

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 014/2018

BETWEEN:

MIYANDA FEARNESS SIAMOONGWA

APPELLANT

AND

FINANCIAL INTELLIGENCE CENTRE

RESPONDENT



CORAM: CHASHI, LENGALENGA AND SIAVWAPA, JJA

On 27th June and 22nd November 2018

FOR THE APPELLANT: MRS BWALYA MWAPE OF MESSRS
MWENYE AND MWITWA ADVOCATES

FOR THE RESPONDENT: MR S. CHISENGA & C. NGABA BOTH OF
MESSRS CORPUS LEGAL PRACTITIONERS

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to

1. Rating Valuation Consortium and D.W. Zgambo and Associates (suing as a firm) v Lusaka City Council and Zambia National Tender Board (2004) ZR 109
2. Munali Insurance Brokers Ltd and Another v Attorney-General and Others
3. Pickard v Sears (1837) 6A and E 469
4. Jonas Amon Banda v Dickson Machiya Tembo SCZ Judgment No. 18 of 2008

The Appellant in this case was initially engaged as the Head of the Financial Intelligence Unit which resided within the Ministry of Finance in 2010 for a period of one year on contract. He was awarded an extension of the contract in April 2011 as Head of the same entity which had now been transformed into the Financial Intelligence Centre (hereinafter referred to as the FIC) to discharge the functions of Director until July 2011 or until the Board of the FIC determined otherwise.

The FIC Board allowed the Appellant to continue in office until December 2012 when it again extended his contract up to 30th April 2013.

In April 2013, the Board took the decision to appoint the Appellant as the Director of the FIC with effect from 11th December 2012 pursuant to Section 9 (1) of the Financial Intelligence Centre Act No. 46 of 2010. The Board then engaged the Judiciary to seek an appointment with the Chief Justice to swear in the Appellant in his new appointment.

The Board further, whilst waiting for the swearing in, awarded the Appellant a three year contract as Director of the FIC subject to the Minister's approval.

On 21st February 2013 another request was made for the Appellant to be sworn in and the following day, the Board Chairman wrote to

the Minister of Finance seeking his approval of the Appellant's appointment.

In May 2013, the Board passed a resolution to subject all positions to an open recruitment process. With the approval of the Minister, the position of Director FIC was advertised with six candidates, including the Appellant, being shortlisted for interviews before the list was further reduced to three including the Appellant.

The results of the interview showed that the Appellant occupied the third and final slot in order of preference with one Mary Sikazwe occupying the top slot. Subsequently, the said Mary Sikazwe received the Minister's approval and she was appointed as Director of the FIC.

Dissatisfied with the turn of events, the Appellant instituted proceedings in the High Court against the Respondent seeking the following reliefs;

- (i) *Payment of salaries, gratuity and allowances due and payable for the remainder of the contract period of employment that was entered into effective 15th February 2013 with the Defendant as agreed by both parties.*

- (ii) *Purchase of the personal to holder vehicle at the higher of book value (at the deemed end of 3 year contract) and 10% of purchase price.*
- (iii) *Payment of 3 months' pay in lieu of notice.*
- (iv) *Damages*
- (v) *Interest*
- (vi) *A letter of reference from the Defendant which the Plaintiff needs to secure future appointments. The Defendant is on record that the Plaintiff completed his tasks assiduously, diligently and up to a very high standard.*
- (vii) *Costs.*

In her Judgment, the learned trial Judge in the court below dismissed the claim on all the grounds mainly on the reasoning that since the Appellant's appointment was subject to the Minister's approval, no valid contract of employment existed.

Dissatisfied with the Judgment, the Appellant lodged this appeal which is anchored on four grounds namely;

- 1. The Court below erred in law and in fact when it found and concluded at page J21 of the Judgment that the contract of employment had not been executed and that therefore, there was no breach of contract of employment when there was no evidence on record to disprove the Appellant's assertion that he had been employed by the Respondent and that he was held out as an employee of the Respondent and performing duties expected of him as Director General of the Respondent.***

- 2. The Court below misdirected itself in law and in fact when it concluded and held at page J23 of the Judgment that there was no binding contract between the Appellant and the Respondent when in fact there was an offer of employment to the Appellant by the Respondent which the Appellant accepted and as a result of which the Appellant worked for the Respondent as Director General and was remunerated as such by the Respondent.**
- 3. The Court below misdirected itself in law and in fact when it held at page 26 of the Judgment that the Appellant was not entitled to his reliefs as endorsed on the writ of summons when it misdirected itself on the question as to whether there was in fact a binding agreement between the parties.**
- 4. Having misdirected itself on the issues raised in grounds 1, 2 and 3 above, the Court below erred in law and in fact when it awarded costs to the Respondent.**

We take the view that grounds 1 to 3 are all disputing the lower court's finding that there was no binding contract between the parties as a result of which no reliefs were available to the Appellant.

What is clear is that the Appellant's contract as Director of the FIC was awarded prior to the call for applications for the same position. It is also clear that the FIC Board rescinded its earlier decision appointing the Appellant as Director.

The letter of appointment dated 18th February 2013, exhibited at page 151 of the Record of Appeal, in line 18, states clearly that the

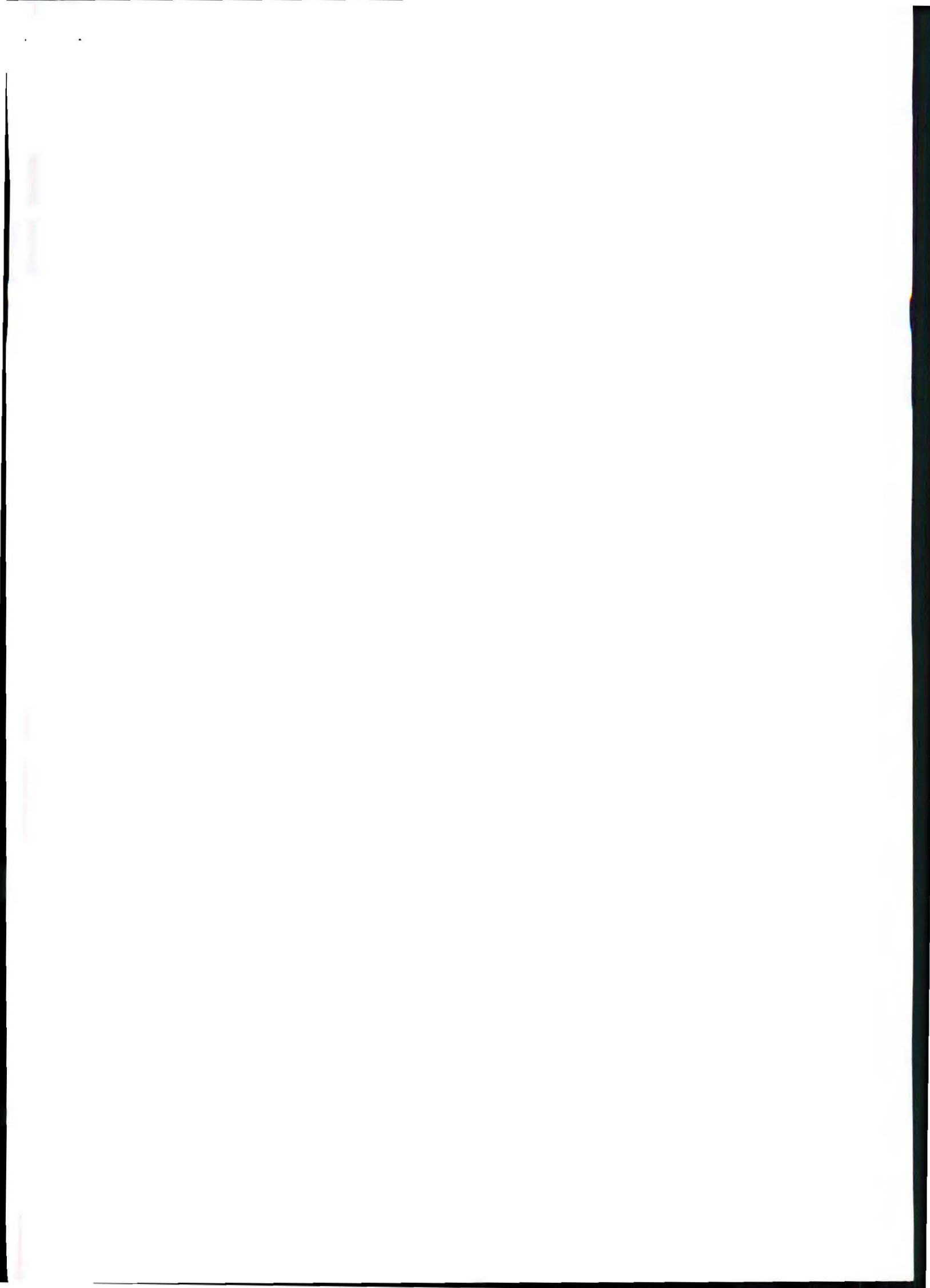
appointment was subject to the Minister of Finance approving it. Further, in line 20, it states that his terms and conditions of employment would only be given to him after the Minister approved his appointment.

This appointment was communicated to the Minister by letter dated 22nd February 2013 exhibited at page 154 of the Record of Appeal by which his approval of the Appellant's appointment was sought.

At a special meeting of the Board held on 17th May 2013, exhibited at page 161 of the Record of Appeal at which the Appellant was present as Secretary, his appointment was rescinded and instead, it was resolved to identify a recruitment agency to facilitate the recruitment of the Director through an advertisement in the media.

By letter dated 17th May 2013 exhibited at page 163 of the Record of Appeal, the Minister was duly informed of the Board's decision to rescind the Appellant's appointment and to subject all positions to an open recruitment process.

The Minister responded to the information with approval by letter dated 3rd June 2013 exhibited at page 165 of the Record of Appeal. The recruitment exercise was awarded to MAC who conducted the process and submitted a final shortlist of three names as earlier indicated including the Appellant as the third choice.



In her Judgment after considering all the evidence before her, the learned trial Judge posed the following question at page 26 (J19) from line 15 of the Record of Appeal;

“Was the Plaintiff employed as Director by the Defendant? Or put differently did the contract of employment entered into between the Plaintiff and the Defendant create a legally binding relationship”.

She then went on to examine the letter of appointment and focused on the phrase ‘*subject to*’ in the letter which is defined as “*conditional or dependent on something*” by Black’s Law Dictionary. She then came to the conclusion that the contract of employment had not crystalized as the Minister did not give it his approval. She further concluded that there was no breach of contract as the process of employment was not completed.

In agreeing with the learned trial Judge, we wish to state that not only was the appointment process not completed but the appointment was actually rescinded by the Respondent as already shown in this Judgment. The Appellant minuted the proceedings of the Board and the Minister accepted the Respondent’s decision to rescind the appointment and subject the position of Director and others to an open and transparent recruitment process.

There is no indication that the Appellant protested the Respondent’s resolutions and went on to participate in the interview. It is therefore, our firm view that in fact, at the time of the recruitment process, the position of Director was vacant and the Appellant was

just performing the functions of that office as he had always done on specific contract terms.

There is an argument in the Appellant's heads of argument that the Minister acted ultra vires Section 6 (i) of the Act when he overruled the decision of the Board because it provides that the Centre in its performance of its duties shall not be subject to the direction or control of any person.

The Appellant has also tried to down play the import of Section 9 (1) of the Act which subjects the appointment to the approval of the Minister by arguing that the Respondent did not demonstrate that the Minister did indeed issue an instruction not to approve the appointment.

This is to misconstrue the provision because, when an appointment is stated to be subject to the approval of another authority the appointment does not take effect until and unless that other authority gives its approval. The fact that the Minister did not state his non-approval of the appointment but chose to remain mute does not amount to approval and the rescission of the appointment by the appointing authority meant that there no longer existed any appointment which the Minister could approve.

It is also noted that the Act, in Section 9 (1), does not stipulate any time frame within which the Minister should approve or reject the

appointment. Had the Board not decided to rescind the appointment, the Minister would most likely have indicated his position on the appointment, one way or the other.

The argument relating to the conduct of the Respondent as creating an employer-employee relationship is a non-issue because, from inception the record reveals that the Appellant was engaged on short term contracts since 2010 which contracts were being extended upon expiry until 2013 February when the Respondent decided to appoint him with a view to having the appointment approved by the Minister in compliance with the Act.

This means that the employer-employee relationship existed from inception but on fixed term contract basis. To put the whole matter into context, by contract executed between the Government of the Republic of Zambia and Miyanda Fearness Siamoongwa, the Appellant herein, dated 9th April, 2010, the Appellant was employed as Head Financial Intelligence Unit on a fixed term contract of 12 months from 12th April 2010 to 11th April 2011. The contract was extended from 11th April 2011 to 31st July 2011 on terms that the Appellant heads the newly established FIC to discharge the functions of Director for the Centre.

There is further evidence that the said contract was extended to 13th April 2013 but before the same expired, the Board, at its

meeting of 15th February 2013, took the decision to make the appointment substantive but subject to approval by the Minister.

The Appellant was, however, unsuccessful in the interviews for appointment as Director for the Centre and his contract effectively came to an end on 31st August 2013 as per the letter dated 19th August 2013 exhibited at page 94 of the Record of Appeal.

We would therefore, agree with the Respondent's submission that in fact, the Appellant had never been appointed as Director of the FIC in accordance with Section 9(1) of the Act. The learned trial Judge found that the appointment never crystalized for want of approval by the Minister.

It follows therefore, that the two parties were only bound by the terms and conditions of the contract of 9th April 2010 which was given short term extensions from time to time until its termination on 31st August 2013.

From the 2010 contract, the only major modification on extension in 2011 was that from being Head of the Financial Intelligence Unit, he would, from hence forth, perform the functions of Director for the newly established FIC while the rest of the terms and conditions of his employment remained the same.

No binding contract of employment could have been created between the parties on the appointment of the Appellant as Director without the Minister giving his approval of the appointment in accordance with Section 9(1) of the Act.

We therefore affirm the learned trial Judge's position as it is the correct position at law as held in the cases of Rating Valuation Consortium and D.W. Zgambo and Associates (suing as a firm) v Lusaka City Council and Zambia National Tender Board¹ and Munali Insurance Brokers Ltd and Another v Attorney-General and Others².

We also note the reference by the Appellant to the case of Pickard v Sears³ in which it was held that;

“Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induce him to act on that belief so as to alter his own previous position is excluded from averring against the latter a different state of things as existing at the same time”.

We however, find the case inapplicable to the case at hand because the position that made the Appellant to alter his previous position is that of Head, Financial Intelligence Unit and not that of Director FIC.

Whatever assurances given to the Appellant that he would assume the position of Director FIC could not create a contractual relationship until and unless the mandatory requirements of Section 9(1) of the Act had been complied with.

The other point to note is that whereas the Board did indeed take the decision to appoint the Appellant to the position of Director, and communicated the decision to the Appellant in writing, no contract was executed and in that regard, the letter of appointment dated 18th February 2013 exhibited at page 89 of the Record of Appeal, apart from making it clear that the appointment was subject to the Minister's approval, also made it clear that the appointee's terms and conditions of employment would only be given after the approval of the Minister. In short, a contract spelling out the terms and conditions attaching to the office of Director, would only be available for signing after the appointment had received the requisite Ministerial approval.

So the contract in this case did not just miss a formality as per the quotation relied upon from the case of Jonas Amon Banda v Dickson Machiya Tembo⁴ but it did not exist as it had not been executed for lack of a statutory requirement, the approval by the Minister.

It is therefore, futile in our view, for the Appellant to be-labour a contract that never was, in the first place as any act which is subject to another act, is never actualized until and unless that other act takes place. The end result therefore, is that this appeal has failed on all grounds and we dismiss it accordingly.

We however, did observe from the record that the Appellant, as clearly stated by the Board, upon extending his contract on several

occasions and upon taking the decision to appoint him Director of the FIC in February 2013 subject to the Minister's approval, was eminently qualified for the job and had acquitted himself well in terms of his performance.

It is also noted that among the three candidates whose names were finally submitted to the Minister for approval, the Appellant remained the best qualified candidate but he was the least preferred candidate on account of what the Board termed lack of aggressiveness in his work style and some discomfort with the way he dealt with the Board.

We were left wondering how the same Board that had in February of 2013 paid glowing tribute to the Appellant on appointing him had by 30th July 2013 found him wanting for the position.

We also note that in the confidential Report submitted by the Board Chairman to the Minister of Finance dated 22nd July 2013, exhibited from page 193 to 195 of the Record of Appeal, the remarks on the individual candidates will show that the preferred candidate, Ms. Mary Sikazwe was the least qualified and experienced for the job with her only strength being the pledged support of the Board to develop her potential.

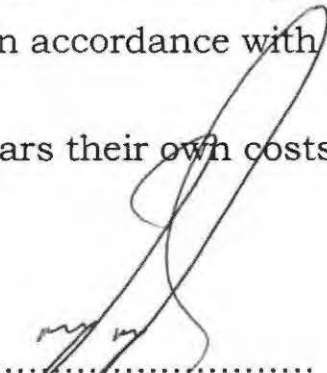
It is therefore our firm view that had the Board been more independent and objective, the Appellant would have emerged as the preferred candidate and in terms of Section 9(1) of the Act, the

Board should have gone ahead to appoint him and present his name to the Minister for approval rather than send three names for the Minister to select from. Section 9 (1) is very clear as to who has the mandate to appoint as it states;

“The Board shall subject to the approval of the Minister appoint a Director who shall be the Chief Executive Officer of the Centre on such terms and conditions as the Board may determine”.

The Board therefore failed in its duty under the Act by giving options to the Minister to choose when the law mandates him only to approve. We therefore hope that in future appointments, the Board will exhibit the highest level of independence and objectivity by performing its mandate in accordance with the law.

We order that each party bears their own costs



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J. CHASHI

COURT OF APPEAL JUDGE



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F. M. LENGALENGA

COURT OF APPEAL JUDGE



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M. J. SIAVWAPA

COURT OF APPEAL JUDGE