

IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)

2016/HPC/0156



In the matter of: **ORDER 30 RULE 14 HIGH COURT RULES CAP 27  
OF THE LAWS OF ZAMBIA**

In the matter of: **THE LOAN FACILITY AGREEMENT DATED THE  
10TH DAY OF DECEMBER 2015 AND A FLOATING  
CHARGE REGISTERED ON THE 27TH DAY OF  
JANUARY 2016**

BETWEEN:

**FRONTLINE FINANCIAL SERVICES LIMITED**

**APPLICANT**

**AND**

**YANGST JIANG ENTERPRISES LTD**

**1<sup>ST</sup> RESPONDENT**

**COLLUM COAL MINING INDUSTRIES LIMITED**

**2<sup>ND</sup> RESPONDENT**

**XU JIANG XUE**

**3<sup>RD</sup> RESPONDENT**

**Before the Hon Madam Mrs. Justice Irene Zeko Mbewe**

*For the Applicant:*

*Mr. E Banda of Messrs BCM Legal  
Practitioners*

*For the 1<sup>st</sup> Respondent:*

*N/A*

*For the 2<sup>nd</sup> Respondent:*

*Mr. Simwanza of Messrs Lungu Simwanza  
and Company*

*For the 3<sup>rd</sup> Respondent:*

*N/A*



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## **JUDGMENT**

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### **Cases Referred to:**

1. *Royal British Bank v Turquand* [1856] 6 E & B 327
2. *Lockyer v Buchust Park Properties* [1964] 1 ALL E R 630
3. *Aberdeen Railway Company v Blaikie Brothers* [1854] 23 LTR
4. *Zambia Bata Shoe Company v Vin Mas Limited* [1993-1994] ZR 136
5. *Magic Carpet Travel and Tours v Zambia National Commercial Bank Limited* [1999] ZR 61
6. *Kasabi Industries v Intermarket Banking Corporation Limited SCZ Appeal No 168/2009*

### **Legislation:**

1. *High Court Rules, Chapter 27 of the Laws of Zambia*
2. *Companies Act Cap 388 of the Laws of Zambia*

By way of an amended originating summons dated 23<sup>rd</sup> March 2018 the Applicant claim to be owed the sum of ZMW2,800,000.00 arising from a loan facility agreement dated 10<sup>th</sup> December 2015 and secured by an equitable mortgage on Collum Mining Industries Limited which is under a large scale mining licence, and a floating charge of the 1<sup>st</sup> Respondent's stock both present and future.



In the alternative, the Applicant claims for an order for foreclosure, delivery of possession of the mortgaged property, order of sale of the mortgaged property and an order making the floating charge to crystallize on the Respondents stock.

The Applicant is a financial institution whilst the 1<sup>st</sup> Respondent is the receiver and manager of Yangst Jiang Enterprises Limited, the 2<sup>nd</sup> Respondent is a limited liability company Collum Coal Mine Industries Limited. The 3<sup>rd</sup> Respondent is a director in Yangst Jiang Enterprises Limited and Collum Coal Mine Industries Limited.

On 10<sup>th</sup> December 2015, the 1<sup>st</sup> Respondent obtained a loan facility from the Applicant in the sum of ZMW1,000,000.00 which loan was payable within 30 days with an interest rate of 45% per annum until full and final payment (Exhibit "GM1"). That the loan facility was secured by an equitable mortgage over the 2<sup>nd</sup> Respondent's mine under Large Scale Mining Licence No 20405-HQ-LML and a floating charge on all the 1<sup>st</sup> Respondent's stock both present and future as authorised by a board resolution (Exhibit "GM2").

The 1<sup>st</sup> Respondent issued post dated cheques as commitment for the repayment of the loan (Exhibit "GM3"). According to the



Applicant, the Respondents do not deny owing the said amount, The Respondents are in possession of the mortgaged property and stock which is the subject of the floating charge. It is alleged that most of the documents were executed by the 3<sup>rd</sup> Respondent in his capacity as director and shareholder of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent Company.

