

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

2023/CCZ/008

**IN THE MATTER OF: ARTICLE 128(1)(a) AND (b) OF THE CONSTITUTION
OF ZAMBIA AS AMENDED BY ACT No.2 OF 2016.**

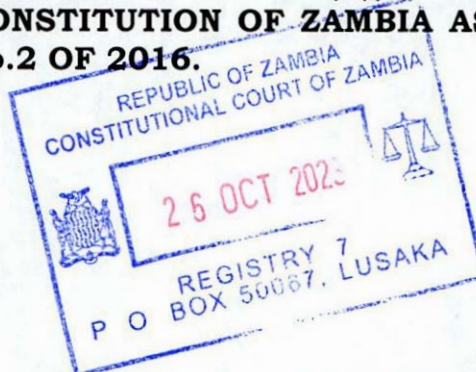
**IN THE MATTER OF: INTERPRETATION OF ARTICLES 8(a) AND (b),
ARTICLE 20 AND 43(1)(a) AND (43)(2)(d) OF THE
CONSTITUTION OF ZAMBIA AS AMENDED BY ACT
No.2 OF 2016.**

LESLIE MBULA

APPLICANT

AND

**ATTORNEY GENERAL
SEAN TEMBO**



**1ST RESPONDENT
2ND RESPONDENT**

**CORAM: Sitali, Mulenga and Mulongoti JJC on 18th July, 2023 and 26th
October, 2023**

For the Applicant:	Mr. M. Moono of Messrs. L.J Michaels Legal Practitioners
For the 1st Respondent:	No appearance
For the 2nd Respondent:	In person

R U L I N G

Sitali, JC delivered the Ruling of the Court

Cases referred to:

- 1. Christopher Shakafuswa and Isaac Mwanza v Attorney General and Electoral Commission of Zambia, 2018/CCZ/005**
- 2. Kabisa Ngwira v National Pension Scheme Authority 2019/CCZ/17**
- 3. Vincent Lilanda and Others v Attorney General 2020 CCZ/004**
- 4. Isaac Mwanza v The Attorney General 2021/CCZ/0045**
- 5. Bernard Kanengo v The Attorney General 2022/CCZ/0024**
- 6. Institute of Law, Policy Research and Human Rights v Attorney General 2021/CCZ/0023**
- 7. Chikuta v. Chipata Rural Council (1974) ZR 241)**

8. Polythene Products Zambia Limited v Cyclone Hardware and Construction Limited and Another (2012) 3 Z.R. 396

Legislation referred to:

- 1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia, as amended**
- 2. The Constitutional Court Rules, Statutory Instrument No.37 of 2016**
- 3. The Rules of the Supreme Court (Whitebook) 1999 edition, Volume 1**

[1.0] INTRODUCTION AND BACKGROUND

[1.1] By originating summons filed in Court on 14th April, 2023, the applicant sought the determination of the following questions.

1. Whether under Article 8(a) and (b) and Article (9) (1)(a), disparaging and dehumanizing remarks or fighting words against elected officials may be deemed to promote national values, human dignity, patriotism, and national unity.
2. Whether Article 20 of the Constitution may be interpreted to encompass disparaging and dehumanizing remarks or fighting words against elected officials as part of the inherent right of one's freedom of expression.
3. Whether under Article 43(1) (a), insulting language or fighting words against elected officials may be deemed to be patriotic and promote the national image.
4. Whether under Article 43 (2) (d), citizens of basic understanding would be offended by insulting language which does not foster national unity and harmony.

5. Whether the disparaging innuendos and insulting words published by the second respondent against the sitting President are contrary to Article 8(a) and (b), 20 and 43(1)(a) and 43(2)(d) of the Constitution of Zambia.
6. In the event that the second respondent is found to have indeed published disparaging and dehumanizing remarks or fighting words contrary to the aforementioned Articles, whether this Honourable Court may declare such statements to be unconstitutional as they do not foster national unity, promote patriotism nor the national values as envisaged by the Constitution of Zambia and grant reliefs as it may deem fit in the circumstances.
7. Costs incidental to these proceedings.

[1.2] The originating summons was supported by an affidavit sworn by the applicant.

[1.3] On 27th April, 2023, the 2nd respondent filed an affidavit in opposition to the originating summons. On the same date, he filed a notice of motion to raise preliminary issues (henceforth referred to as the notice of motion) seeking the determination of the following issues:

- (a) whether this Court as opposed to the local court is clothed with jurisdiction to entertain questions 1 to 5, which above all

seek interpretation of alleged disparaging innuendos, dehumanising remarks or fighting words and whether this Court can engage in the exercise of preservation of cultural values and customs.

- (b) whether the applicant has properly moved this Court by way of originating summons as a mode of commencement given that the originating summons have been issued in accordance with Article 128(1) (a) and (b) and the issues are both for interpretation and contravention of the Constitution.
- (c) whether the issues raised by the applicant for determination by this Court pursuant to Article 128(1) (a) are for sole or exclusive interpretation of constitutional provisions, are general in nature and not personalised, do not raise contentious issues, seek to achieve a legitimate purpose and the Court can grant the reliefs which specifically target the 2nd Respondent, elected officials and the Republican President.

(d) whether this is not a suitable matter for the Court to dismiss the entire action commenced by the applicant stemming from the above-mentioned preliminary issues raised in *limine*.

[1.4] In his affidavit in support of the notice of motion, the 2nd respondent averred that the applicant in his originating summons seeks the interpretation of constitutional provisions and redress for alleged contravention of the Constitution. Further, that an examination of questions 1 to 5 set out in the originating summons revealed that the applicant seeks that this Court should interpret specific words described as “disparaging innuendos, dehumanising remarks and fighting words” in relation to constitutional provisions, which words the applicant claims were allegedly posted on social media by him (the 2nd Respondent).

[1.5] That by the sixth question, the applicant seeks this Court’s intervention to redress a purported contravention of the Constitution by the 2nd Respondent; and further that the applicant in his affidavit in support of the originating summons, did not disclose the basis for commencing this action, save to state that he

has interest in the preservation of Zambia's cultural values and customs.

[1.6] The 2nd respondent added that the applicant desires that the alleged disparaging innuendos, dehumanising remarks and fighting words be declared unconstitutional; and that he (2nd Respondent) be checked for contravening the Constitution as a way to compensate for the repeal of criminal defamation of a sitting President by the National Assembly. Lastly, the 2nd Respondent stated that the applicant commenced this action by a wrong mode of commencement and that this Court, therefore, has no jurisdiction to entertain it or to grant the reliefs he seeks. He therefore prayed that the originating summons be dismissed on those grounds.

[2.0] 2ND RESPONDENT'S ARGUMENTS

[2.1] The 2nd respondent also filed skeleton arguments in support of the notice of motion, whose gist is that the applicant has moved this Court by way of originating summons under Article 128 (1) (a) and (b) of the Constitution, which provisions give this Court jurisdiction to hear matters relating to interpretation of the

Constitution or a violation or contravention of the Constitution. He contended that this jurisdiction does not extend to interpreting the Constitution in relation to alleged disparaging innuendos, dehumanising remarks or fighting words in preservation of what the applicant terms as Zambia's cultural values and customs.

[2.2] He cited the case of **Christopher Shakafuswa and Isaac Mwanza v Attorney General and Electoral Commission of Zambia**⁽¹⁾ in support of the submission that the applicant's application for constitutional interpretation does not relate to constitutional questions with serious policy implications, nor is it intended to clarify the meaning of constitutional provisions so as to guide the efficient and legitimate enforcement of those provisions. Further, that the applicant is inviting the Court to determine which cultural values and customs would be followed to give meaning to the Constitution; and that this Court is not the correct forum for such an action, which he argued, ought to be commenced before a local court or the House of Chiefs.

[2.3] The 2nd respondent further argued that the mode of commencement of actions in this Court is governed by the

Constitution, the Constitutional Court Act No. 35 of 2016 (henceforth referred to as the Act) and the Constitutional Court Rules S. I No. 37 of 2016 (the Rules), and not by the reliefs sought. That these laws form the basis upon which to address the correctness of the mode of commencement employed in bringing this action before this Court.

[2.4] He cited the case of **Kabisa Ngwira v National Pension Scheme Authority**⁽²⁾ wherein we held that the mode of commencement of a matter affects the jurisdiction of the Court, and therefore that a matter that is wrongly commenced cannot be considered as a procedural technicality which should fall under the provisions of Article 118 (2) (e) of the Constitution. He further cited the case of **Vincent Lilanda and others v Attorney-General**⁽³⁾ to fortify his argument that the mode of commencement determines the jurisdiction of this Court. He argued that the applicant had improperly commenced this action by originating summons as the entire action centres on the alleged disparaging innuendos, dehumanising remarks or fighting words and seeks both interpretation and redress of alleged breaches of the Constitution.

[2.5] That in the **Kabisa Ngwira**⁽²⁾ case, this Court was categorical about moving the Court by the right mode when we held that all matters alleging a breach, violation or contravention of constitutional provisions including matters that contain a combination of issues arising from an alleged breach or contravention of the Constitution and an attendant interpretation of constitutional provisions, must be commenced, before this Court, by way of petition. That the reason we gave for doing so in that case, was that this Court would go through the rigorous process of interpreting a provision in dispute before arriving at a decision whether or not the provision was contravened.

[2.6] The 2nd respondent contended that in the present case, the applicant alleged that he had allegedly authored disparaging innuendos, dehumanising remarks or fighting words on social media, which innuendos, remarks or words, the applicant claimed contravened the Constitution. He submitted that Article 128 (3) of the Constitution and Order IV of the Rules are instructive on how process to seek redress of an alleged contravention of the Constitution must be commenced.

[2.7] In conclusion, the 2nd respondent argued that this Court, in the case of **Isaac Mwanza v Attorney-General**,⁽⁴⁾ guided litigants on the manner of framing questions if it is to exercise its jurisdiction to interpret the Constitution. He contended that in this case, an examination of the impugned originating summons revealed that the first five questions raise contentious issues regarding the alleged offensive disparaging words, which questions cannot be determined by way of originating summons; and further, that they are not framed in a general manner but are personalised against the 2nd respondent and the Republican President.

[2.8] Furthermore, that question 6 does not seek exclusive interpretation of the Constitution as its primary goal is to seek redress of the alleged contravention of the Constitution. He argued that the applicant's action is vexatious and improperly before this Court, and should be dismissed with costs to the 2nd respondent.

[3.0] APPLICANT'S AFFIDAVIT EVIDENCE AND ARGUMENTS

[3.1] The applicant opposed the notice of motion by way of affidavit in opposition and skeleton arguments filed on 8th May, 2023. In his opposing affidavit, the applicant asserted that question 1 of the

originating summons merely asks the Court to give meaning to Article 8 (a) and (b) and Article 9 (1) (a) of the Constitution so as to demonstrate whether disparaging innuendos, dehumanising remarks or fighting words against an elected official can be said to encompass or include the promotion of national values, human dignity, patriotism and national values in their interpretation.

[3.2] That question 2 of the originating summons seeks the Court's intervention in providing meaning to Article 20 of the Constitution and to show whether, in its interpretation, disparaging and dehumanising remarks or fighting words against elected officials are included; while question 3 asks the Court to provide an interpretation of Article 43 (1) (a) of the Constitution and state clearly whether insulting language or fighting words against elected officials are encompassed in what amounts to being patriotic and promoting the national image.

[3.3] He further stated that question 4 of the originating summons asks the Court to provide an interpretation of Article 43 (2) (d) of the Constitution and state clearly whether citizens of basic understanding would be offended by insulting language which does

not foster national unity and harmony; that question 5 of the originating summons seeks the Court to interpret whether, based on its findings on questions 1 to 4, the disparaging innuendos and insulting words published by the 2nd respondent against the sitting President are within or contrary to Articles 8 (a) and (b), 20, 43 (1) (a) and 43 (2) (d) of the Constitution.

[3.4] That question 6 of the originating summons seeks the Court to provide clarity on the consequential effect that the disparaging and dehumanising remarks or fighting words have in relation to the specified Articles of the Constitution; and further provide an interpretation of the effects that the 2nd Respondent's utterances made against the sitting President have in relation to the mentioned Articles of the Constitution on which this action is premised.

[3.5] The applicant further averred that he had been advised by his advocates and believed that it is the responsibility of every Zambian citizen to acquire basic understanding of the Constitution and to promote and protect its ideals and objectives. He, therefore, stressed that it was on that premise that the action was commenced.

[3.6] The applicant asserted that he had been advised by his advocates and believed that this action was commenced using the stipulated mode of commencement as prescribed by law and that this Court has jurisdiction to entertain it. He stated, in conclusion, that the current action seeks interpretation of constitutional provisions as opposed to words ordinarily used by citizens of Zambia as alleged by the 2nd respondent.

[3.7] In his skeleton arguments, the applicant submitted that this action is not meant to redress a constitutional contravention as grossly misconstrued by the 2nd respondent. That on the contrary, the applicant seeks the interpretation of Articles 8(a) and (b), 20(3)(a) and (b), 43(1)(a) and 43(2)(d) of the Constitution in the context of insulting words against elected officials. The mode of commencement of his action by originating summons was correct and that this Court has jurisdiction to interpret Articles 8(a) and (b), 20(3)(a) and (b), 43(1)(a) and (2)(d) of the Constitution in the context of insulting words against elected officials. He asserted that he neither seeks a benefit to be conferred on him nor a penalty against the 2nd Respondent, but that the matter seeks a declaration

on the constitutionality of insulting words against elected officials.

[3.8] The Applicant submitted that Article 128(1) (a) and (b) of the Constitution allows him to bring a matter before the Court regarding the interpretation of the Constitution and a matter that violates or contravenes the Constitution. He thus contended that this Court is the correct forum from which to seek an interpretation of the cited Articles; and not a local court or the House of Chiefs.

[3.9] Regarding the mode of commencement, the applicant submitted that he complied with Order IV of the Rules. He asserted that the 2nd Respondent was attempting to transform a general matter of constitutional interpretation to a personalised and contentious one. That in questions 1 to 4 of his originating summons, the Applicant seeks to know whether insulting language against elected officials is within or contrary to the Constitution, and that questions 5 and 6 seek an interpretation as to whether the 2nd Respondent's remarks are constitutional or not, and whether freedom of expression is unfettered in Zambia following the recent amendment of the law which repealed the offence of defamation of

the President, which resulted in the insulting remarks against elected officials.

[3.10] He contended that the matter therefore goes beyond the 2nd respondent and raises legitimate policy concerns for the general Zambian society, hence the declaratory constitutional interpretation sought in the matter. The Applicant submitted that this Court affirmed its jurisdiction to interpret provisions of the Constitution, as provided by Article 128(1) of the Constitution, in the case of **Bernard Kanengo v The Attorney General**,⁽⁵⁾ which case was commenced by way of originating summons.

[3.11] The Applicant therefore prayed that the preliminary issues raised be dismissed and that the questions raised in the originating summons be interpreted so that the present constitutional ambiguity surrounding insulting words against elected officials can be addressed by the Court.

[4.0] 2ND RESPONDENT'S REPLY

[4.1] In his affidavit in reply filed on 15th May, 2023, the 2nd Respondent reiterated that questions 1 and 3 of the originating summons seek interpretation of disparaging and dehumanising

remarks or fighting words, which is outside the function of constitutional interpretation. He stated that question 2 does not serve any legitimate purpose save to move the Court to pronounce itself on question 5, as regards the constitutionality of actions by a citizen, and that the same does not support the function of constitutional interpretation.

[4.2] That in his affidavit, the applicant seeks the Court's opinion on whether or not a citizen with a basic understanding would be offended by the said language which the applicant deems to be insulting and has nothing to do with the interpretation of the words in Article 43(2)(d) of the Constitution. Further, that the applicant, in his affidavit, admitted that question 5 of the originating summons is personalised to acts allegedly done by the 2nd respondent and alleges contravention of the cited provisions of the Constitution which this Court lacks jurisdiction to entertain due to wrong mode of commencement.

[4.3] The 2nd respondent further averred that question 6 in the originating summons is framed to purposefully obtain a declaration from this Court on the constitutionality or otherwise of acts done by

the 2nd Respondent in the event that this Court finds the alleged words were published by the 2nd respondent and contravened the Constitution. He contended that declaratory relief is not tenable, as the action was commenced by a wrong mode.

[4.4] In the skeleton arguments in reply also filed on 15th May, 2023, the 2nd respondent argued that the words which are the subject of the originating summons were seen on social media and do not form part of the law to be subjected to constitutional interpretation. He reiterated that matters which relate to both interpretation and violation of the Constitution can only be commenced by way of a petition and not by originating summons.

[4.5] He further submitted that in question 6, the applicant urges this Court to grant such reliefs as the Court may deem fit for words published by the 2nd respondent, which are contrary to the Constitution and seeks penalties against him, which reliefs are untenable in a matter commenced for purposes of seeking constitutional interpretation. He submitted that the mode of commencement affects jurisdiction, and therefore wrong commencement cannot be considered a procedural technicality.

[4.6] Concerning the applicant's assertion that the matter is not personalised, contentious or an action against a contravention of the Constitution, the 2nd respondent contended that an examination of questions 5 and 6 of the originating summons directly point to acts allegedly done by the 2nd respondent. That therefore, the applicant ought to have commenced the action by way of petition. Further, that the issue of the author or publisher of the alleged words is contentious and requires to be proved by the applicant.

[4.7] The 2nd respondent conceded that the Court has previously discouraged parties from raising preliminary issues but contended that parties still retain the right to raise preliminary issues particularly where the jurisdiction of the Court is in question. He cited the case of **Institute of Law, Policy Research and Human Rights v Attorney General**⁽⁶⁾ wherein, he argued, this Court settled a similar question by hearing a motion for a preliminary issue raised.

