**IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 18012015**

**HOLDEN AT NDOLA**

*(Civil Jurisdiction*

**BETWEEN:**

**STANBIC BANK** **APPELLANT**

**AND**

**MICOQUIP ZAMBIA LIMITED** **RESPONDENT**

**Coram: Wood, Kajimanga and Musonda, JJS.**

**On 5' June, 2018 and 8th June, 2018.**

*For the Appellant: Mr. W. Luwabeiwa-In House Counsel and Mr. J. Kawana Corpus Legal Practitioners*

*For the Respondent: Mr. M. Chugani- Messrs Chugani & Company*

JUDGMENT

Wood, JS, delivered the judgment of the Court.

**Cases Referred to:**

1. *London Ngoma and others v LCM Company Limited and another (1999) ZR 75*
2. *Attorney General v Aboubacar Tall and Zambia Airways Corporation (199511997) Z.R. 534.*

3. *London Ngoma, Joseph Biyela, Richard Ng'ombe and Friday Simwanza v LCM Company Limited and United Bus Company of Zambia Limited (1999) Z.R. 75*

4. *Zambia Privatisation Agency v Huddell Chisenga Chibichabo and Zamcargo Limited (2005) Z.R. 74.*

5. *Mulenga v Mumbi ex parte Mhango (1975) Z.R. 78.*

6. *Rex v General Medical Council Ex-parte Spackman.*

7. *Eureka Construction Limited v Attorney General, Consolidated Lighting Zambia Limited (Proposed Intervening Party) (2008) Z.R. 72 Vol. 2*

8. *Simbeye Enterprises Limited and Investrust Merchant Bank (Z) Limited v Ibrahim Yousuf (2000) Z.R. 159.*

9. *Kingfarm Products Limited, Mwanamuto Investments Limited v Dipti Rani Sen*

***Legislation Referred to:***

1. ***Order X1V rule 5(1)*** *of the High Court Rules Cap 27*
2. *Section 2(1) Cap 27*
3. *Order XXJX Cap 27*
4. *Rule 67 Cap 25*

***Other Works Referred to:***

1. *Order 151612 (b) RSC*

At the core of this appeal is the issue of whether or not a bank as debenture holder can be joined to proceedings after judgment by the respondent for purposes of being liable for the actions of receivers it had appointed in respect of a company called Jes Mining Zambia Limited (In Receivership) (hereinafter referred to as "Jes").

On 21St July, 2010, the respondent took out a summons under Order XIV Cap 27 for leave to join the appellant as a second defendant to the proceedings in the court below. The affidavit in support sworn by Michael John Gait-Smith stated that the respondent had obtained judgment against Jes for the sum of US$169,366.41 with interest at the rate of 5% per annum from 31st January, 2008 until full settlement. Jes was given conditional leave to appeal to the Supreme Court. The condition was that it had to pay US$96,000.00 together with costs. Thereafter, Jes appealed to the Supreme Court against a ruling of 28th May, 2010. The Supreme Court dismissed the appeal and confirmed the ruling of 28th May, 2010 with costs. The deponent further stated in his affidavit in support that it was evident from the affidavit of one Peter Mutale Kango'mbe filed on 16th September, 2008 that Peter Mutale Kango'mbe was appointed Receiver by the appellant as debenture holder. Under the terms of the debenture, the debenture holder was responsible for the appointment of the Receiver as well as for his remuneration and removal. Furthermore, under the terms of the debenture Jes ". . . *appointed the Bank and its*

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*substitutes... as the Attorney of the Company."* In view of the foregoing, the appellant as Debenture Holder should have been joined to the proceedings as the 2nd defendant.

The appellant opposed the application for joinder through Lydia Chilumba, its Head of Legal Department and Company Secretary. The appellant was of the view that the application for joinder was misconceived and at law incompetent as there were no pending disputes to be determined between the respondent and the appellant as their rights were derived from totally different factual and legal circumstances. In addition, the appellant was never a party to the action during trial and it was not accorded an opportunity to be heard. The deponent pointed out that the appellant's rights were derived from a legally constituted debenture of 11th July, 2006 created over the legal and equitable interests in the leased assets of Jes. That in exercise of its rights under the said debenture the appellant on or about 30th January, 2008 appointed joint receivers over the charged assets of Jes. The respondent's rights on the other hand arose from a totally different

contractual relationship it allegedly had with Jes. The affidavit concluded by stating that the application to join the appellant as a party to these proceedings by the respondent lacked any satisfaction of the basic requirements that warrant the granting of such an application.

