

IN THE CONSTITUTIONAL COURT OF ZAMBIA  
HOLDEN AT LUSAKA  
(Constitutional Jurisdiction)

2023/CCZ/0018

IN THE MATTER OF: ARTICLES 1(5), 2, 128, 255(l) AND (m), 256 (c) AND 257 (d) OF THE CONSTITUTION OF ZAMBIA ACT NO. 2 OF 2016

IN THE MATTER OF: SECTION 8 (3) OF THE CONSTITUTIONAL COURT ACT NO. 8 OF 2016

AND

IN THE MATTER OF: ORDER IV RULE 1 OF THE CONSTITUTIONAL COURT RULES, STATUTORY INSTRUMENT NO. 37 OF 2016

AND

IN THE MATTER OF: THE UNLAWFUL AWARD OF TOURISM BLOCK CONCESSIONS IN THE LOWER ZAMBEZI NATIONAL PARK, SOUTH LUANGWA NATIONAL PARK AND KAFUE NATIONAL PARK

AND

IN THE MATTER OF: THE FAILURE BY THE DEPARTMENT OF NATIONAL PARKS AND WILDLIFE TO PROVIDE THE PETITIONER ACCESS TO ENVIRONMENTAL INFORMATION

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 255 (l) and (m), 256 (c), 257 (d) OF THE CONSTITUTION OF ZAMBIA ACT NO. 2 OF 2016 AND SECTION 4 (d), 5 (2) (q), 7 (1) and 29 OF THE ZAMBIA WILDLIFE ACT NO. 14 OF 2015

BETWEEN:

CONSERVATION ADVOCATES ZAMBIA LIMITED

PETITIONER

AND

THE ATTORNEY GENERAL

RESPONDENT



CORAM: Sitali, Mulonda, Musaluke, Mulongoti and Mulife, JJC on 16<sup>th</sup> February, 2024 and 16<sup>th</sup> April, 2024.

For the Petitioner: Mr. D. Ncube and Ms. V. Munasinyungwe of Malisa and Partners Legal Practitioners

For the Respondent: Miss C. Mulenga Acting Chief State Advocate and Miss M. Mwiya Principal State Advocate

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## MAJORITY JUDGMENT

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Sitali JC delivered the majority Judgment of the Court

Cases referred to:

1. Milford Maambo and Others v. the People (2017) 2 ZR 182
2. Public Protector of the Republic of Zambia v Indeni Petroleum Refinery Company, Selected Judgment No. 16 of 2019
3. Zambia National Commercial Bank Plc v Martin Musonda and Others, Selected Judgment No. 24 of 2018
4. Kunda v. Konkola Coppermine's Plc, SCZ Appeal No. 48 of 2005
5. Bizwayo Newton Nkunika v. Lawrence Nyirenda and the Electoral Commission of Zambia, 2019/CCZ/005
6. Joseph Malanji v Charles Abel Mulenga and the Electoral Commission of Zambia, 2021/CCZ/A0021
7. Gervas Chansa v. Attorney General, 2019/CCZ/004

### 1.0 INTRODUCTION AND BACKGROUND

[1.1] By petition filed on 7<sup>th</sup> September 2023, the petitioner, Conservation Advocates Zambia Limited, seeks the following remedies:

- (i) An order that the award of Tourism Block Concessions by the Department of National Parks and Wildlife in the Lower

Zambezi National Park, South Luangwa National Park, Kafue National Park and any other national park in Zambia, without public participation, tendering, adherence to the general management plans and without going through the Wildlife Management Licensing Committee are (sic) unconstitutional and therefore null and void;

- (ii) An order that the adaptive management processes and guidelines issued thereunder, which are employed by the Department of National Parks and Wildlife to award tourism block concessions are unconstitutional and unlawful;
- (iii) An order that all tourism block concessions granted by the Department in breach of the law are null and void, and should be quashed forthwith;
- (iv) An order of stay of any proceedings related to the awarding of tourism block concessions until this matter is disposed of;
- (v) An order that the Department immediately develops and implements general management plans for all game management areas in the country, and that no award of tourism block concessions is done until such general management plans are completed and promulgated;

- (vi) An order that the Department should only award tourism block concessions through the Wildlife Management Licensing Committee and in line with the provisions of the general management plans and the law;
- (vii) An order that the failure by the Department to grant the petitioner access to the requested information is unconstitutional and the Department be ordered to grant the petitioner such access forthwith;
- (viii) That the petitioner may have such further and other reliefs that this Court shall deem fit and just in the circumstances; and
- (ix) Costs.

## **2.0 PETITIONER'S CASE**

[2.1] In its petition and affidavit verifying facts, the petitioner contended that since the transformation of the Zambia Wildlife Authority into the Department of National Parks and Wildlife (henceforth referred to as the Department) in 2015, the Department has by-passed the Wildlife Management Licensing Committee (henceforth referred to as the Licensing Committee) in awarding tourism block concessions (TBCs) in the Lower Zambezi National Park, South Luangwa National Park and the Kafue

National Park (henceforth referred to as the three national parks) and without discernible public participation, contrary to the requirements of the law. Further, that the Department had been allocating new sites in the national parks, for several years, without renewing the general management plans for those national parks and has instead been using adaptive management processes and relying on guidelines formulated under those processes.

[2.2] The petitioner contended that this has led to overcrowding of campsites in the western part of the Lower Zambezi National Park and South Luangwa National Park, with potential adverse effects on the environment which may result in the degradation of natural ecosystems in those national parks.

[2.3] The petitioner further alleged that although it is entitled to access environmental information, the Director of National Parks and Wildlife had not availed to it information on the selection process employed by the Department in awarding the TBCs in the three national parks which its lawyers had requested for in writing.

### **3.0 ALLEGED CONTRAVENTION OF THE CONSTITUTION AND THE LAW**

[3.1] The petitioner thus alleged that the failure by the Department to renew the general management plans for the three national parks is a violation of Articles 255 (l) and 257 (d) of the Constitution read with section 29 of the Zambia Wildlife Act No. 14 of 2015 (henceforth referred to as the Act) which provide for public participation in the development and renewal of general management plans; and that by not renewing the general management plans, the Department had denied the public their right to participate in the management and utilisation of the natural resources in the national parks.

[3.2] The petitioner further alleged that:

- (a) the failure, neglect or refusal by the Department to award tourism block concessions through public tenders and without following the provisions of the general management plans or involving the Licensing Committee violated Article 255 (m) of the Constitution read with sections 2, 5 (2) (q), 7 (1) and (6) and 29 of the Act;

- (b) the refusal by the Department to give the petitioner access to the environmental information requested for contravened Article 255 (m) of the Constitution; and
- (c) the Department's practice of using adaptive management processes, which are not provided for by the Act, in awarding tourism block concessions, without adhering to the guidelines set out in the general management plans and the tender process, violated section 29 of the Act and was unlawful.

[3.3] The petitioner thus prayed that it be granted the remedies it seeks as set out at paragraph 1.1.

#### **4.0 PETITIONER'S ARGUMENTS**

[4.1] In its skeleton arguments, the petitioner argued, in the main, that the Department had contravened Articles 255 (l) and (m), 256 (c) and 257 (d) of the Constitution in the award of tourism block concessions in the Lower Zambezi National Park and the South Luangwa National Park by its failure to follow a process that ensured or encouraged effective public participation in the development of policies, plans and programmes for the utilisation of natural resources and management of the environment as enshrined in the Constitution. The petitioner thus contended that the

matter herein is justiciable as it raises serious constitutional issues that require the interpretation of the Constitution by this Court.

[4.2] The petitioner submitted that in determining the petition, the Court must consider the following questions: whether the Department has the mandate to award tourism block concessions without involving the Licensing Committee; the legal procedure bestowed on the Department, acting through the Licensing Committee, in awarding tourism block concessions to interested parties; whether an expired general management plan can still be relied on until a new general management plan is developed and implemented; whether or not the Department contravened Articles 255(l) and (m), 256(c) and 257(d) of the Constitution; and lastly, what is the effect of the decision of the Department if it is unconstitutional.

[4.3] In answer to the first question, the petitioner submitted that based on the definition of "tourism block concession" given in section 2 of the Act read with section 7(1)(d) of the Act, the authority to award a tourism block concession vests in the Licensing Committee and that the Department has no power to do so. That section 5(2)(q) of the Act which gives the Department power to grant and regulate tourism block concessions is subject to section 7 of the Act which establishes the Licensing Committee. Therefore, that the Department can only issue tourism block concessions

through the Licensing Committee in accordance with a general management plan for a specific area. The petitioner concluded that all tourism block concessions awarded by the Department in the three national parks without the involvement of the Licensing Committee are illegal and therefore null and void.

[4.4] Regarding the procedure to be followed by the Department, in awarding tourism block concessions, the petitioner conceded that the Act does not provide for a specific procedure for the award of tourism block concessions but contended that the Department has exploited the lacuna in the Act by awarding tourism block concessions in an arbitrary and non-transparent manner. The petitioner argued that notwithstanding that the Act does not provide for any procedure, tourism concession agreements ought to be awarded by tender or public auction as the Public Procurement Act No. 8 of 2020 (PPA) regulates procurement procedures for all public entities in Zambia and applies to the award of tourism block concessions.

[4.5]The petitioner submitted that the Department, as a public procuring entity, ought to follow the procedure set out in section 17 of the PPA, which is couched in mandatory terms, in awarding tourism block concessions and not use the adaptive management processes which it purported to have been using. It further argued that any tourism block concession awarded

by the Department in any national park without following the laid down procurement procedure is illegal.

[4.6] Regarding the question whether or not an expired general management plan can be relied on until a new general management plan is developed, the petitioner contended that the Department had been allocating new sites in the three national parks without renewing the general management plans for those parks using adaptive management processes and relying on guidelines formulated within those processes. The petitioner further submitted that the tourism block concession for the Lower Zambezi National Park provides that the expired 2001 general management plan is still in force and therefore binds the parties; and that the Department is therefore obliged to follow it and any last existing general management plan for the Kafue National Park and the South Luangwa National Park, respectively.

[4.7] The petitioner submitted that section 29 of the Act provides that a person who lives in a game management area must comply with the provisions of a general management plan for the game management area. That this means that each game management area must have a general management plan to comply with the Act. The petitioner submitted that in light of the provisions of sections 2 and 5 (2) (a), (h) and (l) of the Act, the

Department cannot control or manage any national park without a general management plan for the national park. That failure to prepare and implement a general management plan for a national park would be ultra vires the Act. For that reason, the petitioner argued that an expired general management plan remains in force until it is renewed or replaced so that there is no gap in the management of the game management area.

[4.8] The petitioner further submitted that the western part of the Lower Zambezi National Park was being over crowded with camping sites, while the small and fragile Busanga Plains in the Kafue National Park were being over developed with numerous safari campus and safari vehicles, leaving vast swathes of the national park undeveloped and unprotected. Furthermore, that the adaptive management approach taken by the Department may cause adverse effects on the environment and lead to degradation of natural resources thus contravening section 3 of the Environmental Management Act No. 12 of 2011. The petitioner contended that the Department must develop a new general management plan for the Lower Zambezi National Park or increase the enforcement of the existing or expired general management plan to address the potential impact of overcrowding in that national park.

[4.9] The petitioner contended that the Department's failure to renew the general management plans for the three national parks is a violation of Articles 255(l) and 257(d) of the Constitution read with section 29 of the Act. That the Constitution is the Supreme law and governs the actions of all institutions including the Department; that any act or omission that contravenes the Constitution is illegal. That the provisions of Articles 255(l) and (m), 256(c) and 257(d) of the Constitution are clear and unambiguous and should be given their plain meanings as was held in the case of **Milford Maambo and Others v the People<sup>(1)</sup>**, **Public Protector of the Republic of Zambia v Indeni Petroleum Refinery Company<sup>(2)</sup>** and **Zambia National Commercial Bank Plc v Martin Musonda and Others<sup>(3)</sup>**.

[4.10] The petitioner submitted that by not renewing the general management plans, the Department has denied the public their right to participate in the management of the national parks and has abdicated its duty to protect the environment and natural resources of Zambia. Furthermore, that the Department's actions or failure to act are both a breach of its statutory duty and a violation of the Constitution. That this Court must therefore intervene and ensure that the Department fulfils its constitutional obligations.

[4.11] The petitioner further submitted that Article 255(m) of the Constitution requires the Department to provide the petitioner access to the documentation relating to the tourism block concessions awarded in the Lower Zambezi National Park and Kafue National Park and does not give the Department discretion to decline to provide such information when it is requested for under that Article. The petitioner urged us to find that the Department's failure to grant it access to the requested information is unconstitutional and order it to avail the requested information to the petitioner.

[4.12] The petitioner further submitted that also in issue in this matter is whether or not the Department contravened Article 256 (c) of the Constitution which confers a duty upon the petitioner to cooperate with the Department to protect the environment and natural resources; and that Article 257 (d) of the Constitution obligates the Department to encourage public participation in the utilization of natural resources and management of the environment. The petitioner argued that the Department issued tourism block concessions in the three national parks without any public tender process, leaving an information gap regarding what procedure was followed in granting the tourism block concessions contrary to Articles 256 (c) and 257 (d) of the Constitution.

[4.13] Regarding the effect of the decision of the Department if it is unconstitutional, the petitioner contended that any act, omission, measure or decision made by the Department which is inconsistent with the Constitution is illegal. That Article 1(2) of the Constitution is crucial for maintaining the rule of law, as it ensures that all laws, actions, and practices within the country are held to the same standard namely, the Constitution. That any decision, action or policy by a State institution that is inconsistent with the Constitution ought to be struck down.

[4.14] The petitioner prayed that it be granted the reliefs it seeks.

## **5.0 RESPONDENT'S CASE**

[5.1] In opposing the petition, the respondent filed an answer and opposing affidavit together with skeleton arguments on 27<sup>th</sup> September, 2023. The respondent asserted at the outset that the Department had not awarded any tourism block concessions in any national park or game management area but had instead granted tourism concession agreements and leased approximately 70 tourism sites for accommodation and other tourism purposes to various operators across the country as part of the national agenda to develop national parks. It averred that it had not exceeded any

limits of tourism sites in any protected area to cause overcrowding resulting in the degradation of natural ecosystems.

[5.2] The respondent asserted that the general management plans for the South Luangwa National Park and Kafue National Park are still valid and that tourism developments had been allowed through tourism concession agreements in zones where developments are permitted. That the Lower Zambezi National Park, however, has no valid general management plan and therefore all site allocations in the Lower Zambezi National Park and game management areas are based on adaptive management processes. That this is because when a protected area has an expired or no subsisting general management plan, the Department is mandated to manage such a protected area using adaptive management processes. The respondent added that the decision to award a tourism site is based on an environmental impact assessment conducted by the Zambia Environmental Agency (ZEMA).

[5.3] The respondent further averred that the Department is mandated to carry out commercial activities related to consumptive and non-consumptive tourism, and in doing so, to carry out activities relating to wildlife conservation and management.

[5.4] The respondent asserted that the Department has not failed to renew general management plans as the process for the review of the general management plan for the Kafue National Park had commenced with the baseline data collected while the review of the general management plan for the South Luangwa National Park will commence in 2024. It further stated that the Government had prioritized the formulation of a general management plan for the Lower Zambezi National Park in the 2024 budget.

[5.5] The respondent denied that the Department had failed or refused to provide the petitioner with access to environmental information and contended that the Department has always availed information to any person or institution that requests for it, as evidenced by the letters that the Ministry of Tourism or the Department wrote to the Tourism Council of Zambia and the Lower Zambezi Tourism Association, who are stakeholders in the area in contention.

[5.6] The respondent also stated that neither the Act nor the general management plans prescribe the procedures for the award of tourism concession agreements and that the Department, therefore, relies on the formulated guidelines to do so. The respondent further stated that a general management plan is formulated through a participatory approach

that involves consultation with all stakeholders on agreed and shared objectives which culminate into what is permissible and prohibited in a protected area.

[5.7] The respondent, thus, contended that the petitioner is not entitled to the reliefs it seeks and urged that the petition be dismissed with costs.

## **6.0 RESPONDENT'S ARGUMENTS**

[6.1] In opposing the petition, the respondent responded, in turn, to each of the questions raised by the petitioner in its skeleton arguments. The respondent submitted that the question whether the Department has the mandate to award tourism block concessions without involving the Licensing Committee is speculative because the Department has not issued any tourism block concessions in any national park or game management area. That the Department has instead granted tourism concession agreements for the lease of tourism sites as part of its statutory function and the national agenda to develop national parks in line with section 5(2) (a) and (d) of the Act.

[6.2] The respondent argued that the petitioner has not produced any proof that the Department has awarded tourism block concession as it alleged nor demonstrated the alleged flaw in procedure; and that it has therefore

not discharged its burden to prove its allegations as was held in the case of **Kunda v Konkola Coppermines Plc**<sup>(4)</sup>. The respondent contended that since the Department has not awarded any tourism block concessions, there is no question to that effect for the Court to determine.

[6.3] Regarding the second question, the respondent reiterated its answer that the general management plans for South Luangwa and Kafue National Parks respectively, are still valid and that tourism developments through tourism concession agreements are permissible. While conceding that the Lower Zambezi National Park has no subsisting general management plan, the respondent argued that where a protected area has an expired general management plan, the Department is mandated to manage such an area through the use of adaptive management processes and guidelines, formulated for such circumstances, in line with the Ministry of Tourism's policy. The respondent reiterated that the Government has prioritised the formulation of a general management plan for Lower Zambezi National Park in the 2024 budget.

[6.4] Regarding the third question, the respondent denied that it has breached Article 256(c) of the Constitution with regard to the protection of the environment and natural resources and Article 257 (d) of the Constitution on public participation. The respondent asserted that the

Department does protect the environment and natural resources as it requires an investor who intends to set up a tourism facility in a national park to conduct an environmental project brief or environmental impact assessment. That this is evidenced by pages 21 and 22 of the Investment Opportunities booklet exhibited to the respondent's affidavit in opposition to the petition.

[6.5] Regarding Article 257 (d), the respondent submitted that the Department does encourage public participation and constantly engages stakeholders in the utilization of natural resources and management of the environment as evidenced by the exhibited documentation. Further, that whereas Article 257(m) of the Constitution provides for the principle of access to environmental information to enable people to preserve, protect and conserve the environment, in this case, the petitioner contended that Article 257(m) of the Constitution requires the Department to provide access to information relating to tourism block concessions awarded in the three national parks. The respondent contended that the provision specifically refers to environmental information and not information on tourism block concessions for specific national parks which, in any case, have not been awarded.

[6.6] With regard to the last question, the respondent submitted that the Department conducts its functions to control, manage, conserve, protect and administer national parks, and game management areas, and to coordinate activities in these areas, in accordance with the Act. That since the Act gives the Department the mandate to enter into agreements to carry out non consumptive commercial activities related to tourism and the power to encourage development of wildlife and regulate tourism block concessions in a tourism block, the awarding of tourism concession agreements is an incidental power of the Department which is necessary for it to carry out commercial activities in terms of section 25 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia.

[6.7] The respondent averred that the Department has not acted unconstitutionally and therefore, the petitioner is not entitled to any of the reliefs it seeks.

## **7.0 PETITIONER'S REPLY**

[7.1] In its reply filed on 4<sup>th</sup> October, 2023, the petitioner asserted that the respondent did not produce the general management plans for South Luangwa National Park and Kafue National Park to substantiate its claim

that the plans had not expired but were still valid as it alleged. It further asserted that the respondent did not dispute that the Department had by passed the Licensing Committee in awarding tourism concession agreements, but conceded that the Department had awarded over 70 tourism sites since the year 2015.

[7.2] Further, the petitioner reiterated that it was a separate and distinct person from the Tourism Council of Zambia and the Lower Zambezi Tourism Association and that the letters written to those stakeholders were not evidence that the respondent had availed the petitioner with environmental information, as it alleged.

## **8.0 PETITIONER'S ARGUMENTS IN REPLY**

[8.1] In reply, the petitioner refuted all of the respondent's arguments and reiterated its arguments in support of the petition. It added that Articles 8 and 9 of the Constitution obligate the Department to conduct itself in accordance with the national values and to adhere to sound principles of good governance when developing and implementing any State policy.

[8.2] It also countered the respondent's argument that if a protected area has an expired or no game management plan, the Department is mandated to manage such a protected area by relying on the adaptive management

processes such as the National Parks and Wildlife Policy exhibited to the opposing affidavit. The petitioner stated that general management plans are provided for by section 5 of the Act and are formulated through public consultation in accordance with Articles 255(l) and 257 (d) of the Constitution. Further, that the provisions of section 5(2) (a), (h) and (i) of the Act do not permit the Department to use adaptive management processes as a policy cannot override the provisions of the Act. The respondent contended that the adaptive management processes are not provided for under the Act and are unconstitutional.

[8.3] The petitioner argued that the petition raises serious questions about the constitutionality of the actions of the Department and seeks the intervention of this Court to uphold the supremacy of the Constitution. The petitioner urged us to hear and determine the petition on its merits and, in support, cited the case of **Bizwayo Newton Nkunika v. Lawrence Nyirenda and the Electoral Commission of Zambia**<sup>(4)</sup> wherein this Court held that the mandate of this Court, when an allegation of the violation or contravention of the Constitution is presented before it, is that the allegation must be heard and determined by this Court on its merit.

[8.4] It reiterated that the Department violated its right to access environmental information as guaranteed by Article 255(m) of the

Constitution and that the Department has no discretion to refuse any person access to such information. The petitioner, thus, urged us to find that the Department violated and contravened the petitioner's right to access environmental information.

[8.5] The petitioner further argued that Article 256 (c) of the Constitution which mandates every person to respect, protect and safeguard the environment is not merely a suggestion or a guideline but is a constitutional duty that binds all individuals, State organs, and State institutions. That the Department, as a State institution, is therefore, obligated to uphold this constitutional provision in all its policies and actions.

[8.6] The petitioner contended that the Department's current policy does not align with the Constitution's mandate to protect the environment and natural resources. Citing the case of **Joseph Malanji v Charles Abel Mulenga and the Electoral Commission of Zambia**, <sup>(5)</sup> the petitioner submitted that the principle reaffirmed therein is that the party asserting a positive claim bears the burden of proof. That in this context, the Department asserted the positive claim that its policy is in line with the Constitution and therefore, has the burden to prove that the policy respects, protects, and safeguards the environment as mandated by Article 256(c) of the Constitution.

[8.7] Lastly, regarding whether the Department had been awarding tourism block concessions or tourism concession agreements, the petitioner submitted that what is defined in the Act is a tourism block concession and reference to a tourism block concession must be taken as a reference to a tourism concession agreement.

## **9.0 TRIAL**

[9.1] At the trial of the petition, Mr. Ncube and Ms. Munasinyungwe, counsel for the petitioner, relied on the petition, affidavit verifying facts and affidavit in reply, and skeleton arguments and list of authorities filed in support of the petition, which they augmented orally. Similarly, Ms. Mulenga, counsel for the respondent relied on the respondent's answer, opposing affidavit, skeleton arguments in opposition and the list of authorities. She too orally augmented the arguments advanced by the respondent in its written arguments. Neither party called any witness.

## **10.0 CONSIDERATION AND DECISION**

[10.1] We have considered the petition, the answer, the affidavits in support of and in opposition to the petition and in reply. We have also considered the skeleton and oral arguments made by the respective parties

in this matter. In determining this petition, we have carefully considered the petitioner's allegations in its petition and examined the remedies it seeks.

[10.2] In the main, the petitioner contends that the respondent, through the Department, has contravened Articles 255(l) and 257(d) of the Constitution, read with section 29 of the Act, by not renewing the general management plans for the three national parks. It contends that the Department has, in so doing, denied the public the right to participate in the decision making process relating to the environment and management and utilisation of natural resources in those national parks.

[10.3] The respondent is further alleged to have contravened Article 255(m) of the Constitution, firstly, by its failure to award tourism block concessions through the Licensing Committee and without adhering to the provisions of the general management plans and the tender process which entail public participation; secondly, by using adaptive management processes which are not provided for in the Act; and thirdly, by its failure or refusal to provide the petitioner with access to environmental information which it had requested for.

[10.4] In addressing these contentions, we have examined the provisions of Articles 255(l) and (m), 256(c) and 257(d) of the Constitution. Article 255(l) and (m) read as follows:

The management and development of Zambia's environment and natural resources shall be governed by the following principles:

- (l) effective participation of people in the development of relevant policies, plans and programmes; and
- (m) access to environmental information to enable people preserve, protect and conserve the environment.

[10.5] Articles 256(c) of the Constitution provides as follows:

**A person has a duty to co-operate with State Organs, State institutions and other persons to –**

- (c) respect, protect and safeguard the environment.**

[10.6] On the other hand, Article 257(d) of the Constitution provides that:

**The State shall, in the utilisation of natural resources and management of the environment -**

- (d) encourage public participation.**

[10.7] It will be observed from the provisions set out above that Article 255 provides for principles of environmental and natural resources management and development. Article 256 provides for protection of the environment and natural resources while Article 257 provides generally for the utilisation of natural resources and management of the environment. These Articles therefore need to be read in light of the provisions of Article

272 of the Constitution which provides for the enactment of legislation to give effect to an Article or a provision of the Constitution. To that effect, Article 272 (f) and (g) which are applicable in this case provide as follows:

**272. Parliament may enact legislation to give effect to an Article or provision in this Constitution which –**

- (f) deals with a specific subject-matter or general matter that would require to be legislated on in order to give effect to the Constitution; or**
- (g) generally requires something to be prescribed.**

[10.8] Thus in order to give effect to the provisions of Articles 255, 256 and 257 of the Constitution, Parliament enacted the Zambia Wildlife Act No. 14 of 2015. The long title of the Act states that the object of the Act is, among other things, to:

**provide for the sustainable use of wildlife and the effective management of the wildlife habit in game management areas; enhance the benefits of Game Management Areas to local communities and wildlife; involve local communities in the management of Game Management Areas; provide for the development and implementation of management plans; provide for the regulation of game ranching; and provide for licensing of hunting and control of the processing, sale, import and export of wild animals and trophies. (Emphasis added)**

[10.9] Section 4 of the Act sets out the principles of wildlife conservation and management which are in line with the principles of environmental and natural resources management and development set out in Article 255 of the Constitution. Section 5 of the Act establishes the Department of National Parks and Wildlife which is responsible for the administration of the Act. The functions of the Department include those set out in section 5(2) (h) and (l) which are to:

- (h) **prepare and implement management plans for National Parks, Community Partnership Parks, bird and wildlife sanctuaries and Game Management Areas in consultation with relevant stakeholders;**
- (l) **formulate and advise the Minister on the regulations for the preparation and implementation of general management plans for National Parks, Community Partnership Parks, birds and wildlife sanctuaries and Game Management Areas.** (Emphasis added)

[10.10] Section 7 of the Act establishes the Wildlife Management Licensing Committee and stipulates its functions which include performing the functions of the Department relating to licensing as stated in section 7(2) (d) of the Act. The Act thus regulates all matters relating to the management, protection and conservation of national parks and wildlife habitat in game management areas.

[10.11] An examination of the provisions of the Act reveals that the issues which the petitioner has raised in its petition are clearly provided for in the Act and can be resolved without reference to the Constitution. We say so because the petitioner's major bone of contention against the respondent is that the Department has awarded tourism block concessions in the three national parks without regard to the provisions of the general management plans, which action has allegedly resulted in overcrowding with possible detrimental effect on the environment and the ecosystems of the three national parks. Section 38 of the Act is instructive as to how such a matter can be dealt with within the provisions of the Act. The section provides that:

**38. (1) A person who has reasonable grounds to believe that a proposed or existing government plan or activity of the Government, an organisation or person may have an adverse effect on wildlife in a National Park, Community Partnership Park, bird or wildlife sanctuary, Game Management Area or open area, may request the Minister through the Director that a wildlife impact assessment be conducted.**

**(2) Where the Minister requires an environmental impact assessment to be conducted, it shall be conducted in accordance with the procedures specified under the Environmental Management Act, 2011, taking into account**

**(a) existing or anticipated impact upon wildlife that may be threatened; and**

- (b) an endangered or endemic species which are or may be affected. (Emphasis added)

[10.12] In the present case, the petitioner contended that the manner in which the Department has been awarding tourism block concessions may have an adverse effect on the national parks and wildlife and may alter the ecosystems in those national parks. A reading of section 38 set out above reveals that the environmental concerns raised by the petitioner can be resolved by the petitioner making a request to the Minister under section 38 of the Act. That concern, therefore, is not a constitutional issue requiring the interpretation of Article 255 (m) or 256 (c ) of the Constitution as the concern can be addressed under section 38 of the Act. Any dispute arising from that concern can be addressed by a court of competent jurisdiction and not this Court.

[10.13] The petitioner has also taken issue with the Department's alleged decision to award tourism block concessions without recourse to the Licensing Committee. It contends that the Department has no power to do so. Our short answer to that assertion is that whether or not the Department has the mandate to award tourism block concessions without the involvement of the Licensing Committee is not a constitutional issue as it is a question that can be resolved by the interpretation of the provisions

of the Act. This is evidenced by the various provisions of the Act which the petitioner cited in its attempt to demonstrate that the Licensing Committee and not the Department has the legal mandate to issue tourism block concessions, namely sections 2, 5(2)(q) and 7(1)(d) of the Act.

[10.14] We are fortified in our conclusion by the petitioner's endeavour to show, in its skeleton arguments, that the functions of the Department as stated in section 5(2)(q) of the Act are subject to the functions of the Licensing Committee set out in section 7(1)(d) of the Act. Since the issue of whether or not the power to issue tourism block concessions is vested in the Licensing Committee and not in the Department and also whether or not the alleged issuance of tourism block concessions by the Department in the three national parks without the involvement of the Licensing Committee is illegal and therefore, null and void, are issues which can be resolved by the interpretation of sections 2, 5(2)(q) and 7(1) (d) and other relevant provisions of the Act, the questions ought to have been raised for determination by a court of competent jurisdiction. This is confirmed by the petitioner's submissions in paragraphs 2.1 to 2.8 of its skeleton arguments in support of the petition.

[10.15] Similarly, the petitioner contended that since 2015, the Department has awarded tourism block concessions in the three national

parks without any evident public participation in the award process, and further that while the Act does not stipulate the procedure to be followed in the award of tourism block concessions, the Department, as a public procuring entity, ought to have awarded the tourism block concessions by way of tender or public auction in terms of section 17 of the PPA. That by failing to follow the tender procedures stipulated for the award of tourism block concessions, and instead, following the adaptive management processes, the respondent has violated the petitioner's constitutional right to participate in the management of natural resources and conservation of the environment. It is the petitioner's contention that the tourism block concessions awarded without following the requirements of section 17 of the Act are illegal.

[10.16] Again, it is evident to us that the issue regarding what procedure ought to have been followed in the award of tourism block concessions by the Department is not a constitutional issue as the Constitution does not stipulate any procedure which the Department ought to follow. If the Department breached tender procedures in terms of the PPA as the petitioner alleged, the right forum before which to raise that issue is not this Court but a court with jurisdiction to determine the correct procedure to be employed in the award of tourism block concessions.

[10.17] The petitioner also complained that the Director of the Department did not avail it the information it had requested for regarding the award of tourism block concessions in the three national parks. In the petitioner's view, the alleged refusal constituted a contravention of Article 255 (m) of the Constitution. Suffice it to state that Article 255 (m) provides for the principle that the management and development of Zambia's environment and natural resources shall be governed by access to environmental information to enable people preserve, protect and conserve the environment, among other principles. The outworking of this constitutional provision is provided for in the Act as a person who is aggrieved by a decision of the Director or the Department may appeal to the Minister in terms of section 146 of the Act. Thus, the Department's alleged failure to avail the petitioner with the alleged environmental information requested for may be resolved by interpretation of the provisions of the Act and is therefore not a constitutional issue.

[10.18] In the case of **Gervas Chansa v Attorney General**<sup>(6)</sup>, we held at page J33 of our judgment that our jurisdiction is confined to determining constitutional questions. We further pointed out that -

**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.** As the learned author Sweet points out in

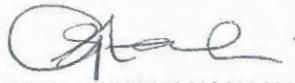
Constitutional Courts, at page 818, of the Oxford Handbook on Comparative Constitutional Law, while constitutional courts possess a monopoly on the power to invalidate unconstitutional acts and statutes, they do not preside over litigation which remains the purview of the ordinary courts. We agree with the learned authors Max du Plessis, Glenn Penfold and Jason Brickhill at page 38 of their text entitled Constitutional Litigation, who relate the ‘constitutional question’ to ‘ripeness’ in the sense that where the issue to be litigated can be resolved without recourse to the Constitution then it is not ripe for constitutional determination. (Emphasis added)

[10.19] We reiterate the above observations in this case and emphasise that it is not within this Court’s jurisdiction, as set out in Article 128 of the Constitution, to preside over litigation which remains within the purview of the ordinary courts; and whose issues are resolvable by interpretation of a statute, as in this case.

[10.20] When the provisions of Articles 255(l) and (m), 256(c) and 257 (d) of the Constitution, which the petitioner alleged were breached by the respondent, through the Department, are read together with the provisions of section 38 and other provisions of the Act, it is evident that the issues raised by the petitioner in its petition do not require interpretation of the Constitution but can be resolved by interpretation of the provisions of the Act. For that reason, we hold that the matters raised in the petition do not

fall within the jurisdiction of this Court. In other words, the petitioner's contentions in its petition do not raise constitutional issues for our determination. The petition is accordingly dismissed.

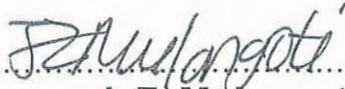
[10.21] Each party shall bear its own costs.



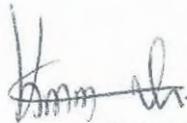
.....  
**A. M. Sitali**  
**CONSTITUTIONAL COURT JUDGE**



.....  
**P. Mulonda**  
**CONSTITUTIONAL COURT JUDGE**



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**J. Z. Mulongoti**  
**CONSTITUTIONAL COURT JUDGE**



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**K. Mulife**  
**CONSTITUTIONAL COURT JUDGE**

MUSALUKE, JC., dissenting

**THE CONSTITUTIONAL COURT OF ZAMBIA**

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2023/CCZ/0018

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CONSERVATION ADVOCATES ZAMBIA LIMITED

v

THE ATTORNEY GENERAL

JUSTICE MUSALUKE, dissenting in the judgment.

**Cases referred to:**

1. Communication of Kenya & 5 others v Royal Media Services Limited & 5 others, Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated) Judgment of the Supreme Court (2014) eKLR 256-258
2. The Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v Nigeria Comm. 155/96 (ACmHPR, Oct. 27, 2001)
3. Lopez Ostra v Spain [1994] ECHR 46
4. Guerra and Others v Italy [1998] ECHR 7
5. Hatton and Other v United Kingdom [2003] ECHR 338

**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 Zambia Wildlife Act No. 14 of 2015
3. The Environmental Management Act No. 12 of 2011

**International treaties referred to:**

1. Limburg Principles on the Implementation of the International Covenant on Social, Cultural and Economic Rights 1987
2. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 1997
3. Rio Declaration on the Environment 1992

**Publications referred to:**

1. Ochieng K W., From constitutional avoidance to the primacy of rights approach to adjudication in Kenya: A case study of the interplay between constitutional rights and the law of contract *Kabaraj Journal of Law and Ethics*, Vol 6 (2022)
2. Picolotti R and Taillant JD (eds) *Linking Human Rights and the Environment* (University of Arizona Press Tucson Arizona 2003)
3. Du Plessis A, Public participation, Good Environmental Governance and fulfilment of environmental rights *PER* vol.11 n.2 Potchefstroom Jan. 2008.

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[1] I have read the majority judgment and I have discerned that it heavily weighs towards the doctrine of constitutional avoidance. This doctrine entails that a court should not reach out to decide a constitutional issue if it can be resolved by the application of a statute, the common law, or customary law. By virtue of this principle, a court will not determine a constitutional issue, when a matter may properly be decided on another basis.

[2] To put emphasis to this doctrine, in the Kenyan case of **Communication of Kenya & 5 others v Royal Media Services Limited & 5 others**<sup>1</sup>, the Supreme Court when discussing the avoidance doctrine had the following to say:

**The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.**

In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court KetrIDGE AJ, articulated the principle of avoidance in his minority judgment as follows [at paragraph 59]: 'I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'

Similarly, the US Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v Tennessee Valley Authority*, 297 US 288, 347 (1936)).

From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.

- [3] The learned author Walter Khobe Ochieng in his article, "*From constitutional avoidance to the primacy of rights approach to adjudication in Kenya: A case study of the interplay between constitutional rights and the law of contract*," writes in reference to the constitutional avoidance principle that it is the norm that a litigant cannot directly invoke the Constitution (through a constitutional petition) to extract a right he or she seeks to enforce without first either predicating the case on a legislation that is a normative derivative of the Constitution, or challenging the constitutionality of such a derivative statute.

[4] I agree with the doctrine of constitutional avoidance. My point of departure to that doctrine in this matter is that the Constitution has brought in an obligation that values and principles must be protected.

Article 118 (2) (f) provides as follows:

**118 (2) In exercising judicial authority, the courts shall be guided by the following principles:**

**(f) the values and principles of this Constitution shall be protected and promoted.**

[5] Further, Article 267 (1) of the Constitution provides as follows:

**267 (1) This Constitution shall be interpreted in accordance with the Bill of Rights and in a manner that—**

**(a) promotes its purposes, values and principles;**

**(b) permits the development of the law; and**

**(c) contributes to good governance.**

[6] These two Articles therefore, offer the promise of transformative adjudication in our jurisdiction. The learned author Ochieng, argues and I agree that instead of avoiding constitutional issues by applying the doctrine of avoidance, all legal issues including the interpretation and application of legislation are ultimately constitutional. This is so because constitutional rights give shape and color to the law. The adjudication of constitutional rights whenever they arise reinforce the principle of the primacy of constitutional rights approach over constitutional avoidance doctrine.

[7] Who else apart from this Court ought to protect the values and principles enshrined in the Constitution? If a value or principle of the Constitution is violated, should that not be the preserve of this Court to deal with as obligated by Article 128 of the Constitution? It is with this in mind that I feel beholden to write a dissent in judgment so that I can deal with the alleged violations of the constitutional principles provided for under Articles 255 and 257 of the Constitution and in line with the dictates of Articles of 118 (2) (f) and 267 (1) of the Constitution which oblige me to protect and promote the values and principles of the Constitution. This is indeed breaking away from the established doctrine of constitutional avoidance as elucidated in the majority judgment.

[8] That said, it is my considered view that in the petition before us, the Court needed to resolve three questions as outlined at paragraph 3.2 of the majority judgment as follows:

- a) Whether or not the Department of National Parks and Wildlife (DNPW) has been issuing Tourism Block Concessions (TBCs) while bypassing the Wildlife Management Licensing Committee (WMLC) and without public participation, thereby contravening Article 255 (l) and (m) of the Constitution as read with sections 2, 5(2) (q), (7(1) and (6) and 29 of the Zambia Wildlife Act (ZAWA Act).

- b) Whether or not the allocation of new sites by the DNPW on the expired General Management Plans (GMPs) for Lower Zambezi National Park, South Luangwa National Park and the Kafue National Park, respectively, without public participation is a contravention of Articles 255(l) and 257(d) of the Constitution as read with section 29 of the ZAWA Act.
- c) Whether or not the failure or refusal by the DNPW to provide the Petitioner with access to environmental information upon request is a contravention of Article 255(m) of the Constitution which guarantees members of the public the right of access to information.

I, will deal with these questions seriatim.

I

[9] The first question raised by the Petitioner is whether the DNPW has been issuing TBCs while bypassing the WMLC and without public participation, thereby contravening Article 255 (l) and (m) of the Constitution as read with sections 2, 5(2) (q), (7(1) and (6) and 29 of the ZAWA Act. Like the majority, I find that this issue does not breach the Constitution but I do so for different reasons.

[10] In order to answer this question, I have to inevitably consider the relevant legislation that deals with Wildlife and National Parks in Zambia in line with the principle that the Constitution should not be read in isolation.

[11] The Petitioner asserts that the Respondent has been issuing Tourism Block Concessions (TBCs) but the Respondent has denied this assertion by stating that the DNPW has only been issuing Tourism Concession Agreements (TCAs). A perusal of the interpretation section of the ZAWA Act, reveals that it makes no mention of the TCAs. The ZAWA Act only makes mentions of the TBC, which has been defined as *“an authority, given by the Committee for a specific period of time, to conduct non-consumptive tourism within a tourism block”*. The term ‘Committee’ is further defined to mean “the Wildlife Management Licensing Committee appointed under section seven.

[12] On the question as to who has the power to grant the TBCs, section 5 of the ZAWA Act, which sets up the DNPW and provides for its functions in section 5(2), whose functions is highlighted in section 5(2) (q), is to *“grant and regulate tourism block concessions”*. Further, section 7(1) which establishes the Wildlife Management Licensing Committee, states that the Committee has powers to consider applications for licenses, permits and certificates and grant, renew or refuse to grant or renew licences, permits and certificates. It is clear

from the combined import of the above provisions that the grant of TBCs is done by the DPNW in conjunction with the WMLC.

[13] The question then, is whether or not there is a breach of Article 255(l) and (m) of the Constitution in the manner the TBCs are granted. Article 255 (l) and (m) of the Constitution provides for Principles of environmental and natural resources management and development as follows:

**The management and development of Zambia's environment and natural resources shall be governed by the following principles:**

**(l) effective participation of people in the development of relevant policies, plans and programmes; and**

**(m) access to environmental information to enable people preserve, protect and conserve the environment.**

[14] Although the ZAWA Act states that the DNPW and WMLC have the power to grant and regulate TBCs, there is no provision in the Act that stipulates the procedure to be followed or the manner in which the TBCs must be granted. The Respondent in fact has argued that neither the Act nor the General Management Plans prescribe procedures for award of the Concessions as such that the Department relies on formulated internal guidelines.

[15] The absence of any laid down procedure as to the manner that TBCs must be granted, makes it difficult for this Court to ascertain the

alleged flaw in procedure to constitute breach of Article 255 (l) and (m) of the Constitution as read with sections 2, 5(2)(q),7(1) and (6) and 29 of the ZAWA Act. The Petitioner has also not adduced any evidence before this Court proving to whom the TBCs were unlawfully issued, thereby making the Petitioners' assertions speculative and not factual. Like the majority, I, thus find that the alleged constitutional breach lacks merit and should be dismissed.

## II

[16] The second question is whether or not the allocation of new sites by the DNPW on the expired General Management Plans (GMPs) for Lower Zambezi National Park, South Luangwa National Park and the Kafue National Park respectively without public participation is a contravention of Articles 255(l) and 257(d) of the Constitution as read with section 29 of the ZAWA Act.

[17] The Respondent has argued that the GMPs for South Luangwa and Kafue National Parks were still valid, while the Lower Zambezi National Park has no subsisting GMP. It was argued that where a protected area has an expired GMP or lacks a subsisting GMP, the DNPW is mandated to manage such a protected area by relying on the Adaptive Management Process (AMPs) by relying on guidelines

for such circumstances and that this was done in line with the ministerial policy.

[18] The term General Management Plan has been defined in the interpretation section of the ZAWA Act as *“a document that sets out the basic management and development philosophy for a protected area and provides strategies for addressing problems and achieving identified management objectives”*. Section 5(d) and (h) which provides for the functions of the DNPW states as follows:

**Subject to the other provisions of this Act, the functions of the Department are to -“5(d) encourage the general development of National Parks, Community Partnership Parks, bird and wildlife sanctuaries and Game Management Areas, including the development of facilities and amenities within these areas in accordance with the management plans for those areas;**

**(h) prepare and implement management plans for National Parks, Community Partnership Parks, bird and wildlife sanctuaries and Game Management Areas in consultation with relevant stakeholders;**

[19] Section 29 of the ZAWA Act further states that:

**A person who settles or lives in a Game Management Area shall comply with the provisions of a general management plan for the Game Management Area.**

[20] It is clear from the above provisions that the GMPs are provided by law and formulated in consultation with relevant stakeholders. It is also clear from the provision of sections 5 and 29 of the ZAWA Act

that settlement and development of National Parks, Community Partnership Parks, birds and wildlife sanctuaries and Game Management Area must comply with the provisions of the said General Management Plan. It follows therefore, that allocation of sites in National parks cannot be done on expired or non-existent GMPs.

[21] The Petitioner attached two GMPs for South Luangwa and Kafue National Parks which were implemented in 2011, for a period of 10 years (2011-2020), which GMPs were subsisting during the period of the alleged contravention of the Constitution, but that have since expired as at the year 2020. The evidence further shows that the Lower Zambezi National Park has had no subsisting GMP and that site allocations are based on internal guidelines for site allocation. The Respondent has argued that where a protected area has an expired or lacks a subsisting GMP, the DNPW is mandated to manage such a protected area by relying on the Adaptive Management Process (AMPs) an ad hoc measure.

[22] This question brings the issue of public participation in management of the country's environment and natural resources. Article 255 (l) reinforces this aspect and provides as follows:

**255. The management and development of Zambia's environment and natural resources shall be governed by the following principles:**

(l) effective participation of people in the development of relevant policies, plans and programmes;

Further, Article 257 (d) provides as follows:

**257. The State shall, in the utilisation of natural resources and management of the environment—**

**(d) encourage public participation.**

[23] What then does it entail to have public participation of the people in the development of relevant policies, plans and programs touching on the environment? And why is it the responsibility of the State to encourage public participation in the utilization of natural resources and management of the environment?

[24] According to Du Plessis in his article entitled: *Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights*, public participation in environmental decision making relates to the notion of participatory democracy and environmental justice. It is therefore, important to look at the environmental rights as forming part of the broader aspect of human rights for us to appreciate why public participation for decisions made under this umbrella is cardinal. Du Plessis, further argues that the scope of environmental rights extend beyond peoples natural environment but also includes aspects such as cultural heritage, human habitat and health.

[25] The learned authors Picolotti and Tailland in their article entitled; *Linking Human Rights and the Environment* define participation as a real involvement of all social actors in social and political decision-making processes that potentially affect the countries in which they live and work. It is also defined as an interaction between the government and civil society including the process by which government and civil society open dialogue, establish partnerships, share information and otherwise interact to design, implement and evaluate development policies, projects and programs.

[26] Public participation of communities in decision making therefore, enhances democracy. The link between public participation in environmental decision making, cannot be over emphasized as it is clearly provided for under Articles 255 (l) and 257 (d) of the Constitution.

[27] At international level, the Limburg Principles on Implementation of the International Convention on Social, Cultural and Economic Rights of 1987 (*The Limburg Principles*), the Maastricht Guidelines on Violation of Economic, Social and Cultural Rights of 1997 (*The Maastricht Principles*) and the international law jurisprudence provide

that fulfilment of environmental rights require public participation in decisions related to issues covered by these rights.

[28] The cases of **The Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v Nigeria<sup>1</sup>**, **Lopez Ostra v Spain<sup>2</sup>**, **Guerra and Others v Italy<sup>3</sup>** and **Hatton and Other v the United Kingdom<sup>4</sup>** are good examples that outline the duties of governments to address rights arising from environmental rights and the importance of public participation in environmental decision making.

[29] It is therefore, the duty of the judiciary and in particular this Court to strengthen the aspect of public participation in the development of relevant policies, plans and programs touching on the environment. It is also the duty of the public to take the Government and State institutions to task so that they take the responsibility to encourage public participation in the utilization of natural resources and management of the environment. Case law should therefore, serve to show that the judiciary is alive to the need of public participation in environmental decision making as it is constitutionally entrenched and this assonances with the constitutional right to freedom of expression. This is based on the strength of Articles 255

(l) and 257 (d) of the Constitution, International treaties and international jurisprudence on protection of environmental rights.

[30] The constitutional framework on encouraging public participation in environmental decision making in Zambia is not only entrenched in the Constitution but also supported by *inter alia*, the Environmental Management Act No. 12 of 2011 which at section 91 provides as follows:

**91. (1) The public have the right to be informed of the intention of public authorities to make decisions affecting the environment and of available opportunities to participate in such decisions.**

**(2) The public shall have the right to participate in decisions concerning the formulation of environmental policies, strategies, plans and programmes and to participate in the preparation of laws and regulations relating to the environment.**

**(3) The Agency and the appropriate authorities shall establish mechanisms to collect and respond to public comments, concerns and questions relating to the environment including public debates and hearing.**

[31] This entails that the constitutional right for public participation has been enhanced and places the duty on the State to consult local communities on decisions touching on their environmental rights. Members of the communities have the right to contribute to decision making processes.

[32] That said, a perusal of the ZAWA Act reveals that it makes no mention of the AMPs, there is no provision that states that the DNPW is mandated to manage the protected areas using the AMPs. The said AMPs (internal guidelines) have no legal basis and cannot be relied upon in the allocation of sites. This should collectively be done with the consultation of the public. AMPs therefore, offend Articles 255(I) and 257(d) of the Constitution and section 91 of the Environment Management Act which provide for public participation of the people in the development of relevant policies, plans and programmes affecting the environment.

[33] In view of the above, the use of the AMPs in site allocations in as far as it does not promote public participation is in breach of Articles 255(I) and 257(d) of the Constitution. These actions by the DNPW are therefore, unconstitutional.

### III

[34] The last question to be considered is whether or not the failure or refusal by the DNPW to provide the Petitioner with access to environmental information upon request is a contravention of Article 255(m) of the Constitution which guarantees members of the public the right of access to environmental information.

[35] I have argued in the preceding paragraphs and found that lack of public participation in environmental decision making contravenes Articles 255 (l) and 257 (d) of the Constitution. There is a link between public participation on environmental decision making and access to environmental information as no meaningful participation can occur without appreciation of the scope of decisions being made by the authorities through information sharing.

[36] Article 255 (m) provides as follows:

**The management and development of Zambia's environment and natural resources shall be governed by the following principles:**

**(m) access to environmental information to enable people preserve, protect and conserve the environment**

[37] This principle should not be looked at in vacuum but be actualized and once violated, this Court is mandated to call it. That is why the Rio Declaration and chapter 23 of the Agenda 21 (Zambia became a signatory to the Rio Convention on 11<sup>th</sup> June 1992 and ratified it in March 1993) explicitly calls for access to information on the environmental development. If there is no access to environmental information, there will be no public participation as envisaged by Article 255 (l) and 257 of the Constitution and there will

be no accountability by decision makers. Ultimately, violation of the Constitution and the Rio Declaration occurs.

[38] Article 1(3) of the Constitution, states that the Constitution binds all persons in Zambia, State organs and State institutions. Thus, the principles enunciated in the Constitution ought to be binding on all persons, state organs and state institutions. Article 255 (m) of the Constitution guarantees access to information to enable people, preserve, protect and conserve the environment. Protection of the environment through access to information to the public cannot be overemphasized with the all to see effects of climate change. Only when people have access to environmental information will they be able to actively participate and help preserve the environment they live in.

[39] This Court should therefore, make the Respondent accountable for failing to follow the letters of the Constitution on this important aspect of public participation and access to environmental information in the management of the environment and natural resources. We cannot therefore, over-rely on the doctrine of constitutional avoidance as it deprives this Court its transformative dispensation to guide the nation and courts below on important constitutional issues. The

principles as espoused in Articles 255 and 257 of the Constitution as regards the environment and natural resources must be upheld by all persons including State organs and institutions. The Constitution is value and principles based and it envisages that all legal rules sourced from statutes, common law, or customary law will be developed to ensure conformity and consistency with its principles and value order.

[40] Thus, the failure by the DNPW, as a State institution, to avail the Petitioner the environmental information requested for in their letters dated 2<sup>nd</sup> and 26<sup>th</sup> June, 2023 challenges the principle that guarantees access to environmental information as enshrined in Article 255 (m) of the Constitution and therefore, its actions are unconstitutional.

[41] To the extent that I have indicated in this judgment, it is my considered view that the Petitioner's petition has merit as the Respondent's actions are in breach of Articles 255 (l) and (m) and 257 (d) of the Constitution and therefore, unconstitutional. I order each party to bear own costs.

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M. Musaluke  
CONSTITUTIONAL COURT JUDGE