[4.8] The 2nd respondent reiterated in conclusion that the questions raised by the applicant in his originating summons are not constitutional questions as the words, language used or phrases

complained of are not in the Constitution for the Court to render an interpretation.

[4.9] The 2nd respondent urged us to frown on the applicant's conduct of seeking an opinion from this Court on how a citizen may feel towards the use of words he sees on social media and does not approve of. He reiterated that this Court has no jurisdiction to entertain the originating summons as, in his view, the right forum for determining whether words are disparaging and dehumanising remarks or fighting words based on traditions and customs as that determination, he contends, can only be done by a local court that deals with customary law.

[4.10] The 2nd respondent prayed that the matter be dismissed for being vexatious and improperly before the Court.

[5.0] THE HEARING

[5.1] At the hearing of the matter, the 2nd respondent relied on his affidavit in support of the notice of motion and skeleton arguments, which he augmented with brief oral submissions.

[5.2] He reiterated that the applicant used a wrong mode of commencement as an examination of the applicant's originating summons and affidavit in support of originating summons clearly showed that the applicant seeks both an interpretation of the Constitution and redress for alleged contravention of the Constitution. He cited the case of **Vincent Lilanda and Others v Attorney General**⁽³⁾ wherein we held that bringing a matter before this Court by a wrong mode of commencement was fatal.

[5.3] The 2nd respondent further submitted that this Court has been categorical on how parties must move the Court, and that the applicant's action based on alleged disparaging innuendos, dehumanising remarks or fighting words, raises contentious issues which cannot be disposed of by way of originating summons.

[5.4] He submitted that this Court has guided litigants on the manner of framing questions in order for the Court to exercise its jurisdiction to interpret provisions of the Constitution, and cited the case of **Isaac Mwanza v Attorney General**⁽⁴⁾ wherein we stated the principles that apply to originating summons where a party seeks this Court's interpretation of constitutional provisions, as follows:

firstly, that the issues raised must relate solely or exclusively to interpretation of constitutional provisions; secondly, the questions must be of a general nature avoiding personalisation; thirdly, they should be prospective in their effect, thereby guiding future conduct or decision making; fourthly, they should not contain contentious matters which necessitate a proper trial in order to settle the facts and/or the law; and lastly, there must be a legitimate purpose to the interpretation.

[5.5] The 2nd respondent contended that an examination of the questions set out in the originating summons as framed by the applicant will show that the Court cannot engage in constitutional interpretation in the manner envisaged by the applicant. That the applicant wrongly commenced his action by way of originating summons instead of a petition as guided by the Constitution and this Court. He, therefore, urged us to dismiss the originating summons with costs.

[5.6] In opposing the notice of motion, Mr. Moono, Counsel for the applicant, relied on the applicant's affidavit in opposition and skeleton arguments, which he augmented with oral submissions.

[5.7] Counsel conceded that when a matter is brought before this Court for interpretation of constitutional provisions, it must not be contentious or be a matter in which one seeks redress for the conduct complained against. He submitted that, in this case, an examination of the originating summons reveals that the applicant does not seek any redress or benefit for himself against the 2nd respondent nor has he beckoned the Court to sanction the 2nd respondent.

[5.8] Counsel further submitted that the applicant seeks a general interpretation, from this Court, regarding the exercise of freedom of expression in the face of other constitutional provisions that guide or indeed dictate the behaviour of Zambian citizens. He contended that the case of **Isaac Mwanza v the Attorney General**⁽⁴⁾ reinforces the suitability of the mode of commencement used in this matter, which mode he argued is the correct one.

[5.9] Counsel further submitted that the 2nd respondent invites this Court to conclude that the reference to words spoken by him in illustrating the exercise of freedom of expression renders this matter a personalized one, when in fact questions 5 and 6 of the

originating summons simply invite this Court to provide a conclusive interpretation on whether language such as that demonstrated to have been used by the 2nd respondent falls within the protection of the fundamental freedom of expression.

