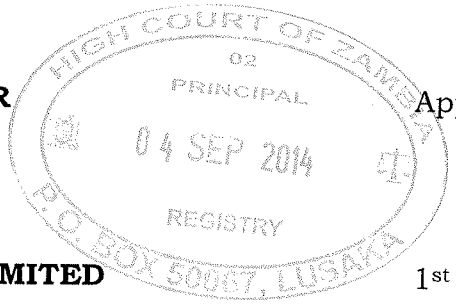
IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
(Civil Jurisdiction)

2013/HP/A032

Between:



COMPETITION AND CONSUMER PROTECTION COMMISSION Appellant

AND

OMNIA FERTILISER ZAMBIA LIMITED 1st Respondent

NYIOMBO INVESTMENTS LIMITED 2nd Respondent

Before the Hon. Justice N.A. Sharpe-Phiri on the 4th September, 2014

For the Appellant: Mr. M.B. Mwanza, In-House Legal Counsel
For the Respondents: Mr. A.J Shonga, SC and Mr. S.N Lungu of Messrs Shamwana & Company

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J U D G M E N T

Cases referred to:

1. *Re B [2008] UKHL 35*
2. *In re H (Minors) [1996] AC 563 at 586*
3. *Attorney General and Another v Lewanika and Others (1993-94) ZR 164*
4. *Ndola City Council v Charles Mwansa (1994) S.J. 78 (S.C.)*
5. *R v Sussex Justice Ex parte McCarthy(1924) 1 K.B 256*
6. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172*
7. *Victor Namakando Zaza V Zambia Electricity Corporation Ltd (2001) ZR 107*
8. *John Kasanga, Wilmingstone Shayawa Kasempa v Ibrahim Mumba, Goodwin Yoram Mumba, Yousuf Ahmed Patel (2006) ZR 7*
9. *Re Nori's Application [1989] LRC (Const) 10*
10. *Norton v Shelly Country (1986) 118 Us 425 at 444-445*
11. *The Minister of Information and Broadcasting Services and the Attorney General v Fanwell Chembo and Others SCZ Judgment number 11 of 2007*

12. *Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa, ECZ and the Attorney General (2005) Z.R. 138 (S.C.)*
13. *Mwape v The People (1976) ZR 160*

Other authorities:

1. *The Supreme Court Practice, Sweet & Maxwell, 1999 Edition*
2. *Judicial (Code of Conduct), Act No. 13 of 1999*
3. *The Competition and Consumer Protection Act No. 24 of 2010*
4. *Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia*
5. *The Competition and Consumer Protection (General) Regulations No. 97 of 2011*
6. *The Competition and Consumer Protection (Tribunal) Rules, Statutory Instrument No. 37 of 2012*

This is an appeal by the *Competition and Consumer Protection Commission* against the ruling of the Competition and Consumer Protection Tribunal dated the 3rd September, 2013. By the said Ruling, the Tribunal decided that the Appellant should not have continued to investigate a matter against the Respondents, which was already before the Tribunal on appeal. It further ruled that the Appellant's decision of the 26th April 2013 relating to the said investigations was null and void and set it aside for irregularity.

The detailed facts pertaining to this appeal are that on the 16th October 2012, the Appellant conducted a search at the Respondents' premises and collected certain items. On the 6th November 2012, the Appellant issued a notice of investigation on the Respondents containing the following information:

'TAKE NOTICE that the Competition and Consumer Protection Commission has officially commenced investigations against you on the following allegation:

That your company working in collaboration with Nyiombo Investment Limited is alleged to be engaged in allocation of markets, bid rigging and sharing price information in supplying fertiliser under the Farmer input support Programme. I wish to inform you that the alleged conduct is anti-competitive and in contravention of Section 9(1)(a)(b) and (c) of the Competition and Consumer Protection Act No. 24 of 2010.

You are hereby requested to respond to this Notice within 14 days of receipt thereof.'

The notice was served on the Respondents on the 8th November 2012. The first Respondent being dissatisfied with the said decision did not respond to the notice but instead decided to lodge an appeal before the Competition and Consumer Protection Tribunal regarding the said decision on the 22nd November 2012 and the appeal was served on the Commission on the 23rd November 2012. Before the appeal was heard, the Appellant rendered its decision pertaining to the investigations on the 26th April 2013 which decision was served on the Respondents on the 3rd June 2013. The Respondent made an application before the Tribunal for an order to set aside the decision of the Appellant pursuant to **Rule 19(1) of Statutory Instrument No. 37 of 2012** on the ground that the Commission erred and acted in contravention of the provisions of **Act no. 24 of 2010** when it proceeded to investigate and render a decision when there was an appeal before the Tribunal on the same issues.

The Tribunal in its ruling, made the following findings of fact:

1. That it was agreed by both parties that **Section 55(11) of Act no. 24 of 2010** was a clear and mandatory provision that needed no further interpretation.

2. That although the two words, that is, 'investigation' and 'decision' can be distinguished as they do not mean the same thing, there cannot be a decision without an investigation as the object of an investigation is to come up with findings or a decision.

3. That bearing in mind that **Section 55(10)** provides that at the conclusion of an investigation, the Commission will publish a report of the inquiry and its conclusions, and also taking into account the documents filed in the record of proceeding by the Respondents, the Tribunal arrived at the inescapable conclusion that the Commission was indeed investigating the matter while fully being aware that the matter was before the Tribunal thereby offending the provisions of **Section 55(11)**.

4. That the moment the notice of appeal is lodged before the Tribunal, **Section 55(11)** kicks in as the notice itself signifies that the matter now sits before the Tribunal.

5. That as **Section 55(11)** is a mandatory provision, the Appellant's argument that there was no law or lawful order to stop the commission from making a determination from the findings following the events of 19th October 2012, 6th November 2012 and 22nd November 2012 was flawed.

6. That even if a distinction were to be made between 'investigation' and 'decision,' the Tribunal would have still arrived at the conclusion that the Commission had continued to investigate a matter that was before the Tribunal on appeal because the notice served on the Respondent stated that investigations had officially been commenced against them, meaning that investigations were just beginning or getting underway notwithstanding that a search had already been conducted on the Respondent premises on the 19th October 2012.

