

IN THE CONSTITUTIONAL COURT OF ZAMBIA 2017/CCZ/0010  
AT THE CONSTITUTIONAL REGISTRY  
HOLDEN AT LUSAKA  
(Constitutional Jurisdiction)



IN THE MATTER OF: ARTICLE ~~128~~ (1), (3) AND AS READ TOGETHER WITH ARTICLE 1 (5) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016. THE JURISDICTION OF THE CONSTITUTIONAL COURT

IN THE MATTER OF: ARTICLE 1 (2) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016. THE CONTRAVENTION OF THE CONSTITUTION IS ILLEGAL

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

IN THE MATTER OF: ARTICLE 22 (1) (C) OF THE 1996 ZAMBIAN CONSTITUTION OF THE LAWS OF ZAMBIA. FREEDOM OF MOVEMENT

IN THE MATTER OF: SECTION 55 OF THE SUBORDINATE COURT ACT, CHAPTER 28 OF THE LAWS OF ZAMBIA. THE PROTECTION OF THE MAGISTRATE FROM ACTIONS.

IN THE MATTER OF: REGULATION 34 OF THE JUDICIAL SERVICE COMMISSION REGULATIONS, 1998 STATUTORY INSTRUMENT NO. 8 OF THE JUDICATURE ADMINISTRATION ACT. SUSPENSION OF JUDICIAL OFFICER.

IN THE MATTER OF: ARTICLE 122 (1) AND (2) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016. FUNCTIONAL INDEPENDENCE OF JUDICIARY.

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 122 (1), (2) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016, ARTICLE 22 (1) (C) OF THE 1996 CONSTITUTION,

SECTION 55 OF THE SUBORDINATE COURT ACT, CHAPTER 28 OF THE LAWS OF ZAMBIA AND REGULATION 34 OF THE JUDICIAL SERVICE COMMISSION REGULATIONS, 1998 STATUTORY INSTRUMENT NO. 8 OF THE JUDICATURE ADMINISTRATION ACT.

BETWEEN:

BENJAMIN MWELWA

PETITIONER

AND

ATTORNEY GENERAL

RESPONDENT

Before Justice P. Mulonda, in Chambers, on the 28<sup>th</sup> day of September, 2017

For the Appellant:

Mr. M. Cheelo of Messrs Mak Partners

For the Respondent:

Ms. L. Shula of Attorney General Chambers

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**RULING**

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AUTHORITIES & MATERIALS REFERRED TO:

1. Wilson Mwenya v. Nkandu Luo and The Attorney General 2017/CCZ/009
2. Henry Kapoko v. The People 2016/CCZ/0023 Selected Judgment No. 43
3. Godfrey Malembeka v. The Attorney General & Electoral Commission of Zambia - Selected Judgment No. 34 of 2017
4. Milford Maambo & 2 others v. The People - Selected Judgment No. 31 of 2017
5. Mutembo Nchito v. The Attorney General 2016/CC/0029
6. Sydney Chisanga v. Davies Chisopa & 2 Others- 2016/CC/A46

LEGISLATION REFERRED TO:

1. The Constitution of Zambia, (Amendment) Act No. 2 of 2016



2. **Constitutional Court Rules Act, S.I. No. 37 of 2016**
3. **The White Book, 1999 Edition**

The respondent in this matter raised a preliminary issue on two points of law, both of which border on the jurisdiction of this court. The first issue was whether or not this court had jurisdiction to hear and determine a Petition which sought to challenge the legality and constitutionality of the Petitioner's suspension from employment. The second issue was whether or not this Court was clothed with the requisite jurisdiction to hear a Petition attempting to enforce rights and freedoms under the Bill of Rights. In raising the preliminary issue which was filed into court on 26<sup>th</sup> September, 2017, reliance was made on the provisions of **Articles 28 and 128 of the Constitution of Zambia, (Amendment) Act No. 2 of 2016**.

To support this application, the learned counsel for the respondent, Ms. Shula, relied on the Affidavit in Support of the application and the List of Authorities filed. The core of the application stemmed from the reliefs sought by the Petitioner in the main matter which are listed in the respondent's Affidavit as follows:-

- a. **A declaration that the decision to suspend the petitioner made on 9<sup>th</sup> August, 2016 by the Acting Chief Registrar (Hon.**

**Charles Kafunda) is illegal and unconstitutional ab initio and therefore it must be expunged from the petitioner's employment file;**

- b. **An interim order allowing the petitioner to go out of Zambia and attend inter alia seminars, workshops and lectures;**
- c. **Damages for illegal suspension and embarrassment which are:**
  - i. **Punitive damages; and**
  - ii. **Ordinary damages**
- d. **Damages for the professional reputation damage, odium, anguish and torture caused during the period of suspension.**

It was the respondent's argument that from the reliefs sought, it was clear that the Petitioner was attempting to challenge two specific issues, namely, his suspension from employment by his employer and the enforcement of his rights under the Bill of Rights relating to the restriction of his freedom of movement by his employer. It was argued that this Court is clothed with very specific jurisdiction and that those two issues were not within the said jurisdiction of this court.

In cementing her argument, counsel for the respondent cited the provisions of **Article 128 of the Constitution of Zambia (Amendment) Act No. 2 of 2016** which reads as follows:

**"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 violation or contravention of this Constitution;**
- (c) A matter relating to the President, Vice-President or an election of a President**
- (d) Appeals relating to election of Members of Parliament and councilors; and**
- (e) Whether or not a matter falls within the jurisdiction of the Constitutional Court."**

The provisions of **Article 28 of the Constitution of Zambia** were further cited as they specify how rights under the Bill of Rights ought to be dealt with. Article 28 (1) reads as follows:

**"28 (1) Subject to Clause (5), if any person alleges that any provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall;**

- (a) Hear and determine any such application;**
- (b) Determine any question arising in the case of any person which is referred to it in pursuance of clause (2);**

**and which may, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive."**



Further, counsel for the respondent referred this Court to the matter of **Wilson Mwenya v. Nkandu Luo and The Attorney General – 2017/CCZ/009** where we aptly addressed the issue of jurisdiction under the Bill of Rights. In that matter we ruled that Article 28 of the Constitution was clear in as far as the enforcement of rights and freedoms under the Bill of Rights were concerned and that those were proper matters for the High Court's constitutional jurisdiction. Counsel went on to cite the case of **Henry Kapoko v. The People – 2016/CC/0023 – Selected Judgment No. 43** where we similarly held that by virtue of Article 128 (1) (a), it was the preserve of this Court to interpret the Constitution other than the Bill of Rights. Lastly, the respondent urged this Court to dismiss the petition for want of jurisdiction with costs.

In responding to the preliminary issue, counsel for the petitioner, Mr. Cheelo, filed on 2<sup>nd</sup> October, 2017 an Affidavit in Opposition to the notice of intention to raise preliminary issue on a point of law and skeleton arguments which he relied on. The gist of the Petitioner's opposition was that the petition was properly before this

court as the Petitioner's suspension from employment emanated from his referral of a matter to this Court for constitutional interpretation as per the requirement in **Article 128 (2)** of the **Constitution of Zambia (Amendment) Act No. 2 of 2016**.

In responding to the preliminary issue on the jurisdiction of this court to hear a petition attempting to enforce rights and freedoms under the Bill of Rights, counsel for the Petitioner submitted that this court had jurisdiction to hear the petition and all the reliefs sought by the petitioner in *toto*. It was contended that **Article 128 (1) (a), (b) and (e) of the Constitution** were instructive on the jurisdiction of this court and that this court's jurisdiction extended to any matter relating to the violation or contravention of the Constitution.

Counsel for the Petitioner conceded to this court's holding on jurisdiction under the Bill of Rights in the case of **Wilson Mwenya v. Nkandu Luo and The Attorney General** as cited by the respondent. Counsel however went on to distinguish the said case with the petition in *casu*, by stating that the Petitioner in this case

sought among other reliefs an auxiliary relief. The case of **Godfrey Malembeka v. The Attorney General & The Electoral Commission of Zambia – Selected Judgment No. 34 of 2017** was cited to support the above position. It read in part on pages 34 and 35 that;

**“...We have previously guided that actions relating to the enforcement of the rights and freedom contained in part III of the Constitution must be commenced in the High Court.”**

With the above in mind, it was submitted that where a petitioner sought various reliefs and some of those reliefs fell under part III of the Constitution, the court ought to allow the matter to proceed to trial and consequently dismiss only those claims that fell under the Bill of Rights. It was the Petitioner’s prayer that this matter be allowed to proceed to trial and that in the alternative, if this Court finds that it does not have jurisdiction to hear matters relating to Article 22 of the Constitution, then this Court should refer only those matters to the High Court for determination and proceed with the rest of the petition.

In proceeding with the submission, a brief background to the



matter was given. Counsel for the petitioner indicated that the petitioner who was a judicial officer (Magistrate) in exercising his duties under the provisions of **Article 128 (2) of the Constitution**, referred to this Court the case of **Milford Maambo and 2 others v. The People– Selected Judgment No. 31 of 2017** for interpretation on the powers of the Director of Public Prosecution in relation to the provisions of the **Constitution of Zambia (Amendment) Act No. 2 of 2016**. The said constitutional interpretation was subsequently rendered by this Court. Counsel submitted that the judicial function of referring the matter to this Court resulted in the petitioner's suspension by his employer's agent, the Acting Chief Registrar, Mr. C. Kafunda. That the said act violated the independence of the judiciary as provided in **Article 122 (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016**. The said Article reads as follows:

**“A person and a person holding a public office shall not interfere with the performance of a judicial function by a judge or judicial officer.”**

In support of the above submission, **Article 128 (3) (c) of the Constitution of Zambia (Amendment) Act No. 2 of 2016** was

cited which provides:

**“Subject to Article 28, a person who alleges that an action, measure or decision by a person or an authority; contravenes this Constitution, may petition the Constitutional Court for redress.”**

Counsel for the Petitioner further submitted that the Petitioner merely adhered to the demands of the law under Article 128 (3) (C) cited above, which was to the effect that an aggrieved party could petition the Constitutional Court for redress under circumstances such as the ones in this matter.

In responding to the point of law raised on whether or not this Court had jurisdiction to hear and determine a petition which sought to challenge the legality and constitutionality of the petitioner's suspension from employment, the Petitioner argued that such assertion was misconceived at law. It was the Petitioner's submission that the matter before this Court was not about employment but the violation of the principle of judicial independence as enshrined in the Constitution. It was pointed out that the question before this Court was whether or not a judicial officer performing his judicial function could be suspended for referring a matter to the Constitutional Court for interpretation as

per **Article 128 (2) of the Constitution.**

The Petitioner produced in his affidavit in opposition, at paragraph 8, a copy of the letter of suspension dated 9<sup>th</sup> August, 2016 and marked as "**BM 1**". It was submitted that a perusal of the said letter revealed that the Petitioner was suspended for referring the case of **The People v. Milford Maambo & 2 others 2L/92/16** to the Constitutional Court for interpretation.

It was further submitted that this court had previously heard and determined similar cases such as that of **Mutembo Nchito v. The Attorney General- 2016/CC/0029**. Therefore, the Petitioner urged this court to read and consider the Constitution as a whole as stated by Munalula J. in her dissenting judgment in the case of **Milford Maambo & 2 others v. The people - Selected Judgment No. 31 of 2017**. In cementing his submission, the Petitioner also cited the provisions of **Article 1 (5) of the Constitution of Zambia (Amendment) Act No. 2 of 2016** which read as follows:

*"A matter relating to this Constitution shall be heard by the Constitutional Court."*



It was the Petitioner's submission that the above provision was couched in mandatory terms to mean that any matter relating to the interpretation, violation and/or contravention of the Constitution ought to be heard by the Constitutional Court as the original and final court. **Article 1 (2) of the Constitution** was then cited which states that;

**"An act or omission that contravenes this Constitution is illegal"**

Based on the above provisions, it was the petitioner's position that the act of suspending him for referring a matter to this court for constitutional interpretation not only violated the Constitution but also contravened the provisions of the Constitution which empower the Petitioner to refer a matter to the Constitutional Court under **Article 128 (2)**. It was therefore the Petitioner's argument that the petition and all the reliefs sought therein were properly before this court.

I have carefully considered the arguments by learned counsel for the parties and the authorities brought to my attention. Before I

proceed to deal with the matter at hand, I note with concern that the preliminary issue was erroneously raised under the provisions of **Article 28 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia**. It is trite that the correct authority must be cited when making an application before any court. A perusal of the **Constitutional Court Rules Act, S.I. No. 37 of 2016** reveals that there is no provision relating to the raising of a preliminary issue in that statute. This Court already pronounced itself on the issue of lacunas in our existing laws. This was in a Ruling in the case of **Sydney Chisanga v. Davies Chisopa & 2 Others- 2016/CC/A46** where we considered the effect of the provisions of **Order 1 Rule 1 of the Constitutional Court Rules**, we stated at page 9 as follows;

**“It has been our practice to make use of the Supreme Court Practice, 1999 (White Book) whenever our own rules as a court prove inadequate.”**

Having stated the above, the appropriate provision to raise a preliminary issue in this particular instance is **Order 14A, Rule 1 and Order 33, Rule 3 of the White Book, 1999 Edition as read together with Article 128 (1) (e) of the Constitution of Zambia (Amendment) Act, No. 2 of 2016**.

In determining the matter before me, I note that the Petitioner in the main matter is seeking certain reliefs that relate to his right to freedom of movement. I will not dwell much into the issue of jurisdiction to hear matters relating to Part III of the Constitution. This is because as a Court we have aptly pronounced ourselves on this issue in the cases of **Wilson Mwenya v. Nkandu Luo and The Attorney General 2017/CCZ/009**, **Henry Kapoko v. The People 2016/CCZ/0023 Selected Judgment No. 43** and **Godfrey Malembeka v. The Attorney General & Electoral Commission of Zambia – Selected Judgment No. 34 of 2017**.

Our position is very simple and clear, actions relating to the enforcement of rights and freedoms contained under Part III of the Constitution as amended must be commenced and dealt with in the High Court. That being the case, this Court has no jurisdiction to deal with the petitioner's claims relating to his freedom of movement and the enforcement of rights and freedoms contained under the Bill of Rights. Therefore all claims relating to Article 22 of the Constitution are dismissed as they are claims suitable for determination by the High Court.



In dealing with the issue of this Court's jurisdiction to hear the matter as it relates to the legality and constitutionality of the Petitioner's suspension from employment, the starting point is the Constitution itself. **Article 128 (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016** provides:

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

**Article 1 (5) of the Constitution of Zambia (Amendment) Act No. 2 of 2016** provides:

*"A matter relating to this Constitution shall be heard by the Constitutional Court."*

**Article 122 (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016** provides:

*"A person and a person holding a public office shall not interfere with the performance of a judicial function by a judge or judicial officer."*

It is clear from the record that the Acting Chief Registrar of the Judiciary, Mr. Charles Kafunda did issue to the Petitioner a letter of

suspension dated 9<sup>th</sup> August, 2016. The said letter is exhibited by the Petitioner and marked "**BM 1**" which reads in part as follows;

**"It has come to the attention of Management that you on 20<sup>th</sup> July, 2016 refused to give effect to a Nolle Prosequi entered by the Director of Public Prosecutions in the case of the People v. Milford Maambo, Ziwa Malilo and Chanda Chabala. You instead ordered that the matter be stayed pending determination of constitutional issues by the Constitutional Court regarding the entry of the Nolle Prosequi, a position in brazen disregard of clear and elementary provisions of the law regarding the power of the Director of Public Prosecutions to discontinue cases before the Court.**

**Following this development, Management has deemed it necessary that disciplinary proceedings be instituted against you in relation to your competence...or in relation to your dispensation of justice as a Magistrate....In the meantime; I find it necessary that you be placed on immediate suspension pending the outcome of the disciplinary process..."** (Emphasis mine)

It is clear from the above that the Petitioner was suspended for referring the case of **The People v. Milford Maambo & 2 others** to this Court for constitutional interpretation.

In view of the above cited provisions and the contents of the Exhibit marked "**BM 1**", it is my firm view that this is a proper matter for this Court's consideration, as it raises constitutional issues that are within this Court's jurisdiction. I am of the firm view that to dismiss this Petition in *toto* would deny this Court an opportunity to pronounce itself on a matter that clearly falls within its purview but

more importantly would deny the parties an opportunity to be heard on the merits of their matter. Therefore this matter will proceed to be heard on its merits by the full Court, save for the rights and freedoms contained under Part III of the Constitution.

Costs for this hearing shall be in the cause.

Dated the 30 day of OCTOBER 2017



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**JUDGE P. MULONDA**  
**CONSTITUTIONAL COURT JUDGE**