IN THE SUPREME COURT OF ZAMBIA **Appeal No. 4 of 2020**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

THE ATTORNEY GENERAL **APPELLANT**

AND

RAJAN MAHTHANI **RESPONDENT**

CORAM: Musonda DCJ, Kabuka and Mutuna, JJS

On 10th of June 2025 and 24th July 2025

FOR THE APPELLANT: **Ms. C. Mulenga and Mr. N. Mukelebai, Attorney General's Chambers**

FOR THE RESPONDENT: **Mr. J. Sangwa SC, Messrs Semeza Sangwa and Associates**

Mr. S. B. Chilembo, Dr. A. Ngenda and Mr. N. Chibeleka of Messrs Russo Chambers

Mr. N. Nkunika and Ms D. Katolo, Messrs Z S Legal Practitioners

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RULING

Mutuna, JS, delivered the Ruling of the Court.

Cases referred to:

1. **Finsbury Investments Limited v Antonio Ventriglia and Manuela**

Ventriglia 2018/CAZ/126
2. Mwenya v The People (1973) Z.R. 261
3. Michael Mabenga v The Post Newspapers Ltd Appeal No. 69 of 2012
4. Atlantic Bakery Limited v ZESCO Limited SCZ 61 of 2018
5. Milingo Lungu v Attorney General and Administrator General (2022/CCZ/006);
6. C. J. Peter Mwangi Gachuri v the Attorney General, Salaries and Remuneration Commission, Kenya Judges Welfare Association and The Judicial Service Commission Constitutional Petition E040 of 2022, (2024) KEAL 14791 (kln)
7. Republic of South Africa and Others v South African Rugby Football Union & Others (1999) ZACC 9
8. South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Bongani Masuku and Others CCT 14/19
9. Savenda Management Services Limited v Stanbic Bank Zambia Limited SCZ judgment number 10 of 2018

Statute referred to:

1. Supreme Court Rules 19 and 58 (a)
2. The Constitution of Zambia, Article 18
3. Judicial (Code of Conduct) Act No. 13 of 1999, sections 4 and 6

Works referred to:

1. Concise Oxford English Dictionary 11th edition
2. Black's Law Dictionary by Bryan A. Garner, 7th edition
3. Stone's Justices' Manual, 1973 edition volume 269

Introduction

1. In the recent past, Judges in Zambia have been inundated with applications requesting them to recuse themselves from being involved in the adjudication of some cases. These applications are premised or founded on allegations of bias, perceived bias, incompetence, among others.

2. The applications take the form of verbal motions launched at the Bar by counsel, and written motions filed before Court.

3. The pattern which has evolved over the years is that these motions or applications are preceded by and linked to unfavourable rulings handed down by the court against the litigants moving such motions or making the applications in question. The motions are also normally launched by litigants who have, in the course of the proceedings, procrastinated and appear to have no desire to see an end to the proceedings.

4. The motion before us is for recusal. It is moved by the Respondent, one Rajan Mahtiani, pursuant to sections 4 and 6 of the **Judicial Code of Conduct Act**. It seeks the following reliefs:

4.1 that, the Honourable Justices currently empanelled to hear the appeal herein, namely, the Hon. Deputy Chief Justice M. Musonda SC, Lady Justice J. K. Kabuka and Justice N. K. Mutuna, recuse and disqualify themselves from further participation in this appeal;

4.2 that arising from 4.1, a differently constituted panel of Judges be empanelled to hear and determine the appeal;

4.3 that the ruling of this Honourable Court of 8th April 2025, on the Respondent's Notice of Preliminary

Objection to the appeal filed on 24th August 2020, be set aside and the application heard *denovo*;

4.4 that such further or other order as this Honourable Court may deem fit be granted; and,

4.5 that the costs of and occasioned by this application be costs in the appeal;

5. The application is supported by an affidavit sworn by the Respondent and skeleton arguments settled by counsel for the Respondent. It is anchored on the following grounds:

5.1 that the Justices identified in 4.1. above abandoned their duty of judicial impartiality by improperly descending into the arena of the appeal, raising and determining issues not pleaded or argued by the parties, and, thereby effectively upholding the appeal on grounds not advanced by the Appellant;

5.2 that the conduct of the Justices in question demonstrates manifest bias in favour of the Appellant;

5.3 that the actions of the named Justices constitute a grave breach of the duty of impartiality imposed by Article 18 of the **Constitution of the Republic of Zambia**, the **Judicial (Code of Conduct) Act No. 13 of 1999**, and the common law; and,

5.4 that justice requires that the appeal be heard *denovo* by a differently constituted panel that is free from bias or any reasonable apprehension of bias.

