

Selected Judgment No. 47 of 2018

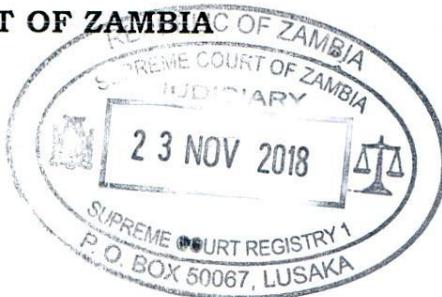
P.1658

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 37/2017

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

SAVENDA MANAGEMENT SERVICES LIMITED

APPELLANT

AND

STANBIC BANK ZAMBIA LIMITED

RESPONDENT

GREGORY CHIFIRE

ALLEGED CONTEMNOR

Coram : Mwanamwambwa DCJ, Phiri, Muyovwe, Hamaundu,
Malila, Kaoma, Musonda, Kabuka and Mutuna , JJS

On 17th July 2018, 18th August 2018, 19th September
2018 and 23rd November 2018

For the Contemnor : Mr. L. Banda of Messrs T.S. Chilembo Chambers
and Ms G Kumwenda and Mr. M. Zaza of Messrs
M. Musonda and Company

J U D G M E N T

Mutuna JS. delivered the judgment of the Court.

Cases referred to:

- 1) **Savenda Management Services Limited v Stanbic Bank (Z) Limited, SCZ judgment No. 10 of 2018**
- 2) **Republic v Liberty Press Limited and others (1968) GLR 123**
- 3) **Ambard v Attorney General of Trinidad and Tobago (1936) AC 322**
- 4) **In the matter of Article 143, Constitution of India AIR (1965) SC 745**
- 5) **Lungu v Kalikeka Appeal No. 114 of 2014**
- 6) **Re Supply of Ready Mixed Concrete (1991) 1 WLR 707**
- 7) **R v Commissioner of Police of Metropolis, ex P Blackburn (1968) 2 QB 150**
- 8) **Vine Products v Green (1969) Ch D 51**
- 9) **Attorney General v Times Newspapers Ltd [1973] 3 ALL ER 54**
- 10) **National Union of Metal Workers of South Africa and others v Fry's Metal (Pty) (2005) 3 ALL SA 318**
- 11) **Masiye Motels Limited v Rescue Shoulders and Estate Agency Limited SCZ judgment No. 34 of 2010**

Legislation referred to:

- 1) **Law Association of Zambia Act, Cap 31**
- 2) **Constitution, Cap 1**
- 3) **Rules of The Supreme Court, 1965**
- 4) **The Constitution (Amendment) Act No. 2 of 2016**
- 5) **Legal Aid Act, Cap 34**
- 6) **Penal Code Cap 87**
- 7) **English Law (Extent of Application) Act, Cap 11**
- 8) **Contempt of Court Act 1981**
- 9) **Contempt of Court (Miscellaneous Provisions) Act, Cap 38**
- 10) **Legal Practitioners Act, Cap 30**

- 11) **Legal Practitioners Practice Rules SI No. 51 of 2002**
- 12) **Supreme Court Act, Cap 27**

Works referred to:

- 1) **Black's Law Dictionary by Bryan A. Garner, 7th edition, Thomson West, USA**
- 2) **Halsburys Laws of England, 3rd edition, volume 8, by Lord Simonds, Butterworths and Co. (Publishers) Ltd, London**
- 3) **Halsburys Laws of England, 4th edition, volume 37 by Lord Hailsham of St. Marylebone, Butterworths, London**
- 4) **Contempt of Court and the Limitation of Freedom of Expression in the course of Judicial Proceedings: The Zambian Experience, by Justice M. Malila Zambia Law Journal 38th edition page 110**
- 5) **The Law of Contempt of Court by Anthony Arlige and David Eachy**
- 6) **Atkins Court Forms by Lord Evershed, 2nd edition volume 12 1994 issue Butterworths, London**
- 7) **The Road to Justice, by the Right Honourable Sir Alfred Denning, 1953, Stevens and Sons Limited London**

Introduction

- 1) The Judiciary is a unique organ of the State whose effectiveness in the discharge of its function of dispensing justice lies in the confidence reposed in it by members of the public. Where public confidence in the Judiciary is

eroded, its orders, judgments and rulings are normally not obeyed resulting in lawlessness in a country.

- 2) One factor which erodes public confidence in the Judiciary is the frequent and unjustified attacks on its members. These take the form of unjustified criticism of the character and integrity of its members and the decisions rendered. The attacks are made through electronic and print media and, as such, have a wide readership.
- 3) Zambia like most democratic countries has enshrined in its **Constitution** the freedom of speech and a free press. In the exercise of such freedom by individuals and media houses, the Judiciary, and indeed its members, are not immune to criticism or public scrutiny. However, such criticism and scrutiny should not impede the discharge of the primary function of the Judiciary which is the administration of justice or indeed bring the institution into ridicule. This is the case because the need for proper administration of justice in a country, as we will

demonstrate in the later part of this judgment, is for the benefit of the community at large. To this end, individual rights to exercise these freedoms is superseded by the rights of the larger majority.

- 4) Some of the attacks against the Judiciary are often times unnecessary and are made in the wrong forum. Examples of such attacks are allegations of corruption, criminal acts and impropriety on the part of the members of the Judiciary. The right forum to address such allegations is the Police, Anti Corruption Commission and the Judicial Complaints Commission. Therefore, when one engages in such attacks in online and other public media it may be perceived as intended at fueling discontent among the majority of the masses.
- 5) In the course of this year, the Judiciary of Zambia has been inundated with such attacks and criticism ranging from allegations of incompetence and bias to impropriety in the form of corruption. The allegations stemmed from a decision rendered by this Court in a judgment delivered

on 13th March 2018, in the matter of **Savenda Management Services v Stanbic Bank of Zambia Limited**¹, (hereinafter referred to as the Savenda matter).

- 6) Following the judgment various individuals and media houses launched attacks on this Court and the Court of Appeal alleging that the decision was not only flawed but procured by corruption. To justify the allegations, the individuals and media houses also attacked the credibility of the Respondent in the appeal, Stanbic Bank Zambia Limited (the Bank) and its lead counsel, one Eric S. Silwamba SC, alleging that the Bank was renowned for corrupt practices and that its lead counsel had given out colossal sums of money to the Judges forming the coram in the appeal and other members of this Court and the Court of Appeal for purposes of procuring the judgment in favour of his client.
- 7) In addition, letters were written to the Chief Justice, as head of the Judiciary, calling upon her to reverse the decision as it displayed incompetence on the part of the

presiding judges, revealed corruption in the manner it was delivered in favour of the bank, and set a bad precedent.

- 8) The Judiciary on account of the dignity and decorum it possesses cannot defend itself through the media, nor can it publicly make statements in respect of its decisions. It, therefore, remained silent during these unjustified attacks. However, it was not all doom and gloom because the Law Association of Zambia (LAZ) leapt to the defence of the judiciary and issued a statement condemning the unjustified attacks against the Judiciary. This was in line with LAZ's mandate under Section 4 of the **Law Association of Zambia Act** to, among other things, "*... seek the advancement of the rule of law ...*" which can only be attained through the proper administration of justice. The President of LAZ and his council must be commended.
- 9) The alleged contemnor in this matter is one of the persons, to whom some articles in the print media and

letter to the Chief Justice are attributed hence his being summoned by this Court to show cause why he should not be cited for contempt of Court. The summons was issued and pronounced as being pursuant to the inherent jurisdiction of this Court and pursuant to Order 52 of the **Rules of the Supreme Court**, 1965 (1999 edition) (**White Book**).

- 10) The matter is thus an inquiry into whether or not the actions attributed to the alleged contemnor were made by him and if so, whether they undermined the integrity of this Court; the proper administration of justice; or have the potential for such an effect; and were thus contemptuous.
- 11) The matter also considers the rationale for the powers of the Court to punish for contempt and where these powers are derived from.
- 12) Lastly, we will once again discuss misconduct on the part of counsel at the Bar, which vice continues to permeate our Courts. In this matter it took the form of counsel's:

failure to perform their duty to the Court; to desist from doing anything prejudicial to the administration of justice; lacking in courtesy to the Court; abrogating the duty to the profession; and abrogating counsel's independence.

The authority of the Court to punish for contempt

- 13) This matter has drawn immense public attention and as such it is necessary for us to explain the authority pursuant to which we have acted. We also hasten to add that we have been prompted to act swiftly because in the recent past similar attacks were directed at another Court, resulting in disorder in that Court which has had an adverse effect on the proper administration of justice in the country. The community at large has suffered the consequences.
- 14) The starting point is Article 118 of the **Constitution** (as amended) which is titled "*Judicial Authority, System of Courts and Independence*". We have been prompted to set out the title because it speaks to the principle of

"*independence*" of the Judiciary which is the hallmark of adjudication. The independence envisaged here is not that of freeing a Judge to do as he wills but rather the adjudicative functions. That is to say, a Judge must at all times not feel impeded in handing down a decision which he feels is correct. Put simply, it is the independence of the mind of the Judge.

