

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2009/HP/0996

**IN THE MATTER OF THE PROTECTION OF FUNDAMENTAL RIGHTS
REGULATIONS, 1969.**

AND

**IN THE MATTER OF ARTICLES 1, 19(9)(10) AND 28(1), OF THE
CONSTITUTION OF ZAMBIA**

BETWEEN:

**FAUSTIN MWENYA KABWE
ARRON CHUNGU
JOHN SANGWA**

**1ST PETITIONER
2ND PETITIONER
3RD PETITIONER**

AND

**JUDICIAL COMPLAINTS AUTHORITY
THE ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT**

**BEFORE THE HON. MR. JUSTICE C. KAJIMANGA THIS 4TH DAY OF NOVEMBER,
2011**

FOR THE PETITIONERS: Mr. J. Sangwa, Messrs Simeza Sangwa & Associates
FOR THE RESPONDENTS: Mr. A. J. Shonga Jnr, SC, Attorney General

J U D G M E N T

Cases referred to:

1. R v Secretary for Education and Science, ex parte Avon County Council [1991] 1 ALL E. R. 283
2. Wynter Kabimba v The Attorney-General and Lusaka City Council [1995 – 1997] Z. R. 152
3. Rafiu Raviu v S (1981) 2 NCLR 293

4. Ifezue v Mbagdugha and Another [1985] LRC (Const) 1141
5. Attorney-General, Movement for Multi-Party Democracy v Akashambatwa Mbikusita Lewanika and Others (1994) Z. R. 1
6. Minister of Land Affairs and Another v Slamdien and Others (no citation provided)

Legislation referred to:

1. Judicial Code of Conduct Act No. 13 of 1999, as amended by Act No. 13 of 2006, Section 3, 4, 24, 25 to 27
2. The Constitution of Zambia Chapter 1 of the Laws of Zambia Articles 1, 18, 28 and 91.

Other Works referred to:

1. Black's Law Dictionary Sixth Edition
2. Jowits Dictionary of English Law

The Court regrets the delay in delivering this judgment.

The Petitioners filed a petition pursuant Article 28(1) of the Constitution of Zambia ("the Constitution") in which the following facts were outlined:

- "1. The 1st Petitioner is a Zambian citizen of Flat No. 8/6893 off Haile Selasie Avenue, Longacres Lusaka***
- 2 The 2nd Petitioner is a Zambian National of Plot No. 2303/C Twin Palm Road, Ibex Hill Lusaka***
- 3. The 3rd Petitioner is a Zambian National of Sub-Division No. 1 of Sub- Division "U" of Farm No. 215a, Lusaka West, Lusaka and a legal practitioner practicing under the name and style of***

SIMEZA, SANGWA & ASSOCIATES the firm that has been acting for the 1st and 2nd Petitioners in many other legal cases.

- 4. The 1st Respondent is a statutory body established under Section 20 of the Judicial (Code of Conduct) Act No. 13 of 1999, as amended by Act No. 13 of 2006.***
- 5. The 1st Respondent is an adjudicative body provided for in Article 18(9) of the Constitution and is specifically mandated in Section 24 of the Judicial (Code of Conduct) Act to receive any complaint or allegation of misconduct and to investigate any complaint or allegation made against a judicial officer, and it is required to submit its findings and recommendations to the appropriate authority for disciplinary action or other administrative action; and the Director of Public Prosecution for consideration of possible criminal prosecution.***
- 6. The 2nd Respondent is the principal legal adviser to the Government of the Republic of Zambia and has been included to these proceedings by virtue of Section 12 of the State Proceedings Act, Cap 92 of the Laws of Zambia.***
- 7. On 24th June, 2009, the Petitioners laid a complaint against the Chief Justice, Mr. Justice Ernest Sakala and Mr. Justice Essau Chulu in line with the provisions of the Judicial (Code of Conduct) Act No. 13 of 1999, as amended by Act No. 13 of 2006 for misconduct for violating Sections 3, 4, 24(2) and 25(2) of the Act.***
- 8. The said complaint was presented in writing through a letter dated 24th June, 2009. The acts, which formed the basis of the complaint are outlined in the said letter. By letter dated 29th***

June, 2009, the Secretary to the Authority wrote to the Petitioners acknowledging receipt of the complaint and advised that the decision of the Authority on the complaint will be communicated to the Petitioners after consideration of the complaint by the Authority.

- 9. By letter dated 1st July, 2009, the Petitioners wrote to the Secretary to the Authority acknowledging receipt of the letter of 29th June, 2009 and sought clarification as to how the Authority could make its decision on the matter without a hearing and asked to be advised on the steps to be taken by the Authority in view of the fact that the complaint had been accepted by the Authority.*
- 10. In response the Petitioners received a letter from the Secretary to the Authority in which some Sections of the Act were reproduced without any clear direction being provided on how the hearing of the complaint was going to proceed.*
- 11. On 29th July, 2009, the Petitioners caused another letter to be sent to the Chairman of the Authority complaining about the lack of a meaningful response from the Authority on the way forward in the hearing of the Complaint and pointed out the need to comply with the provisions of Articles 18(9) and (10) of the Constitution. There has been no response.*
- 12. At the time of lodging this petition no date of hearing of the complaint had communicated to the Petitioners and there has been no indication from the Authority when the complaint will be heard.*

- 13. *The Petitioners have not waived their right to a public hearing of the complaint as provided for in Article 18(9) of the Constitution.***
- 14. *By virtue of what is stated in paragraphs 1 to 13 the Petitioners' right to a fair hearing before an independent adjudicating authority is likely to be violated against them.***
- 15. *By virtue of what is stated in paragraphs 1 to 13:***
 - (a) the Petitioners' right to have their complaint heard and determined by an independent and impartial adjudicating authority as provided for in Articles 18(9) is likely to be violated against them in that the conduct of the Authority thus far does not show that the 1st Respondent is independent and impartial;***
 - (b) the Petitioners' right to a fair hearing within a reasonable time by an independent and impartial adjudicating authority as provided for in Article 18(9) is likely to be violated against them in that the 1st Respondent has not indicated when and where the complaint is likely to be heard.***
 - (c) the Petitioners' right to have their complaint heard and determined by an independent and impartial adjudicating authority in public as provided for in Article 18(10) is likely to be violated against them in that since the 1st Respondent acknowledged receipt of the complaint there has been no indication as to when and where the complaint will be heard.***
- 16. *Your Petitioners, therefore, pray that they be granted an order protecting and furthering the Petitioners' rights under Article***

18(9) and (10) requiring the 1st Respondent, within seven days from date of the Order to give directions on the following issues:

- (a) The period within which the Chief Justice, Mr. Justice Ernest Sakala and Mr. Justice Essau Chulu must deliver their response to the complaint, if any;**
- (b) The period within which the complainants must deliver their reaction to the response, if any;**
- (c) The period within which the parties will be required to provide lists of documents they intend to reply upon at the hearing of the complaint.**
- (d) The period within which inspection of the documents will take place;**
- (e) The date when the complaint will be heard; and**
- (f) The place, open to the public, where the complaint will be heard and determined."**

The Respondents filed an answer in which they raised the following contentions:

- "(a) The Judicial Complaints Authority is a statutory body created under Section 20 of the Judicial (Code of Conduct) Act, as amended by the Judicial (Code of Conduct) (Amendment) Act No. 13 of 2006 ("the Act"), but it is not a corporate body and therefore can neither sue nor be sued in its own name.**
- (b) The Judicial Complaints Authority is not an adjudicative body as provided for in Article 18(9) of the Constitution and that their function as outlined in Section 24 of the Act is investigative and not adjudicative.**

(c) The Judicial Complaints Authority is bound by the provisions of Section 25(8) of the Act which provides that a complaint or allegation lodged against a judicial officer and any investigation carried out into the complaint shall be treated a confidential and shall not be open for public inspection except for the judicial officer concerned and the petitioners."

Before the petition came up for hearing, the learned Attorney-General filed a notice of intention to raise the following preliminary issues pursuant to Order 14A(1) of the Rules of the Supreme Court:

1. Whether Article 18(9) and (10) of the Constitution applies in this matter.
2. Whether the Judicial Complaints Authority can be described as a Court or an adjudicating authority.

At the hearing of the preliminary issues the need to clarify the implications of the issues raised by the Respondents arose. Both parties particularly noted that the Court cannot address these issues without dealing with the petition in its entirety. The parties further acknowledged that Order 14A itself is not designed for preliminary issues but to dispose of a case on a point of law where it involves a question of law or construction of any documents which can be addressed without a full trial and also where the decision of the Court will determine the entire cause. The parties consequently agreed that in the circumstances the Court was empowered to dismiss the petition if the issues raised were decided in favour of the Respondents; and to make such order or judgment as it thinks fit if they were decided in favour of the Petitioners.

In his skeleton arguments on the first preliminary issue, the learned Attorney-General referred the Court to Article 18(9) of the Constitution which reads:

"Any court or adjudicating authority prescribed by law for

determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings 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 a reasonable time.”

Mr. Shonga, SC contended that Article 18(9) clearly envisages an entity created “for the determination of the existence or extent of any civil right or obligation” and the question is whether the Judicial Complaints Authority makes such determination. The learned Attorney-General stated that the 1st Respondent’s functions are set out in Section 24(1) of the Act which reads:

“The functions of the Authority shall be to -

(a) Receive any complaint or allegation of misconduct and investigate any complaint or allegation made against a judicial officer provided that where, in the opinion of the Authority a complaint or allegation of misconduct made against the judicial officer does not disclose any prima facie case, the Authority may dismiss a complaint or allegation without investigating the complaint or allegation.”

Mr. Shonga, SC submitted that it is patently clear from the above provision that the 1st Respondent’s functions are limited to the carrying out of investigations into alleged misconduct of judicial officers. According to his understanding the 1st Respondent does not sit to determine the existence or extent of any civil rights. He submitted that as such, the provisions of Article 18(9) of the Constitution do not apply to sittings or affairs of the 1st Respondent and that if this position is accepted by the Court, then this petition must fail on account of the fact that it hinges on the constitutional provisions of Article 18(9).

On the second preliminary issue, Mr. Shonga, SC stated that in the event that this Court finds that the 1st Respondent does, indeed, determine the existence or extent of any civil right or obligation, then he would argue that the 1st Respondent is not a Court or adjudicating authority as contemplated by Article 18(9) of the Constitution. He submitted that Article 18(9) of the Constitution specifically applies to a court or other adjudicating authorities but there can be no doubt that the 1st Respondent is not a court or an adjudicating authority. The learned Attorney-General contended that it is clear from the provisions of Section 24(1) of the Act that the 1st Respondent's mandate is to receive complaints and investigate them. He stated that after investigating the complaints, the 1st Respondent is required to submit them to an appropriate authority as per Section 24(1)(c) of the Act which reads:

"The functions of the Authority shall be to –

(c) Submit its findings and recommendations to

- (i) the appropriate authority for disciplinary action or other administrative action; and***
- (ii) the Director of Public Prosecutions for consideration of possible criminal prosecution."***

Mr. Shonga, SC submitted that the 1st Respondent does not perform any adjudicative functions. He contended that by necessary implication, a body performing adjudicative functions needs to be able to determine disputes with finality. He referred the Court to the definition of "adjudication" in Jowits Dictionary of English Law as "the judgment or decision of the Court...". The learned Attorney-General submitted that since the 1st Respondent is not empowered to make any decisions that finally determine a complaint, it does not qualify to be called an adjudicating authority and that if his argument was accepted, this petition should be dismissed.

The Petitioners filed submissions numbering fifty-three pages in response which I should hasten to state were more in the form and shape of an academic thesis than the usual submissions filed in a court. Anyhow, on whether the 1st Respondent can sue or be sued in its own name, the Petitioners contended that they moved this Court by way of a petition pursuant to Article 28(1) and that a Petition is not a suit as it falls in the area of public law as opposed to civil law. They contended that a petition is not different from an application for judicial review made pursuant to Order 53 of the rules of the Supreme Court. The Court was referred to the case of ***R v Secretary for Education and Science, ex parte Avon County Council(1)*** which was cited with approval by Gardner J S., in ***Wynter Kabimba v The Attorney-General and Lusaka City Council(2)***. In the former case Lord Justice Glidewell stated at pages 285 to 286 as follows:

"Of course, in some respects an application for judicial review appears to have similarities to civil proceedings between two opposing parties, in which an injunction may be ordered by the court at the suit of one party directed to the other. When correctly analysed, however, the apparent similarity disappears. Proceedings for judicial review, in the field of public law, are not a dispute between two parties, each with an interest to protect, ... Judicial review, by way of an application for certiorari, is a challenge to the way in which a decision has been arrived at. The decision-maker may appear to argue that his, or its, decision was reached by an appropriate procedure. But the decision-maker is not in any true sense an opposing party..."

The Petitioners submitted that in judicial review applications made pursuant to Order 53 and Article 28(1) of the Constitution, there is no *lis inter partes* or suit by one person against another as they are not civil proceedings. They contended that similarly there is no *lis* or suit between the Petitioners and the 1st Respondent in this case as what exists is a dispute over the interpretation of constitutional provisions which are

likely to affect the 1st Respondent in the manner it goes about considering the Petitioner's complaint.

The Petitioners also submitted that as a public institution created pursuant to the provisions of the Act, the 1st Respondent is subject to the provisions of Article 1(4) of the Constitution, which reads:

"This Constitution shall bind all persons in the Republic of Zambia and all Legislative, Executive and Judicial organs of the State at all levels."

It was the Petitioners' contention that the 1st Respondent is a public institution and although it has no power to sue and be sued, it is nonetheless mandated to perform public functions and that it is the performance of those functions which is the subject of this petition.

The Petitioners submitted that the submissions of the Respondents on the preliminary issues are not helpful in addressing what is in contention as the fundamental issues have been ignored. According to the Petitioners, in issue is the interpretation of the Constitution that is supreme and in particular, the entrenched provisions which form the Bill of Rights, Chapter Three of the Constitution as well as the interpretation of the Act which is no ordinary legislation but one whose very existence is provided for in the Constitution. They contended that a supreme Constitution is a unique legal instrument which cannot be interpreted in the same way that ordinary statutes are. The Petitioners submitted that the most important pronouncement on this issue, which is often quoted, is that of Sir Udo Udoma of the Supreme Court of Nigeria in ***Rafiu Raviu v S(3)*** where he stated as follows at page 326:

"... the Supreme Law of the Land; that it is a written, organic instrument meant to serve not only the present generation, but also several generations yet unborn ... that the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the

development of our several communities must involve, ours being a plural, dynamic society, and therefore, more technical rules of interpretation of statutes are to some extent inadmissible in a way as to defeat the principles of government enshrined in the Constitution.”

The Court was also referred to another Nigerian case of *Ifezue v Mbagdugha and Another(4)* which was decided three years later, where Bellow J. S. C. in his dissenting judgment stated at page 1146 that:

"Since the decision of this Court in the celebrated case of Rabi v The State (1980) 8-11 SC 130 ..., the general principles for the interpretation of our Constitution have been laid down. The fundamental principle is that such interpretation as would serve the interest of the constitution and would best carry out its object and purpose should be preferred. To achieve this goal its relevant provisions must be read together and not disjointly; where the words of any section are clear and unambiguous, they must be given their ordinary meaning unless this would lead to absurdity or be in conflict with other provisions of the Constitution and effect must be given to those provisions without any recourse to any other consideration; and where the Constitutions has used an expression in the wider or in the narrower sense the court should always lean where the justice of the case so demands to the broader interpretation unless there is something in the content or the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose. In other words where the provisions of the Constitution are capable of two meanings the Court must choose the meaning that would give force and affect to the Constitution and promote its purpose."

The Petitioners also cited a myriad of cases from Botswana, Zimbabwe, South Africa and those of the Privy Council in Britain which this Court considers otiose to delve into as they espouse the same principle.

The Petitioners further drew the Court's attention to the only Zambian case which discussed the construction of the Constitution. This is the case of ***Attorney-General, Movement for Multi-Party Democracy v Akashambatwa Mbikusita Lewanika and Others(5)*** where our Supreme Court stated as follows:

"In the instant case, we have studied the judgment of the court below and we find it sound and correct by applying the literal interpretation. However, it is clear from the Shartz and Northman cases that the present trend is to move away from the rule of literal interpretation to 'purposive approach' in order to promote the general legislative purpose underlying the provisions. Had the learned trial judge adopted the purposive approach she should undoubtedly have come to a different conclusion. It follows, therefore, that whenever the strict interpretation of a statute gives rise to unreasonable and an unjust situation, it is our view that judges can and should use their good common sense to remedy it- that it is by reading words in if necessary – so as to do what parliament would have done had they had the situation in mind. We, therefore, propose to remedy the situation in this case by reading in the necessary words so as to make the constitutional provision fair and undiscriminatory. Consequently the necessary words to be read in are "vice versa". Hence Article 71(2)(c) should now read (leaving out those sub clauses of no application):

71 (2) A member of the National Assembly shall vacate his seat in the Assembly:

(c) in the case of an elected member, if he becomes a member of a political party other than the party, of which he was an authorized candidate when he was elected to the National Assembly or, if having been an independent, he joins a political party or vice versa."

Regarding the interpretation of constitutionally provided for Acts of Parliament the Petitioners contended that available cases indicate that such Acts have to be interpreted in the same manner that the Constitution is interpreted, that is to say, generously and purposefully. The Court was referred to the South African case of ***Minister of Land Affairs and Another v Slamdien and Others(6) (no citation given)*** where it was stated that:

"What method should be used in interpreting Section 2(1) (a) (of the Restitution of Land Rights Act 22 of 1994)? The approach to the interpretation of constitutional and statutory provisions in our law is not harmonious. The Constitutional Court has made it clear that the approach to be adopted in interpreting the Constitutions is a purposive one. This was the approach adopted in the first judgment of the court, namely S v Zuma and Others. It was confirmed by the President of the court in S v Makwanyane and Another. It was applied in relation to subsequent judgments under the 1993 Constitution and had continued to be applied in relation to the 1996 Constitution. That it must be accepted as binding all other courts to the purposive method in constitutional cases is clear. This Court signaled its acceptance of a purposive approach early in its life in the judgment of Meer J (Gildenhuys J concurring) in Dulabh and Another v Department of Land Affairs. In that case the purposive method was used in order to determine the 'ambit of restitution" under the 1993 Constitution."

The Court further went on to explain the purposive interpretation saying:

"The purposive approach as elucidated in the decisions of the Constitutional Court and this Court requires that one must:

- (i) in general terms, ascertain the meaning of the provision to be interpreted by an analysis of its purpose and, in doing so,***
- (ii) have regard to the context of the provision in the sense of its historical origins;***
- (iii) have regard to its context in the sense of the statute as a whole, the subject matter and broad objects of the statute and the value which underlie it;***
- (iv) have regard to its immediate context in the sense of the particular part of the statute in which the provision appears or those provisions with which it is interrelated;***
- (v) have regard to the precise wording of the provision; and***
- (vi) where a constitutional right is concerned, as is the case here, adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection which the right confers."***

And the Court further said:

"With reference to the last of these guidelines, the observation needs to be made that the adoption of a purposive approach will not always mean the adoption of a wide or literal interpretation of the words concerned. It may well be that, upon a proper analysis of the purpose of the provisions, a meaning which is narrower than the ordinary,

literal meaning of the provision is arrived at. The goal is to ascertain the proper ambit of the provision. This point is made in the judgment of Chaskalson P in Soobramoney v Minister of Health, KwaZulu-Natal where he says: "The purposive approach will often be one which calls for a generous interpretation to be given to a right to ensure that individuals secure the full protection of the bill of rights, but this is not always the case, and the context may indicate that in order to give effect to the purpose of a particular provision 'a narrower or specific meaning' should be given to it."

It was the Petitioners' contention that in the light of the above authority, the provisions of the Act have to be interpreted in the same manner as the Constitution.

The Petitioners submitted that they have moved the Court pursuant to the provisions of Article 28(1) of the Constitution which reads:

"Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall –

(a) hear and determine any such application

(b) Determine any question arising in the case of any person which is referred to it in pursuance of clause(2);

and which may, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive."

They contended that their rights as guaranteed under Article 18(9) and 10 are about to be violated on account of the facts outlined in the petition. They referred the Court to Article 18(9) quoted above and Article 18(10) which reads:

"Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the Court or other authority shall be held in public."

It was submitted that Article 18(9) covers not just the courts but all other adjudicating authorities prescribed by law for purposes of determining the existence or extent of any civil right or obligation. The Petitioners contended that this Article applies to this case as it involves the powers and functions of the 1st Respondent. They submitted that as long as the 1st Respondent is an organ of the State mandated to perform certain state functions it is subject to the standard of behavior prescribed by the Constitution and in this case, Article 18(9) of the Constitution. It was further argued that as a public institution created by statute, the 1st Respondent is bound by the Constitution as stipulated in Article 1(4) and that although it is not a statutory body independent of Government with the right to sue and be sued in its own name, it is still an institution that is part of government and therefore subject to the provisions of the Constitution.

On the Respondents' contention that the 1st Respondent is not an adjudicative but an investigative body, the Petitioners contended that the Respondents have only focused on Section 24 of the Act instead of construing all its provisions which have a bearing on this issue. They reproduced Section 24 of the Act which reads as follows:

"24(1). The functions of the Authority shall be to-

(a) Receive any complaint or allegation of misconduct and to investigate any complaint or allegation made against a judicial officer:

Provided that where, in the opinion of the Authority a complaint or allegation of misconduct made against the judicial officer does not disclose any prima facie case, the Authority may dismiss such complaint or allegation without investigating the complaint or allegation.

(b) Submit its findings and recommendations to –

(i) The appropriate authority for disciplinary action or other administrative action; and

(ii) The Director of Public Prosecutions for consideration of possible criminal prosecution.

(2) In this part, "appropriate authority" means-

(a) in the case of the Chief Justice, the president;

(b) in the case of a judge, the Chief Justice, who may admonish the judge concerned and in the case of a breach requiring removal under subsection (2) of Article ninety-eight of the constitution, the Chief Justice shall inform the President;

(c) in the case of Registrar, the Chief Administrator, who shall inform the Commission;

(d) in the case of a Magistrate, the Director of Local Courts or any other judicial officer, the Registrar, who shall report to the Commission for action; and

- (e) in the case of a Local Court officer or justice, the Director of Local Courts, who shall report to the Commission for action.***
- (3) The appropriate authority or the Director of Public Prosecutions shall, where a report is made by the Authority under subsection (1), notify the member against whom the report is made within seven days from the date the report is received and shall thereafter notify the Authority of the action taken, if any, on the Authority's recommendation."***

The Petitioners submitted that the language of Section 24 is clear in that the role of the 1st Respondent is not just to receive complaints or allegations of misconduct or investigate any complaint or allegation made against a judicial officer. It was also their contention that Section 25 of the Act provides an elaborate procedure for lodging a complaint against a judicial officer. The section reads:

"25. (1) Any member of the public who has a complaint against a judicial officer or who alleges or has reasonable grounds to believe that a judicial officer has contravened this Act shall inform the Authority.

(2) Where a judicial officer alleges or has reasonable grounds to believe that any other judicial officer has contravened this Act, the judicial officer may inform the Authority.

(3) A person who has a complaint or allegation against any judicial officer shall lodge it with –

(a) the Secretary; or

(b) the clerk of court in the area where the incident or circumstances giving rise to the complaint or allegation occurred; or

(c) the District Commissioner in the area where the incident or circumstances giving rise to the complaint or allegation occurred.

(4) A complaint may be made orally or in writing.

(5) A complaint shall include the following:

(a) the name, physical and postal address of the person making the complaint;

(b) the complainant's age; and

(c) a detailed statement including the facts of the incident or circumstances giving rise to the complaint.

(6) Where a complaint or allegation is made orally, the recipient of the complaint shall reduce it to writing.

(7) A complaint shall bear the signature or thumb print of the person making it.

(8) A complaint or allegation lodged against a judicial officer and any investigation carried out into the complaint by the Authority shall be treated as confidential, and shall not be open for public inspection except for the judicial officer concerned and the complainant.

(9) A judicial officer or a member of staff shall not prevent or attempt to prevent the lodging of a complaint or an allegation against any judicial officer.

(10) A person who contravenes subsection (9) commits an offence and is liable, upon conviction, to a fine not exceeding two thousand penalty units, or to imprisonment for a period not exceeding one year, or to both."

The Petitioners submitted that in the light of these provisions, there is no basis for the Respondents to maintain that the functions of the 1st Respondent are limited to investigating the complaints, hence not an adjudicative body within the meaning of Article 18(9) of the Constitution. They contented that such a proposition is consistent with the objects of Article 91(2) and the Act itself. Article 91(2) reads:

"The Judges, members, magistrates and justices, as the case may be, of the courts mentioned in clause (1) shall be independent, impartial and subject only to this Constitution and the law and shall conduct themselves in accordance with a code of conduct promulgated by Parliament."

The Petitioners submitted that the 1st Respondent is both an investigative and adjudicating authority. They wondered who had power or authority to determine whether or not a judicial officer has violated the Code of Conduct or enforce it, if indeed the 1st Respondent is not an adjudicative body. They maintained that the determination or adjudication of complaints of violation of the Judicial Code of Conduct is the responsibility of the 1st Respondent as evident in Section 24 of the Act. It was also the 1st Respondent's contention that the 1st Respondent upon receipt of the complaint presented before it has to make a determination or has to adjudicate whether a prima facie case has been made against a judicial officer.

The Petitioners also submitted that unless the Hon. Chief Justice Mr. Ernest L. Sakala and Mr. Justice Essau Chulu have advance knowledge of the outcome of the complaint and they are certain that the same will be in their favour, there is no sound reason for contending that Article 18(9) and (10) are not binding on the 1st Respondent. They concluded by submitting that since the questions posed by the Respondents have been answered in favour of the Petitioners they urged the Court to determine the substantive matter and grant them the order prayed for in their petition.

In reply Mr. Shonga, SC contended that the Petitioners have gone to great length, in their submissions, debating as to which is the correct method to interpret provisions of the Constitution. According to him, the simple approach is to question whether the provisions are ambiguous in nature; that if the answer be that they are, then the purposive approach would be adopted in interpreting them; and if they are clear and unambiguous, a literal approach would be adopted. The learned Attorney-General drew strength in advocating this approach from the case of ***Attorney-General, Movement for Multi-Party Democracy v Akashambatwa Mbikusita Lewanika and Another*** cited by the Petitioners.

He submitted that a closer perusal of the provisions of Article 18(9) and (10) of the Constitution persuaded him to conclude that they are so clear that there can be no debate about what their purport is. That Article 18(9) qualifies not only the sort of organ that is in contemplation but also the nature of the issue that organ should be determining for the said Article to apply. He contended that the Article will only apply if the organ in issue is either a court or an adjudicating authority; and further, that Court or adjudicating authority must be charged with the responsibility of determining not just any issue or dispute but only those issues that involve the determination of the existence or extent of any civil right or obligation.

Mr. Shonga, SC drew the Court's attention to paragraph 7 of the petition where the Petitioners aver that they laid a complaint against Chief Justice Ernest Sakala and

High Court Judge Essau Chulu that the said Judges misconducted themselves by violating Section 3, 4, 24(2) and 25(2) of the Act and that the relevant sections read as follows:

- "3. A judicial officer shall uphold the integrity, independence and impartiality of the judicature in accordance with the Constitution, this Act or any other law.***

- 4. Any judicial officer shall perform the duties of that office without bias and 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, sex, place or origin, marital status, political opinion, colour or creed and shall not permit any member of staff or any other person subject to the officer's directions and control to so discriminate or manifest bias or prejudice."***

He posed a question whether investigating the allegations levelled against the two Judges would, in any way, involve the determination of the existence or extent of a civil right. He stated that the term "Civil right" or "Bill of rights" refers to those rights guaranteed in Part III of the Constitution of Zambia. The learned Attorney-General submitted that it was unimaginable that the 1st Respondent would, in investigating the allegations by the Petitioners, be determining the existence or extent of any civil rights as the only court mandated to do so is the High Court and on appeal, the Supreme Court. He contended that the provisions of Article 28(1) of the Constitution are quite illustrative on this issue.

It was also his submission that if the 1st Respondent is not a court or an adjudicative body and does not determine the existence or extent of civil rights or obligations, then clearly no party is at liberty to rely on the provisions of Article 18(9)

with respect to any matter before the 1st Respondent. He contended that the obvious effect of this legal position is that the Petitioners' case immediately disintegrates.

Mr. Shonga, SC further submitted that the Petitioners seek to move the Court to order that the 1st Respondent be directed to give directions on the following issues within seven days of the date of the order;

- "(a) The period within which the Chief Justice, Mr. Ernest Sakala and Mr. Justice Essau Chulu must deliver their response to the complaint, if any;***
- (b) The period within which the Complainants must deliver their reactions to the response if any;***
- (c) The period within which the parties will be required to provide lists of documents they intend to rely upon at the hearing of the complaint;***
- (d) The period within which inspection of documents will take place;***
- (e) The date when the Complaint will be heard; and***
- (f) The place, open to the public, where the complaint will be heard and determined."***

He contended that the effect of the Petitioners' claims, if granted, will be that this Court will have given orders for directions with respect to how the 1st Respondent should conduct the Petitioners' complaint. According to the learned Attorney-General, such an eventuality would be incapable of being reconciled with the provisions of Sections 25 to 27 of the Act which set out the procedure to be adopted when a complaint is lodged and he questioned whether this Court is able to give a direction which would override the procedure contained in legislation. He submitted that to ask

this Court to give orders for directions in circumstances where no law permits is asking it to misdirect itself.

Mr. Shonga, SC also submitted that the Court process reveals that the 1st Respondent has been sued in its own name but a perusal of the Act shows that the 1st Respondent is not a body corporate and therefore, incapable of being sued in the manner the Petitioners have done.

For the above reasons, Mr. Shonga, SC submitted that sufficient reasons exist for the Court to exercise its powers under Order 14(A) of the Rules of the Supreme Court and dismiss this Petitions with costs.

I have considered the written submissions filed by the parties and the authorities cited. The first issue for determination is whether the 1st Respondent is capable of suing and being sued in its own name. The learned Attorney-General's position is that it cannot. On the other hand the Petitioners contended that the Court has been moved by way of a petition pursuant to Article 28(1) of the Constitution; and that a petition is not a suit because it falls under the realm of public law, like an application for judicial review under Order 53 of the Rules of the Supreme Court. I accept the Petitioners' contention as fortified by the authorities they have cited. Further, Black's Law Dictionary, Sixth edition defines "suit" as:

"A generic term, of comprehensive signification, referring to any proceeding by one person or persons against another or others in a court of law in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or in equity."

In the instant case the Petitioners are not, strictly speaking, pursuing any redress against the 1st Respondent. What is in issue, as aptly contended by the Petitioners, is the interpretation of the constitutional provisions in relation to the complaint they have

lodged with the Judicial Complaint's Authority. To that extent, therefore, there is no *lis inter partes* or suit by the Petitioners against the Respondents. As such the 1st Respondent could not be said to have been sued as a party in its own name. Consequently, I conclude that there is no impropriety in the 1st Respondent being cited as a "party" in this petition.

I now turn to the two preliminary issues raised by the learned Attorney-General. The first is whether Article 18(9) and (10) applies in this matter. This Article is not nebulous. It is as clear as crystal and it does not require a purposive interpretation as nothing more can be read in it. Its import is simply that a person who institutes proceedings in any court or adjudicating authority which is mandated to determine the **"existence or extent of any civil right or obligation"** must be given a fair hearing within a reasonable time. The question, therefore, is whether the 1st Respondent was created to make such a determination as envisaged in Article 18(9). The functions of the 1st Respondent are clearly stated in Section 24(1) of the Act. These are to receive complaints or allegations of misconduct against judicial officers; to investigate such complaints or allegations; and to submit its findings and recommendations to relevant authorities for further action. It is plain to me that the 1st Respondent does not determine any civil rights or obligations between parties to be amenable to Article 18(9). I cannot agree more with the Attorney-General that the 1st Respondent's functions are limited to the receipt of complaints or allegations of misconduct made against judicial officers and investigating them. Such functions are not what is envisaged in Article 18(9) of the Constitution.

The Petitioners would like this Court to adopt purposive interpretation of Section 24(1) of the Act because it is a constitutionally provided for Act, so that it can meet the provisions of Article 18(9). I am reluctant to pursue this path because, firstly, there is no ambiguity in Section 24(1) of the Act and secondly, such an interpretation would lead to absurdity. In the result, I conclude on the first preliminary issue that Article 18(9) and (10) of the Constitution does not apply in this matter.

The second preliminary issue is whether the 1st Respondent can be described as a Court or adjudicating authority as contemplated by Article 18(9). It is not difficult to discern that the 1st Respondent is not a court because it is not prescribed as such either in the Constitution or the Act. As to whether the 1st Respondent is an adjudicating authority, Black's Law Dictionary defines "adjudication" as:

"The legal process of resolving a dispute. The formal giving or pronouncing a judgment or decree in court proceedings; also the judgment or decision given. The entry of a decree by a court in respect to the parties in a case... It implies a hearing by a court, after notice, of legal evidence on the factual issue(s) involved."

The Petitioners contended, inter alia, that the 1st Respondent is both an investigative and adjudicating authority because it determines or adjudicates, for example, whether a prima facie case has been made against a judicial officer. I do not agree. According to Section 24(1) (a) of the Act, the 1st Respondent can make an opinion that a complaint or allegation against a judicial officer does not disclose a prima facie case without even investigating such complaint or allegation. From the above definition, it is clear that adjudicating or determining a dispute involves hearing parties where there is a dispute. However, an opinion that the allegation or complaint does not disclose a prima facie case is made by the 1st Respondent without such a process as there is no dispute between parties as such. And according to Section 25(8) of the Act a complaint or allegation against a judicial officer and any investigation carried out by the Judicial Complaints Authority is confidential and not open for public inspection. This in my view further buttresses the position that the 1st Respondent is not an adjudicating authority.

Furthermore, according to Section 24(1)(c) of the Act the 1st Respondent's function after investigating a complaint is to submit its findings and recommendations to other authorities for further action. I agree with the learned Attorney-General that

since the 1st Respondent is not empowered to make decisions which finally determine complaints or allegations, it does not qualify as an adjudicating authority. In my judgment the 1st Respondent is purely an investigating authority and this comes out clearly when one reads its functions stated in Section 24(1) of the Act. Consequently, I conclude on the second preliminary issue that the 1st Respondent cannot be described as either a Court or an adjudicating authority in the context of Article (18(9) of the Constitution.

Finally, the Petitioners' prayer is that the Court should grant an order directing the 1st Respondent to give directions on how it should conduct their complaint as specifically outlined in paragraph 16 of the petition. The procedure to be adopted by the 1st Respondent when a complaint is lodged is clearly stipulated in Sections 25 to 27 of the Act. No where in these sections is the Court's role provided for. As properly submitted by the learned Attorney-General, the Court would be misdirecting itself if it made the order being canvassed by the Petitioners. In my judgment it would be highly irresponsible for this Court to grant such an unconscionable order when there is in existence appropriate legislation providing for the *modus operandi* of the 1st Respondent's powers and functions.

Since the preliminary issues raised by the Respondents have been answered in their favour, I am compelled to arrive at the ineluctable conclusion that this petition must be dismissed in its entirety pursuant to Order 14A of the Rules of the Supreme Court. Costs shall abide the event and will be taxed in default of agreement.

Leave to appeal to the Supreme Court is granted.

DELIVERED THIS 4TH DAY OF NOVEMBER 2011

**C. KAJIMANGA
JUDGE**