IN THE CONSTITUTIONAL COURT OF ZAMBIA 2020/CCZ/A002
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLE 128 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO.2 OF 2016

IN THE MATTER OF: SECTION 8 OF THE CONSTITUTIONAL COURT ACT NO. 8 OF 2016

IN THE MATTER OF: ARTICLE 189 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016

BETWEEN:

BRIC BACK LIMITED T/A GAMAMWE RANCHES APPELLANT

AND

NEIL KIRKPATRICK RESPONDENT

Coram: Chibomba, P.C., Mulonda and Munalula, JJC

On 1st December, 2020 and 29th January, 2021.

For the Appellant: Mr. J. Madaika of Messrs. J & M Advocates.

For the Respondent: Ms. Z. Maipambe of Messrs. Mwenye & Mwiitwa Legal Practitioners

RULING

Munalula, JC, delivered the Ruling of the Court.

Cases Referred to:

1. Felix Mutati and 3 Others v Winnie Zaloumis (suing in her capacity as acting National Secretary of the Movement for Multi-party Democracy) SCZ Judgment No. 31 of 2018
2. Steven Katuka and Law Association of Zambia v Attorney General and Ngosa Simbyakula and 63 Others Selected Judgment No 29 of 2016

Legislation Referred to:

1. Constitution of Zambia (Amendment) Act No. 2 of 2016
2. The Constitutional Court Act No. 8 of 2016
3. The Constitutional Court Rules, S.I. No. 37 of 2016

Work referred to:

Andrew Harding, *The Fundamentals of Constitutional Courts* <www.idea.int.> accessed 25 March, 2020.

This is a Ruling on whether this Court can entertain an appeal against a refusal by a presiding court to refer a matter to this Court. The question was reserved for ruling at a hearing held on 1st December, 2020 in a matter that came to us by way of appeal. The brief background to the matter is that the Appellant moved this Court by way of appeal seeking to challenge the decision of a Judge sitting in the Industrial Relations Division of the High Court refusing to refer to this Court a purported constitutional question raised in the said court by the Appellant.

Before the substantive Appeal could be heard, the Court directed Counsel for the Appellant to address it on the question whether this Court has the jurisdiction to hear an appeal, other than an election petition appeal, given the provisions of Article 128 (1) (d) of the Constitution (Amendment) Act No.2 of 2016 (henceforth "the Constitution").

In responding to the question whether this is the proper Court to hear the appeal, the Appellant's Counsel, Mr. Madaika, made two arguments. First

he relied on the Supreme Court decision in the case of **Felix Chapota Mutati and 3 Others v Winnie Zaloumis (suing in her capacity as National Secretary of the Movement for Multi-Party Democracy).**[1] Counsel averred that in the said case, the Court of Appeal declined to hear an appeal on the grounds that determining it would have led the Court to encroach on the jurisdiction of this Court. That the Supreme Court upheld the Court of Appeal stating that the issues raised were constitutional in nature hence the correct court to appeal to was the Constitutional Court.

Counsel opined that the Supreme Court which ranks *pari-passu* with the Constitutional Court had pronounced itself on such appeals thereby closing the door to the appeal at hand. That the door to the Supreme Court could only be re-opened if this Court holds that Judgment No. 31 of 2018 was rendered *per incuriam*. He concluded that it would be an injustice for this Court to close its own door when there is no other avenue that is open to litigants to seek redress.

Mr. Madaika's second argument was that Article 128(1) (d) has not restricted appeals to this Court, to those relating to the election of a Member of Parliament or Councillor. Further, that the Jurisdiction of the

Constitutional Court is very wide and in the absence of an express prohibition, the Court has the latitude to entertain such an appeal. In short, this Court has the jurisdiction to hear the appeal.