6. The Appellant has filed arguments opposing the motion.

Background

7. The facts leading up to this motion, as they are relevant to its determination, are that the appeal in this matter was scheduled for hearing on 1st September 2020. It arose out of a challenge mounted by the Respondent in the High Court against the decision of the Director of Public Prosecution (DPP) to prosecute him in a criminal matter which had earlier been discontinued, following consultations between the DPP and the Attorney General. Prior to the hearing, on 24th August 2020, the Respondent filed a Notice of Objection to the appeal pursuant to Rule 19 of the **Supreme Court Rules**, CAP 25 which was supported by skeleton arguments. Along with this notice, the Respondent also filed his arguments opposing the appeal in which he addressed all four grounds of the appeal.

8. The grounds upon which the objection was raised were as

follows:

8.1 The grounds of appeal have no bearing on the decision of the High Court; and,

8.2 The subject matter of the planned prosecution of the Respondent has already been adjudicated upon by the Court of Appeal in its judgment delivered on 31st January 2019, in appeal number **2018/CAZ/126** between, **Finsbury Investments Limited v Antonio Ventriglia and Manuela Ventriglia**[1].

9. At the hearing scheduled for 1st September 2020 we gave directions for the filing of the affidavit and arguments in opposition and those in reply. This followed a request for an adjournment by the Appellant to enable it file documents opposing the motion. We then adjourned the matter for a ruling which we delivered on 8th April 2025, upon considering the documents that had been placed before us.

10. After the delivery of the ruling, the matter was set down for hearing of the remainder of the appeal, given the fact that the determination of the preliminary objection had substantially dealt with the appeal. Prior to the hearing that had been set for 6th May 2025, the Respondent, on 25th April 2025, filed another notice of preliminary objection to the

appeal pursuant to **Rule 19** of the **Supreme Court Rules, CAP 25**. The grounds of the objection were that all the four grounds of appeal advanced by the Appellant in the appeal offended **Rule 58(2)** of the **Supreme Court Rules** because they alleged both error of law and fact and, although they alleged that the Court below erred, they did not disclose the point of law and fact alleged to have been wrongly decided. The Respondent filed this objection notwithstanding that he had opposed and addressed all the grounds of appeal in his arguments opposing the appeal referred to in paragraph 7 of this ruling.

11. At the hearing of the appeal, we directed the parties to focus their arguments on the outstanding issue in the appeal which was, whether, a *nolle prosequi* entered pursuant to section 81(1) of the **Criminal Procedure Code Act, CAP 88** in circumstances suggesting that the Director of Public Prosecution may have invoked Article 56(7) of the **Constitution** and acted on the directive of the Attorney General can have the same effect as *autrofois acquit?* We also indicated that the objection by the Respondent would be addressed later. Counsel for both parties agreed to this approach and requested for time in which to file arguments

specifically directed at the issue that had been identified by the Court. We accordingly adjourned the matter to 3rd June 2025.

12. Prior to the hearing stated in the preceding paragraph, the Respondent filed this motion. He did not file any arguments addressing the outstanding issue in the appeal in accordance with the directive of the Court. The Appellant on the other hand, not only opposed this motion, but also filed arguments addressing the outstanding issue as directed by the Court.

Roadmap to determination of the motion

13. The allegations made by the Respondent against us are very serious. As such, they have attracted a lot of attention both within and outside the Judiciary. The record of proceedings is, after all, a public document open to scrutiny by members of the public. We are, therefore, compelled to explain in detail how we will determine the motion.

14. We will proceed as follows:

14.1 Restating the motion;

14.2 Stating the burden and standard of proof – threshold issue;

14.3 Summary of the Respondent's evidence and the

arguments by the two parties;

14.4 Determination of whether the Respondent has proved his case;

14.5 Summary of our holding;

14.6 Consequences of the allegations; and,

14.7 Conclusion.

The motion

15. The nature of the motion has been set out in paragraphs 4 and 5 of this ruling. It is, however, still necessary for us to give a detailed explanation of the reliefs claimed and grounds upon which they are sought.

16. The reliefs claimed are, firstly, that we disqualify ourselves from further participation in this appeal. What this means in layman terms is that we must, if the allegations made against us are true, step down from adjudicating further on this appeal. Our stepping down will be premised on the fact that we are disqualified from hearing the appeal because sufficient facts have been placed before us which point to the fact that we are biased and there are reasonable grounds to doubt our independence and impartiality.

17. The second relief claimed is the empaneling of a differently

constituted panel of Judges to hear and determine the appeal. This would inevitably flow from the first relief and would entail the reconstitution of the members of the panel to preside over the appeal. The Respondent's motivation here is that the impartiality of the reconstituted panel, drawn from the members of our court, would not be compromised.

18. The third relief being sought is for setting aside of our ruling of 8th April 2025 and the rehearing of the preliminary objection from which the ruling arose. This entails the revocation of our ruling, handed down for and on behalf of the Court, and the rehearing of the preliminary objection from which the ruling emanated. The ultimate objective is to declare as a nullity the final decision of this Court.

19. The third and fourth reliefs seek to have us render any other order we may deem fit and that costs should be in the cause. These two reliefs are self-explanatory and we need not explain them further.

20. The grounds or, from our perspective, the allegations upon which the reliefs are sought are as follows:

20.1 that we abandoned our duty of judicial impartiality by improperly descending into the arena of the

appeal;

20.2 that we raised and determined issues not pleaded or argued by the parties; and,

20.3 that we upheld the appeal on grounds which were not advanced by the Appellant.

21. The allegation at paragraph 20.1 projects an abandonment of our judicial oath to be impartial and a breach of the provisions of **Article 118(1)** of **the Constitution** and **section 3** of the **Judicial (Code of Conduct) Act**. It also suggests that we actively participated in the proceedings as opposed to discharging our proper role as umpires.

22. The ground (allegation) at paragraph 20.2 suggests that we abandoned the record of appeal and introduced our own issues for determination, away from what the parties had actually pleaded and argued. What this effectively means is that, we denied the parties an opportunity to have their case heard and determined on the basis of the issues they had pleaded and argued in court.

23. The last ground (allegation) at paragraph 20.3 is an extension of the one at paragraph 20.2. It is therefore, not necessary for us to explain it beyond what we have said in the preceding paragraph.

The burden and standard of proof – the threshold issue.

24. It is an elementary proposition of the law that he who asserts must prove. In this case, the Respondent has made various allegations. He, therefore, bears the burden of proof and must do the following:

24.1 Adduce sufficient evidence to prove that we have breached **section 4** of the **Judicial (Code of Conduct) Act** which enacts as follows:

"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, colour or creed ...".

By its formulation, section 4 obliges the Respondent to adduce evidence pointing to actual bias on our part either through our conduct or the words we used during the proceedings. This evidence must show bias, discrimination and prejudice on our part based upon, but not limited to race, tribe, sex, place of origin, marital status, political opinion, colour or creed. In other words, there has to be a basis upon

which the bias, discrimination or prejudice is founded.

24.2 The Respondent is also legally obliged to adduce evidence showing that there are circumstances which raise doubt as to our impartiality and independence. These circumstances must be those listed in **sections 6(1)** and **6(2)(a)** to **(f)** of the **Judicial (Code of Conduct) Act** and they must be factual in nature, adduced by the Respondent in the affidavit in support of the motion.

24.3 In the case of the allegations under both sections 4 and 6 of the **Judicial (Code of Conduct) Act**, the Respondent must lead evidence to show that our actions or conduct have led to an apprehension on his part that we have breached the provisions of the two sections.

Evidence led by the Respondent and arguments by the parties

25. The relevant portions of the Respondent's evidence contained in the affidavit in support are at paragraphs 4, 6, 8 and 9 and they state as follows:

25.1 "(4)... I filed a notice of preliminary objection to the appeal and arguments in support in which I sought to

have the appeal dismissed on the ground that it was an abuse of the process of court...".

25.2 "(6) The application was heard on 8th April 2025 and the Honourable Justices, namely the Deputy Chief Justice M. Musonda, Madam Justice J. K. Kabuka and Mr. Justice N. K. Mutuna rendered a ruling in which they disregarded the issues properly raised by me in the notice of preliminary objection".

25.3 "I am informed by my advocate, John Sangwa SC and I have no reason to doubt his counsel that: -

(a) The Honorable Justices abandoned the neutrality required of judicial officers and improperly assumed the role of active participants in the proceedings.

(b) The Justices hijacked my application, introduced issues not advanced by either party, deliberated upon those issues, and determined them without jurisdiction.

(c) The Justices went beyond the preliminary objection and adjudicated the substantive appeal without being heard on the propriety of this course of action.

(d) Specifically, the Justices:

(i) Mischaracterised my notice of preliminary objection by asserting, in paragraph 60 of the ruling, that I sought dismissal of the appeal solely on the ground of *res judicata.*

(ii) Alleged, in paragraph 64 of the ruling, that I had tacitly raised the doctrine of issue estoppel without any basis in the record.

(iii) In paragraph 70 of the ruling, determined on their own initiative – that the main issue of the appeal was ".... whether, a *nolle prosequi* entered pursuant to **section 81(1)** in circumstances suggesting the DPP may have invoked **Article 56(7)** of the **Constitution,** and acted on the directive given by the Office of the Attorney General can have the same effect of *autrofois acquit,* is an issue to be determined in the main appeal". This issue was neither pleaded nor argued by the parties.

(iv) When the appeal came up for hearing on 6th May 2025, the Justices maintained that the

appeal was confined to the issue raised in paragraph 70 of the ruling and was the only outstanding issue.

(v) The Justices directed the parties to address them on the issue they had raised in paragraph 70 of the ruling.

(e) The conduct of the Justices amounts to manifest bias and constitutes a grave breach of the duty of impartiality that the law imposes.

(f) Their actions have given rise to a reasonable apprehension that they have aligned themselves with the Appellant's cause".

25.4 "(9) On the advice of my advocate, I respectfully submit that the Justices are disqualified from further hearing of this appeal and that justice demands that the appeal be heard before a differently constituted panel".

26. Coming to the arguments in support of the allegations, counsel for the Respondent has set out in great detail the provisions of the **Constitution** on a party's right to a fair hearing. They, in this regard, referred to **Article 18(9)** of the **Constitution** which states as follows:

"Any court or other adjudicating authority prescribed by

law for determination of the existence or extent of any civil right or obligations shall be established by law and shall be independent and impartial; and where proceeding for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within reasonable time".

According to counsel, the foregoing article has two components. The first relates to disposition of the Judges which is that they must be independent and impartial. The second relates to conduct of the judicial officers in the exercise of their authority, which is that they must accord parties a fair hearing within a reasonable time.

27. Counsel contended further that the provisions of **Article 18(9)** are reinforced by those in **Article 118** which sets out the principles which govern the exercise of judicial authority. Here, counsel submitted that the provision reminds Judges that they are not above the law and that judicial authority is derived from the people and must be exercised in a just manner to promote accountability. Counsel specifically referred to **Article 118(2)(a)** which provides that justice shall be done to all, without discrimination.

28. Advancing their arguments on the issue of the parties' right to a fair hearing and the court's duty in this regard, counsel

referred to the case of **Mwenya v The People**[2] and quoted at length from the holding by Silungwe J (as he then was) on the issue of bias. They argued that the principles articulated by Silungwe J, were cited with approval by this court in the case of **Michael Mabenga v The Post Newspapers Ltd**[3].

29. Counsel concluded their arguments on this issue by citing the following passage from **Stone's Justices' Manual**, 1973 edition, volume 1, page 369:

> **"A justice should refrain from taking part in any matter in which he is individually interested, or where he is nearly related to either party, or where he had advised upon the matter unless the objection is expressly waived by the parties".**

30. The next limb of counsel's arguments focused on the interpretation of the provisions of the **Judicial (Code of Conduct) Act**. The view taken by counsel was that the **Judicial (Code of Conduct) Act** was enacted to enforce the constitutional provisions discussed in the preceding paragraphs. The Judges' duties are, therefore, not only constitutional obligations but also statutory.

31. Counsel set out the provisions of sections 4 and 6(2)(a) of the **Judicial (Code of Conduct) Act** and the cases in which the provisions have been discussed. They then explained the test

of what constitutes bias with particular references to the **Mwenya**[2] case.

32. Next, counsel submitted on the prohibition against judicial activism. They argued that due to the need for fairness in an adversarial system of the courts, we have repeatedly affirmed that litigation is for the parties, not for the court. That Judges have no right to expand the boundaries of the litigation beyond what the parties have deployed before them. Counsel argued that the duties of Judges is to consider and decide only those issues expressly raised by the parties to the proceedings. They cannot frame their own issues and proceed to determine them. Reference was made to the decision in the case of **Atlantic Bakery Limited v ZESCO Limited**[4] which states as follows:

> **"A court is not to decide on an issue which has not been pleaded. Put differently, a court should confine its decision to the questions raised in the pleadings. It can thus not grant relief which is not claimed. Ligations is for the parties; not the court. The court has no business extending or expanding the boundaries of litigation beyond the scope defined by i.e. parties in their pleadings. In other words, a court has no jurisdiction to set up a different or new case for the parties".**

33. Counsel went on to argue that the principle in the **Atlantic Bakery**[4] case applies with equal force to interlocutory

applications. They referred to two cases in support of their argument which we have not cited because counsel omitted to indicate their citations.

34. After setting out the law, counsel then proceeded to address the allegations. They contended that we ignored the notice of preliminary objection because in paragraphs 5 to 22 of the ruling we gave background details which related to the appeal and not the preliminary objection. Counsel argued that the Respondent objected to the hearing and determination of the appeal on the ground that his prosecution constituted an abuse of court process because (a) the grounds of appeal have no bearing on the decision of the High Court sought to be assailed, and, (b) the subject matter of his planned prosecution had already been adjudicated upon by the Court of Appeal in its judgment delivered on 31st January 2018 in appeal number **2018/CAZ/126 Finsbury Investments Limited v Antonio Ventriglia and Manuela Ventriglia**[1].

35. Counsel went on to contend that we deliberately disregarded the issues placed before us in the notice of preliminary objection. They submitted that we: (a) abandoned the neutrality required of a Bench and hijacked the Respondent's application; (b) raised issues not advanced by either party,

deliberated upon them, and, (c) we proceeded to determine them without jurisdiction. Further, our subsequent conduct at the hearing of 6th May 2025 led them to conclude that we have formed a fixed view on the appeal and that we want the Respondent to be prosecuted.

36. The particulars of the allegations were as follows:

36.1 We distorted the Respondent's notice of preliminary objection by falsely asserting that it sought dismissal of the appeal solely on the ground of *res judicata*. Neither the Respondent nor the Appellant, in arguing the preliminary objection, raised the doctrine of *res judicata*. According to counsel, the issue was raised by us in arriving at a decision not informed by law and facts of the case, in an effort to justify our decision to uphold the appeal and pave way for the prosecution of the Respondent on the criminal charge. Counsel, therefore, attacked our determination of the preliminary objection based on the principles of *res judicata* at paragraphs 60, 61 and 62 and our conclusion at paragraph 63 of the ruling of the court.

36.2 We "conjured a new argument" alleging, without

any basis in the record of appeal, that the Respondent tacitly invoked the doctrine of issue estoppel and held as such at paragraph 64 of the ruling. They argued that for an issue to be determined by the Court it must be expressly raised in the motion moving the Court. It cannot be raised tacitly. Further, there was no such issue raised in the notice of preliminary objection nor did the Respondent or Appellant raise it in their arguments. Counsel concluded that our determination aforestated mischaracterized the Respondent's preliminary objection and was aimed at justifying our conclusion in paragraph 70 of the ruling of the court.

36.3 At paragraph 70 of the ruling of the court, we determined, on our own initiative, that the central question in the appeal is whether a *nolle prosequi* entered pursuant to section 81(1) of the **Criminal Procedure Code Act**, in circumstances suggesting invocation of **Article 56(7)** of the **Constitution** and a directive from the office of the Attorney General, could operate as *autrofois acquit*. Counsel contended that this was the clearest evidence of our bias. They contended that from the statements we made in

paragraphs 68 to 70 of the ruling, it is reasonable to conclude that we had already determined the appeal in favour of the Appellant. Neither the Respondent nor the Appellant raised or discussed the powers of the Director of Public Prosecution, nor did they refer to section 81 of the **Criminal Procedure Code Act**; and,

36.4 We entirely disregarded the proper limits of the preliminary objection and unlawfully adjudicated substantive issues in the appeal. Counsel contended that our conduct at the hearing of 6th May 2025 and the statements we made indicated that we had prejudged the appeal. They argued that since the Respondent's preliminary objection had been dismissed, the next logical step was for us to hear the appeal. This, however, could not be the case because the Respondent had raised another preliminary objection and we were, according to counsel, obliged to hear this preliminary objection before the appeal. Instead of proceeding as aforestated, we, once again, improperly inserted ourselves into the proceedings and directed the Respondent to address the Court on the issue we identified in paragraph 70 of the ruling. The

provisions of section 25(1) of the **Supreme Court Act,** pursuant to which we acted, do not allow us to disregard the grounds of appeal and formulate our own issues for determination. According to counsel, the thrust of the Appellant's grievance deployed before us in the appeal, is reflected in ground 3, and it relates to the finding by the High Court that a decision by the Attorney General made pursuant to **Article 56(7)** of the **Constitution** cannot be revisited by a subsequent Attorney General. The Appellant's grievance does not relate to the issue raised in paragraph 70 which we identified as falling for determination.

37. The response by counsel for the Appellant was as follows:

37.1 Recusal of a judicial officers is governed by sections 6 and 7 of the **Judicial (Code of Conduct) Act**;

37.2 The standard of proof required to sustain an application for recusal is high and the burden of proof lies with the one making the allegations. This is in line with the decision of the Constitutional Court in the case of **Milingo Lungu v Attorney General and The Administrator General**[5];

37.3 It is not enough for the Respondent to merely make

the allegations it has made. There is need for the Respondent to produce credible evidence in support of the allegation;

37.4 It is also not enough for an applicant to merely suspect or apprehend that the Court may be biased;

37.5 Mere apprehension on the part of a litigant that a judge will be biased, including a strongly and honestly felt anxiety, is not enough. The court must carefully scrutinize the apprehension to determine whether it is reasonable. See the case of **Peter Mwangi Gachuri v the Attorney General, Salaries and Remuneration Commission, Kenya Judges Welfare Association and The Judicial Service Commission**[6].

37.6 For an allegation of apprehension of bias to be sustained, it must be founded on the correct facts. In other words, if the factual foundation of bias is wanting then the apprehension is also wanting and the application for recusal will be refused.

37.7 The test is whether a reasonable, objective and informed person would, on the facts presented, reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication

of the case. In addition, the reasonableness of the apprehension must be assessed in light of the Oath of Office taken by Judges to administer justice without fear or favour. This is in accordance with the decision by the Constitutional Court of South Africa in the case of **President of the Republic of South Africa and Others v South African Rugby Football Union and Others**[7]; and,

37.8 There is a presumption of impartiality which has the effect that a judicial officer will not lightly be presumed to be biased. This presumption is not easily rebuttable according to the **Milingo**[5] case which adopted the reasoning of the Constitutional Court of South Africa in the case of **South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Bongani Masuku and Others**[8]

38. At the hearing of the motion, counsel for the two parties relied entirely on the documents presented before us. Following a query from the court, all counsel for the Respondent confirmed that they had participated in settling the affidavit and arguments in support of the Respondent's motion.

Determination of whether the Respondent has proved his case

39. This motion is anchored on **sections 4** and **6** of the **Judicial (Code of Conduct) Act**. The relevant portion of **section 4** is at page R12 of this ruling while **section 6** states in part as follows:

> **Section 6:**
>
> **"(1) Not withstanding section seven (7) a judicial officer shall not adjudicate on or take part in any consideration or discussion of any proceedings in which the officer or 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 matter in which the officer's impartiality might reasonably be questioned on the ground 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 he 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 proceedings".

40. The two sections list the instances that disqualify a judicial officer from adjudicating upon a matter. In paragraph 24 of this ruling, there is an explanation of the threshold which is that an applicant is required to lead evidence which proves any one or any combination of the instances set out in these two sections.

41. Our task is to determine whether the evidence laid before us by the Respondent has proved any one or more of the instances set out in these two sections warranting our disqualification from adjudicating further upon the appeal, out of which this motion has been launched.

42. We begin by relating the facts set out in paragraph 25 of this ruling to **section 6** of the **Judicial (Code of Conduct) Act**. To recap, that section disqualifies a Judge from adjudicating upon a matter where his impartiality might reasonably be questioned on account of the Judge's personal bias or

prejudice towards a party or counsel, or the Judges' relationship with such counsel. This relationship relates to previous employment or partnership with such counsel.

43. The section stipulates other grounds as being the private association the Judge had with the matter or the Judge or his members of the family having a pecuniary or other interest in the matter.

44. The facts adduced by the Respondent which we have set out earlier and indeed the extensive arguments by his counsel did not lead or even suggest any evidence which points to conflict of interest on our part arising from the instances set out in section 6. They suggest a dissatisfaction with the decision of the court revealed in the ruling of 8th April 2025 and a discomfort with the procedure we adopted in dealing with the matters presented to us in the appeal as a whole.

45. Consequently, the conclusion reached at paragraph 9 of the Respondent's allegations that we are disqualified is flawed. In arriving at this conclusion we endorse the argument by counsel for the Appellant and the case she cited that where the factual foundation of bias is wanting the application for recusal will be refused.

46. As for **section 4** of the **Judicial (Code of Conduct) Act**, the

facts adduced and arguments advanced by the Respondent are only relevant in so far as they allege bias, prejudice and discrimination. The section requires an Applicant to prove the following:

46.1 that in the performance of his or her function the Judge was biased or acted in a manner which was prejudicial to the applicant;

46.2 that in the performance of his or her functions, the Judge, through the words spoken or the actions, manifested bias, discrimination or prejudice which should arise from the views held by the Judge in respect of the applicant's race, tribe, sex, place or origin, marital status, political opinion, colour or creed, among others.

47. By definition and according to the compilers of English lexicon, the **Concise Oxford English Dictionary, 11th edition**, bias is defined as an *"inclination or prejudice for or against one thing or person"*. The inclination must demonstrate how one acts in favour of one party against another arising from one's prejudices.

48. **Black's Law Dictionary by Bryan A. Garner, 7th edition** takes the definition of bias further when defining the phrase

"judicial bias" as follows:

> **"Bias that a judge develops during a trial. Judicial bias is usu. insufficient to justify disqualifying a judge from presiding over a case. To justify disqualification or recusal, the judge's bias usu. must be personal or based on some extra judicial reason".**

This definition ties in well with the provisions of **section 4(1)** of the **Judicial (Code of Conduct) Act** which specifically disqualifies a Judge from adjudicating upon a matter where bias may arise due to his or her personal beliefs in relation to race, tribe, sex, place of origin, marital status, political opinion, colour or creed, among others.

49. The position we have stated in the preceding paragraph is not unique to our Code of Conduct. Writing in a text entitled ***"Guide to Judicial Conduct":* Independence, Impartiality Integrity,** July 2023, Lord Burnett of Maldon (former Lord Chief Justice England and Wales) and Sir Keith Lindblom, Senior President of Tribunals stated as follows at page 9:

> **"Judicial office holders should strive to ensure that their conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants, court staff and colleagues in their personal impartiality and that of the Judiciary.**
>
> **It follows that judicial office holders should, so far as is reasonable, avoid extra judicial activities that are likely to**

cause them to have to refrain from sitting because of a reasonable apprehension of bias or because of a conflict of interest that would arise from the activity".

The sound warning in the last paragraph of the quotation serves to ensure that Judges do not develop personal inclinations or biases outside their judicial functions which affect their impartiality in the discharge of their official functions.

50. At paragraph 29 of this ruling we have cited a passage from **Stones Justice Manual** referred to us by counsel for the Respondent. This was an attempt by counsel at reinforcing the Respondent's contention that we are biased. The quotation does not in any way support the Respondent's contention because, like the **Judicial (Code of Conduct) Act,** Stones emphasizes that the ingredients in support of disqualification are personal in nature. The manual, refers, to, disqualification where a judge is *".. individually interested" or "... nearly related to either party..." or "... where he advised upon the matter ...".* All these are personal traits and are extra judicial in nature.

51. An allegation of bias can, therefore, not be sustained against a judicial officer if it does not have those personal

ingredients.

52. It is not enough for an Applicant merely to complain about the manner in which a Court has conducted the proceedings and directions it has given in the process. Nor is it enough to complain about the demeanor of a Judge. We shudder to think how often a Judge with an indignant disposition would be asked to recuse himself on the belief that he hated an applicant. This would throw the administration of justice in total disarray because it would result in frequent and unnecessary adjournments and erode the independence of Judges, who, as human nature dictates, would be forced to adopt a friendlier, though unnatural disposition.

53. The same is true of the disqualification under **section 6** which arises where a judicial officer's impartiality might reasonably be questioned. The instances set out in **sections 6(1)** and **6(2)(a)** to **(f)** which must be proved are personal attributes, therefore, extra judicial traits. The rationale for what we have said in the last two preceding paragraphs is that the ends of justice demand that court proceedings should be allowed to proceed unhindered if the constitutional provisions for equal justice and a speedy trial under **Articles 118 (2) (a)** and **(b)** of the **Constitution** are

to be achieved. Hence the presumption of impartiality of a Judge which counsel for the Appellant articulated in their arguments.

54. As we have stated earlier in this ruling, the Respondent has not only failed to prove the allegations by way of leading evidence on our personal attributes or relationship to him or his matter that disqualify us, but lamentably failed to prove his case as a whole. This is compounded by the fact that the basis upon which he anchors his allegations is wrong. In the affidavit evidence in support of the motion quoted at paragraph 25.3 of this ruling, the Respondent says that he was informed by his counsel, John Sangwa SC, and he has no reason to doubt his counsel, that we have breached both the provisions of the **Judicial (Code of Conduct) Act** and **Constitution**. This is a belief or apprehension which was brought about, not from his dealings with the Court, but rather advice from counsel.

55. Motions for recusal are triggered by perceptions that parties and litigants have of the Court they are appearing before. It is informed by their experience with the Court which gives them an apprehension as to the independence, impartiality, prejudice, discrimination or bias of the court. The

apprehension is then what the court tests against the threshold we have set out earlier to determine if the test for recusal has been surmounted and it must satisfy the standard set out by counsel for the Appellant at paragraphs 37.3 to 37.7 of this ruling. The fact, in and of itself, that the Respondent predicated his motion on advice from counsel and not his apprehension of our attitude defeats the motion in its entirety.

56. The holdings we have made in the proceeding paragraphs effectively reveal our decision on this motion which is that it lacks merit. The motion is a deliberate attack on this court and the integrity of the judiciary aimed at derailing the proceedings and having us re-open the hearing of an appeal and set aside the ruling of the court.

57. Decisions of our court are final and binding on the parties. In a ruling delivered on 24th November, 2020 in the case of **Savenda Management Services Limited v Stanbic Bank Zambia Limited**[9], we set out the rare instances where this court can re-open and rehear an appeal or a motion and the time limit set for such a situation. Motions of such a nature can not be launched, as the Respondent has done in this

motion, by way of **sections 4** and **6** of the **Judicial (Code of Conduct) Act** seeking our recusal.

Summary of our holding

58. The following is a summary of our holding:

58.1 An applicant moving a motion for recusal bears the burden of proving the allegations.

58.2 The proof that is required is in the form of evidence supporting the ingredients for bias, discriminations, prejudice and lack of impartiality set out in **sections 4** and **6** of the **Judicial (Code of Conduct) Act**.

58.3 Merely lifting provisions in **sections 4 and 6** and repackaging them does not constitute evidence or the necessary factual matrix in which to ground the legal provisions in question.

58.4 The evidence should show an inclination of bias, prejudice, discrimination or lack of impartiality by a Judge of an extra judicial nature as perceived by the applicant.

58.5 The decisions of the Supreme Court are final and not subject to review or reopening. These decisions may only be reopened in very exceptional cases and a

motion for recusal is not a vehicle by which these decisions can be reopened.

58.6 Applications for recusal only serve the purpose of disqualifying a Judge.

58.7 The Respondent has failed to adduce facts which prove the allegations he has made.

Consequences of allegations

59. The determination we have made in paragraphs 47 to 53 of this ruling shows that there was no basis whatsoever for the Respondent to make the allegations he made against us. Consequently, counsel should not have led him on this futile exercise which was doomed to fail.

60. It is apparent that the motivation by the Respondent was not only to scandalise the court but also derail the proceedings before us as well as forum shopping as he sought a reconstituted panel of this Court and a corresponding expectation of a different favourable outcome. An attempt at subverting the course and administration of justice at a cost to the tax payer. The end game being to delay the hearing of the appeal. Such conduct will not be condoned by this or any other court and will be dealt with swiftly and

sternly as it amounts, *prima facie*, to contempt in the face of the court.

61. Present in court on the day of the hearing were a number of young and junior counsel, watching John Sangwa SC and his colleagues pursue this hopeless application clearly anchored on a misapprehension of the law by counsel. We have asked ourselves what example such conduct by senior members of the Bar sets for these young and junior counsel. Hence the need for stern action by this Court.

62. The Respondent will be spared just this once because it is the first time this or indeed any other court in Zambia has explained the ingredients that have to be proved in accordance with **sections 4** and **6 of the Judicial (Code of Conduct) Act.** We have assumed that the Respondent made the allegations in ignorance of the law which though is not a defence, but excusable. The failure by counsel on both sides to address us on the ingredients aforementioned is testimony to the fact that our assumption of the Respondent's ignorance is not misplaced.

63. Let this ruling be a guide by which counsel will in future refer to in launching motions pursuant to sections 4 and 6 of the **Judicial (Code of Conduct) Act.** Let it also be a

warning to counsel and litigants who are in the habit of launching baseless motions for recusal that their actions shall not go unpunished. Such punishment will extend to condemning counsel to payment of costs on the ground that he or she misled the client.

Conclusion

64. By way of conclusion, we hold that the motion before us is lacking in merit and we accordingly dismiss it with costs. The costs will be taxed in default of agreement.

M. MUSONDA
DEPUTY CHIEF JUSTICE

J. K. KABUKA
SUPREME COURT JUDGE

N. K. MUTUNA
SUPREME COURT JUDGE