REPUBLIC OF ZAMBIA

SPEECH BY THE HON. CHIEF JUSTICE OF

OF ZAMBIA

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DURING THE CEREMONIAL OPENING OF THE SPECIAL CRIMINAL SESSION OF THE HIGH COURT AND THE OFFICIAL OPENING OF THE MEDIATION SETTLEMENT WEEK 2023

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ON THE SUPREME COURT GROUNDS AT LUSAKA

SALUTATIONS

It gives me great pleasure to be here today to witness the ceremonial opening of the special criminal session of the High Court and the official opening of the Mediation Settlement Week. I must be quick to note that apart from the special criminal session and mediation, the atmosphere is also laced with conversations surrounding the 50th anniversary, this year, of both the Supreme Court and the Law Association of Zambia (LAZ). This ambiance is aptly captured by today's theme "Enhancing Access to Justice through Mediation as the Supreme Court and the Law Association of Zambia Commemorate 50 years".

Distinguished Guests, allow me to extend, on behalf of the Judiciary, our highest appreciation to Her Honour, The Vice President of the Republic of Zambia, Mrs. W. K. Mutale Nalumango, MP, for taking time off her busy schedule to join us today to celebrate important milestones by the bar and the bench and to officially open this year's Mediation Settlement Week.

Madam Vice-President, the subject of access to justice opens an extremely timely conversation. I will propose to unpack today's theme in two parts: First, I will briefly reiterate what mediation demands of our entire judicial system particularly the bar and the bench. In the second part, I will explain why we, judges, and our colleagues at the Bar must respond to the call by the Constitution to encourage and utilise alternative forms of dispute resolution. Of particular interest to us is court-annexed mediation. I will sketch out my thoughts against the backdrop of the 50th anniversary of both the Supreme

Court and LAZ which has culminated into the opening of the special criminal session. It is gratifying to note that in keeping with the best traditions of the legal profession, LAZ has opted to mark this milestone by offering to take up 50 *pro bono* cases. For our part we have responded to this noble cause by gazetting this special criminal session and having our judges take up the additional load hearing the *pro bono* cases. By design, the ceremonial opening of the criminal session takes place at the commencement of another important activity in our judicial calendar: the mediation settlement week.

Distinguished Guests, several reasons have sometimes been put forward as an excuse for shunning mediation particularly, courtannexed mediation. Some lawyers are simply reluctant to try out something that is new to them. Others do not want to settle cases but want to win them in a courtroom, on their turf, a forum that is much more familiar to them. I have heard some careless whispers that lawyers do not like mediation because it significantly tampers with the fee note. There is a temptation, by some lawyers, to agree with this logic. But surely, the urge to issue a bigger fee note should not be the justification to shun or frustrate the mediation process.

The Judiciary has embraced what is a called a multi-door courthouse. One scholar[1] at a presentation on the concept of a 'multi-door courthouse' asked the question: If a patient is ill, does the doctor always operate? Of course, not. The doctor and patient discuss all possible solutions. Likewise, with the legal field - for each legal ailment, a variety of options need to be discussed. For our institution,

[1] Presentation by Terry Simonson, Director, Tulsa Multi-Door Courthouse Program (November 7, 1984).

the alternative is court-annexed mediation. The idea is for our institution to route appropriate incoming court cases to mediation

I hope as the bar turns 50 this year it will appreciate the role of mediation in our court system. Where it is possible, I urge you to direct your clients to alternative dispute resolution channels before you even approach the courts. When you do approach the courts, accept to attempt mediation when we make orders suggesting that it is the appropriate forum for settlement of a particular dispute. A bold lawyer is one who, in the face of losing the much-needed profit in legal fees, will still advise a client to attempt alternative dispute resolution where the circumstances warrant. To buttress this point, allow me to quote Abraham Lincoln, the 16th President of the United States of America, who was himself a lawyer, who put it this way:

> "Discourage litigation. Persuade your neighbors [sic] to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."[2]

Distinguished guests, there is no need to insist on matters proceeding to trial when you know full well that the case has no merit or can be resolved through mediation. A rapidly growing literature admonishes lawyers to shed adversarial clothing, think outside the litigation box, embrace creativity, create value and move into the 21st century as

[2] Basler, Collected Works of Abraham Lincoln, Rutgers University Press, 1953-1955.

problem-solvers rather than as gladiators. I know it is tempting and in fact becoming increasingly fashionable amongst young lawyers to brandish the 'I am a lawyer' phrase or to throw around the famous rhetoric question; Do you know who I am?

This should not be the approach or attitude to take when a court orders that your clients attempt mediation. Even during the mediation process, hard as it may seem, lawyers must leave their legal toolkit at the door. The process, as you all know, is meant to assist the parties reach a satisfying settlement that is made on their own terms as opposed to the terms of the court that may leave at least one of the parties dissatisfied. Therefore, lawyers must embrace their unfamiliar role that the mediation process requires of them.

At a basic level, it may seem silly to talk of lawyers as problem solvers in the context of mediation. Lawyers have always been sought out as solvers of legal problems. What then is significant about a problem-solving approach to lawyering during mediation? This approach opens up greater possibilities for developing broadened options and solutions that more directly respond to the parties' underlying needs.

I am aware that the legal profession may have its own economic concerns regarding mediation. This may, to some extent explain the limitation of its usage or its success. While the utilisation of mediation may be limited, other important considerations must be borne in mind when considering whether or not to attempt mediation; at least on the part of the disputing parties. Premium should be placed on the need to contain legal costs for the parties, to be more time-efficient, and to reduce backlog in our courts. This will

invariably ensure that parties appreciate court-annexed mediation. We need to reach a point when mediation will eventually be considered the appropriate form of dispute resolution rather a mere alternative to litigation.

Before I keep going on and on about mediation, I must remember that the theme also speaks to the 50th anniversary commemoration. 50 years on, we must come up with new ways in which the functioning of the judiciary must be seen to evolve to meet modern challenges. Even though our judiciary may not be equipped or mandated to address all the issues the world is facing, my suggestion will be that we nonetheless can and must refine and modernise our vision and understanding of the judicial role, if we are to remain able to administer justice effectively and to help maintain order and legitimacy in our society today.

Over the course of the last 50 years, when the Supreme Court has rendered justice according to the usages, laws and the Republican Constitution, the world has changed immensely. But in many ways, the fundamental setup of our courts has largely remained the same. We are charged with the same constitutional responsibility to do justice, and we take a broadly similar oath of office to resolve all manner of controversies according to the law, without fear or favour, affection or ill-will. The rule of law, which is a fundamental pillar of our system of government, depends on this. Yet, it is an inescapable reality that changes are taking place in the world around us that are dramatic both in rate and in scope. This raises the question of how we should square our unchanging and unyielding judicial responsibility with the relentlessly dynamic world that we find

ourselves in today. How should we envision the role of the judiciary in this changing world?

Distinguished Guests, we are aware that the Legislature enacts the laws and the Executive branch carries it out. But the imperfections of human foresight, the limitations of language, the constraints of our Constitution and the human tendency to try to get what one wants, all come together to give rise to disputes over what the law is and therefore, over whether one is acting lawfully. When this happens, it is us here at the Judiciary that must decide.

This, at its core, is our role: to resolve the many disputes that are part and parcel of societal life. It is in the seemingly small and routine matters involving grievances of our people that issues of moment, both in jurisprudential and consequential terms, emerge. When the Judiciary functions well, it serves as a stabilising force in society, by easing tensions and giving final and authoritative directions to help all of us get through these numerous daily conflicts. When it functions well, the Judiciary serves as part of the glue that holds the various moving parts together.

One author famously noted that the judiciary holds neither the sword nor the purse, only judgment[3]. Consequently, 50 years on, our Judiciary still needs legitimacy to function well and this is secured when it enjoys the confidence of the public. Gaining that confidence is a function of many factors: Does the public generally believe that we are acting honestly, wisely, impartially, independently and with

[3] Alexander Hamilton, The Federalist Papers: No. 78 available at https://avalon.law.yale.edu/18th_century/fed78.asp

integrity? Does it believe that we are competent to discharge our duties? Are we regarded as being out of touch and existing to serve the needs only of the wealthy and powerful? Or does the public believe that we are here to serve justice and that we are resolute in our commitment to bring down whatever obstacles stand in the way?

Before I get carried with about our institution, I must point out that the bench does not function in a vacuum. The Judiciary cannot fully function without the full support of the bar. This year LAZ has taken a noble step by providing *pro bono* services in 50 criminal cases. I must hasten to state that access to justice is the single most compelling reason for our legal profession. The day we take our oath as legal practitioners, we essentially swear to demean ourselves in the practice of the law. All legal practitioners have taken this oath. A core value of the legal profession is to provide legal services without fee to persons of limited means and organisations serving their interests. The Judiciary also plays its part by making provision for indigent litigants to file their court process at no fee.

The concept of providing access to justice without cost is fundamental to the culture of the legal profession and has long been viewed as an ethical responsibility of legal practitioners – both formally and informally – since the beginning of the profession.

The elements of professionalism include not only integrity, honour, independence, civility and leadership. Central to professionalism is the duty of service to the public: not to some of the public; not to only the dominant majority; but, to all the public, including the

disadvantaged, the unpopular and the marginalised. Any contemporary definition of professionalism can import no less. Some have observed that the obligation to undertake *pro bono* work is indeed the *quid pro quo* for the legal profession's self-governing status and the monopoly it has been granted in the provision of legal services.

Meanwhile, in the past 50 years, the practice of law has undergone a transformation so sweeping as to cause many to question whether the ideal of service can survive the tyranny of the billable hour and the relentless focus, by lawyers, on amassing wealth. Some have argued that the profession is losing its soul, that the ideal of the lawyer-statesman has been replaced by a new style of corporate practice that is ruthlessly competitive, powered nearly exclusively by the drive for profits, so demanding as to leave little time or energy for other commitments, and mostly indifferent to social responsibility and public values. However, today LAZ has shown, by taking up *pro bono* cases, that the profession may be judged too harshly, it may after all still have its soul. Or at least I hope it still does.

We live in a time when there is an epidemic of unrepresented litigants appearing in our courts. The natural consequence is that the availability of the government funded legal aid has steadily become scarce. Therefore, the LAZ should not stop at this commemoration to encourage its members to take up a few cases every year from the Legal Aid Board in order to ameliorate the challenges faced in our society today.

On that note, allow me to urge all stakeholders to continue championing for access to justice through mediation today and in the future. I now officially open the special criminal session of the High Court.

I thank you.