When prodded to show the Court a provision authorising it to hear the type of appeal at hand, Mr. Madaika referred the Court to section 8 of the Constitutional Court Act No. 8 of 2016 (henceforth "the Act"). He contended that the Court has both original and appellate jurisdiction hence the use of the term 'matter' in section 8. That the appeal had come under section 8(1) (a) and (h) relating to the interpretation of the Constitution. When his attention was drawn to Order IV rule (2) (2) of the Constitutional Court Rules, the CCR, on commencement of matters by originating summons in relation to section 8 (1) (a); and to Order IV (1) of the CCR on commencement of matters not otherwise provided for by petition *vis a vis* section 8 (h), Counsel maintained that this Court has the jurisdiction to hear the appeal in issue because it is an appeal against a decision made under Article 128 (2).

In her response to Mr. Madaika's submissions on the question of this Court's jurisdiction to hear the appeal, Ms Maipambe, Counsel for the Respondent, began by arguing that this Court is not bound by the **Felix**

Mutati[1] decision which offers no meaningful guidance on this Court's jurisdiction as expressly stated under Article 128 of the Constitution. She distinguished the case at hand from the **Mutati**[1] case. And in response to Mr. Madaika's second argument, she contended that the Appellant could still move the Court in 'testing out' constitutional matters under Order IV of the CCR by way of originating summons or petition. She concluded by averring that the matter is improperly before the Court and ought to be dismissed.

In his brief reply, Mr. Madaika maintained that this Court's jurisdiction is very wide and the matter cannot fail because it has not come by way of petition since the only way to challenge the decision of an inferior court in a superior Court is by appeal.

We are grateful to both Counsel for their off the cuff submissions on the question whether this Court has the jurisdiction to hear the appeal in *casu*. Without going into the merits of the appeal, we note that it challenges a decision of the High Court declining to refer a matter to this Court. As we have already stated, Mr. Madaika's argument as to why the issue is properly before us, is two-fold. He contends, firstly, that the Supreme Court has already guided on the matter and, secondly, that there are clear

provisions in the law granting this Court jurisdiction to hear the appeal in issue. We shall consider the arguments in the order in which they were made.

Firstly, Mr. Madaika's position is that through its decision in the **Mutati**[1] case, the Supreme Court has settled the question whether the type of appeal in *casu* lies to this Court. That this is so because the Supreme Court upheld the Court of Appeal which had declined to hear an appeal therein stemming from the High Court's refusal to refer a matter to this Court. That the Supreme Court thereby closed what may be said to be the general appeal route. That the effect of the decision is that the Appellant has nowhere else to go, and will be denied justice if turned away by this Court.

We have carefully perused the said **Mutati**[1] judgment and our understanding of what transpired in that case is that, the High Court presiding over the matter declined the Appellants' application to refer the matter to the Constitutional Court or to stay the proceedings pending appeal, prompting the Appellants to take the issue of a stay of proceedings to the Court of Appeal. The full Bench of the Court of Appeal relying on section 23 of the Act read with section 4 of the Court of Appeal

Act No. 7 of 2016 found that it had no jurisdiction to entertain the application because the Constitution mandates the Constitutional Court only, as the Court to hear such appeals from the High Court. The Court of Appeal further observed that by virtue of section 4 (2) of the Court of Appeal Act, it can only refer questions to the Constitutional Court that arise in matters that are properly before it and not those that first arise in the High Court. As a result of the dismissal of the interlocutory application the substantive appeal was not heard.

Dissatisfied, the Appellants took their grievances to the Supreme Court, challenging in grounds one and two respectively, the Court of Appeal's finding that an appeal from a decision of the High Court refusing to refer a matter to the Constitutional Court lies with the Constitutional Court and that such an appeal is within the definition of constitutional matters as defined by Section 23 of the Act. Ground three challenged the dismissal of the entire appeal during the hearing of an interlocutory application. And ground four averred that the Court of Appeal erred in making a determination on whether or not the matter fell within the jurisdiction of the Constitutional Court instead of referring the question to the Constitutional Court.

