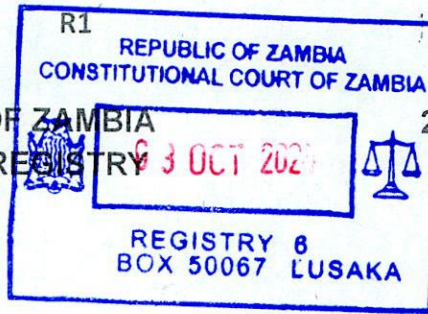


IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL COURT REGISTRY
HOLDEN AT LUSAKA
(CONSTITUTIONAL JURISDICTION)



2023/CCZ/0021

IN THE MATTER OF: ARTICLE 2, 47 AND 206 (3) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016

IN THE MATTER OF: SECTION 7 OF ACT NO. 1 OF 2016

IN THE MATTER OF: SECTION 2 OF ACT NO. 1 OF 2016

IN THE MATTER OF: REPEALED ARTICLE 35 OF THE CONSTITUTION OF ZAMBIA 1991 AS AMENDED

AND

IN THE MATTER OF: THE EFFECT OF THE NOW REPEALED ARTICLE 35 OF THE CONSTITUTION OF ZAMBIA 1991 (AS AMENDED) ON EDGAR LUNGU'S FIRST TERM AS PRESIDENT

BETWEEN:

MICHELO CHIZOMBE

PETITIONER

AND

EDGAR CHAGWA LUNGU

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

ATTORNEY GENERAL

3RD RESPONDENT

Coram: Munalula PC, Shilimi DPC, Kawimbe, JC on 3rd October, 2024.

- For the Petitioner:** Mr. Michael Moono of Messrs LJ Michael Moono and Partners
- For the 1st Respondent:** Mr. N. Zulu and Mr. J. Zimba of Messrs Makebi Zulu & Associates
Mr B.C. Mutale of Ellis and Co
- For the 2nd Respondent:** Mr. M. Bwalya – In house counsel
- For the 3rd Respondent:** Mr. M. Muchende, SC, Solicitor General, Ms C. Mulenga Chief State Advocate, Mr. C. Mulonda Principal State Advocate, Mr. N. Mwiya Principal State Advocate, Mr. M. Mutwena Senior State Advocate

RULING

RULING OF THE COURT

Cases referred to:

1. Milingo Lungu v The Attorney General and The Administrator General
2. South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Bongani Masuku and others
3. FSM v Wainit 11 FSM Intrm. 424 (Chk, 2003)
4. In Re Pinochet, (1999) 237 NR 225 (HL)
5. Bernet v ABSA Bank Ltd, 2019 (3) SA 92 (CC)
6. The President of the Republic of South Africa, The Minister of Sport and Tourism, The Director General of the National Department of Sport and Recreation v South African Rugby Football Union, Gauteng Lions Rugby Union, Mpumalanga Rugby Union and Dr. Louis Luyt (CCT 16/98) at page paragraph 48
7. Re J.R.L: Ex parte C.J.L (1986) 161 CLR 342 at 352

Legislation referred to:

1. The Constitution of Zambia (Amendment) Act No. 2 of 2016
2. Judicial Code of Conduct Act No. 13 of 1999
3. Constitutional Court Rules Act No. 8 of 2016

Other works referred to:

1. Judicial Leadership and the quest for a reformed Zambian Judiciary, a compendium of selected speeches and statements (2003)

1. Introduction

- 1.1 On 30th September 2024, the 1st respondent filed an application into Court for the recusal of Lady Justice Prof. Margaret Munalula (JSD) President of the Court, Mr. Justice Arnold Shilimi, the Deputy President of the Court and Lady Justice Maria Mapani-Kawimbe a member of this Court from hearing the main matter herein, the application was filed pursuant to *Order 9 Rule 20(1) of the Constitutional Court Rules 2016 as read with Sections 6(2)(a) and (7) of the Judicial (Code of Conduct) Act, No. 13 of 1999.*
- 1.2 The application was accompanied by an affidavit deposed to by the 1st Respondent and skeleton arguments of even date as well as a replying affidavit.
- 1.3 In response, the 3rd Respondent and the Petitioner filed affidavits in opposition and skeleton arguments.

2. The allegations

- 2.1 The allegations made against the Judges, as the grounds upon which the application is founded are stated as follows: -

2.1.1 Against Lady Justice Prof. Margaret Munalula:

Whether Honourable Justice Margaret M. Munalula can continue to sit on the panel to determine this matter in light of her disposition concerning this matter and seemingly favourable treatment by the President and Judicial Service Commission despite her being part of complaints from 2016, where other judges have been suspended while she has inexplicably not been suspended, and her past rulings favourable to President Hakainde Hichilema, especially given the President's public opposition to the 1st Respondent's participation in the 2021 and 2026 General Elections, without recusing herself or registering on record any interest or perception thereof.

2.1.2 Against Mr. Justice Arnold Shilimi:

Whether Honourable Justice Mr. Arnold Mweetwa Shilimi can continue to sit on the panel due to his close personal and professional relationship with President Hakainde Hichilema, raising concerns of bias, especially given the President's interest in the case, without recusing himself or registering on record any personal or indirect interest.

2.1.3 Against Lady Justice Maria Mapani-Kawimbe:

Whether Honourable Justice Maria Mapani Kawimbe can continue to sit on this panel due to her familial relationship with President Hakainde Hichilema, raising concerns of bias, without recusing herself or registering on record any interest or perception of potential bias.

3 Hearing

- 3.1 When the matter came up for hearing on 3rd October, 2024, the parties presented their respective positions which we have taken into consideration in our determination of this application. We are grateful.

4. The law guiding the application

The starting point is the Constitution of Zambia, which enacts in Article 119 that:

(1) Judicial authority vests in the courts and shall be exercised by the courts in accordance with this Constitution and other laws

- 4.1 In our view, these constitutional provisions inherently speak to the right of any litigant to a fair trial. In this regard, therefore, the 1st respondent is entitled to a fair trial by a competent, impartial and independent (unbiased) bench. How this is to be achieved is through Article 118(2)(a), of the Constitution, which elucidates that justice should be

done to all without discrimination, intrinsically providing that we as judges have both a duty and responsibility to uphold the Constitution in administering justice to all.

4.2 Sitting in this case as we do, and in view of the allegations that have been made against us that we should be disqualified because of our perceived bias, the law requires that if such allegations are proved, we must recuse ourselves from a case.

4.3 In as far as the law requires, we being the named judges in the recusal application have an obligation to deal with it personally. Therefore, the decision we shall take in this matter is purely our own and we have not consulted the other members of the Court because we see no role for them in these highly personalized allegations.

5. What is the test for bias?

5.1 Our own Judicial Code of Conduct states on a judge's integrity that: -

4. (1) A judicial officer shall perform the duties of that office without bias or prejudice and shall not, in the performance of adjudicative duties, by word or conduct, manifest bias discrimination or prejudice, including but not limited to bias or prejudice based upon race, tribe, sex, place of origin, marital status, political opinion, color or creed and shall not permit any member of staff or any other person subject to the officer's direction and control or so discriminate or manifest bias or prejudice...

5.2 Section 5 of the Act provides that:

5. (1) subject to section six a judicial officer shall hear and determine any matter assigned to the officer except a matter which the officer is, by law not competent to hear or determine
- (2) A judicial officer shall not, in the performance of adjudicative duties, be influenced by –
 - (a) partisan interests, public clamour or fear of criticism;
 - (b) family, personal, social, political or other interests; or
 - (c) any other circumstances otherwise than that provided by law.
- (3) A judicial officer shall not use the office or the officer's position to advance any private interest of that officer, the officer's spouse, child, relation or other person or make any person believe that the officer's spouse, child, relation or other person is in a position to influence the officer in any manner.

5.3 The Act in section 6 goes on to state that:

6. (1) Notwithstanding section seven a judicial officer shall not adjudicate on or take part in any consideration or discussion or any matter in which the officer or the officer's spouse has any personal, legal or pecuniary interest whether directly or indirectly.
- (2) A judicial officer shall not adjudicate or take part in any consideration or discussion of any proceedings in which the officer's impartiality might reasonably be question on the grounds that –
 - (a) the officer has a personal bias or prejudice concerning a party or a party's legal practitioner or personal knowledge of the facts concerning the proceedings;
 - (b) the officer served as a legal practitioner in the matter;

- (c) a legal practitioner with whom the officer previously practiced law or served is handling the matter;
- (d) the officer has been a material witness concerning the matter or a party to the proceedings;
- (e) the officer individually or as a trustee, or the officer's spouse, parent or child or any other member of the officer's family has a pecuniary interest in the subject matter or has any other interest that could substantially affect the proceedings or;
- (f) A person related to the officer or the spouse of the officer –
 - (i) is a party to the proceedings or an officer, director or a trustee of a party;
 - (ii) is acting as a legal practitioner in the proceedings;
 - (iii) has any interest that could interfere with a fair trial or hearing; or
 - (iv) is to the officer's knowledge likely to be a material witness in the proceeding.

5.4 What is discerned from the cited law is that an impartial and independent judiciary is at the heart of a just and fair legal system. If at all those who are charged to dispense justice such as judges appear to be devoid of those values and principles by showing lack of independence or partiality, through actual or apparent bias, then the judges or judges concerned must recuse themselves from the concerned proceedings.

- 5.5 The responsibility of discharging the burden of proof in an application for recusal lies with the accuser (who is the 1st respondent in this case) to establish objectively that the judges he seeks to disqualify, harbour bias against him. The requirement therefore, is that, his allegations must be founded and proved from the facts that have been presented in the application for recusal.
- 5.6 There is however a presumption of impartiality under our law which is important for the legitimacy of a judge's performance of his or her adjudicative functions. It is anchored on the understanding that the oath of office taken by judges coupled with their training and experience, equips them to make determinations based only on merit in all disputes before them.
- 5.7 As stated in our previous decision in the case of **Milingo Lungu v The Attorney General and The Administrator General**¹, Superior Courts in other jurisdictions have in a plethora of decisions applied their minds to this fundamental principle of law and our understanding of the law on this matter is indeed fortified by the jurisprudence emanating from these jurisdictions. In the South African case of **South African Human Rights Commission on behalf of South African Jewish Board of**

Deputies v Bongani Masuku and others², the Court stated as follows:

Courts have repeatedly recognised the presumption that officers of the judiciary will discharge their oath of office through the impartial adjudication of all disputes. In SARFU, this Court recognised this stating that –

‘In applying the test for recusal, Courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare judges for the often-difficult task of fairly determining where the truth may lie in a welter of contradictory evidence.

5.8 The Court went on to state that:

All this to say that the law does not suppose the possibility of bias. If it did, imagine the bedlam that would ensue. There is an assumption that judges are individuals of careful conscience and intellectual discipline, capable of applying their minds to the multiplicity of cases which will seize them during their term of office, without imparting their own views or attempting to achieve ends justified in feebleness by their own personal opinions.

The presumption of impartiality has the effect ‘that a judicial officer will not lightly be presumed to be biased’ This was confirmed in the SACCAWU, where this court emphasised that, not only is there a presumption in favour of the impartiality of the court, but that this is a presumption that is not easily dislodged. (emphasis added)

5.9 We adopt the reasoning of the South African Constitutional Court in this matter as our own. The standard for recusal is not only an objective one, but is very high due to the need to preserve the presumption of impartiality which is necessary for the effective functioning of courts of law and to prevent forum shopping. It is not enough to merely allege that there is a danger of bias without producing cogent evidence, neither is it enough for the person alleging to merely have suspicions or apprehensions.

5.10 With regard to specific allegations against the three individual judges, each judge now responds as follows;

Munalula, PC

1.1 What I am able to decipher from the issue raised by the 1st Respondent and quoted verbatim in paragraph 2.1.1 of this Ruling, is that my impartiality and integrity are questioned on two grounds. First, that the Petitioner in this matter has relied heavily on my opinion to make his case. Secondly, that I have been deliberately spared from a disciplinary process which similarly circumstanced judges on the Court are being subjected to because of a disposition and rulings that are favourable to the incumbent President Mr H Hichilema. That, I ought to have

declared interest in the matter and recused myself. I have considered the allegation.

- 1.2 It is important for reasons that will become apparent as the Ruling unfolds that I begin by locating the 1st Respondent's claims in their proper context.

The first point to note is that the main matter which was long scheduled to be heard on the 26th of September, 2024, was not heard as the hearing was pre-empted by the Motion in issue. The 1st Respondent who had willingly prosecuted his own earlier Motion to dismiss the main matter before a full Bench that included myself the Deputy President of this Court and Justice Kawimbe, all of a sudden, at the 11th hour decided to raise the issue of bias on our part. Questions arise. Why now. Why me? And, did he not sleep on his rights? These questions will where possible resolve themselves as the Ruling unfolds.

- 1.3 The second point is that, the 1st Respondent's application for recusal 'ambushed' the Court and other litigants in more ways than one. Despite being aware that such an application is made before the Court in Chambers, the 1st Respondent first filed a complaint with the Judicial Complaints Commission (JCC) and shared it with the Media. My concern goes further. The 1st Respondent proceeded to have the

complaint served on me as I was heading to the courtroom to hear the properly cause listed main matter. More questions pop up. Is the application intended to intimidate me into stepping away from the case? If so, is this the conduct expected of either himself or his legal counsel since they are all officers of the Court? Is the application for recusal in good faith?

- 1.4 I find it necessary to raise these questions because this is not the first time a complaint of bias has been lodged against me by a party represented by the very same lawyers representing the 1st Respondent. It is not the first time that the said lawyers have served me with a copy of the complaint just as I was about to hear their matter.
- 1.5 After being subjected to a recusal process only by the same lawyers and their surrogates on three occasions I believe I am on firm ground to see this as their settled '*modus operandi*' for dislodging 'unwanted' judges in matters that they want to go a particular way. A method of controlling the judicial process which is contrary to the provisions of Article 122 of the Constitution.
- 1.6 Whatever the case, the behaviour of the said lawyers is scandalising the Court. It is an embarrassment to the legal profession and must be frowned upon by all right-thinking members of society. I would thus

urge the Attorney General as leader of the Zambian Bar and protector of the public interest, to look into the issue and if confirmed to take steps to address it as a matter of urgency.

1.7 That said, I now turn to the actual notice of motion. Once again, I am constrained to begin with the anomalies that it revealed. To begin with, the 1st Respondent's application for leave to file a formal application for recusal meant that the properly scheduled main matter was stopped from proceeding causing great inconvenience to the Court, the parties and the general public. In a bid to minimise the delay and assuming that the 1st Respondent, who had already laid a complaint with the JCC, had his evidence in hand the Court gave him leave to file his application in the shortest possible time. He did not do so claiming the time allowed was too short as he needed to carry out research to compile the evidence.

1.8 The question must be asked. How does a litigant acting in good faith file a complaint against a judge before whom he is scheduled to appear and proceed to announce his complaint to all and sundry without any evidence of the alleged bias. That he has continued to peddle his unsubstantiated narrative in the public belies his lawyers claims in Court that they come in good faith. This is because it is

calculated to disrespect the Court, the sub-judice rule and the common decency of our shared community as Zambians.

1.9 The problems with the notice of motion do not end there. When it was eventually filed, it was evident that the affidavit of fact was bereft of fact and had relied on assumptions to draw conclusions which were then offered as facts. For convenience, I wish to reproduce all the paragraphs in the affidavit that relate to myself. They read:

11. That firstly, the Petitioner herein has extensively relied on the dissenting opinion of Justice Margaret Munalula (hereinafter referred to as "Justice Munalula"), the President of this Honourable Court and presiding judge to move this Court to abandon its earlier decisions that were granted in my favour.
12. That the position by Justice Margaret M Munalula is well known and there is a likelihood of bias on her part on the issue of eligibility to stand in the 2026 elections and I am concerned about the perceived and potential bias or impartiality of Justice Munalula (the Judge President of this Honourable Court), who, in the year 2016, had complaints raised against her and several other judges of this Honourable Court, some of whom have been suspended by the Republican President and are currently facing proceedings before the Judicial Complaints Commission (hereinafter referred to as "the Commission")
13. That interestingly, Justice Munalula, notwithstanding that she was part of the panel and persons complained against after the ruling of the 5th September, 2016, has neither been suspended nor called before the Commission, raising questions as to why she has seemingly been excluded and /or favoured in the renewed complaint and recommendation of the Commission and subsequent suspension of her colleagues by Mr Hakainde Hichilema and given these circumstances, there is reasonable apprehension of bias and partiality if Justice Munalula continues to preside over this matter, and her recusal is necessary to preserve the integrity of proceedings.

- 1.10 Given the lack of particulars, it is difficult to respond effectively to the allegations which as I have already said are nothing more than suspicion. To put it graphically, smokescreen and mirrors. I will do what I can.
- 1.11 The first allegation is that the Petitioner has extensively cited my dissenting ruling in **Legal Resources Foundation and others v Lungu and Others** case hence the perception of bias.
- 1.12 I am constrained to begin by pointing out that I have no control over the Petitioner's citing of my decision and do not see how a litigant's reliance on a particular judge's decision translates into bias on the part of that Judge. If that were so judges would be forced to decry their previous decisions at every turn and the foundations of the common law system would collapse. I thus find helpful the submission made by the 3rd Respondent on this point and find comfort in the case of **FSM v Wainit**³ wherein the court made two statements: First that where the same judge hears different cases involving the same party or parties or related issues does not automatically result in an appearance of partiality; secondly that a judge's statements and rulings made in the course of judicial

proceedings do not provide grounds for disqualification. I am of the firm view that the 1st Respondent's contention is untenable.

1.13 More so as by the same token, the allegation ought to equally apply to the judges who rendered the majority decision and have not been cited by the 1st Respondent in his application for recusals. I say so because the gravamen of his defence is that the majority decision determined his eligibility to stand in the 2021 presidential election. He is wholly relying on the Majority decision. Many questions must follow. If I am perceived to be interested in my dissenting opinion, aren't these other judges equally interested in their majority decision? Why is the interest only perceived in relation to the dissent? Is it because it did not support the 1st Respondent's eligibility? Does that then not suggest that the desire to remove me from the panel is motivated by the 1st Respondent's desire to ensure that the majority that ruled in his favour can do so again without my irritating dissent? Is this not the true intent behind the application for recusal? Once again, I am left to question whether the application is made in good faith.

1.14 I now turn to the more substantive allegation. It is apparent from the framing of the application that the 1st Respondent's major claim is anchored on another allegation to the effect that I have been spared

from disciplinary proceedings taken against other similarly circumstanced judges hence creating fertile ground for a perception of partiality on my part.

1.15 My short answer to this assumption is as follows: Given that neither the 1st Respondent nor I are privy to the allegations against the said judges how can it be said that I ought to have been charged with them otherwise I must be seen to have been favoured. This conclusion is not properly founded as the 1st Respondent has not brought forth the charges in issue nor linked them to me. His claim is derived from an assumption. It is mere lies and innuendo and carries no evidential value. I am mindful that the 1st Respondent in his filed Reply proffered the decision of the JCC in 2016 matter. This does not help his case as it shows that I was acquitted of those charges. The evidence needed now is the proof that I ought to be part of the charges currently before the JCC. That evidence is not there.

1.16 My long answer is more profound and must begin with a more fundamental assumption which underpins the system of adjudication. That is the assumption of judicial impartiality which goes hand in hand with a judge's duty to adjudicate. In explaining judicial impartiality, the 1st Respondent has gone to great lengths to cite foreign authorities

such as the **Pinochet**⁴ case. The applicable law on recusal in this Court is found in the Judicial Code of Conduct Act as well as the **Milingo Lungu**¹ case. Hence the efforts by the 1st Respondent to ignore the case are not unhelpful to his case.

1.17 Every judge on the Court including myself enjoys the assumption of judicial impartiality. As we stated in the case of **Milingo Lungu**¹, it is an assumption which is not easily rebutted. This is in order to protect the integrity of judicial proceedings, and indeed the system as a whole, by closing the door to forum shopping especially in a Court such as this one. This is then balanced by the provisions on judge's accountability to the Constitution, the law and the framers of the Constitution, the People of Zambia.

1.18 I say so because this Court deals with high stakes matters that can affect the whole country. It is often forgotten however, that the Court deals only with constitutional questions, matters of public law. Hence in any matter that is properly before this Court the fundamental issue is the meaning of contested Constitutional provisions.

1.19 Article 128 is patently clear that the decisions of this Court are intended to vindicate the Constitution. Any petition before this Court must be seen in that light in order to put into perspective the extent to

which the individual litigants before the Court may demand procedural fair trial or due process at the expense of ensuring a determination of Constitutional questions on the merits.

- 1.20 The fact that the meaning or interpretation of the Constitution may impact a particular litigant, whether directly or indirectly, is to put it simply a by-product of the vindication process. More so as this Court does not have the power to determine human rights claims focusing on individual rights.
- 1.21 A judge on this Court cannot therefore lightly abandon his or her duty to interpret and protect the Constitution simply because an individual claims, perhaps in bad faith, that he or she is apprehensive that the meaning that the Court will accord to the Constitutional provision in contention will not favour his or her position. The judge's primary duty is to interpret the Constitutional provision correctly. All things being equal, a perception of bias against a litigant should only arise where a Constitutional provision is misconstrued especially if the incorrect interpretation favours or disfavors a particular interest.
- 1.22 The test for a reasonable apprehension of bias or partiality is objective. Thus, in the case in *casu* it must appear to a reasonable or right-thinking member of society that I am inclined to misinterpret the

Constitutional provisions in issue order to favour either the interests of the 1st Respondent or of those that are opposed to him. He has not proved such potential or perceived bias.

- 1.23 The final point I wish to make is that the 1st Respondent accuses me of making rulings in favour of Mr Hichilema but has offered no evidence to substantiate his claim. I enjoin him and all those who are interested in this matter to read all the decisions relating to both himself and Mr Hichilema which I have made either as a single judge or as part of a panel and it will be evident to them that there is no shred of truth in the accusation.
- 1.24 This is because I take seriously my oath of office and, the provisions of Article 122, wherein I am duty bound to adjudicate in accordance with the Constitution and the law and not under the direction or control of any person. My performing my duties diligently cannot on the face of it be said to constitute an unfair process or outcome. It also in some way points to why those who seek to manipulate and control the Court would not want me to hear their matters.
- 1.25 Having applied the objective test under our law, I am of the firm view that any reasonable person can see this application for what it is, a brazen attempt to reconstitute the Court in an illegal and illegitimate

manner. The application is in bad faith and I am not swayed by it. There was and is no need for me to declare an interest when such interest does not and has never existed. I hereby decline to recuse myself.

Shilimi, DPC

- 2.1 It has been alleged by the 1st Respondent that I have a close and personal relationship with President Hakainde Hichilema, (Republican President) specifically on account that I previously served as a Director in African Life Financial Services Limited in which the Republican President is alleged to have or had an interest through Menel Management Services Limited (Menel)
- 2.2 The 1st Respondent submits that these alleged ties with the Republican President raise what he terms serious concerns that may impact my ability to impartially adjudicate this matter, he has however, not defined the nature of my alleged relationship except that I once served as a director in a company in which the Republican President had an interest. I will therefore limit my response to this specific allegation.
- 2.3 It is in public domain that I was appointed as Non-Executive Director in African Life Financial Services Limited (Aflife) in 2017 and served

in that capacity until my appointment to the Judiciary in 2023 when I resigned. My appointment as a director in Aflife was purely for professional reasons both as a practicing lawyer at that time and my wide experience in corporate and financial law both in Zambia and Internationally where I worked for a Development Finance Institution (DFI) for 16 years. My appointment was also as per regulatory requirements approved by the Pensions and Insurance Authority (PIA) to ensure that I possessed the requisite qualifications and experience for such an appointment.

- 2.4 The Republican President was as far as I know not a shareholder of Aflife and neither was he a director, but a shareholder at that time in a third-party company called Menel Management Services Limited (Menel), which in turn held equity in Aflife together with other shareholders. He was not involved in my appointment and neither did I have any dealings with him whatsoever during my time as a Director in Aflife. My fiduciary duty was to Aflife.
- 2.5 Further and to my knowledge, the Republican President later divested from his shareholding in Menel. I continued serving as a director in Aflife while also practicing law as a partner in a law firm until 2023 when I resigned to take up my appointment with the

Zambian judiciary as my tenure as Director in Aflife was not connected with his indirect interest in the Company.

- 2.6 The 1st Respondent's accusation of bias against me is not backed by any evidence. It is based purely on the fact that I served on a board of a company in which the Republican President, had an indirect interest. It is such a remote connection which in my view would never be considered by any reasonable person to amount to a conflict of interest or bias.
- 2.7 I therefore, find the 1st Respondent's allegation that my service as a Non- Executive Director in Aflife, to which I was appointed for purely professional reasons, may impact my ability to impartially adjudicate this matter, extremely unfortunate.
- 2.8 The law recognizes the presumption of impartiality on the part of the judges. As stated in the South African case of **South Africa Human Rights Commission on behalf of South Arica Jewish Board of Deputies v Bongani Masuku and Others**², the presumption of impartiality has the effect that a judicial officer will not lightly be presumed to be biased and that a presumption in favour of impartiality is a presumption that is not easily dislodged.

2.9 The standard required to dislodge this presumption is quite high. As this court stated in the case of **Milingo Lungu v The Attorney General**¹, it is not enough to merely allege that there is a danger of bias without producing cogent evidence, neither is it enough for the person alleging to merely have suspicions or apprehensions.

2.10 Further, and as observed in the case of **Bernert v ABSA Bank Ltd**⁵, judges do not choose their cases and litigants do not choose their judges. Furthermore, and as observed in **The President of the Republic of South Africa and Others v South African Rugby Football Union and Others**⁶;

While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour.

2.11 The in **Re, Pinochet**⁴ case cited by the 1st Respondent, can be distinguished from this case in the sense that the person I am alleged to have a close personal relationship is not a party to these proceedings. I also do not have a financial or proprietary interest in its outcome or indeed any other interest in the subject matter. My

role and interest in this matter is in accordance with my constitutional mandate.

- 2.12 If I was to disqualify myself based on this previous indirect and remote connection between myself and the Republican President, it would set such a dangerous precedent that I may in future not be able to discharge my Constitutional mandate. I would be faced with demands for recusal for various personal and professional connections I may have had in my long career no matter how remote they may be.
- 2.13 In any event, I was part of a panel that sat on 14th June, 2024 to hear a notice of Motion filed by the 1st Respondent in this matter and he had no problem with me hearing the matter. The question one may therefore, ask is what has happened between then and now? Could it be a question of forum shopping? As stated in the case of *Bernard v Absa Bank Limited* judges do not choose their cases and litigants do not choose their judges.
- 2.14 Finally, the *Zambian Constitution* requires me to perform my adjudicative function without fear or favour. It is my considered view, taking into account the authorities cited above, that the 1st Respondent has failed to dislodge the presumption of impartiality. The standard for recusal is not only an objective one but is very high

more so in a Constitutional Court. The allegations of bias levelled against me and the evidence produced of PACRA print outs of different companies most of which are unrelated to this matter fall short of the required standard.

2.15 I accordingly decline to recuse myself in this matter.

Mapani-Kawimbe, J.C.

3.1 From the allegation that has been laid against me, the 1st respondent seems to paint a picture that my presence in this case raises a valid ground of bias or a perception thereof. This is seen in my failure to declare that I share a familial relationship with the Republican President, Mr. Hakainde Hichilema.

3.2 The evidence of his allegation is given in paragraph 17 of his Affidavit in Support of Notice of Motion for an Order of Recusal as follows:

That thirdly, I am concerned about the involvement of Honourable Justice Maria Mapani Kawimbe (hereinafter referred to as "Justice Kawimbe") in this matter. Justice Kawimbe has a family connection to Mr. Hakainde Hichilema whose interest is to stop me from participating in the 2026 election. The family tie, whether by consanguinity or affinity is sufficient reason for the judge to recuse herself from hearing and determining this matter especially that

President Hakainde Hichilema has made it clear that he opposes my candidature in the 2026 elections.

3.3 The law on recusal was stated earlier in this ruling and after applying the law to the facts herein, I wish to start from the premise of what should be contained in an affidavit. The Constitutional Court Rules which regulate this Court's operations instructively provide in Order VI Rule 13 that:

An affidavit shall contain only a statement of facts and circumstances to which the witness deposes, based on the witnesses' own personal knowledge or from information which the witness believes to be true.

3.4 The operative words therein are that the evidence given by a witness in an affidavit should either come from

- (i) facts within that person (or deponent's) knowledge or
- (ii) information which the witness believes to be true.

In my view, this requirement of the law sets a very high standard and duty on any witness to only give evidence which is accurate and truthful.

3.5 Now, what is on trial in the application of recusal as regards my circumstances in essence concerns my integrity to discharge my

judicial responsibility as an independent and impartial judge. This is what the 1st respondent seeks to impugn through his affidavit evidence.

3.6 From where I sit, the 1st respondent has failed to disclose any fact real or imaginary in support of my purported familial relationship with the Republican President. The allegation against me is spurious and scandalous because for a relationship to exist, it must be born from actual proof and not suspicion or perception as argued by the 1st respondent. Accordingly, the purported facts against me, which have not been substantiated by any evidence carry no weight whatsoever to establish and/or to demonstrate that I share a familial relationship with the Republican President. The truth of the matter is that, no relationship exists between me and the Republican President, and therefore no reasonable person would be swayed by the 1st respondent's fictitious assertions offered in his affidavit in support of notice of motion and reiterated in his replying affidavit that I either have a traceable relationship through consanguinity or affinity with the President.

3.7 I therefore, find that this allegation against me or rather innuendo, which is a total falsehood and has been forcefully propelled in the public domain is and was meant to serve two things. Firstly, to

maliciously injure my reputation and career, which I have built over the past 20 years nationally and internationally, through merit-based recognition and nothing else. Secondly, to incite public disdain against me that I have no integrity to handle cases in this Court. I therefore, take great exception to the 1st respondent's evidence at paragraph 24 of his affidavit: *That this application is not a personal affront to this Honourable Court but it is made in the interest of justice and that it is in the interest of justice and fairness that it should be allowed to protect and entrench fairness, impartiality and judicial independence when hearing this matter, as the hub of this Court's mandate* when in fact, the whole purpose of the application, which has been made on the basis of untrue injurious and malicious falsehoods meant to convey to the public that I do not have integrity, in that, I acted dishonestly by failing to disclose to the world that I share a familial relationship with the Republican President, when none exists at all.

3.8 I am also at loss where the 1st respondent grounds his fear that I have ulterior motives to maintain President Hakainde Hichilema in office when the latter already found me serving as a Judge. In fact, the 1st respondent is the person who ushered me into the Judiciary by swearing me into office as Puisne Judge on 14th June, 2016. What

motive would I have therefore, to ensure that the current Republican President who is not even a party to this case stays in office? I ask.

3.9 Unlike other ordinary persons in this country, I do not enjoy the privilege of speaking outside my rulings and judgments, and these malicious falsehoods against me are so aggressive. Therefore, I have taken a very firm view in this ruling to speak and convey that disinformation such as what I have been subjected to, is an insidious enemy and spreads like a virus in infecting minds and manipulating perceptions. Therefore, those that wish to speak against others should do so when there is real cause and substance in allegations. This is what the 1st respondent has failed to do.

3.10 After all is considered, it is my view that, the allegation against me is hardly a factor of forming a basis for my recusal in this case and would agree with Mason J in the case of *Re J.R.L: Ex parte C.J.L* that:

Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

3.11 As far as I am concerned, it is in the interest of justice is to preserve the integrity, impartiality and independence of the Judiciary and judges

from any litigant or any other person that would want to exert intimidatory tactics or pressure on them. His Lordship the Chief Justice Mumba Malila in his book entitled Judicial Leadership and the Quest for a Reformed Zambian Judiciary, A Compendium of Selected Speeches and Statements eloquently states at page 172 that:

We judges should be left to decide cases before us in adherence with the law, regardless of who is involved. We should determine cases based on evidence and the law and therefore must not be unduly influenced by external pressures and factors such as political statements or, indeed our own prejudices.

3.12 In summation, there is no merit in the allegation that was laid against me and I decline to be disqualified from these proceedings. I wish to make clear that I harbour no personal bias against the 1st respondent. I shall proceed to hear this matter on the basis of the law and on the merits dictated by the values of judicial independence, impartiality and integrity.

5.11 We wish to note that the conduct of the 1st Respondent's counsel and their client of accusing the three judges of bias borders on contempt of court. This Court will not condone such baseless accusations by counsel through their client against the Bench.

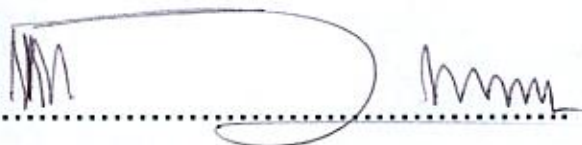
6. Orders

6.1 Finally, our orders are as follows:

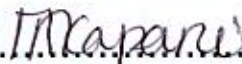
1. The application for the recusal of Honourable Justice Professor M. Munalula, Honourable Justice Arnold M. Shilimi and Honourable Justice M. M. Kawimbe from cause no. 2022/CCZ/006 is hereby dismissed for want of merit.
2. The costs are awarded against the 1st Respondent in favour of the Petitioner and the 3rd Respondent.



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M. MUNALULA, JSD
PRESIDENT – CONSTITUTIONAL COURT



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A. M. SHILIMI
DEPUTY PRESIDENT – CONSTITUTIONAL COURT



.....
M. M. KAWIMBE
CONSTITUTIONAL COURT JUDGE