- 15) This independence will normally be impaired by publications such as those which haunted the Judiciary in the recent past. Judges are human and any unjustified and repeated threats which go undeterred are bound to affect the Judges' independence which militates against the oath they took to dispense justice "*without fear or favour, affection or ill will*". Therefore, when a Court punishes an erring party, it is in the pursuit of, among other things, maintaining its independence as enshrined in the **Constitution** (as amended).
- 16) The second aspect of Article 118 is contained in sub article (1) which states as follows:

"The judicial authority of the Republic derives from the people of Zambia and shall be exercised in a just manner and such exercise shall promote accountability."

The important words for our purposes in the foregoing article are "*just manner*" and "*promote accountability*". The reference to "*just manner*" connotes that persons or entities appearing before the Courts shall be given an opportunity to present their case, treated equally and given an opportunity to know and understand the case against them. Justice can only be achieved by the Courts and seen to be done if they are not impeded in the exercise of their functions.

- 17) On the other hand, the word "*accountability*" curtails the Judges' functions by requiring them to be transparent in the justice delivery system (hence the need for open court hearings) and the need for a reasoned judgment, which explains to both parties why one has lost and the other succeeded. These are just two examples.

- 18) Advocating for the principle of an open court, Lord Denning writing in the *Road To Justice* had the following to say about a judge at page 64:

"The Judge will be careful to see that the trial is fairly and properly conducted if he realizes that any unfairness or impropriety on his part will be noted by those in court ... He will be more anxious to give a correct decision if he knows that his reasons must justify themselves at the bar of public opinion."

The need for the system of open court as prevails in this and other jurisdictions cannot, therefore, be over emphasized.

- 19) Recourse, against failure to abide by the provisions of Article 118(1) lies in an appeal where the Court concerned is a trial or first level appeal Court. Where there is an allegation of impropriety and corruption resort is had to the Judicial Complaints Commission, the Police, Anti-Corruption Commission or other law enforcement agencies. It does not lie in the public attacks on the Judiciary.

- 20) The other source of our jurisdiction is what is known as the inherent jurisdiction of the court. ***Black's Law Dictionary*** does not define the phrase but refers to "*inherent power*" which it defines as "*a power that necessarily derives from an office, position or status*".
- 21) ***Halsbury's Laws of England***, 4th edition in describing the phrase inherent jurisdiction of the Court puts it this way at pages 22 and 23

"Unlike all other branches of law, except perhaps criminal procedure, there is a source of law which is peculiar and special to civil procedural law and is commonly called "*the inherent jurisdiction of the Court*". In the ordinary way the Supreme Court, as a superior Court of record, exercises the full plenitude of judicial power in all matters concerning the general administration of justice within its territorial limits, and enjoys unrestricted and unlimited powers in all matters of substantive law, both civil and criminal except insofar as that has been taken away in unequivocal terms by statutory enactment. The term "*inherent jurisdiction*" is not used in contradistinction to jurisdiction of the Court exercisable at common law or conferred on it by statute or rules of Court, for the Court may exercise its inherent jurisdiction even in respect of matters which are

regulated by statute or rules of Court. The jurisdiction of the Court which is comprised within the term "*inherent*" is that which enables it to fulfil itself, properly and effectively, as a Court of law. The overriding feature of the inherent jurisdiction of the Court is that it is a part of the procedural law, both civil and criminal, and not a part of substantive law; it is exercisable by summary process, without a plenary trial; it may be invoked not only in relation to parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in the litigation between the parties ... and it may be exercised even in circumstances governed by rules of Court. The inherent jurisdiction of the Court enable it to exercise (1) control over process by regulating its proceedings by preventing the abuse of process and by compelling the observance of process (2) control over persons ..."

- 22) What we understand this to mean in relation to jurisdiction of a court to punish for contempt is that it is the unlegislated ancillary power of this Court in the exercise of its duty in the administration of justice. Put differently, it is the power of the Court which is incidental to its day to day functions which is intended to ensure that the wheels of justice do not grind to a halt.

- 23) Further, although the inherent jurisdiction in relation to contempt of court is not specifically legislated, it is mentioned in Section 116 of the **Penal Code**, as we will demonstrate later in this judgment. **Halsbury's Laws of England**, third edition, in speaking to the common law position, also refers to the criminal aspect of this inherent jurisdiction by stating at pages 3 to 4 that the *"... superior courts have an inherent jurisdiction to punish criminal contempt by the summary process of attachment or committal in cases when an indictment, or an information in the Queen's Bench Division is not calculated to serve the ends of Justice"*. The details of this jurisdiction and procedure are explained later.
- 24) The last source of our jurisdiction is Order 52 of the **White Book** which gives power to the Courts in Zambia to punish for civil contempt of Court. Its main purpose has been aptly put in the explanatory note to Order 52 under rule 1 sub-rule 2 of the **White Book** thus:

"The term 'contempt of Court' is of ancient origin having been used in England certainly since the thirteenth century and probably earlier. It is based not on any exaggerated notion of the dignity of individuals be they judges, witnesses or others but on the duty of preventing any attempt to interfere with the administration of justice."

- 25) The Courts in Ghana have justified this power in the following words in the case of *Republic v Liberty Press Limited and others*²

" ... the important position of the judiciary in any democratic set-up must be fully appreciated. Performing, as they are called upon to do, the sacred duty of holding the scales between the executive power of the State and the subject and protecting the fundamental liberties of the individual, the Courts must not only enjoy the respect and confidence of the people among whom they operate, but also must have the means to protect that respect and confidence in order to maintain their authority. For this reason any conduct that tends to bring the authority and administration of the law into disrespect or disregard or to interfere in any way with the course of justice becomes an offence not only against the Court but against the entire community which the Courts serve."

Contempt of Court is not personal. It is not about repairing the personal egos or images of Judges who may have been attacked but about preserving the dignity of the institution of the Court; for purposes of making it effective in the discharge of its core function of administration of justice; and to prevent chaos to reign in the community. The relevance of this all encompassing purpose of contempt of court becomes apparent in the discussion on the difference between criminal and civil contempt.

- 26) We must emphasize that the institution of the Judiciary and its members are not entirely immune from criticism especially that we have an open court system. As early as 1936 Lord Atkin acknowledged this fact and put it this way in the case of *Ambard v Attorney General for Trinidad and Tobago*³ at page 335:

"No wrong is done by any member of the public who exercises the ordinary right of criticizing, in good faith, in public or private, the public act done in a seat of justice. The path of criticism is a public way: the wrong-

headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice ... they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

Counsel for the alleged contemnor have also referred to this passage in their final submissions.

- 27) Further, criticism of the Judiciary and its members is normally through or triggered by journalists whose important role as campaigners of public awareness cannot be ignored. Lord Denning, writing in ***The Road To Justice***, in the chapter titled "*Free Press*", describes the role of a journalist as follows:

"He is, I verily believe, the watchdog of justice. If he is to do his work properly and effectively we must hold fast the principle that every case must be heard and determined in open court."

As watchdogs of justice, the press are free to criticize the courts as long as they do not cross the line by demeaning

the Court or interfering with the administration of justice.

- 28) It is also important that we explain the effect of Order 52 rule 1 sub-rule 3 of the **White Book** in relation to the approach taken by the English Courts when the practice and procedure in their courts was based on the **White Book**, prior to the introduction of the **Civil Procedure Rules** (CPR). Civil contempt was usually attributed to disobedience to an order of the Court by a party to proceedings, which is referred to as contempt in procedure. On the other hand, criminal contempt related to contempt in the face of the Court. The example given of such contempt was hurling abuse or an object at the Court. We have deliberately restricted our discussion of the position in England to the period before the CPR because the **White Book** is still applicable in our jurisdiction.
- 29) The distinction we have stated in the preceding paragraph was unique to England at the material time

and does not apply to Zambia although we have retained the **White Book** because the distinction in the two sets of contempt of court in Zambia lies in the fact that what constitutes criminal contempt has been specifically legislated under section 116(1) of the **Penal Code**. Anything else constituting contempt is civil contempt. For completeness we are compelled to quote section 116 of the **Penal Code** in full as follows:

29.1 "116(1) Any person who -

Within the premises in which any judicial proceeding is being had or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being had or taken; or

29.2 Having been called upon to give evidence in a judicial proceeding, fails to attend or having attended, refuses to be sworn or to make an affirmation, or having been sworn lawfully refuses to answer a question or to produce a document, or remains in the room in which such proceeding is being had or taken, after the witnesses have been ordered to leave such room; or

- 29.3 Causes an obstruction or disturbance in the course of a judicial proceeding; or
- 29.4 While a judicial proceeding is pending, makes use of any speech or writing, misrepresenting such proceeding, or capable of prejudicing any person in favour of or against any parties to such proceedings, or calculated to lower the authority of any person before whom such proceeding is being had or taken; or
- 29.5 Publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private; or
- 29.6 Attempts wrongfully to interfere with or influence a witness in a judicial proceeding either before or after he has given evidence, in connection with such evidence; or
- 29.7 Dismisses a servant because he has given evidence on behalf of a certain party to a judicial proceeding; or
- 29.8 Retakes possession of land from any person who has recently obtained possession by a writ of Court; or
- 29.9 Commits any other act of intentional disrespect to any judicial proceeding, or to any person before whom such proceeding is being had or taken;

is guilty of a misdemeanor and is liable to imprisonment for six months or to a fine not exceeding seven hundred and fifty penalty units."

