

IN THE CONSTITUTIONAL COURT
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

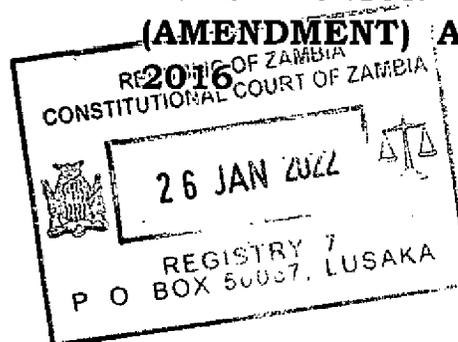
2021/CCZ/0016

IN THE MATTER OF: **ORDER IV RULE 1 OF THE
CONSTITUTIONAL COURT
RULES, 2016**

IN THE MATTER OF: **ALLEGED CONTRAVENTION OF
ARTICLE 189(2) OF THE
CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF**

BETWEEN:

CHANDA KOLALA



PETITIONER

AND

ZAMBIA POSTAL SERVICES CORPORATION RESPONDENT

CORAM: *Mulonda, Musaluke, Chitabo, Chisunka and Mulongoti,
JJC, On 23rd July, 2021 and 26th January, 2022.*

APPEARANCES:

For the Petitioner: *Mr. J. Ilunga – Messrs Ilunga and
Company*

For the Respondent: *Mr. G. Tembo – Messrs James and Doris
Legal Practitioners*

R U L I N G

Chisunka, JC, delivered the Ruling of the Court.

Legislation referred to:

1. ***The Constitutional Court Rules, Statutory Instrument No. 37 of 2016***

2. *The Rules of the Supreme Court of England, 1999 Edition*
3. *The Constitution of Zambia (Amendment) Act No. 2 of 2016*
4. *The Employment Code Act No. 3 of 2019*
5. *The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia*

Cases referred to:

1. *Lubunda Ngala and Jason Chulu v Anti-Corruption Commission Selected Judgment No. 4 of 2018*
2. *Ngolima v Zambia Consolidated Copper Mines Appeal No. 97 of 2001*
3. *Owen Mayapi and 4 Others v Attorney General 2019/CCZ/003*
4. *Levy Mwale v Zambia National Broadcasting Corporation 2020/CC/0012*
5. *Faustine Mwenya Kabwe and Another v Mr. Justice E.L. Sakala, Mr. Peter Chitengi and Attorney General SCZ/8/93/2009*
6. *Godfrey Malembeka (suing as Executive Director of Prisons Care and Counselling Association) v Attorney General and Another Selected Judgment No. 34 of 2017*
7. *African Banking Corporation Zambia Limited v Mubende Country Lodge Limited Appeal No. 116 of 2016*
8. *Twampane Mining Co-operative Society Limited v E & M Storti Mining Limited, SCZ Judgment No 20 of 2011*
9. *Development Bank of Zambia and KPMG Peat Marwick v Sunvst Limited and Sun Pharmaceuticals Limited S.C.Z Judgment No .3 of 1997*
10. *Lloyd Chembo v The Attorney General Selected Judgment No. 15 of 2018*
11. *Bric Back Limited T/A Gamamwe Ranches v Neil Kirkpatrick 2021/CCZ/0002*

Introduction

1. This Ruling decides a motion to raise preliminary issues on a point of law. The motion was filed by **Zambia Postal Services**

Corporation (hereafter the 'Respondent') pursuant to Order 1 Rule 1 (2) of the *Constitutional Court Rules, Statutory Instrument No. 37 of 2016*, as read together with *Order 14A Rule 1 and Order 33 Rule 3 of the Rules of the Supreme Court of England, 1999 Edition*.

2. When we heard this motion, Honourable Mr. Justice M. Chitabo sat with us. He has since passed on unfortunately. This is therefore a Ruling by the majority.

