

## **THE PRESS STATEMENT BY THE JUDICIARY: A TRAGEDY OF STYLE AND A TRAGEDY OF SUBSTANCE**

**By**

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On August 8, 2013 the Public Relations Officer of the Judiciary issued a statement allegedly on behalf of the Judiciary which purported to give an authoritative interpretation of section 104 ((6) and (7) of the Electoral Act of 2006. The section states that: (a) *Where it appears to the High Court upon trial of an Election Petition that any corrupt practice or illegal practice has been committed by any person in connection with the Elections to which the Election Petition relates, the High Court shall, at the conclusion of the proceeding prepare a Report stating: (1) the evidence given in the proceedings in respect of the corrupt practice or illegal practice; (2) the names and particulars of any person by whom the corrupt practice or illegal practice was, in the opinion of the court, committed; Provided that the Court shall not state the name of any person under this paragraph unless the person has been given an opportunity of appearing before the Court and of showing cause why that person's name should not be so stated. Section 104 (7) states, The Registrar shall deliver a copy of every report prepared by the High Court under Sub Section (6) to the Electoral Commission and to the Director of Public Prosecutions.*

The Statement issued by the Public Relations Officer states that: “*the Judiciary wishes to state however that where there is an appeal to the Supreme Court as the case was in most of the 2011 Parliamentary Election Petitions, the Judgment of the Supreme Court reigns supreme and the judiciary is of the considered view that the requirement to render the said Report by the High Court is overtaken.*” It goes on to state that Section 104 (6) and (7) does not extend its application to the Supreme Court. Therefore there is no requirement by the High Court to render a Report to either the Electoral Commission of Zambia or the Director of Public Prosecutions after the pronouncement of a judgment by the Supreme Court. The Statement gives no reasons for coming to this conclusion.

Two questions arise here: (a) whether or not the statement interprets the law with respect to articles 104 (6) and (7) correctly, and (b) Whether or not the statement issued by a “Judiciary Press Officer” without any court process has any legal status in law? This comment does not deal with question (a). Although I find the interpretation of the law deeply flawed, the position we take in answer to the question raised in (b) make it unnecessary to deal with (a). The Constitution of Zambia gives all judicial power to the judiciary and identifies the courts in which that judicial power responses. Article 94 (1) states that: “the High Court...has unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this constitution or any other law. The Supreme Court Act in article 7 states that “The Court Shall have jurisdiction to hear and determine appeals in civil and criminal matters as provided in this Act and such other appellant or original jurisdiction as may be conferred upon it by or under the constitution or any other law.” Article 3 of the Supreme Court Act states that “when determining any matter, other than an interlocutory

matter, it shall be composed of such uneven number of Judges, not being less than three, as the Chief Justice may direct; (b) the determination of any question before the court shall be according to the opinion of the majority of the members of the Court hearing the case. It is trite law that for both the High Court and the Supreme Court to exercise their respective jurisdiction they must be properly constituted, sit as courts of law and follow all the procedures as outlined in the High Court Act and the Supreme Court Act. The relevant procedural rules are designed to ensure the due process of law. Both the High Court and the Supreme Court are courts of record. In the common law jurisdiction, a court of record is a court in which a court clerk or a court reporter takes down a record of proceedings. That written record is preserved at least as long enough for all appeals to be exhausted or for some period of time prescribed by law. Courts of record have rules of procedure and therefore require that parties be represented by lawyers before the specific tribunal. The primary function of the record is to provide certified copies of the record of proceedings. In this case the process that led to the issuance of the Statement by the Press Officer is unknown. The little that is known suggests a perversion of the due process of law and clearly violates the principles of a court of record.

The first requirement, therefore, is that any Court to exercise judicial power it must be properly constituted and hear cases or petitions in open court and in accordance with procedures as prescribed by law. All courts, the Supreme Court and High Court included make decisions through delivering judgments, decrees, orders, convictions, sentences and decisions. A judgment of a court is a decision of the court that resolves a controversy and determines the rights and obligations of the parties. It states who wins the case and what remedies the winner is awarded. A judgment must be in writing and must clearly show all the issues that have been adjudicated. What is binding in a judgment is the "*ratio decidenda*" of the case. The *Ratio decidenda of the case* is the decision of the court on the subject matter of the judicial decision. Statements made by the court in the context of a judgment that are not the subject of the judicial decision, even if they happen to be correct statements of the law are not

binding. A statement made on “behalf of the Judiciary” not sitting as a court and not adjudicating matter a matter raised by parties is no way a judgment of a court. The Judiciary is not a court, it is nowhere mentioned in the Constitution as a Court. The only entities recognized by the Constitution in article 91 (1) as courts are the Supreme Court, High Court, Industrial Relations Court, the Subordinate Courts and the Local Courts. Article 92 of the constitution states that there shall be a Supreme Court of Zambia which shall be the final court of appeal for the Republic and shall have such jurisdiction and powers as may be conferred on it by this constitution or any other law. Article 92 (5) provides that when the Supreme Court is determining any matter, other than an interlocutory matter, it shall be composed of an uneven number of judges not being less than three except as provided for under article 41. In this case the Supreme Court was not constituted. The statement appears to be the efforts of the Chief Justice acting with persons unknown. In *Schierhout v. Union Government* (1919) The South African Supreme Court held that whenever a number of individuals were empowered by statute to deal with any matter as one body, the action taken will have to be the joint action of all of them otherwise they would not be acting in accordance with the provisions of the law.

Further the point of law the statement seeks to clarify was not raised or argued in the appeal case process *simplicitor* and indeed was not decided or referred to by the Supreme Court on appeal. Both the trial judge and the Supreme Court had made no decision on it and the appellants did not raise it as an appeal matter. It is the primary obligation of every court to hear and determine issues in a controversy before it, and presented to it by litigants. The Court cannot *Sou motu* formulate a case for the parties. Hence, the principle of fair hearing not only demands but also dictates that a case must be heard on the basis of issues formulated by the parties. It is only then that the concept of a fair hearing can have a real meaning. In *Ebenezer Nwoko v. Titua Onuma* (1990) in a unanimous decision, the Nigerian Supreme Court held that a party is entitled as of right for the consideration of his case before the court. If the Supreme Court had felt that this is a matter which the High Court ought to have

considered it would seem to me that the proper course would have been for the Supreme Court to refer the matter back to the High Court for a decision. Especially that Article 107 (6) (7), reinforcing the principles of natural justice, provides that: “provided that the Court shall not state the name of any person under this paragraph unless the person has been given an opportunity of appearing before the Court and showing cause why that person’s name should not be so stated.” There are a few exceptions to the rule stated in the Nwoko case above. These are where the issues involved affect jurisdiction, matters are evidently plain error, matters whose consideration is necessary to arriving at a just solution and matters upon which the determination of a question properly assigned is dependent. These exceptions are to be construed strictly.

The Statement cannot even be classified as an advisory opinion because for a start the Zambia Constitution does not provide for courts to give Advisory Opinions. And in any event the “judicial Statement” was not issued by a court of law. In jurisdiction where Advisory Opinions are allowed, such as India and Canada to name two Commonwealth countries, this is specifically provided for in the Constitution and a well-defined procedure is provided for the exercise of such power by a properly constituted court.

In conclusion we wish to emphasize the point that the statement issued by the Judiciary Press Relations Office was not issued by a court of law but by an entity -the judiciary- which is a collective term used to describe the court system and court officials. In the Ebnezer case cited above the Nigerian Supreme Court held that “It is a fundamental principle of legality that were an act of conduct fails to meet the requirements prescribed by law, such that the non-compliance renders the act or course of conduct devoid of legal effect, no legal consequences flow from such acts or course of conduct.”