IN THE CONSTITUTIONAL COURT OF ZAMBIA 2023/CCZ/007
HOLDEN AT KABWE
(Constitutional Jurisdiction)

IN THE MATTER OF: ARTICLES 1 AND 165 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 of 2016

AND

IN THE MATTER OF: SECTION 3 OF THE CHIEFS ACT CHAPTER 287 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: THE CHIEFS (RECOGNITION) (NO. 6) ORDER, STATUTORY INSTRUMENT NO. 25 OF 2012

AND

IN THE MATTER OF: THE JUDGMENT OF THIS HONOURABLE COURT IN THE MATTER BETWEEN WEBSTER MULUBISHA AND THE ATTORNEY GENERAL UNDER CAUSE NO. 2018/CCZ/2013 DELIVERED ON THE 27TH OF NOVEMBER, 2019

AND

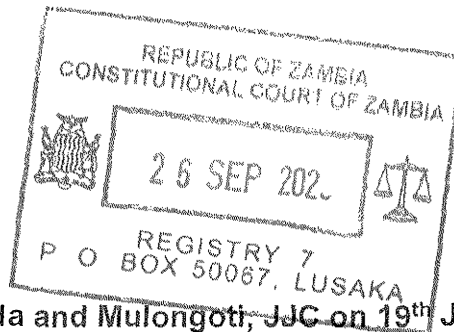
IN THE MATTER OF: THE GOVERNMENT'S DECISION TO HAND-PICK JEREMIAH JASUSI MUTAMBO AND PURPORT TO INSTALL HIM AS CHIEF KATYETYE OF THE TAMBO PEOPLE OF THE KATYETYE CHIEFDOM OF ISOKA DISTRICT CONTRARY TO THE TRADITIONS, CULTURE AND CUSTOMS OF THE TAMBO PEOPLE

BETWEEN:

LUCKY MUTAMBO PETITIONER

AND

THE ATTORNEY GENERAL RESPONDENT



Coram: Munalula, PC, Mulonda and Mulongoti, JJC on 19th July, 2023 and 26th September, 2023

For the Petitioner: Mr. I. Simbeye of Messrs. Muyatwa Legal Practitioners
For the Respondent: No Appearance

JUDGMENT

Munalula, PC, delivered the Judgment of the Court.

Cases referred to:

1. Webby Mulubisha v Attorney General 2018/CCZ/0013
2. HRH The Litunga and 3 Others v Attorney General 2020/CCZ/009
3. Bernard Shajilwa and 4 Others v Attorney General and 3 Others 2018/CC/004
4. Steven Katuka (Suing as Secretary General of the United Party for National Development) and Another v The Attorney General and 64 Others Selected Judgment No. 29 of 2016
5. Mutembo Nchito, v Attorney General 2016/CC/004
6. Member of the Executive Council for Development Planning and Local Government in the Provincial Government of Gauteng v The Democratic Party and Others CCT 33/97
7. President of the Republic of South Africa and 2 Others v United Democratic Movement and 8 Others CCT 23/02
8. Gervas Chansa v Attorney General 2019/CCZ/004
9. Lloyd Chembo v Attorney General Selected Judgment No. 15 of 2018

Legislation referred to:

The Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by Act No. 18 of 1996
The Constitution of Zambia (Amendment) Act No. 2 of 2016
The Constitution of Zambia Act No. 1 of 2016
Constitutional Court Rules Statutory Instrument No. 37 of 2016
The Chiefs Act, Cap 287 of the laws of Zambia
The Chiefs (Recognition) (No. 6) Order, Statutory Instrument No. 25 of 2012

Work referred to:

Black's Law Dictionary, Eighth edn.

[1] We wish to say from the outset, that the record shows that the respondent were served with the petition filed on 21st March, 2023 on the 23rd of March, 2023 and appeared before the single judge on 28th March, 2023, at which point they received directions to file their answer by 5th April, 2023.

[2] The record further shows that the respondent did not comply nor did they take any action in accordance with Order IX of the Constitutional Court Rules Statutory Instrument No. 37 of 2016 (henceforth "the Rules). When the matter came up for hearing on 19th July, 2023, at Kabwe, the respondent was not present in Court.

[3] As the Rules do not permit a default judgment, we proceeded to hear the petition pursuant to Order IX rule 17 (1) of the Rules. The said rule provides as follows:

> i. **17 (1) If the Respondent does not respond within the time stipulated for the answer to a petition, originating notice of motion or originating summons, the Court may hear and determine the petition or application in the respondent's absence.**

At the conclusion of the hearing, we reserved our judgment which we now proceed to deliver.

[4] Ordinarily we would have begun the judgment with an outline of the facts, followed by the parties full written and oral submissions. In this judgment, we have departed from our usual practice for reasons that will become apparent as the Judgment unfolds. Our approach is to limit our consideration of facts and arguments so as to first settle the competence of the reliefs sought. Only if the reliefs are competent will we proceed to consider them on the merits.

[5] The petitioner's prayers for relief which are at page 6 of the record of proceedings are couched thus:

a) **An order that the Respondent violated the Constitution by interfering in the succession process of selecting the next Chief of the Katyetye Chiefdom of the Tambo people of Isoka District when it purportedly installed and recognized Mr. Jasusi Jeremiah Mutambo as Chief Katyetye contrary to the tradition and customs of the Tambo people.**
b) **An order quashing the recognition of Jasusi Mutambo as Chief Katyetye of the Tambo people contained in Statutory Instrument No. 25 of 2012 for being unconstitutional.**
c) **An order that only a person selected by the Amakombe Electoral college in accordance with culture, customary law and traditions of the Tambo people can be an heir to the throne of Chief Katyetye.**
d) **A declaration that the Petitioner, Lucky Mutambo, having been selected in accordance with the culture, customs and traditions of the Tambo people is the rightful Chief Katyete of the Tambo people of Isoka District in the Republic of Zambia.**

[6] For convenience, we will deal with the first two prayers together as they are related and in essence founded on the claim that Article 165 of the Constitution as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (henceforth "the Constitution as amended") is retrospective in its effect. Thereafter we will consider the remaining two prayers together, as they are also related and are founded on the view that this Court has jurisdiction over chieftaincy succession disputes.

[7] It is apparent that the relief sought in prayers (a) and (b), is based on the claim that Article 165 of the Constitution as amended is similar in content to

Article 127 of the Constitution of Zambia as amended by Constitution of Zambia Act No. 18 of 1996 (henceforth the Constitution before amendment). That the finding we made in **Webby Mulubisha v Attorney General**[1] to the effect that section 3 of the Chiefs Act, Chapter 287 of the Laws of Zambia (henceforth the Chiefs Act) is inconsistent with Article 165 of the Constitution as amended, and therefore void, should be applied to facts that arose during the currency of Article 127 of the Constitution before amendment.

[8] The facts, in a nutshell, are a challenge to the President's recognition of Chief Katyetye through Statutory Instrument No. 25 of 2012 sanctioned by section 3 of the Chiefs Act and Article 127 of the Constitution before amendment.

[9] In support of his claim that the recognition was unconstitutional, the petitioner contends that Article 127 of the Constitution before amendment, regulated the institution of chieftaincy at the time of the selection of Chief Katyetye.

[10] That Article 127 (2) of the Constitution before amendment, empowered Parliament to pass legislation intended to resolve chieftaincy issues and to this end the Chiefs Act, specifically, sections 3, 4, 5, 6 and 7, flowed from this constitutional enablement. That to actualize section 3(2) of the said

Chiefs Act, the Chiefs (Recognition) (No. 6) Order, 2012, or Statutory Instrument No. 25 of 2012 was promulgated.

[11] That following the coming into force of the Constitution as amended, Article 165(1) of the Constitution as amended still recognizes the institution of chief to the effect that the institution shall exist in accordance with the culture, customs and traditions applicable in a specific chiefdom.

[12] That accordingly, Article 165 (2) of the Constitution as amended further prohibits Parliament from passing any enactment that confers on any person the power to recognize or withdraw the recognition of a chief as such authority is restricted to the governing traditions, customs and culture of the people to whom they apply. Coupled with the definition of a chief provided for in Article 266 of the said Constitution, each chiefdom has a unique and standardized method by which a person is selected and installed as chief.

[13] It was the petitioner's argument that the amendment to the Constitution in 2016, Article 165 of the Constitution as amended, is the equivalent of Article 127 of the Constitution before amendment. That the two are the same. As such, Article 127 of the Constitution before amendment should be given the same meaning as that given to Article 165 by the **Webby Mulubisha**[1] case. We have considered this extraordinary claim.

[14] We wish to begin by reciting the relevant provisions verbatim. The Constitution before amendment, provided in Article 127, for the institution of chief as follows:

> **(1) Subject to the provisions of this Constitution, the Institution of Chief shall exist in any area of Zambia in accordance with the culture, customs and traditions or wishes and aspirations of the people to who it applies. In any community, where the issue of a Chief has not been resolved, the issue shall be resolved by the community concerned using a method prescribed by an Act of Parliament.** *(emphasis added)*

[15] The Constitution as amended provides in Article 165 that:

> **165. (1) The institution of chieftaincy and traditional institutions are guaranteed and shall exist in accordance with the culture, customs and traditions of the people to whom they apply.**
> **(2) Parliament shall not enact legislation which—**
> **confers on a person or authority the right to recognize or withdraw the recognition of a chief; or derogates from the honour and dignity of the institution of chieftaincy.** *(emphasis added)*

[16] It is evident to us that Article 127 of the Constitution before amendment and Article 165 of the Constitution as amended are similar in terms of sub-Article (1) but substantially different in terms of sub-Article (2). In the **Mulubisha**[1] case, we proceeded to strike out sections 3, 4, 5, 6 and 7 of the Chiefs Act for being in contravention of Article 165, because of the said sub-Article (2) of the Constitution as amended. The effect of this difference requires elaboration.

[17] The law envisioned in Article 127 of the Constitution before amendment no longer exists under the current constitutional order, hence the position of this Court in the **Webby Mulubisha**[1] case. The implication is that the provisions are prospective and not retrospective.

[18] That Article 165 of the Constitution as amended is prospective was brought out in the case of **HRH The Litunga and 3 Others v Attorney General**[2] where we voided section 2 of the Chiefs Act to the extent stated and said that:

> **... the provisions of Article 165... no longer require recognition of a chief by the President** *(emphasis added)*

[19] Similarly, in the **Bernard Shajilwa and 4 Others v Attorney General and 3 Others**[3] case, which considered Article 165 of the Constitution as amended, we said that:

> **Enacting legislation to recognise or withdraw recognition of a chief is prohibited by the Constitution as amended... Article 165 repealed Article 127 of the Constitution of Zambia (Amendment) Act No. 18 of 1996.** *(emphasis added)*

[20] Even if this Court were inclined to entertain the petitioner's claim, it would go against the intentions of the framers of the Constitution and lead to the

absurd result of reversing the recognition of all chiefs that assumed office before the Constitution was amended by Article 165. We are fortified that no such intention exists by the provisions of the Constitution of Zambia Act No. 1 of 2016 which contains transitional provisions.

[21] Section 6 (1) of the said Act provides that:

> **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 into conformity with the Constitution as amended.** *(emphasis added)*

[22] The wording of this provision, takes in to account the need for transitioning between two constitutional orders alive to the possibility that certain actions or omissions undertaken under existing laws would be affected. This Court has already given guidance on the importance of the provisions of Act No. 1 of 2016, in the case of **Steven Katuka (Suing as Secretary General of the United Party for National Development) and Another v The Attorney General and 64 Others**[4]

[23] Other than avoiding a vacuum, the transitional provisions also ensure that there is no abrupt halt to the performance of executive, legislative or

judicial functions, which would in turn create chaos. Thus, in the case of **Mutembo Nchito, SC v Attorney General**[5] we held at pages J18 to J19 that:

> **[I]t is trite that when a new law, including the Constitution, comes into effect or repeals and replaces an existing law, it does not automatically invalidate existing rights and obligations. This is where the transitional provisions come in to continue the state of affairs in existence at the time of coming into force of the new law particularly pending proceedings, to avoid absurdity that may occur if there is an abrupt change in the law. These transitional provisions do not have any impact or bearing on transactions or processes under the old law which are already complete on the coming into effect of the new law.** *(emphasis added)*

[24] The approach is not unique to this jurisdiction as the South African Constitutional Court also gave a similar position in the case of **Member of the Executive Council for Development Planning and Local Government in the Provincial Government of Gauteng v The Democratic Party and Others**[6], where Lord Justice Yacoob stated that:

> **[45] The section either expressly or by necessary implication recognizes that the Constitution aims to establish a new constitutional order, that the new order will not come into effect or begin to exist immediately or miraculously, that an order other than the new constitutional order contemplated in the section will be in existence at the time that the Constitution comes into effect.** *(emphasis added)*

[25] And further in the case of the **President of the Republic of South Africa and 2 Others v United Democratic Movement and 8 Others**[7] that Court held that:

> **Legislation, and especially legislation which amends the Constitution, does not usually have an immediate effect on persons or their rights. More often than not, it establishes a framework in terms of which public officials or individuals take action or modify their conduct.***(emphasis added)*

[26] The facts in *casu* are peculiar as they attempt to bridge two constitutional orders. They beg the question 'whether similarities in a new constitutional order entail that the repealed law should be interpreted in the same manner as its replacement'. The answer is 'no'.

[27] The impugned act of recognition challenged by the Petitioner occurred before the current Constitution as amended came into effect. The action was therefore complete before the new constitutional provision, Article 165, took effect.

[28] Any challenge to the legality of the impugned action or desire by the petitioner to have a pronouncement made with regard to the constitutionality of the statutory instrument in question ought to be made in light of the provisions of Article 127 of the Constitution before amendment and not its replacement.

[29] Other than the implications flowing from Act No. 1 of 2016 *vis a vis* the actions complained of, it would be absurd for this Court to hold that the mere similarity existing in sub-articles (1) of Article 127 of the Constitution before amendment and 165 of the Constitution as amended is enough reason to justify a finding that our position in the **Webby Mulubisha**[1] case should be extended to facts that occurred before 2016. If this Court were to grant the petitioner's wish, it would be retrospectively applying the provisions of the Constitution as amended unreasonably, without any lawful basis and ignoring the provisions of the Act No. 1 of 2016.

It is our conclusion that prayers (a) and (b) must fail. They are accordingly dismissed.

[30] We now turn to prayers (c) and (d) which are premised on the view that this Court has jurisdiction to determine a succession dispute and grant the relief sought. The factual basis of the relief remains the same as stated in paragraph 8. On the said facts, the petitioner seeks the removal and replacement of the current chief Katyetye with himself as the rightful heir to the Tambo Chieftainship or "stool".

[31] As we have already observed without delving into the merits of the petitioner's case, prayers (c) and (d) invite this Court to determine general

questions of law, specifically customary law, as opposed to constitutional issues. They fly in the face of the jurisdiction spelt out in the Constitution as amended and as determined in our jurisprudence.

[32] We reiterate that this Court is mandated under Article 1(5) to determine matters relating to the Constitution. What constitutes a constitutional matter or more specifically, a constitutional question, flows not just from constitutional law generally but from what is contained in the Constitution as amended.

[33] Hence, a constitutional question, is one which is resolvable by resort to constitutional principles rather than statute. To further buttress the point, in the case of **Gervas Chansa v Attorney General**[8] we relied on **Black's Law Dictionary, Eighth Edition** to define a constitutional question and said that it is a legal question resolvable by interpretation of the Constitution rather than by statute. We said that, if a question can be resolved without recourse to the Constitution, then that is the route to take as such a matter is not ripe for constitutional interpretation.

[34] This differentiation is necessary because the Constitution is the *grund* norm or basic law of the land and for the most part, it contains principles of

law as opposed to detailed and comprehensive legislation. The principles are the foundation and reference point for all the other laws of the land.

[35] By virtue of Article 7 of the Constitution as amended, customary law is included among the laws of the land. Article 7(d) specifies that any customary law or customary practice that is inconsistent with the Constitution is void to the extent of the inconsistency. Customary law is therefore distinguished from constitutional law. More so as the source and content of customary law is private, a fact discernible from the common understanding of it as a rule of conduct of long usage that is obligatory on those within its scope.

[36] Part XII of the Constitution as amended, which begins with Article 165 and captures the institution of chieftaincy, merely guarantees the existence of the institution in accordance with the culture, customs and traditions of the people to whom it applies.

[37] Where disputes arise stemming from a violation of these customs and traditions, it is not for this Court to resolve them but for the courts of general jurisdiction. Such courts can apply Article 165. It is only where a constitutional issue arises, as in a necessity to interpret the Constitution during the determining of the matter can the said constitutional question come to this Court by way of referral.

[38] In the case of **Lloyd Chembo v Attorney General**[9] we not only made this principle clear, we further held that:

> ...this Court does not operate in a vacuum. There is comity between the courts constituting the Judiciary. This Court works hand in hand with other courts so that matters before it and before other courts are heard and determined in an orderly and efficient manner. The nature and status of this Court is such that it deals with direct violations of the Constitution. By virtue of Article 1(5) a matter relating to the Constitution is heard by the Constitutional Court. The rest of the law is adequately handled by other courts.

[39] And as we held in the **Shajilwa**[3] case, this Court has no jurisdiction to determine general questions of law which are not constitutional in nature nor any other matters whether civil or criminal. Specifically, we stated that under Article 1(5) read with Article 128 (1)(a), (1)(b), (2) and (3) of the Constitution as amended, this Court has jurisdiction only over constitutional matters. We further said that:

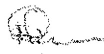
> ...the related question of whether the 2nd Respondent was properly selected and installed as chief Matebo is not a constitutional matter and it is for this reason not properly before this Court.

[40] The sum of our position on prayers (c) and (d) is that whilst a question as to whether a customary law or practice is constitutional, would constitute a constitutional question, whether a particular customary law or practice has been followed in any given circumstances is not a constitutional question.

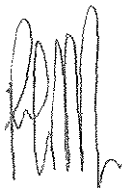
Specifically, whether or not someone has been selected and installed as a chief in accordance their customary law and traditions is not a constitutional question.

[41] We are of the firm view that we have no jurisdiction over the succession dispute. Prayers (c) and (d) are therefore improperly before this Court and are accordingly dismissed.

[42] Before we leave this matter, we note that the issue of costs did not arise. Nevertheless, costs are in our discretion. In view of our findings, we make no adverse order of costs against the Petitioner only because the respondent did not mount a defence.



M. M. Munalula (JSD)
Constitutional Court President



P. Mulonda
Constitutional Court Judge

J. Z. Mulongoti
Constitutional Court Judge