

## ● Hon. Mr. Justice Nigel Kalonde Mutuna



Hon. Mr. Justice Nigel Kalonde Mutuna CIArb obtained his LLB degree from the University of Zambia in 1984 and was admitted to the Bar as a practitioner in 1985. From 1999 to 2009, he served as President for Zambia Association of Arbitrators.

Hon. Mr. Justice Mutuna completed a Special Member course, CIArb in 2002 and was admitted to membership, he also took the first step to Fellowship CIArb, Amsterdam in 2004 and is an accredited tutor CIArb, London. He served as Judge of the High Court Commercial List from 2009 until 2016 when he was appointed Judge of the Supreme Court of Zambia.

Hon. Mr. Justice Mutuna is the Chairperson of the Advisory Committee on Court Annexed Mediation and Delay Reduction.

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**BACKLOG, ITS CAUSES, SOLUTIONS AND  
ROLE OF JUDGES AND LAWYERS IN THE  
ADMINISTRATION OF JUSTICE**

**PRESENTED BY NIGEL K. MUTUNA J.S  
AT THE STAKEHOLDERS' SEMINAR OF THE LAW  
ASSOCIATION OF ZAMBIA HELD ON 1<sup>ST</sup> MARCH 2017**

# *Introduction-Backlog*

- ▶ Aimed at exchanging ideas on the subject with LAZ, a key stakeholder in the Justice delivery
- ▶ To provoke discussions that will result in us agreeing on resolutions
- ▶ Presentation is in six (6) parts
  - Rationale for the presentation
  - Definition of backlog
  - Causes of backlog

# *Introduction-Backlog*

- ✓ LAZ's perspective
- ✓ Judiciary's Perspective
  - The effect of backlog on the administration of justice
  - Solutions
- ✓ Judiciary's perspective
- ✓ LAZ's perspective
  - Conclusion

# 1. Rationale

- ▶ Why should we have this interaction?
- ▶ Judiciary's perspective
  - Obligations under article 118 Constitution as amended
    - ✓ Article is the genesis of Judicial authority
    - ✓ Judicial authority derived from the people to be exercised by the Courts
    - ✓ Justice to be done to all without discrimination
    - ✓ Justice shall not be delayed
    - ✓ ADR mechanisms to play a role in justice delivery

# Rationale Cont...

- ✓ Justice to be done without undue regard to procedural technicalities
- ✓ Values and principles of the constitution to be protected and promoted
- ▶ LAZ's perspective
  - Obligations of LAZ under the enabling Act
  - ✓ Law Association of Zambia Act section 4 sets out the objects:
    - ✓ to maintain and improve the standards of conduct of all members of the legal profession – Counsels' duty to the profession

# Rationale Cont...

- ✓ to seek the advancement of the rule of law and of the rights and liberties of the individual – Counsel's duty to the client
- ✓ to promote the improvement and reform of the judicial and administrative systems , including tribunals and their procedure
- Obligations of Practitioners under the regulatory Act
- ✓ Legal Practitioners Act – conduct and offences section 52
- ✓ Duty to the Court
- ✓ Duty to the client

# Rationale Cont...

- ✓ Duty to fellow Counsel
- ✓ Duty to the profession
- ✓ Consequence of breach of these duties
- Obligations of a Practitioner under the practice rules
  - ✓ The Legal Practitioners' Practice Rules, 2002
  - ✓ Part VII Advocacy, Ethics and Etiquette
  - ✓ Sets out the four (4) duties of Counsel
  - ✓ Duty to ensure the proper administration of justice