Our reading of the Supreme Court judgment shows that it addressed the fourth ground of appeal. It held that the real question before it was whether the constitutional issue was properly raised before the High Court and if so whether the High Court properly dealt with it. Having reviewed the manner in which the constitutional issue had been raised and how it had proceeded before the High Court, the Supreme Court said as follows:

> **[W]e find the counter-claim was taken before a forum that was legally incompetent to entertain it for want of jurisdiction. The appellants had no option but to take it directly to the Constitutional Court which is the competent court mandated with *original* jurisdiction to hear matters relating to the interpretation of constitutional provisions. As the record shows, the appellants were clearly aware of this fact as they had previously commenced the matter in that court. On those facts, we cannot fault the trial judge for finding this was not a proper matter to refer to the Constitutional Court as the matter was not properly before the High Court. .... [S]ince the High Court lacked jurisdiction to entertain the matter, no competent appeal could emanate from its said refusal. The mandate of the high Court is limited to referring constitutional issues on matters that are properly commenced in that court and over which it substantially has jurisdiction to hear and determine. The constitutional issue must arise from the plaintiff's claim, in the process of hearing the matter and not be introduced by a defendant, through a counter-claim over which the court has no jurisdiction to hear and determine.**

We are of the firm view that the **Mutati**[1] case does not help the Appellant's case because it does not deal with the question of whether an appeal against a refusal to refer a matter to this Court lies to the courts of general jurisdiction or to this Court. The first of Mr. Madaika's arguments is therefore untenable.

We now turn to the second argument. It was Mr. Madaika's submission that the appeal is rightly before this Court. That the law provides that a refusal to refer a matter to the Constitutional Court is to be appealed to this Court as opposed to following the general appeal route culminating in the Supreme Court. The issue is clearly procedural. We have considered the provisions of the Constitutional Court Act and the CCR. Part II of the Act sets out the jurisdiction of the Court. Part IV of the Act provides for appeals, substantively. The wording of most of Part IV is not specific to election petitions. It provides in section 23 (1) that, subject to Article 28 and section 24, an appeal shall lie to the Court from a judgment of the High Court in a constitutional matter. And in section 23 (2), it is provided that, an appeal shall lie to the Court from a judgment of a Tribunal. Section 24 provides for leave to appeal and notice of appeal; it also permits appeals from interlocutory orders and judgments.

The CCR provides for appeals and cross-appeals under Order XI. Here too, the provisions make no specific reference to election petitions in prescribing the manner in which leave to appeal is to be secured, how a notice of appeal is to be filed, and how the appeal and cross- appeal are to proceed to a hearing. Only rule 4 of Order XI makes specific reference

to Parliamentary and Local Government election petitions by mentioning appeals relating to nominations.

Part IV of the Act and Order XI of the CCR are thus couched in language that appears to accommodate appeals other than those relating to election petitions, that is, appeals relating to a constitutional matter such as an appeal against a decision declining to refer a matter to this Court. However, it is trite that the Act and the CCR are informed by the Constitution. There is a hierarchical relationship between the Constitution as the *grundnorm*, the Act and the Rules. The Court's jurisdiction begins with Article 1 (5) of the Constitution which provides that a matter relating to the Constitution shall be heard by this Court. Article 128 is the substantive provision on the jurisdiction of the Court and it is only qualified by Article 28 providing for matters to do with the Bill of Rights.

The relevant portion of Article 128 reads:

> **128. (1) 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;**
> ***(c)* a matter relating to the President, Vice-President or an election of a President;**
> ***(d)* appeals relating to election of Members of Parliament and councillors; and**
> ***(e)* whether or not a matter falls within the jurisdiction of the Constitutional court.**

(2) Subject to Article 28 (2), where a question relating to this Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court.

This means that, the starting point in understanding how matters come to this Court must be the Constitution itself. This is because the Constitution governs the Act which in turn governs the CCR. The three must be read together. Neither the CCR nor the Act can extend the jurisdiction of the Court beyond that stated in the Constitution. Article 128 (1) (d) is categorical and specific about the type of appeal that may be brought before this Court. It provides only for Parliamentary and Local Government election petition appeals. The import of this is that regardless of the breadth of the general jurisdiction accorded to the Court by Article 1 (5), the Constitution has through Article 128 (1) (d), specified the types of appeals which may come to this Court.

The reason for the restriction is obvious. The Constitutional Court of Zambia is a specialised Court, set up to resolve only constitutional questions. In that sense, it is separated from the general court hierarchy under which matters move from the lower courts up to the final court of appeal. This Court exemplifies what the learned author **Andrew Harding** in **The Fundamentals of Constitutional Courts** calls a centralised

system as opposed to a diffuse system. In the latter, a supreme court has general jurisdiction over civil and criminal matters as well as constitutional issues. In our case, the Constitutional Court exists only for constitutional matters hence it is separate and additional to the Supreme Court which has general jurisdiction. In the Zambian court system, all questions of a general nature, including procedural questions, must proceed through the courts of general jurisdiction.

Admittedly, the separation is of necessity, not absolute. There is some sharing of jurisdiction which we shall not go into. In order to ensure that the separation and sharing of jurisdiction follows an orderly process the Constitution of Zambia, the Act and the CCR have provided for specific routes by which constitutional questions are to be brought to the attention of the Court. Under the first route, constitutional matters must be commenced in the Constitutional Court. This is why the Court enjoys original jurisdiction. Under the second route, a constitutional issue arising in a matter commenced in a court of general jurisdiction can come to the Constitutional Court through the referral of that constitutional question by the presiding officer. This route is provided for in Article 128 (2).

Article 128 (2) provides for referrals where the presiding court finds that there is a constitutional question in issue. It does not provide for what is to happen if the presiding court finds that there is no constitutional question and the affected party wants to appeal against that decision. It is our firm view that this 'gap' does not portend an appeal to this Court because Article 128 (2) must be read with Article 128 (1) (d). As this Court stated in **Steven Katuka and Law Association of Zambia v Attorney General and Ngosa Simbyakula and 63 Others**[2] the provisions of the Constitution should not be read in isolation.

A reading of the two Articles together entails that until such time as the Constitution is amended, it will not be possible for an appeal that is not explicitly mentioned in Article 128 (1) (d), that is, one which is not an election petition appeal relating to a Member of Parliament or a Councillor, to come before this Court. Hence attention must be paid to the fact that section 8 (4) of the Act categorically states that the Court shall hear and determine appeals from the High Court to challenge the election of a Member of Parliament and appeals from a tribunal. These are the appeals envisaged in Part IV of the Act. Further, Order IV of the CCR on commencement of proceedings, provides in rule 1 (1) that *except as otherwise provided in the Constitution, the Act and these Rules* all matters

under the Act shall be commenced by Petition. There is no provision anywhere in the Constitution for appeals such as the one in *casu*.

There being no constitutional provision supporting nonelection appeals, there can be no leeway for appeals against a refusal to refer a matter to this Court under Article 128 (2). Without any constitutional provision expressly permitting this Court to hear appeals against a decision declining to refer a matter to this Court, such issues must be commenced in this Court by invoking the Court's original jurisdiction and not by appeal. By default, the **Mutati**[1] case affirms this Court's view that constitutional matters other than those in Article 128 (1) (d) must be commenced under the original jurisdiction of this Court unless they are referred to this Court as provided for in Article 128 (2). Mr. Madaika's second argument is equally untenable.

It is the holding of this Court that it has no jurisdiction to entertain an appeal against a refusal by another court or tribunal to refer a matter to it. The Court's guidance is that a party that is dissatisfied with the presiding person's decision refusing to refer an alleged constitutional question to this Court ought to apply to stay the proceedings in that court and initiate

a separate action for the interpretation of the issue by this Court in accordance with Order IV of the CCR.

The appeal is accordingly dismissed. There is no order as to costs.

H. Chibomba

President

CONSTITUTIONAL COURT

P. Mulonda

Judge

CONSTITUTIONAL COURT

M.M. Munalula

Judge

CONSTITUTIONAL COURT