The learned judge in her ruling relied on our decision in *London Ngoma and others v LCM Company Limited and another'* and came to the conclusion that in terms of rule 67 of the Supreme Court Rules Cap 25 and the case of *Attorney General v Aboubacar Tall and another,* the Court has inherent jurisdiction to join a party to an action after judgment has been entered. She therefore reached the conclusion that the respondent was claiming relief against the appellant which arose from the same transaction or series of transactions that led to a judgment being entered against Jes. There were therefore special circumstances which existed to make it necessary for the court to consider joining the appellant to these proceedings. The appellant was accordingly joined as a party to the proceedings.

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The appellant has now appealed to this court against the judgment on three grounds. The first ground is that the court below erred in law when it failed to address the issue that the application for joinder which was made by the respondent was incompetent in that it was made under the wrong law despite the fact that the appellant had made submissions on the issue. The second ground is that the court below erred in law when it joined the appellant to the proceedings when the court below was *functus officio* and that the appellant was never accorded the right to be heard during trial since it was not a party to the action and that there was no pending appeal to warrant the joinder. The third ground of appeal was that the court below erred in law when it joined the appellant to the proceedings and ordered that the parties were at liberty to make applications to the court with the implication that the appellant could be tried on the merit after judgment had already been rendered and that commencing a fresh action would inconvenience the respondent as it would incur further costs.

With respect to the first ground the appellant has submitted that it was a grave misdirection on the part of the court below to disregard the submissions made by the appellant with regard to the respondent having relied on the wrong law when it made the application for joinder. The appellant submitted that in terms of Order XIV rule 5(1) of the High Court Rules Cap 27, a party can only make an application for joinder at or before the hearing of the suit. The respondent in this matter made the application for joinder on 21st July, 2010, nine months after the matter had been heard and determined. By then the judgment of the court below had already been rendered and the appellant was not a party to the action at the material time. In the circumstances, the order for joinder should not have been granted as it was not made at or before the hearing of the suit but after the hearing of the suit. In fortifying its argument, the appellant relied on a quotation from *Attorney General v Aboubacar Tall and Zambia Airways Corporation*[2] which states as follows:

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> *"In a proper case, a Court can join a party to the proceedings when both the plaintiff and the defendant have closed their cases and before judgment has been delivered by invoking Order 14 rule 5."*

The appellant has submitted that from the *Tall* case, it is quite clear that Order XIV rule 5 can only be invoked for the purpose of joining a party before judgment has been delivered. This was not the case in the Court below and as such the respondent's application should not have been allowed. The appellant was of the view that in arriving at the decision with respect to joining the appellant, the court below erroneously relied on the case of *London Ngoma, Joseph Biyela, Richard Ng'ombe and Friday Simwanza v LCM Company Limited and United Bus Company of Zambia Limited* where this Court stated *inter alia* that:

> *"In terms of rule 67 of the Supreme Court Rules and the decided case of Attorney General v Aboubacar Tall and another, the Court has inherent power to join a party after judgment has been entered."*

The appellant has submitted that the case of *London Ngoma* related to an appeal. However, the appellant argued that Rule 67(1) only applies where there is an appeal pending or a notice of appeal

because the phrase *"When an appeal is called for hearing or at any previous time..."* entails that the joinder application can only be made at the time the appeal is called for hearing or at any time before the appeal is called but where an appeal or a notice of appeal has been intimated to the Court. In addition, the subsequent phrase *'–.direct that the record of appeal, or any respondent's notice be served..."* only goes to show that there must be an appeal or a party's notice of its intended appeal. In the light of this, the appellant submitted that the holding of this Court in the *London Ngoma* case was to a certain extent in error as the facts did not support the import of Rule 67. There was therefore a sufficiently strong reason to decline to follow the *London Ngoma* case, to the extent of the appellant's arguments and the facts of this case. The appellant went on to argue that if the reasoning of the earlier decision is followed, the effect would be that any party would be at liberty to apply to join a party without having to follow the law that was cited in the summons for joinder.

Mr. Chugani has valiantly argued against the first ground of appeal. His starting point was that Section 2 (1) of Cap 27 defines *"action"* as *"a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court but does not include a criminal proceeding by the people."* Arising out of this and following the definition of the term action in paragraph 17 of Volume 37 of the Haisbury's Laws of England he has argued on behalf of the respondent that the suit is not completed until the legal right or claim is determined or any justiciable issue between two or more persons has been resolved. In other words, the action does not end upon the passing of judgment but could include applications made after judgment until the action is resolved. He argued that in the present case the receivers had not abided by the court's ruling but in blatant disregard of the same have passed on the monies realized from the sale of the respondent's goods to the appellant.

The respondent has also argued under the first ground of appeal that a court has wide discretionary powers to make any

necessary amendment as to parties by adding, substituting or striking them out and to make all such changes in respect of parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute between them in terms of Order 15/6/(2) (b) RSC as read with order XII 5 (1) of the High Court Rules Cap 27. The respondent has however, acknowledged and quite rightly so that an application for joinder should be made promptly. A delay of nine months before taking steps to join the appellant to the action cannot be said to be a prompt step.

The second ground of appeal dealt with three issues. The first issue was that the court was *functus officio.* The second issue was that the appellant was never accorded the right to be heard during trial since it was not a party and the third issue was that there was no appeal to warrant a joinder. The appellant's argument in connection with the court being *functus officio* was that when the court made the order for joinder, it had already delivered its judgment and by entertaining the application for joinder, the court below re-opened the case. The appellant argued that an instance

where a court can join a party after judgment has been delivered is if there is an application for review in accordance with Order XXXIX rules 1 and 2 of the High Court Rules. In the instant case there was no such application. The appellant contended that since there was a final judgment with no review the court became *functus officio* as it had completed its duty of adjudication. It was therefore effectively precluded by law to join any party after it had delivered its judgment. The appellant drew our attention to the case *of Zambia Privatisation Agency v Huddell Chisenga Chibichabo and Zamcargo Limited*[4] where we held that an application to join the appellant to the matter after the final judgment was legally incompetent as the Industrial Relations Court which did not have power to review its own judgment, therefore was *functus officio* and could not order joinder.

The other argument under this ground was that the court below totally disregarded the conditions that must be satisfied in order for a party to be joined, these being:

(i) *The party being joined to a matter must be placed in similar facts as the parties already party to the matter;*

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*(ii) There must exist common questions of law between the claim by the party being joined to a matter and the claim of the parties already party to the matter; and*

*(iii) The relief that is being sought by the parties being joined to a matter must be capable of being satisfied by the relief being sought by parties already parties to the matter.*

The appellant contended that none of these conditions were satisfied. The respondent's rights arose from a totally different contractual relationship that it had with Jes in the court below. The fact that the appellants was the debenture holder and that it appointed the receivers was immaterial as the receivers were agents of Jes in the court below and not the appellant. There was therefore no fiduciary relationship between the receivers and the appellant which would have warranted liability being slapped on them for the receivers or Jes' inability to pay the judgment sum. In the circumstances, counsel for Jes should have followed up the shareholders of Jes since there had been an alleged cessation of receivership.

A further argument advanced by the appellant was that the appellant was never accorded the right to be heard during trial

since it was not a party to the action. The appellant argued that a party cannot have an order made against it without being party to the proceedings. The appellant was not a party to the action in the Court below and it was never heard at trial. In effect, the appellant argued, by being joined to the proceedings without being heard during the trial, it amounted to breaching the rules of natural justice and was contrary to the holding in the case of *Mulenga v Mumbi exparte Mhango*[5] in which it was held that:

> *"No order should be made to the detriment of an individual unless he is a party to the proceedings and is given an opportunity to be heard before any such order is made. Anything done to the contrary would be a breach of the rules of natural justice."*

The appellant also relied on paragraph 1368 of *Halsbury's Laws of England* Volume 30, 3rd Edition which reads:

> *"All persons exercising judicial or quasi-judicial functions must have due regard to the dictates of natural justice. These require that the parties to the proceedings shall be duly notified when and where they may be heard and shall then be given full opportunity of stating their views, the matters in dispute being decided honestly, impartially and without bias by a tribunal, no member of which has any interest, either pecuniary or otherwise in the matter."*

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Further reliance was placed on the case of *Rex v General Medical Council Ex parte Spackman*[6] in which *Lord Wright* said as follows at page 644.

> *"If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of departure from the essential principles of justice. The decision must be declared to be no decision."*

The appellant contended that in the light of the above authorities the respondent was at all times aware that the appellant was the debenture holder over the assets of Jes in the court below and that it had appointed joint receivers. In the circumstances, the respondent should have applied to join the appellant in the court below before judgment was passed. In addition to this argument, the appellant argued that there was no pending appeal. For this argument, the appellant relied on a passage from *Eureka Construction Limited v Attorney General, Consolidated Lighting Zambia Limited (Proposed Intervening Party)*[7] in which we held that:

*'Rule 67(1) of the Supreme Court Rules envisages joinder of an interested party when an appeal is called for hearing and not long after the judgment has been delivered."*

In *Simbeye Enterprises Limited and Investrust Merchant Bank (Z) Limited v Ibrahim Yousuj*[8], the appellant argued that we held that:

*"It has been the practice of the Supreme Court to join any person to the appeal if the decision of the court would affect that person or his interest. The purpose of the rule is to bring all parties to disputes relating to one subject-matter before the court at the same time so that disputes may be determined without the delay, inconvenience and expense of separate actions and trials."*

In *Kingfarm Products Limited, Mwanamuto Investments Limited v Dipti Rani Sen (Executrix and Administratrix of the Estate of Ajit Barab Sen)* this Court held that:

*"A party may only be joined to proceedings, on appeal, prior to judgment."*

The appellant accordingly submitted that on the strength of these authorities, the law is certain with respect to a party being joined after judgment only when there is an appeal. In view of this, after the Court below rendered its final judgment on 26th November,

2009, there was no pending trial or appeal to be determined to have warranted the joining of the appellant to the proceedings.

The respondent has argued with respect to the second ground of appeal that a party can be joined even after judgment and that the trial court had found that special circumstances existed which made it necessary for the court to consider joining the appellant to the proceedings in the court below. The respondent then went on to argue that the receivers held property received by them in a fiduciary capacity.

In the third ground, it was contended by the appellant that it was an error for the Court below to further imply that the appellant could be tried on the merits after judgment had already been rendered and there was no appeal pending. The appellant could not be tried on the merits since the matter had already been determined with no appeal, or even application or order by the Court for review. As such there were no matters pending. It was also contended by the appellant that the action that the respondent would commence against the appellant would not have some

common questions of fact as with the action that the respondent commenced against Jes. In the light of the undisputed facts and questions of law, the only relationship that was tenable at law is that between the respondent and Jes flowing from their initial contract. There was no relationship between the appellant and the respondent in the Court below. The respondent's application to join the appellant was only for the purpose of executing a judgment against the appellant.

In its response to the third ground of appeal, the respondent has argued that on the issue of review in accordance with order XXIX of Cap 27, the appellant's advocates have conveniently left out a vital part which reads as follows:

> *("Except where either party shall have obtained leave to appeal, and such appeal is not withdrawn")*

The respondent has argued that the receiver had obtained leave to appeal and had not withdrawn such appeal and contrary to what was being stated about there being no fresh evidence, this

whole issue had arisen because of fresh evidence which was that the receivers of Jes had refused to comply with this court's ruling of 26th November, 2009 and instead passed on the proceeds to the appellant.

The respondent has got a point when it argues that some words relating to obtaining leave were omitted from Order XXUX. The appellant has in our view not deliberately omitted the words because the quotation shows that the appellant has indicated that the words were being omitted. The inclusion of the omitted words would not have helped the respondent much as the conditional leave of appeal which Jes had obtained had collapsed due to the non-payment of the sum of US$96,000.00.

Although this appeal relates to the question of whether or not the appellant should have been joined to the proceedings after judgment even in the absence of a review or an appeal it also dwells on the broader issues of the rights and liabilities of debenture holders and receivers in general in relation to unsecured creditors

which should have been addressed at the time of the making of the application.

In terms of section 113 (1) of the Companies Act Cap 388 of the Laws of Zambia, a receiver appointed otherwise than by the court is deemed in relation to the property or undertaking to be an agent and officer of the company and not an agent of the persons by or on behalf of whom he is appointed. This has been the position at common law and most standard debentures including the one in connection with this appeal contain a clause to that effect.

Section 114 of the Companies Act on the other hand which deals with liabilities of receivers on contracts states as follows:

> *"1 14. (1) A receiver of any property or undertaking of a company shall be personally liable on any contract entered into by him as receiver except insofar as the contract expressly provides otherwise.*
>
> *(2) Where the contract was entered into by the receiver in the proper performance of his functions, he shall have, subject to the rights of any prior encumbrances, an indemnity in respect of liability thereon out of the property in respect of which he has been appointed to act as receiver.*

> *(3) Where the receiver was appointed otherwise than by a court, under a power contained in any instrument, and the contract was entered into by him with the express or implied authority of those appointing him, he shall also have an indemnity in respect of liability thereon from those appointing him to the extent to which he is unable to recover in accordance with subsection (2)."*

Bearing in mind sections 113 and 114 of the Companies Act and these principles on receivers and debenture holders in, we are of the view that the learned Judge adopted an erroneous approach when she came to the conclusion that it was necessary for the bank to be joined to the proceedings because there were special circumstances. The special circumstances mentioned in the judgment are as follows:

1. *The receivers who are agents of the defendant company were appointed by the debenture holder to secure its interests. In the process the receivers wrongfully sold goods belonging to the plaintiff and paid the proceeds to the debenture holder.*

2. *The receivers tactfully put the receivership to an end before the judgment of the court against them could be perfected. In the circumstances the receivers are answerable for the judgment debt and not Jes.*

3. *Since there is no appeal pending it was in the interests of justice to bring in the appellant to explain why it should not refund the money to the respondent.*

4. *The jurisdiction of the High Court is different from that of the Industrial Relations Court because the High Court can review its own judgment, that is why it is allowed to join a party to an action even after judgment has been entered.*

5. *Should the appellant be joined to the action, all the parties involved would have an opportunity to make appropriate applications so that the issues in controversy may be determined on their merit.*

6. *It would not be in the interest of justice for the respondent to incur further costs by instituting a separate action against the appellant.*

The special circumstances being advanced by the learned Judge in her judgment are not supported by the law. To begin with, section 113 (1) of the Companies Act makes a receiver in relation to the property or undertaking to be an agent and officer of the company and not an agent of the persons by or on behalf of whom he is appointed. Even assuming that the receivers wrongfully sold goods belonging to the appellant and paid the proceeds to the debenture holder, liability would be attached to the receivers as agents of Jes and not to the appellant as debenture holder. The

receiver is of course entitled to indemnity in respect of liability from those appointing him in accordance with section 114 (3).

Section 114 (1) of the Companies Act makes a receiver personally liable on any contract entered into by him as receiver except insofar as the contract expressly provides otherwise. However, these two sections we have just referred to do not give a creditor the leeway to sue a debenture holder or join a debenture holder to the proceedings as there is no nexus between the respondent and the appellant and it is up to the receiver to decide whether or not to commence proceedings against a debenture holder to seek indemnity for his actions.

The learned judge deprecated the tactics of the receivers because according to her, the receivers tactfully brought the receivership to an end before the judgment of the court could be perfected. A perusal of the record of appeal shows that Jes owed the debenture holder US$12,175,271.32 and out of this, the receivers managed to recover US$6,000,000.00. The receivers did not deem it fit to pursue the balance of the claim due to the fact

that Jes was insolvent with liabilities far exceeding assets available. Another reason was that there was a Mareva injunction in place which impeded the recovery of any remaining assets so the receivers invoked the provisions of section 109 and filed a notice ceasing to act as receivers. Their actions can hardly be said to be tactful. If anything it was a prudent move by the receivers to avoid unnecessary costs. The fact that the receivers ceased acting as receivers did not in any way prejudice the respondent as the respondent was in any event an unsecured creditor even if it had a judgment in its favour. The receivers cannot therefore, be said to be answerable for the judgment debt of Jes when they had ceased to act and handed over Jes to its directors and shareholders.

The learned Judge acknowledged that there was no appeal pending in the matter between the respondent and Jes. She nevertheless went ahead and held that it was necessary in the interest of justice to bring in the appellant to explain why it should not refund the money to the respondent.

Since there was no appeal because Jes did not meet the terms of paying $96,000.00 prior to appealing, or applications for review for that matter after judgment was delivered, the learned Judge was as has been correctly argued by the appellant, functus officio. She had performed her function as a Judge and her role as adjudicator was at an end.

The learned Judge in dealing with the issue of special circumstances was of the view that in the event that the appellant was joined to the action, all the parties involved would have an opportunity to make applications so that the matter was heard on the merits. This was an incorrect approach to the issue at hand because the respondent's affidavit in support of the application for joinder does not raise any question about a review or an appeal. We are inclined to agree with the appellants' arguments that where there is no appeal or application for review there is no basis for joining the appellant to the proceedings which are in any event at an end. The challenges encountered by the respondent in

attempting to enforce its judgment cannot be linked to the appellant or to the cessation of the receivership.

The first ground of appeal focuses on Order XIV Rule 5 (1) of the High Court Rules Cap 27 and attacks the lower courts finding that there was a need for a joinder because Order XIV Rule 5(1) only allows for a joinder *"at or before the hearing of a suit"* and not nine months after judgment as happened in the matter. In addition to that, there was no appeal or an application for review by any of the parties. The appellant has relied on the *Tall* case which seems to suggest that in a proper case a party can be joined before judgment has been delivered by invoking Order 14 Rule 5 of the High Court Rules. The appellant has also gone to great lengths to explain the *London Ngoma* case and has even suggested that it may have been wrongly decided. We take the view that the *London Ngoma* case was correctly decided given its circumstances and in terms of Rule 67 (1) of the Supreme Court Rules Cap 25 which provides for joinder when an appeal is called for hearing. We are also of the view that the *London Ngoma* case was dealing with a matter on appeal while

in the current appeal there was no appeal or review after the judgment. There is therefore considerable force in the appellant's argument that the process for joinder should really have been set in motion at or before the hearing of the suit. In other words, the respondent should have applied earlier to join the appellant so as to enable the appellant to defend itself during the proceedings. At any rate, the application should have been made before judgment was delivered as was decided in the *Tall* case.

The difficulty we have with this argument by the respondent's argument in relation to the appellant's first ground of appeal is that an action usually terminates with the delivery of the judgment and enforcement of the judgment unless, of course, there is an appeal or an application for review none of which happened in the present case. It cannot therefore be possibly argued that an action should be open ended as litigants are expected to be vigilant in asserting their rights. The other difficulty we have is that the reference to the ruling of a single Judge of this court is not entirely correct. A perusal of the ruling shows that the Judge in his ruling clearly

recognized the rights of a debenture holder in relation to judgment creditors and refused to stay execution. It cannot therefore be argued that the receivers in blatant disregard of the ruling passed on the monies to the appellant as debenture holder. The learned single Judge however stressed that procedure had to be followed if the respondent wanted to execute.

We therefore agree with the appellant that there is merit in the first ground of appeal that the application for joinder was incompetent because it was made long after judgment had been delivered between the respondent and Jes and in any event there was no appeal as Jes had failed to meet the condition for the appeal nor was there any application for review. It follows also that the second ground of appeal must inevitably succeed because the court below had become *functus officio* as the judgment had been delivered and there was no pending appeal or review to warrant the joinder. In addition, the appellant was never accorded the right to be heard during the trial since it was not a party to the action.

We see no need to dwell on the third ground of appeal after having **k*nxl** that the application for joinder was incompetent. We **i** y allow this appeal and set aside the order for joinder *f/* **usts** to the appellant, to be agreed or taxed in default of ezuent

SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE

M. MUSONDA, SC
**SUPREME COURT JUDGE**