

IN THE CONSTITUTIONAL COURT OF ZAMBIA

2022/CCZ/007

HOLDEN AT LUSAKA

(CONSTITUTIONAL JURISDICTION)

IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA, CHAPTER 1 VOLUME 1, OF THE LAWS OF ZAMBIA

IN THE MATTER OF: ARTICLES 128 (1) (a) OF THE CONSTITUTION OF ZAMBIA ACT NO. 2 OF 2016, CHAPTER 1 VOLUME 1, OF THE LAWS OF ZAMBIA

IN THE MATTER OF: THE INTERPRETATION OF ARTICLE 236 (1) AND (2) (A) OF THE CONSTITUTION OF ZAMBIA ACT NO. 2 OF 2016, CHAPTER 1 VOLUME 1, OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: THE INTERPRETATION OF ARTICLE 180(7) AND 182(3) OF THE CONSTITUTION OF ZAMBIA ACT NO. 2 OF 2016, CHAPTER 1 VOLUME 1, OF THE LAWS OF ZAMBIA

BETWEEN

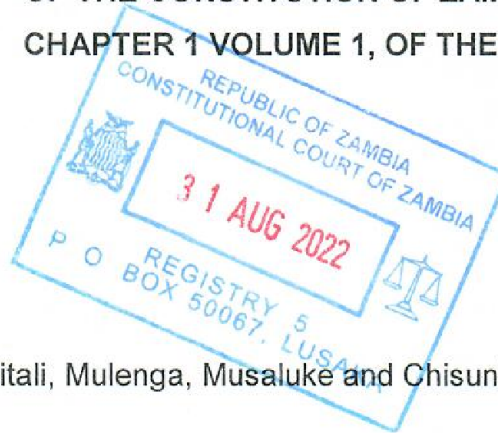
JONAS ZIMBA

AND

ATTORNEY GENERAL

APPLICANT

RESPONDENT



Coram: Munalula DPC, Sitali, Mulenga, Musaluke and Chisunka JJC on 28th July, 2022 and 31st August, 2022

For the Applicant: Mr J. Chirwa of Ferd Jere and Co.

For the Respondent: Mr M. Muchende SC., Solicitor General with Mr C. Mulonda Principal State Advocate and Mrs T. Musiska-Lungu Assistant Senior State Advocate

JUDGMENT

Munalula DPC, delivered the Judgment of the Court.

Cases referred to:

1. Isaac Mwanza v Attorney General 2021/CCZ/0045
2. Vincent Lilanda and two others v Attorney General 2020/CCZ/004
3. Gervas Chansa v Attorney General 2019/CCZ/004
4. Mutembo Nchito v Attorney General 2016/CC/0029
5. Daniel Pule and Others v Attorney General 2017/CCZ/004
6. Law Association of Zambia v Attorney General 2021/CCZ/0051
7. Stephen Katuka and Law Association of Zambia v Ngosa Simbyakula and 63 Others CCZ Selected Judgment No. 26 of 2016

Legislation referred to:

Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016

Constitutional Court Rules Statutory Instrument No. 37 of 2016

[1] This matter comes to us by way of originating summons filed under Article 128 (1) (a) of the Constitution as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (henceforth “the Constitution”). The summons was amended with leave of the Court on 27th April, 2022 and seeks determination of three questions as follows:

1. Whether the Director of Public Prosecutions can be subjected to the procedure under the Judicial Code of Conduct Act when the DPP is not a judicial officer.
2. Whether Article 236 of the Constitution of Zambia as read with Article 180 (7) of the Constitution confers Jurisdiction on the Judicial Complaints Commission to try the Director of Public Prosecutions for any of the allegations that may be brought against her under Article 181 of the Constitution of Zambia as amended under Act No. 2 of 2016.
3. By virtue of reliefs in 1 and 2 above, it be declared that the complaint and proceedings before the Judicial Complaints Commission are void *ab initio* and therefore a nullity.

[2] We are mindful from the outset that the Applicant moved us under Article 128 (1) (a) which informs Order IV Rule 2(2) of the Constitutional Court Rules Statutory Instrument No. 37 of 2016 (henceforth "the Rules"). Order IV rule 2(2) provides that a matter relating to the interpretation of the Constitution shall be commenced by originating summons.