# Rationale Cont...

- Obligations under common law and as defined by case law

# *2. Definition-Backlog*



# *Definition-Backlog*



# *Definition-Backlog*



# *Definition - Backlog*



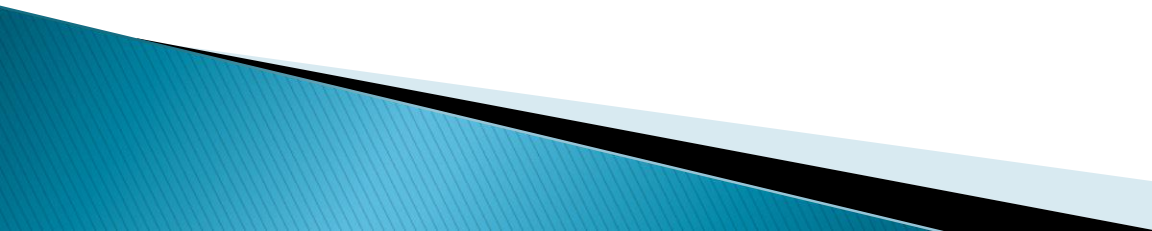
# *Definition-Backlog*



# *Definition - Backlog*

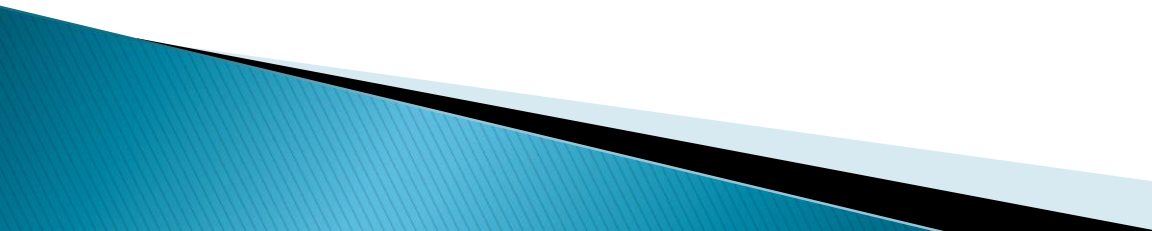


# *Definition- Backlog Cont...*

- ▶ Dictionary definitions-
  - Generally refers to an accumulation over time of work waiting to be done.
  - An accumulation ,especially of unfinished work.
  - An accumulation of uncompleted work.
  - An accumulation of unfinished tasks.
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# *Definition- Backlog*

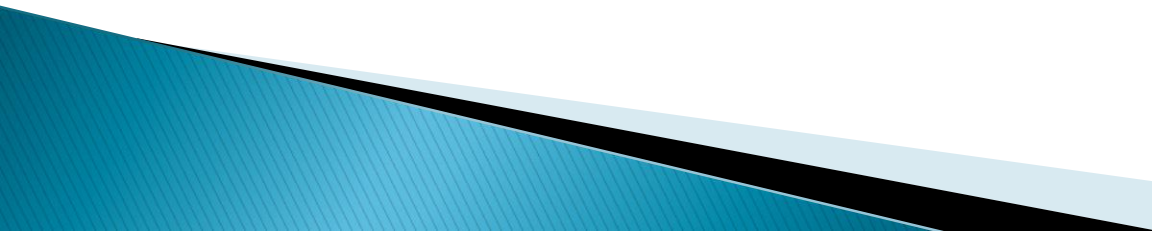
- ▶ Judiciary's definition-
  - A combination of delayed judgments, rulings and matters pending hearing and allocation of hearing dates.
  - A collection of matters that have exceeded realistic timelines for disposal.
  - Definition demonstrates that the origins of the problem are twofold i.e from the legal profession and from the Judiciary
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# *Definition- Backlog*

- ▶ Statistics on backlog as at 1<sup>st</sup> February 2016  
Lusaka
  - Civil cases pending: **6141**
  - Civil cases in backlog:**3721**
  - Civil cases not in backlog:**2420**
  - Average number of cases per Judge:**267**

# *Causes of backlog*

Legal practitioners' perspective

- Failure to prepare adequately for cases
  - ✓ No pretrial briefings
  - ✓ Request for unnecessary adjournments
  - ✓ Reporting to court late
  - ✓ Frivolous and unnecessary applications
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# *Causes of backlog*

- ✓ Breakdown in the mentoring system:
  - No proper supervision of assistance/Settling of pleadings (amendments)/ instructions prior to sending them to Court
  - No proper training of assistance/introduction to ADR mechanisms/leading by example/introduction to new systems in the Courts.

# *Causes of backlog*

- Failure to perform their duties as officers of the court:
  - ✓ Failure to adhere to orders of the court / discovery / bundles of documents
  - ✓ Little or no research in the matter before court
  - ✓ Misleading Judges/ Misquotes / Non-existent authorities
  - ✓ Lack of courtesy and professional etiquette
- Poor professional training:
  - ✓ Lack of training beyond UNZA and ZIALE
  - ✓ Lack of exposure to ADR mechanisms
  - ✓ Lack of exposure to specialized fields in the Law

# *Causes of backlog*

- Failure to perform their duties to their clients:
  - ✓ No proper assessment of strengths and weaknesses of clients case
  - ✓ No proper advice given on cost effect of litigation
  - ✓ No proper advice given on alternatives available to client/mediation and Arbitration
  - ✓ Delays in executing clients instructions/time to appeal /leave to appeal /enlargement of time for performing an act

# *Causes of backlog*

- ✓ Jumping into the arena of the dispute

# *3. Causes of backlog*

Judge's perspective

- Diary management
- ✓ Challenges in communicating with counsel when court is not able to sit and immediate allocation of fresh hearing dates
- ✓ Allowing unnecessary adjournments
- ✓ Failure to adhere to one's diary in terms of time allocated to cases
- ✓ Failure to deliver judgments and rulings on time



# *Causes of backlog*

- Case management skills
- ✓ Challenges in properly prioritizing cases i.e. easy cases to be dealt with first
- ✓ Challenges in properly prioritizing time i.e. chamber matters to be heard in 15 minute time slots; between 08:15 and 09:00 and 14:00 to 14:30; trials to be held thereafter; segregating time for sitting and writing judgments
- ✓ Challenges in controlling the parties and taking charge of ones court room

# *Causes of backlog*

- ✓ Challenges in properly segregating cases to ensure that the new ones do not fall into backlog
- ✓ Challenges in identifying and utilizing tools available for reduction of backlog such as referral to mediation, real-time court reporting, research advocates resort to order 23 of the High Court Act
- ✓ Failure to engage parties as a first step in the adjudicative process to pursue an *excuria* settlement where prospects are real

# *Causes of backlog*

- Court administrative system
  - ✓ Infrastructure challenges
  - ✓ Manpower challenges
  - ✓ Delays in opening of records by registry staff
  - ✓ Delays in referral of new records to the judge-in-charge for allocation
  - ✓ Delays in allocating matters
  - ✓ Delays in attending to matters allocated to judges
  - ✓ Inheritance of court records

# ***4. Effects of backlog on administration of Justice***

- ✓ Judiciary fails to deliver on its mandate
- ✓ Frustration and lack of job satisfaction by judges
- ✓ LAZ also fails to deliver on its mandate both to the client and the profession
- ✓ Reduction of billing power and capacity by Counsel
- ✓ Frustration and lack of job satisfaction by Counsel
- ✓ Client dissatisfaction and frustration
- ✓ Breakdown in the Justice delivery system

## ***4. Effects of backlog on administration of Justice***

- ✓ Recipe for chaos and lawlessness in the nation
  - ✓ Stagnation in the development of the law in the nation
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# 5. Solutions to backlog

1. *“The control of proceedings was always a matter for the trial judge and the parties were not entitled as of right to have their case tried to a conclusion in such a manner as they thought fit”.*  
***Ashmore V Corp of Lloyd’s (1992) 2 ALL ER 486***
2. *“...the rules of Court require that when matters are filed and are allocated to a judge, they should be court driven by way of a judge giving appropriate directions in relation to applications before him ”.*  
***Zaloumis (Suing in her capacity as the acting national secretary of MMD) V Mutati and 3 others Appeal no. 106/2016***

# *Solutions to backlog Cont..*

## Judges' perspective

- Diary management
- ✓ parties to be notified well in advance if the court is unable to sit- alternative hearing dates to be given immediately
- ✓ Adjournments to be allowed sparingly and for good cause- resort to be had to penalty of costs / no adjournments to be allowed where hearing dates set in the presence of parties
- ✓ Deal firmly with frivolous applications
- ✓ Strict adherence to times allocated for sittings – parties should not be made to wait

# *Solutions to backlog*

## Judges' perspective

- Case management skills
- ✓ segregation and prioritizing of cases – easy cases, urgent cases
- ✓ Prioritization of time
  - Chamber sittings
  - Trials
  - Judgments and rulings/ when are they to be written



# *Solutions to backlog*

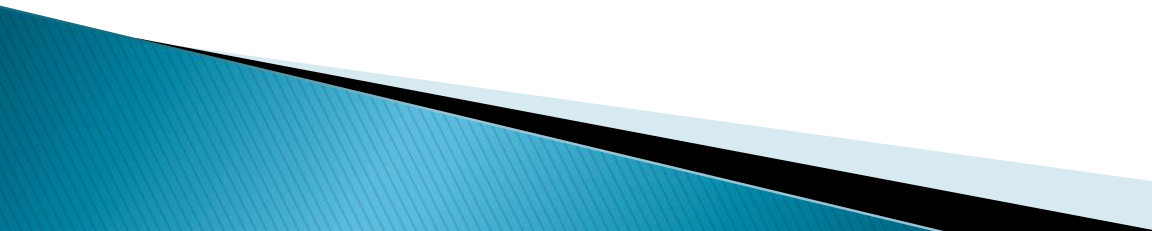
- ✓ Judicial capacity
  - Guide and control parties
  - Take charge of courtroom
- ✓ Segregation of cases
  - Old allocation from new ones
  - The ones in backlog not to delay the new ones

# *Solutions to backlog*

- ✓ Proper utilization of tools to reduce backlog
  - Court annexed mediation
  - Arbitration / Section 10 of the Arbitration Act
  - Real-time court reporting
  - Research advocates
  - Resort to order 23 of the High Court Act – Referral of matter to a referee

*“...in any civil cause or matter requiring any prolonged examination of documents or accounts or any scientific or local examination which cannot, in the opinion of the court ...conveniently be made by the court in the usual manner...”*

# *Solutions to backlog*

- ✓ Engage parties as first step
  - Thoroughly study record
  - Suggest options for settlement *ex curia*
  - Advise on advantages
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# *Solutions to backlog*

- Court administrative system
  - ✓ Need for political will to provide infrastructure
  - ✓ Need for political will to recruit more judges
  - ✓ Allocation of records
    - To ensure records are opened and scanned immediately process is filed
    - To ensure records opened on the day are transmitted to their chambers by 16:00hrs of the same day
    - To allocate records promptly

# *Solutions to backlog Cont..*

- ✓ Categorizing of cases
  - Complex cases
  - Less complex cases
  - Simple cases

# *Solutions to backlog Cont..*

- Complex cases
- Writs of summons
- Pleadings
- Interlocutory application

Timelines

1 Year

# *Solutions to backlog Cont..*

- Less complex cases
- ✓ Petitions
- Divorce
- Winding up

Timeline

6 Months

# *Solutions to backlog Cont..*

- Simple cases
- ✓ Originating summons
- Mortgage actions
- Recovery of land
- Interpretation of contracts
- ✓ Originating notice of motion
- Recovery of rent
- Recovery of property(termination of tenancy)

Timeline

1 to 3 Months



# *Solutions to backlog Cont..*

1. *“He must be honest with his client. He must be honest with his opponent. He must be honest with the Court. Above all he must be honest with himself.” **Denning, The Road To Justice***
2. *“He has a duty to his client no doubt: but he has also a duty to the Court which I take it to mean a duty to the cause of justice. He must never suppress or distort the truth” **Denning, The Road To Justice***

# *Solutions to backlog Cont..*

3. *“A Practitioner has a duty to ensure that the proper and efficient administration of justice is achieved.”* **Rule 32 (2) The Legal Practitioners Practice Rules, 2002**
4. *“No Practitioner shall - ...*
  - (c) *Mislead or allow any court to be misled, so that such court makes an order which such practitioner knows to be wrong or improper...”* **Section 52 LPA**

# *Solutions to backlog Cont..*

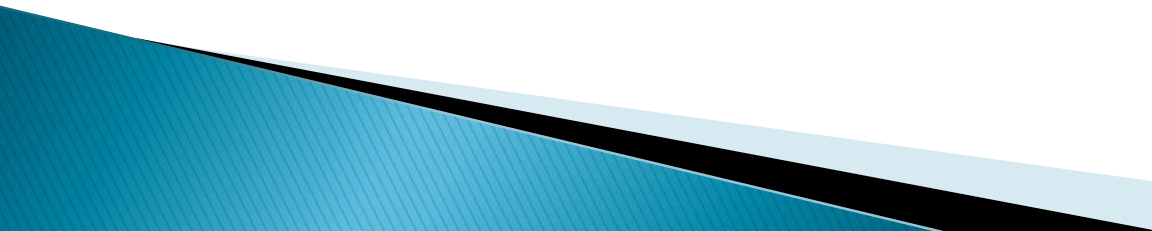
## LAZ's Perspective

- ✓ Preparation for cases
  - Need for pretrial briefings with clients
  - Request for adjournments to be made sparingly
  - Need to arrive at court early
  - Frivolous and vexatious applications to be done away with
- ✓ Mentoring system
  - Assistant advocates and junior Counsel to be properly coached and supervised / given adequate and full instructions

# *Solutions to backlog Cont..*

- Need to expose assistant advocate to new developments in the law and practice / Seminars / in-house workshops / LAZ conferences
- Senior Counsel to lead by example
- ✓ Duty as officers of the court
- Thoroughly research and prepare for matters before court
- Avoid misleading the court/ misquoting authorities/ selective quoting of authorities/ quoting non-existent authorities

# *Solutions to backlog Cont..*

- ✓ Need to enhance one's training beyond UNZA and ZIALE
  - ✓ Duty to the client
    - Need to properly assess the strengths and weaknesses of a case and advise a client accordingly
- “ A solicitor must not lead himself to a feigned or counterfeit action ”* **Denning, The Road To Justice**
- 

# *Solutions to backlog Cont..*

- ✓ Need to properly advise the client on the cost of litigation

*“They are more concerned with their fees than with the interest of their clients: that they will advise their clients to go to law when they know or ought to know he had best stay out of it: and that they run up costs in legal procedures and technicalities which could well be done away with”* **Denning, The Road To Justice**

# *Solutions to backlog Cont..*

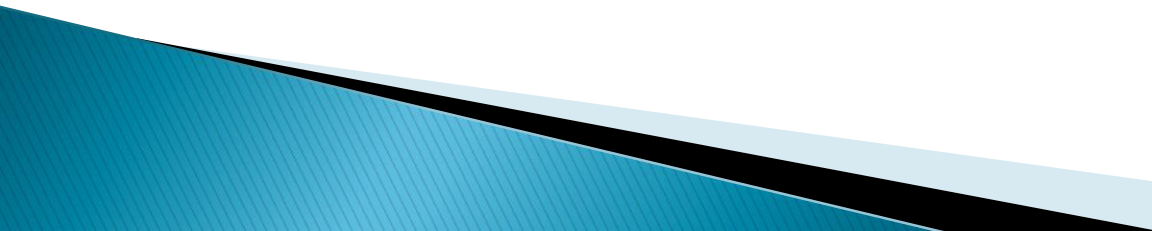
- ✓ Need to acquaint oneself with ADR mechanisms and accordingly advise a client/ avoid litigating where there is an arbitration clause/ resort to mediation in suitable cases.
- ✓ Need to observe the rules of court as to doing of acts
- ✓ Never jump into the arena of the dispute
- The dispute belongs to the client not Counsel
- Counsel's role is to guide and calm the tempers

# *Solutions to backlog Cont..*

- Counsel's role is also to be a bridge between his client and the client's opponent
- Counsel is not in partnership with his client



# *Conclusion*

- ✓ Do we accept that there is a problem in the administration of justice?
  - ✓ Do we accept that we have a statutory duty to play in ensuring the proper administration of Justice?
  - ✓ Are we willing to partner with the Judiciary?
  - ✓ Is such partnership beneficial to the profession, society as a whole and us personally?
  - ✓ What legacy or foot print do we want to leave as an association on society as a whole?
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***THANK YOU !!!***

