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O'Brien Kaaba

University of Zambia; Southern African Institute for Policy and Research, okaaba@yahoo.com

Kafumu Kalyalya

Southern African Institute for Policy and Research

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Chief Justice Mumba Malila and the Challenges Ahead: An Editorial

This special edition of the Saipar Case Review (SCR) has been compiled in honour of the new Chief Justice of Zambia, Mumba Malila. Justice Mumba Malila was sworn in as the Chief Justice of Zambia on 22 December, 2021. His appointment was widely acclaimed and celebrated across the country as he is seen to represent a new beginning. Having been appointed at a time when public confidence in the judiciary was at its lowest, Malila carries a heavy burden of bringing to life the people's expectations of seeing a responsive, efficient, competent, and progressive judiciary.

Although he is a relative outsider, having been a judge for only about seven years at the time of appointment, Malila does not come into office empty handed. He possesses qualities that could make him a successful Chief Justice and transform the judiciary for the better. Two attributes are worthy highlighting here. First, as demonstrated through public outreach and engagement activities he has had so far, Malila disavows the entrenched culture of judges talking down to people. He reaches out, converses, listens, and accords due respect to those who speak with him. He values the people, pays attention, and engages with those who ask questions. He does not hide behind titles nor arid legalism. He takes time to explain things. Where things are not well, he readily concedes problems and outlines what can be done within his powers to reform the judiciary and what is beyond him and not realistic to expect from his leadership. He speaks with human warmth and everyone around him feels comfortable to speak their mind. He does not escape from uncomfortable questions through exaggerated pomp and self-elevated importance, as is often common for people who wield enormous power.

This human quality has the potential effect of opening the judiciary to many people. By being approachable, those with grievances can easily approach the Chief Justice to vent or share their views. After all he is their Chief Justice, and it is their judiciary. Judges exist to serve. Malila is slowly demonstrating that it is possible to be accessible, warm, and kind, yet uncompromising and incorruptible.

Second, Malila is an intellectually gifted judge. He carefully analyses matters before him and goes to lengths to demonstrate how he reached a decision. His words are carefully chosen. He writes with passion and clarity. What Ronald Dworkin said of Professor HLA Hart, his teacher and mentor, could easily be said of Malila: 'In him reason and passion do not contend, but combine in intelligence, the faculty of making clear what was dark without making it dull. In his hands clarity enhances rather than dissipates the power of an idea.'¹

Malila's judgements speak for themselves. He does not need to append his name for one to know a judgment was written by him. He has a distinct style of writing, with contagious diction, un-mechanical use of authorities and precedents, intellectualism, impressive depth of research, exhaustive treatment of issues and clarity. In him law is not a neutral tool, but a positive instrument for the development and transformation of society.

This does not come by accident. It speaks about the profound passion Malila has for law and his job as a judge. How he thinks through issues, processes facts, and applies himself towards reaching decisions can only be imagined. But it wouldn't be an exaggeration to compare his passion for his work with that of Arthur Chaskalson, the retired South African Chief Justice. Justice Albie Sachs narrates how his colleague, Arthur Chaskalson and his wife, were attacked

¹ Ronald Dworkin, 'Hard Cases,' (1975) 88 Harvard Law Review, 1058.

at home by armed robbers, forced to kneel at gunpoint while the robbers went about grabbing what they wanted. Yet throughout the ordeal, Chaskalson worried not about his life or his property, but the judgement he was writing:

And why that stands out in my memory, is that on the morning we were due to make that decision, and that was the critical one, we hear that Arthur and Lorraine Chaskalson's home was burgled the night before, the robbers forced them down onto their knees, stole a whole lot of stuff at gunpoint. So we all come into chambers, and Arthur is there, and he's telling the story. And it was a very remarkable story and I believe deserves to be somehow placed in the annals of the Constitutional Court, because it illustrates so much. He said he drove into their home, he's not in particularly secure premises, he's parking the car in the garage, and suddenly he's aware of a pistol to his head. And he said, he got such a surprise, he actually dropped the keys. He is taken into the house, and he and Lorraine are forced to kneel on the ground, and they start helping themselves, the robbers, to a whole range of things. I think Lorraine is speaking to them quite calmly, and Arthur says what's going on through his mind all the time, is whether or not these measures in the constitutional text substantially reduce provincial powers or not? And he'd had a document in his car that had some notes that he had drafted, and he's worried they're going to drive off with that, but because he dropped the keys, they drove off in another car. So his main concern isn't losing his car, or anything, it's losing those notes. And only Arthur can tell that story in a way that's totally credible, and he said, as I'm down on my knees there, I suddenly get the solution to the whole thing. But, he added, if I rushed afterwards to my computer and typed it up, Lorraine would kill me: thinking about a case when our house is being ravaged in this way? But, he said, Lorraine got to the computer before he did to make her notes about a poem she had been composing. And then he proceeded to tell us what he thought the solution was. And in fact, that we developed and incorporated into the final judgment. So that case stands out.²

