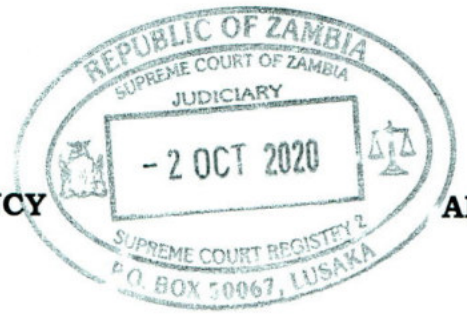
IN THE SUPREME COURT OF ZAMBIA **APPEAL No. 12/2019**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

ZAMBIA TOURISM AGENCY **APPELLANT**

AND

CHARITY CHANDA LUMPA **RESPONDENT**

CORAM : **MAMBILIMA CJ, KAJIMANGA and KABUKA JJS, on 11th August, 2020 and 2nd October, 2020**

For the Appellant : **Mr. M. Ndalameta of Musa Dhudia & Company**
For the Respondent : **Mr. A. Chileshe, Kasama Chambers**

J U D G M E N T

MAMBILIMA, CJ, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **DOCTOR JW BILLINGSLEY V. JA MUNDI (1982) ZR 11**
2. **MUSUKUMA V MAJOR BAXTER C. CHIBANDA SCZ JUDGMENT NO. 33 OF 2014**
3. **BOARD V. THOMAS HEDLEY AND COMPANY LIMITED [1951] 2 All E R 431**
4. **VERNON V BOSLEY (1951) 2 ALL ER 431**
5. **MONK V REDWIG AIRCRAFT COMPANY LIMITED [1942] 1 KB**
6. **ROSEMARY CHIBWE V AUSTIN CHIBWE SCZ JUDGMENT NO. 38 OF 2000**
7. **R. V GOUGH [1993] 2 ALL ER**
8. **HEUFF V MBEWE (1965) ZR 111 SC**
9. **R V BOW STREET METROPOLITAN STIPENDIARY MAGISTRATE AND OTHERS, EX PARTE PINOCHET UGARTE (NO. 2) [1999] 1 ALL ER 577**
10. **VENTOURIS V MOUNTAIN THE ITALIA EXPRESS [1991] 3 ALL ER**
11. **R V SUSSEX JUSTICES, EX PARTE MCCARTHY [1924] 1KB 256 at page 259**
12. **COLLET V VAN ZYL BROTHERS LIMITED (1966) ZR 65 (CA)**

13. EAGIL TRUST COMPANY LIMITED V. PIGGOTT BROWN [1985] 3 ALL ER 199 CA
14. WATTS V. MANNING [1964] 2 ALL ER CA
15. DOCTOR J.W. BILLINGSLEY V J.A. MUNDI (1982) ZR 11
16. R V. CAMBORNE JUSTICES EX PARTE PEARCE (1955) 1 QB 41 at page 48
17. KHAN (DAVID) INC V CONWAY STEWARD & CO LTD [1972] FSR 169
18. SCHERER V COUNTING INVESTMENTS LIMITED (1986) 1 WLR 615
19. MATALE JAMES KABWE V. MULUNGUSHI INVESTMENTS LIMITED (1993-1994) ZR 94 (SC)
20. VINCENT MULEVU MUSUKUMA, KAINDU MUKUMBI MULEVU (SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE MOSES B. MULEVU) V MAJOR BAXTER C. CHIBANDA, REGISTRAR OF LANDS AND DEEDS AND ATTORNEY GENERAL SCZ JUDGMENT NO. 33 of 2014
21. LOCABAIL (UK) LIMITED V BAYFIELD PROPERTIES LIMITED AND ANOTHER [2000] QB 451
22. TAYLOR AND ANOTHER V LAWRENCE [2002] 2 All ER 353
23. AFROPE ZAMBIA LIMITED V. ANTHONY CHATE AND OTHERS SCZ APPEAL NUMBER 160 OF 2016
24. YB AND F TRANSPORT LIMITED V. SUPERSONIC MOTORS LIMITED SCZ JUDGMENT NO. 3 OF 2000
25. GENERAL NURSING COUNCIL OF ZAMBIA V. ING'UTU MILAMBO MBANGWETA (2008) Z.R. VOLUME 2 105
26. WOOTTON V CENTRAL LAND BOARD [1957] 1 All ER 441 at page 446

LEGISLATION REFERRED TO:

a. THE TOURISM ACT, CHAPTER 155 OF THE LAWS OF ZAMBIA
b. THE JUDICIAL CODE OF CONDUCT ACT NO. 13 OF 1999
c. THE COURT OF APPEAL ACT NO. 7 OF 2016

OTHER WORKS REFERRED TO:

(i) DR. P. MATIBINI, SC. ZAMBIAN CIVIL PROCEDURE: COMMENTARY AND CASES, DURBAN: LEXIS NEXIS, 2017 page 1019
(ii) ROBERT TURNER, J. I. WINEGARTEN & JUSTICE KERSHAW (EDs). ATKINS COURT FORMS, 2ND EDITION, VOLUME 15, page 86
(iii) THE RULES OF THE SUPREME COURT OF ENGLAND (WHITE BOOK) 1999 EDITION
(iv) LORD HAILSHAM (ED) HALSBURY'S LAWS OF ENGLAND 4TH EDITION, VOL. 17 paragraph 5, paragraph 1
(v) BRYAN A. GARNER IN BLACK'S LAW DICTIONARY 8TH EDITION page 171

1. INTRODUCTION

1.1 This is an appeal from the decision of the Court of Appeal delivered on 21st March, 2019. It emanates from that Court's decision to send the case involving the parties back to the High Court to take its normal course before the same Judge, despite holding that the trial Judge had delved into the merits of the main matter when determining an interlocutory application which was before it. The Appellant was also aggrieved with the Court of Appeal's refusal to order the Respondent to submit a further and better list of documents and discovery of particular documents. The Appellant has, in addition, assailed the Court below's decision to condemn the Appellant in costs, despite succeeding in two of the three grounds of appeal before it.

2. BACKGROUND

2.1 The Respondent commenced an action in the High Court against the Appellant by way of writ of summons and statement of claim seeking the following reliefs:-

I. **The balance of the terminal benefits due plus interest at current rates**
II. **Further and other reliefs**
III. **Costs**

2.2 In her pleadings, the Respondent averred that she was employed as Managing Director by the Appellant on 2nd May, 2003 on a 3-year contract which was set to expire on 31st December 2006. On 17th December 2006, her contract was extended for a further term of 1 year.

2.3 According to the Respondent, it was a term of her contract of employment that in the event of termination or non-renewal of the said contract other than on disciplinary grounds, she would be entitled to payment of a years' pay and benefits as compensation for loss of employment. That until the full benefits are settled, the Respondent would be considered an employee of the Appellant and would, consequently continue to draw a salary and receive benefits as an employee.

2.4 On 23rd August 2007, the Respondent was informed by letter, that her contract would not be renewed owing to restructuring. The net effect of the communication was that her employment would terminate on 31st December 2007.

2.5 The Respondent asserted that her terminal benefits were wrongly calculated on the basis of arrears of her salary,

gratuity and leave days for the months of January to December 2007. That the amounts due to her had not been settled despite several reminders to do so.

2.6 The Appellant, in its defence, conceded that the Respondent was indeed employed under a contract that ran from 2nd May 2003 to 31st December 2006. It, however, contended the extension of her contract by a year was irregular in that it was not ratified by the Appellant's **BOARD** or the **MINISTER OF TOURISM** as required under the **TOURISM ACT[a],** and that consequently, the terms of the said contract were unenforceable.

2.7 The Appellant averred that the terms of the contract which provided that the Respondent would be entitled to a year's pay and benefits as compensation for loss of employment was not tenable at law. Also, that the term relating to the Respondent being deemed an employee of the Appellant until final settlement of her benefits is unconscionable and not tenable at law.

2.8 The Appellant further averred that the Respondent was given due notice of the intention to terminate her contract. That following the termination, she was paid all her dues. That

upon leaving the employment of the Appellant, the Respondent has since taken up another job. The Appellant disputed that the Respondent was entitled to any of the reliefs sought.

2.9 Before the matter could proceed to trial, the Appellant made an interlocutory application for a further and better list of documents and discovery of particular documents.

3 THE APPELLANT'S INTERLOCUTORY APPLICATION BEFORE THE HIGH COURT

3.1 The thrust of the Appellant's interlocutory application was that during the course of the proceedings in the High Court, the Respondent had been appointed to various positions of employment. That she did not include on her list of documents, any document relating to when she found new employment following her termination of employment with the Appellant. That there was no document revealing the terms of her subsequent contracts of employment or remuneration to which she was entitled following her later appointments.

3.2 The Appellant was of the view that the documents for which discovery was sought are relevant to the determination of the disputes before the High Court. That they would assist in establishing the actual damage suffered by the Respondent.

3.3 The Respondent opposed the application and stated that following the termination of her contract of employment, her terminal benefits were wrongly calculated. She asserted that the information sought by the Appellant was not necessary in determining her dues.

4. CONSIDERATION OF THE INTERLOCUTORY APPLICATION BY THE HIGH COURT

4.1 The learned trial Judge, in her ruling, stated that the claim by the Respondent was not ambiguous as it was clearly set out in the statement of claim and the Appellant would not be ambushed at trial. That the particulars sought by the Defendant were not material to the main matter. She went on to hold that the Appellant's request was irrelevant in determining the claimed balance of terminal benefits due to the Respondent.

4.2 The trial Court was of the view that the Respondent's claim was hinged on clauses 3.6 and 3.7 of the Respondent's contract of employment. The said clauses provide as follows:

> **"3.6 In an (sic) event of termination or non-renewal of the contract by either restructuring, reorganization, redundancy or any other reason other than disciplinary nature, the**

employee will be paid the remaining contract period benefits and one year's pay and benefits as compensation for loss of office.

3.7 Until payment in Clause 3.6 above are paid in full, the employee will be considered to be in employment. The monthly salary and benefits shall continue to be paid to the employee."

4.3 The learned Judge was of the view that since the main claim by the Respondent was for the balance of her terminal benefits together with interest, the said dues could be ascertained without the aid of the documents sought by the Appellant.

4.4 The learned trial Judge was also of the firm view that Clause 3.7 of the contract of employment prompted the Appellant's application for further and better list of documents. She held that the said clause could not be 'remedied' as the contract was already executed and its terms clearly set out. Further, that having drafted the contract in question, the Appellant was precluded from reneging on it, under the doctrine of ***contra proferentem***. Consequently, the trial Court dismissed the application for a further and better list of documents, and discovery of particular documents.

5. GROUNDS OF APPEAL BEFORE THE COURT OF APPEAL

5.1 Dissatisfied with the decision of the High Court, the Appellant appealed to the Court of Appeal advancing the following grounds of appeal, that:

I. **The court below erred in law and in fact by deciding on matters that were not the subject of the particular application before it, and in the process determining the main matter.**
II. **The Court below erred in law and in fact when it found that the Respondent's earnings since leaving the Appellant's employment are not relevant to the case before the lower court.**
III. **The Court below erred in law and in fact when it held that the contra proferentem doctrine was applicable to the present case.**

5.2 In the first ground of appeal, the Appellant's argument, in the main, was that the Court below was precluded from commenting or making a decision that could lead to the determination of the main matter. To support this argument, the Appellant relied on our decisions in the cases of **DOCTOR JW BILLINGSLEY V. JA MUNDI**[1] and **MUSUKUMA V MAJOR BAXTER C. CHIBANDA**[2] where we guided that a Judge should not determine the merits of a case when deciding an interlocutory application.

5.3 According to Counsel, the trial Court made findings which determined the main matter. He urged the Court of Appeal to

send the matter back to the High Court to proceed before a different Judge.

5.4 With regard to the second ground of appeal, the Appellant argued that the discovery sought was relevant in determining the damages which the Respondent would be entitled to should she succeed in the High Court. That in determining the Respondent's dues, the trial Court would be required to consider whether the Respondent had found any new employment following the termination of her contract. To support this submission, the Appellant relied on the cases of **BOARD V. THOMAS HEDLEY AND COMPANY LIMTED[3], VERNON V BOSLEY[4]** and **MONK V REDWIG AIRCRAFT COMPANY LIMITED[5]**. In the case of **VERNON V BOSLEY[4]** the Court held that in calculating damages for loss of prospective earnings, information on any new lucrative employment should be disclosed.

5.5 With respect to the third ground of appeal, the Appellant argued that the finding by the High Court, that it was in fact the Appellant who had drafted the contract in question was not supported by any evidence before it. The Court of Appeal

was referred to our decision in the case of **ROSEMARY CHIBWE V AUSTIN CHIBWE** [6] where we held that a Court's conclusion must be based on facts before it.

5.6 In response to the Appellant's arguments in support of the first ground of appeal, the Respondent argued that the Appellant merely made a 'blanket statement' that the trial Court delved into the merits of the main matter. Consequently, that the first ground of appeal lacked merit.

5.7 With regard to the second ground of appeal, the Respondent contended that the documents which are being sought are not relevant at pre-trial stage. That they would only become relevant at the time which the Court will be determining the quantum of damages, should the Respondent's action succeed in the High Court.

5.8 Under the third ground of appeal, the Respondent was of the view that the Appellant has not disputed the fact that it drafted the executed contract of employment and as such, that the ***contra proferentem*** rule applied. The Court of Appeal was urged to dismiss the appeal.

6. DETERMINATION OF THE

APPEAL BY THE COURT OF APPEAL

6.1 The Court of Appeal opted to deal with the first and third grounds of appeal together as they were of the view that the said grounds raised the same question as to "***whether the Court below went outside what was being considered in the interlocutory application and delved into the merits of the case.***" We have reproduced the said grounds of appeal in paragraph 5.1 above. The Court agreed with the Appellant that the learned trial Judge had, indeed, delved into the merits of the main matter when she ought to have only resolved the application which was before her. This was the application under Order 24 of the Rules of the Supreme Court (White Book) on discovery of documents.

6.2 With regard to the second ground of appeal, the Court was of the view that the whole appeal turned on this ground. It agreed with the Respondent that the documents sought, as to when the Respondent found employment and the terms of the contract of the subsequent employment, were not relevant. That while the Appellant would use such information to mitigate damages, the only relevant information at that stage

was *whether the Respondent had obtained employment and the date of commencement of the employment,* which information could be solicited in cross examination. The decision of the Court on this point was couched in the following terms:

> **"Turning to ground two, we entirely agree with the Court below when it refused to grant the application for further and better discovery of list of documents relating to when the Respondent found employment and the terms of that employment contract. That the same was irrelevant to the case at hand. While we appreciate that the appellant would like to use the information in mitigation of damages, the only relevant facts are that the respondent has obtained employment and the date when the employment commenced; information that can be obtained through cross-examination. The Respondent's actual earning or remuneration is irrelevant."**

The second ground of appeal was thus, dismissed.

6.3 The Court opined that the second ground of appeal having failed, the entire appeal failed **"as *the nominal success of the first and third grounds of appeal had no bearing on the Court below."*** The Court dismissed the entire appeal with costs and sent the matter back to the High Court to continue before the same Judge.

7. GROUNDS OF APPEAL BEFORE THIS COURT

7.1 Dissatisfied with the Judgment of the Court of Appeal, the Appellant has now escalated the matter to this Court, advancing three grounds of appeal couched as follows:

1. **The Court below erred in law and in fact when it ordered that the case proceeds for trial before the same learned High Court Judge it held had delved into the merits of the main matter and predetermined the case;**
2. **The Court below erred in law and in fact when it treated as one and the same relief governed by the same considerations, the Appellant's request for a further and better list of documents and the Appellant's request for discovery of particular documents; and**
3. **The Court below fell into error when it ordered costs against the Appellant despite accepting that the High Court had misdirected itself by predetermining the main matter and making findings of fact not supported by evidence.**

7.2 Both parties filed written heads of argument which they augment with oral submissions at the hearing of the appeal.

7.3 In support of the first ground of appeal, Mr. Ndalameta, the learned Counsel for the Appellant contended that the fact that the trial Court delved into the merits of the case when determining the interlocutory application before her is not disputed. The Court of Appeal clearly stated in its judgment that "***we hasten to agree with the appellant that the court below did delve into the merits of the main matter.***"

7.4 Learned Counsel argued that the determination by the High Court took away the Appellant's defence in paragraphs 3 and 4 of its defence wherein it averred that:-

> **"3. The Contract of Employment which the Plaintiff is seeking to endorse in this action was drawn up sometime in 2007 and the same is irregular since it was not ratified by Board of the Defendant or the Minister of Tourism as required by the Tourism Act, Chapter 155 of the Laws of Zambia. As such, the terms of the said Contract of Employment are unenforceable for lack of compliance with the requirements of the law.**
>
> **4. The Defendant will at trial further state the clauses in the Plaintiff's Contract of Employment which provided that the Plaintiff would be entitled to one year's pay and benefits as compensation for loss of office and that she would be deemed to continue to be an employee of the Defendant until such payments were made are unconscionable and unenforceable at law."**

7.5 He submitted that the comments by the High Court Judge, on page 66 of the record of appeal that the Appellants are the ones who drafted and appended their signatures to the document and that they *'cannot now renegade on the stipulations and conditions of service under the contract'* means that it will be virtually impossible for the Appellant to succeed. He contended that the Appellant will be prejudiced in that the Judge will not be open to persuasion.

7.6 Counsel submitted further, that the decision by the Court of Appeal to send the matter back for continuation before the

same High Court Judge after holding that she delved into the merits of the main matter also goes against established practice. To buttress this argument, he referred us to our decision in the case of **DR. JW BILLINGSLEY V JA MUNDI**[1] where Ngulube DCJ, as he then was, stated as follows:

> **"In the light of the unanimous conclusion already indicated by this court when we heard this appeal, I am of the view that it is unnecessary to give further consideration to any aspect of this case other than to stress that, unless the parties have specifically and clearly applied for a consent judgment, which they are at liberty to apply for at any stage of an action, the court should only deal with the particular application properly before it. The application for an interim injunction should be treated as such and should not be taken as a convenient opportunity for the summary determination in finality of an entire suit. In this case I would hold that the purported final determination of all the issues at that stage was premature and incompetent, and accordingly a complete nullity. For the foregoing reasons the appeal was allowed with costs, the judgment of the court below set aside, and the case remitted to the High Court to take its normal course."**

7.7 According to Counsel, once a Judge has prematurely determined a matter, there is a presumption that the Judge will arrive at the same conclusion should an opportunity for the same Judge to try the same matter arise. He referred us to a decision of the House of Lords in **R. V GOUGH** [7] where the Court stated that:

> **"The Court of Appeal however identified in the cases two strands of authority, revealing that differing criteria have been applied in the past when considering the question of bias. The two tests have, as will appear, themselves been variously described. The Court of Appeal identified them as being (1) whether there was a real danger of bias on the part of the person concerned or (2) whether a reasonable person might reasonably suspect bias on his part."**

7.8 It was Learned Counsel's submission that the predetermination of the matter by the trial Judge raises a suspicion of bias in the eyes of a reasonable person. Further, that members of the Judicature must be impartial in order for justice to not only be done, but to manifestly be seen to be done. To fortify this argument Learned Counsel relied on our holding in the case of **HEUFF V MBEWE**[8] where we stated that it is in the public interest that justice should always be done and seen to be done. He also stated that Section 3 of the **JUDICIAL CODE OF CONDUCT ACT NO. 13 OF 1999** [b] emphasizes the need for a judicial officer to be impartial.

7.9 Counsel contended that justice cannot be done or seen to be done in this case if the matter is taken back to take its course before a judge who has prematurely made findings not supported by evidence. The case of **R V BOW STREET METROPOLITAN STIPENDIARY MAGISTRATE AND OTHERS, EX PARTE PINOCHET UGARTE**[8] was called in aid.

In this case, the House of Lords held that it was appropriate to direct a rehearing of the appeal before a differently constituted committee so that on the rehearing, the parties were not faced with a committee, four of whom had already expressed their conclusion on the issues before them.

7.10 To advance the argument further, Learned Counsel referred us to the works of Dr. P. Matibini in his book, **ZAMBIAN CIVIL PROCEDURE: COMMENTARY AND CASES**[1], where, at page 1019, the learned author discusses the importance of a trial, in finally determining the issues in a case. The learned author opined that during trial, the evidence adduced is assessed by the adjudicator after which a decision will be arrived at. In Counsel's view, it would not be just to have the matter tried before a Judge who has predetermined the issues without a trial.

7.11 Coming to the second ground of appeal, Counsel's submissions on behalf of the Appellant were that the Court below erred when it treated as one and the same relief, the Appellant's request for further and better list of documents,

and, the Appellant's request for discovery of particular documents.

7.12 Counsel submitted that the process of discovery is significant as it ensures that the Court is in possession of all material evidence to enable it make a well-informed decision. That this is what the Appellant sought to achieve when it made the application before the High Court. That the Court of Appeal, however, agreed with the High Court's decision to decline the Application. In doing so, it stated:-

> **"Turning to ground two, we entirely agree with the Court below when it refused to grant the application for further and better discovery of list of documents relating to when the Respondent found employment and terms of that employment contract. While we appreciate that the Appellant would like to use the information in mitigation of damages, the only relevant facts are that the Respondent has obtained employment and the date when the employment commenced; information that can be obtained through cross examination. The Respondent's actual earning or remuneration is irrelevant."**

7.13 Referencing the above extract, Counsel argued that the Court of Appeal completely misunderstood the applications which were made before the High Court, as the power of the Court in relation to each of the applications is separate. That though the applications were parallel, each is governed by different

considerations. Counsel relied on a passage from **ATKINS COURT FORMS**[ii], where the learned authors state that:

> **"The Court's power to order discovery of particular documents or classes of documents is parallel to its power to order further and better discovery, and the two applications may be combined."**

7.14 According to Counsel, the fact that the Appellant combined the applications did not entail that the power of the Court in relation to the two applications is the same. That the distinction between the two applications is evident from the fact that they emanate from different rules though under the same Order in the **WHITE BOOK**[iii]. That in line with the explanatory notes at paragraph 24/3/8 of the **WHITE BOOK**[iii], a further and better list of documents is requested for in circumstances where a party has reason to believe that the other party has not fully disclosed the documents in his custody, possession or power. That on the other hand, an application for production of particular documents is governed by Order 24 Rule 7 of the **WHITE BOOK** [iii] and in line with the explanatory notes at paragraph 24/7/2, the rule is applied in circumstances where a party seeks the other party to specify whether it has at any time been in possession and

custody of a class of documents, and if not in his possession, when he parted with them. That the portion of the explanatory notes referred to specifically state that an order under Order 24 Rule 7 of the **WHITE BOOK**[iii] will not be made unless:

> **"(a) there is sufficient evidence that the documents exist which the other party has not disclosed; (b) the document or documents relate to matters in issue in the action; (c) there is sufficient evidence that the document is in the possession, custody or power of the other party."**

7.15 According to Counsel, the Appellant satisfied the above requirements in the High Court as shown in the affidavit in support of summons for an Order for further and better list of documents and discovery of particular documents. That the Court of Appeal ought to have addressed its mind to the two applications separately and pronounced itself on both applications. To buttress this point, Counsel referred us to the case of **VENTOURIS V MOUNTAIN THE ITALIA EXPRESS**[10] where the Court stated, at page 485, that:

> **"Next I venture to repeat in summary form that which I pointed out in DOLLING-BAKER V MERRETT (1991) 2 ALL ER 890..., namely that discovery and inspection or production of documents are two quite separate matters, discovery being dealt with in rr 1 to 8 of Ord 24 and inspection in rr 9 to 14. This is of importance because orders for discovery are made subject to r 8, whereas orders for inspection or production are made subject to r 13. In the former case, the burden is upon**

the objecting party to satisfy the court that discovery is not necessary for the purposes specified, whereas in the latter the burden is on the applying party to satisfy the court that production is necessary for the purposes specified."

7.16 Counsel submitted that in an application for production of documents, the burden is on the party objecting to satisfy the Court that the production is not necessary. According to Counsel, the Respondent did not discharge this burden. In his view the production of the requested documents was necessary as they related to issues in dispute before the trial Court.

7.17 Counsel contended that the Court below ought to have ordered the Respondent to make and serve on the Appellant, a further and better list of documents which are or have been in her possession, custody or power relating to any matter in question; and to have further ordered the Respondent to state whether she has or had in her possession, custody or power, specific documents, and if she did not have them, to state when she parted with them or what has become of them.

7.18 With regard to the third ground of appeal, the Appellant's contention was that the Court of Appeal erred when it ordered costs against it, despite acknowledging that the trial Court

delved into the merits of the main matter. Counsel alluded to the settled principle of law that courts have a discretion with regard to the award of costs and this discretion is exercised on well established principles. To support this submission, Counsel again referred us to an extract from the literally works of Dr. P. Matibini, SC, in his book **ZAMBIAN CIVIL PROCEDURE: COMMENTARY AND CASES, VOLUME(i)** where, at page 1697, he states:

> **"The most important of these principles is that a party who has been substantively successful in bringing or defending a claim is generally entitled to have a costs order made in its favour against a party who was not successful. This seminal principle is often expressed as 'costs follow the event' case"**

7.19 Counsel submitted that the holding of the Court below regarding the fate of the appeal was ***"loaded with several misdirections in law and in fact"***. He cited a portion of the Court of Appeal's judgment where it was stated that:

> **"In this case the ground that was pertinent to the Court below was ground two. The failure of that ground means that this appeal is unsuccessful as the nominal success of grounds one and three have no bearing on the court below.**
>
> **The net result is that the appeal is dismissed. The matter will continue before the same judge.**
>
> **Costs abide the event to be taxed in default of agreement."**

7.20 Counsel contended that it was a misdirection on the part of the Court below, to hold that only the second ground of appeal was pertinent when it had found that the lower Court had indeed delved into the merits of the main matter. According to Counsel, it was at this point, that the Appellant decided to appeal because it was impracticable to proceed to trial before a Judge who had made a determination of the merits of the main matter. That the Appellant intended to correct the error of the Court delving into the merits, although it added the second and third grounds of appeal dealing with the rejected applications for discovery. Counsel contended that the first ground of appeal before the lower Court was important because it went to the core of the principle that "***justice should not only be done, but should manifestly be seen to be done***.' To buttress this point, the Appellant relied on the case of **R V SUSSEX JUSTICES, EX PARTE MCCARTHY** [11]. In this case, Lord Hewart CJ recounted an all too familiar principle when he said that:

> **"...a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."**

7.21 Counsel argued further that the Court below misdirected itself when it termed the success of grounds one and three of its appeal as 'nominal'. He contended that the first ground of appeal before the lower Court was paramount and it was, therefore, not judicious for the Court of Appeal to have awarded costs to the Respondent.

7.22 In Counsel's view the mere fact that the application before the High Court was for further and better discovery, did not mean that only the grounds related to discovery were important. That every ground of appeal is important unless it does not conform with the rules of Court.

7.23 Counsel, consequently, argued that the exercise of discretion by the Court of Appeal was not judicious in that it did not even give an explanation as to why it found the second ground of appeal to be pertinent and the other two grounds to be less important. According to Counsel, the Court's discretion in the award of costs must be exercised within the principles of law, otherwise its exercise may be reviewed on appeal. To support this position of the law, Counsel referred to the decision in the

case of **COLLET V VAN ZYL BROTHERS LIMITED** [12] where it was stated that:

> **"A trial judge, in exercise of his discretion, should, as a matter of principle, view the litigation as a whole and see what was the substantial result. Where he does not do so, the Court of Appeal is entitled to review the exercise of his discretion."**

7.24 According to Counsel, the Court below should have considered the substantial result of the appeal, and this was that the Appellant was successful on the most important issue raised. He invited us, consequently, to interfere with the order for costs granted by the lower Court.

7.25 The Appellant argued further that there was nothing in the conduct of the Appellant which warranted an order for costs against it. Further, that the exercise of discretion in this regard ought to be guided by law and should not be arbitrary or vague. That a Court in exercising judicial discretion must show the legal principles it employed. To support this argument, Counsel relied on the case of **EAGIL TRUST COMPANY LIMITED V. PIGGOTT BROWN** [13] where the Court stated that:

> **"In decisions involving the exercise of judicial discretion a judge should, as a general rule, ... give his reasons in sufficient detail to show the Court of Appeal the basic principles on**

which he has acted and the reasons that have led to his conclusion."

7.26 Counsel echoed his earlier submission that the Court of Appeal did not give any reasons as to why it considered one ground of appeal to be more substantial, and affecting the entire appeal and the other two grounds of appeal to have no bearing on the appeal. In his view, the failure to give reasons for its decision warrants interference by this Court with the lower Court's exercise of discretion to award costs to the Respondent. Counsel cited a passage in the case of **WATTS V. MANNING**[14] stating that:

> **"Reviewing discretion if the judge was wrong: the judge has given no weight or insufficient weight to the considerations which ought to have weighed with him. It sometimes happens that the judge has given reasons which enable this court to know the considerations which have weighed with; but even if he has given no reasons, the court may infer from the way he has decided that the judge must have gone wrong in one respect or the other, and will therefore reverse this discretion.**
>
> **But discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rules, not humour; it must not be arbitrary, vague and fanciful, but legal and regular."**

7.27 As he concluded, Counsel maintained that the exercise of the Court's discretion in awarding costs was not governed by law and was arbitrary for failure to inform the parties the basis of

the exercise of the discretion. He urged us to allow the appeal with costs.

8. THE RESPONDENT'S HEADS OF ARGUMENT

8.1 The Respondent filed written heads of argument. Reacting to the issues raised by the Appellant in the first ground of appeal, Mr. Chileshe, the learned Counsel for the Respondent argued that the Court below did not fall into error when it sent the matter back to the High Court for continuation, as the Court of Appeal was guided by the provisions of Section 24 (1)(b)(iv) of the **COURT OF APPEAL,** which stipulate that:

> **"24. (1) The Court may, on the hearing of an appeal in a civil matter-**
>
> **(iv) remit the case to the High Court or quasi-judicial body for further hearing, with such instructions as regards the taking of further evidence or otherwise as appears to the Court necessary..."**

8.2 Counsel also argued that the Court of Appeal acted within the confines of the law when it sent the matter back to the same High Court Judge to take its normal course. He was of the view that the case of **DOCTOR JW BILLINGSLEY V. JA MUNDI**[15] on which the Appellant relied to assail the Order by the Court of Appeal to send the matter back to the same judge of the High Court did not help its case. He referred us to a

portion of the judgment where Ngulube DCJ, as he then was, stated that:

> **"For the foregoing reasons the appeal was allowed with costs, the judgment of the Court below is set aside and the case remitted to the High Court to take its normal course."**

8.3 With regard to the allegation of judicial bias, should the same Judge preside over the case, Counsel referred us to an extract from the learned authors of **BLACK'S LAW DICTIONARY**[V] who state that:

> **"Judicial bias is usually insufficient to justify disqualifying a Judge from presiding over a case. To justify disqualification or recusal, the judge's bias usually must be personal or based on some extrajudicial reason."**

8.4 Counsel argued that the Appellant has failed to demonstrate how the trial Judge would be personally biased against the Appellant. Further that the Appellant has also failed to demonstrate that the trial Judge is excluded from adjudicating upon the issues before her in line with the grounds set out in Section 6 (2) of the **JUDICIAL CODE OF CONDUCT ACT**[b]. The said Section 6 (2) of the **JUDICIAL CODE OF CONDUCT ACT NO. 13 OF 1999**[b] stipulates 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;

(b) the officer served as a legal practitioner in the matter;

(c) a legal practitioner with whom the officer previously practiced law or served is handling the matter;

(d) the officer has been a material witness concerning the matter or a party to the proceeding;

(e) the officer individually or as a trustee, or the officer's spouse, parent or child or any other member of the officer's family has a pecuniary interest in the subject matter or has any other interest that could substantially affect the proceeding; or

(f) a person related to the officer or the spouse of the officer-

(i) is a party to the proceeding or an officer, director or a trustee of a party;

(ii) is acting as a legal practitioner in the proceedings;

(iii) has any interest that could interfere with fair trial or hearing; or

(iv) is to the officer's knowledge likely to be a material witness in the proceeding."

8.5 According to Counsel, the suspicion of bias by the Appellant is subjective. To buttress this point Counsel relied on the case of **R V. CAMBORNE JUSTICES EX PARTE PEARCE**[16] in which Slade J stated:

"By 'bias', I understand real likelihood of an operative prejudice, whether conscious or unconscious. There must, in my opinion, be reasonable evidence to satisfy us that there was real likelihood of bias. I do not think 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 –was reasonably generated-but certainty, mere flimsy, elusive morbid suspicion should not be permitted to form a ground of suspicion."

8.6 Counsel submitted further that the trial Judge did not predetermine the entire action. That the Court of Appeal merely found that the trial Court prematurely found that it was in fact the Appellant who had drafted the contract of employment which was executed by the parties. That on this premise, the Court of Appeal cannot be faulted for sending the matter back to the High Court to be heard before the same Judge. According to Counsel, the Appellant would not be prejudiced in any way as it will have an opportunity, at trial, to present evidence regarding the author of the contract in question.

8.7 In response to the second ground of appeal, Counsel argued that the Appellant's application for further and better list of documents and for discovery of documents was not granted because the trial Court found that the documents which were sought were not relevant. That the High Court was of the view that the information required could be solicited during cross examination. He contended that the relevance of the documents sought to the dispute is the prime consideration in

applications for discovery. In support of this position, Counsel cited a passage from the learned authors of **HALSBURY'S LAWS OF ENGLAND**[iv] where they state inter alia, that *'the prime requirement of anything sought to be admitted in evidence is that it is of sufficient relevance.'*

8.8 Counsel also relied on the provisions of Order 24/02/2 of the **WHITE BOOK**[iii] where, in the editorial introduction, it is stated that discovery will be allowed for documents which are in possession of a party and are relevant to the dispute. The case of **KHAN (DAVID) INC V CONWAY STEWARD & CO LTD**[17] was also cited. According to Counsel, the Court, in that case, held that discovery is only allowed where it is necessary for determining the issue to which it relates.

8.10 Reacting to the Appellant's arguments in the third ground of appeal, challenging the decision of the Court of Appeal to award costs to the Respondent, Counsel submitted that the lower Court clearly stated that "***the net result is that the appeal is dismissed***". He argued that the Respondent, being the successful party, was entitled to costs in line with settled principles of law as enunciated in various authorities,

including the cases of **SCHERER V COUNTING INVESTMENTS LIMITED[18], MATALE JAMES KABWE V. MULUNGUSHI INVESTMENTS LIMITED[19], COLLETT V VAN ZYL BROTHERS[12].** In the case of **SCHERER[18],** Budley LJ stated, inter alia, that 'the normal rule is that costs follow the event,' while the learned author of **ZAMBIA CIVIL PROCEDURE; COMMENTARY AND CASES[1]** expanded the principle by stating that *',,,the unsuccessful party is ordered to pay costs because he is to blame for the successful party's litigation expenses, just as a tortfeaser is blamed for inflicting loss on another.'* According to Counsel, these authorities guide that costs are granted at the discretion of the Court, which discretion ought to be exercised judiciously and that ordinarily, costs follow the event.

8.11 In conclusion, Counsel prayed that the appeal be dismissed with costs as it lacked merit.

9. DECISION OF THE COURT

9.1 We have carefully considered the application which was before the High Court and its Ruling; the grounds of appeal by the Appellant to the Court of Appeal and its Judgment. We have

also considered the grounds of appeal before us and the submissions of Counsel.

9.2 In the first ground of appeal, the Appellant argues that the Court below fell into error, when it ordered that the matter should proceed to trial before the same High Court Judge, after having accepted that the Judge had delved into the merits of the main matter and hence had predetermined the case. Counsel called in aid, our decision in the case of **DR JW BILLINGSLEY V JA MUNDI**[1].

9.3 The thrust of Counsel's argument is that the learned trial Judge, having delved into the merits of the case would be 'biased' and was unlikely to arrive at a different conclusion if the matter continued before her. Further, that any reasonable person would suspect bias on the part of the trial Court, given the circumstances.

9.4 The learned Counsel for the Respondent, on the other hand, was of the view that the Court of Appeal was well within its powers under Section 24 (1)(b)(iv) of **THE COURT OF APPEAL ACT** when it sent the matter back to the same Judge to take its normal course. Further, that in the cited case of **DR JW**

BILLINGSLEY V JA MUNDI [1], this Court did not order that the matter should be heard by a different Judge.

9.5 To fortify his argument, the learned Counsel for the Respondent argued that the Appellant has not cited any of the grounds enumerated in Section 6 (2) of the **JUDICIAL CODE OF CONDUCT ACT**[b] to support its suspicion of bias on the part of the trial Judge. He contends, consequently, that the Appellant's suspicion of bias is not justified and that in any event, the Court below found that the trial Judge did not determine the whole matter but only the issue of the author of the contract of employment.

9.6 We have carefully considered the arguments by Counsel for the parties under the first ground of appeal. Our view is that the cardinal issue emanating from this ground for our consideration is *whether the Court of Appeal erred when it remitted the matter back to the High Court to take its normal course before the same Judge, having found that the Court delved into the merits of the case at an interlocutory stage.*

9.7 In the relevant part of her Ruling appearing on pages 66 and 67 of the record of appeal, the trial Judge stated as follows:-

> **"They are the ones who drafted the document to which the plaintiff and themselves appended their signatures. The defendants cannot renege (sic) on the stipulations and conditions under the contract of employment by requesting for further and better list of discovery of documents to remedy the mishap. The doctrine of contra-proferentem (sic) now works against them."**

9.8 The Court of Appeal agreed with the Appellant that through this pronouncement, the trial judge did delve into the merits of the case at an interlocutory stage. The Court stated at page J7 of its Judgment;

> **"The other side argue that the Court below did not determine the matter in her Ruling. We hasten to agree with the appellant that the court below did delve into the merits of the main matter... The Court should have resolved the application of documents and not extend to look at the merits of the main matter."**

9.9 We have carefully perused the portion of the Ruling of the trial Court highlighted above and we agree with the Court of Appeal that by pronouncing itself as to who drafted the contract of employment executed by the parties, the trial Court strayed into the merits of the main matter. It goes without saying therefore, that the finding by the trial Judge that the *contra preferentem* rule applied in this case was prematurely made. The trial Court ought to have limited itself to the applications before it. We have, time and again, guided trial courts to

confine themselves to matters or questions submitted for their consideration. Where an entire suit is prematurely determined, we have not hesitated to overturn the decisions in question. We were faced with such a situation in the case of **VINCENT MULEVU MUSUKUMA, KAINDU MUKUMBI MULEVU (SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE MOSES B. MULEVU) V MAJOR BAXTER C. CHIBANDA, REGISTRAR OF LANDS AND DEEDS AND ATTORNEY GENERAL** [20]. We stated, inter alia, that:

> **"... that the trial court should only have dealt with the particular application before it and that it should not have dealt with the merits of the whole case. This amounted to a final determination of all the issues which at that particular stage, was premature, incompetent and accordingly a complete nullity."**

9.10 In this case, both parties agree that the trial Court prematurely made a finding regarding the issue of the contract of employment executed by the parties. The only question therefore is *whether it was proper for the Court of Appeal to order that the matter should continue before the same Judge.*

9.11 The learned Counsel for the Appellant has argued that the finding by the trial Judge was not supported by any evidence and it is likely to create a bias against the Appellant. We have

carefully perused the pleadings before the trial Court. We note that the issue as to who drafted the contract of employment has not been raised by any of the parties. The Appellant, in its Defence, only avers that the contract of employment was invalid as it was not ratified by the **BOARD** of the Appellant or **MINISTER** as required under the **TOURISM ACT**[a]. Paragraph 3 of the Appellant's Defence specifically stipulates as follows:

> **"The Contract of Employment which the Plaintiff is seeking to enforce in this action was drawn up sometime in 2007 and the same is irregular since it was not ratified by the (sic) Board of the Defendant or the Minister of Tourism as required by the Tourism Act, Chapter 155 of the Laws of Zambia. As such, the terms of Employment are unenforceable for lack of compliance with the requirements of the law."**

9.12 Thus, while we agree that the finding by the trial Judge as to who drafted the executed contract of employment was prematurely made, we are of the view that the finding does not go to the root of the main matter as gathered from the pleadings on record. The entire claim was for *'...balance of terminal benefits plus interest at current rates.'* As to the suspicion of bias on account of the premature finding by the Judge, we are guided by the sentiments of the Court of Appeal in England in the case of **LOCABAIL (UK) LIMITED V**

BAYFIELD PROPERTIES LIMITED AND ANOTHER[21] when it stated that:

> **"Everything will depend on the facts...a real danger of bias might be well-thought to exist if there were personal friendship or animosity between the Judge and any member of the public involved in the case, or the Judge was closely associated with a member involved in the case..."**

We agree with this observation. Indeed, everything depends on the facts and circumstances of each case. The mere fact that a trial Court has prematurely determined an aspect of a case cannot, as of itself, be taken as evidence of bias. One must go further to prove that there was personal bias. As the authors of **BLACKS LAW DICTIONARY**[v] put it:-

> **"Judicial bias is usually insufficient to justify disqualifying a judge from presiding over a case To justify disqualification or recusal, the judge's bias usually must be personal or based on some extra judicial reason."**

A perusal of the provisions of Section 6(2) of the **JUDICIAL CODE OF CONDUCT ACT**[b] is in line with this view. The instances when a judicial officer is precluded from adjudicating on a matter border on personal bias.

9.13 In the cited case of **DR. BILLINGSLEY**[1], we did not order that the matter should proceed before another Judge.

9.14 In the case of **VINCENT MULEVU MUSUKUMA, KAINDU MUKUMBI MULEVU (SUING AS ADMINISTRATORS OF THE**

ESTATE OF THE LATE MOSES B. MULEVU) V MAJOR BAXTER C. CHIBANDA, REGISTRAR OF LANDS AND DEEDS AND ATTORNEY GENERAL [20] where the trial Court was faced with an application to raise preliminary issues but considered the pleadings before it and rendered a 'judgment' without addressing the preliminary issues raised, we set aside the judgment on account that it amounted to a premature determination of all the issues. We ordered that the matter should take its normal course before the same Judge.

9.15 In this case, no personal bias has been alleged against the trial Judge. We are of the view that the Appellant will not be prejudiced in any way if the matter is sent back to the High Court to continue before the same judge because the Appellant will have an opportunity to present its case at trial, after which the Judge will make findings based on the evidence before her. For this reason, and bearing in mind that the Judge did not decide the entire cause of action, we cannot fault the Court of Appeal for ordering that this matter should be sent back to the High Court to take its normal course before the same Judge. In our view, this is not a proper case for us to order that the

matter should go before a different forum. We accordingly find no merit in the first ground of appeal and we dismiss it.

9.16 We now turn to the second ground of appeal. The thrust of the Appellant's argument under the second ground of appeal is that the application by the Appellant in the High Court was twofold; an application for a further and better list of documents, and an application for discovery of particular documents. It is submitted that the two applications require different considerations by a Court. Further, that the Appellant showed that the documents requested for are relevant as they relate to issues in dispute between the parties. The Respondent, on the other hand essentially argued that documents sought are not relevant to the main issue.

9.17 It is trite that the basis for allowing a party to produce further evidence before a Court is the relevance of that particular evidence to the matters to be decided upon. In this case, therefore, the primary consideration is *whether the documents sought by the Appellant were in fact relevant in determining the main matter.*

9.18 The learned authors of **HALSBURY'S LAWS OF ENGLAND[iv],** at paragraph 1 state as follows, regarding discovery:

> **"The term 'discovery' in this title is used to describe the process by which the parties to a civil cause or matter are enabled to obtain, within certain defined limits, full information of the existence and the contents of all relevant documents relating to the matters in question between them."** (Emphasis Ours)

9.19 Further, **ORDER 24/1/1 OF THE WHITE BOOK[iii]** gives the rationale for applications made under **ORDER 24 OF THE WHITE BOOK [iii]**. It stipulates that:

> **"By the end of the eighteenth century, the Courts of Equity (the Court of Chancery and the Court of Exchequer in its equitable jurisdiction) had evolved a method of proof to which the general name "discovery" was given, and which comprised: (i) discovery of deeds and documents, by which a person could be compelled to produce for inspection deeds or documents relevant to a dispute which were in his possession or power; this procedure was the foundation of discovery in the modern sense as dealt with by this Order..."** (Emphasis Ours).

9.20 According to the affidavit in support of summons for an Order for further and better list of documents and discovery of particular documents, appearing at page 70 of the record of appeal, the basis for the Appellant's application in the High Court is apparent from the reading of paragraph 6 of the affidavit in support of the application. Paragraph 6, in part, reads as follows:

> **"6. ... In particular, the said list of documents does not disclose any documents relating to the following:**
>
> **6.1 When the Plaintiff found employment after her service with the Defendant came to an end;**
>
> **6.2 Other appointments the Plaintiff has held since leaving the employment of the Defendant; and**
>
> **6.3 The terms of such employment and appointments in relation to remuneration."**

9.21 The Respondent, through a writ of summons was claiming 'the balance of terminal benefits due, plus interest at current rates.' Clearly, the information sought by the Appellant was not relevant to the case before the High Court. We agree with the Court of Appeal that the information sought could be obtained at trial, through cross examination. The claim does not require the Respondent to produce before the High Court, documents showing her remuneration and terms of all her subsequent appointments after leaving the employment of the Appellant.

9.22 We do not, therefore, fault the Court of Appeal for holding that the documents sought were not relevant to the matter before the High Court, in view of the pleadings before it. We find no merit in the second ground of appeal and we dismiss it.

9.23 The third ground of appeal assails the order for costs made by the Court of Appeal. The Appellants argument is simply that

the Court of Appeal should not have condemned it in costs because two of its three grounds of appeal succeeded. That there was no basis for the Court of Appeal to have held that only ground two was pertinent. The Respondent, on the other hand, argued that she was entitled to costs following the dismissal of the Appellant's appeal.

9.24 The law regarding the award of costs is well settled. The general rule is that costs are awarded in the discretion of the Court. This rule is echoed in a plethora of authorities. One such authority is that of **AFROPE ZAMBIA LIMITED V. ANTHONY CHATE AND OTHERS** [23] where we said that:

> **"We have ... stated in a number of authorities that costs are in the discretion of the court."**

9.25 In the case of **YB AND F TRANSPORT LIMITED V. SUPERSONIC MOTORS LIMITED** [24] we held;

> **"The general principle is that costs should follow the event; in other words, a successful party should normally not be deprived of his costs, unless the successful party did something wrong in the action or in the conduct of it."**

9.26 Thus while it is settled that costs are awarded at the discretion of the Court, this discretion is exercised judiciously. We underlined this principle in the case of **GENERAL NURSING COUNCIL OF ZAMBIA V. ING'UTU MILAMBO**

MBANGWETA [25] when we stated "***It is trite law that costs are awarded in the discretion of the court, such discretion is however to be exercised judicially.***"

9.27 In this case, the Court of Appeal awarded costs to the Respondent, despite two of the Appellant's three grounds of appeal having succeeded. The Court of Appeal held that the two grounds had only succeeded ***nominally***. In our view, the Court of Appeal should not have made an order for costs against the Appellant as it (the Appellant) had clearly succeeded in two of the three grounds of appeal. Further, the two grounds of appeal, though related, raised an important issue pertaining to a trial Court's mandate to prematurely pronounce on some aspects of the main case in an interlocutory application.

9.28 We are alive to the notion that the exercise of discretion by the trial Courts in the award of costs will not lightly be interfered with on appeal. However, we share the views the Court of Appeal of England in the case of **WOOTTON V CENTRAL LAND BOARD** [26] when it stated that:

> **"It is a common place in cases which come before this court relating to the exercise of a discretion, and more particularly relating to the exercise of a discretion in regard to costs, that this court is very slow indeed to interfere with such exercise. Put in another way, it can be asserted that there is no question of law which this court is competent to determine relating to the exercise of a discretion unless it is shown clearly that, in the exercise of the discretion, the tribunal appealed from has in some material and substantial respect wrongly or unjudicially exercised the discretion, either by some wrong, some erroneous, direction of itself as a foundation for the exercise, or ... where the result arrived at is one producing in the opinion of this court a manifest injustice..."**

9.29 We find that the award of costs against the Appellant in the Court below, when it had succeeded on two of the three grounds of appeal, was manifestly unfair, more so that the other grounds before the Court of Appeal equally raised pertinent issues. We hold the view that the exercise of the Court's discretion was not judicious and warrants our interference. We accordingly vacate the order for costs by the Court of Appeal and instead Order that costs in this case will abide by the outcome of the matter in the High Court.

10. CONCLUSION

10.1 From the foregoing reasons, the appeal partially succeeds. The matter is remitted to the High Court before the same Judge to take its normal course. For the avoidance of doubt, costs in

this Court and the Court below will follow the outcome of the matter in the High Court.

I.C. Mambilima
CHIEF JUSTICE

C. Kajimanga
SUPREME COURT JUDGE

J. Kabuka
SUPREME COURT JUDGE