

IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL COURT REGISTRY

2019/CCZ/0013
2019/CCZ/0014

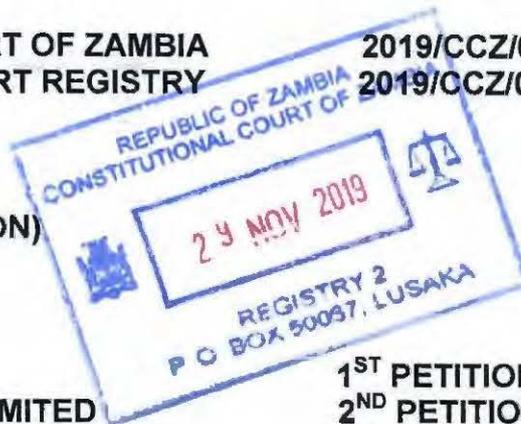
HOLDEN AT LUSAKA

(CONSTITUTIONAL JURISDICTION)

BETWEEN:

LAW ASSOCIATION OF ZAMBIA
CHAPTER ONE FOUNDATION LIMITED

1ST PETITIONER
2ND PETITIONER



AND

THE ATTORNEY GENERAL

RESPONDENT

CORAM: Chibomba, PC, Sitali, Mulenga, Mulembe, Mulonda, Munalula and Musaluke, JCC.

On 25th November, 2019 and on 29th November, 2019.

For the 1st Petitioner: Mr. J. Chimankhata and Mr. L. Mwamba both of Simeza Sangwa and Associates.

For the 2nd Petitioner: Ms. L. C. Kasonde and Mr. J. Kalala both of L. C. K. Chambers.

For the Respondent: Mr. L. Kalaluka, S.C., Attorney General, Mr. A. Mwansa, S.C., Solicitor General, Mr. F. K. Mwale, Principal State Advocate, Mr. S. Mujuda, Principal State Advocate, Ms. J. Mazulanyika, Assistant Senior State Advocate, Mr. J. Sianyabo, State Advocate, Ms. N. K Chongo, State Advocate.

ABRIDGED JUDGMENT

Chibomba, PC, delivered the judgment of the Court.

Due the urgency of this matter, this is an abridged Judgment. The detailed Judgment will come in due course.

By Petition filed on 12th August, 2019, under Cause No. 2019/CCZ/0013, the 1st Petitioner, the Law Association of Zambia (LAZ)

prays for the following reliefs from the Respondent, the Attorney General of the Republic of Zambia:-

- “(a) a declaration that the Respondents’ decision to the extent to which it seeks to amend the Constitution in the manner set in the Constitution of Zambia (Amendment) Bill No. 10 of 2019, is illegal because it contravenes Articles 1(2), 8, 9, 61, 90, 91, 92 and 79 of the Constitution;**
- (b) an order (of Certiorari) that that this Petition be allowed and that the Constitution of Zambia (Amendment) Bill No. 10 of 2019, which evidences the Respondents’ decision to amend the Constitution in the manner provided therein be removed forthwith into the Constitutional Court for purposes of quashing;**
- (c) Any other remedy the Court may consider just in order to defend the Constitution and resist or prevent its overthrow, suspension or illegal abrogation; and**
- (d) The costs of and occasioned by the Petition be borne by the Respondents.”**

The Petition was filed pursuant to Articles 128 (3), 1(2), 8, 9, 61,90, 91, 92 (2) (1), 177 (5) (B) and 79 (2) of the Constitution (Amendment) Act No. 2 of 2016 and Section 8 (3) of the Constitutional Court Act and Order 4 (1) of the Constitutional Court Rules, 2016. The Petition was filed together with an Affidavit Verifying the Petition and skeleton arguments and a witness statement.

In opposing the 1st Petitioner’s Petition, the Respondent, on 8th October, 2019 filed an Answer and affidavit in opposition and skeleton arguments.

On 4th September, 2019, the 2nd Petitioner, Chapter One Foundation Limited, filed an amended Petition under Cause No. 2019/CCZ/0014 in which it is claiming the following reliefs against the same Respondent, the Attorney General:-

- “1. The Court makes a declaration that all institutions that are involved in the process of enacting legislation including National Assembly and Parliament are bound by the Constitution to apply the National Values and Principles in the enactment process;**
- 2. The court makes declaration that Parliament cannot enact legislation that contravenes Article 61 of the Constitution or Articles 8 and 9 of the Constitution and therefore can only enact legislation that protects the Constitution and promote democratic governance in Zambia;**
- 3. The decisions, omissions and the actions by the Government of the Republic of Zambia in drafting and tabling the Constitution of Zambia (amended) Bill No. 10 of 2019 which weakens the Constitution and does not promote democratic governance in Zambia be declared unconstitutional and contrary to the provisions of Article 61 of the Zambian Constitution and therefore illegal;**
- 4. That the court make a declaration that the President, Minister of Justice and Attorney General acted illegally by initiating legislation that did not comply with the National Values and Principles as provided in the Constitution of Zambia;**
- 5. That the court order that the Minister of Justice to withdraw from the National Assembly the Constitution of Zambia (Amended) Bill No. 10 of 2019 from the National Assembly as the process of its enactment and the proposals contained within it do not comply with the National Values and Principles and the provisions of the Constitution of Zambia;**
- 6. That the court make a declaratory order that the Government of Zambia cannot propose or enact legislation including propose the enactment or amend the Constitution of Zambia in a manner that contravenes the National Values and Principles as set out in the Constitution of Zambia;**
- 7. That the court make a declaratory order that the National Assembly of Zambia cannot exercise legislative authority in manner that does not protect the Constitution or promote democratic governance in the Republic of Zambia;**

8. **The court make a declaration that Article 79(1) of the Constitution must be interpreted in a manner that is consistent with the entire Constitution;**
9. **The court make declaratory order that the Government of Zambia cannot fundamentally alter the nature of the Constitution contrary to the will expressed by the people of Zambia without duly consulting the people of Zambia; and**
10. **An Order that costs of and occasioned by the Petition be borne by the parties.”**

The Petition was filed pursuant to Articles 128 (1) (b), 128 (3) (b), 1(3), 8 (c), 8 (e), 9, 61 79 and 287of the Constitution (Amendment) Act No. 2 of 2016. The Petition was also filed together with the Affidavit Verifying the Petition and skeleton arguments.

The Respondent, on 17th October, 2019, filed an answer and affidavit in opposition and Skeleton arguments.

On 4th October, 2019, the parties filed a consent order consolidating the two Petitions so that they could be heard at the same time. The Law Association of Zambia was to be the 1st Petitioner while the Chapter One Foundation Limited is the 2nd Petitioner.

The historical background of this matter, which was common cause to the parties in the Petition, is that following the amendment of the Constitution of Zambia by Constitution (Amendment) Act No. 2. of 2016 which came into force on 5th January, 2016, it was observed that there were some lacunae which required to be addressed. The Ministry of Justice invited members of the public, associations and institutions to make submissions by identifying provisions that required refinement.

Among those who responded to this invitation is the 1st Petitioner, The Law Association of Zambia. The Ministry collated the submissions received from the public and other institutions and these were considered by the Secretaries General of Political Parties who met in Siavonga and came up with the Siavonga Resolutions of 12th June, 2018.

On 9th November, 2019 the National Dialogue (Constitution, Electoral Process, Public Order and Political Parties) Act, 2019 (the Act), was enacted. The Preamble to the Act reads: -

“An Act to facilitate the implementation of the Siavonga resolutions of political parties relating to constitutional and institutional reforms, separation of powers and judicial independence, tolerance, freedom of assembly and civility in politics and electoral reforms; provide for a national dialogue process to facilitate the Constitution refinement process and regulation of political parties, public order and electoral process reforms; establish the National Dialogue Forum and provide for its functions; and provide for matters connected with, or incidental to, the foregoing.”

Section 4 (1) and (3) of the Act provided for the establishment and the functions and powers of the National Dialogue Forum (NDF) and provides as follows: -

“4 (1): There is established the National Dialogue Forum which, subject to the Constitution, is a forum for the implementation and enhancement of the Siavonga resolutions for proposals to –

- (a) alter the Constitution, based on the draft amendments proposed to the Constitution based on submissions from the stakeholders specified in the Schedule, following the enactment of the Constitution of Zambia (Amendment) Act, 2016, and additional submissions from the church; and**
- (b) reform the law on the electoral process, public order and regulation of political parties based on submissions from various stakeholders.**

- “(3) The Forum shall, in the performance of the functions or exercise of the powers conferred by this Act –**
- (a) be accountable to the people of Zambia;**
 - (b) Recognise the importance of confidence building, engendering trust and developing a national consensus for the review process;**
 - (c) Ensure, through the observance of the principles referred to in Section 3, that the review process –**
 - (i) provides the members with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution, the Electoral Process Act, 2016 and the Public Order Act and provide for the enactment of the Political Parties Bill, 2019, as contained in their submissions and appropriate technical or expert reports considered by the Forum;**
 - (ii) is, subject to this Act, conducted in an open manner; and**
 - (iii) is guided by the respect for the universal principles of human rights, gender equality and democracy; and**
 - (d) ensure that the final outcome of the review process faithfully reflects the wishes of the people of Zambia.”**

Section 5 of the Act lists the composition of the Forum while the Schedule under Section 4 (1) lists individuals, institutions and organizations that made submissions to the Constitution Refinement Process, Public Order Act and Political Parties Bill. The draft Constitution Amendment Bill was initiated by the Republican President and signed by the Attorney General, the Respondent in this matter and then it was taken to the National Assembly which caused Bill No. 10 to be published in the Gazette. Thereafter, Bill No. 10 was tabled for first Reading in the National Assembly. The Bill was then referred to the Select Committee for consideration. The Select Committee of the

National Assembly invited the public and certain Organisations and Associations to make their submissions on the Bill for consideration and the 1st Petitioner was invited but did not however attend before the Committee on ground that on the same day that it received the invitation, it had filed its Petition before this court.

We have considered the Prayers in the respective Petitions together with the contents of the affidavits verifying the Petitions and the arguments advanced in the respective skeleton arguments by the Petitioners and the authorities relied upon. We have also considered the Answers and affidavits in opposition to the two Petitions and the authorities cited. We have also considered the evidence adduced by the Petitioners' respective witnesses and the oral submissions by the learned Counsel for the Parties.

In their prayers, the 1st and 2nd Petitioners have sought some declarations based on the provisions of the Constitution, in particular, Articles 8, 9 and 61 on national values and principles as well as how the exercise of legislative authority of the Republic shall be applied. We wish to reiterate that we are alive to and in agreement with, the fact that Article 8 outlines the national values and principles, and Article 9 provides in mandatory terms that the national values and principles shall apply to the enactment and interpretation of the Constitution and the law; among others. This position is further enhanced by Article 1 (3) which provides that the Constitution shall bind all persons in Zambia as well as

the state organs and institutions. Further, the principles guiding the exercise of legislative authority by Parliament are outlined in Article 61 as being the protection of the Constitution and the promotion of the democratic governance of the country. This requirement is settled, as this Court has said in several of its decisions that it is enjoined to apply these national values and principles in interpreting the Constitution and the law.

From the Petitions and submissions by the parties, the central question that seems to be raised in the two petitions is whether Constitution (Amendment) Bill Number 10 should be moved into this Court for the purpose of quashing it on grounds that the Republican President's, the Attorney General's and the National Assembly's decisions to initiate, sign and tabling the Bill in the National Assembly contravened Articles 1(2), 8, 9, 61, 79, 90, 91, and 92 as the process through which it was birthed did not take into account the national values and principles; was not consultative or inclusive and touches the basic structure of the Constitution.

As regards the question, whether the Constitutional Court has jurisdiction to determine a petition which challenges a bill, the learned Attorney General, in arguing this issue, submitted that the Court does not have jurisdiction to hear a case that seeks to challenge proposed legislation. The reason given was that since a bill is proposed legislation which has not yet been enacted into law, the same cannot be

challenged. The second argument in support of this position was that Parliament enjoys exclusive cognizance over its internal proceedings. Hence, the Courts cannot interfere with the internal affairs of Parliament which it enjoys or has the Constitutional mandate or authority to legislate. As authority, the following cases were cited for our consideration:

1. **Nkumbula v Attorney General** where the Court of Appeal had occasion to pronounce itself on the propriety of challenging proposed amendments to the Constitution.
2. **Hem Chandra Sengupta & Others v The Speaker of the Legislative Assembly of West Bengal & Others** in which some parties sought to restrain the Chief Minister from pursuing a resolution approving the union of two States as well as to restrain the Union of India from bringing or initiating any bill or legislation in parliament for purposes of uniting the two States; and
3. **Re Nalumino Mundia** where the High Court was moved to quash the decision of the Chairman of the Standing Orders Committee to suspend a Member of Parliament from the National Assembly. It was held that the court did not have the power to interfere with the exclusive jurisdiction of the National Assembly in the conduct of its internal proceedings.

In response, the learned Counsel for the 1st Petitioner argued that what their Petition challenges is that the Respondent, by their decisions of initiating the Bill by the Republican President, signing the Bill by the

Respondent and publishing it in the government gazette and tabling it for consideration by the National Assembly, contravened Articles 1 (2), 8, 9, 61, 79, 90, 91, and 92 of the Constitution as they did not take into account the national values and principles; which according to Counsel are democracy; constitutionalism; social justice; rule of law; dignity; leadership and integrity. And hence those decisions were not made for the Zambian people's well-being and benefit, and do not uphold and safeguard the Constitution. Further, that what the 1st Petitioner is challenging is not the contents of Bill No. 10 but the decisions taken by the Respondent as outlined above. Hence, this Court has jurisdiction under Article 128 (3) of the Constitution.

The 2nd Petitioner's response was that the national values and Principles under Article 8 of the Constitution were not applied in the manner envisaged by Article 9 of the Constitution in coming up with Bill No. 10. And that the initiation, approval, signing and considering of Bill No. 10 contravened Article 61 of the Constitution which provides for the principles of legislative authority which states that the legislative authority of the Republic derives from the people of Zambia and shall be exercised in a manner that protects the Constitution and promotes the democratic governance of the Republic. Further, that the Court can determine whether the decision to pass Bill No. 10 complied with Article 1 of the Constitution which provides for the supremacy of the

Constitution. And whether non-compliance with national values and principles invalidates any decision, action or measure taken in the legislative process. As authority, the Kenyan case of **Speaker of National Assembly v Attorney General and 3 Others** was cited.

In response to the decision in the **Nkumbula** case, relied upon by the Respondent, Counsel for the 2nd Petitioner contended that the above cited case does not apply in this case because under the Constitutional regime currently in place, national values and principles have been enshrined in the current Constitution, while the Constitutional regime under which that case was decided, no national values and principles had been embedded in the then Constitution. Therefore, that this Court is now enjoined to, in interpreting the Constitution, apply the national values and principles which did not exist at the time of the **Nkumbula** decision.

We have considered the above submissions. The starting point is Article 128 which sets out the jurisdiction of this Court. Article 128 provides 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 a 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 councillors; and**

- (e) whether or not a matter falls within the jurisdiction of the Constitutional Court.
- (2) 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.
- (3) Subject to Article 28, a person who alleges that—
 - (a) an Act of Parliament or statutory instrument;
 - (b) an action, measure or decision taken under law; or
 - (c) an act, omission, measure or decision by a person or an authority; contravenes this Constitution, may petition the Constitutional Court for redress.
- (4) A decision of the Constitutional Court is not appealable to the Supreme Court.”

It is clear from the provision of Article 128 (3) (b) that the Constitutional Court has jurisdiction to hear a matter concerning an allegation that an action, measure or decision taken under the law contravenes the Constitution. However, the question is, does the Court have jurisdiction to hear a matter that alleges that a bill contravenes the Constitution as alleged in this case by the 2nd Petitioner?

Ms. Kasonde’s position in this regard was that where the allegation is that the Bill touches on the basic structure or violates the national values and principles, then the Court has jurisdiction to grant the remedies sought.

As can be seen from the provisions of Article 128, the Constitutional Court has very wide jurisdiction. But however, although this jurisdiction is extensive, it is still limited by the Constitution itself in Article 128. Its jurisdiction is subject to Article 28. Therefore, as a creature of the Constitution, the Constitutional Court can only exercise

the jurisdiction and power given to it by the Constitution. Therefore, the question that follows is whether the Constitutional Court has jurisdiction to hear and determine an allegation that a bill proposed to amend the Constitution contravenes any provision of the Constitution as has been argued by Ms. Kasonde. This has required us to holistically look at the entire provision of Article 128 of the Constitution vis-a-viz the jurisdiction of the Court. We have pronounced ourselves in several of our decisions on the canons on interpretation of the Constitution as amended including in the case of **Steven Katuka and Law Association of Zambia v The Attorney General and Ngosa Simbyakula and 63 Others** where we stated that Article 267 (1) enjoins us to interpret the Constitution in accordance with the Bill of Rights and in a manner that promotes its purposes, values and principles. This entails that this Court must have in mind the broad objects and values that underlie any particular subject matter. We explained in that case that this was premised on the principle that words or provisions in the Constitution or statute must not be read in isolation. And that the purposive approach entails adopting a construction or interpretation that promotes the general legislative purpose which requires the court to ascertain the meaning and purpose of the provision having regard to the context and historical origins, where necessary. Also in **Milford Maambo and Others v The People**, we stated 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. After holistically considering Article 128, our finding is that none of the provisions in Article 128 mention a bill.

Ms. Kasonde has also argued that under Article 1, this Court is the last in the line of defence of the Constitution. As much as we agree with this, there is nothing in Article 128 or any other provision in the Constitution that gives this Court jurisdiction to question the contents of the bill or to declare it unconstitutional. Our position is further buttressed by the fact that the question of giving the Constitutional Court jurisdiction to hear a matter that alleges that a bill contravenes the Constitution was considered by the Technical Committee on drafting the Zambian Constitution but rejected. In this respect we refer to Article 131 at page 361 of the Report of the Technical Committee dated 30th December, 2013 which reads as follows:-

“Article 131: Challenge of Bill and Reference to Constitutional Court Recommendations in the first Draft Constitution.

The following provisions were recommended in the First Draft Constitution:

- 131 (1): Thirty or more Members of Parliament or any person, with leave of the Constitutional Court, may challenge a bill, for its constitutionality, within three days after the final reading of the Bill in the National Assembly.**
- (2) Where the Constitutional Court considers that a challenge of a Bill, under this Article, is frivolous or vexatious, the Constitutional Court shall not decide further on the question as to whether the Bill is, or will be, inconsistent with this Constitution but shall dismiss the action.**

- (3) Where the Constitutional Court determines that any provision of a Bill is, or will be, inconsistent with any provision of this Constitution, the Constitutional Court shall declare the provision unconstitutional and inform the Speaker and the President.**
- (4) Clauses (1), (2), and (3) shall not apply to a Money Bill or a Bill containing only proposals for amending this Constitution or the Constitution of Zambia Act.**
- (5) The Standing Orders of the National Assembly shall provide for the procedure to be followed by Members of Parliament who intend to challenge a Bill."**

Deliberation of the Technical Committee on Article 131

The Committee considered the resolutions of the District Consultative Fora, Provincial, Sector Groups and National conventions.

The Committee observed that since a 'Bill' was not yet law, there was no need to provide for it to be challenged. The Committee, therefore, agreed to delete the Article."

We have considered the prayers of the 2nd Petitioner. The 3rd, 4th, 5th and 6th prayers would require us to delve into Bill No. 10 which we cannot do because we do not have jurisdiction as already stated. The 1st and 2nd prayers are already provided for in the Constitution in Articles 8, 9 and 61. Similarly, Article 9 and 61 respond to the 2nd Petitioner's 7th prayer, while with respect to the 8th prayer, the power to amend the Constitution is given to the legislature in accordance with Article 79(1) of the Constitution. In the 9th prayer, the 2nd Petitioner prays for a declaratory order that the Government of Zambia cannot fundamentally alter the Constitution without consulting the people of Zambia.

Therefore, in as much as we sympathise with the position the 2nd Petitioner finds itself in, that remedy is not available because this Court does not have jurisdiction. We also take note that with respect to an Act of Parliament or Statutory Instrument, specific provision was made by the legislature to give jurisdiction to hear and determine a matter where the allegation is that the Act of Parliament or Statutory Instrument contravenes the Constitution. To this effect, this court has in fact declared certain clauses of Acts of Parliament unconstitutional. (See **Godfrey Malembeka (suing as Executive Director of Prisons Care & Counseling Association) v The Attorney General & The Electoral Commission of Zambia CCZ Selected Judgment No. 34 of 2017** and **Webby Mulubisha v The Attorney General**).

Coming to the 1st Petitioner's case, its first prayer is for a declaration that the President's, Respondent's and National Assembly's decision to the extent that it seeks to amend the Constitution in the manner set out in Bill No. 10, is illegal on grounds that it contravenes Articles 1 (2), 8, 9, 61, 79, 90, 91 and 92 of the Constitution. The 1st Petitioner in its oral submissions argued that the decisions by the President, the Attorney General and the National Assembly to amend the Constitution, are evidenced by Bill No. 10.

From the above, it is clear that what the 1st Petitioner is asking us to do is to delve into Bill No. 10. The 1st Petitioner's submission that what they are challenging is not the contents of the Bill but the decisions,

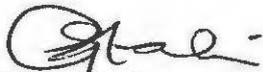
is at variance with their own pleadings and evidence which requires this Court to delve into the contents of the Bill itself. We have already stated that Article 128 (3) (b) gives this Court jurisdiction. However, this jurisdiction does not extend to questioning the contents of a bill. We have considered the prayers of the 1st Petitioner and we are unable to grant them without us delving into the Bill and its contents. It is a roundabout way of asking us to delve into the Bill which we cannot do because we do not have jurisdiction. The prayer is therefore declined.

The Petitions are unmeritorious and are therefore dismissed.

Each party shall bear its own costs.



 H. Chibomba
 PRESIDENT,
 CONSTITUTIONAL COURT



 A. M. Sitali
 CONSTITUTIONAL COURT JUDGE



 M. S. Mulenga
 CONSTITUTIONAL COURT JUDGE

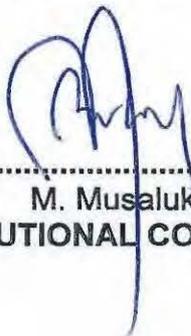


 E. Mulembe
 CONSTITUTIONAL COURT JUDGE



 P. Mulonda
 CONSTITUTIONAL COURT JUDGE

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 M. M. Munalula
 CONSTITUTIONAL COURT JUDGE



 M. Musaluke
 CONSTITUTIONAL COURT JUDGE