Clearly, Malila has passion for his work and takes pride in what he does, and he has the skills to leave behind, as he has already demonstrated, progressive, democratic, people-centred, and contextually relevant jurisprudence. Yet it must be acknowledged that he takes office as Chief Justice at a difficult moment when the credibility of the judiciary and public confidence have been shattered. The dumbfounding incompetence of the Constitutional Court and its poorly reasoned decisions has undoubtedly contributed significantly to the poor image of the judiciary. However, many structural challenges affecting the judiciary cannot be resolved by a chief justice, no matter how well-intentioned one may be. These may need constitutional and other fundamental structural reforms.

There are, however, some challenges that the Chief Justice can help address, which have been endemic. These include inefficiency in delivery of judgments; the need to put in place clear mechanisms for case allocation to avoid forum shopping; over-insulation of judges from criticism; outdated rules that prevent broadcasting open-court proceedings; a culture of judicial arrogance inimical to accountability; and an anti-intellectual culture that often glorifies insularity and stagnation leading often to law reports reading like a museum of English law, littered with the debris of grotesque common law doctrines routinely cited out of context. This is a mammoth task that requires resolve and determination. Malila has the right skills and is equal to the task. Being a relative outsider is an advantage that gives him an opportunity to look at the performance of the judiciary objectively and with an open mind.

² Albie Sachs, Constitutional Court Oral History Project interviews, November 2011- January 2012.

As already noted above, this special edition of the SCR is dedicated to Justice Mumba Malila. The SCR editors are elated that a fellow academic and scholar has been raised to the rank of Chief Justice and trust that he will discharge his responsibilities with passion, fairness, empathy, and dedication. As an ordinary judge of the Supreme Court, Malila amply demonstrated his capacity to develop progressive jurisprudence. This edition presents a selection of case reviews of some decisions made by the new Chief Justice, Mumba Malila, as a Supreme Court judge.

This special edition of the SCR is made up of eighteen entries. The first entry is a review of *Chrismar Hotel Ltd v. Stanbic Bank Zambia Ltd* that dramatizes the bank charges that most depositors are smacked with. Interest, overdraft charges, extension charges, restructuring fee, late charges, base rate, default interest, compound interest. According to Dunia P. Zongwe, *Chrismar Hotel* is a case that has demonstrated Malila CJ's analysis and synthesis of intricate finance disagreements. These skills manifested, for example, when Malila determined that the whole overdraft question hinged on whether the parties had, in fact, agreed on an overdraft facility. In doing so, he distinguished between a loan and an overdraft.

The second entry is a review of *George Mwanza and Melvin Beene v Attorney General*. In *George Mwanza and Melvin Beene v Attorney General* the Supreme Court agreed that there wasn't an express recognition of the right to food in the constitution. However the Supreme Court asserted that it considered that alone was not exhaustive of the matter. The Supreme Court took the view that the right to life (article 12 of the constitution) must be interpreted liberally, which would inevitably lead to conveying of the right to life as incorporating the other economic and social rights such as the rights to food and health.³ Justice Malila reasoned that the right to life should be considered as the right to dignified life, which invariably entails access to nutritious food, commensurate with one's health condition. According to O'Brien Kaaba, Justice Malila's decision is laudable for at least two broad reasons. First, Justice Malila does not just end at connecting the right to life with the right to food. He related the right to food with the right to nutrition. The second significance of this judgement is what it represents in the totality of the gravity of the problem of malnutrition in the country.

The third entry is a review of *Finance Bank and Rajan Mahtani v Simataa Simataa*. Malila delivered the judgment of the Supreme Court that confirmed that damages in the law of contract are awarded for the purpose of putting the innocent party in the position in which they would have been had the contractual obligations been performed. According to Chanda Chungu, *Finance Bank and Rajan Mahtani v Simataa Simataa*, will prove to be one of, if not the leading case on the award of damages under the law of contract as the case brilliantly outlines the purpose of damages, the interests protected, and the way damages should be measured and calculated.

The fourth entry is a review of *Madison Investment, Property and Advisory Company Limited v Peter Kanyinji* in which the Court stated that corporate entities in a group of companies, including the parent company exist separately and distinct from each other and cannot therefore be liable for the debts of another insolvent subsidiary within the same group. According to Ntemena Mwanamwambwa, this case is important to the jurisprudence of Zambian Company law as it endorses the sacredness of the veil over group structures in maintaining investor confidence and preventing the economic liabilities that would

³ Ibid, p. 44

unsuspectingly befall local as well as multinational companies operating within a group structure.

The fifth entry is a review of *Zambia Revenue Authority v Matalloy Company Limited*, a case that focused on the responsibility of taxpayers to prove their eligibility for a tax credit from the Zambia Revenue Authority. According to Mwaba Mulenga Chileya, *Zambia Revenue Authority v Matalloy Company Limited* is a case in which Justice Mumba Malila supplements the jurisprudence on tax law in this judgment that deals with the obligation of a taxpayer in tax cases.

The sixth entry in this special edition of SCR is a review of *Pamodzi Hotels Plc v Rosemary Nyangu* a case in which the Court acknowledged the duty counsel has to the court. According to Natasha Chibuye & Mwami Kabwabwa the ruling in *Pamodzi Hotels Plc v Rosemary Nyangu* is important because it not only outlined the principles and obligations of Lawyers as officers of the Court but it is also an example of the consequences attached to misleading the Court and is a reminder to lawyers that much as they have an obligation to safeguard the interests of their clients they remain officers of the Court and their duty to the court must be the primary priority. Moreover, the ruling in *Pamodzi Hotels Plc v Rosemary Nyangu* serves as a stern warning to legal practitioners to always maintain their professional integrity and prioritise their duty to the court and the administration of justice.

Seventh, under review is *Saidi Banda v The People*. According to Mwaka Chizinga *Saidi Banda v The People* is a fundamental case as it endorses the established rules governing circumstantial evidence and develops the law further by providing clear guidelines which must be applied whenever the case depends principally on circumstantial evidence.

The eighth entry reviews *Charles Mushitu (Sued in his capacity as Secretary-General of Zambia Red Cross Society) v. Christabel M. Kaumba*. In this case the Supreme Court held that the employers' conduct amounted to a fundamental breach of contract when the employee was placed on unpaid, forced, indefinite leave. By so holding, according to Chanda Chungu, the Supreme Court thus confirmed that placing the employee on forced, unpaid leave was an adverse unilateral alteration of the contract – but refused to treat it as a redundancy, despite the question being before the Supreme Court. Rather it was treated as a breach of contract.

Ninth, under review is *Chansa Ng'onga v. Alfred H. Knight (Z) Limited* in which the Supreme Court confirmed that the normal award of damages in employment matters is the notice period provided for in the contract of employment, or where no notice period is provided, the salary equivalent to reasonable notice. Malila, on behalf of the Supreme Court held that the court is permitted to deviate from the salary equivalent to the notice period or reasonable notice period where there are compelling circumstances to warrant such an award, such as the termination of employment or dismissal being inflicted in a traumatic fashion and the loss suffered by the employee justifies an award higher than the salary equivalent to the notice period.

The tenth entry is a review of two related cases, namely: *Edward Chilufya Mwansa and 194 Others v. Konkola Copper Mines Plc & Concrete Pipes v. Kingsley Kaimba and Another*. In *Edward Chilufya Mwansa and 194 Others v. Konkola Copper Mines Plc*, the Supreme Court dealt with a scenario where several employees had been dismissed and sought to enter an out of court settlement with their employer, through the assistance of the Labour Office. This process lasted over three years. The Supreme Court in *Edward Chilufya Mwansa* was of the

view that seeking to pursue an *ex-curia* settlement does not halt the 90-day period from running. The Supreme Court in a judgment delivered by Malila held as follows: ‘In this case, the appellants (the employees) could well have commenced their action in the Industrial Relations Court while they pursued a settlement on a clear understanding that such actions would be discontinued if and when a settlement were reached.’ According to Chanda Chungu, the case thereby fortified the position that the 90-day period only begins to run when the internal administrative channels have been exhausted and once the period has been exhausted, seeking an out of court settlement does not stop the 90-day period from running. In *Concrete Pipes v. Kingsley Kaimba and Another*, the Supreme Court dealt with an appeal from a Ruling of the Industrial Relations Court dismissing a preliminary issue in relation to the need to exhaust internal administrative channels before commencing an action before the court. On Chanda Chungu’s reading of the *Concrete Pipes*, the Supreme Court guided that it is imperative for an employee to exhaust all internal administrative channels before proceeding to court unless the channels are non-existent or are unduly prolonged or totally ineffective.

The eleventh review is provided by Chanda Chungu who reviews *Frida Kabaso (Sued as Country Director of Voluntary Services Overseas Zambia) v. Davies Tembo*. In review of *Frida Kabaso (Sued as Country Director of Voluntary Services Overseas Zambia) v. Davies Tembo*, Chanda Chungu highlights that the Supreme Court confirmed that the provisions on redundancy and the (now repealed) Employment Act situated in section 26B do not apply to employees on written contracts. The Supreme Court issued a powerful statement as to when a redundancy situation occurred. According to Malila, a redundancy takes place when an employer decides that the employee's position and/or services are no longer required and, therefore, the position must be abolished. In this case, the employee’s services were still required as he was offered the alternative position of Finance Manager. As such, there wasn’t a redundancy situation that arose.

The twelfth entry in this special edition of SCR is a review of *Kenny Sililo v. Mend-A-Bath Zambia Limited and Spencon Zambia Limited*, a case in which, according to Chanda Chungu the Supreme Court was categorical that the legislation is not intended to pull down an employee’s terms and conditions which are higher than those provided for in the Ministerial Orders. Further, the Supreme Court confirmed that basic and minimum wages and conditions of employment that are provided for are intended to set the basic minimum for contracts of employment.

The thirteenth entry is provided by Chanda Chungu, and in his entry Chanda Chung reviews *Madison Investment, Property and Advisory Company Limited v. Peter Kanyinji*. According to Chanda Chungu, the decision of the Supreme Court, as delivered by Malila, was a landmark judgment that lucidly provided an overview of the law relating to piercing the corporate veil.

The fourteenth entry is a review of *Fred M’membe and Post Newspapers Limited (in liquidation) v. Abel Mboosi*, a case in which the Supreme Court confirmed that under the Companies Act, Chapter 388 of the Laws of Zambia which was applicable at the time of the events in question, creditors of the company could initiate the winding of the company. Further, the court confirmed that a provisional liquidator could be appointed after the presentation of the winding up petition and before the final winding up order. According to Chanda Chungu, this case is noteworthy because Malila reminded the public at large of the role of the court in liquidation proceedings.

The fifteenth entry reviews *Moving Unit Video Television (t/a Muvi Tv Limited) v. Francis Mwiinga Maingaila*, a case in which the Supreme Court confirmed that the basic test that is employed in establishing whether a statement is defamatory or not is that of examining how an ordinary, right-thinking person of the society generally would respond to the statement, in this case, an ordinary reasonable TV viewer in Zambia. Chanda Chungu sums up the holding of the case as thus: where the claimant is available to offer his side of the story but the publisher neglects to exercise this option, the defence of truth or public interest will not operate effectively as defences to a claim for defamation. Specifically, the defence of justification shall not succeed where there is evidence of bad faith, ulterior motives and malice.

The sixteenth case note is provided by Chanda Chungu, reviewing *Rabson Sikombe v. Access Bank (Zambia) Limited*. According to Chanda Chungu, Malila demonstrated an activist approach and dedication to fairness in ensuring every employee is afforded the chance to be heard, regardless of the type of contract they serve on. Justice Malila recognised that tenets of good decision-making import fairness in the way decisions are arrived at. It is certainly desirable that an employee who will be affected by an adverse decision is given an opportunity to be heard.

The seventeenth entry is a review of two cases, namely: *Tiger Chicks (t/a Progressive Poultry Limited) v. Tembo Chrisford and Others & Kasembo Transport Limited v. Collins John Kinnear*. According to Chanda Chungu, Both the *Kasembo Transport* and *Tiger Chicks* decisions are important in demonstrating that where an employee fits the description of a worker covered by the Order, they shall be entitled to full protection of the conditions in the said Order, unless their contract provides more favourable terms, or they are otherwise excluded.

The last entry in this special edition of SCR is a review of *Zambia Breweries Plc v. Betternow Family Limited*. According to Chanda Chungu, *Zambia Breweries Plc v. Betternow Family Limited* is significant because it deals with the crucial topic of liquidated damages under the law of contract.

We hope you will enjoy this special edition of the SCR that is dedicated to Justice Mumba Malila, the new Chief Justice of the Republic of Zambia.

Editors,

O'Brien Kaaba, University of Zambia

Kafumu Kalyalya, Southern African Institute for Policy and Research