[5.10] He added that in the absence of questions highlighting the behaviour of citizens, an interpretation provided by this Court stating that the exercise of freedom of expression must not conflict with other Articles of the Constitution, would not be useful to the general citizenry that this Court is mandated to guide through the powers it has to interpret the supreme law. That if this Court were to say that every citizen has fundamental freedom of expression and the exercise of this freedom must end where his friend's freedom begins or the exercise of this freedom must not violate other provisions of the Constitution like Article 8 and Article 9, that would be of no use to anyone. He submitted that what would be useful is for this Court to indicate whether in interpreting constitutional provisions, this behaviour generally falls within the bounds of the protection of the freedom of expression without sanctioning the 2nd respondent and without providing any remedy

or redress to the applicant because the relief sought is interpretation so that other citizens may be guided.

[5.11] Counsel submitted that should this Court deem any of the questions presented in the originating summons as unfit or unsuitable for the mode of commencement adopted, then the Court should exercise its inherent power to strike out any such question and leave the remaining questions for final determination.

[5.12] In conclusion, Counsel submitted in relation to the 2nd respondent's prayer for costs, that this Court has adopted the practice of not awarding costs on matters of public importance requiring constitutional interpretation. He contended that even if the applicant were to succeed in this matter in its entirety, there is not a single benefit that would be conferred on him personally. Counsel thus urged us to order that the costs should remain in the cause.

[5.13] In reply, the 2nd respondent briefly submitted that the applicant's assertion that his application was not contentious and that his application did not have any sanctions contradicts what is on record. He reiterated that the matter should not only be

dismissed but that we should award him costs as the issue of wrong commencement is a basic issue which the applicant should have known.

6.0 DECISION

[6.1] We have considered the preliminary issues raised in the notice of motion as well as the contents of the affidavits and arguments advanced by the parties on both sides. The notice of motion was filed pursuant to Order 14A and Order 33 rules 3 and 7 of the Rules of the Supreme Court, 1999 edition (the White Book). Order 14A of the White Book provides for the disposal of a case on a point of law. Specifically, Order 14A rule 1(1), which is relevant to the notice of motion herein, provides for the determination of questions of law or construction in the following terms:

14A.(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

- (a) such question is suitable for determination without a full trial of the action; and**
- (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein."**

[6.2] In the present case, the 2nd respondent has raised four questions which he seeks to have determined as preliminary issues. The questions are set out at paragraph [1.3] of this ruling. We shall first consider the second and third issues as they relate to the jurisdiction of this Court to determine the questions in the originating summons; followed by the related fourth issue.

[6.3] In the main, the 2nd respondent, by the second and third issues raised, contends that this Court has no jurisdiction to hear and determine the questions raised in the applicant's originating summons because the matter was commenced by a wrong mode of commencement; and further that the issues raised in the originating summons are not general in nature but are personalised to him and elected officials, namely the current President; and that they raise contentious issues and do not seek to achieve a legitimate purpose. For that reason, that the reliefs the applicant seeks cannot be granted in an action commenced by originating summons. The 2nd respondent argued that since the matter requires the Court to interpret the provisions of Article 8 (a) and (b) and Article 9 (1) (a) of the Constitution in light of the alleged

disparaging innuendos, dehumanising remarks or fighting words, the matter ought to have been commenced by way of a petition and not by originating summons. He contends, for that reason, that the matter should be dismissed.

[6.4] The applicant, on the other hand, argued that the action was properly commenced by originating summons as the issues raised therein are for interpretation only; that they do not raise contentious issues and are not personalised to the 2nd respondent, as he alleges, and that this Court, therefore, has jurisdiction to determine the questions raised therein.

[6.5] In determining whether or not this matter was properly commenced, we have examined the relevant provisions of the Constitution, the Constitutional Court Act No. 8 of 2016 and the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 which relate to the jurisdiction of this Court and how that jurisdiction should be exercised. In that regard, we begin with a consideration of the provisions of Article 128 of the Constitution which provides for the jurisdiction of this Court. Of relevance to

this action are the provisions of Article 128 (1) (a) and (b) which read:

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;**

[6.6] Article 128 (3) of the Constitution further provides as follows:

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.

[6.7] A holistic examination of the provisions of Article 128 of the Constitution reveals that while Article 128(3) of the Constitution provides for the mode of commencement where there is an alleged breach or contravention of the Constitution in relation to Article 128 (1) (b), the Article is silent on how a matter for interpretation, provided for in Article 128 (1) (a), should be commenced. For that reason, we fall back on the provisions of Article 120 (3) (a) of the Constitution which provides that the processes and procedures of

the courts shall be prescribed. We do so in line with the principle that when interpreting the Constitution, all the provisions touching on the subject for interpretation must be considered together, so that no provision of the Constitution is considered in isolation.

[6.8] Pursuant to the provisions of Article 120 (3) (a) of the Constitution, Parliament enacted the Constitutional Court Act No. 8 of 2016. According to the long title of the Act, the object of the Act is to provide for the procedure of the Constitutional Court; prescribe the powers of the Court; and provide for matters connected with, or incidental to, the foregoing. Section 9 of the Act provides that the jurisdiction of the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the rules. Related to the provisions of section 9 of the Act, section 31 (1) (a) of the Act provides for the rules of the Court as follows:

31. (1) The Chief Justice may, by statutory instrument, make rules for regulating –

(a) the practice and procedure of the Court and with respect to appeals to, or reviews by, the Court; (Emphasis added)

[6.9] Pursuant to the provisions of section 31 (1) (a) of the Act, the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 was promulgated under the hand of the Chief Justice. Order IV of the Rules provides for commencement of proceedings before the Court. Order IV rule 1 (1) provides as follows:

Except as otherwise provided in the Constitution, the Act and these Rules, all matters under the Act brought before the Court shall be commenced by petition in Form I set out in the Schedule.
(Emphasis added)

[6.10] Order IV rule 2 (2) of the Rules provides that:

A matter relating to the interpretation of the Constitution shall be commenced by originating summons.

[6.11] It is evident from the relevant provisions of the Constitution, the Act and the Rules, which we have cited above, that the procedure for commencing any action before this Court is regulated by the Constitution, the Act and the Rules. It is settled law that where the mode of commencing an action before a court is stipulated in the law, a person has no option but to commence the action as prescribed by the law. This position of the law has been articulated by the superior courts in Zambia in a plethora of cases.

[6.12] As far back as 1974, the Supreme court in the case of **Chikuta v. Chipata Rural Council**⁽⁷⁾, which related to commencement of actions in the High Court, held, *inter alia*, that:

Where any matter is brought to the High Court by means of an originating summons when it should have been commenced by writ, the Court has no jurisdiction to make any declarations.

In the same matter, Doyle C.J, as he then was, said:

As the matter was not properly before him, the judge had no jurisdiction to make the declarations requested even if he had been so disposed.

[6.13] Further, in **Polythene Products Zambia Limited v Cyclone Hardware and Construction Limited and Another** ⁽⁸⁾, the Supreme Court had this to say:

In dismissing the appeal, this Court held that the mode of commencement of any action is generally provided by the relevant statutes. Thus, were a statute provides for the procedure of commencing an action, a party has no option but to abide by that procedure. That the matter having been brought to the High Court by way of judicial review, when it should have been commenced by way of an appeal, the Court had no jurisdiction to make the reliefs sought.

[6.14] We cite the **Chikuta**⁽⁷⁾ and **Polythene Products Zambia Limited**⁽⁸⁾ cases to press the point that the requirement that a party moving a Court for redress must do so in accordance with the law, applies to matters commenced before a Court that exercises original jurisdiction and is not peculiar to the Constitutional Court.

[6.15] The Constitutional Court has similarly addressed the effect of moving the Court contrary to the mode of commencement stipulated by the law. In the case of **Kabisa Ngwira v. National Pensions Scheme Authority**⁽²⁾ we said:

...all matters relating to the alleged breach, violation or contravention of constitutional provisions ought to be commenced before this Court by way of petition. Further, except as otherwise provided in the law, all matters brought before this Court ought to be commenced by way of petition. This applies to matters that contain a combination of issues arising from an alleged breach or contravention of the Constitution and an attendant interpretation of constitutional provisions, because this Court will go through the rigorous process of interpreting a provision in dispute before arriving at a decision as to whether the provision has been contravened or not.

Where a party exclusively seeks an interpretation of constitutional provisions, Order IV r 2 (2) of the Constitutional Court Rules guides that such matters ought to be commenced by originating summons. (Emphasis added)

We added at page R 21 of the Ruling in that case that:

The mode of commencement of a matter affects the jurisdiction of the Court, therefore a matter that is wrongly commenced cannot be considered a procedural technicality to fall under the provisions of Article 118(2) (e) of the Constitution as amended.

[6.16] In the case of **Vincent Lilanda and Others v. Attorney General**⁽³⁾ we stated as follows:

The Applicants' allegations of contravention of the Constitution have constrained us to pause and consider our jurisdiction under the Constitution and the law. We say so because the mode of commencement determines the jurisdiction of this Court.