[3] We are equally mindful that the Respondent comes armed with our decision in **Isaac Mwanza v Attorney General**¹ which affirmed **Kabisa Ngwira v National Pension Scheme Authority** and **Vincent Lilanda and Others v the Attorney General** and gave guidance as to when the Court may be moved by way of interpretation.

[4] We held therein that matters to be brought by way of originating summons must relate exclusively to interpretation of constitutional provisions. That the issues raised must not be contentious or personalised. The Respondent therefore raised a jurisdictional issue to the effect that this matter is improperly before us for coming by way of Article 128 (1) (a) when it is not purely for interpretation. We shall therefore begin with the issue.

[5] The Respondent contends that this matter was commenced using the wrong mode because the issues involved are personalised and contentious in nature. That the matter ought to have been commenced by petition as guided in the case of **Isaac Mwanza v The Attorney General**¹.

[6] The Respondent further contends that contrary to the guidance given, the issues raised in this matter are anchored by question 3 which calls for a declaration that the proceedings against the Director of Public Prosecutions (DPP) which are currently before the Judicial Complaints Commission (JCC) be declared null and void *ab initio*. The said arguments were reiterated at the hearing by the Solicitor General Mr Muchende SC, and will not be repeated for the sake of brevity.

[7] In response, the Applicant denies that the questions raised are unsuitable for interpretation. It was contended that the issues draw on a factual basis and raise a novel issue which is in the public domain and is of public importance. Further that the issue has not been personalised.

[8] At the hearing, counsel for the Applicant, Mr Chirwa augmented by arguing that the questions in the summons were in two parts. The first part seeks interpretation whilst the second part seeks nullification and would arise only if the interpretation is in the affirmative. It was contended that it is the duty of the Court to provide an authoritative interpretation so as to settle issues. Further, that it would be an injustice to dismiss the entire matter because of question 3 which seeks a declaratory order.

[9] We wish to point out from the outset that whilst it is the duty of this Court to interpret the Constitution, for the sake of good order and to protect the

legal interests of persons who may be affected by willy nilly interpretation at the behest of third parties, this Court will carry out its interpretative function in accordance with the Constitution and with due regard to the public interest.

[10] We have considered the jurisdictional issue and for reasons that will become apparent in the course of our decision we find it helpful that the Respondent has heeded our oft repeated guidance to incorporate any jurisdictional issues that the parties may have in their answer or opposing affidavit as the case maybe.

[11] We say so because, whilst we affirm our position in the **Isaac Mwanza v Attorney General**¹ decision the facts before us, do not justify a wholesale dismissal of the Applicant's case without consideration on the merits.

[12] In **Isaac Mwanza v Attorney General**¹ the Applicant sought interpretation of various Articles in relation to a number of questions challenging the constitutionality of specific appointments and disappointments made by the incumbent Republican President. We said at page J20 that:

We are therefore of the firm view that the questions do not relate solely or exclusively to interpretation. They are not of a general nature. The legitimate purpose of interpretation cannot be realised because in this matter, interpretation must inevitably be followed by a determination as to whether or not the Constitution has been contravened by the President and his appointees.

[13] Thus, we agree with the Applicant that the case in *casu* is distinguishable from the **Isaac Mwanza**¹ matter. We are fortified in so saying by our decision in the case of **Vincent Lilanda and two Others v Attorney General**² wherein the questions before us included one for sole interpretation of a constitutional provision while the rest sought determination of contentious issues. We were able to dispose of the interpretation question and dismiss (for coming by the wrong mode) the contentious questions which, though founded on the interpreted provision, required a proper trial for their determination.

[14] We have looked at each question in *casu*, individually. Not all the questions are contentious so as to breach the requirements for interpretation to occur under Article 128 (1) (a).

[15] We hasten to say however, that not all the questions are properly before us so as to be considered on the merits. As we shall show, by elaborating further, questions 1 and 3 cannot be considered on the merits. That being so, we will not begin our elaboration by recounting the parties' arguments.

[16] For convenience, we start with, question 3 which in our considered view is not a question strictly speaking but a relief. It is clearly misconceived as it seeks to nullify and void an on-going disciplinary process before the JCC. Such a relief is not tenable in originating summons proceedings for

interpretation of the Constitution. We thus agree with the Respondent that question 3 is misconceived having come by the wrong mode and without any basis. It is accordingly dismissed.