Background

3. The background facts giving rise to the motion are that **Chanda Kolala** (the 'Petitioner') filed a Petition on 28th April, 2021, against the Respondent. The Petition was filed pursuant to Order IV Rule 1 of the *Constitutional Court Rules* alleging contravention of Article 189(2) of the *Constitution of Zambia (Amendment) Act No. 2 of 2016* (hereafter the 'Constitution').
4. The supporting affidavit verifying facts filed on 28th April, 2021, and sworn by the Petitioner, disclosed that:
 - 4.1. The Petitioner was employed by the Respondent as Head of Estates and Property on a renewable three (03) year fixed term contract of employment (hereafter the "*first employment contract*"). On 2nd March, 2017, the Petitioner's contract of employment expired and the Respondent computed his gratuity in the sum of ZMW 251,880.54, which sum was due and payable to the Petitioner.

- 4.2. On 20th March, 2017, the Respondent informed the Petitioner that his contract of employment would be renewed for a further three (03) year term. On 26th March, 2017, the Petitioner signed another three (03) year fixed term contract of employment (hereafter the “*second employment contract*”) with the Respondent.
- 4.3. On or about 18th April, 2019, the Petitioner elected to terminate the second employment contract pursuant to clause 5.1 of the aforementioned contract. At the time of termination of the second employment contract, the Petitioner had accrued gratuity in the sum of ZMW 15,945.41. Immediately after termination of the said contract, the Respondent removed the Petitioner from the payroll despite not having paid the gratuity accrued on both the first and second employment contracts.
- 4.4. His last monthly salary while still on the Respondent’s payroll was ZMW 19, 622.26. The Respondent did not pay the Petitioner salaries due from October, 2018, up to April, 2019, during the subsistence of the second employment contract.
- 4.5. The Respondent, therefore, owed the Petitioner the sum of ZMW 353, 255.55 being monies for unpaid gratuity under both the first and second employment contracts and mileage charges. The Respondent further owed the Petitioner the amount of ZMW 490, 556.50 being monies for 25 months’ salary arrears from termination

(April, 2019) up to the date of the Petition (28th April, 2021).

5. The Petitioner, therefore, sought the following relief:
 - 5.1. **A Declaration that the conduct of the Respondent to remove the Petitioner from the payroll before the payment of terminal benefits due to him was contrary to Article 189(2) as read together with Article 266 of the Constitution of Zambia (Amendment) Act No. 2 of 2016;**
 - 5.2. **An Order for payment of the sum of ZMW 490, 556.50 being money owed to the Petitioner by the Respondent in 25 months' salary arrears from April, 2019, to date of Petition herein;**
 - 5.3. **An Order for payment of salaries from the date of lodgment of Petition to date of judgment and/or payment of amount due for gratuity in full;**
 - 5.4. **An Order for payment of the sum of ZMW 353, 255.55 being money owed to the Petitioner by the Respondent in unpaid gratuities, unpaid salaries prior to termination from October, 2018 to April, 2019 and mileage charges;**
 - 5.5. **Any other relief the Court may deem fit;**
 - 5.6. **Interest; and**
 - 5.7. **Costs.**
6. On 2nd June, 2021, the Respondent filed a motion raising the following preliminary issues for the Court's determination:
 - 6.1. **Whether or not the provisions of the Constitution of Zambia (Amendment) Act No. 2 of 2016, relied on in the Petition applies to the Petitioner;**
 - 6.2. **Whether or not the Petition is competently before this Honourable Court.**
 - 6.3. **That Costs be for the Respondent.**

Affidavit Evidence and Submissions

A. The Respondent (Applicant)

7. The motion was supported by an affidavit in support also filed on 2nd June, 2021 which was deposed to by Sitali Twist Nawa, the Respondent's Assistant Manager - Human Resources. The affidavit disclosed that:
 - 7.1. The Petitioner's contract of employment with the Respondent was terminated by way of resignation as stated by the Petitioner himself in paragraph V (**sic**) of the Petition and paragraph 11 (**sic**) of the affidavit verifying facts.
 - 7.2. The Respondent did not breach any Constitutional provisions. In any case, the provisions of the Constitution that the Petitioner alleges were contravened by the Respondent, did not apply to the Petitioner.
 - 7.3. The Petitioner is seeking to enforce his contractual rights rather than his constitutional rights. The Respondent would therefore, be prejudiced if this Court were to make an order against the Respondent for a petition that was not competently before it.
8. In support of the motion, Counsel for the Respondent informed the Court that he relied on the affidavit in support, list of authorities and skeleton arguments all filed on 2nd June, 2021, on behalf of the Respondent. The Respondent submitted that:

