against the applicant, Dr. Phillip Musonda notwithstanding his resignation from office as Supreme Court Judge;
- (ii) an order of prohibition restraining the Tribunal from acting outside or in excess of its jurisdiction by proceeding against the applicant when the applicant is no longer a Judicial Officer within the terms of Article 98(3) of the Constitution of Zambia as read with the definition of Judicial Officer in section 2 of the Judicial Code of Conduct, Act № 13 of 1999.

I further award costs to the applicant, and in default of agreement costs to be taxed.

Leave to appeal is also hereby granted.

DELIVERED thisday of May, 2014 at Lusaka.

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F. M. Lengalenga
JUDGE