[17] We now turn to question 1. Question 1 is in our considered view equally problematic albeit for different reasons. Firstly, the question is inconsequential to the issue at hand. Secondly, it is not a constitutional question. In the case of **Gervas Chansa v Attorney General**³ we held at page J33 that:

Our short answer to the Petitioner's claim, in its essence, is that it is not a constitutional matter so as to be determined by this Court. We say so because of our specific jurisdiction as a Court. We are confined to determining constitutional questions. A constitutional question is defined in Black's Law Dictionary as a legal issue resolvable by the interpretation of the Constitution rather than a statute.

[18] We echo these sentiments. Question 1 is therefore dismissed for afore-stated reasons.

[19] This means that only question 2 remains. It is our position that question 2 is the crux of the Applicant's case. It is also our position that it is amenable to consideration on the merits because it asks a constitutional question and once isolated from the dismissed questions does not offend the principles governing questions that may come by way of originating summons for interpretation. We say so because of the manner in which question 2 is framed as well as our perusal of the Applicant's affidavit of fact.

[20] Based on the Applicant's own statement and our reading of the manner in which the question is framed, we find that the essence of question 2 is to seek interpretation of identified Articles of the Constitution. The question is therefore rightfully before us by way of originating summons.

[21] From the outset, we wish to point out that although question 2 made reference to Article 181, which was a wrong provision, this was corrected with the agreement of the Respondent at the hearing. For purposes of our consideration therefore Question 2 reads:

Whether Article 236 of the Constitution of Zambia as read with Article 180 (7) of the Constitution confers Jurisdiction on the Judicial Complaints Commission to try the Director of Public Prosecutions for any of the allegations that may be brought against her under Article 182 (3) of the Constitution of Zambia as amended under Act No. 2 of 2016.

[22] Before we proceed with the interpretation, we note that the Respondent has raised a further objection to the effect that the question whether the DPP is amenable to the Judicial Complaints Commission (JCC) disciplinary process has already been settled in another matter. In other words, question 2 is impugned by the Respondent for its alleged lack of novelty as it has allegedly been settled in **Mutembo Nchito v Attorney General**.⁴

[23] **Mutembo Nchito v Attorney General**⁴ is a Judgment of this Court and contains two statements which are pertinent. We stated at page J30 that **Article 144 [provides] the procedure for the removal of a Judge including**

the DPP using a permanent standing body in the name of the JCC. We also stated at page J33 that under the new constitutional order the *ad hoc* arrangement for investigating the DPP has been done away with and in its place a permanent mechanism under the JCC instituted.

[24] To the extent that the Respondent argues that this Court has already had occasion in **Mutembo Nchito v Attorney General**⁴ to state that the DPP is amenable to the jurisdiction of the JCC, we are in agreement with them. We are however of the considered view that the issue of whether the DPP is amenable to the JCC was simply stated as a matter of fact and not actively considered in the said case. This case therefore creates an opportunity for a reasoned interpretation to take place.

[25] Having settled the jurisdictional issues, we now turn to the merits of question 2 and begin by briefly alluding to the parties' arguments. The Applicant submitted that Article 182(3) which provides that the DPP may be removed on the same grounds as apply to a judge, does not imply that the institution to carry out the removal is the JCC. That such subjection of the DPP to the JCC process would undermine the DPP's constitutional independence. Counsel submitted that there was a lacuna in the law which ought to be corrected by the enactment of a law.

[26] The Respondent argued in response that the procedure for the removal of the DPP is akin to that of a judge. Therefore, it follows that the same body be used for the removal of the DPP. In this regard, the DPP need not be defined as a judicial officer because the office of judicial officer is distinguished from that of judge for purposes of the removal process. Further, that the process has no effect on the independence of the DPP. That the Applicant's approach ignores the many authorities on constitutional interpretation. In Support, Solicitor General Muchende SC, cited a number of authorities including **Daniel Pule and Others v Attorney General**⁵, **Law Association of Zambia v Attorney General**⁶ and **Stephen Katuka and Law Association of Zambia v Ngosa Simbyakula and 63 Others**.⁷

[27] This Court has on numerous occasions spelt out the need, when interpreting the Constitution, to bring to bear all the relevant provisions. We will therefore begin with a consideration of all the relevant constitutional provisions, in particular, Articles 143 and 144 (1); Articles 180 (1) and (2) (b); Article 182 (3); and 236 (2) (d). The relevant portions of the said Articles, read for convenience in logical order, provide as follows:

236. (1) There is established the Judicial Complaints Commission.

(2) The Judicial Complaints Commission shall—(a) enforce the Code of Conduct for judges and judicial officers; (b) ensure that judges and judicial officers are accountable to the people for the performance of their functions; (c) receive

complaints lodged against a judge or judicial officer, as prescribed; (d) hear a complaint against a judge or judicial officer, as prescribed;

144. (1) The removal of a judge may be initiated by the Judicial Complaints Commission or by a complaint made to the Judicial Complaints Commission, based on the grounds specified in Article 143

143. A judge shall be removed from office on the following grounds:

(a) a mental or physical disability that makes the judge incapable of performing judicial functions; (b) incompetence; (c) gross misconduct; or (d) bankruptcy.

180. (1) There shall be a Director of Public Prosecutions who shall be appointed by the President, subject to ratification by the National Assembly.

(2) A person qualifies for appointment as Director of Public Prosecutions if that person— (b) is qualified to be appointed as a judge.

182. (3) The Director of Public Prosecutions may be removed from office on the same grounds and procedure as apply to a judge. (*emphasis added*)

[28] Our brief summation of the foregoing provisions is that Article 236 (2) (d) sets up the Judicial Complaints Commission with the mandate to hear a complaint against a judge or judicial officer using a prescribed procedure. Articles 143 and 144 (1) then set out the grounds and procedure for the removal of a judge. Article 180 (1) and (2) (b) set up the office of DPP as a person qualified to be appointed a judge. Article 182 (3) then provides that the DPP may be removed from office in the same manner as a judge.

[29] In our considered view, the foregoing is elementary. Article 182 (3) is clear. We shall however, belabour the point further in view of the Applicant's position.

The starting point is the interpretation of Article 182 (3) itself. Article 182 (3) provides that the Director of Public Prosecutions may be removed from office on the same grounds and procedure as apply to a judge. Black's Law Dictionary defines the word 'same' as '[t]he very thing just mentioned or described'. In Article 182 (3) the very thing mentioned relates to grounds and procedure for the removal of a judge. The language used is plain and the ordinary meaning of the words used will suffice.

[30] Hence, substituting the term 'judge' with that of 'DPP' in the provisions relating to the grounds and procedure for the removal of a judge spells out the intention of the framers of the Constitution explicitly and leaves no room for any alternative meaning. We are fortified in so saying by Article 267(3) (d) which enjoins us to do so where necessary. Article 267(3) (d) provides that:

267 (3) A provision of this Constitution shall be construed according to the doctrine that the law is continuously in force and accordingly—
 (d) a reference in a provision applying that provision to another provision shall be read with any modification necessary to make it applicable in the circumstances and any reference to the modified provision shall apply as modified;"

[31] Article 182 is therefore linked to Article 143 once the Court makes the necessary modifications to make the provision applicable. Article 143 when

read with the necessary modifications may conceivably become - [the DPP] **shall be removed from office on the following grounds: (a) a mental or physical disability that makes [the DPP] incapable of performing [DPP] functions; (b) incompetence; (c) gross misconduct; or (d) bankruptcy.**

[32] Article 182(3) can also be linked to Article 144 for the procedure for the removal of the DPP. Once modified Article 144(1) could conceivably read – **[t]he removal of [the DPP] may be initiated by the Judicial Complaints Commission or by a complaint made to the Judicial Complaints Commission, based on the grounds specified in Article 143.**

[33] The Constitution not only spells out the subjection of the DPP to the JCC's disciplinary process but it also gives guidance on the manner in which to interpret a provision such as Article 182(3) which makes reference to another constitutional provision. It follows that, there is no lacuna in the Constitution as alluded to by the Applicant nor is there any effect on the DPP's independence.

[34] It is our conclusion that on a proper reading of all the relevant Articles, the DPP is amenable to the disciplinary process of the JCC. The DPP may be removed from office in accordance with Article 182 (3) as read with Articles 143 and 144.

[35] Before we leave this matter we take note that both parties asked for costs. In view of the determination of question 2 on the merits, each party will bear their own costs.



M.M.MUNALULA

DEPUTY PRESIDENT CONSTITUTIONAL COURT



A.M.SITALI

CONSTITUTIONAL COURT JUDGE



M.S.MULENGA

CONSTITUTIONAL COURT JUDGE



M.MUSALUKE

CONSTITUTIONAL COURT JUDGE



M.K.CHISUNKA

CONSTITUTIONAL COURT JUDGE