

SELECTED JUDGMENT NO. 33 OF 2018

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**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)**



APPEAL NO. 193/2015

IN THE MATTER OF:

**S.I. NO. 156 OF 1969 THE PROTECTION OF
FUNDAMENTAL RIGHTS RULES**

AND IN THE MATTER OF:

**THE CONSTITUTION OF ZAMBIA, THE
CONSTITUTION OF ZAMBIA ACT, CHAPTER 1,
VOLUME 1 OF THE LAWS OF ZAMBIA**

AND IN THE MATTER OF:

**ARTICLES 11b, 20, 21, 23 AND 28 OF PART III
FOR THE PROTECTION OF THE FUNDAMENTAL
RIGHTS AND FREEDOMS OF AN INDIVIDUAL
CAP. 1 OF THE LAWS OF ZAMBIA**

AND IN THE MATTER OF:

**THE ELECTORAL ACT, SECTION 8 (1), (2) AND
(3) OF THE ELECTORAL (CONDUCT)
REGULATIONS CHAPTER 13 OF THE LAWS OF
ZAMBIA**

AND IN THE MATTER OF:

**SECTION 7 (1) (a), (b), (e), (f), (h), (j) AND (m) OF
THE ZAMBIA NATIONAL BROADCASTING
CORPORATION ACT, CHAPTER 154 OF THE
LAWS OF ZAMBIA**

AND IN THE MATTER OF:

**SECTION 33 OF THE INDEPENDENT
BROADCASTING AUTHORITY ACT, NUMBER 22
OF THE LAWS OF ZAMBIA**

AND IN THE MATTER OF:

**ARTICLES, 1, 3, 4, 6 AND GUIDELINE 2.1 OF
THE CONVENTION ON THE GUIDELINES AND
PRINCIPLES FOR BROADCAST COVERAGE OF
ELECTIONS IN THE SADC REGION**

BETWEEN:

STEPHEN KATUKA (Suing in his capacity
as Secretary General of the United Party
for National Development (UPND))

1ST APPELLANT



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DIPAK K. A. PATEL (Suing in his capacity
as Campaign Manager of the United Party for
National Development (UPND))

2nd APPELLANT**AND**

**ZAMBIA NATIONAL BROADCASTING
CORPORATION**

RESPONDENT

Coram: Wood, Musonda and Mutuna, JJS
on 10th July and 27th July, 2018

For the Appellants: Ms. Martha Mushipe of Mushipe & Associates

For the Respondent: N/A

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

1. **Attorney-General v. Law Association of Zambia (2008) 1 Z.R. 21**
2. **Match Corporation Limited v. Development Bank of Zambia and Attorney-General: (1999) Z.R. 13**
3. **Manganese Ore (India) Ltd v. Regional Asstt. CST (1976) 4 SCC 124 at page 127**
4. **Bengal Immunity Co. Ltd. v. State of Bihar (AIR 1955 SC 661)**
5. **Mutale v. Zambia Consolidated Copper Mines Limited (1993-94) Z.R. 94**
6. **YB and F Transport Limited v. Supersonic Motors Limited (2000) Z.R. 22**
7. **Kuta Chambers (Sued as a Firm) v. Concillia Sibulo (Suing as Administratrix of the estate of the Late Francis Sibulo): Selected Judgment No. 36 of 2015**

**8. Garrick Refrigeration and Air Conditioning v. Fresh Direct:
Selected Judgment No. 34 of 2016**

Legislation referred to:

- 1. Order 14A and Order 33/3 of the Rules of the Supreme Court, 1965, 1999**
- 2. The Constitution of Zambia Act, Chapter 1, Volume 1 of the Laws of Zambia**
- 3. Part III for the Protection of the Fundamental Rights and Freedoms of an Individual, Chapter 1 of the Laws of Zambia**
- 4. The Electoral Act and Electoral Regulations, Chapter 13 of the Laws of Zambia**
- 5. The Zambia National Broadcasting Corporation Act, Chapter 154 of the Laws of Zambia**
- 6. The Independent Broadcasting Authority Act of the Laws of Zambia**
- 7. The Convention on the Guidelines and Principles for Broadcast Coverage of Elections in the Southern African Development Community (SADC)**
- 8. Order 33/3 of the Rules of the Supreme Court, 1965, 1999 edition**
- 9. Article 28 (1) of the Constitution of the Republic of Zambia**

1.0 INTRODUCTION

- 1.1 This appeal has arisen in the way of prompting us to disturb a Ruling of the court below by which that court upheld a preliminary application by which the respondent had sought to have an order of injunction which the court below had

granted in favour of the appellants discharged for irregularity and want of jurisdiction by the dealing court.

- 1.2 The basis of the respondent's preliminary challenge was that, as the appellants had instituted their substantive action in the court below by way of a petition pursuant to the provisions of Article 28 of the Constitution of Zambia, the lower court had no jurisdiction to grant the appellants injunctive relief in the way of an interim remedy. In taking this position, the respondent was buoyed by the decision of this court in **Attorney-General v. The Law Association of Zambia**¹.

2.0 HISTORY AND BACKGROUND OF APPLICATION

- 2.1 The history and background circumstances which had surrounded the respondent's preliminary application were of undoubted perspicuity and can briefly be recounted.
- 2.2 The appellants are and/or were at all material times well known politicians and leading members of the United Party for National Development (UPND) which is and was at all material times the leading or foremost opposition political

party in the Republic of Zambia. The 1st appellant is and/or was at all material times the Secretary General of the United Party for National Development (UPND) while the 2nd Appellant was at all relevant times the Campaign Manager for Mr. Hakainde Hichilema, the UPND's President and was at all relevant times the Party's Republican Presidential candidate in the January, 2015 Presidential by-election.

- 2.3 The respondent is a State-owned statutory corporation which operates the business of a public television and radio broadcaster in the Republic of Zambia and is funded by the Zambian Government through taxes and other public resources. In addition, the respondent is a beneficiary of a public resource window known as 'television levy' which every owner of a television set in Zambia is legally required to pay.
- 2.4 Following the death of Mr. Michael Sata as Zambia's Republican President, a public announcement was made on 18th November, 2014 to the effect that a Presidential by-election was to be held in the country on 20th January, 2015

for the purpose of electing a new Republican President who was to succeed late President Michael Sata.

- 2.5 Concomitantly with the announcement referred to in the preceding paragraph, the Zambian Government also announced the commencement of the campaigns for the by-election in question.

3.0 PRESENTATION OF PETITION

- 3.1 On 15th December, 2014, the appellants presented a petition in the court below seeking a variety of reliefs against the respondent which were founded on some provisions of the Constitution of the Republic of Zambia, the Electoral Act and Electoral Regulations, Chapter 13 of the Laws of Zambia, the Zambia National Broadcasting Corporation Act, Chapter 154 of the Laws of Zambia, the Independent Broadcasting Authority Act of the Laws of Zambia and certain provisions of the Convention on the Guidelines and Principles for Broadcast coverage of Elections in the Southern African Development Community (SADC).

- 3.2 The gist of the appellants' petition was that the respondent, being a State/publicly owned/funded television and radio broadcaster had failed, refused and/or neglected to give coverage and publicity to UPND's campaign messages in respect of this political party's campaigns for the January 2015 Presidential by-elections thereby disadvantaging the Party's Presidential candidate. For completeness, Mr. Hakainde Hichilema, the UPND's Presidential candidate for the by-election in question, launched his Presidential campaign for that election on 23rd November, 2014.
- 3.3 Simultaneously with the presentation of the petition on 15th December, 2014, the appellants also filed an *ex-parte* application in terms of which they sought an interim order of injunction which the learned judge in the court below granted *ex-parte* on 16th December, 2014.
- 3.4 On 18th December, 2014, the respondent's advocates filed a *Notice of Intention to Raise Preliminary Issues* pursuant to the provisions of Order 14A and Order 33/3 of the Rules of the

Supreme Court, 1965, (1999 edition) which was couched in the following terms:

- “(i) That these proceedings having been commenced by *modus operandi* of a petition pursuant to the provisions of Article 28 of the Constitution of Zambia, the Constitution of Zambia Act, Chapter 1 of the Laws of Zambia, this honourable (Court) is not possessed with (sic.) the jurisdiction to grant injunctive relief as sought by the petitioners; and
- (ii) Consequently, the court is wanting in jurisdiction and the *ex-parte* Order of injunction dated 15th December, 2014 is irregular and must be discharged.”

