

IN THE CONSTITUTIONAL COURT FOR ZAMBIA
HOLDEN AT LUSAKA

2021/CCZ/0035

(Constitutional Jurisdiction)

IN THE MATTER OF SECTION 30 OF THE CONSTITUTIONAL COURT ACT No. 8 of
2016

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2, 52(4), 67(3), 101,
103 AND 128 OF THE CONSTITUTION

AND

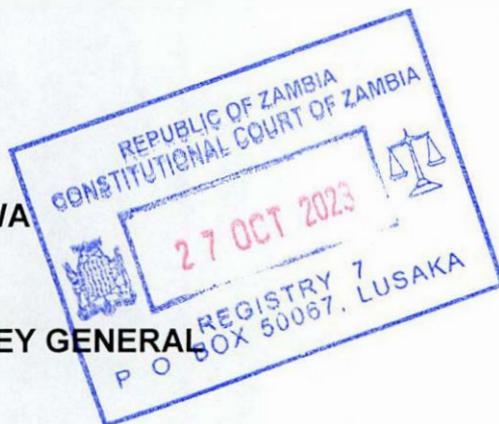
IN THE MATTER OF THE AWARD OF COSTS IN CAUSE NO. 2021/CCZ/ 0021

BETWEEN

JOHN SANGWA

AND

THE ATTORNEY GENERAL



PETITIONER

RESPONDENT

CORAM: MULONDA, MULENGA, MUSALUKE, CHISUNKA AND MULONGOTI,
JJC ON 15TH JUNE, 2023 AND 27TH OCTOBER, 2023

For the Petitioner:

Mr. B. Stephen, Ms. K. Bwalya and Mr. M.
Chungu of Messrs. Simeza, Sangwa and
Associates

For the Respondent:

Ms. C. Mulenga, Acting Chief State Advocate
and Mrs. K. F. Mumba - Phiri, Acting Senior
State Advocate

JUDGMENT

Musaluke, JC, delivered the Judgment of the Court.

Cases referred to:

1. Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995 (1996) 3 SA 165 (CC)
2. British Columbia (Minister of Forests) v Okanagan Indian Food (2003) 3 SCR 371 (SCC)
3. Silvermine Valley Coalition v Sybrand Van Der Spuy Boerderye (2002) 1 SA 478 (CC)
4. Democratic Alliance and Another v Masondo NO and Another (2003) ZACC 4
5. Dindi Oscar Okumu v Robert Pavel Oimeke & 5 others [2021] eKLR
6. Saverino Twinobusingye v Attorney General (Constitutional Petition No. 47 of 2011) [2012] UGCC 1
7. Afrope Zambia Limited v Anthony Chate and Others SCZ Appeal No. 160/2013
8. Ferial Hassan and 2 Others v Public Service Board of Marsabit County and Another [2016] eKLR
9. Zambia National Commercial Bank Plc. v Martin Musonda and 58 Others CCZ Selected Judgment No. 24 of 2018
10. Dipak Patel v Minister of Finance 2020/CCZ/005
11. Affordable Medicines Trust and Others v Minister of Health and Another (2005) ZACC 3
12. Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR
13. Ferreira v Levin NO and Others 1997(2) SA 898 (CC)
14. R (Corner House Research) v Secretary of State for Trade and Industry 2005 1 WLR 2600
15. Mahar v Rogers Cable Systems Ltd 1995 25 OR (3rd) 690 (General Division) 703b
16. New Zealand Maori Council v Attorney-General of New Zealand 1994 1 AC 466
17. Oshlack v Richmond River Council (1999) 193 CLR 72
18. Kufuka Kufuka v Mundia Ndalamei CCZ Appeal No. 15 of 2016

Legislation referred to:

1. The Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016
2. The Constitutional Court Act No. 8 of 2016
3. The Legal Practitioners Act Chapter 30 of the Laws of Zambia
4. The Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia.
5. The Electoral Process Act No. 35 of 2016
6. The Constitutional Court Rules, Statutory Instrument No. 37 of 2016
7. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013

Other Works referred to:

1. Atkins Court Forms Volume 13
2. B.A Garner, Black's Law Dictionary (2004) (16th Edition).

Introduction

- [1] When we heard this petition, we sat with our brother Justice M. K. Chisunka who is currently indisposed. The judgment is therefore, by the Majority.
- [2] Delivery of the judgment in this cause has taken unnecessarily long due to the reasons outlined here below. The petition was filed on 9th June, 2021. On 29th June, 2021, the Respondent filed a notice of motion to raise preliminary issue which was heard on 14th September, 2022 and a ruling delivered on 10th November, 2022. On 21 March, 2023 when the single judge called for a status conference, the

Advocates for the Petitioner asked for an extension of time in which to file Consolidated Record of Proceedings as their client was outside jurisdiction at the time. On 17th April, 2023 when a status conference was called again, the Petitioner still had not filed the Consolidated Record of Proceedings. The Consolidated Record of Proceedings was later filed on 24th April, 2023 and the case was finally heard in the June 2023 session.

Background.

- [3] The Petitioner herein was a litigant in another case before us under cause 2021/CCZ/0021. In that cause, he had filed a petition alleging that the Electoral Commission of Zambia (ECZ) had contravened Articles 52 and 106 (3) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution), when it prescribed the affidavit for Presidential/Running Mate by not stating the requirements of Article 106 (3) which provides that a person who has twice held office as President is not eligible for election as President.
- [4] We heard that petition and dismissed it with costs to the Respondents against the Petitioner. Following that order for costs, the Petitioner

received demands for total costs in the sum of Kwacha nine million five hundred thousand (K 9, 500, 000 .00) from the Respondents and the Interested Party therein.

[5] Aggrieved by the demand for payment of costs by the Respondents and the Interested Party, the Petitioner filed this petition on 9th June, 2021 seeking the following relief:

- (a) **A declaration that section 30 of the Constitutional Court Act to the extent that it confers discretionary power in the Constitutional Court to award costs violates Articles 2, 52(4), 67(3), 101(4), 103(1) and 128(3) of the Constitution and therefore null and void; and**
- (b) **A declaration that the award of costs by the Constitutional Court in cause No. 2021/CCZ/ 0021 contravened Articles 2, 52(4), 67(3), 101(4), 103(1) and 128(3) of the Constitution and therefore the award of costs is null and void; and**
- (c) **Order of Certiorari quashing section 30 of the Constitutional Court Act and the award of costs in Cause No. 2021/CCZ/0021.**

Petitioner's case

[6] In support of the petition, the Petitioner filed an affidavit verifying facts and skeleton arguments.

[7] In the arguments, the Petitioner submits on the discretionary power of the Court to award costs in constitutional litigation. The Petitioner cites

a plethora of foreign authorities, justifying why constitutional litigation should not attract an award for costs.

[8] We will recite a few of these arguments by the Petitioner to bring context to this suit.

[9] The Petitioner begins by giving a general overview of the law on costs and in so doing, reliance is placed on the learned authors of Atkins Court Forms Volume 13, who define the term 'costs' as:

Costs are fees, charges, disbursements, expenses and remuneration incurred by a party in or incidental to the conduct of proceedings.

[10] Reference is also made to the definition of costs as contained in section 2 of the Legal Practitioners Act Chapter 30 of the Laws of Zambia, which defines costs as including fees, disbursements, expenses and remuneration. It is then opined that based on the definitions, costs are generally legal fees, charges, disbursements or expenses incurred by a litigant in prosecuting or defending a matter before court.

[11] It is contended that the rationale for award of costs by courts generally is to indemnify a successful party to a suit for the expenses they would have reasonably incurred because of the action. Further, that costs

serve to penalize the unsuccessful party for putting the successful party at expense in prosecuting or defending a suit, which could have otherwise, been settled out of court. It is therefore, argued that the general position is that costs *'follow the event'* meaning that an unsuccessful party should be ordered to pay costs to the successful party.

[12] It is the Petitioner's submission that the general position of the law on costs does not apply to constitutional or public interest litigation and that in the context of constitutional litigation, the general rule is that an unsuccessful litigant should not be ordered to pay costs of litigation.

[13] The Petitioner's argument for this departure from the general position on costs is summed up in three parts. Firstly, that the threat of adverse costs orders has a chilling effect on a prospective litigant's desire to assert their rights to defend the Constitution. Secondly, that constitutional litigation often has far-reaching implications outside just the parties to the litigation and extends to the public or class of the public to which the litigation relates. Thirdly, that since it is the State that bears the responsibility of ensuring that the laws and conduct are

consistent with the Constitution, the burden to pay costs of the litigation should not fall on a litigant simply because they are unsuccessful.

- [14] To coagulate these arguments, the Petitioner has cited a number of cases on how courts in other jurisdictions have dealt with the issue of costs in constitutional litigation. Particularly, in the South African Constitutional Court case of **Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995**¹ where the court cautioned against discouraging persons trying to vindicate their constitutional rights from doing so by the risk of attracting adverse costs orders.
- [15] In light of the above, the Petitioner argues that the South African Constitutional Court has taken the position that although the power to order costs is in the discretion of the court, in constitutional litigation, this discretion ought to be exercised with caution.
- [16] The Petitioner emphasizes the vital role that constitutional litigation plays in enriching the body of constitutional jurisprudence. He therefore, argues that the principle of awarding costs to the successful party is undesirable in the context of constitutional litigation on the

basis that meritorious claims may never be brought to court for fear that failure could lead to financially ruinous consequences.

[17] The Petitioner also contends that the departure from the general rule on costs ensures that society has access to justice in relation to matters of public interest. He cites a Canadian Supreme Court decision in **British Columbia (Minister of Forests) v Okanagan Indian Band**² and South African cases of **Silvermine Valley Coalition v Sybrand Van Der Spuy Boerderye**³ and **Democratic Alliance and Another v Masondo NO and Another**⁴ in which the significance of public interest litigation as a factor for consideration of award of costs was endorsed. On the strength of these cases, the Petitioner argues that constitutional courts would not award costs to a party where the issues raised are important issues of public interest.

[18] The Petitioner therefore, argues that where the law confers discretion on a court hearing a constitutional matter to award costs, the law ought to prescribe how that discretion ought to be applied to protect the rights of litigants who wish to assert their constitutional rights. He cites **Rule 26(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms)**, which has prescribed the manner in which

courts in Kenya ought to exercise their discretion as regards award of costs in litigation involving rights and fundamental freedoms of the people. The said rule enacts as follows:

26 (1) The award of costs is at the discretion of the Court.

(2) In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to the court to determine their rights and fundamental freedoms.

[19] With that, he contends that a court hearing a constitutional matter must ensure that in exercising its discretion to make an award as to costs, it preserves the rights of litigants to have access to the court. The Kenyan case of **Dindi Oscar Okumu v Robert Pavel Oimeke & 5 others**⁵ has been cited for the position that the courts should take into account public interest in exercising its discretion to award costs.

[20] After laying the background on why constitutional litigation should hardly entertain award of costs, the Petitioner argues that Article 2 of the Constitution gives every person the right to defend the Constitution and to resist or prevent its abrogation thereof. He contends that Article 2 aforesaid, deliberately uses the term '*person*' which is defined under Article 266 of the Constitution, to include an individual, a company or an association of persons, whether corporate or unincorporated. That

Article 2, therefore, does not limit the category of persons who can defend the Constitution, but entitles anyone including the Petitioner to defend the Constitution.

[21] That in exercising his duty to defend the Constitution as espoused in Article 2 of the Constitution, the Petitioner took out a petition under cause No. 2021/CCZ/0021, seeking to have the ECZ's General Affidavit for Presidential Candidate/Running Mate declared unconstitutional for being in contravention of Article 52 of the Constitution. That the Court dismissed the action and in exercising its discretion under section 30 of the Constitutional Court Act (CCA) ordered costs against him. That this is the reason he is challenging the constitutionality of section 30 of the CCA.

[22] It is the Petitioner's contention that section 30 of the CCA is unconstitutional in so far as it confers the Constitutional Court with unfettered discretion to make an order for costs against a person exercising his entrenched right to defend the Constitution. The Petitioner contends that, it's from the said right to defend the Constitution that a person is entitled to petition the Constitutional Court under Articles 52(4),67(3), 101,103(1) and 128(3) of the Constitution.

[23] The Petitioner further contends that section 30 does not prescribe or give guidelines as to how the discretion ought to be exercised but merely provides for the application of the ordinary rule for awarding costs in civil matters.

[24] The Petitioner emphasizes that the Constitutional Court must only have power to award costs where there is frivolous, vexatious or otherwise mischievous litigation and that this is necessary to protect the due administration of justice by preventing busy bodies clogging up the Court with mischievous litigation. He, however, opines that even where an order for costs is made in circumstances where a petition is regarded as frivolous, vexatious or an abuse of process, that must not stifle a litigant by expecting him/her to indemnify the successful party. He explicates that such an approach has a petrifying effect of locking out potential litigants who may be discouraged from seeking to enforce their rights by the threat of an adverse costs order and effectively infringes on the right to defend the Constitution.

[25] To buttress this point, the Petitioner relies on the Ugandan case of **Saverino Twinobusingye v Attorney General**⁶. In that case, it was held that, wherever costs are awarded in public interest litigation, they

ought to be minimal to create a balance whereby on one hand the successful litigant is reimbursed to a certain extent, at the same time, the award is such that it does not create a chilling effect on potential public interest litigants.

[26] On the strength of the authorities cited, the Petitioner submits that section 30 of the CCA is unconstitutional as it is inconsistent with Articles 2, 52(4), 67(3), 101(4), 103(1) and 128(3) of the Constitution. Further, that section 30 is unconstitutional, as it does not contain any mechanism to protect public and constitutional litigants from the threat of an adverse costs order and therefore, ought to be struck out. He therefore, argues that having demonstrated that section 30 of the CCA is inconsistent with Articles 2, 52(4), 67(3), 101(4), 103(1) and 128(3) of the Constitution, the order for costs in the judgment under cause No. 2021/CCZ/0021 ought to be set aside for unconstitutionality.

Respondent's case

[27] The Respondent herein filed its answer and an affidavit verifying facts on 29th June, 2021.

[28] In the answer, the Respondent states that the Petitioner sat on his rights at the close of his case when he decided not to promptly address

the Court regarding the issue on costs in cause No. 2021/CCZ/0021. Further, it is the Respondent's contention that the issue of costs could only have been conclusively dealt with under cause Number 2021/CCZ/0021 and not in this cause as the Court is now *functus officio* having already pronounced itself on the question of costs under cause Number 2021/CCZ/0021.

[29] The Respondent further states that section 30 of the CCA is good law as it *inter alia* guards against 'busy bodies' from unnecessarily commencing frivolous actions without thinking of the consequences of such litigation. That therefore, the Petitioner has failed, omitted or neglected to demonstrate how the discretion given to the Constitutional Court under section 30 of the CCA contravenes Articles 2, 52(4), 67(3), 101(4), 103(1) and 128(3) of the Constitution.

[30] In the arguments in response, the Respondent contends that the Petitioner's action is a veiled attempt to appeal the judgment under cause No. 2021/CCZ/0021. The Court's attention is drawn to page 96 of the record of proceedings containing the Petitioner's heads of argument where it is stated as follows:

We have already demonstrated that section 30 of the CCA is inconsistent with articles 2, 54(4), 67(3), 101, 103(1) and 128(3) of the

Constitution and therefore ought to be declared unconstitutional. As a consequence, the order for costs in the judgment of the Court under cause 2021/CCZ/0021 ought to be set aside for unconstitutionality.

