

File

IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT KABWE
(Original Jurisdiction)

2023/CCZ/003

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 1(5) OF THE
CONSTITUTION OF ZAMBIA (AS AMENDED BY ACT NO.
2 OF 2016)

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 128(1)(A) AND
128(1) (B) OF THE CONSTITUTION OF ZAMBIA (AS
AMENDED BY ACT NO. 2 OF 2016)

AND

IN THE MATTER OF: ARTICLE 183(3)(D) OF THE CONSTITUTION OF ZAMBIA
(AS AMENDED BY ACT NO. 2 OF 2016)

BETWEEN:

FREDSON KANGO YAMBA

AND

THE PRINCIPAL RESIDENT MAGISTRATE
ANTI-CORRUPTION COMMISSION
THE ATTORNEY-GENERAL



PETITIONER

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

Coram: Sitali, Mulenga and Musaluke JJC on 21st July, 2023 and on 1st December, 2023

For the Petitioner:

Mr. L. Mwamba and Mr. M. Desai of Messrs
Mwamba & Milan Advocates

For the 1st and 3rd Respondents:

Mr. M. Muchende (SC) Solicitor General and
Mr. C. Mulonda, Principal State Advocate –
Attorney General's Chambers

For the 2nd Respondent:

Ms. G.M. Muyunda, Mr. E. Mbewe, and Mr.
K. Lukama – In House Counsel

J U D G M E N T

Mulenga, JC delivered the Judgment of the Court.

Cases cited:

1. Benjamin Mwelwa v The Attorney-General and 3 Others 2020/CCZ/007
2. Shamwana and 7 Others v The People (1985) Z.R.41 (SC)
3. The People v Wilson Lungu and Others-HPEF/03/2022 (unreported)
4. Savenda Management Services Limited v Stanbic Bank Zambia Limited and Gregory Chifire (SCZ) Selected Judgment Number 47 of 2018
5. Richard Nsofu Mandona v Total Aviation and Export Limited & 3 Others (SCZ) Appeal No. 82 of 2009
6. Bric Back Limited T/A Gamawe Ranches v Neil Kirk Patrick 2021/CCZ/002
7. Lloyd Chembo v Attorney General CCZ Selected Judgment No. 15 of 2018

Legislation referred to:

1. The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016
2. The Anti-Corruption Act No. 3 of 2012
3. The Criminal Procedure Code Chapter 88 of the Laws of Zambia

Other Materials referred to:

1. Halsbury's Laws of England, Criminal Law, Evidence and Procedure Volume 11(1) (2006 Reissue)
2. Black's Law Dictionary 8th Edition

Background

[1]The Petitioner, Fredson Kango Yamba, filed the Petition against the Respondents on 14th February, 2023 alleging that the charge sheet and his attendant criminal prosecution, premised on breach of Article 183 (3)(d) of the Constitution as amended by the Constitution of Zambia

(Amendment) Act No. 2 of 2016 (the Constitution), contravenes Articles 1(5) and 128(1)(a) and (b) of the Constitution.

[2] The Petitioner thus seeks the following remedies:

- (i) A declaration that the charge sheet and attendant prosecution is a violation or contravention of Articles 1(5) and 128(1)(a) and (b) of the Constitution;
- (ii) A declaration that the Subordinate Court does not have jurisdiction to hear and determine matters relating to the interpretation or breach of the Constitution particularly breach of Article 183(3)(d) of the Constitution;
- (iii) An order removing into this Court for the purposes of quashing the indictment/charge and the ongoing criminal prosecution of the Petitioner;
- (iv) Further or other relief the court may deem fit; and
- (v) Costs.

[3] The facts leading to the Petition, as outlined in the Petition and the affidavit verifying facts as well as the Respondents' Answers and supporting affidavits, are not in dispute. These are that the Petitioner is a former civil servant who served as Secretary to the Treasury in the years 2011 to 2021. Sometime in 2022, he was arrested and charged by the 2nd Respondent with one count of willful failure to comply with the law. When he first appeared before the Subordinate Court to take plea, the Petitioner raised a preliminary objection that the charge sheet as it stood did not contain sufficient particulars regarding the law he was

alleged to have breached in order for him to prepare a defence. The preliminary objection was upheld by the court and on 28th November, 2022, the 2nd Respondent amended the charge sheet to read as follows:

Statement of Offence: Willful failure to comply with applicable law and procedure contrary to section 34(2)(b) of the Anti-Corruption Act No. 3 of 2012.

Particulars of the Offence: being that FREDSON YAMBA on a date unknown but between the 1st day of January, 2017 and the 31st day of December, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, being Secretary to the Treasury in the Ministry of Finance, did willfully fail to comply with Article 183(3)(d) of the Constitution of Zambia Amendment Act No. 2 of 2016 being the applicable law relating to the preparation of supplementary estimates of expenditure and the management of funds in authorizing an advance payment of Thirty Three Million Seven Hundred and Fifty Thousand United States Dollars (US\$33, 750,000.00) to China Energy Engineering Group-Hunan Electric Power Design Institute Co. Ltd for the construction of FTJ Chiluba University under the Ministry of Higher Education. (Emphasis added)

- [4] The Petitioner takes issue with the inclusion of the constitutional provision, being Article 183 (3)(d), in the particulars of offence alleging that it contravenes the Constitution as regards the jurisdiction of the Subordinate Court to determine matters relating to the interpretation or breach of the constitutional provision in issue.

[5] In view of the position that we have taken in this matter and for the sake of brevity, we have not outlined oral arguments presented at the hearing.

Petitioner's case

[6] In sum, the Petitioner averred that he has been charged with breaching or violating Article 183 (3) (d) of the Constitution. Consequently, that the Subordinate Court would have to interpret the article in issue to determine whether there was breach or violation of the Constitution. The Petitioner contends that the Subordinate Court does not have jurisdiction to interpret a provision of the Constitution and that doing so will breach Articles 1 (5) and 128 of the Constitution which grants original and final jurisdiction to the Constitutional Court to interpret the Constitution and deal with breach or contravention of the Constitution. The case of **Benjamin Mwelwa v The Attorney General, and 3 Others**¹ was cited in support of the proposition that the interpretation of constitutional provisions falls within the exclusive jurisdiction of the Constitutional Court. Further, that the charge and attendant prosecution is in breach or violation of Article 128 (1) (a) and (b) and amounts to usurping the jurisdiction of this Court under the guise of a criminal prosecution because it relates to the interpretation and contravention of the Constitution.

[7] It was also the Petitioner's position that reference to decisions where courts have referred to constitutional provisions in disposing of cases was a misdirection as the matter at hand involved an alleged breach of the Constitution.

[8] The Petitioner posits that what falls to be considered is whether the matter before the Subordinate Court relates to the Constitution or the interpretation or contravention of the Constitution. The Petitioner proffers that the answer is in the affirmative. Citing Black's Law Dictionary 8th Edition on the meaning of the word 'comply', the Petitioner argues that the charge or statement of offence is willful failure to comply with applicable law and procedure contrary to section 34 (2) (b) of the Anti-Corruption Act No. 3 of 2012 (the Anti-Corruption Act). In the particulars of offence, the applicable law is Article 183 (3) (d) of the Constitution, hence that the Petitioner has been charged with breaching the Constitution. That this amounts to criminalizing a constitutional provision. The Petitioner adds that an examination of Article 183 reveals no penalties, whether civil or criminal, for breach of the said Article and the provision cannot therefore be criminalized. Further, that a criminal prosecution alleging breach of the Constitution usurps the jurisdiction of this Court.

[9] The Petitioner further contends that the statement of offence cannot stand alone from the particulars of offence because it is when the two are read together that they constitute the count or the charge. The case of **Shamwana and 7 Others v The People²** was cited wherein the Supreme Court considered a 'count' to include the statement of offence as read with the particulars of offence, as follows:

To ascertain whether a count is bad for duplicity, it is generally enough to examine the count itself, that is, the count's statement of offence as read with its particulars of offence, it being ordinarily unnecessary to look further than the count itself. (emphasis theirs)

[10] The Petitioner further cites section 134 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia which provides as follows:

"134. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person stands charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

[11] In reliance on section 134, the Petitioner posits that a charge comprises the two elements, namely; the statement of offence and the particulars of offence which are necessary for giving 'reasonable information as to the nature of the offence charged'. It follows therefore, that the Petitioner is charged to have willfully contravened Article 183 (3) (d) of the Constitution. Further, that in determining the charge, the

Subordinate Court would have to interpret the constitutional provision and its contravention when these are outside the jurisdiction of the Subordinate Court.

[12] By way of illustration, the Petitioner submitted that in order to determine the limits of Article 183 (3) (d) in terms of its meaning and boundaries, the Subordinate Court will need to delve into a foray of constitutional interpretation. Additionally, that the alleged failure to comply with the Constitution relates to contravention of the constitutional provision for which the Constitutional Court ought to be moved in accordance with Article 128.

[13] The Petitioner reiterated that the charge and attendant prosecution of the Petitioner on matters relating to the interpretation and contravention of the Constitution is a violation of Articles 1 (5) and 128 (1) (a) and (b) of the Constitution.

1st and 3rd Respondents' case

[14] The 1st and 3rd Respondents' position is that the Petitioner is charged under section 34 (2) (b) of the Anti-Corruption Act which creates the criminal offence of willful failure to comply with applicable law, procedure or guidelines while Article 183 (3) (d) of the Constitution

merely sets out the applicable law in stating the duties which must be complied with by one acting in the capacity of Secretary to the Treasury. Section 34(2)(b) provides that:

(2) A person whose functions concern the administration, custody, management, receipt or use of any public revenue or public property or in whom any public revenue or public property is vested by virtue of that person's position or office, commits an offence if that person-

(b) willfully fails to comply with any law or applicable procedure or guideline relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of public expenditure.

[15] The 1st and 3rd Respondents' further posited that it is settled that not every reference to constitutional provisions raises the need for interpretation or determination of a constitutional violation or breach. It is acknowledged that the Subordinate Court has no jurisdiction to interpret the Constitution and that it was not usurping the jurisdiction of this Court by hearing and determining the criminal charge or proceedings against the Petitioner.

[16] The 1st and 3rd Respondents reiterated that the Petitioner is not charged with breaching Article 183 (3) (d) of the Constitution and further that the said constitutional provision does not create a criminal offence or any offence at all but merely outlines the functions, rule and guidelines that

are applicable to one acting in the capacity of Secretary to the Treasury.
That the statement of offence is the one that sets out the offence and not the particulars of offence.

[17] Reliance was placed on paragraph 1212 of Halsbury's Laws of England, Criminal Law, Evidence and Procedure, Volume 11 (1) 2006 Reissue as stating that:

"Each count of an indictment must commence with a statement of the offence charged, which must briefly describe it. If the offence is created by or under an enactment, the statement must contain a reference to the relevant statutory provision.

After the statement of the offence, particulars of the offence must be set out with such particularity as may be necessary for giving reasonable information as to the nature of the charge. Where the offence is one created by or under an enactment, the particulars must disclose the essential elements of the offence."

[18] Assailing the argument by the Petitioner that it is not legally tenable to sever the particulars of offence from the statement of offence as it is the two read together which constitute the charge, the 1st and 3rd Respondents contend that while the two together comprise the charge, they each play a specific and distinct role and that the particulars of offence do not inform the offence charged but only give particulars of the offence charged. In support of this proposition, reliance was placed on Section 137 (1) (a) (b) and (c) of the Criminal Procedure Code which provides in part that:

“137 (1) (b)and if the offence charged is one created by an enactment, shall contain a reference to the section of the enactment creating the offence;

(c) after the statement of offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary.”

[19] It is proffered that these provisions support the position that the offence is created by section 34 (2) (b) of the Anti-Corruption Act and therefore the contention that Article 183 (3) (d) of the Constitution has been criminalized holds no merit because it is a mere reference.

[20] The 1st and 3rd Respondents further argue that several courts have on occasion interacted with the Constitution while determining matters without declining jurisdiction. The cases highlighted are **The People v. Wilson Lungu and Others**³ and **Savenda Management Services Limited v. Stanbic Bank Zambia Limited and Gregory Chifire**⁴ where reference was made to Articles 180 and 118 of the Constitution, respectively. That the courts did not decline to refer to the Constitution even in light of the provisions of Article 128 of the Constitution. Taking the argument further, it is posited that not every reference to a constitutional provision warrants the interpretative powers of the Constitutional Court as stated by the Supreme Court in **Richard Nsofu Mandona v Total Aviation and Export Limited & 3 Others**⁵. It is

further posited that in the matter at hand, the Subordinate Court would not have to interpret or determine whether Article 183 (3) (d) was contravened because not every reference requires that. Reliance is also placed on the case of **Bric Back Limited T/A Gamawe Ranches v. Neil Kirk Patrick**⁶ in which this Court stated that the mere fact that a relief is provided for by the Constitution does not automatically make an issue into a constitutional matter to be determined by the Constitutional Court. That the reference to the provision in the Constitution which is not ambiguous does not require the Subordinate Court to interpret the Constitution.

2nd Respondent's case

[21] The 2nd Respondent's position is that the Petitioner is charged with an offence contrary to section 34 (2) (b) of the Anti-Corruption Act and the constitutional provision forming part of the particulars of offence is merely an ingredient in proving the offence. It is posited that there is no alleged breach of Articles 1 (5) and 128 (1) (a) and (b) of the Constitution because these articles only relate to purely constitutional issues and the current case did not fall in that category. Further, that these articles do not envisage matters alleging contravention of penal legislation and the charge does not invite the Subordinate Court to

delve into interpretation of Article 183 (3) (d) of the Constitution. That at most, the Court below would pronounce itself on whether or not criminal liability can arise from the alleged willful failure to comply with an applicable law. Further, that Article 128 (1) (a) and (b) does not state that criminal liability cannot arise from alleged non-compliance with a constitutional provision alongside the remedies for breach of the Constitution which may be pursued independently of any criminal proceedings.

[22] The 2nd Respondent acknowledged that Article 183 (3) (d) does not create an offence upon which a charge can be anchored but that in determining the contravention of section 34 (2) (b) of the Anti-Corruption Act, the Subordinate Court will inevitably make observations on Article 183 (3) (d) without encroaching or usurping the jurisdiction of this Court by delving into the substantive construction of the article.

Consideration

[23] We have duly considered the positions advanced by the parties regarding the issues raised in the petition. The Petitioner seeks a declaration that the charge sheet and attendant prosecution is a

violation or contravention of Articles 1(5) and 128(1)(a) and (b) of the Constitution. He further seeks a declaration that the Subordinate Court does not have jurisdiction to hear and determine matters relating to the interpretation or breach of the Constitution particularly breach of Article 183(3)(d) of the Constitution. Article 183 (3)(d) of the Constitution constitutes the office of the Secretary to the Treasury and outlines the duties of the office and specifically provides that:

(3) The Secretary to the Treasury shall-

(d) cause to be prepared annual estimates of revenue and expenditure, supplementary estimates of expenditure and the budget;

[24] Arising from the two reliefs, the main issue for determination is whether the charge sheet and attendant prosecution of the Petitioner before the Subordinate Court violates or contravenes Articles 1(5) and 128(1) (a) and (b) of the Constitution. In other words, the issue is whether the charge sheet or particulars of offence that contain a constitutional provision contravene Articles 1(5) and 128(1) (a) and (b) of the Constitution.

[25] Articles 1(5) and 128(1) (a) and (b) provide as follows:

1. (5) A matter relating to this Constitution shall be heard by the Constitutional Court.

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;

[26] Article 1(5) requires any matter relating to the Constitution to be heard by the Constitutional Court. Article 128 of the Constitution vests original and final jurisdiction on constitutional matters solely in the Constitutional Court, subject only to Article 28. Thus, matters relating to the interpretation, violation and contravention of the Constitution fall within the jurisdiction of this Court.

[27] Therefore, the Constitutional Court has the sole mandate of interpreting constitutional provisions and determining of the breach or contravention of constitutional provisions. It is only the application of constitutional provisions which can be done by all courts as Article 119 of the Constitution requires that all judicial authority be exercised in line with the Constitution and the law as we stated in **Bric Back Limited T/A Gamawe Ranches v Neil Kirk Patrick**⁶.

[28] The Petitioner contends that Articles 1(5) and 128(1)(a) and (b) of the Constitution have been contravened based on the following two

reasons. Firstly, that Article 183(3)(d) of the Constitution being a primary constituent element of the offence that the Petitioner is charged with, means that the Subordinate Court will have to pronounce itself on a constitutional provision, which is a sole preserve of this Court. Secondly, that to allow the charge to remain as is amounts to criminalizing a constitutional provision.

[29] The Respondents, on the other hand, contend that the predicate offence is set out in section 34(2)(b) of the Anti-Corruption Act and that there was a mere reference to Article 183(3)(d) of the Constitution in the particulars of the offence to show the element that was to be complied with. Further, that the reference to the constitutional provision does not amount to criminalizing it.

[30] The Petitioner's contention that the charge sheet and attendant prosecution violates or contravenes Articles 1 (5) and 128 (1) (a) and (b) of the Constitution, is based on the fact that the Subordinate Court will have to pronounce itself on Article 183(3)(d) in the particulars of offence, which issue he contends, is both outside its jurisdiction and amounts to criminalizing a constitutional provision.

[31] This matter brings to the fore the issue of the jurisdiction, processes and procedures of the courts. The Constitution in Part VIII provides for the judicial authority and system of courts including the jurisdiction of the courts. Article 120(1) provides for the composition of the Judicature which includes Superior Courts and Subordinate Courts, among others. In terms of the Constitutional Court and the Subordinate Court, which are in issue, Article 128 outlines the jurisdiction of the Constitutional Court while Article 120(3)(e) provides that the jurisdiction of the Subordinate Court is to be prescribed or provided for in an Act of Parliament.

[32] Thus, as we already observed, matters to do with the Constitution fall within the jurisdiction of the Constitutional Court and as aptly acknowledged by the parties, Article 128(1)(a) and (b) vests the Constitutional Court with original and final jurisdiction in matters relating to the interpretation, violation and contravention of the Constitution.

[33] As regards the Subordinate Courts, in line with the provisions of Articles 120(1) and (3)(e) of the Constitution, the Subordinate Courts Act Chapter 28 of the Laws of Zambia vests jurisdiction in the

Subordinate Courts to determine civil and criminal matters as prescribed therein. The substance of the Petition relates to the criminal proceedings before the Subordinate Court, which has the requisite jurisdiction to hear the criminal matter in issue.

[34] In that criminal matter, we note that the Petitioner stands charged with the offence of willful failure to comply with applicable law and procedure contrary to section 34(2)(b) of the Anti-Corruption Act. In the charge sheet, the particulars of the offence allege that the Petitioner willfully failed to comply with Article 183(3)(d) of the Constitution as the law or applicable procedure or guideline.

[35] In light of the particulars of offence as stated in the charge sheet, the Petitioner contends that the reference to Article 183(3)(d) violates or contravenes Articles 1(5) and 128(1)(a) and (b) of the Constitution and seeks that the charge sheet should consequently be quashed.

[36] In considering this claim, we are mindful that there are prior ongoing criminal proceedings in the Subordinate Court to which the charge sheet relates. There is no dispute that the Subordinate Court before which the Petitioner is arraigned has the requisite jurisdiction to try him for the criminal offence with which he is charged. However, the

Petitioner has taken issue with the reference to the constitutional provision, Article 183(3)(d), in the particulars of offence in the charge sheet. We have examined the Petitioner's affidavit evidence and we note that he did not raise the issue regarding the reference to Article 183(3)(d) of the Constitution in the charge sheet and what that reference entails for the trial court. This would have provided opportunity to the Subordinate Court to consider whether a constitutional issue had arisen which would require referral. This is what is envisaged by Article 128(2) of the Constitution.

[37] We say so bearing in mind that the Constitution, which has arrogated the Constitutional Court with its jurisdiction as well as the Subordinate Court, has specified in Article 128 how matters between the courts will be dealt with whenever a constitutional matter arises. A holistic reading of Article 128 on the jurisdiction of the Court reveals that while clause (3) mandates a person who alleges a contravention of the Constitution to petition the Court, clause (2) categorically provides that where a question relating to the Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court. The Constitution has, therefore, expressly provided how a constitutional question which arises in proceedings before another

court is to be brought before the Constitutional Court. Instead, the Petitioner commenced these proceedings before this Court.

[38] In the case of **Lloyd Chembo v Attorney General**⁷, we stated that there is comity between the courts which demands that matters that are properly and competently before courts must be heard and determined in an orderly and efficient manner by the courts in order to also ensure prudent and responsible use of public resources. Hence, Article 128(2) of the Constitution is clear on what should happen when a constitutional issue arises in any court and provides for a referral of the question or issue to the Constitutional Court.

[39] Article 128(2) of the Constitution provides as follows:

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

[40] Article 128(2) of the Constitution takes care of a scenario where a constitutional issue arises in any court by providing for referral. In such instances, the court, on its own motion or on application by a party, can refer a constitutional question or issue that arises in that court. Where this is done, the referring court must frame the constitutional question or issue for this Court's determination. In exceptional cases where a

party applies and the court declines to refer a question, we guided in our Ruling of 29th January, 2021 in the case of **Bric Back Limited T/A Gamawe Ranches v Neil Kirk Patrick**⁶ at pages R13 and R14 as follows:

Article 128(2) provides for referral 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).

.....

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

[41] Thus, it is only in the circumstance, where the presiding court refuses to make a referral, that a party can directly approach this Court. These processes are imperative to ensure that earlier proceedings that are before courts, such as the Subordinate Court that is exercising its criminal jurisdiction conferred by the law in this case, are not unduly disrupted or affected in a haphazard manner.

[42] In *casu*, the Petitioner has not shown that any of these steps were followed. We note that when the Petitioner first had an issue with the charge, he raised a preliminary objection that was then duly considered by the Subordinate Court. The Petitioner thus ought to have raised the issue regarding the constitutional reference in the charge sheet. In the absence of evidence that he raised this issue before the Subordinate Court, to enable that court to consider whether there was a constitutional issue to be referred to this Court as required by Article 128(2) of the Constitution, the issue regarding the charge sheet cannot competently be considered in these proceedings.

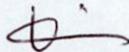
[43] Premised on what has been stated above, we decline to grant the declaration that the charge sheet and attendant prosecution is a violation or contravention of Articles 1 (5) and 128 (1) (a) and (b) of the Constitution. We also decline to grant the declaration that the Subordinate Court does not have jurisdiction to hear and determine matters relating to the interpretation or breach of the Constitution, in particular Article 183 (3) (d), because it would serve no useful purpose in view of our determination that only this Court has the requisite jurisdiction in line with Articles 1 (5) and 128 of the Constitution. Relief

(iii) to (v) which are premised on the first two substantive reliefs consequently fall off.

[44] Accordingly, the Petition fails and is hereby dismissed. Each party is to bear their own costs.



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A.M. SITALI
CONSTITUTIONAL COURT JUDGE



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M.S. MULENGA
CONSTITUTIONAL COURT JUDGE



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M. MUSALUKE
CONSTITUTIONAL COURT JUDGE