IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. 111/ 2009**
HOLDEN AT LUSAKA **SCZ/8/135/09**
(Civil Jurisdiction)

B E T W E E N :

WILLIAM HARRINGTON **APPELLANT**

AND

HON. DORA SILIYA, MP (Femme Sole) **1ST RESPONDENT**
THE ATTORNEY GENERAL **2ND RESPONDENT**

CORAM: Mambilima, D.C.J.,Chibesakunda, Silomba, Mwanamwambwa and Chibomba, J.J.S.,
On 17th February 2010 and 8th July 2011

For the Appellant:	*Mr. B.C. Mutale, S.C., Ellis & Company and with him, Mr. L. Kalaluka of Ellis & Co.*
	Mr. W. Mubanga, Permanent Chambers
	Mr. W. Kabimba, of Wynter Kabimba & Co.
For the 1st Respondent:	*Mr. E.S. Silwamba, S.C., of Silwamba & Company and with him, Mr.L. Linyama of Silwamba & Company.*
For the 2nd Respondent:	*Professor M. P. Mvunga, S.C., of Mvunga & Associates.*

JUDGMENT

Mwanamwambwa, JS, delivered the Judgment of the Court.

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Cases Referred to:

1. **Nyampala Safaris (Z) Limited & Others v ZAWA & Others [2004] Z. R. 49.**
2. **Phiri Emmanuel v The People [1978] Z.R. 79.**
3. **Minersville School District v Gobits, 310 NS 586 [1940].**
4. **Jones v Opelika 316 NS584 [1943].**
5. **A.G. v Roy Clarke [2008] Z.R. 38.**
6. **Mung'omba & Others v Machungwa & Mandandi and A.G. [2003] Z.R. 17.**
7. **R v Panel on Take-Overs and Mergers, Ex-parte Datafin PLC**
8. **Anisminic Limited v Foreign Compensation Commission [1969] 2 AC 147.**
9. **R v Hill University Ex-parte Page [1993] AC, 682.**
10. **Inland Revenue Commissioners v National Federation of Self-Employed and Small Scale Business Limited [1981] 2 ALL E.R. 93.**
11. **Porter v Magill [2002] 1 ALL E.R. 465.**
12. **Mabenga v Wina and Others [2003] Z.R. 110.**
13. **Chikuta v Chipata Rural Council [1974] Z.R. 241.**
14. **New Plast Industries v The Commissioner of Lands and A.G. [2001] Z.R. 51.**
15. **Ridge v Baldwin [1963] 2 ALL E.R. 121.**

Legislation referred to:

1. **The Parliamentary and Ministerial Code of Conduct Act, CAP 16 of the Laws of Zambia. Sections 3, 4, 8, 13 and 14.**

Other Works referred to:

1. **Lewis Clive: Judicial Remedies in Public Law – Sweet and Maxwell, London page 186.**
2. **S.A. De Smith: Judiciary Review of Administrative Action (3rd Edition), at page 97.**

The delay in delivering this judgment is deeply regretted. It is due to a heavy workload arising from overlapping of Supreme Court and High Court work, coupled with other unexpected intervening events and the big size of the appeal record.

Hon. Judge S. Silomba was part of the Court that heard this appeal. He has since retired. Therefore, this Judgment is by the majority of the Court.

The appellant is appealing against a Judgment of the High Court of 16th June 2009. By that Judgment, the High Court:-

1. **Reversed the decision of the Tribunal, to the effect that the respondent had breached Article 54 (3) of the Constitution and**
2. **Confirmed the Tribunal's decision that the 1st respondent had not breached part II of the Parliamentary and Ministerial Code of Conduct Act, CAP 16 of the Laws of Zambia.**

The facts of the matter are that by a letter dated 16th February 2009, the appellant lodged a complaint with the Hon. Chief Justice against the 1st respondent, in her capacity, then as Minister of Transport and Communications. The complaint was that the 1st respondent had breached Part II of the Parliamentary and Ministerial Code of Conduct, CAP 16 of the Laws of Zambia *(hereinafter referred to as "the ACT")*. The particulars of the alleged breach in so far as relevant were:-

1. **That the 1st respondent, against the professional advice of the Attorney General, awarded a contract, in the sum of US $2,000,000, to R.P. Capital Partners of Cayman Islands, to value the assets of Zambia Telecommunications Corporation Limited (ZAMTEL), without compliance with the provisions of the Zambia National Tender Board (Z.N.T.B.) Act, CAP 394 of the Laws of Zambia.**

2. **That the 1st respondent, arbitrarily cancelled a duly awarded contract by the Z.N.T.B., to Thales Air Systems of South Africa, the successful bidder, for the supply, delivery and installation of a Zambia Air Traffic management surveillance radar system, at Lusaka, and then awarded the contract to SELEX Sistemi Integrati of Italy.**

The appellant asked the Hon. Chief Justice to have the allegations investigated under **Section 13 (3)** of the Act. In the process he was joined by a number of non governmental organisations. Pursuant to the complaint, the Hon. Acting Chief Justice, constituted a Tribunal to probe the allegations. The Tribunal consisted of two Supreme Court Judges and one High Court Judge.

The Tribunal conducted an inquiry into the allegations and submitted a report to His Excellency the President. The relevant holdings of the Tribunal were:-

1. **That the first allegation which was proved, did not fall under Part II of the Parliamentary and Ministerial Code of Conduct Act.**
2. **That by ignoring the legal advice of the Attorney General, the 1st respondent breached Article 54 (3) of the Constitution. The Tribunal made this observation under Section 14 (8) of the Act, for consideration by the President.**

The 1st respondent was not happy with the Tribunal's 2nd finding. So, she applied for Judicial Review, before the High Court. She sought an Order of Certiorari, to move into the High Court, for

the purpose of quashing and expunging from the Tribunal Report, the portion of the decision of 16th April 2009, in so far as the Tribunal decided and made recommendations, pursuant to **Section 14 (8)** of the Act, that the respondent was in breach of **Article 54 (3)** of **the Constitution.**

On behalf of the 1st respondent, in the Court below, three (3) grounds were raised and argued. These were:-

1. **Illegality,**
2. **Irrationality and**
3. **Procedural impropriety**

On **illegality**, three arguments were advanced. One was that the Tribunal exceeded its jurisdiction, as stipulated under the Act, when it decided that the 1st respondent breached Article 54 (3) of the Constitution and made recommendations on the alleged breach.

Second was that the Tribunal erred in law, when it purported to adjudicate on Constitutional matters and pronounced itself on the provisions of **the Constitution** of Zambia, as that is the preserve of the High Court.

Third was that even assuming that the Tribunal possessed the requisite jurisdiction, it still erred in law when it misconstrued the interpretation of Article 54 (3) of **the Constitution** of Zambia, that the 1st respondent's disregard of the Attorney General's advice, is a breach of **the Constitution**.

On **irrationality**, it was argued that the finding by the Tribunal that the 1st respondent was vicariously liable for a misfeasance allegedly committed by the Ministry of Communications and Transport, is a Wednesbury unreasonable.

On **procedural impropriety**, two arguments were made. One was that the Tribunal having been appointed pursuant to **Sections 13 and 14** of the Act, it had a restricted mandate of investigating alleged breaches of Part II of the Act. That the said mandate was restricted and no other matters could be considered. That however, the Tribunal went further and purported to pronounce itself on Constitutional matters by holding that the 1st respondent breached Article 54 (3) of **the Constitution**. That it was procedurally improper and a breach of the Rules of natural justice, for the Tribunal to pronounce itself on matters which had not been the subject of the proceedings and which the 1st respondent had not been given an opportunity to be heard in her defence.

Secondly, it was argued that the purported breach of the Constitution was not a cognate or minor allegation, in relation to alleged breach of Part II of the Act.

On **illegality**, in relation to exceeding jurisdiction, it was argued in the Court below, on behalf of the Attorney-General, that while Parts II and IV of the Act placed limitations on the nature of complaints that the Tribunal may find to be a breach of Part II of

the Act, the Act did not prohibit the Tribunal from considering provisions of the Constitution, as they relate to the alleged breach of Section 4 of the Act. That the Tribunal possessed the requisite jurisdiction to inquire into all manner of allegations under Section 4 and in that regard may draw in the Constitution.

On Article 54 (3), the position of the Attorney-General was that the Attorney-General's advice under that Article was not binding. Therefore, the State did not entirely agree with the Tribunal's finding on the issue.

On his application, the appellant was joined as a party to the Judicial Review proceedings. He was joined as an interested party; having lodged the complaint to the Chief Justice, which gave rise to the Tribunal's inquiry. The appellant was joined to the proceedings, Under **Order 53/14/76** of the **Rules of the Supreme Court, [1999**], which states:

> **"On the hearing of any motion or summons, as the case may be, for judicial review, if it appears to the Court that a *'a proper person'* desires to be heard in opposition and that he is such a proper person, that person will be heard not withstanding that he has not been served with notice of the motion or the summons."**

Having been so joined, the appellant commenced separate proceedings, within judicial review, without leave. This gave rise to another issue. Counsel for the 1st respondent attacked the move as

procedurally irregular and misconceived, for breach of **the Rules of the Supreme Court, Order 53, Rule 5 (2)**. That there is no provision under Order 53 which allows a party joined as a '*proper person*' to institute his own '*proceedings within proceedings*'. That a joined '*proper person*' should only be heard in opposition to the applicant's application.

Having evaluated the evidence and considered the various authorities, the learned trial Judge observed that the issues that arose were as follows:-

1. **What was the scope of judicial review?**
2. **Can Judges be held Wednesbury unreasonable, for having a different opinion with the High Court or a different opinion amongst Judges of the same Court?**
3. **Was there illegality or excess of jurisdiction when the Tribunal dealt with Article 54 (3)?**
4. **What is the general character and meaning of Article 54 (3)? and**
5. **Was there procedural impropriety?**

On the scope of judicial review, the learned trial Judge followed **Nyampala Safaris (Z) Limited and Others v Zambia Wildlife Authority & Others (1)** and stated that the basic principles underlying the process were as follows:-

(a) That the remedy of judicial review is concerned, not with the merits of the decision, but with the decision-making process itself;

(b) That the purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected and that it is not part of the purpose to substitute the opinion of the judiciary or of the individual Judge for that of the Authority constituted by law, to decide the matter in question.

(c) That a decision of an inferior Court or public Authority may be quashed, (by an order of certiorari) where:-

(i) The Authority acted without jurisdictions; or

(ii) The Authority exceeded its jurisdiction.

(iii) The Authority failed to comply with the rules of natural justice, where these rules apply; or

(iv) There is an error of law on the face of the record; or

(v) The decision is unreasonable in the wednesbury sense; meaning it is a decision which no person or body or persons, properly directing itself or themselves on the relevant law and acting reasonably, could have reached.

He referred to the following cases:-

(a) Phiri Emmanuel v The People (2)

(b) Minersville School District v Gobits, (3)

(c) Jones v Opelika (4)

and observed that holding different opinions among Judges was not unreasonable and was normative. He then rejected the Wednesbury unreasonable ground. He said that given the dignity of high office, he refused to characterise the members of the Tribunal as unreasonable.

On jurisdiction, he followed **A.G. v Roy Clarke (5)**, and observed that the Constitution was not part of the legislation intended to be dealt with under the terms of reference. Therefore, the 1st Respondent could only be vindicated or censured within the confines, parameters or context of the Act. So he held that there was an excess exercise of jurisdiction.

He then considered the meaning of Article 54 (3) at length. After reviewing several authorities, he observed that what was unconstitutional was failure to get the advice of the Attorney General and not failure to follow it. He held that the advice of the Attorney General, under Article 54 (3), is not binding; it is discretional or optional. In effect, he reversed the decision of the Tribunal on the issue.

He declined an invitation by the appellant, for him to make a legal finding that the tribunal failed to properly interpret Section 4 of the Act; that if they did, they would have found the 1st Respondent culpable. He pointed out that on the authority of **the Nyampala case (1)**, on judicial review, the function is not appellate. That the matter is not determined on merits. That under judicial review, he would not delve into the merits of the Tribunal's decision. He added that even if he was sitting as an appellate Court, he would not disturb the findings of fact.

The learned trial Judge then finally held as follows:-

"Having said that there is no coherent alternative to the excess of jurisdiction and the misinterpretation of Article 54 (3), arguments advanced by the applicant and substantially conceded by the Attorney (*succeed).* The Order of Certiorari to quash the finding that there was breach of the Constitution is granted, as prayed. The Tribunal's findings that there was no breach of Part II of the Ministerial Code of Conduct, remain undisturbed, which means she is cleared by the Tribunal, under Part II and by this Court, under Article 54 (3) of the Constitution and is so ordered".

There are seven (7) grounds of appeal. These read as follows:-

(1) The learned High Court Judge erred in law and in fact when he used judicial review proceedings as an appeal process by delving into the merits of the Tribunal's findings by purporting to interpret Article 54 (3) of the Constitution and holding that the Attorney General's advice is mandatory and therefore non compliance is inconsequential.

(2) The Court below misdirected itself in law and in fact when it held that intervenors once joined to judicial review proceedings are not at liberty to institute judicial review proceedings without leave of the Court.

(3) The learned Judge in the Court below erred in law when he heard the proceedings in the Court below notwithstanding he enjoys an intimate and excellent personal relationship with the members of the Tribunal, whose decisions were in issue. The Judge below ought to have recused himself.

(4) The Judge below erred in law and in fact when he held that a Judge cannot be held to be Wednesbury unreasonable.

(5) The learned trial Judge erred in both law and fact by failing to recognize and appreciate that incorrect understanding by the

tribunal of the provisions of Section 4 (a) and (b) of the Ministerial and Parliamentary Code of Conduct Act as read together with Article 52 of the Constitution of Zambia amounted to an error on the face of the record.

(6) The learned trial Judge erred in both law and fact when he held that the Tribunal exceeded its jurisdiction when it decided that the respondent had breached the Constitution and the laws made thereunder contrary to the applicable law and the evidence on record.

(7) The learned trial Judge erred in law and in fact for failure to quash the Hon. Tribunal's decision not to order that the respondent had breached the Ministerial and Parliamentary Code of Conduct Act on account of unreasonableness contrary to the evidence on record.

On the 1st ground, Mr. Mutale, State Counsel, the leading Counsel for the appellant, submits that the learned High Court Judge misdirected himself by delving into the merits of the Tribunal's findings, by purporting to interpret Article 54 (3) of the Constitution. He points out that the Court below, sitting as a review or supervisory Court, ought to have been concerned only with the decision making process and not with the merits of the decision. In support of his submissions he referred us to three authorities. One is **Nyampala Safaris (Z) Limited & Others v Zambia Wildlife Authority (1)**. Here he quoted a passage that reads:

"that it is important to remember that in every case, the purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subject and that

> **it is not part of that purpose to substitute the opinion of the judiciary or of individual Judges for that of the authority constituted by the law to decide the matter in question."**

Second is **Dean Mung'omba & two Others v Peter Machungwa, Golden Mandandi and the Attorney General (6)**, wherein this Court stated, as follows:

> **"Judicial review is not concerned with the merits of the decision..... We do not wish to go into the merits of the pending judicial review, but it is not shown that the circumstances or facts surrounding Dr. Kalumba can be subject to a judicial review. It seems that the appellants are not satisfied with the clearance, by the Tribunal of Dr. Kalumba, surely that cannot be subject of judicial review."**

Third is a text book, called **Judicial Remedies in Public Law** [2000] London, Sweet and Maxwell. He quoted a passage at page 353, which reads:

> **"Appeals deal with the merits of the case whereas review deals with the legality of the exercise of power."**

Coming back to this case, he argues that the Court below effectively substituted the Tribunal's opinion, vis-avis, the effect of the Attorney General's advice not being of binding nature and that non compliance thereof is inconsequential. He points out that the Court below went at length to impugn the Tribunal's interpretation of Article 54 (3) of the Constitution. He urges us to set aside the holding on Article 54 (3).

In response on behalf of the 1st respondent, Mr. Silwamba, State Counsel, argues that the learned review Judge was on firm ground, when he interpreted Article 54 (3) and reversed the Tribunal's finding thereunder. That the review and supervisory powers of the High Court should not be limited in the manner suggested by the appellant. He points out that the learned High Court Judge was called upon, in ground one, to make an order of certiorari, to quash and expunge from record, the decision of the Tribunal, made under Section 14 (8) of the Act, that the 1st respondent breached Article 54 (3) of **the Constitution**, for exceeding jurisdiction and in the alternative, for wrong interpretation of Article 54 (3). It is Mr. Silwamba's argument that in the circumstances, the learned review Judge had to pronounce himself on the issues raised before him. That doing so did not amount to delving into the merits of the matter. That what the learned trial Judge did was simply a necessary process in arriving at a decision as to whether the decision of the Tribunal could be challenged on the grounds of illegality, irrationality and procedural propriety. That it cannot be said to be an appeal at all. In support of his submissions, he cited **R v Panel on Take-Overs and Mergers, Ex-Parte Datafin PLC (7).**

On behalf of the 2nd respondent, the gist of the response by Professor Mvunga, State Counsel, is that the learned trial did not err in law and fact when he held that the Attorney General's advice

was not mandatory, as the holding was complemented by the holding that the Tribunal, in interpreting the provisions of the Constitution, exceeded its jurisdiction; and its finding of the breach of the Constitution did not take into the 1st respondent's right to be given an opportunity to be heard.

He points out that the Act is quite specific on the jurisdiction of the Tribunal established under the same Act. That the Tribunal having been appointed under Section 13 (3) of the Act, is enjoined to inquire under Section 4 of the Act, the five areas of conduct, as specified therein. He argues that in nothing in terms of the jurisdiction of the Tribunal includes inquiry into whether **the Constitution** has been infringed. That there is no provision under the Act to make a general inquiry into Constitutional issues. That such inquiry can only be justified as it relates to violation of Section 4 of the Act. That if ever the Tribunal had jurisdiction to delve into any other matters, then that could only be justified, if permitted under Section 13 (8) of the Act. This Section provides:-

> **"13 (8) In its report, the Tribunal may make such recommendations as to administrative actions criminal prosecutions or other further actions to be taken as it thinks fit."**

He submits that this Section, in its proper context, means that the Tribunal can make such recommendations as would arise from its findings of violations under Section 4 of the Act. He points out that the Tribunal absolved the 1st respondent on the allegations of

impropriety under Section 4 of the Act. That with the acquittal of the 1st respondent on alleged breach of Section 4, the matter should have rested there. He argues that by proceeding to delve into the breach of the Constitution, the Tribunal exceeded its jurisdiction. It went beyond the limits of Section 4. That the Act did not allow the Tribunal to go that far. As authority for disapproving such excess of authority, that the Tribunal cannot do that which is not authorised the by the Act of Parliament, he referred us to the following:-

(a) **Anisminic Limited v Foreign Compensation Commission (8)**
(b) **R v Hill University Ex-parte Page (9)**
(c) **S. A. De Smith: Judiciary Review of Administrative Action. (3rd Edition), at page 97.**

We have considered the High Court Judgment, ground one and the submissions thereon. We have also looked at Sections 4, and 13 of the Act, together with the authorities we were referred to.

The Tribunal in this matter was appointed under Section 13 (3) of the Act. It was tasked to investigate allegations of breach of Section 4 of the Act, by the 1st respondent, as Minister of Communications and Transport. The alleged breaches were as set out above. Section 4 of the Act provide:

> **"4. A Member shall be considered to have breached the code of conduct if he knowingly acquires any significant pecuniary advantage, or assists in the acquisition of pecuniary advantage by another person, by –**

(a) Improperly using or benefitting from information which is obtained in the course of his official duties and which is not generally available to the public.

(b) Disclosing any official information to unauthorized persons.

(c) Exerting any improper influence in the appointment, promotion, or disciplining or removal of a public officer.

(d) Directly or indirectly converting Government property for personal or any other unauthorized use; or

(e) Soliciting or accepting transfers of economic benefit, other than:-

(i) Benefits of nominal value, including customary hospitality and token gifts;

(ii) Gifts from close family members; or

(iii) Transfers pursuant to an enforceable property right of the Member or pursuant to a contract for which value is given."

The nature and scope of judicial review is stated in **Nyampala Safaris Limited & Others v Zambia Wildlife Authority and Others (1)** cited by both the learned trial Judge and Mr. Mutale. In that case this Court held:

"1. That the remedy of judicial review is concerned not with the merits of the decision, but the decision-making process; and

2. That the purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subject and that it is not part of that purpose to substitute the opinion of the Judiciary or of individual Judges for that of the authority constituted by the law to decide the matter in question."

In the instant case, the learned trial Judge was on firm ground when he held that the Tribunal exceeded its jurisdiction on the grounds:-

> **(a) That the Constitution was not part of the legislation intended to be dealt with under the terms of reference; and**
>
> **(b) That the 1st respondent could only be vindicated or censured within the confines, parameters or context of the Act.**

Having held, as he did, on jurisdiction, we agree with Professor Mvunga's submission that the matter should have ended there. The effect of that holding was to set aside and discard the Tribunal's decision on the status of the Attorney General's advice, under Article 54 (3) of **the Constitution**. The learned trial Judge erred in law when he proceeded to interpret Article 54 (3) of **the Constitution**. In doing so, he delved into the merits of the matter; he substituted his opinion for that of the Tribunal. Such a move was clearly outside the scope of judicial review. We agree with the submissions of Mr. Mutale on the 1st ground of appeal.

We note that the 1st respondent's 3rd head of arguments, under ground one, invited the learned trial Judge to reverse the Tribunal's decision on Article 54 (3) of **the Constitution** and interpret the Article differently. In our view, for the reason given above, he should have declined the invitation. He should not have considered that head of arguments. On this particular issue, we do not accept Mr. Silwamba's argument that the learned trial Judge

had to pronounce himself on the issue; that he had to delve into the provisions of the relevant statutes including **the Constitution**, because the issue was raised before him. In our view, given the 1st head of arguments under ground one, as set out above, the 3rd head of arguments, under the same ground, should not have been raised; because it brought in appellate jurisdiction. It invited the learned trial Judge to deal with the issue as if he was an appellate Judge. We wish to add that a trial or appellate Court, is at liberty not to rule on an issue raised before it, if it is of the view that ruling on such an issue is unnecessary or would go beyond what needs to be adjudicated upon. Of course, we still stand by our earlier decision that a Court should adjudicate on all issues placed before it; so as to achieve finality. However, we wish to emphasize that such an issue must be necessary or relevant, and properly brought or raised before the Court: **See Section 13** of **the High Court Act, CAP 27** of the Laws of Zambia.

For the foregoing reasons, we set aside the learned trial Judge's interpretation of, and decision on, Article 54 (3) of the Constitution. In effect, ground one of the appeal is hereby allowed.

Ground two is on procedure regarding the appellant who was joined to the judicial review proceedings in the Court below, as an interested party. The question was whether the appellant having

been joined as party, required specific leave to commence his own parallel judicial review proceedings.

The gist of Mr. Mutale's argument is that since the Court had found that the appellant had sufficient interest in the judicial proceedings when he was joined to the proceedings, the requirement for leave to apply for judicial review was dispensed with. That the rationale for seeking leave was adequately considered at the stage when the appellant was joined to the proceedings, as an intervenor; and as such it would have been superfluous for him to seek leave, before seeking any relief of his own, within the said proceedings. That once a party has been joined to judicial review proceedings, such a party is at liberty to raise any issue or question relating to or connected to the decision under review. That once initial leave has been granted to commence judicial review proceedings, the appellant, as an interested party joined to such proceedings, is automatically covered by such leave to commence judicial review proceedings. That the appellant was allowed to intervene to avoid multiplicity of actions, whereby he would have to commence fresh judicial review proceedings. He points out that sufficient interest and locus standi in the matter, are some of the issues considered when leave for judicial review is granted. In support of his arguments, he referred us to the following:-

(a) R.S.C., Order 53, Rule 3 (7), Order 15, Rule 6 (a).

(b) Spelling Goldberg Productions v BPC Publishing [1981] R.P.C. 280, at page 281.

(c) Roy v Kensington and Chelsea and Westminister Family Practitioner Committee [1992] 1 ALL ER 705.

In response on behalf of the 1st respondent, Mr. Silwamba made lengthy arguments. The gist of his arguments is that judicial review proceedings are solely governed by Order 53 of the Rules of the Supreme Court, 1999, which comprehensively outlines the law and procedure in judicial review. He argues that there is no provision under Order 53, Rule 9 (1) or Order 53/14/76, which allows a party joined as a *"proper person"* to institute their own *'proceedings within proceedings'*. That the purpose of joining the appellant, as an interested person and intervenor, to the review proceedings, was to be allowed to be heard in opposition to the 1st respondent's application. That the law does not allow the intervenor to go on a frolick of his own. He points out that the purpose of the requirement of leave is mainly two fold. One is to eliminate frivolous, vexatious or hopeless applications for judicial review without the need for a substantive inter parte judicial review hearing. That the other is to ensure that an applicant is only allowed to proceed to a substantive hearing if the Court is satisfied that there is a case fit for further investigation at a full inter parte hearing. He submits that the law is clear as to necessity for leave in applying for leave for judicial review. Accordingly, the leave stage cannot be surreptitiously circumvented by an intervenor, as purported by the appellant in this case. That the grant of leave to an interested party to join review proceedings, does not amount to a

grant of leave to commence judicial review proceedings. In support of his submissions he referred the Court to the following:-

(a) R.S.C, Order 53, Rule 3, 53/1-14/32.

(b) Dean Mung'omba & Others v Peter Machungwa & Others (6)

(c) Inland Revenue Commissioners v National Federation of Self-Employed and Small Scale Business Limited (10).

He argues that the learned trial Judge was on firm ground when he refused the appellant's attempt to commence separate judicial review proceedings, after having been joined to these proceedings.

We have considered the arguments on this ground. Sufficient interest in the matter is not the only ground on which a party can be granted leave to commence judicial review proceedings. A party wishing to commence judicial review proceedings must apply for leave to do so and must show that there is a case fit for further investigations at full inter partes hearing. That there is a case on merits, warranting full inter parte hearing. In our view, a party joined as an interested party or intervenor, in judicial review proceedings, as was done in this case, must apply for leave to commence his own parallel judicial review proceedings. We do not accept the argument by Mr. Mutale, State Counsel, that once initial leave is granted to the applicant to commence judicial review proceedings, an interested party joined to such proceedings, is automatically covered by such leave to commence his own judicial review proceedings. Therefore, we hold that the learned trial Judge was on firm ground in refusing to adjudicate on parallel judicial review proceedings commenced by the appellant, without leave.

Such parallel proceedings were not properly before him. So he had no jurisdiction to adjudicate on them. **Accordingly, ground two is hereby dismissed.**

On **ground three,** Mr. Mutale submits that the learned trial Judge was conflicted and biased, with regard to the members of the Tribunal, whose decision fell to be reviewed. He argues that the learned trial Judge was biased and as such he could not have been neutral and impartial in adjudicating over the matter, given the nature of the relationship he enjoyed with the members of the Tribunal. That the learned trial Judge was biased because he described his relationship with the members of the Tribunal as follows:-

> **"(i) His professional guiders, who judicial eminence transcends our borders.**
>
> **(ii) He routinely consults them and enjoys an excellent personal relationship with the members of the Tribunal.**
>
> **(iii) Members of the Tribunal are among the friendliest, warm hearted individuals in the Institution."**

He contends that such close and intimate relationship seriously impaired the learned trial Judge's sound judgment. That the close relationship must have weighed heavily in the Judge's mind such that he could not have impartially dealt with the issues at hand. In support of the submissions, he cited two cases. One is **Porter v Magill (11)**, where it was held:

> **"That the Court must first ascertain all circumstances which make a hearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair minded and**

> **informed observer to conclude that there was a real possibility or a danger the two being the same that the tribunal was biased."**

The other is **Locaball (UK) Limited v Bayfield Properties Limited & Another,** where the English Court of Appeal held:

> **"In contrast, a real danger of bias may well be thought to arise if there is personal friendship or animosity between the Judge and any member of the public involved in the case, particularly if that person's credibility may be significant in the outcome of the case, if, in a case where the Judge has to determine an individual's credibility, he has rejected that person's evidence, in a previous case, in terms so outspoken that they throw doubt on his ability to approach that person's evidence with an open mind on a later occasion; if the Judge has expressed views, particularly in the course of the hearing, on any question at issue extreme and unbalanced terms that they cast doubt on his ability to try the issue with an objective judicial mind or if for any other reason, there is a real ground for doubting the Judge's ability to ignore extraneous considerations, prejudices and predilections and inability to bring an objective judgment to bear on the issue."**

(Unfortunately, he did not give the citation of the case). He adds that a fair-minded and informed observer would have concluded that there was miscarriage of justice, in the circumstances. That public confidence in the Judiciary may be eroded by improper conduct, especially where the Judge allows family, social, political or other relationship to influence judicial conduct or judgment. He argues that the learned trial Judge ought to have recused himself on the basis that there was an appearance of bias arising from the social relationship existing between him and the members of the Tribunal.

In response, on behalf of the 1st respondent, Mr. Silwamba advances three main arguments.

Firstly, he argues that the learned trial Judge's comments relating to his relationship with members of the Tribunal were made obiter dicta and did not constitute the ratio decidendi of the judgment. As authority for the argument, he cited **Sikota Wina v Michael Mabenga (12)**, wherein it was decided that a remark made obiter dictum, did not go to the root of the judgment appealed against.

Secondly, he argues that in any event, the decision of the learned trial Judge went against the decision of the Tribunal, a clear indication that the learned trial Judge did not lose objectivity.

Thirdly, he argues that the learned trial Judge's comments, alluded to the well known professional relationship that Judges enjoy as brothers and sisters on the Bench, which relationship does not amount to prejudice, for which a Judge can be requested to recuse himself. That the Hon. Judge did not allude to any personal relationship outside the scope of his professional relationship to the Tribunal members, as Judges. He adds that the professional relationship that a Judge enjoys with other Judges cannot be construed to constitute sufficient ground to constitute bias. That he quashed the decision of the Honourable Tribunal, clearly illustrates the complete lack of bias. Mr. Silwamba then refers us

to **Zambia National Holding Limited and UNIP v A.G. [1993/94] Z.L.R. 115,** wherein the Supreme Court acknowledged the eminence and seniority of the learned trial Judge and then proceeded to overrule him. That in that case, the learned Chief Justice did not recuse himself, just because the learned trial Judge, was then the Deputy Chief Justice.

We must say at once that we totally agree with the arguments of Mr. Silwamba. They are precise and on point. We wish to add that on the facts of this matter, we find ground three and Mr. Mutale's arguments thereon, unrealistic and unfair to the learned trial Judge. There is an increasing tendency by litigants and their advocates to make unwarranted personal imputations of bias against Judges, when they lose cases. Judges are not in a position to reply to such imputations. We strongly disapprove of this practice. In our view, imputations of bias should not be lightly made against a Judge. They should only be made in clear situations, such as that described in **Localbail UK Limited v Bayfield Properties Limited & Another**, as set out above. That was not the case here. **There are no merits in ground three. We dismiss it.**

On **ground four**, Mr. Mutale submits that the learned trial Judge misdirected himself and abdicated his authority when he held that a Judge cannot be wednesbury unreasonable. He points out that wednesbury unreasonableness is one of the principles that

constitute the doctrine of judicial review. He submits that a tribunal, howsoever constituted, is amenable to judicial review and its decisions being held to be wednesbury unreasonable, by a Court of competent jurisdiction. He points out that members of the Tribunal were not sitting as Supreme Court or High Court Judges, respectively, but as members of the Tribunal. That as such, are amenable to judicial review proceedings, under the ground of wednesbury unreasonableness. And if proved, can be held wednesbury unreasonable.

We agree with Mr. Mutale that, in an appropriate case, a decision made by a Tribunal consisting of Judges of the High Court and the Supreme Court, can be held to be unreasonable in the wednesbury sense. When a decision of a Tribunal is under judicial review, the focus is on the decision itself and not the individuals who constituted the Tribunal. **Accordingly we allow ground four.**

On **ground five** Mr. Mutale submits that the trial Court misdirected itself when it failed to recognize and appreciate the provisions of Section 4 (a) and (b) of the Act as read with **Article 54** of **the Constitution**. That the trial Court should have quashed the Tribunal's decision for being unreasonable and contrary to Section 4 (a) of the Act. He argues that the conduct of the 1st respondent in awarding a contract to R P Capital Partners, directly benefitted that company, as it became entitled to a base fee of US $2 million, with the assistance of the 1st respondent, through information she

acquired by virtue of her position as a public officer, and which information was not available to the public at the time. He refers to the six (6) findings of the Tribunal, as set out above, and argues that given those findings there was evidence established by the Tribunal that the 1st respondent assisted another person in the acquisition of pecuniary advantage of US $2 million. That it was also evident that the improper conduct of the 1st respondent resulted into disclosing of official information to unauthorized persons, which was a breach of Section 4 of the Act.

Counsel also argues that there was an error on the face of the record in that the Tribunal incorrectly understood the meaning of Section 4 (a) and (b) of the Act, as read with Article 54 of **the Constitution**. As regards Article 54, he argues that, having regard to Section 14 (8) of the Act, the Tribunal had wide powers, and discretion in making recommendations in its report, after its findings which go beyond the allegations but taking into account the inquiry and evidence before it. Therefore, the recommendations it made were on firm ground. It did not depart from the powers with which it is clothed by Section 14 (8). These are the submissions in the Court below which the learned trial Judge is said to have ignored and instead dealt with procedure under the Rules of the Supreme Court, Order 53. Procedure is the subject of ground two.

In response on behalf of the 1st respondent, Mr. Silwamba reiterated his submissions under ground two that the grant of leave to join proceedings as an intervenor did not entitle the appellant to commence separate judicial review proceedings. He adds that even if the appellant had been granted leave to apply for judicial review, he had commenced his application by the wrong mode, namely *"interveno's Notice of Motion"*. That the correct mode is Originating Notice of Motion. He argues that the appellant's Notice of Motion was not properly before the Court and hence incompetent. Therefore, the learned trial Judge had no jurisdiction to entertain it. So he was on firm ground in refusing to adjudicate on it. In support of his submissions, he cited the following:-

(a) Chikuta v Chipata Rural Council (13) and

(b) New Plast Industries v The Commissioner of Lands and A.G. (14).

We have considered the ground and the submissions thereon. This ground is interlinked with ground two. Our decision on ground two has a bearing on this ground. In ground two, we said that the appellant needed leave in the Court below, to commence parallel judicial review of the Tribunal's decision. He did not get such leave. Therefore, we agree with Mr. Silwamba that his counter application for judicial review was not properly before the Court. That being the case, we accept Mr. Silwamba's argument that the learned trial Judge correctly declined to entertain the application. The learned trial Judge correctly refused to rule on the merits or otherwise of these arguments. We similarly decline to rule on the merits or otherwise of Mr. Mutale's arguments on Section 4 (a) and

(b) of the Act and Article 54 of **the Constitution**. **Accordingly, ground five fails.**

On **ground six (6)**, Mr. Mutale submits that Sections 3 (4), 3 (1) and 3 (2) of the Act confers on the Tribunal the jurisdiction to have regard to the provisions of **the Constitution**, when investigating any aspect therein. That investigation for a breach of the Code of Conduct cannot be carried out in vacuum or isolation from other laws. That in terms of other laws, the commencement point is **the Constitution** of Zambia, which is the supreme law of Zambia. That in the circumstances of this case, Section 4 of the Act should be read together with Article 54 (3) of **the Constitution**; and not in isolation.

In response on behalf of the 1st respondent, Mr. Silwamba supports the learned trial Judge's holding that the Tribunal exceeded its jurisdiction in pronouncing itself on purported breaches of **the Constitution**. He submits that the jurisdiction of the Tribunal constituted under the Act, is expressly stipulated under Sections 3, 4, 8, 13 and 14 of the Act. He points out that the complaint against the 1st respondent was filed pursuant to Sections 4, 13 and 14 of the Act. That the Tribunal was to inquire as to whether the 1st respondent had breached Part II of the Act. He points out that the Tribunal found as a fact that the 1st respondent did not breach Part II of the Act, and duly cleared her of all the three allegations. He submits that the Tribunal totally acted in

excess of its jurisdiction and as such illegally, when it purported to invoke Section 14 (8) of the Act, to make a finding that the 1st respondent had acted contrary to **the Constitution**. It is his argument that Section 14 (8) of the Act mandates the Tribunal to make recommendations to the President, to investigate whether the 1st respondent had breached Article 54 (3) of **the Constitution**; and not to adjudicate on matters that are not within its scope, while not affording the 1st respondent an opportunity to be heard on the specific constitutional issues. In support of his submissions he cited **Ridge v Baldwin and Others (15)**. In that case, Lord Hodson observed that where the power to be exercised involves a charge of misconduct made against the person who is dismissed, the principles of natural justice have to be observed before the power is exercised. He then specified the three features of natural justice as follows:-

1. **The right to be heard by an un biased tribunal.**
2. **The right to have notice of charges of misconduct; and**
3. **The right to be heard in answer to those charges.**

He adds that only the High Court has original and exclusive jurisdiction to deal with Constitutional matters; that the Tribunal constituted under the Act does not have such jurisdiction. That Section 3 (1) and (2) does not confer jurisdiction on the Tribunal, to adjudicate on alleged breaches of the Constitution.

Professor Mvunga's submissions on ground one, on behalf of the 2nd respondent, are relevant to this ground. They are already set out above. We do not wish to repeat them here.

We have considered ground six, the submissions thereon. We have also looked at the authorities cited, Sections 3 (1), 3 (2), 4, 13 and 14 of Act CAP 16. In so far as relevant, the Sections read as follows:

"S.3 (1) The provisions of this Part shall constitute part of the code of conduct for Members for the purposes of the Constitution, a breach of which results in the vacation of the seat of the Member concerned.

(2) The provisions of this Part, in their application to Ministers and Deputy Ministers, shall constitute part of the code of conduct for Ministers for the purposes of the Constitution."

"S.4 A Member shall be considered to have breached the code of conduct if he knowingly acquires any significant pecuniary advantage, or assists in the acquisition of pecuniary advantage by another person, by:

(a) Improperly using or benefitting from information which is obtained in the course of his official duties and which is not generally available to the public.

(b) Disclosing any official information to unauthorized persons.

(c) Exerting any improper influence in the appointment, promotion, or disciplining or removal of a public officer.

(d) Directly or indirectly converting Government property for personal or any other unauthorized use; or

(e) Soliciting or accepting transfers of economic benefit, other than:-

(i) Benefits of nominal value, including customary hospitality and token gifts.

(ii) Gifts from close family members; or

(iii) transfers pursuant to an enforceable property right of the Member or pursuant to a contact for which full value is given."

"13 (1) An allegation that a Member has breached Part II may be made to the Chief Justice by any person, in writing giving particulars of the breaches or breaches alleged, signed by the complainant and giving the complainant's name and address

(2) Where a Member considers that a statement made in the press or through the other public media alleges, directly or by implication, that he has bleached Part II, he may report the particulars of the breach or breaches alleged, in writing, to the Chief Justice and request that the matter be referred to a Tribunal."

"14 (1) A tribunal for the purposes of this Act shall consist of three persons appointed by the Chief Justice from amongst persons who hold or have held the office of Judge of the Supreme Court or of the High Court.

(2) Where a tribunal has been constituted under Subsection (3) of Section 13, the Chief Justice may commission it to investigate further allegations received by him under that Section, whether against the Member concerned or another Member.

(3) The Chief Justice shall appoint one Member of the tribunal as Chairman.

(5) A tribunal shall conduct its inquiry in public:

Provided that may exclude representatives of the press or any or all other persons if it considers it necessary so to do for the preservation of order, for the due conduct of the inquiry or for any other reason.

(6) A tribunal may engage the services of such technical advisors or other experts as it considers necessary for the proper conduct of the inquiry.

(7) A tribunal may request assistance from other investigative organs, including the Police, the Anti-Corruption Commission and the Commission for Investigations, and those organs shall be empowered to provide information to the tribunal and to conduct investigations on its behalf.

(8) In its report, the tribunal may make such recommendations as to administrative actions, criminal prosecutions or other further actions to be taken as it thinks fit.

(9) If the tribunal considers that an allegation was malicious, frivolous or vexatious, or that the particulars accompanying it are insufficient to allow a proper investigation to proceed, it shall say so in its report.

(10) Sections 7, 11, 13, 14, 15 and 17 of the Inquiries Act shall apply to a tribunal as if:

(a) the tribunal were a commission appointed under the Act.

(b) a reference to a commissioner were a reference to a member of the tribuna; and.

(c) a reference to the President were a reference to the Chief Justice."

At this stage, we wish to point out that ground six considerably overlaps with ground one.

The first issue is the jurisdiction of the Tribunal. The Tribunal derived its jurisdiction from Section 13 (3) and 14 of the Act, as read with its letter of its appointment of 25th February 2009. It

derives its jurisdiction from these two Sections because it was appointed pursuant to them. It also derives jurisdiction from the letter of appointment because that letter specified the allegations it was tasked to investigate. The two Sections are quoted above. The letter of appointment reads as follows:-

> **"CHIEF JUSTICE CHAMBERS**
> **SUPREME COURT**
> **LUSAKA**
>
> ***CONFIDENTIAL***
>
> **TJ/CJ/4/17/1**
>
> **25th February 2009**
>
> **The Hon. Mr. Justice D.K. Chirwa**
> **Supreme Court Judge**
> **LUSAKA**
>
> **The Hon. Mr. Justice P. Chitengi**
> **Supreme Court Judge**
> **LUSAKA**
>
> **The Hon. Mr. Justice E. Hamaundu**
> **High Court Judge**
> **LUSAKA**
>
> **RE: APPOINTMENT AS A TRIBUNAL UNDER THE PARLIAMENTARY AND MINISTERIAL CODE OF CONDUCT**
>
> **This serves to notify you the distinguished addressees of your appointments as a Tribunal under the Parliamentary and Ministerial Code of Conduct Act for purposes of considering complaints relating to the matters lodged by Mr. William Harrington and the Civil Societies. The complaints are against the Hon. Dora Siliya.**
>
> **I hereby appoint the Hon. Mr. Justice D.K. Chirwa to be the Chairman of the Tribunal.**
>
> **For ease of reference, I enclose the complaints and the accompanying documents from the complainants.**

I have no doubt that you will serve the copies on the Member of Parliament complained against.

Please note that according to the Act, the Inquiry and the Report have to be completed within a period of 45 days from the date hereof.

I wish you all the best of luck in the performance of this national duty.

Signed
E.L. SAKALA
CHIEF JUSTICE"

The second issue is the allegations over which the 1st respondent was investigated. They were three specific allegations against her. These are set out at the beginning of the Judgment. All allege that the 1st respondent breached Part II of the Act. The inquiry was centered on alleged breach of Part II of the Act. The 1st respondent was afforded an opportunity to be heard on the alleged breach of Part II of the Act. She was not investigated for alleged breach of Article 54 (3) of **the Constitution** and was not heard on that alleged breach.

We agree with the decision of the learned trial Judge, the submissions of Mr. Silwamba and Professor Mvunga that the Tribunal's jurisdiction was confined to investigating the 1st respondent's alleged breaches of Part II of the Act. That was what it was tasked to do. The Tribunal was not tasked to investigate the 1st respondent for alleged breach of **the Constitution**. There is no provision under the Act or the Tribunal's terms of reference, to make a general inquiry into Constitutional issues. Such an inquiry

can only be justified if it related to breach of Section 4 of the Act, which was not the case in this particular matter. The Tribunal exceeded its jurisdiction when it pronounced itself on breach of **the Constitution**. At the same time, it breached the Rules of Natural Justice, because the 1st respondent was not afforded a chance to be heard on alleged breach of **the Constitution**. **For the foregoing reasons, Ground Six fails.**

With regard to **ground seven**, Mr. Mutale refers us to the relevant provisions of Section 4 of the Act, which again reads as follows:-

> **"4 A member shall be considered to have breached the Code of Conduct if he knowingly acquires any significant pecuniary advantage or assists in the acquisition of pecuniary advantage by another person by:**
>
> **(a) Improperly or benefitting from information which is obtained in the course of his official duties and which is not generally available to the public.**
>
> **(b) Disclosing any official information to unauthorised person."**

He then refers us to the six findings of the Tribunal, which read as follows:-

> **(i) That the 1st respondent assisted in the acquisition of pecuniary advantage by another person, namely R.P. Capital Partners.**
>
> **(ii) The Government became bound by the memorandum of understanding to allow R. P. Capital Partners to proceed to provide consultancy services leading to the sale of ZAMTEL and thereby bound to pay at least US $2 million.**

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(iii) **The payment of US $2 million to R.P.Capital Partners was without the approval of the Zambia Public Procurement Authority and clearly beyond the Minister's threshold.**

(iv) **R.P. Capital Partners simply received an appointment with the 1st respondent and on the appointed day presented to her and her officials a proposal to value ZAMTEL.**

(v) **The Minister did not select R.P. Capital Partners from any shortlist of bidders mentioned, contrary to law and procedure and got themselves a memorandum of understanding. It is clear that the manner in which R.P. Partners were selected was against the provisions of the Public Procurement Authority Act.**

(vi) **The evidence clearly shows that R.P. Capital Partners went to the Ministry through Hon. Dora Siliya. Therefore, the omission must squarely be put on the shoulders of the Hon. Dora Siliya.**

(vii) **Therefore, we find that Hon. Dora Siliya did not follow the requisite tender process in the selection of R.P. Capital Partners Limited.**

He then submits that it is abundantly clear that the Tribunal's own six findings that the 1st respondent assisted another person in the acquisition of pecuniary advantage. That the other person so assisted was R.P. Capital Partners. And the pecuniary advantage being the US $2 million base fee. He submits that the evidence on record showed that the 1st respondent contravened Section 4 of the Act. Therefore, the decision to clear her was so unreasonable and in total contradiction and misinterpretation of application of the findings of the Tribunal's investigations, as set out above. He

submits that the Tribunal's decision ought to be quashed as being unreasonable and in defiance of logic or accepted moral standard; that no sensible person, who had applied his mind to the question to be decided, could have arrived at it. In support of these submissions, he referred us to **CLIVE LEWIS – JUDICIAL REMEDIES IN PUBLIC LAW**.

In response on behalf of the 1st respondent, Mr. Silwamba totally reiterates his submissions under ground five; the gist of which is that the learned trial Judge was on firm ground in refusing to delve into the appellant's separate application for judicial review.

We have looked at the record of appeal, the authority cited and Section 4 of the Act. We have also considered the submissions on this ground. We note that the issues in this ground are substantially the same as those in ground five; such that this ground is almost a repeat of ground five. There are six main issues in ground five. One is that the conduct of the 1st respondent financially benefitted R.P. Capital Partners to the tune of US $2 million. Second is that her conduct breached Section 4 of the Act. Third is that on the basis of the six findings of the Tribunal, it should have found that the 1st respondent breached Section 4 of the Act. Fourth is that by absolving the 1st respondent from breach of Section 4 of the Act, the Tribunal made an error on law and behaved unreasonably. Fifth is that the learned trial Judge should have quashed the Tribunal's decision for being unreasonable.

Sixth, we are being invited to quash the Tribunal's decision, for being unreasonable. These are the very issues raised in ground five.

Additionally, as we pointed out in grounds two and five, the learned trial Judge declined to adjudicate on these issues because they were not properly before him. The appellant did not follow the correct procedure in his bid to raise the issues before the trial Court. In ground two and five, we upheld the learned trial Judge's refusal to adjudicate on the issues because they were not properly before him. Then in ground five we proceeded to refuse to rule on the merits of the issues, for the reason that they were not properly before the trial Court. We are of the view that if an issue was not properly before the trial Court and was correctly not adjudicated upon at trial, we cannot deal with it as an appellate Court. For the foregoing reasons, we repeat our decision on ground five and refuse to deal with the merits of the issues in ground seven. **Accordingly, ground seven fails.**

In the final analysis, this appeal is dismissed. We note that the appeal raised important legal and Constitutional issues. We order that each party bears its own costs.

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I.C. MAMBILIMA
DEPUTY CHIEF JUSTICE

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L.P.CHIBESAKUNDA
SUPREME COURT JUDGE

.....
S. S. SILOMBA
SUPREME COURT JUDGE

.....
M. S. MWANAMWAMBWA
SUPREME COURT JUDGE

.....
H. CHIBOMBA
SUPREME COURT JUDGE