7. That even if the notice of investigation was issued pursuant to **Section 55 (6)** so that one could argue that the investigations had already been concluded by the time the notice of appeal was filed, this argument could not be sustained in light of the documents filed by the Appellants in particular the Notice of Grounds in Opposition to Appeal wherein the Appellant admitted in paragraph 2 and 3 that the Appellant was still investigating the matter.

8. That on the available evidence adduced before the Tribunal, the Commission acted in contravention of **Section 55 (11) of Act no. 24 of 2010** when it proceeded to investigate and render a decision when there was an appeal before the Tribunal on the same issues.

The Appellant being dissatisfied with the above ruling decided to appeal citing the following grounds:

1. **The Tribunal erred in both law and in fact by finding that on the available evidence before it the Appellant *investigated* a matter that was before the Tribunal on appeal.**

2. **The Tribunal erred in fact and misdirected itself by failing to take into account the evidence filed to support the position that investigations had already taken place by the time the appeal was lodged.**

3. **The Tribunal erred both in law and in fact by finding that Section 55(11) of the Competition and Consumer Protection Act No. 24 of 2010 operated as a law or lawful order to stop the Appellant from making a determination under the circumstances of this case.**

4. **The Tribunal erred and misdirected itself by finding that the Appellant's Grounds in opposition to appeal filed on 6th December 2012 and in particular paragraphs 2 and 3 are an admission that the matter was still being investigated at the time the appeal was lodged.**

5. **The Tribunal erred in fact and in law by determining that the Appellant's decision of 26th April, 2013 is null and void and thereby proceeding to set it aside for irregularity.**

6. **The Tribunal erred in fact and in law by failing to evoke Section 71 of the Competition and Consumer Protection Act No. 24 of 2010 to request for further and better particulars in this matter.**

7. **The Tribunal erred by allowing the Vice-Chairperson to chair the proceedings in this matter despite her having worked under the chambers of Messrs Shamwana and Company and therefore being conflicted without according the Appellant an opportunity to state its position on this issue thereby resulting in the process becoming an irregularity.**

The reliefs sought by the Appellant are as follows:

1. **A declaration that its decision of 26th April, 2012 is upheld.**

2. **A declaration that the Tribunal Ruling of 3rd September, 2013 is null and void *ab initio* and be set aside with costs.**

The Appellant submitted pertaining to **grounds one, two and four** that the Tribunal failed to take into account the fact that the Appellant did not 'investigate' the case within the meaning of the term as defined in its own ruling.

At page 5 of its ruling, the Tribunal defined the term 'investigate' as ***'to inquire into the matter systematically or to make an official inquiry; examination, inquiry, study, inspection, exploration, consideration, research, scrutiny, personal, probe, or review.'***

It was the Appellant's argument that the record showed that no evidence was adduced by the Respondent to show that the Appellant investigated the matter after the appeal was lodged on 22nd November, 2012. They submitted further that the onus was on the Respondent to show that the Appellant investigated the matter, as per above definition, after the appeal was lodged.

They contended that it is trite law that *he who alleges must prove* and in this case, the burden was on the Respondent to prove to the Tribunal, on a balance of probabilities, that the Appellant investigated a matter after an appeal was lodged with the Tribunal.

They cited the case of **Re B [2008]**[1] wherein Lord Hoffman put this position as follows:

> ***'If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is retained and the fact is treated as not having happened. If he does discharge it, a value of 1 is retained and the fact is treated as having happened.'***

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They also cited the case of **In re H (Minors)**,[2] where Lord Nicholls explained:

> ***'The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not...'***

They submitted that the Respondent failed in their duty to prove on a balance of probability that the Appellant investigated a matter that was on appeal before the tribunal.

They argued further that there was no evidence on the documents filed by the Appellant to show that this case was indeed investigated after the appeal was lodged. They explained that the Appellant conducted a search with the authority of court warrants as shown on pages 7-8 of the record of proceedings filed before the Tribunal (now on page 38 and 39 of the record of appeal). This search was conducted pursuant to **Section 55(3)** as read with **Section 55(6) of the Act**. They went on further to state that while **Section 55(3) of the Act** mandates the Appellant to issue notices of investigation upon the opening of an investigation, **Subsection 6** of the same section allows the Appellant to defer the giving of such notice under given circumstances.

They submitted that the Notice provided for under **Section 55(3)** was in a prescribed form in the first schedule of the **Competition and Consumer Protection (General) Regulations, 2011, Statutory Instrument No. 97 of 2011**. This notice reads in part as follows:

> **'TAKE NOTICE** ***that the Competition and Consumer Protection Commission has officially commenced investigations against you on the following allegations...'***

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It also provides at the end that:

> ***'You are hereby requested to respond to this Notice within fourteen (14) days of receipt thereof.'***

They submitted that given the language of **Section 55(3) and (6)** it was the same notice that should be used for investigations whether at initiation stage or at conclusion stage.

Section 55(3) provides that:

> ***'The Commission shall, upon opening an investigation, as soon as practicable, give written notice of the investigation to the person who is the subject of the investigation or to an enterprise which is suspected to be a party to the matter to be investigated and shall indicate in the notice, the subject matter and the purpose of the investigation.'***

Subsection (6) of the same section provides that:

> ***'The commission may, where it has reasonable grounds to believe that the giving of a written notice under subsections (3) and (4) may materially prejudice its investigations, defer the giving of such notice until after the investigation is concluded.'***

They contended that reference to *"such notice"* in **Subsection (3)** implies that it is the same notice being referred to in **Subsection (6)**. They thus submitted that the Appellant, having conducted the search on 9th October, 2012 and being alive to its statutory duty to issue notices when investigating matters did so via a notice of investigation issued on November, 6th, 2012 pursuant to **Section 55(6) of the Act**.

They added that further evidence that the notice was issued at the conclusion of the investigation is the report that was included in the supplementary record of proceedings filed in the Tribunal (see pages 30-92) which is also on page 41-132 of record of appeal which was issued pursuant to **Section 55(10) of the Act**.

In concluding the three grounds, the Appellant's argument is that by the time the appeal was lodged, it had completed its investigations as evidenced by the notice issued on 6th November, 2013, three weeks after the search, and the report dated November, 2012.

In relation to **ground three and five**, the Appellants submitted that the correct position at law is that **Section 55(11) of the Act** operates as a stay or lawful order from carrying out investigations where an appeal is lodged with the Tribunal. They cited the case of **The Attorney General and Another v Lewanika and Others**[3] where the Court stated at page 164 that

> ***'If the words of the statute are precise and unambiguous, then no more can be necessary than to expand on those words in their ordinary and natural sense.'***

They argued that **Section 55(11) of the Act** should not arise in this case because investigations had already concluded by the time the appeal was lodged. They maintained that there was no lawful order to stop the Appellant from making a determination following its investigations because:

1. **Section 55(11)** did not apply to this case as investigations had concluded when the appeal was lodged as such the section could not operate as a stay against the proceedings; and

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2. The Appellants did not apply for a stay with its appeal. They contended that a stay was a relief which must specifically be pleaded for and cited the case of **Ndola City Council v Charles Mwansa**[4] where it was held *inter alia* that an appeal does not operate as a stay of execution, it must be applied for and the decision is discretionary.

The Appellant also referred to **Order 59, Rule 13 of the Supreme Court Practice,** which provides that:

> ***'13 (1) Except in so far as the Court below or the Court of Appeal or a single judge may otherwise direct –***
>
> *a.* ***An appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below...'***

They argued that under the circumstances, the finding by the Tribunal that the Appellant's decision of 26th April, 2013 was null and void and its decision to set it aside for irregularity was flawed at law. They added that the decision was based on findings made prior to the appeal being lodged as evidenced by the report of November, 2012. They argued also that the proceedings held for purposes of making the said decision were not unlawful as there was no stay or other lawful order to stop the said proceedings from being held.

In relation to **ground six** the Appellant's Counsel submitted that the Tribunal had discretion where necessary to call for further and better particulars in order to ensure that a matter is handled in a just and speedy manner. They added that this case demanded that the Tribunal exercise its power in line with the law but they failed to do so and thereby made an unjust determination. They argued that although the Tribunal made reference to **Section 55(10) of the Act**

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that mandates the Commission to publish a report of the inquiry at the conclusion of an investigation, they made no reference to this report which was filed by the Appellant. According to the Appellants, the Tribunal using **Section 71 (1) (a) of the Act** ought to have ensured that further information on this report was availed to them notwithstanding that it was filed in the proceedings before them.

In **ground seven**, they argued that the **Judicial (Code of Conduct), Act No. 13 of 1999** (herein after referred to as 'the code') is instructive on how adjudicators must address issues where they are disqualified from adjudicating on the basis of possible conflict of interest or situations where impartiality might be questioned.

They cited **Section 6(2)(a) of the Code** which provides that:

> ***'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-***
>
> ***(c) A legal practitioner with whom the officer previously practiced law or served is handling the matter'***

They also submitted that **Section 7(1) of the code** mandates a judicial officer to disclose his or her disqualification at the commencement of the proceedings to the parties and request the parties or their legal representatives to consider, whether or not to waive the disqualification. They argued further that **Section 7(3)** makes it mandatory that the disclosure under subsection (1) or the agreement under subsection (2) should form part of the record of the proceedings in which it is made.

They also argued that the record of the Tribunal proceedings showed that the Deputy Chairperson, Mrs. M Natala-Siasima did not disclose that she served at Shamwana and Company at one time, despite having an obligation to disclose this fact and that her failure to do so was inimical to the provisions of the Code as cited above. They further submitted that this omission was fatal to the proceedings before the Tribunal resulting into the process becoming a mistrial.

They cited the case of **R Vs Sussex Justice Ex parte McCarthy,**[5] wherein it was held 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. Nothing which creates a suspicion that there has been an improper interference with the course of justice and further that justice is rooted in confidence and confidence is lost when any right minded person goes out there believing justice was not done.'***

In the Respondents heads of argument, they submitted on the other hand, in relation to **ground one**, that the authorities cited by the Appellants to aid their argument that the burden of proving the existence of a fact was on the Respondents, do not dictate that an Applicant should provide evidence to prove his allegation. They argued that it is trite law that he who alleges must prove and looking at the facts of the present case, there was evidence before the tribunal to support the fact that investigations continued after the appeal was lodged.

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They submitted that the tribunal relied on the following to prove the above assertion:

1. **The Notice of Investigation which read as follows:**

'TAKE NOTICE that the Competition and Consumer Protection Commission has officially commenced investigations against you on the following allegation:

That your company working in collaboration with Nyiombo Investment Limited is alleged to be engaged in allocation of markets, bid rigging and sharing price information in supplying fertilizer under the Farmer input Support Programme. I wish to inform you that the alleged conduct is anti-competitive and in contravention of section 9(1) (a) (b) and (c) of the Competition and Consumer Protection Act No. 24 of 2010.

You are hereby requested to respond to this Notice within 14 days of receipt thereof.'

They argued that the law governing the issuance of the said Notice is **Section 55(3) of the Competition and Consumer Protection Act, No 24 of 2010** (hereinafter referred to as 'the Act'), which provides as follows:

'The Commission shall, upon opening an investigation, as soon as practicable, give written notice of the investigation to the person who is the subject of the investigation or to an enterprise which is suspected to be a party to the matter to be investigated and shall indicate in the notice, the subject matter and the purpose of the investigation.'

They submitted that the notice clearly conveyed the message that the Appellant had officially commenced investigations against the Respondent and the same Notice, in line with the rules of natural justice, gave the Respondent 14 days in which to respond.

They submitted that the Appellants argued that they issued notice under **Section 55(6) of the Act,** which section allows the Appellant to defer the giving of a Notice till after the investigation is concluded provided the Appellant has reasonable grounds to believe that the giving of a written notice at the commencement of official investigation will prejudice the investigation.

They argued that if indeed the Appellant did issue notice pursuant to **Section 55(6),** there ought to have been evidence of that on the record. However, a reproduction of the arguments from both parties, at pages 20 to 29 of the Record of Appeal does not refer to **Section 55(6) of the Act**. They argued that the only logical inference to be made, given the Appellant's silence throughout the Tribunal proceedings, was that reference to **Section 55(6) of the Act** was an afterthought.

They submitted that the said section does not allow the Appellant to issue a misleading notice as the notice issued on page 40 of the Record of Appeal did not say that investigations had concluded.

They argued further that the decision to issue a notice pursuant to **Section 55(6) of the Act** carries with it the corresponding responsibility to show that the notice has been issued at the close of investigations and also the reasons for invoking the provisions of **Section 55(6) of the Act**. They submitted that the Record of Proceedings submitted before the Tribunal clearly demonstrated that the Appellant made no decision to defer the giving of the Notice till after investigations and also did not in anyway disclose that the question regarding

which section to issue the Notice under was ever in contemplation by the Appellant.

Further, they added that, it was not possible for an investigation to have concluded without the Appellant having been heard by the Respondent. They argued that if it was the intention of the Appellant to convince the Court that even if the Respondent had put in a response, that response would have had no bearing on the investigation because the investigation had already concluded, legal reason did not support such a conclusion.

They also submitted that the second document the Tribunal relied on in concluding that investigations had continued even after the appeal was lodged was:

2. **The notice of grounds in opposition to appeal filed by the Appellant before the Tribunal.**

They submitted that this document shown at pages 139 to 142 of the Record of Appeal was filed on 6th December, 2012, whereas the Respondent's Appeal before the Tribunal was lodged on 22nd November, 2012.

They drew the Court's attention to paragraph 2, line 10 at page 140 of the Record of Appeal where the Appellant is quoted to have stated the following:

> ***'...The Respondent will show that the entire Article 18 of the Constitution of Zambia, while important, is out of context in the case in casu as no one was arraigned in this case which is still at investigation stage.....The Respondent contends that no one has been charged with a criminal offence in this case which, again, is merely at investigation stage.'***

They also submitted that in paragraph 3 from line 4 on the same page 140 of the Record of Appeal, the Appellant stated thus:

> ***'..We are at pains to see how this Article is relevant to this case which is merely at investigation stage.'***

The Respondents argued that since the document was filed two weeks after the appeal was lodged, it clearly shows that two weeks after the appeal was filed, the matter was still at investigation stage and hence proving that the Appellants had continued to investigate a matter that was on appeal before the Tribunal.

They also argued that the time lag between the issuance of the notice of investigation and the rendering of the decision makes it improbable that investigations had concluded by the time the notice of investigation was issued. If it was true then the decision ought to have been handed down somewhat sooner.

They argued further that the Appellant was appealing against a finding of fact by the Tribunal and not any alleged procedural error. They cited the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[6] which is instructive on this point. The Court held in that case as follows:

> ***'The appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts.'***

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They also cited the case of **Victor Namakando Zaza V Zambia Electricity Corporation Limited**,[7] where the Court approved the above holding thus:

> ***'The finding made by the trial court should not lightly be interfered with, in keeping with what this court has said on numerous occasions in the past'***

They argued that it could not be said that the Tribunal's ruling was perverse or that it was made in the absence of any supporting evidence or based on a misapprehension of any facts. They finally submitted that ground one had no merit due to the fact that the Tribunal was on *terra firma* in arriving at the inescapable conclusion that the Appellant had continued investigating a matter after a notice of appeal had been filed with the Tribunal.

In relation to **ground two**, the Respondent argued that the Appellant did not argue this ground sufficiently except to state on page 7 of the record thus:

> ***'The Appellant's argument is that by the time the appeal was lodged it had completed its investigations as evidenced by the notice which was issued on 6th November, 2013, which was three weeks after the search as well as the report dated November, 2012....'***

The Respondent submitted that although the Appellant argued that the said report was issued in line with **Section 55(10) of the Act**, that was not the case because **Section 55(10) of the Act** provides that:

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'The Commission shall, at the conclusion of an investigation under this section, publish a report of the inquiry and its conclusions in such manner as it considers appropriate.'

They argued that the document purportedly relied upon by the Appellant as a report issued in line with **Section 55(10) of the Act** which is exhibited on page 70 of the Record of Appeal reveals the following omissions:

i. It does not bear the full date it was created. Page 70 merely says November, 2012, the same month that the Respondents filed their Appeal;
ii. The document is missing pages 1,3,5,7,9,11,13, and 15;
iii. The document has no conclusion and ends abruptly at page 38 of the Record of Appeal.

It was the Respondent's submission that the Tribunal cannot be faulted for not taking the above document into account as it considered the matter before it. Further they argued that the Appellant had not explained to the Court how the Supplementary Record of Proceedings at page 41, which includes the "report" at page 70, found itself on the record.

They further submitted that at the direction of the Tribunal, the Appellant filed a Record of Proceedings before the Tribunal and the said record was received by the Tribunal on 13th June, 2013 shown at page 30 of the Record of Appeal. The Respondent's application, leading to this appeal, was heard on 21st June, 2013 as evidenced by the document at page 20 of the Record of Appeal. The Tribunal heard arguments from both sides and adjourned the matter for a ruling. They submitted that on the day arguments were heard, the only record of proceedings before the Tribunal was that received by the Tribunal on 13th June, 2013.

They argued that the Supplementary Record of Proceedings containing, amongst other things, the purported "report", was only received by the Tribunal on 5th July, 2013 as evidenced by the date stamp on the record, which was well after arguments had been heard and the Tribunal adjourned for a ruling.

They submitted further that notwithstanding the fact that the said Supplementary Record of Proceedings was not available when the matter was being argued, the Tribunal did take all available documents into account as it considered the matter. At page 13 of the Record of Appeal, the Tribunal said the following:

> ***'In light of the forgoing and having taken into account the Respondents documents filed in the Record of proceedings, we have come to the inescapable conclusion that the Commission was indeed investigating the matter at hand while it was fully aware that the matter was before this Tribunal...'***

They argued further that even if the tribunal had not taken the documents in the supplementary Record of Appeal into account, there existed no documents in the Record of proceedings which would materially affect the ruling of the tribunal. Further, that there were no documents in the supplementary record of proceedings which the Tribunal could have employed to show that the matter was already investigated by the time the Respondent's appeal was lodged on 22nd November, 2012.

In relation to **ground three** that he Tribunal erred by finding that the Competition and Consumer Protection Act operated as a lawful order to stop t he Appellant from making a determination of the matter, the Respondent argued that in its ruling, the Tribunal simply meant that once a notice of appeal is lodged, the said notice serves as a bar to prevent the Appellant from determining the matter by virtue of **Section 55(11).** It said that the said section

prevents further investigations from being carried out the moment a notice of appeal is filed as it is a mandatory provision. They argued further that it was not a question of whether one could choose to give effect to the provision or not.

In relation to **ground four** that the Tribunal erred by finding that paragraph 2 and 3 of the Appellant's grounds in opposition was an admission that the matter was still being investigated at the time the appeal was lodged, the Respondent submitted that they would rely on their argument advanced in ground one above. Additionally, they argued that this ground, like ground two, was not challenging a point of law but was based on a finding of fact alone and reiterated their submissions in ground two regarding appeals against a finding of fact.

Pertaining to **ground five** of appeal that the Tribunal erred in declaring the Appellant's decision of 26th April, 2013 null and void, the Respondent submitted that the reason the Tribunal declared the decision of the Appellant null and void for irregularity was because in the Tribunal's view, the Appellant had breached the provisions of **Section 55(11) of the Act** by continuing to investigate a matter that was on appeal before the Tribunal.

With respect to **ground six** of appeal that the Tribunal erred in failing to exercise its discretion to request for further and better particulars in line with **Section 71 of the Competition and Consumer Protection Act**, the Respondents argued that **Section 71** which provides as follows:

> ***'The Tribunal may-***
>
> ***(a) Order the parties or either of them to produce to the Tribunal such information as the Tribunal considers necessary for purposes of the proceedings; or***

(b) Take any other course which may lead to the just, speedy and inexpensive settlement of any matter before the Tribunal.

2. The Tribunal may summons witnesses, call for the production of, or inspection of, books, documents and other things, and examine witnesses on oath, and for those purposes, the Chairperson is hereby authorised to administer oaths.

3. A summons for the attendance of any witness or the production of any book, document or other thing shall be signed by the chairperson and served in the prescribed manner.'

They argued firstly that it was standard practice for the Tribunal to request for a full Record of proceedings before proceeding to hear a matter, that is why the Record of Proceedings filed on 13th June, 2013 was lodged before the Tribunal and secondly, that the wording of **Section 71 of the said Act** clearly points to the fact that the exercise by the Tribunal of the powers under **Section 71** thereof was purely discretionary. It is up to the Tribunal to determine whether or not it has before it all the documents necessary to dispense justice and rule fairly. They submitted that in the present case, all necessary documents were already before the Tribunal.

They argued that the document that the Appellant purported to call a report, though before the Tribunal after the matter was argued, had no resemblance to a report as envisaged by **Section 71(10) of the Act**. They argued further that the onus of whether or not to produce the report during submissions lay squarely with the Appellant.

In relation to **ground seven** of appeal that the Tribunal erred by allowing the vice-chairperson to chair the proceedings despite her having worked for Shamwana and Company and being conflicted and without giving the Appellants an opportunity to state their position, the Respondents argued as follows:

1. **Correct Interpretation of Section 6(2)(a)(c) of the Judicial (Code of Conduct) Act No. 13 of 1999**

This Section provides thus:

> ***'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 ground that-.....***
>
> (c) ***A legal practitioner with whom the officer previously practiced law or served is handling the matter.'***

The Respondents argued that at first glance, it may appear that the above section demands that in each and every case, without exception, a judicial officer must not take part in a case, if the matter is being handled by a legal practitioner with whom the said officer previously practiced law or served. They argued however, that a closer scrutiny reveals that global application was not the intention of the framers of this piece of legislation and that the section, invites a situation where the case before the officer is being handled by a legal practitioner with whom the officer previously practiced law or served.

Further, they argued that **Section 6(2)(a)** states that a judicial officer shall not take part in any matter in which the officers impartially **might reasonably be questioned** on various grounds, one which is that the matter is being handled by a legal practitioner with whom the officer previously practiced law or served.

They argued that put another way, in cases where a judicial officer is adjudicating in a matter which is being handled by a legal practitioner with whom the officer previously practiced or served, then **if**, in the circumstances of that case, it is reasonable to question the judicial officers impartiality, that officer must not adjudicate in the matter. They argued that the section did not state that a judicial officer must not adjudicate in a matter the moment it transpires that the matter is being handled by a legal practitioner with whom the officer may have practiced law or served. The two positions they argued were distinct.

In support of their argument, they cited the case of **John Kasanga, Wilmingstone Shayawa Kasempa v Ibrahim Mumba, Goodwin Yoram Mumba, Yousuf Ashmed Patel,**[8] where the court held that,

> ***'if Judges were to recuse themselves because any lawyer was known to them, people or society would not get justice.'***

On page 11 the Supreme Court made this observation:

> ***'We have agonizingly considered the arguments before us. Agonizingly, because our legal profession is very young and small. Some judges were classmates of most lawyers. Some lawyers were students of some judges. If judges were to recuse themselves because any lawyer was known to them, people or society would not get justice. We do not think it was the intention of the legislature in enacting the judicial (Code of Conduct) Act that any relationship between a judicial officer and counsel representing any party should make the judicial officer disqualified from adjudicating in the matter.'***

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Following the above reasoning, they submitted that before a judicial officer is prevented from taking part in a matter, it must be established that, on the facts before the Tribunal, that officer's impartiality might reasonably be questioned on the basis of a particular ground. It is only after this subjective test is applied that a particular judicial officer will either adjudicate or not participate in a matter.

2. The Facts before the Tribunal

They argued that the assertion that the Vice chair once worked at Shamwana and Company was introduced before this Court not as a fact but as an allegation in the Appellants memorandum of appeal, appearing at page 6 of the record of appeal. They argued further that such an allegation cannot be introduced at appeal stage unless the record showed that the fact had been raised at trial.

3. Does breach of Section 6(2) (a) (c) of the Judicial (Code of Conduct) Act No. 13 of 1999 invalidate the ruling of the Tribunal?

The Respondents argued further on this ground that the wording of **Section 6(2) (a)(c) of the Judicial (Code of Conduct) Act No. 13 of 1999** deals only with whether or not a judicial officer should take part in proceedings in the wake of evidence that the officer's impartiality might be reasonably questioned. They argued that the said section did not offer any guidance as to whether a ruling handed down with the participation of a member of the Tribunal who should not have adjudicated may be invalidated, as suggested by the Appellant.

They also cited the provisions of **Section 33 (b)** of **the Interpretation and General Provisions Act Cap 2** of the laws of Zambia which provides that:

'Whereby or under any written law any Board, Commission, Committee, Council or similar body, whether corporate or unincorporated, is established, the powers of such board, commission, committee, council, or similar body shall not be affected by –

b. Any defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof.'

They submitted that, the Competition and Consumer Protection Tribunal, is a body within the meaning of **Section 33 (b) of the Interpretation and General Provisions Act**. Disqualification of a member of the Tribunal would not invalidate a decision or ruling handed down by the Tribunal.

They further cited the case of **Re Nori's Application**[9] where at page 10, the court cited the case of **Norton v Shelly Country.**[10] They submitted that these authorities confirmed one thing, that the judgment or ruling of a court or Tribunal shall not be invalidated on the ground that one of the members may have been disqualified from sitting.

In conclusion, the Respondents submitted that the Appellant had failed to justify why this court should set aside the ruling of the Tribunal appealed against. The Record of Appeal, they submitted, confirmed that on the available evidence the Tribunal was correct to arrive at the decision that it did. The Respondents urged the Court to dismiss the appeal with costs.

In reply to the Respondent's preliminary submission as regards the identity of the settlor of the Appellant's Skeleton Heads of argument, the Appellant submitted that Messrs Lewis Nathan Advocates was only retained during the

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period when there was no in house counsel for the appellant. The position had since been filled and as such there was no need to continue retaining the services of the said law firm.

The Appellant submitted that this Honourable Court has jurisdiction, and is implored to judiciously exercise that jurisdiction to formally allow the said Messrs. Lewis Nathan Advocates to cease from acting as practitioners for the Appellant, especially considering that the position as raised by the Respondents have since been overtaken by events; the Appellant's Legal Counsel having been placed on record in this case on the 29th January, 2014.

The Appellant recognising the importance of procedural rules of the Court, admitted the derogation therefrom, presented by the delayed notice, submitted in prayer, that this Court gives justice a chance by determining this appeal on its merits.

The Appellant further reaffirmed its arguments in reply to the Respondents arguments on all the grounds of appeal. I will not endeavour to repeat them as they are encompassed in the Appellant's skeleton arguments above, suffice to say, I have taken note. That in essence, was the totality of the submissions from both parties.

I have considered the facts of this case, the proceedings before the Tribunal, the judgment and the detailed submissions from both parties. I am truly indebted to both Counsel for the well thought out arguments.

I will start by addressing the preliminary issue raised. The Respondents complained of not being clear on who was representing the Appellant in this matter and argued that it was pertinent for the Appellant to notify the Court as to who would represent them. They submitted that Messrs. Lewis Nathan Advocates were initially on record as Solicitors for the Appellant but that the

record subsequently showed that the Appellant was being represented by in-house counsel without a notice of change being filed. The Appellant submitted on the other hand that they had engaged Messrs Lewis Nathan when their In-House legal counsel had resigned from employment and by the time the matter was being heard they had employed another In-House counsel to act on their behalf. They argued that they had the right to use In-House counsel and to dispense with the services of their former solicitors.

The record shows that the Notice of Appeal was lodged on behalf of the Appellant on the 3rd October, 2013, by its in-house legal counsel. However, on the 15th November, 2013, a notice of appointment of Advocates was filed by Messrs Lewis Nathan Advocates notifying the Court that they had been appointed to represent the Appellant in this matter. Subsequently, on the 27th January, 2014, Messrs Lewis Nathan Advocates filed an application to withdraw from acting as Advocates in this matter. An order was granted by the learned Deputy Registrar on 28th January, 2014 pursuant to **Order 67 rule 6** allowing the Advocates to withdraw from representing for the Appellant.

The learned authors of the **White Book** state on the question of change of solicitor at **rule 1 of Order 67** thereof, that a party to any matter who sues or defends by a solicitor may change his solicitor without an order for that purpose but until the notice of change is filed and copies lodged and served, the former solicitor shall be considered the solicitor of the party until the final conclusion of the matter.

However, **rule 6 of Order 67** does permit a solicitor who has ceased to act for a party to apply to court for an order declaring that the solicitor has ceased to be the solicitor acting for the party in the case, where the party has not given notice of change in accordance with rule 1 above.

From the provisions above, it is clear that a party and/or its solicitor must notify the Court who their solicitors are or if there has been any change in retainer and until such notification, the former solicitor shall be considered as the solicitor of the party until the final conclusion of the matter. In this case, when the matter came up for hearing on 29th January, 2014, Messrs Lewis Nathan Advocates had clearly ceased to act for the Appellant. It was therefore essential for the Appellant to have informed the Court and the Respondents as to whom it had appointed to represent it in this matter. However, this was not done. Be that as it may, I am of the considered view that notwithstanding the fact that the Appellant did not comply with the rules of court as indicated above, this contravention did not affect the core issues of the case. I am also not satisfied that this failure caused any prejudice or inconvenience to the Respondents in any way whatsoever, particularly as the heads of arguments had already been settled and exchanged between the parties. In view of the foregoing, I dismiss this preliminary issue.

I now turn to address grounds of appeal, one through to five, which have been argued together. These grounds hinge on two issues, namely, the interpretation of **Section 55(11) of the Competition and Consumer Protection Act No. 24 of 2010** and whether at the time the Respondents lodged an appeal to the tribunal, the Appellant had completed its investigations as they contend.

The facts of this case as earlier stated are that on the 8th November, 2012 the Appellant issued and served a notice to investigate on the Respondents. The Respondents lodged an appeal against the notice with the Tribunal on the 22nd November, 2012. Before the appeal was heard, the Appellant proceeded to render a decision on the matter in April, 2013, notwithstanding the fact that an appeal was pending before the Tribunal.

I will start with the question of interpretation of **Section 55 (11) of the Act**.

The Courts have in a number of cases stated categorically that the words of a statute should be construed in their natural meaning unless the words are ambiguous and giving a literal interpretation would lead to absurdity. In the case of **The Minister of Information and Broadcasting Services and the Attorney General v Fanwell Chembo and Others,**[11] the Court held as follows:

> ***'... if words of a statute are precise and unambiguous, then no more is necessary to interpret those words and the words should be given their natural and ordinary meaning; that the primary rule of interpretation of statutes is that the meaning of any enactment is to be found in the natural and ordinary meaning of the words used; and that the literal and grammatical meaning will prevail where there is nothing to indicate or suggest that the language should be understood in any other sense.'***

In the case of **Anderson Kambela Mazoka and Others Vs Levy Patrick Mwanawasa, ECZ and the Attorney General**[12] the Court also held that:

> ***'In all cases now in the interpretation of statutes we adopt such a construction as will promote the general legislative purpose underlying the provision. It is no longer necessary for the Judges to wring their hands and say: "There is nothing we can do about it...."It follows, therefore, that whenever the strict interpretation of a statute gives rise to unreasonable and an unjust situation, it is our view that judges can and should use their good common sense to remedy it - that is by reading words in if necessary - so as to do what parliament would have done had they had the situation in mind.'***

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We must look at the words of the statute, in order to interpret the intention of the drafter. **Section 55(11)** states as follows:

> '***The Commission shall not investigate a matter that is before the Tribunal unless the Tribunal directs otherwise.***'

The words of the above provision appear clear in their meaning that when a matter goes on appeal before the Tribunal, the commission shall not investigate a matter. It implies that any ongoing investigations by the Commission pertaining to the affected party should be suspended unless the Tribunal directs otherwise. This issue is not in dispute. The contention is whether **Section 55(11)** talks about an investigation only. Did the drafter intend to refer to an investigation only? Is it reasonable to suggest that the section only refers to investigations? Did they envisage a situation as the one before me, where the Commission has completed its investigations that it could render a decision on the matter notwithstanding that an appeal is before the Commission?

The tribunal indicated that although **'investigation'** and '**decision**' entail different things, they are related and one cannot exist without the other especially. It is correct that one investigates in order to render a decision. To investigate also means to study, examine, search, enquire and analyse a matter. A decision is as a result of an investigation or follows an inquiry, and does involve an analysis. If the latter has been suspended, how does one justify moving on to the former when the two are inter-related or connected? Therefore, the argument that the decision making process has nothing to do with the investigation is untenable as the two are inclusive. I am of the considered view that the intention of the provisions of **Section 55(11)** is that any investigations, enquiries and analysis of any sort being undertaken by the Commission against an affected party, should be suspended, after an appeal has been lodged before a Tribunal, until the Tribunal directs otherwise. The Section in my view is not restrictive as contended by the Appellant.

Turning to the second aspect of whether or not the Appellant continued to investigate the matter whilst the appeal was pending before the Tribunal. In view of my findings above, I believe the issue of whether or not the Appellants continued to investigate is a mute point, but I must address the arguments of the parties. The Appellant argued that at the time the appeal was filed by the Respondents on 22nd November, 2012 against their Notice to investigate, they had already concluded their investigations into the matter and all that remained was for them to render a decision. They argued further that the Respondents had failed to prove that they had continued to investigate the matter. The Respondents argued on the other hand, that there was evidence before the Tribunal to support the fact that investigations continued after the appeal was lodged.

I have perused the documents at *pages 42 to 110 of the record of appeal*, to which I was referred by the Appellant. These are as follows:

- Authorisation of investigation.
- Minutes of a meeting between an unknown person and Appellant on 3rd September 2012.
- A brief on the investigation dated 10th October, 2012, giving an outline of how the investigation would be conducted.
- An investigation plan dated 4th September 2012.
- Minutes of a meeting between ACC and the Appellant of 27th September 2012.
- Search Warrant.
- Notice of Investigation dated 6th November 2012.
- Letter of 14th November 2012 indicating that seized items had been returned.
- Document entitled 'the Board of Commissioners meeting for adjudication of cases to be held on the 26th April 2013'.

- Staff paper dated November, 2012 on restrictive business practices by the Respondents.
- Various correspondences
- Decision of the Appellant against the Respondents dated 26th April, 2013.

The Appellant argued that the above documents prove that the investigations were already concluded by the time the Appeal was lodged on the 22nd of November 2012.

Having critically analysed these documents, I was not able to see how these documents would show that the Appellant had completed investigations as at the 22nd November, 2012. The staff paper simply states that it was in November 2012 which is not helpful as the date in contention is the 22nd of November 2012. Also the said exhibited paper is haphazardly put together, the pages do not run in a chronological manner and the information contained on one page does not seem to connect to the next page. Further, the exhibited paper does not convince me that the report was concluded before the 22nd of November 2012. Even if that were the case, the decision was only made on the 26th of April 2013.

The Appellant submitted further that from the language of **Section 55(3)** and **Section 55(6),** it was evident that the form of the notice was standard and is used for investigations, whether at initiation stage or at conclusion. The Appellant have also insinuated that the notice issued under **Section 55(6)** was a mere formality.

The words of **subsection 55(6)** are clear, that where it appears that investigations might be interfered with, the notice should be deferred until the investigations are concluded. If the intention of the drafter was that notices in cases such as **subsection 55(6)** were a mere formality, then why issue them?

The notice is issued for a purpose and is a necessity in either case because the rules of natural justice demand that a party should not be condemned without being heard. I do not believe **subsection 55(6)** implies that the Commission should investigate and condemn a party unheard. It simply means that if it appears that there might be interference while evidence is being gathered against a party, then the giving of the notice should be done after the evidence has been gathered. However, all the necessary stages in investigating a party and rendering a decision for or against them have to be adhered to.

I have perused the proceedings before the Tribunal. The Appellant's legal counsel at the time did not indicate whether the notice served upon the Respondents was made pursuant to **Section 55(6)** instead of **Section 55(3)**. By raising this before me, they are raising a new issue now which they did not raise earlier. If this evidence existed, the Appellant's counsel would have mentioned it sooner.

Also, the Appellant did not show that there were certain circumstances that made them issue the notice pursuant to **Section 55(6)** and not **Section 55(3)**. I do not think it was the intention of the drafter that one should be left guessing as to which section the notice falls under. I agree with the Respondents that if indeed it was issued under **Section 55(6)**, the language of the notice would have stated so.

Nevertheless, whatever section the notice was issued under, at the point that the appeal was lodged, everything pertaining to the investigations ought to have been suspended regardless of what stage it was at, whether at the beginning or at the end when the decision had to be rendered. Instead, the Appellant went ahead and rendered its decision citing the reason that the notice they served was pursuant to **Section 55(6)** meaning investigations were done and the notice was just a statutory provision they had to follow, the content being irrelevant.

I do not believe that that was the intention of the drafter at all, if we go by that absurd interpretation; we are rendering ineffective certain provisions of **Act no. 24 of 2010**.

The Appellant's interpretation of **Section 55(6)** meant that the Respondents had no opportunity to respond or answer the allegations against them as they decided to take the matter before the Tribunal to determine whether the Appellant had a right to investigate them or not. Therefore, whether the Respondents decided to respond to the notice within the grace period of 14 days or not, it would have made no difference as the decision rendered on the 26th April 2013 made in the absence of a response from the Respondent demonstrated that the Appellant did not need to hear from the Respondents before making the decision.

Another question raised was if investigations had indeed completed as at 22nd November, 2012, why did the Appellant take almost five months to render its decision in April, 2013? Further, there is the issue of admission on the part of the Appellant regarding the investigations. The two paragraphs in the Appellant's grounds in opposition to appeal filed on the 6th December 2012, particularly paragraph two thereof, the Appellant did state in line 12 and 16 that the case was still at investigation stage. Also, in paragraph three at line five, the Appellant did state that the matter was still at investigation stage. Therefore, I agree with the Tribunal that this in essence meant that by the time they were lodging in their grounds in opposition in December 2012, the matter was still at investigation stage and had not been concluded as clearly admitted by themselves and hence the reason that the decision was only rendered in April 2013.

From the foregoing, I find that the Appellant could not have concluded their investigations by the 22nd November 2012 when the Respondents lodged their appeal. Also, the Appellant's investigations ought to have included an inquiry

into the Respondents response on the allegations. That, notwithstanding, even assuming that the Appellant had concluded their investigations into the matter, the fact that the Respondents had not been heard on the notice to investigate and more especially that the Respondents had lodged an appeal, the Appellant ought not to have proceeded to render its decision on the matter. By doing so, the Appellant was endeavouring to supersede the appeal hearing.

The Appellant should have immediately suspended all issues relating to the Respondents as no decision had been rendered by the Appellant as at 22nd November 2012 when the Respondents filed their appeal. The Appellant ought to have adhered to the provisions of **Section 55(11)**, irrespective of the stage the Commission was at in the investigation process, whether still gathering data, analysing, assessing or rendering a decision, everything needed to be stalled, as the issue for determination was whether the Appellant was right in investigating the Respondents.

Turning to ground 6, the Appellant has argued that the Tribunal should have invoked **Section 71 of Act No. 24 of 2010** and requested for further and better particulars. However, the Appellant has not demonstrated that it was mandatory for the Tribunal to invoke the provisions of **Section 71** referred to above. I therefore agree with the Respondents that all the documents needed for the Tribunal to decide judiciously were before them and the discretion was there's on whether or not to request anything further. The tribunal cannot be faulted for not requesting for further and better particulars. Further, if the Appellant needed to draw the Tribunal's attention to additional documentation to prove their case, it was their duty to do so.

Lastly, ground 7 refers to the question of conflict of interest between the Vice-Chairperson of the Tribunal and Messrs Shamwana and Company representing the Respondents.

The Appellant has argued that the decision of the Tribunal was compromised by the fact that the Vice-Chair used to work for Shamwana and Company. **Section 6(2) (c)** relied on by the Appellants states as follows:

> ***'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 legal practitioner with whom the officer previously practiced law or served is handling the matter.'***

The provision of the **Judicial (Code of Conduct) Act above** envisages a situation where if a judicial officer finds herself in a situation where her impartiality might reasonably be questioned, the judicial officer must disclose that disqualification and recuse herself. It is question of whether the Judicial Officer's the particular situation is such that her impartiality might reasonably be questioned.

It is a fact in this case that the Vice-Chair did at one time work for Shamwana and Company, the law firm representing the Respondents. The Appellant has argued that on account of this fact, the Vice-Chair was conflicted and ought to have recused herself and by not doing so, the tribunal was compromised. The question is whether the fact that a person worked for a law firm automatically entails that she was conflicted and compromised. The Appellant has not shown that the Vice-Chair was in a particular situation where her impartiality in taking part in the Tribunal might reasonably be questioned. I do not consider that the section above states that a judicial officer must not adjudicate in a matter the moment it transpires that the matter is being handled by a legal practitioner with whom the officer may have served or that a Judicial Officer's impartiality might reasonably be questioned merely because she has previously practiced law with the legal practitioner representing a party. There should be something more to show that the judicial officer acted in such a manner that

would question her impartiality in handling the matter. It would be a different situation, if the Judicial Officer had perhaps worked for one of the parties. I am therefore not satisfied that there was something to bring the impartiality of the Vice-Chair into question to a point of rendering the trial a mistrial and declaring the decision a nullity.

Also, the question of the impartiality of the Vice-Chair was not raised at the hearing for her to consider recusing herself. Therefore, I also agree with the Respondent's argument that if indeed this was an issue and there were grounds to question the impartiality of the Vice-Chair, it ought to have been raised at trial stage before the Tribunal? It is trite law that issues not raised at trial cannot be raised at appeal stage.

Even assuming that the Vice-Chair was disqualified from taking part in the proceedings does this mean that the ruling of the tribunal should be invalidated? **Section 33(b) of the Interpretation and General Provisions Act** states that any defect discovered in the qualification of a member of a commission shall not affect its powers. It follows that the decision of the tribunal should not be invalidated on account of any purported disqualification of one person. Therefore, since the Tribunal was comprised of several members, I am of the view that their decision should not be invalidated on this account.

In view of the foregoing, I uphold the decision of the Tribunal of the 3rd September, 2012 in its entirety and dismiss all the grounds of this appeal with costs to the Respondents, to be taxed in default of agreement.

Delivered in Chambers on the 4th day of September 2014

N.A. Sharpe-Phiri
HIGH COURT JUDGE