- 8.1. This matter was suitable for final determination without a full trial pursuant to Order 1 Rule 1 of *Constitutional Court Rules* as read with Order 14A Rule 1 and Order 33 Rule 1 of the *Rules of the Supreme Court of England, 1999 Edition* (hereafter the 'Whitebook').
- 8.2. In the case of ***Lubunda Ngala and Jason Chulu v Anti-Corruption Commission***¹, this Court held that pension benefits relate to a person who has reached retirement age or is retired early while resignation is a termination that occurs before retirement age.
- 8.3. The Petitioner, therefore, was not entitled to be kept on the payroll on account that his employment with the Respondent was terminated by way of a voluntary resignation. The Respondent could, thus, not have contravened the provisions of Article 189(2) of the Constitution because the said provisions did not apply to the Petitioner.
- 8.4. The Petitioner was essentially seeking to enforce contractual rights stemming from his employment contract with the Respondent. In support of this submission the Respondent placed reliance on the case of ***Ngolima v Zambia Consolidated Copper Mines***². Thus, this matter was amenable to the provisions of the *Employment Code Act No. 3 of 2019*. *Act No.3 of 2019*, which however, did not mandate an employer to keep an employee who separates by way of resignation, on the payroll.

8.5. Since the Petitioner seeks an Order for payment of terminal benefits that accrued under a contract of employment and the Respondent did not breach any provision in the Constitution, this matter ought to be declared irregular and set aside.

B. The Petitioner (Respondent)

9. In response to the motion, the Petitioner filed an affidavit in opposition, list of authorities and skeleton arguments on 16th June, 2021. The affidavit in opposition was sworn by Joseph Ilunga, counsel seized with conduct of this matter on behalf of the Petitioner. The affidavit in opposition disclosed that the relief sought by the Petitioner was within the exclusive jurisdiction of this Court.

10. At the hearing, Counsel for the Petitioner informed the Court that the Petitioner would rely on the affidavit in opposition, list of authorities and skeleton arguments all filed on 16th June, 2021. It was submitted on behalf of the Petitioner that:

10.1. The Petitioner was entitled to gratuity on a *pro rata* basis pursuant to clause 7.4 of the Petitioner's employment contract. Article 266 of the Constitution defined pension benefit to include gratuity. By virtue of Article 189 (1) and (2), the Petitioner was therefore, entitled to be retained on the payroll until the full and final settlement of the Petitioner's gratuity. In advancing this argument, the Petitioner relied on this Court's decision in the cases of ***Owen Mayapi and 4***

***Others v Attorney General*³ and *Levy Mwale v Zambia National Broadcasting Corporation*⁴.**

- 10.2. This Court ought to construe Article 189(2) of the Constitution in a non-restrictive manner in order for the Petitioner to fully enjoy the benefits of the said constitutional provision. The cases of ***Faustine Mwenya Kabwe and Another v Mr. Justice E.L. Sakala, Mr. Peter Chitengi and Attorney General*⁵ and *Godfrey Malembeka (suing as Executive Director of Prisons Care and Counselling Association) v Attorney General and Another*⁶, were relied on for this proposition.**
- 10.3. The Industrial Relations Division of the High Court for Zambia does not have jurisdiction to determine matters concerning alleged contraventions of the Constitution. The Industrial Relations Division only has jurisdiction to deal with industrial relations matters enumerated under section 85 (9) of the *Industrial Relations Act Chapter 269 of the Laws of Zambia*, (hereafter "CAP 269"). Furthermore, that section 85A of CAP 269 lists the remedies that can be granted by the Industrial Relations Division and the remedies being sought by the Petitioner in this case, could not be obtained from the Industrial Relations Division of the High Court. The Industrial Relations Division, therefore, has no jurisdiction to determine this matter as it involves the interpretation of the Constitution.