These are the instances that constitute the offence of criminal contempt under the **Penal Code**. Further, one will note from the summary we have given that the events attributed to the alleged contemnor do not fall within the ambit of section 116(1) of the **Penal Code**. Hence, his being brought before us under Order 52 of the **White Book** and our inherent jurisdiction for civil contempt.

- 30) It is also important that we point out that in the ordinary course of things any offence committed under the **Penal Code** is brought to Court and prosecuted by the office of the Director of Public Prosecutions. This, however, is not the case in all instances of criminal contempt because certain paragraphs of section 116 of the **Penal Code** permit the Court to deal with the offender summarily, by its own motion and without involving the Director of Public Prosecutions. Section 116(2) of the **Penal Code** states, in this regard; as follows:

"When any offence against paragraph (a), (b), (c), or (i) of Subsection (1) is committed in view of the Court, the Court may cause the offender to be detained in custody, and at any time before the rising of the Court on the same day may take cognizance of the offence and sentence the offender to a fine not exceeding six hundred penalty units or, in default of payment, to imprisonment without hard labour for one month."

- 31) This summary procedure is also in line with the passage we have referred to in *Halsbury's Laws of England*, third edition.
- 32) The rationale for the foregoing is that the law recognizes that there is need for the administration of justice to flow unhindered and in order to achieve this, those who are charged with ensuring the proper administration of justice, i.e. the Judges, must be given the leeway to deal swiftly and firmly with any threats at the interruption of its flow.
- 33) We have been prompted to make the clarifications in the last three preceding paragraphs because counsel for the alleged contemnor and certain sections of the media have

expressed the opinion that we should not have moved the motion for these proceedings because prosecution of the same is the preserve of the Director of Public Prosecutions. The explanation we have given and indeed the consequence of our inherent jurisdiction shows that these opinions are misguided.

- 34) Another provision of Section 116 of the **Penal Code** which we need to address in discussing our jurisdiction is sub-section (3) which specifically states that the provisions of the section are "*... deemed to be in addition to and not in derogation from the power of a Court to punish for contempt of Court*". The position we have taken is that this provision restates the inherent jurisdiction of the Court to punish for contempt. Further, it recognizes that such inherent jurisdiction is not to be shackled by the provisions of section 116.

Background

- 35) The facts of this case make very sad reading. Sad because they arise from the actions of a bystander,

unconcerned with the proceedings that were before the Courts, who chooses to blindly pursue the cause of a losing party. He does so relentlessly, unhindered and oblivious to wise counsel given to him by the Chief Justice.

- 36) In 2014 Savenda took out an action in the High Court against the Bank. The action was a claim, among others, for general damages for negligence arising from the alleged unlawful referral of the credit details of Savenda to the credit reference agency. A hearing was held and judgment delivered on 17th August 2016 by the High Court. The judgment found the Bank culpable and ordered it to pay Savenda the sum of ZMW192,500,000.00. The Court also awarded Savenda general damages to be assessed by the Honourable Deputy Registrar.
- 37) The Bank was aggrieved by the decision of the High Court and decided to appeal to the Court of Appeal. The appeal was heard by the Court of Appeal and judgment of

the Court delivered on 30th October 2017, reversing the award by the High Court of damages in the sum of K192,500,000.00 and general damages. In its place it awarded nominal damages in the sum of K5,000.00 for breach of confidentiality. The Court also granted the parties leave to appeal.

- 38) Savenda was not happy about losing the huge monetary award, it naturally appealed to the Supreme Court. To ring fence its appeal and in view of the colossal amounts of money involved, it retained the services of state counsel and four other counsel. The Bank reciprocated in like manner.
- 39) This Court heard the appeal on 6th March 2018 and delivered its unanimous judgment (the judgment) on 13th March 2018. The judgment reversed the decision of the Court of Appeal on the holding of breach of confidentiality and the award of nominal damages. It however, agreed with the Court of Appeal that the Learned High Court Judge misdirected himself in making

the awards he made as they were not supported by the evidence and were made from a misapprehension of the facts.

- 40) Enter the alleged contemnor. On 10th May 2018, the alleged contemnor wrote a letter to the Chief Justice calling upon her to reverse the judgment. In doing so, he punctuated the request by referring to himself as *"a law abiding citizen of the republic of Zambia who has great [er] admiration of [the] law and respect for the Constitution of the Republic of Zambia which guarantees the independence of the judges and judicial officers"*.
- 41) The Chief Justice responded to the letter, through her personal assistant, by advising the alleged contemnor that the parties to the case were ably represented by counsel who no doubt would look after their clients' interests.
- 42) Later, on 23rd June 2018, the alleged contemnor was reported by an online publication called *Zambian Watchdog* as labeling the Chief Justice the most corrupt

judge. He reportedly went on to allege that moneys had been paid to judges of this Court and the Court of Appeal under the watchful eye of the Chief Justice in order to procure the judgment in favour of the Bank. The same online publication on 15th June 2018 attributed another statement to the alleged contemnor stating that he was persuaded beyond any shadow of doubt that justice was not properly dispensed in the Savenda matter and if the matter was left unresolved, it would help in the creation of bad law.

- 43) Finally, in July 2018, the alleged contemnor gave a telephone interview to *The Mast*, a daily tabloid, with wide circulation in Zambia. He is quoted as having continued to allege that: the judgment is bad law; and impropriety on the part of members of the judiciary. The article was titled "*Judiciary one of the most corrupt in Zambia*" and was published in the 2nd July 2018 edition of the tabloid.

- 44) In the course of allegedly giving these statements, the alleged contemnor also indicated that he and other persons would demonstrate publicly against the judgment.
- 45) Acting in concert with the alleged contemnor, the online publication and tabloid, there were other individuals and tabloids making similar allegations against the Judiciary. Some of these individuals and publishing houses are before this Court facing similar charges as the alleged contemnor.
- 46) It is also important to mention that the alleged contemnor and another person by the name of Bishop John Mambo, caused complaints to be lodged with the Judicial Complaints Commission against the three judges who presided over the Savenda matter. The allegations were similar to those they peddled in public and called for the review of the judgment and removal of the presiding Judges. To the Judicial Complaints Commission's credit, it dismissed the complaints.

- 47) The foregoing reveals the rampant and unjustified attacks on the Judiciary which is unprecedented. The frequency and callousness with which they were made is what prompted us to take swift action in order to avert the breakdown in the proper administration of justice in Zambia.

The charges against the alleged Contemnor and proceedings in this Court

- 48) This action was moved by this Court by way of a summons to an accused person under the Court's inherent jurisdiction and pursuant to Order 52, rule 1 sub-rules 22 and 23 of the **White Book**. It was issued on 10th July 2018 under the hand of the Chief Justice.
- 49) The charge against the alleged contemnor was contempt of court on four counts as follows:

49.1 Count 1 statement of offence

Contempt of Court, contrary to Order 52/1/22 and 52/23 of the Rules of the Supreme Court, 1965 (1999)

edition) and pursuant to the inherent jurisdiction of the Court.

49.2 Particulars of offence

Are that, the Contemnor on 23rd June 2018, published and/or caused to be published an article, headlined "Mambilima is the most corrupt judge," in the Zambia watchdog, an online publication with unlimited circulation, wherein he stated the following contemptuous words in relation to the decision of this Court under Appeal No. 37 of 2017 between Savenda Management Services Limited v Stanbic Bank Zambia Limited.

49.3 The statement read as follows:

"By Gregory Chifire

Justice Irene Mambilima is presiding over the most corrupt judiciary in the history of post independent Zambia

The Chief Justice has failed the people of Zambia whereas a lot of corruption allegations have been leveled against senior Judges in the judiciary, she has shielded and defended such judges.

49.4 One case in point is the Savenda v Stanbic Bank. In this matter, there is written evidence of corruption involving the judges that presided over the case, but the Chief Justice has given a blind eye. Reasons best known to herself.

We have written to her Ladyship to take action, but she has blatantly refused.

49.5 A lot of money is alleged to have exchanged hands, and is still exchanging hands even this time around just to suppress justice, all under the watch of her Ladyship the Chief Justice.

The Chief Justice ought to allow her subordinates cited in this case to be probed. She needs to suspend the Judges and allow for a tribunal against them ..., if anything citizens will begin to think that the Chief Justice was also a beneficiary."

50) Count 2 statement of offence

Contempt of Court, contrary to Order 52/1/22 and Order 52/1/23 of the Rules of the Supreme Court , 1965 (1999 edition) and pursuant to the inherent jurisdiction of the Court.

50.1 Particulars of the offence are that, the Contemnor, on the 10th day of May, 2018, wrote a letter to the Honourable Chief Justice of the Republic of Zambia, wherein he stated the following contemptuous words in relation to the decision of this Court in Appeal No. 37 of 2017 between Savenda Management Services Limited v Stanbic Bank Zambia Limited:

50.2 "I submit to your office that this Supreme Court Judgment has affected the delivery of the justice system in Zambia, and if the judgment is allowed to stand in view of the glaring omissions on the part of the Supreme Court, it has a potential to inhibit justice and development of jurisprudence".

50.3 Count 3

Statement of offence

Contempt of Court, Contrary to Order 52/1/22 and Order 52/1/23 of the Rules of the Supreme Court, 1965 (1999 edition) and pursuant to the inherent jurisdiction of the Court

50.4 Particulars of offence

Are that, the Contemnor on 15th day of June, 2018, published a press statement in the *Zambian watchdog* an online publication with unlimited circulation, wherein he stated the following contemptuous words:-

50.5 In relation to the decision of this Court in Appeal

No. 37 of 2017 between Savenda Management

Services Limited v Stanbic Bank Zambia Limited

50.5.1 "Am persuaded beyond any shadow of doubt that justice was not properly dispensed in this matter, and

if the matter is left unresolved, shall create bad law."

50.6 Count 4

Statement of offence

Contempt of Court, contrary to Order 52/1/22 and Order 52/1/23 of the Rules of the Supreme Court, 1965 (1999 edition) and pursuant to the inherent jurisdiction of the Court

50.7 Particulars of the offence

Are that, the Contemnor on 2nd day of July, 2018, published and or caused to be published in The Mast newspaper, a newspaper with wide circulation in Zambia an article headlined, "Judiciary one of most corrupt in Zambia", wherein you stated the following contemptuous words in relation to the decision of this Court in appeal No. 37 of 2017 between Savenda Management Services Limited v Stanbic Bank Zambia Limited

50.7.1 "Its an open secret in Zambia today that the Judiciary is viewed as one of the most corrupt institutions, second only to the Zambia Police", Gregory Chifire has alleged

50.7.2 Chifire, a Lusaka resident, noted that in the recent past, the country had seen questionable decisions made by honorable justices when the Court was supposed to be a defender of societal morals and the weak.

He further lamented that numerous reports of corruption involving the judiciary officers have been heard but unfortunately, nothing has been done.

50.7.3 At all material times, the judiciary must never be seen to be biased or compromised because its nature is supposed to be a scourer of the weak a defender of societal morals, a soul of the nation ...

"It is an open secret in Zambia today that the Judiciary is viewed as one of the most corrupt institutions, second only to the Zambia Police ...

50.7.4 Members of the public know that in Zambia today, judgments are

being bought. It is an open secret today that there are lawyers, some even respected and senior at the bar, specialized in bribing judges ..."

He further alleged that the judgment in the Savenda versus Stanbic Bank case had exposed the extent of corruption in the judiciary and further opened the Bench to scrutiny.

Chifire said the judiciary should never play to the gallery and maintained that the Savenda versus Stanbic Bank matter will not go away until justice is not only done, but seen to be done

50.7.5 The judgment in the Savenda v Stanbic Bank has just exposed the extent of corruption in the judiciary ...

The judiciary must never play to the gallery. Citizens demand justice and justice is what they will get. This matter will not go away until justice is not only done, but also seen to be done.

We shall only rest when justice is done ... As a matter of fact, we have notified the police of our peaceful demonstration this coming Thursday to demand the Chief Justice, as the immediate supervisor of the judges mentioned in the Savenda case, to act. The Chief Justice cannot be silent on this matter she needs to act with reasonable speed because justice delayed is justice denied. The delay in acting on this matter is causing irreparable damage to the judiciary

50.7.6 Chifire further echoed Civil society for Constitutional Agenda (CISA) Chairperson Bishop John Mambo's call for a material indaba to address concerns raised about the conduct of judicial officers ...

"The problems that the judiciary is going through are self inflicted.

Her Ladyship the Chief Justice needs to take a bold decision in providing leadership. It is like

**there is no head for the judiciary,
said Chifire."**

- 51) These were the four counts which were preferred upon the alleged contemnor and the statements attributed to him. We have felt compelled to reproduce the portions of the statements attributed to the alleged contemnor for reasons that become apparent later.
- 52) The summons to an accused was subsequently served upon the alleged contemnor who appeared before us on 17th July, 2018 for purposes of taking plea and showing cause why he should not be cited for contempt.

The hearing of the matter before the Court

- 53) The hearing began with the testimony of two witnesses called by the Court. These were Justice A.M. Wood, Judge of this Court and Hon. F. Hamaundu, a Magistrate and spouse to one of our number. We have not recounted the evidence of these two witnesses in detail and have only focused on the portions which have

a bearing on the decision we have reached in the matter. Suffice to say that Justice Wood's testimony revealed the operations of this Court. That is to say, decisions of the Court are decisions of all thirteen judges of the Court who include the Chief Justice and Deputy Chief Justice. He also disclosed that prior to going into session, the Court meets and discusses all the cases in the session, agree on the decision to be taken, appoint a panel of at least three judges to hear each matter and allocate each matter to Judges of the Court to write the judgment for and on behalf of the Court after a hearing.

- 54) Justice Wood's evidence revealed further that the judgments rendered following the steps set out in the preceding paragraph are pronounced to be judgments of the Court. No judgment can be attributed to one Judge of the Court or the panel dealing with the appeal. He also revealed that the Savenda judgment went through this process and was indeed a decision of the entire Court

and not just the panel of judges who presided over the matter.

- 55) In respect to dissent, the Judge explained that where one of the thirteen judges of the Court had dissenting views, he or she was at liberty to write a dissenting judgment. There would, in such a situation, be two judgments that is, the judgment of the majority and that of the minority, with the former carrying the day.
- 56) The evidence by Hon. F. Hamaundu, revealed the actual whereabouts of her spouse, Justice E. Hamaundu, who was at Protea Hotel, Chisamba, attending a workshop when he was wrongly reported by an online publication to be at Lusaka meeting officials from the Bank with the Deputy Chief Justice.
- 57) Prior to the reception of the evidence set out in the preceding paragraphs, the Court explained to the alleged contemnor the steps that the proceedings would follow and the need for him to be attentive in case he required to question any of the two witnesses. The alleged

contemnor however, insisted on the matter being adjourned to enable him engage the services of counsel despite the Court having already ruled on this issue by pointing out to him that he had had sufficient time to engage counsel between the time of service of the process upon him and the hearing date.

- 58) After the two witnesses had testified and on the insistence of the alleged contemnor that the matter be adjourned once again it was adjourned to enable him engage counsel. He was at this point guided by the Court to take the notes of the proceedings from the court reporters for purposes of assisting him to properly instruct counsel. Further, although he requested for a two week adjournment he was given a month's adjournment which, in the Court's view, was more than sufficient time in which to engage counsel. He was also reminded to consider seeking the services of legal aid counsel from the Legal Aid Board if he was not able to afford counsel from private practice.

- 59) The matter next came up on 18th August 2018, and was adjourned to 23rd August 2018 because the alleged contemnor was indisposed. On 23rd August 2018, the alleged contemnor was present in Court and once again sought an adjournment to enable him engage counsel. In doing so he indicated to the Court that his attempts at engaging counsel had been futile because counsel were reluctant to represent him on account of the nine member panel of the Court hearing the matter. He went on to inform the Court that he had, as a result, commenced an action before the High Court to seek a declaration that he would be denied his right to a fair hearing because he was unrepresented.
- 60) The alleged contemnor contended further that since his prosecution was criminal in nature, it was in the preserve of the National Prosecutions Authority and not the Court. He, in this regard, reminded us that on taking up office of Judge, we had sworn to uphold the **Constitution**. We

understood the alleged contemnor to be saying that we had denied him his right to a fair trial and that the proceedings against him were incompetent for want of compliance with procedure on prosecution of criminal matters. It was also evident that the alleged contemnor, by his speech, was playing to the gallery and intent on exciting and inciting the public and to derail the proceedings.

- 61) We considered the alleged contemnor's application for an adjournment and dismissed it. Notwithstanding this, the alleged contemnor continued to allege infringement of his human rights by the Court.
- 62) This is an opportune time for us to pause and reflect on the conduct of the alleged contemnor and demonstrate how unmeritorious his contentions and allegations were.
- 63) As a starting point we wish to state that, whilst it is in the interest of any litigant to be represented by counsel when he or she appears before Court, there is no constitutional right to legal representation. The

fundamental rights of an individual are contained in part III of the **Constitution** and they do not provide for the right to legal representation. However, the **Legal Aid Act** under sections 8 and 9 compels the High Court to issue a legal aid certificate where a person has insufficient means and is facing criminal prosecution. This certificate prompts the Director of Legal Aid Board to appoint legal aid counsel. The same Act under Section 11 makes provision for a person with insufficient means in a civil matter to apply to the Director of Legal Aid Board for legal aid.

- 64) In relation to the allegation that the prosecution of this matter should have been by the Director of Public Prosecution, we explained in the portion setting out the sources of our jurisdiction that this motion is on firm ground and need not have been so prosecuted.
- 65) The provisions of the law we have set out in the preceding paragraphs clearly show that the alleged contemnor does not qualify for automatic legal

representation. This fact notwithstanding, the Court did remind the alleged contemnor that he could apply for legal aid and gave him more than sufficient time to pursue that avenue.

- 66) As to the allegations of an unfair trial, these are untenable because the requirements of a fair trial are: a person's right to be heard; opportunity to present his case; and being informed in full of the case that he has to answer to. The record in this matter will reveal that the Court satisfied all the foregoing requirements along with the requirement of a public hearing by way of an open court hearing.
- 67) The alleged contemnor later composed himself and with the direction of the Court, albeit at great difficulty, began to address the counts which he was facing.
- 68) In respect of count 1 he testified that he did not publish or cause to be published the article in the online publication *Zambian Watchdog*, titled "*Mambilima is the most corrupt Judge*". The alleged contemnor, however,

admitted that he did author the letter written to the Chief Justice whose contents appeared under count 2. He justified it by stating that he was motivated by the need to help the Judiciary in addressing the various negative publicity. Further, that as a concerned citizen he had a constitutional right to bring up such issues with the Chief Justice and that, his hope was that she would review the decision. He also hoped to stimulate public debate on the issue.

- 69) Turning to count 3, the alleged contemnor denied publishing or causing to be published in the *Zambian Watchdog* an online publication the article alleging that justice was not properly dispensed in the Savenda matter.
- 70) As regards count 4, the alleged contemnor denied publishing or causing to be published an article in the daily tabloid, *The Mast*, an article titled "*Judiciary one of the most corrupt in Zambia*". He, however, conceded that he had actually given a telephone interview to a

journalist from *The Mast* prior to the publication. He also conceded that the contents of the articles on *Zambian Watchdog* and *The Mast* attributed to him were in line with the theme in his letter to the Chief Justice and addressed similar issues.

- 71) After giving his testimony the alleged contemnor requested for an adjournment to enable him call witnesses, one of whom was from *The Mast*, in relation to count 4 of the charge. The matter was adjourned to 19th September 2018 for this sole purpose.
- 72) When the matter came up on 19th September 2018, the alleged contemnor had engaged counsel who stated that they were ready to proceed but not in the manner the Court expected. Lead counsel, Mr. L. Banda stated that they sought the guidance of the Court as to whether their client was facing criminal or civil contempt. When asked by the Court if he was raising a preliminary issue on behalf of his client he prefaced his explanation that it was not a preliminary issue, with repeated apologies to

the Court for seeking the clarification, which were not only condescending but tainted with sarcasm and were clearly intended to mock the Court.

- 73) Counsel then went on to submit at length with the aid of co-counsel, Mr. M. Zaza and Ms G. Kumwenda, on the provisions of the **White Book** in regard to the distinction between criminal and civil contempt. At this point the Court clarified to counsel that the summons which was served upon the alleged contemnor was self-explanatory and revealed that it was civil contempt, with a criminal element to it as the sanction could be a custodial sentence.
- 74) Despite the clarification, counsel continued to seek further clarification and attempted to raise a preliminary issue despite their omission to file a notice before the hearing to that effect. The reason given for the omission was that they were only instructed the previous day. This went on for an hour and half and we viewed it as a

continuation by counsel on the path taken by their client of delaying and frustrating the proceedings.

- 75) After being guided back to the real issue, counsel applied to put the alleged contemnor back on the stand. The Court allowed this in the interest of justice.
- 76) When the alleged contemnor took the stand a second time he essentially restated the same evidence he had led on the third day of the hearing. Counsel then sought an adjournment to enable them call the witness from *The Mast* which the Court declined to grant on account of the fact that the alleged contemnor had been afforded more than sufficient time to call the witness and had spurned the opportunity. This marked the close of the hearing following which the Court sought clarification from counsel if they intended to file written submissions. Mr. L. Banda's response was in the affirmative. The Court reserved the matter for judgment and directed counsel to file the alleged condemner's final submissions within fourteen days.

Submissions by counsel for the alleged contemnor

- 77) In the introductory part of the submissions by counsel for the alleged contemnor, counsel began by quoting from a passage by the Chief Justice of India in the case of ***In the matter of Article 143, Constitution of India***⁴ at page 791 as follows:

"We ought never to forget that the power to punish for Contempt of Court large as it is, must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the Court, but may sometimes affect it adversely. Wise judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct."

In addition counsel reminded us of our duty to exercise judicial functions *"in a just manner"* and be guided by the principle, among others, that *"justice shall be done to all*

..." pursuant to Article 118 of the **Constitution** (as amended).

- 78) Counsel then turned to address us on what they termed issues to be considered, which in effect questioned the legitimacy of the proceedings once again as follows:

78.1 Nature of the proceedings-

78.1.1 Civil or criminal contempt

Counsel began by referring to an article by one of our number Justice M. Malila SC, entitled "*Contempt of Court and the Limitation of Freedom of Expression in the course of Judicial Proceedings: The Zambian Experience*" appearing in the 38th edition of the Zambia Law Journal at page 110 where the author classifies criminal contempt as "consisting of words or acts obstructing, or tending to obstruct or interfere with the administration of justice."

Counsel, likened this to the provisions of the **White Book** which we have set out in the earlier parts of this judgment in distinguishing what constitutes the two types of contempt in accordance with Order 52.

- 78.1.2 In effect counsel argued that since the contempt the alleged contemnor is alleged to have committed is in relation to the administration of justice it is criminal in nature. They reinforced this argument by referring to the text by Anthony Arlige and David Eachy, *The Law of Contempt of Court* in which the authors define criminal contempt in accordance with Order 52.
- 78.1.3 In relation to civil contempt, counsel argued that this takes the form of a breach of a specific order of the Court. That there is no allegation of a breach of a specific order of this Court by the alleged contemnor, to bring the matter in the realm of civil contempt. Counsel argued further that the fact, in and of itself, that the motion by the Court was pursuant to the **White Book**, does not make the proceedings before it civil in nature because the **White Book** provides for both civil and criminal contempt. To reinforce the argument that the proceedings were criminal in nature, counsel drew our attention to the fact that the alleged contemnor was asked to take a plea in respect of the four counts he faces. This procedure, they argued, is unique to criminal contempt.
- 78.1.4 Concluding arguments on this issue, counsel submitted that Order 52, rule 1 sub-rule 8 sets out the instances of criminal and civil contempt.

A perusal of the summons reveals that the Order of the **White Book** pursuant to which the alleged contemnor was brought before Court relates to criminal contempt. Counsel also defined what constitutes the Court's inherent jurisdiction as being its residual source of power to do justice between parties, which does not extend to assumption of jurisdiction not conferred upon it by statute. They, in this regard, referred to a passage in the writings of a legal Scholar IH Jacob, **Current Legal Problems** and the South African Constitutional Court decision of **National Union of Metal Workers of South Africa and others v Fry's Metal (Pty)**⁶.

- 78.1.5 In relation to this matter counsel questioned the purported exercise of our inherent jurisdiction on the ground that the proceedings amounted to an injustice because we have no power whatsoever to move the motion for contempt as we have. The basis for counsel's argument was that proceedings in this matter are concluded and as such we have no jurisdiction over the matter any longer. That we can only move a motion for contempt of Court in relation to matters that are still active before the Court.

- 78.2 Use of the **White Book** in contempt proceedings.

Counsel's argument here was simply that we should not have resorted to the **White Book** in moving the motion in this matter because we already have adequate legislation in the **Contempt of Court (Miscellaneous) Provisions Act**, **Penal Code** and **Supreme Court Act** to address the issue. Resort to the **White Book** should only be had where there is a lacuna in our law in line with our decision in the case of **Lungu v Kalikeka**⁹. Finally, that pursuant to Article 125(3) of the **Constitution**, we are bound by our own decisions.

78.3 Constitutionality of the hearing

78.3.1 In relation to this head, counsel made reference to Articles 8 and 9 of the **Constitution** (as amended) which set out the national values and principles and the fact that these values and principles should be applied when, among other things, interpreting the law and that they bind all persons and institutions in the republic (including the Judiciary). The values and principles include justice and equity.

78.3.2 The contention by counsel was that we have by these proceedings abrogated our constitutional duty of ensuring justice and equity because we are the complainant, investigator, prosecutor and adjudicator. We were thus, "... *implored ... to introspect on [our jurisdiction], [our] conduct of this case and if [we] deem fit, correct the*

impression that [we are] not alive to the Constitutional requirement to do justice ..."

78.4 Evidence led in the matter after the charge

The arguments by counsel here were merely this that, the evidence led by the Court had no relevance to the charge the alleged contemnor faced. The evidence cannot be used to prosecute or find the alleged contemnor guilty of the charge especially that it revealed events that happened subsequent to the charge leveled against the alleged contemnor.

- 79) After addressing the foregoing preliminary issues, counsel addressed the substantive charge against the alleged contemnor. In respect of counts 1 and 3, which deal with the publications by the *Zambian Watchdog*, they argued that the alleged contemnor disassociated himself from the publications and no evidence was led connecting the alleged contemnor to them.
- 80) Coming to count 2, counsel argued that there is nothing unique about writing a letter to the Chief Justice. There were other people like State Counsel John Sangwa and one Henry Chilombo who had also written to the Chief Justice. Further, no evidence was led at the hearing to

show that the words complained of were contemptuous or that there was *mens rea* on the alleged contemnor's part. There was need for the prosecutor (Court) to prove beyond reasonable doubt that by his words the alleged contemnor intended to scandalize the Court or interfere with the administration of justice. Our attention was drawn to the case of ***Re Supply of Ready Mixed Concrete***⁶.

- 81) In relation to count 4, the contention by counsel was that the alleged contemnor made the statement in *The Mast* tabloid as a way of exercising his freedom of expression as guaranteed by Article 20 of the ***Constitution***. The said freedom is a fundamental right which can only be curtailed in accordance with Article 20(3) of the ***Constitution*** which reveals that contempt of court proceedings are not one of the grounds upon which it can be curtailed. Therefore, the proceedings are unlawful as they breach Article 20 of the ***Constitution*** and have the

propensity of restricting the enjoyment of freedom of expression.

- 82) Counsel urged us to use this case as a way of championing and improving judicial activism in accordance with the words of one of our number, Justice M. Malila SC, writing in the article referred to earlier, by way of commenting on the Mazoka and Kavindele contempt cases, as follows:

"Taken by themselves, the Supreme Court decisions in the two cases would help curb unrestricted commentary on matters pending in the Courts of law. The two decisions, however, do nothing to improve the Supreme Court's disappointing record in the field of judicial activism in favour of human rights."

Counsel submitted that maintenance of the authority and independence of the Court does not give Courts the power to commence contempt proceedings for the sole purpose of silencing critics of the Judiciary. That according to the case of ***R v Commissioner of Police of Metropolis, ex parte Blackburn (No. 2)***⁷ criticism of the

Court or its decision in the course of exercising the right to free speech, even if it is inaccurate, is not a contempt of court. Counsel also referred us to the case of ***Vine Products v Green***⁸ that publication of an article which prejudged an issue in a case was no contempt unless there was a grave and real risk of the proper administration of justice being interfered with. The publications in this matter, counsel argued, were in no way intended to interfere with the administration of justice.

- 83) Counsel's concluding remarks were that this court sitting as prosecutor and adjudicator is a clear violation of the principles of natural justice.

Consideration by this Court and decision

- 84) In our consideration of this matter, we will begin with the first part of counsel's submissions because they question the legitimacy of the matter before us. In doing so, we are

mindful that some of the issues raised were dealt with during the hearing.

- 85) The first issue raised is that of the nature of the proceedings, that is, are they civil or criminal in nature? We not only dealt with this issue during the hearing but we have also restated the position in the second part of this judgment dealing with our authority to deal with a person by way of contempt of court. In doing so, we did not address the argument by counsel that the contempt envisaged under Order 52, rule 1 sub-rules 22 and 23 of the **White Book** pursuant to which the alleged contemnor is charged, are criminal in nature. The sub-rules do indeed prescribe for "*words written or spoken, calculated to interfere with the course of justice*" and "*acts calculated to prejudice the course of justice*" to be criminal contempt. However, as we explained, in Zambia this distinction is not applicable because the events which constitute criminal contempt have been specifically legislated and itemized in the **Penal Code**. All other

events are civil contempt. This arises, and as counsel, quite rightly argued, from the fact that resort to the **White Book** will only be made where there are lacunas in our law and practice.

- 86) Further, counsel appears to hold the view that any acts that are intended or do interfere with the administration of justice are in all cases criminal contempt. This is a fiction. A fiction because, as we demonstrated in our discussion of Order 52, rule 1 sub-rule 2 of the **White Book**, the purpose of the power to punish for contempt, civil or criminal, is "*... preventing any attempt to interfere with the administration of justice ...*". This is also evident from what constitutes civil contempt under Order 52, rule 1 sub-rule 8 of the **White Book**. They all address the issue of "*...preventing any attempt to interfere with the administration of justice ...*". Counsel has thus taken a very dim and narrow view of the distinction between the two types of contempt of Court. Consequently, the

allegation of injustice on the part of this Court is unjustified.

- 87) Arising from our holding in the preceding paragraph we have also considered counsel's argument that, we ought not to have moved this motion because the matters in the Savenda matter have been concluded. This argument suggests that the powers of a Court to punish for contempt come to an end once judgment in a matter has been pronounced. Again, we find this argument unmeritorious because none of the authorities from which the Court draws its jurisdiction to punish for contempt limits it to the point of delivery of judgment. From a common sense position, what would happen if, following the delivery of judgment and the Court is in the process of rising, a litigant hurls abuse at it? Would the Court in such an instance be *functus officio* merely because the judgment has been delivered? We think not.
- 88) In addition, by definition, administration of justice is "[the] maintenance of right within a political community by

means of the physical force of the state; the state's application of the sanction of force to the rule of the right".

(Blacks Law Dictionary) 7th edition. Apart from the fact that this definition does not set time limits within which the "*sanction of force*" will be applied, it reveals that administration of justice is always in a state of flux. Those who are its guardians, the Judges, cannot afford to go to sleep.

- 89) We have also dismissed the argument that by moving this motion we are judges in our own cause because the mandate of ensuring the proper administration of justice is in the sole preserve of the Judiciary. Further, the cause we are seeking by these proceedings, as we have explained, is not to repair our egos, but rather ensure that the administration of justice is not hindered in any way and the reputation of our institution preserved. There is thus, nothing personal about these proceedings for the contention that we are judges in our own cause to be tenable.

90) In addition, we have found no merit in the argument that the procedure we have adopted by charging the alleged contemnor and requiring him to take a plea is unique to criminal proceedings. The **White Book** does not set out the procedure to be adopted by a court at the hearing of contempt of court proceedings. Therefore, in dealing with contempt of court proceedings, this Court has jurisdiction to conduct a general inquiry into the matter as long as an alleged contemnor's rights to be heard and present his case are observed. In addition, the case of **Re Supply of Ready Mixed Concrete**⁶ offers some guidance on procedure at a hearing in general. The case involved civil contempt arising from disobedience to an order of an injunction. There is a finding of guilt of the alleged contemnors in the case, requirement of proof beyond reasonable doubt and *mens rea*. All of these three elements attest to the need for a practice similar to a criminal trial of taking plea. How else can a person be found guilty if he is not initially charged and asked to

take a plea of guilty or not guilty? For these reasons, the procedure in civil contempt is akin to the procedure in criminal trials.

- 91) Lastly, with respect to the contention that we ought not to have proceeded by way of the **White Book**, our focus will be on the argument by counsel that there is adequate provision in our law in the **Contempt of Court (Miscellaneous) Provision Act**, the **Penal Code** and **Supreme Court Act**, and thus there was no need for us to resort to the **White Book**.
- 92) We have already stated that the **Penal Code** relates to criminal contempt and specific instances of that type of contempt of court. The alleged contemnor is facing civil contempt which is not covered under the **Penal Code** because the acts he is alleged to have committed are not provided for under that Code and are, therefore, civil contempt.
- 93) In regard to the **Contempt of Court (Miscellaneous) Provisions Act**, it is an act whose intention as revealed

by the preamble is "... to amend the law relating to contempt of court and to restrict the publication of details of certain proceedings ...". It does not pronounce itself as being an Act to provide for practice and procedure in civil or criminal contempt of court nor does it define what constitutes the said contempt or its instances. It is also bereft of any penalties or sanctions for contempt of court.

- 94) As for the **Supreme Court Act**, it has no section or rules devoted to contempt of court, whether civil or criminal.
- 95) In contrast to these pieces of legislation the **White Book** has, among other things, the practice and procedure in contempt matters as it obtained at the material time in England which is still applicable to us, *mutatis mutandis*. The deficiency in the other Acts is what compelled us to resort to the **White Book**. The arguments by counsel on this issue are, consequently, lacking in merit.
- 96) As to the issue of constitutionality of the hearing, we feel that we have adequately dealt with the issue in our

discussion on the need for a fair trial. We hasten to add however, that counsel's arguments on the point alleging injustice on our part as revealed at paragraph 78.3.2 at page J54 of this judgment, by and large, are contemptuous. Our holding in this respect, is in no way intended to intimidate counsel but merely remind them to at all times remember to address the Court in an appropriate manner. We will address our minds to the transgression later.

- 97) We now turn to consideration of the evidence and other arguments by counsel. We wish to begin by restating what constitutes contempt and why it is important to deal with contempt. The earlier part of this judgment has revealed that contempt of court is any act by a person that tends to or is calculated at derailing the proper administration of justice. **Atkin's Court Forms** extends the definition to any words spoken or acts done calculated at lowering the Court's dignity and authority.

- 98) The actions and words which are attributed to the alleged contemnor must, therefore, be in line with the definition in the preceding paragraph if he is to be punished for contempt.
- 99) In our examination of the alleged contemnor's actions and words we will begin with count 2 because our decision on this count has a bearing on the decision on the other three counts.
- 100) The alleged contemnor has not denied that he wrote the letter to the Chief Justice which, among other things, referred to the judgment as resulting from "*a glaring omission on the part of the Supreme Court which has a potential to inhibit justice and development of jurisprudence*". The letter then called upon the Chief Justice "*to explore whether one of our esteemed highest Courts of the land exercised its authority in a just manner*

which promote[s] accountability, serve[s] the interest of justice and development of jurisprudence as required by both Article[s] 118(1) and 125 of the Constitution of Zambia". The contentions in these passages are that this Court failed to dispense justice in accordance with its constitutional mandate arising from a glaring omission on its part.

- 101) Counsel has argued that no evidence was led to prove that the words were contemptuous or that there was *mens rea* on the part of the alleged contemnor. It was also argued that: other people had written to the Chief Justice on the issue; that the burden lay on the Court to prove the contempt; and that the said burden was beyond reasonable doubt.
- 102) The burden of proof for contempt of court is indeed proof beyond reasonable doubt that the alleged contemnor committed the act and that it was contemptuous. There must also be *mens rea*. This is the case because the proceedings are quasi criminal in nature though civil and

in line with the case of ***Re Supply of Ready Mixed Concrete***⁶ as argued by counsel for the alleged contemnor. It was held in that case, albeit, per curiam at page 708, "*that it is an essential prerequisite to a finding of contempt that the factual basis shall have been proved beyond all reasonable doubt and there shall have been mens rea on the part of the alleged contemnor*".

- 103) We are inclined to adopt this standard though made per curiam because the ***White Book*** at Order 52, rule 1 sub-rule 5, in setting the standard of proof, relies entirely on the said case.
- 104) The evidence before us in respect of count 2 is the letter to the Chief Justice whose effect we have explained in a paragraph that follows. We have also explained it further when we discuss the other counts. The said letter, by the alleged contemnor's own admission, was authored by him. Consequently, no further proof is required as to authorship and we are satisfied beyond reasonable doubt that he authored the letter.

- 105) As to the contents of the letter, to allege injustice on the part of any Court is contemptuous because it suggests failure by the Court to discharge its functions and an abrogation of its constitutional mandate which in effect erodes public confidence in the institution. For this reason, any challenge directed at the discharge of the Courts' functions must be with the use of the word and phrases such as "*misdirection*" or "*misapprehension of the law or facts*". One cannot, without proof and in the manner the alleged contemnor did, allege injustice on the part of a court without sanction because it is an attack on the core function of the court. It eventually leads to interference in the administration of justice.
- 106) The alleged contemnor's allegation is compounded by a request that the matter be reopened for there to be justice. We are thus, satisfied, beyond reasonable doubt that the alleged contemnor was in contempt of this Court when he authored the said letter and his words are

actually contemptuous due to the effect they have on the administration of justice.

- 107) Flowing from that letter and on 15th June 2018, the alleged contemnor is quoted by the *Zambian Watchdog* as repeating the statement that justice was not dispensed in the Savenda matter. Later, on 23rd June, 2018, he is quoted by the same online publication as alleging corruption in the procurement of the Savenda judgment and calling for the suspension of the presiding Judges. To this end, the alleged contemnor wrote a letter to the Judicial Complaints Commission making the same allegations and seeking a review of the decision and removal of the presiding judges. Finally on 2nd July 2018, the alleged contemnor is quoted by *The Mast* tabloid as making similar allegations. These events are as appears in counts 1, 3 and 4 of the charge.
- 108) Counsel has argued that the alleged contemnor has disassociated himself from the online publications aforestated. He has also distanced himself from the

contents of the publication in *The Mast*, whilst conceding that he gave an interview to the tabloid. Counsel has in, this regard, argued that he was exercising his right to free speech which under Article 20 of the **Constitution** is not curtailed by the administration of justice.

- 109) The theme in all these publications is that of injustice and the need for reversal of the decision in the judgment. This is the same theme which resonates through the letter the alleged contemnor wrote to the Chief Justice. To his credit and in answer to a question posed by the Court, the alleged contemnor admitted that this was the case. We, therefore, have no reason to doubt that he caused the publications. The coincidence is too extreme to be otherwise. In the case of the publication in *The Mast* tabloid, although he admits having given an interview, he neglected to call on *The Mast* to retract the statement attributed to him.
- 110) We have no doubt in our minds that the statements, when they are viewed in their totality have the effect of

fueling discontent in the nation and a total breakdown of the justice system. They are also calculated at demeaning the Court. This is evident from the number of persons and publications who echoed and continue to echo the alleged contemnor's unjustified attacks against the Judiciary.

- 111) Whilst the alleged contemnor has the freedom of speech, which invites debate on an issue, and indeed to demonstrate within permitted limits this must be weighed against the need for preservation of the proper administration of justice which is for the benefit of the community at large as we have explained earlier. In support of the position we have taken, the then House of Lords in England in the case of ***Attorney General v Times Newspaper Ltd***⁹ had the following to say at page 55-

"It was the purpose of the law of contempt to protect the public interest in the proper administration of justice and in those circumstances that interest outweighed the

public interest in discussion of the issues raised by the litigation."

Indeed, our **Constitution** under Article 20(3)(b) whilst giving individuals the freedom of speech i.e. to hold opinions, impart and communicate ideas etc, restricts such freedom "*for purposes [of among other things] ... maintaining the authority and independence of the Courts ...*". This freedom like all freedom is not absolute. Further, by his statements, the alleged contemnor alleged corruption on the part of the judges. Corruption is a criminal act and no one has the freedom to impute unsubstantiated criminality on the part of someone under the guise of exercising his or her right to free speech.

- 112) In his letter to the Chief Justice, the alleged contemnor also indicated that he was motivated by the need to assist the judiciary by drawing its attention to the negative publicity. We find this to be a contradiction

because it is he who initiated and fueled the negative publicity.

- 113) The alleged contemnor crossed the line and he must be punished. Further, he revealed that he planned a demonstration to protest his and other people's misgivings with the judgment and thus, he had to be curtailed. Exactly forty nine years ago, certain individuals staged a demonstration protesting against the decision of the High Court which resulted in chaos in the country, breakdown of the administration of justice and the resignation and fleeing from the country of the then Chief Justice Skinner, due to the harassment he underwent. These events represent a dark day in the history of our democratic country which should not be allowed to happen again. Demonstrations, whilst an important feature of democratic societies, are not the prescribed remedy against the decisions of the Court.
- 114) The contemnor is thus guilty of contempt of court on all four counts and we accordingly convict him.

The sanction against the now contemnor

- 115) In considering the sanction which must be imposed upon the contemnor we have first considered the aggravating circumstances. These are, the callousness with which the contemnor conducted himself as revealed by the statements he caused to be published after his letter to the Chief Justice. This was notwithstanding the wise counsel given to him by the office of the Chief Justice that Savenda was adequately represented by capable lawyers, as is indeed revealed by the lofty status of its lead counsel and four other counsel. It was also apparent during his testimony that he did not fully appreciate what transpired in all three courts in which the Savenda matter was adjudicated leading to the judgment. He should, therefore, not have proceeded to recklessly comment on the matter given his ignorance.
- 116) The other aggravating factor is the lack of remorse or repentance on the part of the contemnor as displayed by

his conduct throughout the proceedings. This conduct, was calculated at ridiculing the Court, derailing the proceedings and administration of justice. Regrettably, counsel partnered with him in this effort when they came on the scene, which factor we have addressed in the next portion of this judgment.

It is also evident that the contemnor's conduct excited and fueled the media frenzy which followed his utterances. He must thus, take full responsibility for the confusion he caused.

- 117) We have also considered the fact that the contemnor is aware that the content of the online publication and in *The Mast* were contemptuous. For that reason he sought to disassociate and distance himself from the publications. Despite this knowledge, he made no effort to retract the statements or purge the contempt. Consequently, the matter proceeded to a lengthy trial at great cost to the tax payer, which trial could have been avoided.

- 118) The contemnor must also be punished for his attempt to divide this court by attributing the judgment in issue to the presiding panel when he knew or ought to have known that it was a unanimous decision of the Court because it was pronounced as a judgment of the Court. This action was calculated at making members of this Court who did not form part of the panel in the Savenda matter distance themselves from the panel, and ultimately the decision, for fear of ridicule, thereby eroding this Court's independence.
- 119) The conduct of the contemnor as expressed in the five preceding paragraphs calls for a stiff and custodial sentence.
- 120) In terms of the **Penal Code**, we have already explained that it applies to criminal contempt and the maximum sentence is imprisonment for six months. On the other hand, in England, the Courts in dealing with custodial sentence for punishment for contempt of court under Order 52 of the **White Book**, when it was the applicable

practice and procedure, were guided by the **Contempt of Court Act** 1981, Section 13A. This is evident from the editorial introduction to Order 52 of the **White Book** which states, among other things, that "*... committal should be for a fixed period and is limited by the Contempt of Court Act 1981.*"

- 121) Section 13A of the **Contempt of Court Act 1981** is at page 1191 of volume 2 of the **White Book**. It says in part that "*... the committal [of a person cited for contempt and meriting custodial sentence] shall be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior Court or one month in the case of committal by an inferior Court*". The Courts in England were specifically bound by these fixed terms for committal purposes and are still bound by section 13A of the **Contempt of Court Act** 1981 because it is still unrepealed, notwithstanding, the fact that the **White Book** is no longer the guide for practice and procedure.

- 122) Our Courts, however, are not bound by the provisions of Section 13A of the **Contempt of Court Act 1981** although it is referred to in the **White Book** because it is contained in a 1981 English Act which, by virtue of Section 2 of the **English Law (Extent of Application) Act**, is not applicable to Zambia.
- 123) Further, although section 116 of the **Penal Code** prescribes the limit of six months imprisonment for criminal contempt, subsection (3) renders the provisions of the other two subsections *"in addition to and not in derogation from the power of a Court to punish for contempt of court"*. Our understanding of this provision, the non legislation of provisions of the law to limit our powers and indeed, the situation presented by the non application of the English **Contempt of Court Act 1981**, is that we are at large to prescribe a term of imprisonment we find reasonable as our powers are not limited by statute as is the case in England. That is why in the case of **Masiye Motels Limited v Rescue**

Shoulders and Estate Agency Limited¹⁰, we sentenced the persons cited for contempt to a term of imprisonment of 36 months.

- 124) Arising from what we have stated in the preceding paragraph and having found that the contemnor is in contempt of this Court by virtue of his acts which were calculated to ridicule and bring the Court into disrepute and thereby, derail the administration of justice, we sentence the contemnor, one Gregory Chifire, to a term of six (6) years simple imprisonment on each of the four counts. The said terms are to run concurrently.

Counsel's misconduct

- 125) We have referred to the conduct of counsel for the contemnor which we have found falling below the required professional standard. It took the form of disobedience to the orders issued by this Court. That is, they refused to proceed after clarification was given and despite being warned by the court of the transgression they had committed thereby, abrogating their paramount

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duty which is to the Court. By this conduct they were also contemptuous in the face of the Court, discourteous and failed in their duty to ensure the proper administration of justice in accordance with rule 32(1) (ii) of the **Legal Practitioners Practice Rules**. Further, they partnered with their client in defending the action against their client thereby breaching their duty to the profession, which is unethical. Lastly, they mocked the Court and delayed proceedings which was calculated at derailing the proceedings. Their actions left us in shock.

- 126) The conduct cannot go unpunished because the vice has become prevalent among counsel in our Courts. The options open to us are: to place counsel on the stand to face contempt proceedings in line with our inherent jurisdiction and Order 52 of the **White Book** or punish them summarily for the contempt which was in our face; or in accordance with Section 53 of the **Legal Practitioners Act** admonish or suspend them from practice; or cause their names to be struck off the roll.

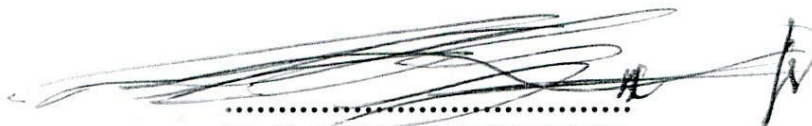
- 127) One thing all three counsels have in their favour, and perhaps a mitigating factor, is that they are fairly young, though relatively senior at the bar, and as such misguided, perhaps arising from youthful exuberance which clouded their perception of the occasion. Our shock arises from the fact that we compared and contrasted their conduct to that of State Counsel Chifumu Banda in this very case in which he conducted himself with the highest professional ethics whilst vigorously defending his client Bishop John Mambo, an alleged contemnor; balancing as it were, his duty to the Court and the interests of his client. Being at a loss as to their duty to the profession, counsel would do well to attend the timely workshops LAZ is currently hosting on professional ethics.
- 128) We shall therefore be lenient on counsel, that is to say, one Landilani Banda, Grace Kumwenda and McQueen

Zaza, and merely admonish them in the strongest terms possible and hope our action will send a message throughout the legal profession that the interests of a client do not override counsel's paramount duty which is to the Court. Counsel are not only officers of the court but also key stakeholders in the administration of justice. When counsel begins to adhere to the highest ethical standards, this will bolster the administration of justice.

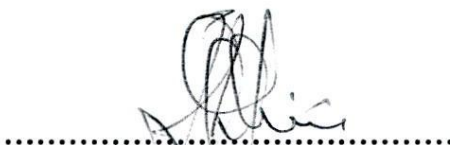
Conclusion

- 129) The events which have preceded this judgment are unfortunate. They have perhaps served one useful purpose which is allow us once again to remind the public at large and the media houses on the importance of preserving the dignity of the Courts and allowing the administration of justice to take its course.
- 130) It is also hoped that media houses will be guided by this judgment to exercise caution before publishing unsubstantiated and or unverified outbursts and

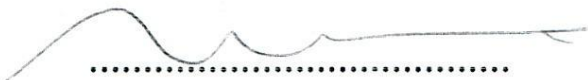
accusations against the Judiciary in line with media ethics as they too are stakeholders in the administration of justice. As such, we cannot over emphasis the importance of integrity, ethics and objectivity on the part of media houses (the watchdogs of justice) as it is not our desire to silence healthy and productive debate on the administration of justice. We are also mindful on the need, in a democratic country, to allow individuals and media houses to exercise their freedom of speech within the limits of the **Constitution**.



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M. S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE



.....
G. S. PHIRI
SUPREME COURT JUDGE



.....
E. N. C. MUYOVWE
SUPREME COURT JUDGE



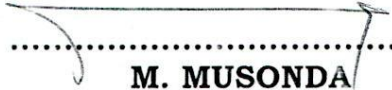
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E. M. HAMAUNDU
SUPREME COURT JUDGE



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M. MALILA
SUPREME COURT JUDGE



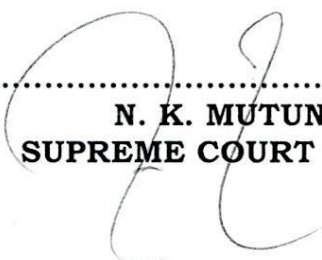
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R. M. C. KAOMA
SUPREME COURT JUDGE



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M. MUSONDA
SUPREME COURT JUDGE



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J. K. KABUKA
SUPREME COURT JUDGE



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N. K. MUTUNA
SUPREME COURT JUDGE