3.5 The *Notice of Intention to Raise Preliminary Issues* was supported by an Affidavit and List of Authorities.

3.6 The respondent's preliminary Application was contested by the appellants who filed an opposing Affidavit and Skeleton Arguments to that end.

4.0 CONSIDERATION OF APPLICATION AND DECISION OF LOWER COURT

- 4.1 The Court below considered the preliminary application and the arguments which counsel for the two sides had placed before that Court and arrived at the conclusion that, on the authority of the decision of this Court in **Attorney-General v. Law Association of Zambia**¹, he had erred to have granted the *ex-parte* Order of injunction on 16th December, 2014 as he did not have the requisite jurisdiction.
- 4.2 In reaching his conclusion at paragraph 4.1 above, the judge below acknowledged that he was bound by our decision in the **Law Association of Zambia**¹ matter in which we had occasion to consider the meaning and effect of Article 28 (1) of the Constitution of the Republic of Zambia in relation to the granting of interim injunctive relief when we said:

“Article 28 (1) of the Constitution does not make provision for interim orders. An application must first be determined before an Order, writ or direction is issued for purposes of enforcing or securing the enforcement of any provision under Articles 11-26 inclusive.”

- 4.3 The learned judge accordingly concluded his Ruling with the following words:

“I hold that because of want of jurisdiction, the purported interim Order of injunction [which] I granted was null and void.”

5.0 THE APPEAL AND GROUNDS THEREFOR

- 5.1 The appellants were totally displeased with the Ruling of the court below and have sought to have us intervene and put matters right on the basis of the following grounds which appear in the Memorandum of Appeal:

- “1. The Learned trial Judge erred and misdirected himself in law and in fact when he did not take into consideration the material fact of the serious and immediate injury shown by the Petitioners that demanded the extraordinary relief of an interim injunction that the Petitioners applied for and were initially granted.**
- 2. The learned trial Judge erred and misdirected himself in law and in fact when he did not take into account that the grant of an interim injunction varies with the facts of each case and the necessity of the Petitioners’ case was a special circumstance requiring such a grant.**
- 3. The Learned trial Judge erred and misdirected himself in law and in fact when he ordered the discharge of the interim injunction and failed to appreciate that the discharge of the interim injunction is a legal and**

administrative obstacle which stands in the way of equitable access to the media during the election process in a discriminatory basis for all political groupings and individuals wishing to participate in the electoral process thus defeating the whole purpose of a free, fair and transparent Presidential Election.

4. The Learned trial Judge erred and misdirected himself in law by failing to distinguish that the discharge of the interim injunction on the basis of the authority cited by the Respondent's Advocates was distinguishable with the Petitioners' case as the Petitioners' Advocates advanced good reasons to depart from it or to effect a variation.
5. The Learned trial Judge erred and misdirected himself in law and in fact by failing to hold himself free from the precedent cited by the Respondent's Advocates and should have instead exercised his judicial discretion to refuse to follow the said precedent as such refusal would have been the right thing to do considering the special circumstances of the case as well as the denial of an interim injunction being an illegal limitation to safeguard the Petitioners' freedom of expression during election time.
6. The Learned trial Judge erred and misdirected himself in law by holding that he was wanting of jurisdiction without considering the need to have a correct interpretation to be given to the wording of Article 28(1) of the Constitution as the current wording applied to it in the precedent relied is unconstitutional, oppressive, unreasonable, illogical, ambiguous, a major front to the administration of justice and a huge impediment to the enforcement and protection

of an individual's fundamental right that is being violated or infringed during and before the determination of a Petition.

7. The Learned trial Judge erred and misdirected himself in law and in fact by failing to apply other principles of interpretation to the wording of Article 28 (1) of the Constitution which is ambiguous to a certain extent as the intention of the legislature and the mischief which intended to cure cannot be clearly ascertained from the words in their ordinary grammatical and natural meaning.
8. The Learned trial Judge erred and misdirected himself in law and in fact by failing to appreciate and take judicial notice of the clearly established and notorious fact that the election campaign is of limited time and that the continued flaws, incompetence and derelictions of duty by the Respondent shown in the affidavit evidence as well as the skeleton arguments by the Petitioners was a violation of the Petitioners' Presidential Candidate's rights to fair media coverage during the election process thereby denying the electorates a chance to choose a candidate of their choice.
9. The Learned trial Judge erred and misdirected himself in law and in fact when he made an order for costs as costs should not have been granted considering the fact that he declared the application for the injunction null and *void abinitio*.
10. The Learned trial Judge grossly misdirected himself in awarding costs to the Respondent as the Petitioners' action was commenced on a matter of public interest.

11. Any other grounds as may be adduced at hearing.”

6.0 APPELLANTS’ ARGUMENTS IN SUPPORT OF THE APPEAL

- 6.1 At the hearing of the appeal, Ms. M. Mushipe, learned counsel for the appellants informed us that she did file Heads of Argument on behalf of the appellants upon which she entirely relied. Learned counsel further informed us that no Arguments had been served upon her on behalf of the respondent and that a search for the same in the record kept in the Supreme Court Registry had drawn a blank.
- 6.2 A point which, in the interest of managing the resources of this Court which are at our disposal effectively, struck us at this early stage is that when we patiently and scrupulously examined the grounds of appeal which we have set out above in relation to the Ruling of the lower Court now under attack, it became clear to us that grounds 1, 2, 3, 4, 5, 7 and 8 bore no meaningful or direct bearing on the gist or essence of the Ruling in question. In point of fact, leaving aside grounds 9 and 10 which deal with the issue of costs, it is only ground 6 as orally augmented by the appellants’ counsel when we

heard the appeal which has a realistic bearing upon the core issue which the court below pronounced itself upon. For this reason, we propose to highlight counsel's oral augmentation which, we believe, served to fortify ground 6 of the appeal.

- 6.3 In opening her oral augmentation, Ms. Mushipe began by reacting to our observation that no useful purpose was going to be served by proceeding with the appeal in the light of the fact that the injunctive relief which had been the subject of the lower Court's Ruling had since been overtaken by events given that the 2015 Presidential by-election had long past.
- 6.4 According to Ms. Mushipe, although the 2015 Presidential by-election and the issues around that election which had aroused the appellants' anxiety and search for relief, including injunctive relief, had long been rendered historical, it was still necessary and critical to have this Court settle the issue of whether or not an order of injunction could be granted in circumstances involving a court action which is mounted via a petition pursuant to the provisions of Article 28 (1) of the Zambian Constitution. Secondly, it was the wish

and desire of the appellants to have this ultimate Court distinguish the matter which the appellant had instituted in the Court below from the **Law Association of Zambia**¹ matter which had formed the basis of the lower Court's decision to uphold the respondent's preliminary application.

- 6.5 According to the appellants' counsel, the Court below should have distinguished the matter which the appellants instituted in the Court below from the **Law Association of Zambia**¹ matter by reason of the fact that the former does not involve the Attorney-General and raises compelling electoral and human rights issues which are of general public interest.
- 6.6 Ms. Mushipe further contended that this Court should also distinguish the matter in the Court below from its judgment in the **Law Association of Zambia**¹ case to the extent that it determined that Article 28(1) of the Zambian Constitution did not provide for the granting of interim injunctive relief. Ms. Mushipe also fervently argued that the Court below should not have been shackled by the **Law Association of Zambia**¹ decision in the face of breaches or violations of

constitutionally guaranteed freedoms and rights which the matter in the Court below raises.

- 6.7 According to Ms. Mushipe, Article 28(1) of the Constitution of Zambia did not preclude anyone invoking it from seeking injunctive relief.
- 6.8 In closing her oral augmentation, Ms. Mushipe complained that the relief which her clients were seeking had largely been rendered academic because it has taken over three years to have the appeal heard from the time when it was filed in 2015.
- 6.9 Before we turn to give our perspective around counsel's arguments, we must momentarily pause here to acknowledge that counsel cited a number of Zambian, English and Indian authorities which have espoused the notion that a final court of appeal such as ourselves is not bound by its previous decisions. These decisions included **Match Corporation Limited v. Development Bank of Zambia and Attorney-General²**, **Manganese Ore (India) Ltd v. Regional Asstt. CST³**, **Bengal Immunity Co. Ltd. v. State of Bihar⁴** which

established the principle that the doctrine of *stare decisis* should not be rigidly observed. Having regard to the foregoing, counsel urged us to depart from the position which we adopted in the **Law Association of Zambia**¹ matter.

6.10 Learned counsel further argued that, instead of following the flawed position which the lower Court adopted on the basis of the **Law Association of Zambia**¹ decision, this Court should declare that interim orders, particularly of the nature of injunctive relief, are permitted under Article 28 (1) of the Zambian Constitution in exceptional and compelling circumstances.

7.0 CONSIDERATION OF ARGUMENTS ON APPEAL AND DECISION

7.1 We have examined the Heads of Argument as filed in this matter on behalf of the appellants.

7.2 Having examined what have been projected as 10 grounds of appeal, it is our considered view that grounds 1, 2, 3, 4, 5, 7 and 8 are clearly off-tangent and have no meaningful bearing on what the judge below pronounced himself upon in his

Ruling now under attack and the basis of such pronouncement.

- 7.3 In the Ruling now appealed against, the judge below unequivocally announced that the purported granting of the interim Order of injunction by his lordship on 16th December, 2014 was null and void for want of jurisdiction. In our assessment, none of the 8 grounds which we have identified above addresses the critical and decisive issue pertaining to the granting of interim injunctive relief at an interlocutory stage upon which the judge's Ruling was both founded and anchored.
- 7.4 According to the judge below, Article 28(1) of the Constitution does not envisage the granting of interim orders once the same is invoked as a basis for launching a court action.
- 7.5 Although the interlocutory relief which was sought in this matter was thwarted prior to its escalation to this Court by the disaffected parties and its purpose rendered academic by reason of the fact that the elections which had inspired the same had passed so many years ago, Ms. Martha Mushipe,

learned counsel for the appellants did insist, during her oral arguments, on having this Court pronounce itself as to the correctness of the position which the lower Court adopted. According to Ms. Mushipe, this appeal had provided an opportunity for this Court of last resort to clarify an issue of general public importance which this Court reflected upon in the **Law Association of Zambia**¹ case.

- 7.8 As we see it, our consideration of the mild challenge which has been thrown at us should necessarily begin by quoting Article 28 (1) of the Constitution which provides as follows:

“28 (1) subject to clause 5, if any person alleges that any of the provisions of Articles 11-26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall:

“(a) hear and determine any such application.

(b) determine any question arising in the case of any person which is referred to it in pursuance of clause 2 and which may make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing

the enforcement of any of the provisions of Articles 11 to 26 inclusive.”

7.9 This Court had occasion to consider the above provisions in the case of **Attorney-General v. Law Association of Zambia**¹. According to our judgment in the **Law Association of Zambia**¹ matter:

“... the wording of Article 28 (of the Constitution) makes no provision for interim orders and that [an] application must first be determined before an order, writ, or direction [can] be issued for the purpose of enforcing or securing the enforcement of any provision under Articles 11 to 26 inclusive.”

7.10 We pause here to observe that, by its nature, an Order of injunction can be sought either as a substantive remedy or as a procedural remedy. In the context of this appeal, the Order of interim injunction was sought in the Court below as a procedural remedy pending the determination of the appellants' substantive rights as had been set out in their petition. In this sense, the interim Order of injunction was not being sought for **the purpose of enforcing or securing**

the enforcement of any provision under the Bill of Rights of the Zambian Constitution.

7.11 It is also worthy of note that in the **Law Association of Zambia**¹ case, we ventured to italicize, at page 37, the words “... *for the purpose of enforcing or securing the enforcement of any provision under Articles 11 to 26 inclusive [of the Constitution]*” by way of laying emphasis on the element or aspect of employing ‘*an order, writ, or direction*’ for the purpose of enforcing or securing the enforcement of any provision under Articles 11 to 26 inclusive.

7.12 Having regard to what we have stated at 7.10 and 7.11 above, it is our considered view that the applications which Article 28 (1) of the Constitution would forbid are those which would be calculated to secure the enforcement of any provision under Articles 11 to 26 of the Constitution. This was clearly not the situation with respect to the appellants’ interim application in the Court below because the interim injunction was being sought as an ancillary or incidental relief of a procedural nature pending the determination of the

substantive relief which the petitioners were seeking in their petition. Needless to say, it is only the substantive relief which the invocation of Article 28 (1) of the Constitution affords which cannot be the subject of interim enforcement orders because such orders can only appropriately arise after the determination of the petition. This is the position which we affirmed in the **Law Association of Zambia**¹ case.

7.13 Notwithstanding what we have just articulated above, we must turn to the very decisive position which we took in the **Law Association of Zambia**¹ matter, namely that, as in that case, the purpose for which the interim injunctive relief which became the subject of the preliminary application had been sought by the appellants “... *has since been overtaken by events [in the light of] the elections having passed.*”

7.14 Accordingly, we entertain no doubt about the correctness of the conclusion which we reached in the **Law Association of Zambia**¹ matter, namely that any pronouncement which we would have made in that case would have served no useful

purpose beyond being an academic exercise, an eventuality that this Court distinctly frowns upon.

7.15 Having regard to our observations in 7.13 and 7.14 above, we would refrain from taking the procedural clarification which we have made at 7.10 to 7.12 further by delving into the merits or otherwise of the appellants' search for injunctive relief.

7.16 With regard to the appellants' complaints over their condemnation in costs as captured in grounds 9 and 10, we must say, at once, that we find no basis for disturbing the manner in which the Court below exercised its discretion.

7.17 Quite apart from the principle which we alluded to in **Mutale v. Zambia Consolidated Copper Mines Limited**⁵ which the judge below correctly applied, we have reiterated the same principle in countless subsequent decisions such as **YB and F Transport Limited v. Supersonic Motors Limited**⁶; **Kuta Chambers (Sued as a Firm) v. Concillia Sibulo (Suing as Administratrix of the estate of the Late Francis Sibulo)**⁷

and **Garrick Refrigeration and Air Conditioning v. Fresh Direct**⁸. In **YB and F Transport Limited**⁶ we said:

“The general principle is that costs should follow the event; in other words, a successful party should normally not be deprived of his costs”

while in **Kuta Chambers**⁷ we said:

“We do not think that the respondent’s conduct in the present case was such as to disentitle the respondent, as the successful party in that court, to the costs of that action.”

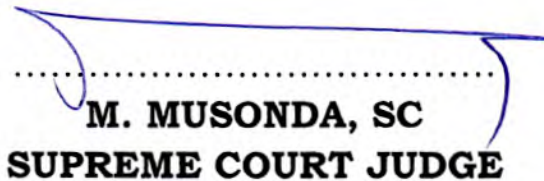
7.18 In the context of the matter at hand, the respondent’s preliminary application having succeeded, the dealing court felt inclined to grant costs in the absence of conduct, on the part of the respondent, which would have operated to deprive it of the same.

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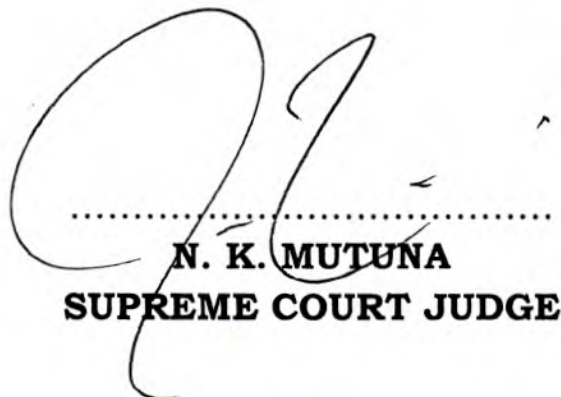
7.19 In sum, this appeal has failed in its entirety. However, in the light of the fact that the respondent did not contest the appeal, we make no order as to costs.



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A. M. WOOD
SUPREME COURT JUDGE



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M. MUSONDA, SC
SUPREME COURT JUDGE



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N. K. MUTUNA
SUPREME COURT JUDGE