[6.17] In the same **Vincent Lilanda**⁽³⁾ case, we firmly stated that:

Order IV Rule 1(1) prescribes that except as provided in the Constitution, the Act or the Rules, matters under the Act brought before the Court shall be commenced by Petition. Order IV Rule 2(2) then states that a matter relating to the interpretation of the Constitution shall be commenced by Originating Summons. There is no choice as to which mode to adopt in commencing one's case nor is there provision for a different mode to be substituted in the course of hearing and determining the matter. (Emphasis added)

[6.18] We shall bear these principles in mind as we determine the issues raised in the notice of motion. An examination of the questions raised by the applicant in the impugned originating

summons, which questions we have set out in paragraph [1.1] of this Ruling, reveals that the questions are not suitable for determination by way of originating summons. We say so because in the first question raised in the originating summons, the applicant seeks a determination by the Court regarding whether the words complained of, and attributed to the 2nd respondent, promote national values, human dignity, patriotism and national unity as envisaged by Article 8(a) and (b) and Article 9(1) (a) of the Constitution. In the second question, the applicant seeks a determination as to whether one's freedom of expression under Article 20 of the Constitution includes disparaging and dehumanising remarks or fighting words against elected officials.

[6.19] Similarly, in the third and fourth questions, the applicant seeks a determination whether under Article 43(1)(a) of the Constitution, insulting or fighting words against elected officials are patriotic and promote national unity and harmony; and whether under Article 43(2)(d) of the Constitution, citizens of basic understanding would be offended by insulting language which does not foster national unity and harmony. In the fifth question, the

applicant seeks a determination as to whether or not the words, which he attributes to the 2nd respondent, are not contrary to Articles 8(a) and (b), 20, 43 (1) (a) and 43 (2)(d) of the Constitution. In the sixth question, the applicant seeks a declaration that the statements are unconstitutional as they do not foster national unity, should we find that the 2nd respondent did publish the alleged disparaging innuendos, dehumanising remarks or fighting words, contrary to Articles 8(a) and (b), 20, 43 (1) (a) and 43 (2)(d) of the Constitution.

[6.20] It is evident from the contents of the applicant's affidavit evidence as well as his skeleton and oral arguments, that the applicant has taken issue with the alleged action of the 2nd respondent to publish disparaging innuendos, dehumanising remarks or fighting words against the current Republican President. That being the case, the provisions of Article 128 (3)(c) of the Constitution apply. Article 128 (3)(c) of the Constitution reads as follows:

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. (Emphasis added).

[6.21] The provisions of Article 128 (3) (c) of the Constitution, which are set out above, are clear and unambiguous. They state that where a person alleges, inter alia, that an act by a person contravenes the Constitution, the person must approach the Court by way of petition and not in any other way.

[6.22] As the applicant has clearly stated, in his affidavit in support of the originating summons and skeleton arguments, that he was moved to commence the action herein by the alleged act of the 2nd respondent to publish disparaging innuendos, dehumanising remarks or fighting words against the current Republican President, which words he alleges are contrary to Articles 8(a) and (b), 20, 43 (1) (a) and 43 (2)(d) of the Constitution, he ought to have moved this Court by petition and not by way of originating summons. Further, as the 2nd respondent has contested the applicant's assertion that he did publish disparaging innuendos, dehumanising remarks or fighting words against the current Republican President, the matter

is clearly contentious and cannot be determined on affidavit evidence or by way of originating summons, as it requires a trial to settle the facts and issues raised by the parties.

[6.23] We wish to emphasise that a failure by a person to commence an action as stipulated by the law divests a Court of jurisdiction to hear and determine the matter. Parties therefore ought to take time to set out their case properly and then decide on the mode of commencement as provided by the law. We further emphasise that commencing an action by wrong mode, and contrary to the provisions of the law, is not a technicality that can be cured by the Court pursuant to Article 118(2)(e) of the Constitution, as we stated in the **Kabisa Ngwira**⁽²⁾ case.

[6.24] For the reasons set out above, we hold that the applicant commenced his action by a wrong mode of commencement when he moved this Court by originating summons seeking redress for the alleged act of the 2nd respondent to publish alleged disparaging innuendos, dehumanising remarks or fighting words against elected officials. We therefore cannot determine it or grant the declaration which he sought. In the circumstances, we uphold the second,

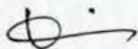
third and fourth preliminary issues raised by the 2nd respondent in the notice of motion.

[6.25] We, accordingly, dismiss the originating summons for lack of jurisdiction. With that said, the first preliminary issue is rendered otiose and we shall not rule on it.

[6.26] Each party will bear their own costs.



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A. M. SITALI
CONSTITUTIONAL COURT JUDGE



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M. S. MULENGA
CONSTITUTIONAL COURT JUDGE



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J. Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE