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IN THE CONSTITUTIONAL COURT OF ZAMBIA 2017/CCZ/R004
HOLDEN AT LUSAKA SELECTED JUDGMENT NO. 24 OF 2018
(Constitutional Jurisdiction)

ZAMBIA NATIONAL COMMERCIAL BANK PLC

APPLICANT

AND

MARTIN MUSONDA & 58 OTHERS

RESPONDENTS

CORAM: Sitali, Mulembe, Mulonda, Munalula and Musaluke, JJC on 20th
March, 2018 and 13th June, 2013

For the Applicant:

Mr. J. Jalasi of Eric Silwamba, Jalasi
and Linyama Legal Practitioners.

For the Respondents:

Mr. M. Lisimba of Mambwe, Siwila
and Lisimba Legal Practitioners.

JUDGMENT

Musaluke, JC, delivered the judgment of the Court

Cases referred to:

1. *Attorney General v Law Association of Zambia* (2008) 1 Z.R. 21.
2. *Attorney General v Nigel Kalonde Mutuna and another*, SCZ Appeal No. 88 of 2012.
3. *Re Thomas Mumba* (1984) Z.R. 38.
4. *Setrec Steel and Wood processing Limited and Others v Zambia National Commercial Bank Plc*, SCZ Appeal No. 39 of 2007.
5. *OTK Limited v Amanita Zambiana Limited, Diego Gan-Maria Casilli, Amanita Premium Oils Limited, Amanita Milling Limited*, 2005/HPC/0199.
6. *GDC Logistics Zambia Limited v Joseph Kanyata and 13 Others*, SCZ Judgment No. 17 of 2017.



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7. *Milford Maambo and Others v The People, Selected Judgment No. 31 of 2017*
8. *Henry Kapoko v The People, Selected Judgment No. 43 of 2016*

Legislation referred to:

1. *The Constitution of Zambia (Amendment) Act No. 1 of 2016*
2. *The Constitution of Zambia (Amendment) Act No. 2 of 2016*
3. *The Constitutional Court Act No. 8 of 2016*
4. *The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia*
5. *The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia*
6. *The Industrial Relations Court Rules, Statutory Instrument No. 206 of 1974*
7. *The High Court Act, Chapter 27 of the Laws of Zambia*

This case came to this Court by way of referral from the Industrial Relations Court Division of the High Court pursuant to Article 128 (2) of the Constitution as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (henceforth referred to as the Constitution as amended) read together with section 8 (2) of the Constitutional Court Act No. 8 of 2016.

The constitutional reference to this Court arose from the Applicant's application to raise preliminary issues following the Respondents' application for leave to file complaint out of time pursuant

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to Rule 47 of the Industrial Relations Court Rules, Chapter 269 of the Laws of Zambia. The preliminary issue raised was that:

The Industrial Relations Court is a Division of the High Court for Zambia, pursuant to the provisions of Article 133 (2) of the Constitution of Zambia Act, Chapter 1, Volume 1 of the Laws of Zambia and section 3 (1) (a) of the High Court Act, Chapter 27, Volume 3 of the Laws of Zambia therefore, the application before this Honourable Court is incompetent as it relies on Rule 47 which rules have no legal effect as the rules applicable to the proceedings before this Court are the High Court Rules and reliance on the Industrial Relations Court Rules is unconstitutional as these Rules are inapplicable pursuant to the provisions of Article 1, Article 133 and Article 136 (2) (e) of the Constitution.

In its heads of argument in support of its case, the Applicant posed three questions for determination by this Court, as follows:

- (a) Whether the Respondents are in order to commence an action in the High Court for Zambia, Industrial Relations Court Division, using the Industrial Relations Court Rules contained in Statutory Instrument No. 206 of 1974, notwithstanding the enactment of the Constitution of Zambia (Amendment) Act No. 2 of 2016 which abolished the Industrial Relations Court and replaced it with the High Court for Zambia, Industrial Relations Court Division whose procedure is to be governed by the High Court Rules or Rules to be promulgated by the Chief Justice of the Republic of Zambia;
- (b) Whether the Respondents are in order to commence proceedings in the High Court for Zambia Industrial Relations Court Division by way of Complaint as set out in the Industrial Relations Court Rules set out in statutory instrument No. 206 of 1974 notwithstanding the provisions of Article 133 (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 which specifically provides that the Industrial Relations Court is a Division of the High Court for Zambia; and

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- (c) Whether it is constitutional for the High Court for Zambia Registry to continue receiving court process using the procedure set out under the Industrial Relations Court Rules contained in Statutory Instrument No. 206 of 1974 notwithstanding the enactment of the Constitution of Zambia (Amendment) Act No. 2 of 2016.**

Although the Applicant posed three questions for determination by this Court, the central question for determination was summarised as follows:

Whether or not the Respondents can constitutionally file process in the High Court using the procedure set out in the Industrial Relations Court Rules, Statutory Instrument No. 206 of 1974?

The Applicant argued that the Industrial Relations Court became a division of the High Court pursuant to Article 133 (2) of the Constitution as amended which provides as follows:

There are established, as divisions of the High Court, the Industrial Relations Court, the Commercial Court, Family Court and Children's Court.

The Applicant's contention was that the constitutional amendment had fundamentally altered and changed the operations of the Industrial Relations Court from a labour tribunal that dispensed substantial justice to a division of the High Court for Zambia. That having become a division of the High Court for Zambia, the Industrial Relations Court as

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established by section 84 of the Industrial and Labour Relations Act had effectively been abolished.

The Applicant particularly contended that the amendment to the Constitution brought about a direct conflict between the provisions of Article 133 (2) of the Constitution as amended and those of the Industrial and Labour Relations Act and the Industrial Relations Court Rules. The Applicant cited Part XI of the Industrial and Labour Relations Act as one part that is inconsistent with the Constitution in so far as it provides for the establishment of the Industrial Relations Court.

The Applicant argued that pursuant to Article 1 of the Constitution, the Constitution is the supreme law of the Republic of Zambia and that any written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.

The Applicant argued that the Industrial and Labour Relations Act, in so far as it provided for the establishment of the Industrial Relations Court under Part XI, was void to the extent of that inconsistency with the provisions of the Constitution. The Applicant further argued that section 96 of the Industrial and Labour Relations Act which gives power to the chairman of the Industrial Relations Court to promulgate rules is

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inconsistent with the provisions of the Constitution which places that responsibility on the Chief Justice.

The Applicant drew our attention to various authorities in which the principle set out in Article 1 of the Constitution has been settled by our courts. The Applicant cited the cases of **Attorney General v Law Association of Zambia**¹, **Attorney General v Nigel Kalonde Mutuna**² and **Re Thomas Mumba**³ where it was held that in countries like Zambia, where there is a written Constitution, the Constitution is the supreme law and any other laws are made because the Constitution provides for their being made. The laws are therefore, subject to it and unless the Constitution is specifically amended, any Act that contravenes the Constitution is null and void.

The Applicant further drew our attention to sections 6, 16 and 21 of the Constitution of Zambia (Amendment) Act No. 1 of 2016 which provide as follows:

6 (1) Subject to the other provisions of this Act and so far as they are not inconsistent with the Constitution as amended, existing laws shall continue in force after the commencement of this Act as if they had been made in pursuance of the Constitution as amended but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them in conformity with the Constitution as amended.

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(2) Parliament shall, within such period as it shall determine, make amendments to any existing law to bring that law into conformity with or give effect to this Act and the Constitution as amended.

16 (1) Unless otherwise provided under the Constitution as amended, proceedings before a court or tribunal shall continue to be heard and determined by the same court or tribunal or may be transferred to a corresponding court or tribunal established under the Constitution as amended.

(2) Unless otherwise provided under the Constitution as amended, a matter or proceeding that immediately before the effective date is pending before a commission, office or authority shall continue before the same commission, office or authority or corresponding commission, office or authority established under the Constitution as amended.

21. Subject to section six, where an Act of Parliament is required to give effect to an Article of the Constitution as amended, that Article shall come into effect upon the publication of the Act of Parliament or such other date as may be prescribed by, or under the Act of Parliament.

The Applicant submitted that the provisions cited above were only applicable to pending matters that were commenced before the amended Constitution came into force. It was further argued that in contrast, the matter before the Court below was in fact filed into court after the amendment to the Constitution and was therefore, not a pending matter. That it was fresh litigation which was not governed and regulated as envisaged by sections 6, 16 and 21 of the Constitution of Zambia (Amendment) Act No. 1 of 2016.

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The Applicant also argued that it was alive to the provisions of section 15 of the Interpretation and General Provisions Act which state that a repeal of the law shall not affect a statutory instrument issued under it and that the said statutory instrument remains in force in so far as it is not inconsistent with the repealing law. The Applicant, however, argued that the Respondents could not ride on this provision to invoke the provisions of the Industrial Relations Court Rules contained in Statutory Instrument No. 206 of 1974 as these Rules were promulgated to govern the operations of the Industrial Relations Court as it existed at the time and not the Industrial Relations Court Division of the High Court.

The Applicant reiterated its argument that having been converted to a division of the High Court, the Rules that automatically apply to this division are the Rules of the High Court as prescribed by the Chief Justice of the Republic of Zambia pursuant to Article 136 (2) (e) of the Constitution.

The applicant emphasised that although the High Court was split into divisions, the divisions were not meant to operate independent of the High Court. In buttressing this argument, the Applicant relied on the

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case of **Setrec Steel and Wood Processing Limited and Others v Zambia National Commercial Bank**⁴ where it was held that:

“Thus the rules for commercial actions must not be read in isolation from or in derogation from the Rules of the High Court general list.”

The Applicant also cited the case of **OTK Limited v Amanita Zambiana Limited, Diego Gan-Maria Casilli, Amanita Premium Oils Limited, Amanita Milling Limited**⁵ where the Court held *inter alia*, that:

“The said List was introduced as a fast track section of the High Court to assist in the speedy disposal of commercial matters. It is not a separate Court from the High Court General List, hence it’s being referred to as the Commercial List and not Commercial Court.”

The Applicant concluded by arguing that having been converted into a division of the High Court, the Industrial Relations Court Division became part of the High Court whose procedure was principally regulated by the High Court Act and the High Court Rules. It was argued that the Respondents had wrongly commenced their action by filing an application to file complaint out of time under rule 47 of the Industrial Relations Court Rules. That this is contrary to Order VI of the High Court Rules, which Order provides for the mode of commencement of actions as being by way of writ of summons and statement of claim. The Applicant contended that it was unconstitutional for the

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Respondents to rely on the Industrial Relations Court Rules as the said Rules are in conflict with the provisions of Article 133 (2) of the Constitution and are therefore, void to the extent of the inconsistency.

The Applicant prayed that this Court departs from the position taken by the Supreme Court in a recent case of **GDC Logistics Zambia Limited v Joseph Kanyata and 13 Others**⁶ where it was held that:

“However, even though the IRC is now a division of the High Court, it is still guided by its own Court rules.....”

In persuading us to depart from the Supreme Court's reasoning in the above cited case, the Applicant argued that pursuant to Article 121 of the Constitution, this Court is not bound by the decision of the Supreme Court as this Court and the Supreme Court rank equivalently.

On 12th December, 2017, the Respondents filed their heads of argument in response in which the Respondents began by acknowledging that Article 133(2) of the Constitution has established divisions of the High Court. The Respondents, however, contended that although the Constitution established the said divisions of the High Court, it did not provide for the rules applicable to each of the established divisions. The Respondents, therefore, argued that this

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vacuum was left to be filled by the various enabling legislation dealing with the particular divisions of the High Court.

The Respondents further submitted that they were not aware of any legislation that had specifically amended the Industrial and Labour Relations Act and the Industrial Relations Court Rules to render them redundant and inapplicable to the present case. The Respondents argued that, for any statutory instrument to be deemed not to be in existence, it should specifically be revoked by another statutory instrument. They cited section 15 of the Interpretation and General Provisions Act to support this argument.

The Respondents argued that until the rules governing the Industrial Relations Court Division of the High Court are promulgated, the Industrial Relations Court Rules contained in Statutory Instrument No. 206 of 1974 will still be applicable. It was further argued that there were no rules promulgated post the enactment of the Constitution of Zambia (Amendment) Act No 2 of 2016, which guide litigants on the manner in which actions are to be commenced in the Industrial Relations Division of the High Court.

The Respondents invited us to address our mind to the practice obtaining in similar divisions of the High Court particularly, the Family

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Court and the Children's Court. It was argued that despite being divisions of the High Court, the rules of procedure adopted in these divisions regarding the commencement of actions are those stipulated in their respective enabling legislation. That the Family Court and the Children's Court do not follow the procedure in the High Court Rules with regard to commencement of actions. That similarly, the Industrial Relations Court Division of the High Court should not follow the procedure in the High Court Rules on commencement of actions as the Industrial Relations Court Rules adequately provide for this aspect and they have not been repealed.

The Respondents distinguished the position taken in the case of **Setrec Steel and Wood Processing Limited**⁴ emphasising that the case was premised on the fact that commercial actions and their Rules were derived principally from the High Court Rules. That, the Commercial Court did not have its own rules of procedure independent and different from the Rules of the High Court unlike the Industrial Relations Court Division which has its own Rules.

The Respondents urged this Court to consider and adopt the position given by the recent decision of the Supreme Court in the case of **GDC Logistics Zambia Limited v Joseph Kanyata and 13 Others**.⁶

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At the hearing Mr. Jalasi, counsel for the Applicant, relied entirely on the Applicant's filed heads of argument and did not make any oral submissions. Mr. Lisimba, counsel for the Respondents also relied on the Respondent's filed heads of argument which he augmented with brief oral submissions.

We have considered the submissions by counsel on both sides.

The reference before us requires us to interpret the provisions of Article 133 (2) of the Constitution as amended with regard to the processes and procedures to be adopted by the Industrial Relations Court as a division of the High Court.

In determining the matter before us we are mindful of the principles applicable to the interpretation of the Constitution. As a starting point we observe that the Constitution is the supreme law in Zambia in terms of Article 1 of the Constitution as amended. It, therefore, ranks above all other laws and any law that is inconsistent with the Constitution is void to the extent of the inconsistency. In **Milford Maambo and Others v The People**⁽⁷⁾ we stated that the primary principle in interpreting the constitution is that the meaning of the text should be derived from the plain meaning of the language used. Only when there is ambiguity or

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where a literal interpretation will lead to absurdity should other principles of interpretation be resorted to.

A further principle of constitutional interpretation is that all the relevant provisions bearing on the subject for interpretation should be considered together as a whole in order to give effect to the objective of the Constitution. This means no one provision of the Constitution should be segregated from the others and considered alone. These are the principles we shall apply in determining the issue before us.

The Constitution as amended has established various superior Courts within the Judiciary of Zambia. One such superior Court is the High Court which is established under Article 133 (1) of the Constitution. Article 133 (2) of the Constitution further establishes divisions of the High Court in the following terms:

“(2) There are established as divisions of the High Court, the Industrial Relations Court, Commercial Court, Family Court and Children’s Court.”

The Industrial Relations Court which is the subject of this reference is established as a division of the High Court under Article 133 (2) of the Constitution which we have cited above.

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Prior to the establishment of the Industrial Relations Court as a division of the High Court under Article 133 (2) of the Constitution, the Industrial Relations Court was established by section 84 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia. The said Act provided for the jurisdiction of the Industrial Relations Court and its objective was to do substantial justice between the parties before it. The Act therefore, tailored the composition of the Court to comprise the Chairperson or Deputy Chairpersons sitting with members of the Court in order to conform to that objective.

Following the enactment of the Constitution of Zambia (Amendment) Act No. 2 of 2016, Article 133 (2) of the Constitution has fundamentally altered the status of the Industrial Relations Court that was established under Section 84 of the Industrial and Labour Relations Act. In view of the altered status of the Industrial Relations Court, the issue we have to determine under the reference before us is whether the Industrial Relations Court Rules, Statutory Instrument No. 206 of 1974 are still applicable to the Industrial Relations Court Division of the High Court.

In seeking to answer this question, we have considered all the provisions of the Constitution which relate to the subject for our

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interpretation in order to give effect to the objective expressed by the framers of the Constitution.

Article 120 (3) (a) and (b) of the Constitution provides as follows:

The following matters shall be prescribed:

- (a) the processes and procedures of the Courts;
- (b) the jurisdiction, powers and sittings of the Industrial Relations Court, the Commercial Court, the Family Court, and the Children's Court and other specialised Courts. (Emphasis ours)

In that regard, we note that the provisions of Article 120 (3) (a) and (b) are particularly critical to the determination of the question before us as they clearly stipulate that the processes and procedures of the Courts and the jurisdiction, powers and sittings of the Industrial Relations Court and other specialised Courts shall be prescribed.

Article 266 of the Constitution as amended defines the word "prescribed" as meaning: "provided for in an Act of Parliament."

It is clear from the provisions of Article 120 (3) (a) and (b) that the processes, procedures, jurisdiction, powers and sittings of the Industrial Relations Court Division should be provided for in an Act of Parliament.

The framers of the Constitution when providing for the establishment of the divisions of the High Court, as specialised Courts

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were alive to the fact that the Courts so established would require their jurisdiction to be clearly defined and further, that specific processes and procedures tailored to the specialisation of each divisional Court should be carefully prescribed.

It will be observed that in terms of Article 120 (3) (b) of the Constitution as amended, the sittings of the Industrial Relations Court Division and other specialised courts are to be prescribed by Act of Parliament. On the other hand, Article 135 of the Constitution as amended which provides for the sittings of the High Court stipulates that the High Court shall be constituted by one judge or such other number of judges as the Chief Justice may determine. Legislation which will be enacted pursuant to Article 120 (3) (b) of the Constitution will have to take into account the provisions of Article 135 of the Constitution with regard to the sittings of the Industrial Relations Court Division and other specialised courts of the High Court. Article 135 of the Constitution therefore, settles the question of the composition of a division of the High Court when sitting to determine a matter before the Court.

It follows that a specific Act of Parliament to give effect to the processes, procedures, jurisdiction, powers and sittings of the divisions

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of the High Court as established under Article 133 of the Constitution has to be enacted.

Article 272 of the Constitution goes further to give guidance and provides that:

“Parliament may enact legislation to give effect to an Article or a provision in this Constitution which—

- (a) confers a function or jurisdiction on a person, office, institution, council or commission;
- (b) provides for a process or procedure to be taken, followed or prescribed;
- (c) requires an action, a measure or decision to be taken or provided;
- (d) requires a remedy or compensation to be given;
- (e) prohibits an action or measure;
- (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.”

We take judicial notice that the processes, procedures, jurisdiction, powers and the sittings of the created divisions of the High Court have not yet been prescribed after the enactment of the Constitution of Zambia (Amendment) Act No. 2 of 2016. The question therefore, is what rules should the Industrial Relations Court Division follow in the interim (in the transition period) as regards its processes, procedures,

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jurisdiction, powers and sittings? The answer lies in section 6(1) of the Constitution of Zambia Act No. 1 of 2016 which provides as follows:

Subject to the other provisions of this Act, and so far as they are not inconsistent with the Constitution as amended, existing laws shall continue in force after the commencement of this Act as if they had been made in pursuance of the Constitution as amended, but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution as amended.

It is with this in mind that we agree with the argument by the Respondents that the transitional provisions as provided for under section 6 (1) of the Constitution of Zambia Act No. 1 of 2016 apply to the Industrial Relations Court Division until specific rules of procedure for the Court are prescribed.

The Applicant's argument that matters before the Industrial Relations Court Division should be commenced in accordance with the High Court Rules, as the Industrial Relations Court is now a division of the High Court is untenable as it is at variance with Article 120 (3) (a) and (b) of the Constitution as amended. In its literal interpretation, Article 133 (2) of the Constitution as amended merely makes the Industrial Relations Court a division of the High Court and has not affected wholesale, the provisions of the Industrial and Labour Relations Act and

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its Rules to the extent that they do not conflict with any provision of the Constitution as amended. Until new legislation is enacted to provide for the processes and procedures and jurisdiction of the Industrial Relations Court Division pursuant to Article 120 (3) (a) and (b) of the Constitution as amended, the Court continues to use the existing processes and procedures and enjoys the same jurisdiction. To find that the rules of the High Court apply by virtue of Article 133 (2) would entail this Court reading words into the provisions of the Article when the wording of the Article is not ambiguous at all.

In common parlance, division refers to a separation. The term divides and does not create one entity. By virtue of separation, the Industrial Relations Court Division maintains its distinct character which is the *raison d'être* for its existence which enables its specialisation in this particular area of law to be discharged more efficiently and effectively than would otherwise be the case.

We find that the Applicant's arguments, if upheld would have the potential of hampering the smooth operation of the Industrial Relations Court Division by '*setting it on its head*' for just long enough to cause confusion and ultimately substantial injustice. In that regard, we reiterate what we have stated in **Kapoko v The People**⁸ that the good order and

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stability of our legal system is a paramount consideration in the transitional period following the enactment of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

Further, the Applicant's argument is confounded by the very authorities that it cited and attempted to distinguish. A reading of Articles 1, 120, 133 and 136 of the Constitution as amended with section 3 of the High Court Act and section 6 of the Constitution of Zambia (Amendment) Act No. 1 of 2016 clearly shows that the Industrial Relations Court now exists as a division of the High Court. That its rules continue to apply, read with necessary modifications to suit its new structure until the said rules are revised by the Chief Justice pursuant to the new legislation to be enacted. This position is fortified by reference to Article 267 (3) of the Constitution as amended which enjoins us to interpret the Constitution in a manner that ensures that the law is continuously in force.

Further answer is provided for under section 15 of the Interpretation and General Provisions Act which states that:

Where any Act, Applied Act or Ordinance or part thereof is repealed, any statutory instrument issued under or made in virtue thereof shall remain in force, until it has been repealed by a statutory instrument issued or

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made under the provisions of such repealing written law and shall be deemed for all purposes to have been made thereunder.

It follows that a statutory instrument issued under any written law remains in force unless it has been repealed by another statutory instrument issued or made under the provisions of such repealing written law.

A perusal of the Industrial Relations Court Rules shows that they give comprehensive guidance to an orderly conduct of court processes and procedures in that division of the High Court. Therefore, the commencement of actions in the Industrial Relations Court Division of the High Court is still governed by the Industrial Relations Court Rules until legislation is enacted to provide for the processes, procedures, jurisdiction, powers and sittings of the Industrial Relations Court Division in accordance with Article 120 (3) (a) and (b) of the Constitution as amended.

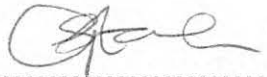
For avoidance of doubt, the Industrial Relations Court Rules promulgated under statutory instrument no. 206 of 1974 continue to govern the processes and procedures including the commencement of actions before the Industrial Relations Court Division of the High Court

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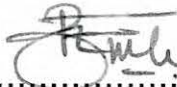
by virtue of sections 6 (1) and 21 of the Constitution of Zambia Act No. 1 of 2016 and section 15 of the Interpretation and General Provisions Act.

In view of the foregoing, we hold that the Respondents rightly commenced their suit in the Industrial Relations Court Division of the High Court pursuant to the Industrial Relations Court Rules promulgated by statutory instrument No. 206 of 1974.

Since this referral raised an important constitutional issue, we order that each party bear their own costs.



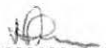
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A.M. Sitali,
CONSTITUTIONAL COURT JUDGE



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E. Mulembe,
CONSTITUTIONAL COURT JUDGE



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P. Mulonda,
CONSTITUTIONAL COURT JUDGE



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M.M. Munalula,
CONSTITUTIONAL COURT JUDGE



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M. Musaluke,
CONSTITUTIONAL COURT JUDGE