- 10.4. The Respondent's failure to accompany its answer to the Petition with an affidavit in opposition, breached Order IV Rule 4 of the *Constitutional Court Rules* and Order 14A of the *Rules of the Supreme Court of England, 1999 Edition*. The Petitioner cited the case of ***African Banking Corporation Zambia Limited v Mubende Country Lodge Limited***⁷, and ***Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited***⁸, and submitted that this Court ought to determine this matter in its entirety based on the undisputed facts on record.
- 10.5. The ***Lubunda Ngala*** case, which the Petitioner relied on, is distinguishable to the present case as that case answered the question whether certain outstanding allowances constituted a 'similar allowance' under the definition of Article 266 of the Constitution. In this case, the main issue was payment of gratuity which remained due, unpaid and undisputed by the Respondent. Under these circumstances, the Petitioner's mode of exit was inconsequential.
- 10.6. The Petitioner was also claiming for the sum of ZMW 353, 255.55 which comprised gratuities, salaries and mileage charges accrued prior to termination. This claim also ought to be dealt with by this Court in an effort to avoid multiplicity of proceedings as guided by the Supreme Court of Zambia in the case of ***Development Bank of Zambia and KPMG Peat***

***Marwick v Sunvst Limited and Sun
Pharmaceuticals Limited⁹.***

C. Reply

11. In reply, the Respondent (Applicant) filed an affidavit in reply and skeleton arguments on 18th June, 2021. The affidavit was sworn by Christopher Phiri, the Respondent's Human Resources Officer. He averred that the Respondent did not breach any provision in the Constitution and therefore, this action was wrongly before this Court.
12. In the skeleton arguments in reply, the Respondent cited the ***Levy Mwale*** case and reiterated the submission that the Petitioner was not entitled to be retained on the payroll on grounds that he voluntarily resigned from employment. The Respondent urged this Court not to dwell on the Respondent's failure to file an affidavit in opposition to the Petition as that was a mere procedural impropriety, but rather this Court should focus on determining the question on jurisdiction.

Issues to be Determined

13. The Respondent's motion raises two (02) preliminary issues enumerated in paragraphs 6.1 and 6.2 above, which in essence seek to dispose of the Petitioner's entire action on a point of law at this stage. Considering the nature of the motion before this Court, we are of the view that the main issues to be determined are:
 - 13.1. **Whether or not Article 189(2) of the Constitution applies to the Petitioner; and**

13.2. **Whether or not the Petition is competently before this Honourable Court.**

Evaluation and Determining the Issues

14. We have considered the motion in this matter together with the affidavit evidence, list of authorities and the skeleton arguments filed by both parties. Before we determine the two (02) main preliminary issues, we will first deal with the Petitioner's submission relating to the requirements of Order 14A of the *White Book*.
15. In opposing the Respondent's motion, the **Petitioner** submitted that since the Respondent failed to file an affidavit in opposition, the Respondent did not meet the minimum mandatory pre-requisite of showing an intention to defend under Order 14A of the *White Book*. On this basis, the Petitioner urged us to dismiss the motion and determine the matter in its entirety. The **Respondent**, argued that the failure to file an affidavit in opposition was a procedural impropriety and should not take precedence over the questions raised in the motion that hinge on jurisdiction.
16. We note that under Order 14A/2/3 of the *White Book*, one of the requirements for invoking the procedure under Order 14A is that a defendant must have given notice of intention to defend. The requirement for a notice of intention to defend is echoed in Order 14A/1/3/ which reads (quoting relevant parts):

"The Court shall not determine any question under this Order unless the parties have either -

(a) had an opportunity of being heard on the question;"

17. We take the view that the main object of the requirement of an intention to defend is to ensure that a matter is not disposed of on a point of law at a preliminary stage without the other party having an opportunity to be heard on a question that has the potential to finally dispose of the matter. In this case, it is not in dispute that the Respondent filed an Answer on 2nd June, 2021, as shown on page 50 of the record of motion. The Answer is, in our view, adequate notice of the Respondent's intention to defend the matter. Additionally, we take into account the purpose of the requirement of an intention to defend under Order 14A of the *White Book*. We note that both parties herein, were given the opportunity and did actively participate in the hearing of, and arguing the motion raised by the Respondent. We are therefore, satisfied that requirements of Order 14A of the *White Book*, were complied with as an Answer was filed thereby signaling an intention to defend and both parties were aware of and did advance their respective position on the issues raised by the Respondent's motion.
18. In light of the foregoing, we now proceed to determine the two (02) main issues raised by the Respondent's motion. We will, however, deal with the second preliminary issue first, as the outcome of the second preliminary issue will determine whether or not it will be necessary to deal with the first preliminary issue.

A. Whether or not the Petition is competently before this Court

19. The issue of whether or not the Petition is competently before this Court goes to the jurisdiction of this Court. The starting point when determining any question regarding this Court's jurisdiction is Article 128(1) of the Constitution which provides that (quoting relevant parts):

“Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear -

a) a matter relating to the interpretation of this Constitution;

b) a matter relating to a violation or contravention of this Constitution;...”

20. It is clear from Article 128(1) of the Constitution that this Court is clothed with jurisdiction to hear and determine matters that relate to an interpretation of the Constitution and any matters that allege a violation or contravention of the Constitution. In the present case, the Petitioner, amongst other things, alleges that the Respondent contravened Article 189(2) of the Constitution by removing the Petitioner from the payroll after termination of his employment but before full payment of his gratuity.

21. In view of the alleged contravention of the Constitution namely Article 189(2), and pursuant to the provisions of Article 128(1) of the Constitution, we are of the firm view that this Court possesses sufficient jurisdiction to probe the issues relating to the alleged contravention of Article 189(2) of the Constitution and empowers this Court to adjudicate on the said alleged violations and contraventions raised in the

Petition. We find, therefore, that the Petition in this case, in so far as it relates to the alleged contravention of Article 189(2) of the Constitution, is competently before this Court.

B. Whether or not Article 189 (2) of the Constitution applies to the Petitioner

22. The crux of the **Respondent's** argument is that Article 189 (2) of the Constitution does not apply to the Petitioner because his employment relationship with the Respondent was terminated through a voluntary resignation, and not triggered by retirement age or other circumstances. The **Petitioner**, on the other hand, argued that he was entitled to gratuity upon termination and in terms of Article 266 of the Constitution, a pension benefit includes gratuity, therefore his removal from the payroll breached Article 189 (2) of the Constitution.
23. In determining this issue, we deem it imperative to consider the relevant facts in this case, which facts, are not in dispute. In doing so we are alive to the fact that we cannot in the process of doing so, avoid touching on the merits of the case, which even the parties in their respective arguments have touched on. This is due to the nature of the motion before us. It is plain to see from the record of motion that the Petitioner entered into a three (03) year fixed term employment contract with the Respondent on 26th March, 2017. On 18th April, 2019, the Petitioner opted to terminate his employment pursuant to clause 5.1 of the said contract. To this end, the Petitioner, penned a resignation letter which appears at page 27 of the record of motion and which reads as follows (quoting relevant parts) :

**“Senior Management Human Resources
Zambia Postal Services
Head Office
Ndola.**

1st April, 2019

Dear Sir,

**RE: RESIGNATION NOTICE - HEAD ESTATES AND
PROPERTIES**

The above subject matter refers.

**Please accept this as formal notice of my resignation from
the position of Head Estates and Properties, effective 18th
April, 2019, therefore, 18th April, 2019, will be my last
working day.**

.....
.....

Yours Sincerely,

Chanda Kolala”

24. It is well established that an employment contract can terminate in numerous ways, either at the instance of the employer or the employee. An example of termination at the instance of the employee is where the employee voluntarily resigns from employment. The undisputed facts in this case, particularly the resignation letter at page 27 of the record of motion, clearly illustrates that the Petitioner’s employment was terminated at his instance by way of a voluntary resignation on his part.
25. The question therefore, is whether a person that voluntarily resigns from employment can successfully make a claim under Article 189(2) of the Constitution.

26. Articles 189(2) and 266 of the Constitution, which were relied on by the Petitioner provide as follows:

“189. (2) Where a pension benefit is not paid on a person’s last working day, that person shall stop work but the person’s name shall be retained on the payroll, until payment of the pension benefit based on the last salary received by that person while on the payroll.”

“266 “pension benefit” includes a pension, compensation, gratuity or similar allowance in respect of a person’s service;”

27. We wish to observe that we have on numerous occasions had the opportunity to construe Articles 189(2) and 266 of the Constitution. In the **Lubunda Ngala** case, we enunciated that the rationale behind the enactment of Article 189(2) of the Constitution was that it was meant to cushion pensioners, retirees and retrenches from the hardships they were experiencing as a result of delayed payment of their pension benefits. We also pronounced that a pension benefit can only be triggered by retirement age or other circumstances and these “other circumstances” must be akin to retirement. In the case of **Owen Mayapi**, we stated that the term “retained on the payroll” means that retirees will continue to be paid what they were getting through the payroll at the time of their retirement.

28. Thus, the aforementioned cases, pronounce that Parliament intended Article 189(2) of the Constitution to only apply to persons who were retirees, retrenches, or those who separated in other circumstances akin to retirement. In the **Lubunda Ngala** case, we stated, and perhaps most importantly for the purposes of the present

case, that resignation is a termination that occurs before retirement age. We also stated as follows:

“Clearly, what is anticipated with a pension is that it becomes effective on retirement in some cases due to age or other circumstances and certainly not resignation.”

29. Further, in the ***Levy Mwale*** case, we expressed the view that a resignation from employment does not fall under the provisions of Article 189(2), in the following terms:

“Our view on the matter is that the very fact that the Respondent accepted the Petitioner's request to go on early retirement though with some misgivings does not relegate the retirement to a resignation from employment which would not attract a pension benefit within the provisions of Article 189 (2) of the Constitution as amended.”

30. From the evidence on record in this case, it is clear to us that the Petitioner voluntarily resigned from the employ of the Respondent. It is also clear that the Petitioner's separation from employment was neither through retirement age nor retrenchment nor any other circumstance akin to retirement. Our view is that a voluntary resignation is not akin to retirement, and as a result, the gratuity claimed by the Petitioner does not fall within the realm of a pension benefit for the purposes of Article 189(2) of the Constitution.

31. We find, therefore, that the Petitioner does not fit within the category of persons that Parliament intended Article 189(2) of the Constitution to apply to. We hold the view, as we did in the ***Lubunda Ngala*** and ***Levy Mwale*** cases, that a person who voluntarily resigns from employment does not attract a pension benefit within the provisions of Article 189(2) of the Constitution.

32. The Petitioner being neither a retiree, retrenchee nor a pensioner is therefore, not entitled to a pension which would have entitled him to remain on the payroll. We therefore, come to the conclusion that the provisions of article 189(2) of the Constitution do not apply to the Petitioner in this case as the Petitioner's employment with the Respondent ended by way of resignation and not retirement.
33. It is further our considered view that the claim for unpaid gratuity, salaries and mileage charges properly falls under sections 85(1), (9) and (4) of CAP 269, and as such this claim is an employment dispute and does not raise a constitutional issue. As already stated the jurisdiction to hear and determine employment disputes exclusively belongs to the IRD.
34. In holding this view, we are strengthened by our decision in the case of **Lloyd Chembo v The Attorney General**¹⁰, where we stated that:
- "The nature and status of this Court is such that it deals with direct violations of the Constitution. By virtue of Article 1(5) a matter relating to the Constitution is heard by the Constitutional Court. The rest of the law is adequately handled by other courts."**
35. We note that the Petitioner argued that the IRD lacks jurisdiction to determine this matter because the IRD lacks jurisdiction to deal with matters relating to allegations of contravention of the Constitution. We dismiss this argument for the same reasons we stated in the case of **Bric Back Limited T/A Gamamwe Ranches v Neil Kirkpatrick**¹¹, that the IRD is a court of competent jurisdiction to determine a

dispute that includes whether a person should continue drawing a monthly salary pending final settlement of pension benefits. This Court has on a number of occasions guided on who qualifies to be retained on the payroll under Article 189 (2) of the Constitution.

Conclusion

36. The upshot is that we find merit in the Respondent's first preliminary issue to the effect that Article 189 (2) of the Constitution does not apply to the Petitioner for reasons already stated in this Ruling.

ORDERS

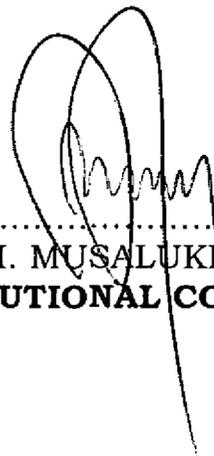
37. For the foregoing reasons we uphold the first preliminary issue and we make the following orders:

37.1. The Petitioner's action is dismissed in its entirety.

37.2. Each party to bear their own costs.



.....
P. MULONDA
CONSTITUTIONAL COURT JUDGE



.....
M. MUSALUKE
CONSTITUTIONAL COURT JUDGE



.....
M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE



.....
J. Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE