

IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CONSTITUTIONAL JURISDICTION)



2022/CCZ/0010

IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA
CHAPTER 1, VOLUME 1 OF THE LAWS
OF ZAMBIA

IN THE MATTER OF: ARTICLES 1(5), 2, 88, (1) 91, (3), 128 (3)
AND (b) AND (c) 140(e), 141(1) (d), 143,
144, 216 (b) 219, 220, 236(2) (a)(b)(c) AND
(d), 261 AND 267(4) OF THE
CONSTITUTION OF ZAMBIA, CHAPTER 1
VOLUME 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: THE STATE PROCEEDINGS ACT,
CHAPTER 71, VOLUME 6 OF THE LAWS
OF ZAMBIA

IN THE MATTER OF: JUDICIAL CODE OF CONDUCT ACT NO.
13 OF 1999 AS AMENDED BY ACT NO. 13
OF 2006

BETWEEN:

JOSHUA NDIPYOLA BANDA

PETITIONER

AND

ATTORNEY GENERAL

RESPONDENT

CORAM: Munalula, PC; Sitali, Mulenga, Chisunka and Mulongoti, JJC
On 8th December, 2022, 17th January and 26th October, 2023

For the Petitioner:

**Mr. S. Sikota, SC of Messrs Central Chambers,
Mr. J. Mataliro and Mr. M. Mwachilenga of
James and Doris Legal Practitioners**

For the Respondent:

**Mrs. K. N. Mundia- Acting Deputy Chief State
Advocate and Mr. N. Mwiya- Acting Principal
State Advocate of Attorney General's
Chambers**

JUDGMENT

Mulongoti, JC, delivered the Judgment of the Court

Cases referred to:

1. Musonda v The Attorney General 2013/HP/922 (HC) (unreported)
2. Gift Luyako Chilombo v Biton Manje Hamaleke CCZ 2016/CCZ/A004
3. Mutembo Nchito v Attorney General CCZ 2016/CCZ/0029
4. Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa (1986) Z.R. 70
5. Attorney General v Million Juma (1984) Z.R. 1
6. Masauso Zulu v Avondale Housing Project (1982) Z.R. 172
7. Faustin Mwenya Kabwe, Aaron Chungu and John Sangwa v Judicial Complaints Authority and Attorney General 2009/HP/0996 (HC)
8. Steven Katuka (suing as Secretary General of the United Party for National Development) and another v Attorney General and another CCZ Selected Judgment No. 29 of 2016
9. South Dakota v North Carolina (1904) 192 USA 268:ED 448
10. Shririang Yadavrao Waghmare v State of Maharashtra and others Civil Appeal No. 7306 of 2019
11. Tarak Singh v Jyoti Basu (2005) 1SCC 201

Legislation referred to:

1. The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act, 2016
2. The Judicial Code of Conduct Act No. 13 of 1999 as amended by Act No.13 of 2006

Other works:

1. Commonwealth Law Bulletin, Volume 4, Issue 4 of 2015
2. S.G.G Edgar, Craies On Statute Law, 7th Edition, 1971 Sweet and Maxwell
3. Report of the Technical Committee on Drafting the Zambian Constitution
30th December, 2013

[1.0] Introduction

[1.1] We wish to state from the outset that since we are subject to the Judicial Complaints Commission (JCC) which is at the center of the issues arising in this matter, we heard it out of necessity in line with our constitutional mandate. With that said we now delve into consideration of the merits of this case.

[1.2] By a Petition filed in this Court on 12th May, 2022, the petitioner, Joshua Ndipyola Banda, sued the Attorney General (the respondent herein) challenging the decision of the President to remove him from office of High Court Judge on recommendation of the Judicial

Complaints Commission (JCC) without following mandatory provisions of the Constitution.

[1.3] The petitioner alleges that by its decision the respondent breached the following Articles of the Constitution: 1(5), 2, 88 (1), (2), 91 (3), 128 (3) (b) and (c), 140 (e), 141 (1) (d), 143, 144, 216 (b), 219, 220, 236 (2) (a), (b), (c) and (d), 261 and 267 (4).

[1.4] As a result of the alleged constitutional breaches by the respondent, the petitioner prays that he be granted the following substantive and interim remedies:

(a) An interim order to stay the decision of the Republican President dated 6th May, 2022 removing the petitioner from office of judge of the High Court and recalling his letters patent which constitute him as a High Court Judge;

(b) A declaration that the jurisdiction of the Judicial Complaints Commission to hear complaints against judges does not extend to matters that happened prior to a judge's appointment to the office of judge as the same is the preserve of the President, Judicial Service Commission and the National Assembly;

(c) An order of certiorari to remove into the Constitutional Court for purposes of quashing the Report of the Judicial Complaints Commission together with its findings and recommendations to the President regarding the petitioner for being unconstitutional;

- (d) A declaration that the decision of the President to remove the petitioner from office of High Court Judge contravenes Articles 143 and 144 and is therefore unconstitutional;
- (e) An order of certiorari to remove into the Constitutional Court for purposes of quashing the decision of the President to accept the recommendations of the Judicial Complaints Commission to remove the petitioner from his office of Judge of the High Court and recalling the letters patent that constitute the petitioner as High Court Judge;
- (f) A declaration that the President's removal of the petitioner from office of Judge of the High Court is null and void ab initio;
- (g) An interpretation of Articles 143 and 144 of the Constitution as amended by Act No.2 of 2016;
- (h) A declaration that the petitioner is not a judicial officer;
- (i) Damages for mentor (sic) torture, ridicule, embarrassment, anguish, and general damages;
- (j) Costs of and incidental to these proceedings;
- (k) any other relief that the Court shall deem fit

[2.0] Petitioner's case

- [2.1]** The facts leading to the petitioner's case are as stated in the Petition and the Affidavits Verifying Facts and in Reply sworn by the petitioner as summarized below.

[2.2] That the petitioner was appointed High Court Judge on 12th January, 2021 by then President Mr. Edgar Chagwa Lungu on recommendation of the Judicial Service Commission (JSC). Before this appointment he was employed as Registrar of the High Court until his retirement in national interest to pave way for his appointment as judge.

[2.3] Following his appointment as judge by the President, the petitioner was subjected to a vetting and screening process by various law enforcement agencies and constitutional bodies namely the Judicial Complaints Commission (JCC), Anti-Corruption Commission (ACC) and Financial Intelligence Center (FIC) as his appointment had to be confirmed and ratified by the National Assembly.

[2.4] The petitioner avers that all the relevant bodies including the JCC and the ACC submitted oral and written reports to the Parliamentary Select Committee (PSC) that was appointed to scrutinize his appointment and stated that there were no adverse reports against the petitioner to preclude him from being appointed High Court Judge. The JCC only mentioned one adverse report to do with delayed judgments when he served as registrar which had been resolved. His appointment as judge was therefore, ratified by the

National Assembly on 2nd March 2021 based on the report of the PSC, exhibited as "JNB3" of the Affidavit Verifying Facts. He was therefore sworn into office as judge on 14th July, 2021 and duly issued with letters patent constituting him as judge of the High Court of Zambia.

[2.5] Consequently, in line with the provisions of Article 261 of the Constitution, he became amenable to the code of conduct and ethics prescribed for the office of judge. The petitioner avers that from the time he took the oath of office as a judge, he never breached the code of conduct and ethics for judges.

[2.6] That, as per the nature of the office, as registrar the petitioner faced a number of complaints which were assessed and found to be unsubstantiated and could not hinder his appointment as judge. One such complaint was made by a man named David Mwaanza who reported him to the ACC and to some Members of Parliament. However, the ACC cleared him for appointment as judge as per letter marked as exhibit "JNB4" of the Affidavit Verifying Facts.

[2.7] On or about 4th February, 2022, after ratification, the petitioner received a notification from the Secretary of the JCC pursuant to

Article 236 (2) (a), (b) and (c) of the Constitution as read with sections 24 and 25 of the Judicial Code of Conduct Act; and attached was a purported complaint which did not contain the age of the complainant and other information as required by the Judicial Code of Conduct Act No 13 of 1999 as amended by Act No.13 of 2006.

[2.8] The purported complaint exhibited as "JNB8" made to the JCC and "JNB9" to the Chief Justice, alleged that the complainant, David Mwaanza, had lodged a complaint against the petitioner involving his office as registrar and another named judge as chief registrar before they were elevated as High Court Judges.

[2.9] The petitioner avers that the complainant was clearly aggrieved with his conduct prior to his appointment as judge which is the concern of the President, the JSC and the National Assembly who had duly exercised their constitutional mandates by considering all issues relating to his appointment before he was ratified and subsequently sworn into office. Therefore, all issues were closed.

[2.10] That according to Articles 144 (1) and 143 of the Constitution, the removal of a judge may be initiated by the JCC or a complaint made to the JCC based on the grounds specified in Article 143. However,

the purported complaint by Mr. Mwaanza was not based on any of the grounds specified in Article 143 of the Constitution and did not relate to any conduct of the petitioner as judge but rather as registrar a position from which he had since been retired. In addition, that the summons from the JCC stated that he was facing allegations of misconduct and not gross misconduct for which a judge could be removed from office.

[2.11] The petitioner further avers that he appeared before the JCC to answer to charges of mere misconduct, per summons exhibited as "JNB10", and that had it been any other charge such as removal from office as judge, he would have called more witnesses and produced further documentary and other evidence to mount up certain legal challenges which he did not do as they were deemed unnecessary for the case he was facing before the JCC.

[2.12] That the issue of the wrong charge and the JCC lacking jurisdiction to hear the complaint as it involved his conduct as registrar was raised before the JCC but dismissed on the premise that it had jurisdiction to inquire into his conduct whether as judge or registrar as the purpose of the hearing was to determine his suitability to continue holding office as judge.

[2.13] The petitioner further alleged that the whole process adopted by the JCC was biased as it assumed the role of both prosecutor and judge. It also called, organized, prepared and led witnesses in support of the allegations against him with the intention of proving the said allegations. That he was merely targeted for theoretical purposes to show that the new government was fighting corruption going by the remarks about corrupt judges belonging to the jungle and not society made by the chairperson when handing over the reports to the President and that one of the reports showed failure in the appointment system as there was already a complaint before ratification of a named judge.

[2.14] The petitioner highlighted several instances at paragraph 34 (a) to (j) of the Petition to demonstrate that the JCC was biased and the procedure it adopted was unconstitutional and contrary to Article 216 (c) and (e) of the Constitution as he was not granted the right to be heard on charges of gross misconduct. The report made a finding of guilt, of gross misconduct in violation of Articles 143 (c) and 266 yet the allegations the petitioner was facing before the JCC were of mere misconduct in line with sections 24 and 25 of the Judicial Code of Conduct Act and Articles 236 (2) (a), (b) and (c) thereby denying him

the right to be heard on a charge of gross misconduct contrary to the rules of natural justice. On top of that he only learnt of his removal on 6th May, 2022 after he read a news article via a Whatsapp link.

[2.15] That he only received a copy of the report exhibit “JNB13” on 7th May, 2022 yet he was removed by the President on 6th May, 2022. The report and the President's decision to remove him from office as judge contravened Article 144 (2), (3) and (4) (a) of the Constitution as a *prima facie* case was not established and he was not suspended before removal from office.

[2.16] That the JCC in fact exceeded its authority and power and thereby usurped the powers of the Constitutional Court, when it delved into interpretation of Articles 143 and 144 in contravention of Article 128 (1) which gives the Constitutional Court power to interpret the Constitution.

[2.17] That on 8th May 2022, he received a letter from the President dated 6th May 2022, informing him that the President had accepted the recommendations of the JCC to remove him from office as judge and that he had been removed. The President also recalled his letters

patent for purposes of cancellation. That these actions by the President are in breach of Articles 143 (b), (c) and (d) and 144.

[2.18] Further, that the President also contravened Article 91 (3) (a) and (f) when he failed to uphold, protect and safeguard the Constitution and to uphold the rule of law and respect the independence of the Judiciary.

[3.0] Respondent's case

[3.1] For its part, the respondent filed an Answer and Affidavit Verifying Answer sworn by Naisa Makeleta, in his capacity as Secretary of the JCC as summarized below.

[3.2] The respondent denied the petitioner's assertions that his appointment and ratification by the President, the JSC and National Assembly meant that he was a man of integrity as the petitioner cannot speak on behalf of the President, the JSC and National Assembly who are not part of the case.

[3.3] The respondent averred that the mere fact that the complaint did not state the age of the complainant did not render it unconstitutional as the same was a defect in form and not substance.

[3.4] That the act of appointing the petitioner as judge did not immunize him from answering for wrongful and gross misconduct committed prior to his appointment and that the Constitutional provisions relied upon are silent as to when such an act ought to have happened. Thus, where an act of gross misconduct is proved it does not assist the petitioner to argue that the conduct carries no consequence simply because of when it occurred.

[3.5] That moreover, there was already evidence in existence illustrating the petitioner's unsuitability to hold the office of judge and since he refunded the money he received from the complainant when he had already been appointed judge, he continued in the act of gross misconduct.

[3.6] The respondent denied the allegation that it supervised, reviewed, directed or controlled the President, JSC and National Assembly when it acted on the complaint lodged against the petitioner. Furthermore, that a determination as to whether a complaint or an allegation of misconduct amounts to gross misconduct could only be done at the end of the hearing upon assessment of the evidence.

[3.7] The respondent averred that Article 236 as read with sections 24 and 25 of the Judicial Code of Conduct Act referenced in the summons issued by the JCC relate to the JCC's exercise or performance of its function as opposed to the statutory provisions a judge or judicial officer is alleged to have breached. Therefore, the couching of the summons and charge was legal.

[3.8] That the petitioner sent his defence to the complaint on 11th February, 2022 and he also exculpated himself on 11th March, 2021 when he responded to the erstwhile Chief Justice Ireen Mambilima involving the same complaint which the complainant lodged before her. The petitioner was therefore, fully aware of the charges he was called to answer and to defend himself before the JCC, being ***"alleged corruption in the manner he solicited and took a bribe to secure a favorable response in the disciplinary proceedings from and for a former judiciary employee"***.

[3.9] Therefore, the respondent denied that the petitioner was charged with mere misconduct as the summons issued to him indicated as follows:

...in the allegation of misconduct pertaining to corrupt practices, extortion, soliciting and receipt of monies by yourself and Hon. Charles Kafunda (then registrar and chief registrar respectively) in

exchange for a favorable outcome in disciplinary proceedings against David K. Mwaanza (the complainant).

- [3.10] That the petitioner was not in any way restricted as to the number of witnesses he could call and neither was he restricted from producing further documentary and other evidence including mounting up "certain" legal challenges during the proceedings. If the petitioner failed to appreciate or comprehend the gravity of the allegations levelled against him, this failure could only be ascribed to himself and not the JCC.
- [3.11] That the petitioner indicated that in addition to himself, he would call two more witnesses in aid of his case and at the petitioner's own volition he only called one more witness in addition to himself and closed the case.
- [3.12] The respondent denied targeting the petitioner as alleged and averred that the JCC performed its well-founded constitutional mandate in full compliance with the law and did not have a pre-determined outcome as revealed in the excerpt of the proceedings exhibit "NM1", of the Affidavit Verifying the Answer, wherein the petitioner indicated that he had no issue with the way the proceedings had been conducted by the JCC.

[3.13] The respondent further averred that at the close of its investigations, the JCC found that the allegation of corruption had been proved against the petitioner and that the definition of gross misconduct under the Constitution includes an act of corruption, and gross misconduct is one of the grounds upon which a judge could be removed from office. Thus, the JCC's findings were within the confines of the law.

[3.14] That the President acted within the law when he removed the petitioner from the office of Judge of the High Court and that he did not fail to uphold, protect and safeguard the Constitution. Therefore, the petitioner is not entitled to any relief that he is seeking before the Court.

[4.0] The trial

[4.1] The trial of the matter was held on 17th January, 2023 and only the petitioner testified orally.

[4.2] During examination in chief, the petitioner relied on his witness statement which was filed into court on the 12th May, 2022 and appears at page 133-144 of the record of proceedings. The petitioner stated *inter alia* that complaints against judicial officers and judges

relate to various allegations and are made to various authorities including the JCC and office of the Chief Justice.

[4.3] That sometime in the year 2021, the petitioner became aware of a complaint made against him by David Mwaanza. Mr. Mwaanza had complained to the ACC, the office of the Chief Justice and to some Members of Parliament alleging that the petitioner had engaged in corrupt activities when he held the office of registrar and was thus not fit to hold the office of High Court Judge.

[4.4] That the basis for this frivolous and malicious accusation followed Mr. Mwaanza's dismissal from employment. The accusation started as an extortion move as Mr. Mwaanza demanded money from the petitioner and threatened to blow the allegation to the media unless he was paid.

[4.5] That Mr. Mwaanza was an undersheriff within the Judiciary. In the year 2020, he was faced with some disciplinary charges for alleged misappropriation of K1,800,000.00 which was part of K3,000,000.00 which was paid as bailiff fees by a litigant who was the subject of an execution.

[4.6] That the allegation by Mr. Mwaanza was that the petitioner solicited some money from him and had received K63,000.00 so that he could help get a favourable outcome for Mr. Mwaanza's disciplinary case. The petitioner recalled that the late Chief Justice Mambilima had brought the same complaint to his attention and asked him to render a response.

[4.7] According to the petitioner he responded to the Chief Justice casually as he took it that such "*an allegation was trivial and one of those spiteful, malicious, vexatious and frivolous allegations*" and that it was made while his appointment as High Court Judge was pending ratification by Parliament.

[4.8] The petitioner further stated that he later came to know that the complainant had lodged the same complaint with the ACC. However, this notwithstanding, Parliament ratified his appointment after all the relevant stakeholders submitted their recommendations and reports supporting his appointment. No adverse report was given from the office of the Chief Justice, JSC, JCC and other law enforcement agencies. Subsequently, he was sworn into office as High Court Judge in July, 2021.

[4.9] The petitioner asserted that it was his understanding that he could not be disciplined for wrongs he might have committed during his tenure of previous designations including the complaint by Mr. Mwaanza as it related to a wrong allegedly committed while he was Registrar of the High Court. It was therefore, impossible to discipline him as he was no longer a judicial officer.

[4.10] Therefore, the JCC was deprived of jurisdiction to entertain the complaint by Mr. Mwaanza. In addition, that the complaint did not comply with Article 143 of the Constitution and the proceedings at the JCC as stated in its report to the President were not in compliance with Article 144, which could only be set in motion on a complaint made under Article 143 of the Constitution.

[4.11] That the petitioner's removal from office without following procedure undermined the Judiciary and is contrary to the tenets of the rule of law. On top of that the JCC was biased and had a predetermined mind and intention to remove him as judge as the chairperson believed everything Mr. Mwaanza said without question.

[4.12] Furthermore, that the JCC did not wait to receive the MTN call records which had delayed to be submitted which information was

vital to determine whether or not the petitioner had called Mr. Mwaanza to solicit for money as alleged. However, since the JCC had a predetermined outcome it proceeded to render its report in the absence of the call records and found the petitioner guilty in the absence of satisfactory evidence to support that finding.

[4.13] In conclusion the petitioner stated that, *"I have been prejudiced and traumatized by the decision of the President to remove me from office of Judge of the High Court. My family and children have been affected including my relationship with my friends."*

[4.14] During cross examination by the acting deputy chief state advocate, the petitioner read aloud the summons at page 101 of the record of proceedings and confirmed that it was the document he received from the JCC and that it related to allegations pertaining to corrupt practices. The petitioner admitted the assertion by counsel that corrupt practice is considered as gross misconduct under the Constitution.

[4.15] According to the petitioner, gross misconduct was one of the grounds for his purported removal. He confirmed that he attended the hearing at the JCC and that he called witnesses. He equally

agreed with the assertion that he was heard and that at the end of the hearing, when the JCC asked if he had any concerns, he confirmed that the proceedings were proper in so far as the inquiry was concerned and that he had no further issues to raise other than the issue of jurisdiction which he had raised before. The petitioner denied the assertion that he was not disputing the misconduct but rather the timing of the charge.

[4.16] Under further cross examination, the petitioner admitted that he received money from Mr. Mwaanza but added that it was a gift, for his personal use. He denied refunding the money but stated that Mr. Mwaanza started to arm twist him and fabricated a story that the petitioner had received a bribe from him. Due to this extortionist act he gave some money to Mr. Mwaanza, when his appointment as judge was awaiting ratification.

[4.17] Furthermore, that Mr. Mwaanza, changed the story from gifting money to the petitioner to soliciting for a bribe after he learnt that the petitioner had been appointed judge. The petitioner disclosed that since he did not want to jeopardize his appointment which was then pending ratification, he gave money to Mr. Mwaanza but this was not a refund of the bribe. He reiterated that Mr. Mwaanza extorted the

money from him although he did not report this to any law enforcement agency.

[4.18] In re-examination by Mr. Mataliro, the petitioner testified that Mr. Mwaanza lost his job at about the same time that the petitioner's appointment was pending ratification. According to the petitioner because he had interacted with Mr. Mwaanza concerning his disciplinary case, Mr. Mwaanza anticipated that being friends or someone the petitioner was close to, he would assist him with the disciplinary case.

[4.19] The petitioner testified regarding the issue of extortion that it came in because Mr. Mwaanza backtracked and alleged that because at some point he had given the petitioner K2000.00 and K500.00, he needed to give it back as he had been dismissed. To the petitioner's surprise Mr. Mwaanza started demanding the money which was not given to the petitioner in the manner alleged.

[4.20] Regarding his friendship with Mr. Mwaanza, the petitioner testified that he knew him when he worked as registrar in Ndola and the duo became close to the extent that Mr. Mwaanza would provide fuel for the petitioner's trips to Lusaka to visit his family and that equally

when Mr. Mwaanza was pressed with something he would seek assistance from the petitioner.

[5.0] Petitioner's Skeleton Arguments

[5.1] In support of his case, the petitioner filed Skeleton Arguments in Support of the Petition dated 10th June, 2022, Skeleton Arguments in Reply dated 23rd November 2022 and Petitioner's Final Submissions dated 30th January, 2023. According to the petitioner the issues arising for the Court's determination are:

- i. Whether the JCC has jurisdiction to hear complaints relating to allegations against judges that allegedly took place before a person became a judge?
- ii. Whether the documents on pages 91 and 92 of the Record of Proceedings meet the requirements of Article 144 (1) of the Constitution?
- iii. Whether the JCC contravened the Constitution when it made a recommendation to the President for the removal of the petitioner under Article 144 (5) (b) without first following the procedures under sub-article 2,3 and 4 of Article 144 of the Constitution?
- iv. Whether the President contravened the Constitution when he removed the petitioner from office of Judge under Article 144 (5) (b) without first following the provisions of Article 144 (3)?

[5.2] With regard to the first issue (i), it was argued that based on the provisions of Articles 236 and 261 of the Constitution, the JCC has

no power to determine complaints against a judge for allegations that took place before a person became judge for the reason that the code of conduct applicable to judges only begins to apply once a person takes up the office of judge and not before.

[5.3] That to allow this would mean retrospective application of the law and would usurp the powers granted by the Constitution to other bodies whose operations are autonomous and cannot be supervised by the JCC such as the JSC which is empowered to scrutinize the appointment of judges. Thus, since the JSC and the National Assembly scrutinized the petitioner's suitability for appointment as judge of the High Court, the issue could not be brought as the basis for his removal before the JCC. Reliance was placed on the persuasive High Court decision in the case of **Musonda v The Attorney General**¹ which holds *inter alia* that the decision of the tribunal to proceed to consider a complaint against a Judge who had resigned was illegal and resulted in the tribunal acting in excess of its jurisdiction.

[5.4] Concerning the second issue (ii), it is argued that the complaint by Mr Mwaanza appearing at pages 91 and 93 of the record of proceedings does not meet the requirements of Article 144 which

provides that a complaint for removal of a judge should be based on the grounds specified in Article 143. It was amplified that a complaint must be clear and specifically state one of the grounds set out in Article 143 as the basis for removal, which was not the case with the complaint against the Petitioner. Thus Article 143 of the Constitution was breached by the JCC and the President when the petitioner was removed from office based on the grounds set out in Article 143 yet he was never heard on the charges of gross misconduct.

[5.5] With respect to the third and fourth issue, it was argued that the unchallenged evidence at the trial of the matter was that the petitioner appeared before the JCC pursuant to a complaint based on Article 236 and not Article 143.

[5.6] After the hearing, the JCC wrote a report to the President recommending removal of the petitioner from office and the latter immediately acted on the report in contravention of Article 144 (2) which provides that after the JCC finds that a *prima facie* case has been established against a judge, the JCC “shall” write the first report to the President who ‘shall’ suspend the judge within 7 days of the report per Article 144 (3). That the JCC “shall” hear the matter within 30 days of the suspension as per Article 144 (4) after which it shall

write a second report to the President recommending removal or lifting the suspension depending on its findings.

[5.7] That the above process is meant to protect the integrity of the Judiciary, uphold its independence and provide judges with security of tenure. Reference was made to our decision in the case of **Gift Luyako Chilombo v Biton Manje Hamaleke**² which holds that "shall" is a word of command and is normally given a compulsory meaning because it is intended to show obligation and is generally imperative or mandatory. It was further submitted, citing S.G.G Edgar the author of Craies On Statute Law, that where an absolute enactment is contravened, the law would treat the thing done as invalid and void.

[6.0] The Respondent's Skeleton Arguments in Support of Answer and Final Submissions

[6.1] The respondent filed Skeleton Arguments in Support of Answer and Respondent's Final Submissions. The respondent argued that the JCC did not contravene Article 143 of the Constitution by recommending removal of the petitioner from office on grounds of gross misconduct, because the definition of gross misconduct under Article 266 of the Constitution includes an act of corruption. Thus,

although at the time the complaint was made, the petitioner was charged with misconduct, after hearing and consideration of the evidence adduced, the JCC found that he had committed an act of corruption which amounts to gross misconduct under the Constitution and warranted his removal from office.

[6.2] That when he was served with the complaint on 4th February, 2022, the petitioner responded to it on 11th February, 2022. Thereafter, he was accorded a full hearing and was not restricted at all in the number of witnesses to call or from producing further documentary evidence including mounting certain legal challenges. Hence the petitioner was not denied the right to be heard and neither was he prejudiced in any way as he fully defended himself before the JCC in line with the due process of the law. That the petitioner cannot therefore ascribe his failure to comprehend the gravity of the allegations levelled against him to the JCC.

[6.3] With regard to the allegation that the JCC contravened Article 144 (2), (3) and (4) of the Constitution, the respondent submitted that Article 144 (2), (3) and (4) provides that a *prima facie* case should be established first and report made to the President. Thereafter the judge would be suspended by the President before the hearing by

the JCC. Thus, it is agreed that Article 144 (2), (3) and (4) should be read with Article 236 (2) (e) of the Constitution which provides that the JCC shall hear a complaint as prescribed.

[6.4] According to the respondent, the Constitution and the Judicial Code of Conduct Act do not prescribe how and when a *prima facie* case is established. Thus, the JCC invoked section 28 of the Judicial Code of Conduct Act which empowers it to regulate its own procedure and Article 236 (2) (e) when it proceeded with the full hearing before making any recommendations to the President. In addition, that whether or not due process under Article 144 (2), (3) and (4) was followed cannot be determined by the Petition before this Court as it is clear that the petitioner was aggrieved by the alleged procedural impropriety by the JCC which issue can only be determined by way of judicial review in line with our decision in the case of **Mutembo Nchito v Attorney General**.³

[6.5] In the alternative, the respondent submitted that should we find that due process was not followed, it would rely on the persuasive case of **Zambia National Provident Fund v Yekweniya Chirwa**⁴ wherein the Supreme Court held that where it was not in dispute that an offence had been committed and the employee was dismissed without

following procedure, no injustice arises and there was no claim for wrongful dismissal or a declaration that the dismissal was a nullity.

[6.6] That the petitioner admitted during cross examination that he received money from the complainant for personal use as a gift but that he refunded the money because the complainant started demanding for the money. It was submitted that if the petitioner received the gift at the time the complainant was undergoing disciplinary hearings then the complainant was attempting to get a favor from the petitioner, a judicial officer, which is prohibited by section 15 of the Judicial Code of Conduct Act. That in fact, the money was not a gift nor was it extortion but money that was corruptly received by the petitioner to influence the outcome of the disciplinary proceedings. Thus, the petitioner committed an act of gross misconduct and the JCC dealt with it accordingly.

[6.7] Concerning the allegation that the JCC and the President contravened Articles 143 and 144 of the Constitution for removal of the petitioner from office of judge on allegations touching on events allegedly done before he became judge, the respondent argued that the two articles are silent on this issue. It was submitted that an act of gross misconduct had occurred and it would be unreasonable to

argue that the act of appointing a person as a High Court Judge immunizes the person from any wrongful act or misconduct committed prior to appointment as judge. Furthermore, that at the time of the petitioner's appointment as judge, there was already evidence to prove that he was unsuitable to hold the office of judge. It would therefore, have been unreasonable and against Article 236 and sections 24 and 25 of the Judicial Code of Conduct Act for the JCC to have stated that its hands were tied simply because a person who the complaint was against had been appointed judge. That the case of **Musonda v The Attorney General**¹ is distinguishable as the tribunal in that matter could not proceed with hearing the matter as the person had resigned as judge, whereas the petitioner was a judge and a complaint had been lodged against him with the JCC which had jurisdiction to deal with it.

- [6.8]** As regards the allegation that the President contravened Article 91 (3) (a), (e) and (f) when he removed the petitioner from office, the respondent contended that Article 144 (b) is couched in mandatory terms and requires the President to act on the recommendations of the JCC as he has no discretion in the matter. That the President in fact upheld the Constitution as he acted in line with Article 91 (3) (a),

(e) and (f) by acting on the recommendations of the JCC. The case of **Attorney General v Million Juma**⁵ was relied upon on the import of mandatory provisions of the Constitution which have to be complied with.

- [6.9] Regarding the allegation that the JCC and the President breached Article 122 (4) of the Constitution, the respondent submitted that the JCC acted within the confines of the law when it disciplined the petitioner as that article requires a person holding the office of judge to protect the independence, dignity and effectiveness of the judiciary. Therefore, that it was at pains to see how the independence, dignity and integrity of the judiciary is being threatened or not protected because this matter involves gross misconduct of a judicial officer who was subject to the jurisdiction of the JCC irrespective of when the misconduct occurred. That, if anything, the integrity of the judiciary would be threatened if the President and the JCC had 'turned a blind eye' to the alleged misconduct simply because of the timing of the misconduct. Additionally, that the gross misconduct was a continuing act as the petitioner paid back the money when he had become judge instead of reporting the alleged extortion to law enforcement agencies.

[6.10] Reliance was placed on the case of **William Masauso Zulu v Avondale Housing Project**⁶ to support the argument that he who alleges must prove his case and cannot be entitled to judgment if he fails to do so, whatever may be said of the opponent's case. That the petitioner had failed to prove that the independence, dignity and effectiveness of the judiciary was being threatened and not protected beyond simply stating so.

[6.11] Concerning the allegation that the JCC contravened Article 128 (1) (a) of the Constitution by interpreting Articles 143, 144, and 266, the respondent argued that the JCC did not usurp the powers of the Constitutional Court when it interrogated the subject complaint. That the petitioner was never restricted from mounting legal challenges during the proceedings including seeking an interpretation from the Constitutional Court as to whether or not he could be investigated for acts committed before his appointment as judge.

[6.12] With regard to the allegation that the JCC breached Article 216 (c) and (e) when it assumed roles of both prosecutor and judge in the proceedings before it and also when without notice to the petitioner it changed the investigation to that of removal from office thereby failing to act with dignity, professionalism, propriety, integrity and

impartiality in the exercise of its authority, it was submitted that the JCC regulates its own procedure and is not an adjudicating body but an investigative tribunal in nature. Thus, that there was nothing wrong with the procedure it adopted in interrogating the complaint.

[6.13] The persuasive High Court decision in the case of **Faustin Mwenya Kabwe, Aaron Chungu and John Sangwa v Judicial Complaints Authority and Attorney General**⁷ was relied upon wherein the court observed that:

The second preliminary issue is whether the 1st respondent can be described as a court or adjudicating authority as contemplated by Article 18 (9). It is not difficult to discern that the 1st respondent is not a court because it is not prescribed as such either in the Constitution or the Act. As to whether the 1st respondent is an adjudicating authority, Black's Law Dictionary defines adjudication as:

The legal process of resolving a dispute. The formal giving or pronouncing a judgment or decree in court proceedings; also the judgment or decision given. The entry of a decree by a court in respect to the parties in a case. It implies a hearing by a court, after notice, of legal evidence on the factual issue(s) involved.

.. From the above definition, it is clear that adjudicating or determining a dispute involves hearing parties where there is a dispute. . . And according to section 25 (8) of the Act a complaint or allegation against a judicial officer and any investigation carried out by the Judicial Complaints Authority is confidential

and not open to public inspection. This, in my view, further buttresses the position that the 1st respondent is not an adjudicating authority. Furthermore, according to section 24 (1) (c) of the Act, the 1st respondent's function after investigating a complaint is to submit its findings and recommendations to other authorities for further action. I agree with the learned Attorney General that since the 1st respondent is not empowered to make decisions which finally determine complaints or allegations, it does not qualify as an adjudicating authority. In my judgment, the 1st respondent is purely an investigative authority and this comes out clearly when one reads its functions as stated in section 24 (1) of the Act. Consequently, I conclude on the second preliminary issue that the 1st respondent cannot be described as an adjudicating authority in the context of Article 18 (9) of the Constitution.

[6.14] It was argued that based on that case, the JCC is an investigating tribunal in nature and, per its mandate, could investigate the petitioner and other persons appearing before it. Furthermore, that section 27 of the Judicial Code of Conduct Act states the powers of the JCC. Therefore, that the JCC did not contravene Article 216 when it assumed the role of both prosecutor and judge as it acted in line with section 27 of the Judicial Code of Conduct Act. At no point did it change the nature of the investigation as the petitioner ought to have known that any appearance before the JCC could eventually lead to a judicial officer's removal from office. In conclusion, it was

submitted that the JCC acted with dignity, professionalism, propriety, integrity and impartiality.

[6.15] As regards the allegation that the JCC contravened Article 236 by acting outside and in excess of its jurisdiction when it purported to review, control, direct, supervise and set aside the actions and decisions of the National Assembly, the JSC and the President as well as other constitutional offices, the respondent contended that the JCC is established under Article 236 of the Constitution to *inter alia* hear complaints against a judge or judicial officer. Thus, it did not contravene Article 236 but acted in line with its mandate. It received a complaint of misconduct of the petitioner on 4th February, 2022 and dealt with it. Whether a similar complaint was made to the office of the Chief Justice on 12th February, 2021 was irrelevant as the complaint of 4th February, 2022 was being made to a different body and needed to be dealt with as received.

[7.0] Petitioner's Final Submissions in Reply

[7.1] In reply to the respondent's final submissions, the petitioner reiterated that the JCC breached Article 143 because it did not put the petitioner on notice from inception that he was facing a case of

gross misconduct. That it cannot be heard that the JCC had powers under the Judicial Code of Conduct Act to convert any other proceedings before it into an allegation under Article 143.

[7.2] Furthermore, that the petitioner sought clarity from the JCC in a preliminary issue that was raised as to whether the proceedings were made under Article 143 or not. The JCC eluded this question by stating that such a question would only be answered at the conclusion of hearing the evidence as at that time there was no evidence to premise the answer to the question that was put up for determination by the JCC. Thus, it is clear from the above even to the JCC that when it set out the proceedings against the petitioner, the question was not about an allegation that was made under Article 143 but a mere inquiry to determine whether the JCC would thereafter invoke Article 143.

[7.3] Moreover, the documents that the JCC issued being the letter dated 4th February 2022, the summons and all documents that pertained to the proceedings had the same caption which did not state that the inquiry was pursuant to Article 143 of the Constitution. That only the Report to the President had a caption that the inquiry was made pursuant to Articles 143 and 144 of the Constitution and this report

was brought to the attention of the petitioner after he had been removed from office.

[7.4] Therefore, the JCC breached Article 143 as it did not conduct any inquiry under that article. It was also submitted that this Court was not sitting to hear an appeal from the JCC for it to determine the question as to whether or not there was sufficient evidence on record to hold that the petitioner was guilty of corruption. Rather, that the issues for determination before this Court are constitutional breaches by the JCC and the President in the manner they acted in removing the petitioner from office of judge.

[7.5] Regarding the submission that the respondent did not breach Article 144 (2), (3) and (4), it was argued that to establish whether the article was contravened all the Court needs to do is look at the evidence which reveals that even Article 144 (1) was breached which requires that the complaint be based on the grounds in Article 143.

[7.6] That clauses (2) and (3) of Article 144 were breached as the JCC never established a *prima facie* case and the petitioner was never suspended prior to removal. Equally clause (4) was breached as the documents filed do not present any evidence that there was any

hearing after any suspension. That the proceedings were in fact against a retired registrar and in accordance with the **Musonda v Attorney General**¹ case were a nullity and in contravention of Article 236 of the Constitution.

[7.7] That the case of **Zambia National Provident Fund v Yekweniya Chirwa**⁴ was inapplicable as this Court is not being called upon to determine whether there was injustice in the removal of the petitioner but to determine whether there were constitutional breaches and contraventions. That unless one undermines the Supremacy of the Constitution, no act or decision that contravenes the Constitution can be allowed to stand by this Court, such a decision or measure should be nullified or quashed and nothing can bring it to life.

[7.8] In reply to the respondent's argument that Articles 143 and 144 of the Constitution are silent on when an act by a judge or judicial officer ought to have occurred in order for the judge or judicial officer to be investigated by JCC, it was argued that the two articles attend only to a judge and not a judicial officer. Therefore, the proceedings before the JCC relating to the petitioner were against him as a judicial officer and not judge. That explained why the summons so

clearly stated under which provisions of the law the proceedings were being conducted.

[7.9] In addition, that when read together Articles 261 and 143 are clear that the conduct in issue must be that which is allegedly done by a judge while holding office of a judge because before a person is appointed judge that person cannot be said to be amenable to the code of conduct of judges. It was further argued that removing judges from office based on their conduct which predates their appointment as judges is an act that not only undermines and attacks the integrity and independence of the judiciary but also contravenes the code of conduct for judges and Articles 122, 236 and 261 of the Constitution.

[7.10] In reply to the argument that the President did not contravene Articles 91 (3) (a), (e) and (f) in the exercise of his powers under Article 144 (5) (b), the petitioner contended that the President can only act on a report that is legal, fair and just and is not obliged to comply with a report that contravened the law.

[8.0] Determination

- [8.1]** We have considered the Petition and Answer, affidavit evidence of both parties, the petitioner's oral evidence and the competing arguments by the parties.
- [8.2]** We have further noted the issues which the petitioner considers to be up for our determination as itemized in paragraph 5.1. As we see it, the cardinal issue or question this matter raises is: whether the respondent contravened various Articles of the Constitution particularly Articles 143 and 144 when the petitioner was removed from office resulting in the respondent exceeding its powers and undermining the independence and integrity of the Judiciary thereby rendering the removal irregular and unfair and liable to be nullified.
- [8.3]** The petitioner is aggrieved with his removal from office of High Court Judge. The Constitution provides for appointment and removal of a judge from office. The office of Judge is created under Article 140 of the Constitution. Judges are therefore subject to the Constitution and invariably accountable to the people of Zambia. Under Article 140 as read with Article 141, it provides that the President shall, on the recommendation of the Judicial Service Commission (JSC), appoint

a judge subject to ratification by the National Assembly. A person qualifies for appointment if, *inter alia*, she/he is of proven integrity, among others.

[8.4] Removal of a Judge from office is provided for under Article 143 which is couched thus:

A judge shall be removed from office on the following grounds:

- (a) a mental and physical disability that makes a judge incapable of performing judicial functions;**
- (b) incompetence;**
- (c) gross misconduct; or**
- (d) bankruptcy.**

[8.5] Article 144 provides the procedure for removal of a judge as follows:

144 (1) The removal of a judge may be initiated by the Judicial Complaints Commission or by a complaint made to the Judicial Complaints Commission, based on the grounds specified in Article 143.

(2) The Judicial Complaints Commission shall, where it decides that a prima facie case has been established against a judge, submit a report to the President.

(3) The President shall, within seven days from the date of receiving the report, submitted in accordance with clause 2, suspend the judge from office and inform the Judicial Complaints Commission of the suspension.

(4) The Judicial Complaints Commission shall, within thirty days of the judge being suspended from office, in accordance with clause 3-

(a) hear the matter against the judge on the grounds specified in Article 143 (b), (c) and (d); or

(b) constitute a medical board, in consultation with the body responsible for regulating health practitioners, to inquire into the matter against the judge based on the ground specified in Article 143 (a).

(5) Where the Judicial Complaints Commission decides that an allegation based on a ground specified in Article 143 (b), (c) and (d) is –

(a) not substantiated, the Judicial Complaints Commission shall recommend, to the President, the revocation of the judge's suspension and the President shall immediately revoke the suspension; or

(b) substantiated, the Judicial Complaints Commission shall recommend, to the President the removal of the judge from

office and the President shall immediately remove the judge from office.

(6) The proceedings under clause 4 (a) shall be held in camera and the judge is entitled to appear, be heard and be represented by a legal practitioner or other person chosen by the judge.

[8.6] Thus, the Judicial Complaints Commission (JCC) has a crucial role to play in the removal of a judge. The JCC is created under Article 236 of the Constitution and its functions, among others, include to receive complaints against a judge or judicial officer, as prescribed and to hear a complaint against a judge or judicial officer, as prescribed. Thus Articles 143, 144 and 236 of the Constitution touch directly on the subject of removal of a judge from office.

[8.7] According to the **Commonwealth Law Bulletin** in an article entitled **Removal Process**, "the question of when a judge maybe removed from office is of vital importance to the rule of law". The authors further note that "besides the risk that a judge may become mentally or physically incapacitated while in office, there is always the danger of a rare judge who refuses to resign when it becomes clear that his or her position is untenable. On the other

hand, there is the threat to judicial independence when the removal process is used to penalize or intimidate judges. The challenge for legal systems is to strike the correct balance between these concerns". Furthermore, that "disciplinary proceedings which might lead to the removal of a judge should include appropriate safeguards to ensure fairness." Even the Report of the Technical Committee on Drafting the Zambian Constitution emphasizes fairness and transparency in the removal of a judge from office at pages 493 and 497 on rationale of the articles on removal and removal procedure of a judge.

[8.8] The petitioner in this case seeks *inter alia* a declaration that his removal from office was unconstitutional, irregular and unfair and threatened the independence and integrity of the judiciary. He also seeks interpretation of Articles 143 and 144. Authorities abound on the rules of interpretation of the Constitution or a statute. In the case of **Steven Katuka and another v Attorney General**⁸ this Court held that:

In terms of the general or guiding principles of interpretation, the starting point in interpreting words or provisions of the Constitution or indeed any statute, is

to first consider the literal or ordinary meaning of the words and articles that touch on the issue or provision in contention. This is premised on the principle that words or provisions in the Constitution or statute must not be read in isolation. It is only when the ordinary meaning leads to an absurdity that the purposive approach should be resorted to.

[8.9] In that case we also referred to the case of **South Dakota v North Carolina**⁹ in which the United States Supreme Court stated that no single provision of the Constitution is to be segregated from the others and considered alone but all other provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to give effect to the greater purpose of the instrument. Additionally, Article 267 of the Constitution also enjoins us to interpret the Constitution in accordance with the Bill of Rights and in a manner that promotes its purposes, permits the development of the law and contributes to good governance.

[8.10] Adverting to the matter before us, it is common ground that the complainant, Mr. Mwaanza, first lodged his complaint against the petitioner on 12th February, 2021 with the office of the Chief Justice. This was following the petitioner's appointment as High

Court Judge by the President on recommendation of the JSC, on 12th January, 2021 but before ratification by the National Assembly. It is equally not in dispute, as the background facts and affidavits reveal, that prior to the complaint, Mr. Mwaanza was an employee of the Judiciary as an undersheriff, who had been dismissed for allegedly misappropriating K1,800,000.00 bailiff fees. Mr. Mwaanza lodged his complaint to the Chief Justice by letter dated 12th February, 2021 alleging that the petitioner had demanded for K130,000.00 from him prior to his dismissal. This was for the petitioner to stop his dismissal.

[8.11] Later by letter dated 18th January, 2022, Mr. Mwaanza lodged a complaint to the JCC alleging corrupt practices and extortion of money by the petitioner. In that letter which is at page 92 of the record of proceedings, Mr. Mwaanza referred to his earlier letters of complaint over the same alleged corrupt conduct of the petitioner dated 12th February, 2021 and 15th March, 2021 respectively. He enclosed responses from the petitioner and another judge dated 9th March, 2021 and 11th March, 2021 and his response dated 19th March, 2021. It is not in dispute therefore, that at the time the petitioner was undergoing

ratification the complaint had been lodged with the Chief Justice in February, 2021 and for the first time with the JCC during the same period.

[8.12] We have noted the assertions by the petitioner that since he was ratified in the face of these complaints it entailed that they had been considered and cleared by the JCC, ACC and some Members of Parliament as no adverse report was made by any of the institutions involved in the ratification of his appointment. We find these arguments to be meritless as the petitioner did not adduce any evidence to prove that the JCC, ACC and some Members of Parliament, considered the complaint by Mr. Mwaanza and cleared him of the allegations. The report of the Parliamentary Select Committee (PSC) appointed to scrutinize the presidential appointment of the petitioner and others to serve as High Court Judges, which is exhibited at pages 38 to 86 of the record of proceedings attests to the fact that no reference was made to Mr. Mwaanza's complaint.

[8.13] The JCC, ACC and others make representations to Parliament regarding the presidential appointments before ratification. This is for Parliament to gauge the integrity of the person before it

ratifies the appointment as the Constitution provides *inter alia* that a person qualifies for appointment as judge if she/he is of proven integrity.

[8.14] In the case of **Shrirang Yadavrao Waghamare v State of Maharashtra and others**¹⁰ which was concerned with removal of a judicial officer, the Supreme Court of India, relying on its earlier decision in **Tarak Singh v Jyoti Basu**¹¹ held that:

Integrity is the hallmark of judicial discipline, apart from others. It is high time the judiciary took utmost care to see that the temple of justice does not crack from inside which will lead to a catastrophe in the judicial delivery system resulting in the failure of public confidence in the judicial delivery system. It must be remembered that woodpeckers inside pose a larger threat than the storm outside.

Furthermore, that:

A judge should always remember that he is there to serve the public. A judge is judged not only by his quality of judgments but also by the quality and purity of his character. Impeccable integrity should be reflected both in public and personal life of a judge. One who stands in

judgement over others should be incorruptible. That is the high standard which is expected of judges.

[8.15] Thus, we are of the considered view that the complaint by Mr. Mwaanza brought the petitioner's integrity into question. For some unknown reason the complaint was either not tabled or considered and yet it was lodged long before the ratification of the petitioner. It was incumbent upon the JCC and ACC to have revealed this complaint in their reports to Parliament, for it to have considered the complaint as it debated and assessed the suitability of the petitioner to occupy the office of High Court Judge.

[8.16] Be that as it may be, as earlier alluded to, Mr. Mwaanza, revived his complaint in the letter of 18th January, 2022 by which date the petitioner had long been appointed and was occupying the office of High Court Judge. It was this letter that then prompted the JCC to write to the petitioner on 4th February, 2022. The petitioner responded to this letter on 11th February, 2022. After considering his response, the JCC decided to summon him to answer to "*the allegation of misconduct pertaining to corrupt practices, extortion, soliciting and receipt of monies by yourself and Hon.*

Charles Kafunda (then registrar and chief registrar respectively) in exchange for a favourable outcome in disciplinary proceedings against David K. Mwaanza (the complainant)."

[8.17] We are alive to the petitioner's argument that he was charged with misconduct and not gross misconduct in line with Article 143 (c) while the respondent contends that Article 266 defines gross misconduct to include an act of corruption. According to Article 266 "**gross misconduct**" means-

(a) **behavior which brings a public office into disrepute, ridicule or contempt;**

(b) **behavior that is prejudicial or inimical to the economy or the security of the State;**

(c) **an act of corruption; or**

(d) **using or lending the prestige of an office to advance the private interests of that person, members of that person's family or another person;**

We agree with the respondent's contention that gross misconduct includes an act of corruption. Thus, the petitioner's argument that he was not heard on a charge of gross misconduct

is devoid of merit as the charge clearly referred to corrupt practices which is captured by the definition of gross misconduct under Article 266. We hasten to state that a charge sets the basis for the hearing of the complaint. It is therefore, critical that it should be properly framed to put the concerned judge on notice as to the allegation under Article 143 that she or he must answer to.

[8.18] In this particular case, the JCC acted in line with its mandate in Article 236 and Article 143 as there was a complaint which it had to investigate, the petitioner was informed about it and he gave a written response to the allegations and then the summons was issued for him to appear before the JCC on 17th February, 2022 and to present any evidence. Thus, Article 143 was complied with in that the JCC, specified in the summons that the petitioner was to answer to the allegation of misconduct pertaining to corrupt practices, among other things.

[8.19] We must state further that the JCC properly considered the complaint even though it was after ratification of the petitioner's appointment as High Court Judge and covered pre-appointment misconduct because it was pending before it. The fact that a

judge has been appointed to that office does not insulate that judge from being investigated for past misconduct, particularly when the alleged misconduct occurred before one became a judge and there was a complaint lodged against them that was pending hearing.

[8.20] Therefore, to determine whether the JCC exceeded its mandate cannot only be based on the fact that the complaint involved pre-appointment misconduct, as argued by the petitioner, but on a full evaluation of the evidence as it is not disputed that the complaint arose before the process of appointing the petitioner as judge concluded.

[8.21] We must add that the JCC did not usurp the powers of this Court when it investigated the complaint. Our perusal of the Constitution reveals that the JCC in discharging its constitutional duties applies the Constitution. A person aggrieved may petition this Court alleging breach of the Constitution by the JCC through its decisions or actions in line with Article 128 (3) (c).

[8.22] We now turn to the allegation of breach of Article 144. After the JCC determines that a *prima facie* case on one of the grounds in

Article 143 has been established, in this case gross misconduct per Article 143 (c), it is mandated to submit a report to the President stating that a *prima facie* case has been established against a judge. This is in accordance with Article 144 (2).

[8.23] Clearly, on the facts before us, it is not in dispute that no report was made to the President on a *prima facie* case. Consequently, Article 144 (3) and first part of sub article (4) of Article 144 which provide that after receipt of the report on a *prima facie* case, the President shall within seven days suspend the judge from office and inform the JCC, were not complied with. Furthermore, the JCC must, within thirty days of the suspension of the judge from office, hear the matter against the judge on the grounds specified in Article 143. Article 144 (2) and (3) are couched in mandatory terms as 'shall' is used. The JCC had no option but to act in accordance with Article 144 (2) by submitting a report to the President once a *prima facie* case had been established against the petitioner as canvassed by the petitioner in line with our decision in the **Gift Luyako**² case.

[8.24] We note the respondent's arguments that the JCC is empowered by section 28 of the Judicial Code of Conduct Act to regulate its

own procedure and that it was on firm ground not to have acted in accordance with Article 144 (2) as the breach is amenable to judicial review proceedings. We find the argument to be flawed as the procedure envisaged by section 28 is about how the JCC conducts its proceedings or hearing and cannot be used to flout constitutional provisions. Furthermore, Article 1 (1) provides that the Constitution is the supreme law of the Republic of Zambia. Considering the Supremacy of the Constitution, the respondent was not at liberty to depart from the procedure laid out in Article 144 because doing so resulted in the respondent engaging in a procedure that is not contemplated by the Constitution. What is contemplated is that a judge subject to removal proceedings must be suspended before being heard and removed from office.

[8.25] Thus, the respondent's conduct in not subjecting the petitioner to a suspension before his hearing and removal is inconsistent with the procedure in Article 144. As already stated the Supremacy of the Constitution demands that all acts drawing their power from the Constitution must be in conformity and consistent with the Constitution.

[8.26]

Article 144 (2) of the Constitution is mandatory and does not contemplate any discretion on the part of any person exercising constitutional power. The JCC is commanded by the Constitution to submit a report on a *prima facie* case and should have complied with Article 144 (2) which would have invariably led to the suspension of the petitioner.

[8.27]

In light of the JCC's contravention of Article 144 (2), the question is whether the petitioner should be granted the reliefs that he seeks before this Court? In the main, the petitioner seeks a declaration that the decision of the respondent to remove him from office of High Court Judge contravenes Articles 143 and 144, is therefore null and void.

[8.28]

We are mindful that at the core of the complaint was a serious allegation of corrupt practices against the petitioner which brought his integrity in question. In the persuasive case of **Shrirang**¹⁰ the Supreme Court of India commenting on integrity of judicial officers and judges further opined that:

**judicial service is not an ordinary government service
and judges are not employees as such...the office that
a judge holds is an office of public trust. A judge must**

be a person of impeccable integrity and unimpeachable independence. He must be honest to the core with high moral values. When a litigant enters the courtroom, he must feel secured that the judge before whom his matter has come, would deliver justice impartially and uninfluenced by any consideration. The standard of conduct of any judge is much higher than for an ordinary man. This is no excuse that since standards in the society have fallen, the judges who are drawn from society cannot be expected to have high standards and ethical fairness required of a judge. A judge, like Ceasar's wife, must be above suspicion. The credibility of the judicial system is dependent upon the judges who man it. For a democracy to thrive and the rule of law to survive, the justice system and the judicial process have to be strong and every judge must discharge his judicial functions with integrity and intellectual honesty.

[8.29] We are persuaded by this observation by the Supreme Court of India, as the petitioner's integrity is apparently in doubt. We say so because in his own evidence during trial, the petitioner admitted receiving money from the complainant and purportedly giving it back because the complainant was extorting money from

him. Furthermore, even though the JCC did not act in accord with Article 144 (2) and (3), the petitioner was afforded an opportunity to be heard on the charges of corrupt practices for which he was found culpable. Given the circumstances of this case, we decline to grant the declaration and other relief sought by the petitioner as they would serve no useful purpose in that even though the complaint was to be re heard to ensure compliance with Article 144 (2) as the outcome is already known.

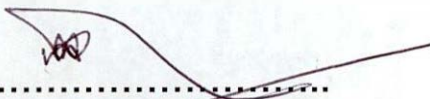
[8.30] In sum, the Petition fails for the reasons advanced herein. We accordingly, order each party to bear own costs.



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M. M. Munalula (JSD)
President Constitutional Court



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A. M. Sitali
Constitutional Court Judge



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M. K. Chisunka
Constitutional Court Judge



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M. S. Mulenga
Constitutional Court Judge



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J. Z. Mulongoti
Constitutional Court Judge