In response, the 2<sup>nd</sup> Respondent's through its director Xu Jian Lin opposes the Applicant's claims and deposes that the 2<sup>nd</sup> Respondent has never authorised the 1<sup>st</sup> Respondent to use its large scale mining licence No 20405-HQ-LML as security for a loan.

The deponent asserted that the floating charge only affects the stock and assets of the 1<sup>st</sup> Respondent. It was claimed that a forgery was perpetuated as the purported board resolution contained forged signatures and produced what he termed the authentic signatures of the other directors in the 2<sup>nd</sup> Respondent company (Exhibit "XJL 1"). According to the deponent, the only relationship that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent share is that one of the directors and shareholders of the 2<sup>nd</sup> Respondent is also a shareholder and director of the 1<sup>st</sup> Respondent who entered into an agreement with the Applicant



without the knowledge of the other directors and shareholders. That any amounts owing is between the Applicant and 1<sup>st</sup> Respondent which should not affect the 2<sup>nd</sup> Respondent.

It is deposed that any encumbrance of a mining licence is supposed to be authorised by the Minister under section 66 of the *Mines and Mineral Development Act No 11 of 2015*, and that this authority was never obtained.

The 3<sup>rd</sup> Respondent was served court process through substituted service and never filed any opposing affidavit. The Applicant, 1<sup>st</sup> and 2<sup>nd</sup> Respondent filed skeleton arguments and list of authorities which I shall refer to when necessary in the Judgment.

Having set out the parties' positions and having considered all the eminent points of view of both Counsel, the affidavit evidence, applicable authorities for and against the substantive application by the Applicant, I now embark on analysing and determining the matter herein. The issues for consideration are as follows:

1. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondent are indebted to the Applicant.



2. Whether the actions of the 3<sup>rd</sup> Respondent binds the 2<sup>nd</sup> Respondent.
3. Whether the 2<sup>nd</sup> Respondent's assets were fraudulently secured under the loan facility.

It is common cause that a loan facility dated 10<sup>th</sup> December 2015 was entered into between the Applicant and 1<sup>st</sup> Respondent for the sum of ZMW1,000,000.00 at an interest rate of 45% per month until full and final payment. Mr. Xue Jian Xue the 3<sup>rd</sup> Respondent signed the loan facility on behalf of the 1<sup>st</sup> Respondent in his capacity as director. The floating charge dated 10<sup>th</sup> December 2015 was registered at PACRA on 27<sup>th</sup> January 2016 between the Applicant and 1<sup>st</sup> Respondent. Postdated cheques were issued with the 1<sup>st</sup> Respondent as payer with the 3<sup>rd</sup> Respondent as the signatory.

The 2<sup>nd</sup> Respondent resists the claim on two fronts. It is denied that the floating charge was created over the 2<sup>nd</sup> Respondent's assets and secondly that the 3<sup>rd</sup> Respondent had no authority to bind the 2<sup>nd</sup> Respondent and any company resolutions were fraudulently done.



### **Forgery of signatures**

The common thread of argument emanating from the 2<sup>nd</sup> Respondent is that the 3<sup>rd</sup> Respondent acted without authority from the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent forcefully denies authorising the 3<sup>rd</sup> Respondent to borrow money from the Applicant. That the 2<sup>nd</sup> Respondent's alleged board resolution is a fraud and contains wrong and forged signatures of the company secretary and two other directors (Exhibit "GM3"). The 2<sup>nd</sup> Respondent contends the letter head used in communicating to the Applicant is not the official letterhead.

I have carefully scrutinised the 2<sup>nd</sup> Respondent's exhibits of the alleged authentic or genuine signatures and its alleged official letterhead. The Applicant contends that the 2<sup>nd</sup> Respondent is trying to run away from its indebtedness to the Applicant by alleging forgery of signatures.

On the face of the documents exhibited by the 2<sup>nd</sup> Respondent, the Court cannot determine which signature is genuine or forged. It is my view that the 2<sup>nd</sup> Respondent did not take any steps to prove to the Court that the signatures appended were not those of the



directors. The 2<sup>nd</sup> Respondent should have brought a document examiner or handwriting expert to prove that the signatures appended on the various documents used by the 3<sup>rd</sup> Respondent were not genuine. In the absence of such evidence, I find that the 2<sup>nd</sup> Respondent has not proved the 3<sup>rd</sup> Respondent's involvement in any fraudulent scheme or forgery as alleged, and consequently, the board resolution and the signatures appended therein are valid.

### **Authority of 3<sup>rd</sup> Respondent to bind the 2<sup>nd</sup> Respondent**

The key issue to determine is whether the 3<sup>rd</sup> Respondent had the authority to bind the 2<sup>nd</sup> Respondent in its transaction with the Applicant. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent are limited liability companies. It is not in dispute that the 3<sup>rd</sup> Respondent is a director in the 1<sup>st</sup> and 2<sup>nd</sup> Respondent Company. Did this clothe the 3<sup>rd</sup> Respondent with authority to bind the 2<sup>nd</sup> Respondent? In its submissions, the 2<sup>nd</sup> Respondent contends the board resolution used by the 1<sup>st</sup> Respondent to show that the 2<sup>nd</sup> Respondent had consented to have its mining licence used as security had forged signatories. Counsel for the 2<sup>nd</sup> Respondent relied on the case of *Royal British Bank v Turquand* [1856] 6 E & B 327<sup>1</sup> and argues that



the facts of the present case falls under the exceptions adumbrated in the said case.

The 3<sup>rd</sup> Respondent's authority has to be viewed through the lens of the surrounding facts and circumstances. The board resolution reads as follows:

*Monday 7 December 2015*

*BOARD OF DIRECTORS RESOLUTION*

*Present*

- |                       |                                    |
|-----------------------|------------------------------------|
| <i>1. Xu Jian Xue</i> | <i>Chairman/ Director</i>          |
| <i>2. Xu Jian Rui</i> | <i>Company Secretary/ Director</i> |
| <i>3. Xu Jian Xun</i> | <i>Director</i>                    |
| <i>4. Xu Jian Lin</i> | <i>Director</i>                    |

*The following resolutions were made:*

- 1. That the sister company Yangst Jiang Enterprises Limited obtains a loan in the amount of K1,000,000..00 (Kwacha One Million) from Frontline Financial Services Limited.*



2. *That Yangst Jiang Enterprises Limited uses Collum Mines mining licence to obtain the loan facility.*
3. *That Mr. Xu Jian Xue oversees the transaction*

*There being no other business, the meeting was closed at 11.30 hours.*

<i>Signed: Xu Jian Xue</i>	<i>Xu Jian Rui</i>	<i>Xu Jian Xun</i>
<i>Chairman/Director</i>	<i>Company Secretary/ Director</i>	<i>Director</i>

In the present case, the issue of the 3<sup>rd</sup> Respondent's authority stems from his directorship in the 1<sup>st</sup> and 2<sup>nd</sup> Defendant Company, and from the law of agency.

In the law of agency, the general rule is that if an agent is not authorised, the agent does not validly bind the principal and no valid contract can be concluded with the principal. Where an agent enters into any contractual relationship with a third party, it gives rise to legal obligations between the principal and a third party. An agent may have actual, apparent or ostensible authority. In this respect, Counsel for the Applicant cited the case of *Lockyer v Buckhust Park Properties [1964] 1 ALL E R 630<sup>2</sup>* where a director



commissioned architects for their estate project. The company later refused to pay for the services rendered. It was held that the company was bound to pay as the director who was the managing director had apparent authority and therefore bound the company. In that case, Lord Diplock stated:

*"An apparent or ostensible authority...is a legal relationship between the principal and the contractor created by a representation made by the principal to the contractor intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract for the kind within the scope of the apparent authority so as to render the principal liable to perform any obligation imposed by him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally) is aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor entering into a contract with the agent operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant*



*whether the agent had actual authority to enter into the contract."*

This excerpt accurately describes the doctrine of apparent or ostensible authority. In the present case, the evidence points to the fact that the 3<sup>rd</sup> Respondent had actual authority through the board resolution to bind both the 1<sup>st</sup> Respondent and 3<sup>rd</sup> Respondent by borrowing monies and using the 2<sup>nd</sup> Respondent's mining licence as security, including the 3<sup>rd</sup> Respondent's authority to oversee the transaction. In my view, Counsel for the 2<sup>nd</sup> Respondent's argument on ostensible or apparent authority is misplaced.

Having set out the common law position, in terms of statute, the powers of a director are governed by the *Companies Act, Cap 388 of the Laws of Zambia* which was in force at the material time. It is stipulated in section 215 and 216 as follows:

*"(3) Without limiting the generality of subsection (1), the directors may exercise the powers of the company to borrow money, to charge any property or business of the company or all or any of its uncalled capital and to issue debentures or give any other security for a debt, liability or obligation of the company or of any other person.*

*216 (1) The directors of a company shall not, without the approval in accordance with this section of an ordinary resolution of the company –*



*(a) sell, lease or otherwise dispose of the whole, or substantially the whole, of the undertaking or the assets of the company.*

*(2) The approval for a transaction referred to in paragraph (a) of subsection (1) shall be an approval of the specific transaction proposed by the directors”.*

The cited provisions encapsulate the principle that a director of a company through a board resolution can bind a company. In the case of *Aberdeen Railway Company v Blaikie Brothers [1854] 23 LTR<sup>3</sup>*, the issue of a director binding a company was aptly stated by Lord Cranworth CL where he held as follows:

*"This therefore, brings us to the general question, whether a director of a railway company is not precluded from dealing on behalf of the company with himself, or with a firm in which he is a partner. The directors are a body to whom is delegated the duty of managing the general affairs of the company. A body corporate can only act by agents, and it is of course the duty of those agents so to act as best,, to promote the interests of the corporation whose affairs they are conducting. ...."*

The cited case is of persuasive authority and sets out the duties of directors in a company.



I take the view that the 2<sup>nd</sup> Respondent is bound by the actions of the 3<sup>rd</sup> Respondent who is a director in the 2<sup>nd</sup> Respondent Company and had actual authority to undertake such actions as stated in the board resolution dated 7<sup>th</sup> December 2015. I am fortified in my finding by the case of *Zambia Bata Shoe Company v VIN Mas Limited [1993-1994] ZR 136<sup>4</sup>* where it was held that the company's authorised agents bound the company to comply with the contract and such liability could not be avoided.

The 2<sup>nd</sup> Respondent argues it is not a sister company to the 1<sup>st</sup> Respondent and therefore is not privy to the contractual relationship between the Applicant and 1<sup>st</sup> Respondent. Even assuming the 1<sup>st</sup> and 2<sup>nd</sup> Respondent company were not sister companies, the board resolution authorised the 1<sup>st</sup> Respondent to use the 2<sup>nd</sup> Respondent's large scale mining licence No 21405-HQ-LML as security for the loan facility.

Interestingly, in the Applicant's affidavit for non joinder, a Consultancy Agreement dated 11<sup>th</sup> March 2016 between the 2<sup>nd</sup> Respondent and Applicant relating to the purchase of the 2<sup>nd</sup> Respondent's large scale mining licence No 21405-HQ-LML was



exhibited. Essentially, its terms are that the Applicant was to source a purchaser for the 2<sup>nd</sup> Respondent's mines. The correct inference to draw from the material before me, is that a business relationship existed between the Respondents herein. I find no evidence to suggest, as the 2<sup>nd</sup> Respondent would have me believe, that the Consultancy Agreement was signed by an unauthorised party. This Consultancy Agreement supports my earlier finding that the 2<sup>nd</sup> Respondent consented to the use of its mining licence as security for the facility from the Applicant.

From the evidence and material before me, I agree with the principles set out in the *Turquand rule* [1856] 6 E & B 327<sup>1</sup> where a party need not inquire into the irregularity of the indoor management of a company but assumes that all requirements have been complied with. The policy behind the rule is that losses from unauthorised acts purporting to be done on behalf of companies should be borne by the companies and not the persons dealing with the companies. The exception is where a purported company document is forged or uttered fraudulently, which I have already found is not the case herein. Applying the *Turquand rule* to the



present case, I find the 3<sup>rd</sup> Respondent act to bind the 2<sup>nd</sup> Respondent was duly authorised through the board resolution.

### **Use of mining licence as security**

The 2<sup>nd</sup> Respondent through its director Xu Jian Lin in his opposing affidavit to the Applicant's application, avers that not only did the 2<sup>nd</sup> Respondent not authorise the use of the large scale mining licence No 21405-HQ-LML as security for the loan facility, but that no authority was sought from the Minister of Mines and Mineral Development in line with Section 66 of the *Mines and Minerals Development Act No. 11 of 2015*. In response, the Applicant relies on the board resolution of the 2<sup>nd</sup> Respondent dated 7<sup>th</sup> December 2015. The relevant clauses in the loan facility agreement states as follows:

#### "SECURITY

4.1 *This facility shall be secured by:*

- *Original letter of Consent for Collum Coal Mining Industries Limited*
- *Original Large Scale Mining Licence Collum Mining Industries Limited Licence No 20405-HQ-LML*



- *Post dated cheques issued by the Borrower*
- *Floating charges on all mine assets."*

The breach and default provisions are contained in Clause 11 of the loan facility in the following terms:

*"b. The Lender shall have exclusive possession of the large scale mining licence No 20405-HQ\_LML which was pledged as security and shall be at liberty to dispose it off in order to recover the monies which is due."*

A reading of the cited provisions entails that where registration is required and not done, the instrument becomes void. In the present case, there is no evidence to suggest the registration of any charge against the 2<sup>nd</sup> Respondent's mine assets. Therefore, the Applicant has no legal legs to stand on in enforcing any charge on the 2<sup>nd</sup> Respondent's mine assets.

I have perused section 66 of the *Mines and Minerals Development Act No. 11 of 2015* which states that:

*"(1) A person shall not transfer, assign, encumber or otherwise deal with a mining right or a mineral processing licence, or an interest in a mining right or a mineral processing*



*licence without the production of a tax clearance certificate.*

- (2) *A holder of a mining right or mineral processing licence or a person with an interest in a mining right or mineral processing who intends to transfer, assign, encumber or otherwise deal with the mining right or mineral or any interest therein shall apply to the Minister for approval in the prescribed manner and form upon payment of the prescribed fee*
- (6) *The Committee shall revoke any mining right or mineral processing licence which is transferred assigned or encumbered or otherwise dealt with contrary to the provisions of the law.”*

It is the duty of this Court to get the real intention of the legislature by carefully attending to the scope of the statute, namely the *Mines and Mineral Development Act, No 11 of 2015*. In construing the intention of Section 66 of the *Mines and Mineral Development Act, No 11 of 2015* which deals with regulatory provisions, it is intended to safeguard and protect mining operations and oversee the activities and operations of holders of mining rights or licences.



Section 66 (1) requires a person to seek prior approval from the Minister before a right or interest in a mining licence may be encumbered, assigned or transferred. This is a mandatory legal requirement and failure to comply attracts unfavourable consequences under Section 66 (6) by the revocation of such mining right or licence.

The Applicant as contemplated in clause 4 of the loan facility agreement, did not adduce any evidence of the authorisation or approval from the 2<sup>nd</sup> Respondent to encumber the mine assets or licence. By all accounts and rather wittingly, the 2<sup>nd</sup> Respondent, after the fact, brought this aspect to the attention of the Court and appeared to use the argument to wangle its assets from the Applicant's reach and the long arm of the law. I say so as, it is a general principle of law that parties have a duty to comply with the necessary laws, and where approval or consent is necessary and not obtained, such a security becomes void and unenforceable.

From the evidence on record, the encumbering of the mining licence is devoid of the Minister's approval which is a prerequisite before a



mining licence or interest can be encumbered, leased or assigned. It therefore follows that the said encumbrance of the mining licence as security for the loan facility is null and void, and unenforceable at law.

### **Equitable mortgage**

In the alternative, the Applicant claims for an order for foreclosure, delivery of possession of the mortgaged property, order of sale of the mortgaged property. First and foremost, as guided by the Supreme Court in the case of *Magic Carpet Travel and Tours v Zambia National Commercial Bank Limited* [1999] ZR 61<sup>5</sup>, an equitable mortgage is created where a borrower surrenders its title deeds to land to the lender as security for the repayment of the loan. In the case of *Kasaba Industries Limited v Intermarket Banking Corporation Limited*, SCZ Appeal No 168/2009<sup>6</sup>, the dicta of the Supreme Court was that an equitable mortgagee does not have the power of sale as a way of enforcing a mortgage. He however has the right to obtain an Order of Court for foreclosure and once the property is foreclosed, the mortgagor's right of redemption is completely



extinguished and the property must be conveyed to the mortgagee by the mortgagor unconditionally.

Having set out the principles of an equitable mortgage, and having found that the security used for the loan facility is void by virtue of section 66 (1) of the *Mines and Minerals Development Act*, the issue is redundant. In conclusion, section 66 (1) strikes the fatal blow on the said security and like quick sand, the Applicant's security has sunk into oblivion leaving the Applicant's facility unsecured.

### **Floating Charge**

The Applicant seeks an order for the crystallisation of the floating charge on the Respondents' stock. Counsel for the 2<sup>nd</sup> Respondent argues it is not affected by the floating charge as it only relates to the assets of the 1<sup>st</sup> Respondent. In the loan facility agreement dated 11<sup>th</sup> December 2015, part of the security is a floating charge on all mine assets. This is in stark contrast to the floating charge duly registered at PACRA and executed between the 1<sup>st</sup> Respondent and Applicant.



The record shows the floating charge was registered at PACRA on 10<sup>th</sup> December, 2015 over the 1<sup>st</sup> Respondent's present and future assets. Clause 2 of the floating charge specifically provides as follows:

- (2) *As security for the repayment and discharge of such principal sum and interest and other sums intended to be hereby secured the Borrower as beneficial Owner hereby charges by way of first floating charge with payment of all money and liabilities hereby agreed to be paid or intended to be hereby referred to in clause 6 hereof and so that the charge hereby created shall be continuing security over all the Borrower's stock whatsoever both present and future including its goodwill and its issued and uncalled capital for the time being. The charge hereby created hereby shall be a floating charge over all the aforesaid property....."*

According to clause 3, the floating charge is enforceable once the borrower who is the 1<sup>st</sup> Respondent, defaults. I concur with Counsel



for the 2<sup>nd</sup> Respondent that the floating charge is specific to the assets of the 1<sup>st</sup> Respondent, and I find so.

A further reading of the loan facility agreement shows that the parties intended to have a floating charge on the mine assets of the 2<sup>nd</sup> Respondent. My starting point is section 99 *Companies Act, Cap 388 of the laws of Zambia* which requires registration of charges by companies in respect to an undertaking on the property of a company, or a charge on land. Subsection (11) stipulates that a charge not registered within the stipulated time of 21 days shall be void against the liquidator or creditor of the company. Subsection (12) provides that this section shall not affect the provisions of any other written law relating to the registration of charges.

As far as the evidence shows, the floating charge only refers to the assets of the 1<sup>st</sup> Respondent and not the 2<sup>nd</sup> Respondent. In any case, if a floating charge was created over the 2<sup>nd</sup> Respondent's mine assets, it required to be registered, and evidently this was not done. Therefore, the Applicant's claim in respect of the 2<sup>nd</sup> Respondent mine assets is untenable.



The upshot is as follows:

1. Judgment entered in favour of the Applicant in the claimed sum of ZMW2,800,000.00 against the 1<sup>st</sup> Respondent plus interest at the commercial lending rate from date of the Originating Summons until date of full payment.
2. The 1<sup>st</sup> Respondent having defaulted, the floating charge crystallises on their stock both present and future and is enforceable against the 1<sup>st</sup> Respondent.
3. The Applicant seeks any other relief that the Court may deem fit. In the circumstances of this case, and in the interest of justice, the Registrar is Ordered to deliver this Judgment to the Minister responsible for mining and mineral development.
4. Costs to the Applicant to be taxed in default of agreement.



5. Leave to appeal granted.

Delivered at Lusaka this 26<sup>th</sup> day of November 2018.



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**HON IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**