REPUBLIC OF ZAMBIA

THE JUDICIARY

WELCOME REMARKS BY THE HONOURABLE CHIEF JUSTICE OF ZAMBIA, DR. MUMBA MALILA SC,

AT THE OPENING OF THE 2022 JUDICIAL CONFERENCE

ON

29TH NOVEMBER, 2022

AT AVANI VICTORIA FALLS RESORT

IN LIVINGSTONE

Distinguished Guests, I warmly welcome you all to the 2022 Judicial Conference which we have popularly coined as a 'working retreat' away from the narrow confines of our chambers and court rooms, to take a broader and candid denotation of our role in the justice sector.

I extend, on your behalf, our highest appreciation to His Excellency the President, Mr. Hakainde Hichilema, for taking time off his demanding schedule to grace this occasion and spend some time with us this morning. This is a vivid demonstration that he is just as concerned about the welfare of this arm of Government as he is with the other two.

Your Excellency you are warmly welcome. We are truly grateful for your presence here this morning. I want you to know that the Judiciary does not take your acceptance to grace this occasion for granted and particularly cherishes this moment because it is the first ever opportunity that your Excellency is meeting and speaking to your Judges directly since you were elected President of Zambia in August, 2021.

I also extend a hearty welcome to our cooperating and collaborating partners and our guests from within and outside our borders who have kindly honoured our invitation to come and

share their experiences, views and perspectives on various issues falling in the topics for discussion at this Conference.

To the Office of the Chief Administrator, the Advisory Committee on Training and Continuing Education and the Steering Committee constituted to organize this Conference, I say thank you. I know it has not been a mean feat to organize a Conference of this magnitude. I understand the preparations started a couple of months ago and you are keeping your guard to ensure that all arrangements proceed like clockwork.

As Your Excellency and distinguished guests may have noticed, the programme for this Conference highlights a series of themed topics centered on eliciting honest engagement amongst adjudicators on the twin principles of Judicial Accountability and Judicial Independence. These values are well espoused in Articles 118 and 122 of the Constitution of Zambia.

Indeed, this Conference, whose theme is 'A Responsive and Accountable Judiciary' is meant to renew our vigor and re-energise our passion for the service that we are privileged to render to the Zambian people. The theme itself amplifies greatly the current expectations of the people of Zambia, namely, judicial integrity, competence, and responsiveness. It furthermore communicates

our resolute quest to remain an institution that is firmly anchored on the realisation that the judicial authority we are privileged to exercise is derived from the people of Zambia and is meant to serve the ends of justice for the people's overall good.

Yet, the theme also re-echoes our hope of delivering timely justice to all Zambians without fear, favour or ill will. It also reinforces our commitment to ensuring that public confidence and trust in the court system are rekindled and maintained.

Although one scholar assumingly observed that once it is accepted that judicial authority derives from the people, the aspect of accountability becomes obvious, our task in this Conference will be to interrogate how each one of us at both individual and at collective institutional level can actualise the delicate balance between the two concepts.

We believe that fostering such engagements amongst ourselves, as we will do in this Conference, will take care of the unspoken sensitivities that we harbour as adjudicators, and will assist us going forward to do our part in discharging the burden we carry of accountability for the judicial power we exercise. It will also help us in maintaining the institution's relevance to the aspirations of the people it is designed to serve. In this regard, please excuse me

if I appear to speak too frankly about what is obtaining in the Judiciary, for candidness should animate our engagement in this Conference, if we are to resolve the issues that confront us. More importantly, we should also indicate the direction that we intend to take to address those issues.

In October 2003, Dato Poram Cumaraswamy, former United Nations Special Rapporteur on the Independence of Judges and Lawyers, articulated his thoughts on judicial accountability and complaints mechanisms against judges in the following terms:

> **Judicial accountability is today a catch phrase in many countries. Judges can no longer oppose calls for greater accountability on the ground that it will impinge on their independence. Judicial independence and judicial accountability must be sufficiently balanced so as to strengthen judicial integrity for effective judicial impartiality. The establishment of a formal judicial complaint mechanism is therefore not inconsistent with judicial independence under international and regional standards.**

For its part, the International Commission of Jurists, speaking to the complementarity of judicial accountability and judicial independence, pertinently observed that:

> **At the broadest level, the judiciary as an institution should be accountable to the society it serves. However, in a democratic society ruled by law the obligation that the judiciary owes to society is limited to applying the law in an independent and impartial way, with integrity and free of corruption .... the judiciary's accountability to society is made operative first and foremost by ensuring judges are accountable to the law: that they explain their decisions based on the application of legal rules, through legal reasoning and findings of fact that are based on evidence and analysis, and that their decisions can be reviewed and if necessary corrected by the judicial hierarchy through a system of appeals.**[1]

Within the context of judicial independence and accountability under the rule of law, all the judges assembled in this hall are fully alive to the role that the Judiciary should play in the maintenance

[1] Judicial Accountability: A Practitioner's Guide No 13 at pp 15-17:

of a just and free society with all that this entails, namely, good governance, respect for human rights and fundamental freedoms, constitutionalism, transparency, and a corrupt-free environment. Afterall, all these judges all have, without exception, vast legal experience as legal practitioners and as adjudicators. We are thus all acutely aware that in a plural society such as we have in Zambia, and as part of its accountability role, the judicial organ of the State must be a balancing, harmonising and unifying force and therefore that any mistake, slackness or omission on its part may lead to devastating consequences.

Accountability, may I add, requires us judges to act strategically and to exercise prudence so as to avoid passing ethically indigestible and conflicting decisions. When we have clarity in our court orders and decisions which we deliver timely, we, in the process, address what the public is reputed to assail the most about the Judiciary – vagueness of court decisions and orders and seeming lack of integrity and competence.

Incongruities and inconsistencies in decision-making, especially at the top level, habitual defiance or unthinking interpretation of the law, evident insufficiency of professional decency and neglect of the doctrines of *stare decisis* and judicial precedence, on our part

can easily give rise to a sense of uncertainty and unpredictability. And if we have to be as sincere as we ought to be, we Judges manning the various courts of Zambia will admit that for a variety of reasons, some of our decisions have caused bewilderment and, sometimes, disquiet in the body politic and these have tended, in some cases, to undermine confidence or injure the esteem in which the public holds the adjudicatory function of the State's trinity.

It would, of course, be surreal to deny that some of our decisions have, most regrettably, contradicted or ignored existing judicial precedents. Others have been plainly vague or ambiguous to the point of being difficult to practically implement. Yet others have either not addressed any or some of the key issues brought to court by litigants, or they have, in complete disregard of the time-honored common law principle of *ubi jus ibi remedium* (where there is a right there is a remedy) found legal infringements but offered no relief to the victim. Some of our decisions, I grieve to say, have drawn us to the brink of a constitutional impasse or quagmire.

I think there is wisdom in the advice of the former Californian Supreme Court Justice Otto Kaus who once warned that, trying to disregard the political consequences of controversial judgments is

'like ignoring a crocodile in your bathtub."[2] In so stating, I do not mean that as courts we should seek to make popular decisions. What I do mean is that our reasoned decisions should always be guided by the Constitution and the law, alive always to the practical consequences of those decisions in the real world – not just on paper. Our decisions must be presented in a way that communicates an honest and independent interrogation of issues to convince litigants and readers of our decisions that those decisions were indeed properly motivated.

Put in homely language, making good and widely acceptable judgments entails assuming responsibility for our decisions and thinking through the consequences. That is accountability. It requires an appreciable amount of judicial wisdom, by which I mean having a disposition that interacts appropriately with the situation at hand and which allows the decision maker, having due regard to all applicable legal provisions and principles, to reason his or her way through to the best and fairest outcome possible. Only then can we speak truthfully about judicial responsibility and accountability.

[2] See Neal Mathew Field, "Politicisation of Judiciary" 10 December 2003 <www.nealmatthews.com/Document/politicisation%20of%20the%20> visited on 31/3/11

We have also, not infrequently, ignored the need for litigation to come to an end and have unfortunately made some decision which in themselves invite further litigation or clarification. We in the Judiciary are all too familiar with the cumulative damage to the reputation of our institution resulting from prevarication and procrastination in our decision-making; and from sluggish and seemingly corrupt justice by some among our number. Declining standards of adjudication, inefficient registries and a laissez faire attitude, are part of a catalogue of criticisms against the justice system in Zambia generally.

All these shortcomings are a blot on the cherished values of responsiveness and accountability, but we may have gotten away with them under the guise of exercising judicial independence. However, as the late former British Prime Minister, Winston Churchill, said in the different context of the Gallipoli Campaign, 'the terrible ifs accumulate.'

In regard to the vitally important interface between judicial independence and responsiveness, George Otieno Ochich[3] observes, correctly in my view, that:

[3] George O. Otieno Ochich 'The changing paradigm of human rights litigation in East Africa' in *Reinforcing Judicial and Legal Institutions: Kenya and Regional Perspectives*, Vol. 5 judicial watch Series (ICJ Kenya section, Nairobi, 2007 p.65

Judicial independence does not imply that judges should be entirely aloof from public sentiments and always disregard the strength of local feelings on an issue before them, neither does it mean that the courts may do entirely as they please. On the contrary the courts must ever be alive to the realities of the society in which they operate, and they must always discharge their functions in accordance with certain explicit and implicit limitations. When determining disputes, the courts are expected to have some regard to the general sense of the community and not to rely merely on idiosyncratic opinions.

We must, as an arm of government, guided as we should, by the Constitutional imperative to be accountable, seek to make decisions that, among other things, are timely and just; decisions that promote social justice, discourage abuse of the country's resources, and encourage an investment friendly atmosphere. This is one of the tangible ways in which we can add to the collective desire of the Zambian people of ensuring economic recovery in our nation so that in our time, we can see the back of mass poverty of our people.

We must, as good judges will feel obliged to do, strive to respond to challenges that undermine the effective and efficient administration of justice. We must not relent in seeking to create a user-friendly legal system where, whether the users of our courts agree with our decisions or not, they walk away with a sense that the process was impartial and, whether lawyer, litigant or witness, that they have had a fair day in court and have been treated justly, with respect and dignity.

Mr. President, distinguished ladies and gentlemen, it is not enough that we are aware of all these things and more which reflect the current state of affairs. We are, to the extent humanly and financially possible striving to address some of these shortcomings. Administratively, we have developed in-house measures to get us back on track. One of the recent actions taken was the amendment effected to our High Court procedural rules to promote efficient and swift justice delivery. We have streamlined the High Court civil procedure with a view to shortening the time for concluding litigation.

Now parties to litigation are required to file pleadings accompanied by legal arguments and witnesses' statements before a hearing. This advance information allows a Judge to understand the shape

and content of the case and the issues in dispute. It also equips the Judge with prior appreciation of the relevant legislation and key authorities that may assist in arriving at a reasoned conclusion swiftly. These procedures and more that are being devised will invariably shorten the length of trials and will in due course have a positive impact on the efficient and quick disposal of matters.

Secondly, we have set out within the rules, timelines for concluding hearings and rendering decisions. Habitually delinquent judges will not escape the notice of the Chief Justice because Judges unable to conclude their cases within set timelines are obliged to offer a satisfactory explanation to the Chief Justice as to why they failed to meet the deadline. This gives the Chief Justice the necessary supervisory control over delays, so that where need be the Chief Justice will use the opportunity to compare notes with the Judicial Complaints Commission.

Thirdly, capacity is being enhanced so that the returns that are routinely filed with the Chief Justice's office, reflecting the performance of judges, will henceforth be scrutinized more closely and individual judges being called to account for any shortcomings identified.

Fourthly, alongside what I have stated already, we expect that the newly introduced performance management system, which I launched earlier this year, will help identify those of our judges not performing to expectations so that they can be assisted to become useful building blocks for the ideal judiciary that meets the expectations of the Zambian people.

Fifthly, in a spirit of responsiveness, Information and Communication Technology (ICT) is one aspect that we have wholly embraced. ICT not only facilitates access to justice, but it also helps in the quick disposal of cases.

With the support we expect to receive from the central government, it is our desire to introduce a Case Management System to all Courts in Zambia. Needless to state, that system does not come cheap, but we are confident that it is an investment well worth making.

Currently, only Lusaka has an electronic record keeping system, which has proved helpful. However, the ideal situation is to have real time court reporting in all the Superior Courts, operating optimally alongside a full case management system which would, not only keep an electronic record of the case files, but would also have an automated allocation and tracking protocols. This will not

only ease up the case flow and case management in the court system but will also enable adjudicators pick up pace in determining and disposing of cases.

I am in this regard happy to state that His Lordship the Chief Justice of the Republic of Zimbabwe, together with some court officials from the Zimbabwe Judiciary and other digitization experts have gracefully accepted our invitation to come and share their experiences of their country which has successfully implemented the case management system and will be making presentations at this Conference.

Sixthly, in full realization that a well-trained judiciary is essential in meeting the challenges of today and tomorrow, especially those of tomorrow, we are striving to ensure that our adjudicators and staff are encouraged to keep abreast with global issues. Continuous professional development of all Judiciary staff holds the key to capacitating our Judges, Magistrates, and support staff so that they effectively meet new challenges. It is an indispensable feature that we cannot do without if we are to maintain the necessary competence levels of our adjudicators and other staff.

We have, in this connection, taken the initiative to set up a Judicial Training Center, as exist in some neighbouring jurisdictions, to

provide the necessary formal framework for continuous professional development. However, it too, does not come cheap. Yet again, this venture can only succeed with the full support of the central government.

We are glad that the learned Minister of Justice and the learned Attorney General and his team have been supportive in this regard by formulating the necessary legislative framework and seeking the necessary Cabinet's approval in introducing legislation necessary to set up the training centre.

These then are but just some of the incremental measures that the institution has introduced in a quest to be responsive and accountable. They will sure pay dividends in due time.

Although Your Excellency is aware of the many problems, challenges, and unmet needs of your Judges and the Judiciary in general. The Chief Administrator will contexualise some of the issues in her state of the Judiciary briefing. It would however, be remiss of me if I did not, at this occasion, allude to some of the most pressing ones which the Judiciary as an institution is facing which stand in the way of efficient justice delivery.

One major problem hampering our operations is that of inadequate or dilapidated infrastructure. At the level of the superior courts, i.e., the High Court, Court of Appeal, Constitutional Court and the Supreme Court, the problem is dire. Since its establishment in 2016, the Constitutional Court has had no office space and court rooms of its own. It squats in the premises belonging to a Division of the High Court and uses some Supreme Court facilities.

The Court of Appeal has been housed in inadequate, most unsuitable, and dangerously located former Industrial Relation Court building near the Inter-City Bus Terminus in Kamwala. The judges have to go, for their criminal appeal hearings, to the Supreme Court building owing to the absence of holding cells at the Kamwala Court.

At High Court level, the situation is not any better. The introduction of resident Judges in Provinces has created a shortage of office and court room accommodation as the senior most Magistrates in those centers were displaced by the newly deployed resident Judges. They in turn took over the next best office spaces. The displacements went on down the pecking order with some lowly Magistrates and support court staff ending up

sharing confined little spaces for want of chambers. A very undesirable state of affairs, I must add.

The creation of the Economic and Financial Crimes Division of the High Court equally calls for additional infrastructure, particularly when the appointment of substantive judges of that court is eventually done. The recently passed Children's Code Act, No. 12 of 2022 has enormous implications on the ideal size of the Family Division of the Hight Court in terms of both staffing and infrastructural needs. That court is presently squatting in the new Ministry of Home Affairs building near Cabinet Office. The newly acquired former German Embassy premises will ameliorate, but not solve the court's accommodation nightmares.

The bottom line is that we need massive infrastructural expansion country-wide. A new court complex at Lusaka, to accommodate all the Superior Courts, is a desideratum.

Our Magistrates too are in serious need of office accommodation and court rooms. The introduction of the fast truck Economic and Financial Crimes Court at Subordinate Court level has compounded what was already a bad situation as regards court rooms and office accommodation considering that these courts are

intended to be fast track and cannot have the luxury, or is it the misery, of sharing courtrooms with ordinary courts.

We recently have had to reclaim some Court rooms from the Boma Local Courts and re-designated them as Subordinate Courts to temporarily ameliorate the accommodation shortage while accommodating the fast truck nature of the Economic and Financial Crimes Court. The accommodation problem has of course not been solved. It has now only shifted to the Local Courts. Talk of priorities!

The working visits to Judiciary facilities and staff around the provinces undertaken at different times by the Deputy Chief Justice and I earlier this year revealed the glaring inadequacy and unbelievably deplorable state of our court infrastructure at Subordinate and Local Court levels in rural areas. We are thankful your Excellency that your administration has prioritised improvement of court infrastructure and as we convene here today, rehabilitation works are underway in various courts across the country.

Your judges, Your Excellency, are concerned about their conditions of service. They are fully aware of constrained national resources. The Judiciary however, considers that emoluments of

judges and their conditions of service generally are important elements in the protection of judicial independence. It is an accepted position world-wide that salaries and other conditions of service of judges must be established by law, and be adequate and commensurate with the status, dignity, and responsibilities of judicial office. This is in clear recognition of the fact that by the dictates of their code of conduct and the nature of their work, judges are precluded from lobbying for conditions of service or engaging in business enterprises, assuming board membership or undertaking other side activities that may bring into question their independence.

Adequate remuneration, in fact, contributes to preventing judges from seeking extra profits or favours and better shields them from potential unethical practices and pressures which may influence their decisions or behaviour. This is true of Magistrates too, especially those assigned to the Financial and Economic Crimes Court.

Your judges, Mr. President, keep wondering what the basis of the wide discrepancy in the conditions of service is with the legislative arm of government when comparable offices and positions from

the top of the institution down to Classified Daily Employees, are considered in perspective.

More solemnly, your Judges believe that salaries, conditions of service and pensions of judges should be accorded to them in full and should not be altered, either *de facto* or *de jure* to their disadvantage after appointment.

We must all continue to reflect seriously on the creation of the Emoluments Commission earlier this year and its role in relation to determining judges' emoluments and conditions of service. It may well affect, in an unanticipated manner, their office, their remuneration, conditions of service or their resources, and may have the undesirable consequence of threatening or bringing financial pressure on the judges.

Your Judges, Mr. President, also continue to grumble about the financial autonomy of their institution which the Constitution envisages. Financial autonomy for the Judiciary would mean that once approved, the budget of the Judiciary should be disbursed and it should be the business of the Judiciary to implement it without having to appear to be supplicant each time it wishes to undertake any of its projects.

There is obvious and understandable discomfort in giving the Judiciary this autonomy for various reasons, the capacity to administer finances seemingly without recourse to executive control, being considered as a significant issue. We should take a leaf from judiciaries materially comparable to our own which have implemented financial autonomy of their judiciaries with appropriate safeguards to prevent possible abuse or misuse of public funds derived from taxpayers' and resources appropriated to this non-elected body.

The Judiciary looks forward to the legal and constitutional reforms which are being spearheaded by the Hon Minister of Justice, particularly as these may affect the form and shape of the judicial estate. We have sufficient concerns that ought to be addressed either through a Constitutional review process or amendment to legislation. It is the Judiciary's expectation that some of these legislative amendments will address what appears to be an impossible workload for some judges, especially at the High Court level. Others will facilitate the better administration of the Judiciary.

The glossary of the needs of the Judiciary is all too familiar with your administration, Mr. President. Allow me in conclusion to

express my utmost delight at the forthcoming and forthright manner that your administration has thus far dealt with, and continues to deal with, the many challenges that our institution faces. It remains our fervent hope that this spirit will continue so that together we can build a Judiciary that is responsive and accountable.

I thank you.