[31] The Respondent argues that the above quotation from the record of proceedings clearly shows that the Petitioner seeks to assail the judgment of this Court in cause No. 2021/CCZ/0021, which is not tenable at law. In fortifying this position, the Respondent places reliance on Article 128(4) of the Constitution, which provides that a decision of the Constitutional Court is final and not appealable to the Supreme Court.

[32] The Respondent submits that it is trite law that costs are in the discretion of the court. The case of **Afrope Zambia Limited v Anthony Chate and Others**⁷ has been cited in support of that proposition. Further, that the general principle on costs applies to all matters, including constitutional cases although costs are rarely awarded in constitutional matters.

[33] The Respondent has cited a surfeit of authorities from other jurisdictions in which courts have given exceptions as to when costs can be awarded in constitutional matters. In particular, the Kenyan case of **Fesial Hassan & 2 Others v Public Service Board of**

Marsabit County & Another⁸ is cited where the court there had this to say:

In constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in the observance and enforcement of the Bill of Rights in the Constitution override the general principle that costs follow the event, unless it can be shown that the Petition was wholly frivolous, or the petitioner was guilty of abuse of the constitutional court process.

[34] The Respondent, contends that constitutional courts can award costs where a matter is frivolous or vexatious. He argues that failure to penalize a litigant in costs for bringing frivolous or vexatious matters before this Court will not only cause litigants to believe that they are free to challenge the constitutionality of statutory provisions even if those matters are spurious and this in turn will undermine the due administration of justice.

[35] It is the Respondent's submission that section 30 of the CCA in so far as it confers this Court with the discretion to award costs is not *ultra vires* Articles 2, 52 (4), 67 (3), 101 (4), 103 (1) and 128 (3) of the Constitution. Further, that section 30 of the CCA does not undermine or take away a litigant's right to defend the Constitution but merely prevents frivolous, vexatious or otherwise mischievous litigation.

[36] That this can be seen by the very fact that the Petitioner was able to come before this Court under cause No. 2021/CCZ/0021 despite section 30 of the CCA.

[37] The Respondent therefore, prays that the order for costs in the judgment under cause 2021/CCZ/0021 be upheld and that this Court should declare that section 30 of the CCA does not contravene the provisions of Articles 2, 52(4), 67(3), 101(4), 103(1) and 128(3) of the Constitution. The Respondent urges us to dismiss the petition with costs.

Determination

[38] The issue for determination in this matter is whether section 30 of the CCA to the extent that it confers discretion on the Constitutional Court to award costs in any proceedings under the said Act is *ultra vires* Articles 2, 52 (4), 67 (3), 101 (4), 103 (1) and 128 (3) of the Constitution. The Petitioner has acknowledged the issue for determination before this Court and summarized it in his skeleton arguments at page 8 of the supplementary record of proceedings filed on 9th June, 2023 as follows:

8. Before delving into arguments, we have summarized the issues for determination in this petition. The first issue for determination of this Court is whether section 30 of the CCA to the extent that it confers discretion on the Constitutional Court to award costs in any proceedings under the said Act is *ultra vires* Articles 2, 52 (4), 67 (3), 101 (4), 103 (1) and 128 (3) of the Constitution.
9. That, if section 30 of the CCA is unconstitutional, whether the award of costs in cause No. 2021/CCZ/0021 is also unconstitutional for violating Articles 2, 52 (4), 67 (3), 101 (4), 103 (1) and 128 (3) of the Constitution.

[39] In addressing the issue for determination, we wish to restate that it is trite law that the Constitution is the supreme law of the land and therefore, any written law, customary law and customary practice which is inconsistent with its provisions is void to the extent of its inconsistency. This principle of constitutional supremacy is well entrenched under Article 1 (1) of the Constitution where it is stated as follows:

This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.

[40] This position of the law has been endorsed in numerous decisions of this Court, one such case is **Zambia National Commercial Bank Plc. v Martin Musonda and 58 Others**⁹. Similarly, in a recent decision of

this Court in the case of **Dipak Patel v Minister of Finance**¹⁰, we reaffirmed the supremacy of the Constitution by stating as follows:

The first principle, which is settled by the Constitution itself in Article 1 (1) of the Constitution, is that the Constitution is the supreme law of this Country and therefore ranks above all other laws. Every other written law derives its authority from the Constitution and is therefore subject to the Constitution. Any law which is inconsistent with the provisions of the Constitution is void to the extent of its inconsistency.

[41] The principle regarding the supremacy of the Constitution cannot therefore, be over emphasized. We are therefore, well placed to enquire and determine whether or not section 30 of the CCA is inconsistent with the Constitution.

[42] We now turn to the impugned section 30 of the CCA, which provides as follows:

The Court has discretion to award costs in any proceedings under this Act. (Emphasis added).

[43] Section 30 of the CCA enacts that the Court has discretion to award costs, on the other hand, the term 'discretion' is not defined in the Constitution, the CCA, the Constitutional Court Rules (CCR) and the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia. For our purposes, therefore, we will refer to the definition

given by B.A Garner, Black's Law Dictionary (2004) (16th Edition) who define discretion generally as follows:

Involving an exercise of judgment and choice; not an implementation of hard and fast rules; the freedom to decide what should be done in a particular situation....

[44] The Blacks' Law Dictionary further defines '*judicial discretion*' as follows:

The exercise of judgment by a Judge on what is fair under the circumstances. Such an act may only be overturned after a showing of abuse of court.

[45] Judicial discretion as envisaged in section 30 of the CCA therefore, involves the freedom by the judge or court to decide whether to award costs in a particular situation. The only time when judicial discretion cannot be exercised is where a statute specifically removes such discretion.

[46] In order to address the issue of courts exercising discretionary power to award costs, we had a chance to consider how other jurisdictions have dealt with this aspect.

[47] In the South African case of **Affordable Medicines Trust and Others v Minister of Health and Another**¹¹, in considering the exercise of judicial discretion to award costs the court stated *inter alia* as follows:

Its trite law that the court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.

[48] In the Kenyan case of **Brian Asin & 2 others v Wafula W. Chebukati & 9 Others**¹², after extensively referencing the case of **Affordable Medicines**¹¹, Motivo J summed up the fundamental principle underlying the award of costs in the following terms:

The fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion.But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place, the general rule is that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.

[49] What we discern from these authorities is that the discretion to award costs must be exercised judiciously and that as a general rule, costs must be awarded to a successful party. This in fact is what generally prevails in our jurisdiction.

[50] As we determine the question on whether or not section 30 of the CCA, in so far as it confers discretionary power upon this Court to award costs, is ultra vires the provisions of Articles 2, 52 (4), 67 (3), 101 (4), 103 (1) and 128 (3) of the Constitution, we wish to take a look at decisions from outside our jurisdiction and see how they have approached the issue of award of costs in constitutional and public interest litigation.

[51] The Constitutional Court of South Africa in the case of **Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill 1995¹**, cautioned against discouraging persons trying to vindicate their constitutional rights from doing so by the risk of attracting an adverse costs order if they lost the case on the merits. Mohammed DP stated as follows:

A litigant seeking to test the constitutionality of a statute usually seeks to ventilate an important issue of constitutional principle. Such persons should not be discouraged from doing so by the risk of having to pay costs of their adversaries, if the court takes the view which is different from the view taken by the Petitioner.

[52] It is because of this important consideration that the South African Constitutional Court has developed factors that courts should consider in exercising its discretion to award costs in constitutional litigation. In the case of **Ferreira v Levin NO and Others**¹³, the South African Constitutional Court laid down the factors that need to be considered by a court as to whether or not to deprive a victorious party of their costs. These factors include the following: the conduct of the parties; the conduct of their legal representatives; whether a party achieves a technical victory only; and the nature of the litigants and the proceedings.

[53] The Court went on to guide as follows:

The principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They [the factors] offer a useful point of departure. If the need arises the rules may have to be substantially adapted; this however should be done on a case by case basis. It is unnecessary, if not impossible, at this stage to attempt to formulate comprehensive rules regarding costs in constitutional litigation.

[54] In Kenya and Uganda, the general approach to the award of costs in constitutional or public interest litigation is that the courts must be

cautious in awarding costs against litigants who seek to enforce their constitutional rights generally and must not be condemned to costs.

[55] It is also worthy to look into other commonwealth jurisdictions outside Africa on how they have treated the issue of costs with regard to constitutional or public interest litigation. We will briefly look at the United Kingdom, Canada, New Zealand and Australia.

[56] On issue of costs with regard to public interest litigation, in an English case of **R (Corner House Research) v Secretary of State for Trade and Industry**¹⁴ it was stated as follows:

Some of the authorities that we have considered thus far demonstrate a trend towards protecting litigants, who reasonably bring public law proceedings in the public interest, from the liability to costs that falls, as a general rule, on an unsuccessful party.

[57] In Canada, public interest litigation is a factor to be considered in awarding costs. In **Mahar v Rogers Cable Systems Ltd**¹⁵, the court stated as follows:

It is fair to characterise this proceeding as a public interest suit. While the ordinary cost rules apply in public interest litigation, those rules do include a discretion to relieve the loser of the burden of paying the winner's costs and that discretion has on occasion been exercised in

favour of public interest litigants. ... In my view, it is appropriate in this case to exercise my discretion in favour of the applicant and to make no order as to costs. The issue raised was novel and certainly involved a matter of public interest. While I decided the jurisdictional point against the applicant, I am satisfied that the application was brought in good faith for the genuine purpose of having a point of law of general public interest resolved.

[58] In New Zealand, public interest litigation is encouraged *inter alia* by shielding that category of litigants from adverse costs orders where the applications are genuine. In the case of **New Zealand Maori Council v Attorney-General of New Zealand**¹⁶, the Privy Council let the parties keep their own costs even though the appellants had been unsuccessful. This was because the appellants did not litigate for private gain, but in the interests of Taonga, an important part of the heritage of New Zealand and therefore, a public interest litigation.

[59] In the case of **Oshlack v Richmond River Council**¹⁷, the High Court of Australia upheld a decision by the New South Wales Land and Environment Court not to award costs against an unsuccessful litigant as it was a public interest litigation.

[60] We are indeed cognizant of the fact that the above authorities are not binding on this Court. We however, endorse the principles enunciated

therein on how this Court can use its discretionary power to award costs in constitutional litigation as provided for under section 30 of the CCA.

[61] What we discern from the jurisdictions we have looked at is that, the general rule in constitutional and public interest litigation is that, where a litigant brings a case raising an important constitutional and public interest issue, such as testing the constitutionality of a statute as in *casu* and loses the challenge, that litigant should not be condemned in costs.

[62] It is therefore, our considered view that before a court can exercise its discretion to award costs in constitutional or public interest litigation, it must evaluate and satisfy itself that the case is either frivolous or vexatious. It also has to evaluate the conduct of the parties and make a finding whether or not they behaved in a manner justifying a punitive costs order against them. The court when evaluating the award of costs must also be alive to circumstances of each case especially those applications that may on the face of it seem frivolous but are brought in good faith for the genuine purpose of having a point of law of general public interest resolved.

[63] The general approach to the award of costs in constitutional litigation in this Court exists as per section 30 of the CCA. This is different to election petitions handled by the High Court and tribunals as section 109 (1) of the Electoral Process Act (EPA) prescribes circumstances where costs may be awarded. It provides as follows:

Subject to the provisions of this section, costs, charges and expenses of, and incidental to, the presentation and trial of an election petition shall be borne in such manner and in such proportions as the High Court or a tribunal may order and in particular, any costs which in the opinion of the High Court or a tribunal have been caused by any vexatious conduct or by any frivolous or vexatious allegations or objections on the part of the petitioner or of the respondent, may be ordered to be paid by the party by whom such costs have been caused.

[64] It is on the basis of this statutory provision that in the case of **Kufuka v Mundia Ndalamei**¹⁸, we guided and directed that a trial judge must always make a finding as to the erring party before awarding costs.

[65] Coming back to the case at hand, we have addressed our minds to the constitutional provisions which section 30 of the CCA is alleged to contravene. We shall briefly, consider these. Article 2 gives right to any person to defend the Constitution and to resist or prevent its

abrogation. Article 52 (4) allows any person to challenge before a court or tribunal, the nomination of a candidate within seven days of the close of nomination. Article 67(3) allows a person to challenge the enactment of a statutory instrument for its constitutionality within fourteen (14) days of its publication in the Gazette. Article 101 (4), (2) and (5) gives right to any person to petition the Constitutional Court to nullify the election of a presidential candidate. Article 103 entitles any person to petition the Constitutional Court to nullify the declaration of a President-elect. Article 128(3) entitles any person who alleges breach or contravention of the Constitution, to petition this Court.

[66] We agree with the Petitioner that these constitutional provisions give right to any person to defend the Constitution and the right to petition the Constitutional Court where there is an alleged violation of the Constitution. We however, do not agree that section 30 of the CCA, limits the person's right to petition this Court for redress. Section 30 of the CCA, was put in place to give discretion to this Court to order costs for frivolous, vexatious and otherwise mischievous litigation. The Petitioner in fact agrees with this position when he states in his

skeleton arguments at page 27 of the supplementary record of proceedings as follows:

That the Constitutional Court must have power to award costs where there is frivolous, vexatious and otherwise mischievous litigation is not disputed. This power is necessary to protect the due administration of justice by preventing busy bodies clogging up the courts with mischievous litigation. However, the consideration for the exercise of the discretion to award costs in constitutional litigation must be altered to give effect to the entrenched right to defend the Constitution under Article 2 of the Constitution. Section 30 of the CCA does not prescribe how the discretion ought to be exercised to protect the public's right to defend the Constitution and have access to petition the Court under Articles 52 (4), 67 (3), 101, 103 (1) and 128 of the Constitution, where there is an allegation of unconstitutional conduct.

[67] We find, therefore, that section 30 of the CCA gives discretionary power to this Court to award costs as a safeguard to filter frivolous and vexatious litigation, among others. The discretion under section 30 of the CCA must however, be exercised judiciously and where frivolous or vexatious litigation is proved by facts presented an award of costs against an unsuccessful litigant can be ordered. This aligns with the fact that an award of costs in constitutional litigation is a matter, which is in the discretion of the judge or Court. Section 30 of the CCA

underpins this principle. We, henceforth, find that section 30 of the CCA does not contravene the Constitution.

[68] In the premise, we find no merit in the Petitioner's claim to declare section 30 of the CCA as *ultra vires* Articles 2, 52(4), 67(3), 101(4), 103(1) and 128(3) of the Constitution in so far as it confers discretion on this Court to award costs.

[69] Since relief (b) and (c) sought by the Petitioner are contingent on the award of relief (a) in the petition, they naturally fall off as relief (a) has not succeeded.

[70] Before we end, we wish to observe and agree with the Petitioner that in as much as section 30 of the CCA gives this Court discretion to award costs, it is important that rules should be promulgated similar to what is stated under section 109 (1) of the EPA. These rules must include factors to be considered before award of costs such as the conduct of the parties, the conduct of their legal representatives, the nature of the litigants and the nature of the proceedings. These factors will give clarity on the issue of award of costs in this Court.

[71] We order each party to bear their own costs.



P. MULONDA
CONSTITUTIONAL COURT JUDGE



M.S. MULENGA
CONSTITUTIONAL COURT JUDGE



M. MUSALUKE
CONSTITUTIONAL COURT JUDGE



J.Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE