

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

2020/CCZ/004

IN THE MATTER OF: ARTICLE 1(5) AND 128(1) (a) OF THE CONSTITUTION OF
ZAMBIA, (AMENDMENT) ACT NO. 2 OF 2016

AND

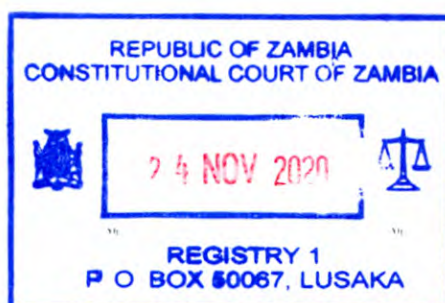
IN THE MATTER OF: INTERPRETATION OF ARTICLE 154 OF THE CONSTITUTION
OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016

BETWEEN:

VINCENT LILANDA
PAUL ROYD CHOMBA
JAMES GRACIOUS NTALASHA

AND

ATTORNEY GENERAL



1ST APPLICANT
2ND APPLICANT
3RD APPLICANT

RESPONDENT

Coram: Sitali, Mulenga and Munalula, JJC on 8th October, 2020 and 24th November 2020.

For the Applicants: Mr George Bwalya of Messrs George Bwalya and Mr.D. Muzamba of Messrs. Douglas and Partners

For the Respondent: Mrs K. Mundia, Principal State Advocate and Mr. J Mujuda, Principal State Advocate both from Attorney General's Chambers.

RULING

Munalula, JC, delivered the Ruling of the Court.

Cases referred to:

1. Steven Katuka and Another v Attorney General and Others Selected CCZ Judgment No. 29 of 2016
2. Taylor v Caldwell [1863] 3 B & S 826
3. Attorney General v Law Association of Zambia (2008) Z.R. 21
4. Law Association of Zambia v The Attorney General 2019/CCZ/0013

Legislation referred to:

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

The Constitutional Court Rules, S.I. No. 37 of 2016

Work referred to:

The Rules of the Supreme Court 1999 edition (White Book)

This is a Ruling on a Notice of Motion to Raise *Issues in Limine* filed by the Respondents *in casu*. By way of brief background, the main matter was commenced by Originating Summons wherein the Applicants are seeking the following reliefs:

1. An interpretation of Article 154 of the Republican Constitution of Zambia Chapter 1 Volume 1 of the Laws of Zambia and the implications of Article 154 of the Republican Constitution of Zambia Chapter 1 Volume 1 of the Laws of Zambia *vis-a-viz* the conditions of service of Office Holders;
2. Whether by not providing for the conditions of service of Mayors and Chairpersons the Respondent is frustrating the office of Mayor and Council Chairperson as envisaged in Article 154 of the Constitution.
3. In the event that the Respondent is found to be frustrating the Office of Mayor and Chairpersons as envisaged in Article 154 of the Constitution of Zambia Chapter 1 Volume 1 of the Laws of Zambia the Applicants will be seeking an Order that the Conditions of Service are set for the Office of Mayor and Council Chairperson.

The Respondent did not file an Affidavit in Opposition to the Originating Summons, but through the Notice of Motion to Raise *Issues in Limine* filed pursuant to Order 33 Rule 7 of the Rules of the Supreme Court 1999 edition (henceforth "the White Book"), raised the following questions for our determination:

1. Whether Article 154 of the Constitution can be interpreted in relation to the conditions of service of the office holders, and;
2. Whether this is a case fit for determination by this Honourable Court.

The application was accompanied by an Affidavit in Support as well as Skeleton Arguments. In the Respondent's Affidavit in Support of this application sworn by the Permanent Secretary in the Ministry of Local Government, Mr. Edward Chomba, it was deposed that the Applicants' conditions of service were already provided for as shown by exhibit marked "VLPCJGN1" in the Applicants' Affidavit in Support of Originating Summons.

In the accompanying Skeleton Arguments, the Respondent averred that Article 154 does not need any interpretation in relation to the Applicants' conditions of service. That the Article merely creates the office of mayor and council chairperson which positions are held by the Applicants. It was submitted that the Applicants were duly elected to their respective positions in 2016 in accordance with Article 154 of the Constitution. Thus, there is no contravention of Article 154. The Respondent contended that the Applicants are asking this Court to make an interpretation of the said

provision to mean that if conditions of service of mayors and council chairpersons are not defined then the said offices are frustrated.

We were referred to the case of **Steven Katuka and Another v Attorney General and Others**¹ where we had given guidance as regards the general principles of interpretation. The Respondent argued that rules of interpretation require that as a rule of thumb, this Court considers the literal meaning of the words in Article 154 of the Constitution. That the ordinary meaning of the words in this provision is the creation of the offices in question which offices were duly created and occupied by the Applicants herein. Further that, interpretation of Article 154 does not include the conditions of service for the office holders.

It was put across that the office of mayor and council chairperson are a creation of the Constitution and thus the incumbents' emoluments should be determined by the Emoluments Commission as provided under Article 232 of the Constitution. The Respondent placed reliance on Article 264 (2) of the Constitution to support this point. The Respondent argued that since the Emoluments Commission has not yet come into existence, the power to review the remuneration for mayors and council chairpersons still rests with the Ministry of Local Government. That contrary to assertions by the

Applicants, conditions of service do exist as shown through exhibit **"VLPCJGN1"**.

The Respondent further submitted that the Applicants are substantive office holders of the offices created under Article 154. The doctrine of frustration of contract was alluded to. The Respondent opined that the offices in question have not been frustrated as alleged by the Applicants for the reasons aforesaid. That the doctrine of frustration as espoused in **Taylor v Caldwell**² discharges both parties from the performance of their contractual obligations in instances where performance of contractual obligations becomes either impossible or radically different. That as shown above, that is not the case herein. The Respondent urged this Court to find in their favour adding that courts should frown upon making decisions that are academic in nature as held by this Court in **Attorney General v Law Association of Zambia**.³

In their oral submissions, Counsel for the Respondent maintained their position that Article 154 of the Constitution does not need interpreting as it merely creates the offices in question. It was added that this matter ought to have been commenced by Petition as provided for in Article 128 of the Constitution alleging the omissions and inaction in issue. The Court was implored to dismiss the Originating Summons.

The Applicants filed an Affidavit in Opposition to the Notice of Motion to Raise *Issues in Limine* sworn by the 1st Applicant together with Skeleton Arguments. The 1st Applicant deposed in the Affidavit in Opposition that the contents of exhibit “**VLPCJGN1**” are explicit. That in interpreting Article 154 of the Constitution, salient implications come with it, among them rights and obligations created thereunder. That there is an implied obligation on the part of the Respondent to create the offices as provided for under the Constitution and to ensure that the office bearers of the same are remunerated for their services. That based on exhibit “**VLPCJGN1**” the remuneration provided therein was on an *ad hoc* basis and the full package was yet to be revealed. Further, that the remuneration set out in the said exhibit did not satisfy the definition of emoluments as provided in Article 266 of the Constitution.

The Applicants submitted that the Respondent misunderstood the import of the word frustration as used in their Originating Summons. That the employment of the word was in common parlance which merely means disappointment, render ineffectual, neutralise, render vain, counteract, make null and void, annul, idle and purposeless, abrogate and/or defeat.

By way of augmenting the written arguments, Counsel for the Applicants submitted that the interpretation that the Applicants seek, to some extent, is

whether it is in order for the conditions of service for their respective offices to come from the Ministry of Local Government and Housing and not the Emoluments Commission. That Article 227 of the Constitution, relating to the Local Government Commission, does not cater for the office of mayor or council chairperson. That the Emoluments Commission under Article 232, has not yet come into existence hence the question in issue. The Applicants concluded that the main matter was rightly commenced by Originating Summons hence this Court should proceed to hear it on its merits and dismiss the application at hand.

We have considered the Notice of Motion to Raise *Issues in Limine* together with the accompanying Affidavit, the Affidavit in Opposition and the skeleton arguments advanced for and against the said Motion. As we understand it, the Motion seeks to have the impugned Originating Summons dismissed without this Court hearing it. It does so by questioning firstly whether Article 154 can be interpreted in relation to the conditions of service of the office holders, and secondly, whether this is a case fit for determination by this Court. We are urged to find in the negative on both questions and thereby dismiss the Originating Summons.

We begin with Order 33 rule 7 of the White Book under which the Motion was raised. It reads:

If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

The wording of Order 33 is clear. There is need for a cause or issue which can be tried separately, the hearing of which, substantially disposes of the main cause or matter or renders the trial of the cause or matter unnecessary.

We have carefully perused the arguments of the Respondent in support of the first question in the Motion. We can discern no separate cause or matter from the arguments of the Respondent. Contrary to the expectations of Order 33 rule 7, the Respondent in arguing the first question, went into the merits of the very case that they seek to have dismissed unheard. This is evident from the Respondent's own evidence and arguments which *prima facie* traverse the gist of the originating process in issue. The Respondent's evidence in the Motion is that the Applicants' conditions of service have already been availed to them and are therefore not an issue. That if they were an issue, the Applicants should have come by way of petition. The Respondent further argued that Article 154 is merely intended

to create the offices of Mayor and Council Chairperson and cannot be used to support the conditions of service of the said offices. That the Emoluments Commission which has not been created is the institution which ought to determine the emoluments of the offices in issue. And that in the Commission's absence it is for the Minister of Local Government to fill in the gap. That this has been done.

In opposing the Motion, the Applicants have maintained that they have a competent case as they have come by the correct mode. That they seek to understand the import of Article 154 in relation to their conditions of service. In our considered view, the arguments that have been brought forth by both sides attempt to interpret Article 154. There is no separate cause or issue to be tried separately and render the hearing of the main matter unnecessary which has been shown by the Respondent's case in relation to the first question. It therefore fails and is dismissed.

The Respondent has asked a second question, that is, whether the matter is fit for the Court's determination. We have closely examined the arguments. As we understand the framing of the question and supporting arguments, this question is contingent on the first question and has no separate standing. As such it also relies on arguments that this Court would be called upon to consider in relation to the Applicants' Originating

Summons and hence cannot be determined without this Court delving into the very reason that the Applicants have come to us, that is, the interpretation of Article 154. We do not see how we can determine it by way of the Motion, at this preliminary stage. It is therefore the finding of this Court that the second question in the Notice of Motion to Raise *Issues in Limine* has no merit because it too hinges on the interpretation of Article 154 of the Constitution. It is dismissed accordingly.

This means that the Notice of Motion stands dismissed for the aforesaid reasons. Before we leave this matter however, we wish to reiterate what we said in **Law Association of Zambia v The Attorney General**⁴:

This Court frowns upon the practice of raising preliminary issues which have a tendency of unnecessarily delaying proceedings. Given the policy implications of constitutional questions and the wide public interest in the said matters it is important that they are heard in a timely manner without undue delay. Litigants are therefore encouraged to incorporate their preliminary issues in their opposing affidavit and skeleton arguments so as to minimise the possibility of multiple hearings.

The proper route to be taken by the Respondent was to file an Affidavit in Opposition in accordance with Order IV of the Constitutional Court Rules S.I. No. 37 of 2016. Order IV rule 4 (4) states that '**The Respondent shall within fourteen days of being served with an originating notice of**

motion or originating summons respond to the summons or motion by way of affidavit in opposition.' (*emphasis added*)

The Motion to raise issues *in limine* having been dismissed, the main matter is referred back to the single judge of this Court for continued scheduling. Each party to bear own costs.



A.M.SITALI

CONSTITUTIONAL COURT JUDGE



M.S.MULENGA

CONSTITUTIONAL COURT JUDGE



M.M.MUNALULA

CONSTITUTIONAL COURT JUDGE