IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 069/2012**

HOLDEN AT KABWE

(CIVIL JURISDICTION)

BETWEEN:

MICHAEL MABENGA **APPELLANT**

AND

THE POST NEWSPAPERS LIMITED **RESPONDENT**

CORAM: Mwanamwambwa, Ag. DCJ, Wood and Malila, JJS.

On 14th April, 2015 and 21st May, 2015.

For the Appellant: Mr. C.L Mundia of Messrs C.L Mundia and Company.

For the Respondent: Mr. N. Nchito of Messrs Nchito and Nchito.

JUDGMENT

Wood, JS, delivered the judgment of the Court.

CASES REFERRED TO:

1. *Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited (1995/ 1997) Z.R. 187.*
2. *Wilheim Roman Buchman v Attorney General (1993/ 1994) Z.R.131.*
3. *Roland Leon Norton v Nicholas Lostrom (2010) Z.R. 360.*
4. *Mwenya (Moses) v The People (1973) Z.R. 261.*
5. *Zambia Telecommunications Company Limited v Celtel Zambia Limited (2008) Z.R. 44 Vol. 2.*
6. *Metropolitan Properties Co. (F.G.C.) Ltd vs Lannon (1968) 1 Q.B. 599.*

7. *R. v Camborne Justices Ex-Parte Pearce (1955) 1 Q.B.41.*
8. *Collett v Van Zyl Brothers Limited (1966) Z.R. 65.*

LEGISLATION REFERRED TO:

1. *Section 23(1) of the High Court Act, Chapter 27 of the Laws of Zambia.*
2. *Order 62 of the Rules of the Supreme Court, 1997 Edition.*
3. *Section 6 of the Judicial (Code of Conduct) Act No. 13 of 1999.*

This is an appeal against a decision of the High Court dismissing an application by counsel for the appellant for the learned Judge to recuse herself in this cause on the ground that she was involved in the matter of one Beatrice Mulako Mukinga. Counsel for the respondent did not oppose the application both here and in the court below.

The record of appeal shows that the proceedings giving rise to this appeal were quite brief. In her application to the learned Judge on 28th February, 2012, Mrs. Tresha who at the time was handling the matter on behalf of State Counsel Mundia stated as follows:

"I have an application to make. I am standing in for State Counsel Mr. C. L. Mundia and my instructions are to make an application that this file be sent for reallocation. This application is being made in light of the fact that

counsel having conduct of this matter is handling an appeal from the Disciplinary Committee relating to Beatrice Mukinga."

When asked by the learned Judge whether she had a copy of the court process she was referring to, she said she did not have it, but undertook to make available to the court a copy of the appeal during the course of that day. A Notice of Appeal No. 2011/HP/A.33 was subsequently placed on the record. In her ruling on the application, the learned Judge held that the application was an attempt at forum shopping because a party is not entitled to decide or choose before which forum his or her action will be entertained. She was also of the view that the notice of appeal that had been informally placed on the file lent no credence to the application and was totally irrelevant. She then made the assumption that even if it was an application asking her to recuse herself in the matter, it was misconceived for want of compliance with the provisions of *Section 6 of the Judicial (Code of Conduct) Act No. 13 of 1999. Section 6 of The Judicial (Code of Conduct) Act* sets out the grounds upon which an adjudicator will be disqualified from adjudicating upon a matter.

The learned Judge held that *Section 6* of the *Judicial (Code of Conduct) Act* was not applicable to this case as the circumstances under which a judicial officer should not adjudicate in a matter did not exist in the matter before her. She went on to state that all Mrs. Tresha had done was to indicate State Counsel Mundia's desire to have the matter reallocated. She held that, that was unacceptable, refused the application and ordered costs against the appellant. The appellant was not satisfied with the ruling of the learned Judge and advanced three grounds of appeal.

Ground one of the appeal was that the learned Judge erred in law and fact when she invoked the provisions of *The Judicial (Code of Conduct) Act No. 13 of 1999* when she was never accused of impropriety. Ground two of the appeal was that the learned Judge erred in law and fact when she held that the request for reallocation amounted to forum shopping. We propose to deal with grounds one and two of the appeal simultaneously as the arguments raised in these two grounds of appeal were similar.

In his heads of argument, State Counsel Mundia extensively referred to the ruling rendered by the Disciplinary Committee of the

Law Association of Zambia relating to a complaint made by one Beatrice Mulako Mukinga against the learned Judge while she was in private practice. We shall not discuss the details of the report for reasons which we shall give shortly.

State Counsel Mundia submitted that the provisions of the *Judicial (Code of Conduct) Act No. 13 of 1999*, which the learned Judge referred to, did not apply to the circumstances of this case as the application by Mrs. Tresha was merely a pertinent request to have the matter transferred to another Judge. He submitted that the request was premised on grounds of fairness to both the Judge and Counsel having conduct of the matter and was not meant as an attack on the integrity of the learned Judge. He also argued that the learned Judge erred when she held that the application amounted to forum shopping as this Court has guided the profession as to what amounts to forum shopping. State Counsel Mundia submitted that forum shopping is a commencement of a multiplicity of actions in the same matter as well as the pursuit of other steps during the action. In support of his submission, State Counsel Mundia cited the case of *Development Bank of Zambia and KPMG Peat Marwick v*

Sunvest Limited and Sun Pharmaceuticals Limited[1]. State Counsel Mundia also submitted that the learned Judge showed emotion when she stated at page 5 of her ruling that "*should the plaintiff's counsel fail to attend on that date, I shall presume that the plaintiff does not intend to prosecute his case and I will take appropriate action.*" This was stated after the application was dismissed and the matter adjourned to a later date.

We have considered the arguments in respect of grounds one and two of the appeal. We had earlier on indicated that we would not discuss the details in the report of the Legal Practitioners' Disciplinary Committee. This was because during the hearing of the appeal, it emerged that the record of appeal was not a correct reflection of what was before the learned Judge. We say so because the decision of the Legal Practitioners' Disciplinary Committee, in which the learned Judge as a lawyer in private practice then, was absolved of any wrongdoing following a complaint by Ms. Beatrice Mulako Mukinga, was part of the record of appeal and yet was not produced in the court below. It also emerged that some of the arguments advanced in respect of grounds one and two of the

appeal dealt extensively with the history of this case as summarised in the ruling of the Disciplinary Committee, thereby raising issues which were not raised during the application before the learned Judge.

While counsel for the appellant was generally at liberty to argue the law on whether or not the learned Judge should have recused herself, this liberty cannot be extended to matters not raised in the court below. We have stated in numerous judgments in the past that matters not raised in the court below cannot and should not be raised on appeal. See the case of *Wilheim Roman Buchman v Attorney General*[2] in which we held that:

> *"A matter that is not raised in the court below cannot be raised before a higher court as a ground of appeal."*

Also see the later case of *Roland Leon Norton v Nicholas Lostrom*[3] in which we reaffirmed this position. It was, therefore, improper for the appellant to include a document that was not before the court below or make reference *in extenso* to the history of the Beatrice Mulako Mukinga case in his heads of argument when this was not raised in the court below. On that basis, we shall not discuss the

issues that were contained in the ruling of the Disciplinary Committee.

In the ruling, the learned Judge held that there was no provision of the law that caters for the application made by Mrs. Tresha. We do not agree with the learned Judge in view of *Section 23(1) of the High Court Act, Chapter 27 of the Laws of Zambia* which reads as follows:

> *"23.(1) Any cause or matter may, at any time or at any stage thereof, and either with or without the application of any of the parties thereto, be transferred from one Judge to another Judge by an order of the Judge before whom the cause or matter has come or been set down:*
> *Provided that no such transfer shall be made without the consent of the Judge to whom it is proposed to transfer such cause or matter"*
> *(Emphasis ours)*

Clearly, a party to an action is entitled to make an application to have their matter transferred to another Judge. Further, *Section 6 of the Judicial (Code of Conduct) Act No. 13 of 1999* outlines instances which may necessitate the transfer of a cause from one Judge to another. Of relevance to this case is *Section 6 (2)* (a) of the *Judicial (Code of Conduct) Act* which provides that:

"(2) A judicial officer shall not adjudicate or take part in any consideration or discussion of any proceedings in which the officer's impartiality might reasonably be questioned on the grounds that:

(a) The officer has a personal bias or prejudice concerning a party or a party's legal practitioner or personal knowledge of the facts concerning the proceedings;"

Although State Counsel Mundia has avoided using the words bias, prejudice or impropriety in the heads of argument, this appeal was about these very words. In fact, the application made by Mrs. Tresha was in essence, rooted in *Section 6 (2)* (a) of the *Judicial (Code of Conduct) Act*. We, therefore, do not agree that the learned Judge was not entitled to consider the provisions of *Section 6 of the Judicial Code of Conduct* Act as argued by State Counsel Mundia, as this was the only way she could determine whether or not she was disqualified from adjudicating in the matter. In this case, it is apparent that State Counsel Mundia was of the view that the learned Judge would be biased because he was prosecuting the learned Judge in Appeal No. 2011/HP/A.33 lodged on 26th September, 2011. The parties to this appeal are Beatrice Mulako Mukinga and Nichola Sharpe-Phiri (Practicing as Sharpe and Howard).

The record of appeal shows that the learned Judge was availed a copy of the Notice of Appeal even though she stated that it was informally placed on the file. She, however, considered it in her ruling when she stated that the Notice of Appeal lent no credence to the application before her and was, therefore, irrelevant. The fact that the learned Judge made reference to the Notice of Appeal in which she is the respondent was sufficient to have put her on notice that State Counsel Mundia was representing the appellant in the appeal against her.

The question to be determined in this case is whether or not there would be a perception or real likelihood of bias against State Counsel Mundia if the learned Judge adjudicated in this matter. In the case of *Mwenya (Moses) v The People*[4] the appellant was charged with official corruption contrary to *Section 94 (a) of the Penal Code, Chapter 87 of the Laws of Zambia.* He was convicted for obtaining money by false pretences contrary to *Section 309 of the Penal Code.* A plea had been taken to this amended charge but the appellant was not asked if he wished to cross-examine the witnesses who had

given evidence nor was he asked if he required an adjournment to meet the new charge. On appeal, the learned Judge held that:

> *"It is of little consequence that the magistrate in actual fact conducted the trial fairly and justly so long as right-minded people thought or might have thought that the trial magistrate on account of what went wrong prior to the commencement of the proceedings would be partial in the matter."*

Further in the case of *Zambia Telecommunications Company Limited v Celtel Zambia Limited*[5], the appellant was questioning the decision of the High Court to set aside an arbitral award on grounds that the Chairman of the tribunal had accepted an appointment to serve as a member of another tribunal at the request of the appellant's advocate. The Chairman of the tribunal was written to on 24th May, 2004 and the arbitral award was rendered on 28th May, 2004. In that case we held that:

> *"(i)The Chairman's involvement in this case without disclosing his interest in the other Arbitral Tribunal could easily be perceived as being contrary to public policy because the perceptions from the objective test would have been that a likelihood of bias or possible conflict of interest could not be ruled out.*
>
> *(2)The Chairman's failure to disclose the fact that he had been appointed to another Arbitral Tribunal by one of the advocates in the proceedings under review raised the question of perceived bias against him."*

The question of the existence of a likelihood of bias was discussed in the English case of *Metropolitan Properties Co. (F.G.C.) Ltd v Lannon*[6], Lord Denning M.R expressed the following view at page 599:

"In considering whether there was a real likelihood of bias, the Court does not look at the mind of the Justice himself or at the mind of the Chairman of the Tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did, in fact, favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: See Reg. v Hugging (1895) 1 Q.B. 563; and Rex v Sunderland Justices (1901) 2 K.B. 357, C.A., per Vaughan Williams, LJ. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: See Reg. v Camborne Justices, Ex Parte Pearce, and Reg. v Naisleworth licensing Justices, Ex Parte Bird (Supra). There must be circumstances from which a reasonable man would think it likely or proper that the Justice, or Chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people

might think he did. The reason is plain enough. Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking 'The Judge was biased'.

State Counsel Mundia represented Ms. Beatrice Mulako Mukinga in a complaint against the learned Judge before the Legal Practitioner' Disciplinary Committee. The learned Judge was exonerated of any wrong doing, prompting Ms. Beatrice Mulako Mukinga to appeal against the decision of the Legal Practitioners' Disciplinary Committee. The learned Judge was aware of the appeal and the fact that State Counsel Mundia was still representing Ms. Beatrice Mulako Mukinga. We are of the view that the learned Judge should not have handled a matter in which the lawyer appearing before her was prosecuting the Judge in a different matter.

Lord Denning, MR, further went on to state as follows at page 600 in the case of *Metropolitan Properties Co. (F.G.C.) Ltd v Lannon*[6]:

"No man can be an advocate for or against a party in one proceeding, and at the same time sit as a Judge of that party in another proceeding."

It can similarly be said that counsel cannot prosecute a Judge in one case and at the same time appear before that Judge in another proceeding. The application in the court below had merit.

We must here state that applications to transfer actions on allegation of bias against judicial officers are not to be made frivolously. In the case of *R. v Camborne Justices Ex Parte Pearce*[7], Slade, J, stated as follows:

> *"By 'bias' I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must, in my opinion be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that the mere vague suspicions of whimsical, capricious and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds and was reasonably generated, but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of suspicion."*

We agree with this position. It follows from what we have stated above that grounds one and two the appeal must succeed.

In ground three of the appeal, the appellant contended that the learned Judge erred in law and fact when she condemned the appellant in costs when the respondent neither objected to the appellant's application nor asked for costs.

In support of ground three of the appeal, State Counsel Mundia submitted that while the award of costs is in the discretion of the court, the discretion must be exercised judicially. To support his argument, Sate Counsel Mundia relied on the case of *Collett v Van Zyl Brothers*[8] in which we held that:

> *"The award of costs in an action is at the discretion of a trial Judge, such discretion to be exercised judicially."*

We have considered the arguments in respect of ground three of the appeal. While costs normally follow the event and are in the discretion of the Judge, the order for costs must be exercised judicially. These principles are explained in great detail in *Order 62 of the Rules of the Supreme Court, 1997 Edition.* In this case, we agree with State Counsel Mundia and reaffirm the principles which must be followed when awarding costs as laid down in the case of *Collett v Van Zyl Brothers Limited*[8]. There was no need in the circumstances, to make an order for costs against the appellant as they were not even applied for by the respondent. An appropriate order would have been to make an order for costs in the cause.

Ground three of the appeal accordingly succeeds.

The net result is that this appeal is successful. We order that this matter be sent back to the High Court for hearing before a different Judge. Costs shall abide the outcome of the case in the Court below.

M.S. MWANAMWAMBWA
ACTING DEPUTY CHIEF JUSTICE

A.M. WOOD
SUPREME COURT JUDGE

M. MALILA
SUPREME COURT JUDGE