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Prof MM MUNALULA PCC. ✓ 14/03/2024.....

A.M SHILIMI DPC. ✓ 14/03/2024.....

P. MULONDA JC. ✓ 14/03/2024.....

M.S MULENGA JC. ✓ 14/03/2024.....

M.K CHISUNKA JC. 15/03/2024.....

M.Z MWANDENGA JC. ✓ 15/03/2024.....

K. MULIFE JC. ✓ 15/03/2024.....

IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA,
CHAPTER 1, VOLUME 1 OF THE LAWS
OF ZAMBIA

IN THE MATTER OF: ARTICLES 1, 1(5), 128, 173 (1) (a), (c),
(g), 180 (7), 216 (c) AND 235 (b) OF THE
CONSTITUTION OF ZAMBIA ACT,
CHAPTER 1, VOLUME 1 OF THE LAWS
OF ZAMBIA

IN THE MATTER OF: THE STATE PROCEEDINGS ACT,
CHAPTER 71, VOLUME 6 OF THE LAWS
OF ZAMBIA

IN THE MATTER OF: SECTION 8 OF THE CONSTITUTIONAL
COURT ACT, 2016

BETWEEN:

MILINGO LUNGU

AND

THE ATTORNEY GENERAL

ADMINISTRATOR GENERAL



PETITIONER

1st RESPONDENT

2nd RESPONDENT

CORAM: M.M.Munalula, P.C, A.M. Shilimi, DPC, P. Mulonda, M.S.
Mulenga, M.K. Chisunka, M.Z. Mwandenga, K. Mulife, JJC on the
16th November, 2023 and 15th March, 2024

For the Petitioner:

Mr. M. Chitambala of Lukona
Chambers

For the 1st Respondent:

Mr. R.M. Simeza, SC
appearing with Mr. W. Kayope
both of Messrs. Simeza
Sangwa & Associates

RULING

Mwandenga, JC delivered the Ruling of the Court.

Authorities referred to:

1. **Bowman Lusambo v Attorney General 2023/CCZ/001**
2. **Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited (1989) KLR 1**
3. **Antonio Ventriglia and Another v Finsbury Investments Limited (2020) ZMSC 100**
4. **Potiphar Tembo v Tasila Lungu and Electoral Commission of Zambia 2021/CCZ/A0040**
5. **Margaret Mwanakatwe v Charlotte Scott and the Attorney General, CCZ Appeal No.14 of 2016**
6. **Bremer Vulkan Schiffbau Maschienfabrik v South India Shipping Corporation Limited [1981] 1 AER 289 at 295**

Legislation referred to:

1. **The Constitution of Zambia (Amendment) Act No. 2 of 2016**
2. **The Constitutional Court Rules, Statutory Instrument No. 37 of 2016**
3. **The Rules of the Supreme Court of England, 1965 (White Book, 1999 Edition)**

Other works referred to:

The Halsbury's Laws of England (4th Edition), 1982, Vol. 37

Introduction

1. This Ruling decides an application by the 1st Respondent for an order to set aside, discharge or reverse a stay of criminal

proceedings issued by a single Judge pending the hearing of the Petition filed by the Petitioner before this Court.

The factual background

2. By a ruling dated the 19th May, 2022, a single Judge of this Court granted the Petitioner a stay of criminal proceedings against him in the Subordinate Courts pending hearing of his Petition by this Court (the Ruling). Following our decision regarding the granting of stays of criminal proceedings handed down on the 9th June, 2023 in the case of **Bowman Lusambo v Attorney General**¹, by a Notice of Motion filed on the 16th June, 2023 (this Notice of Motion) the 1st Respondent seeks an order to set aside, discharge or reverse the Ruling.
3. This Notice of Motion is made pursuant to Order 9 Rule 20 of the Constitutional Court Rules, 2016 (CCR), Statutory Instrument No. 37 of 2016 and the inherent jurisdiction of the Court.
4. The 1st Respondent filed an affidavit in support of this Notice of Motion sworn by the Attorney General, Mr. Mulilo Dimas Kabesha, SC (the affidavit in support) together with skeleton arguments.

5. The 1st Respondent seeks the order referred to in paragraph two hereof on the following grounds:

- (i) That the Constitutional Court does not have the requisite jurisdiction to grant a stay of criminal proceedings before the Subordinate Court or otherwise; and
- (ii) That civil proceedings cannot be used to arrest criminal proceedings.

6. The Petitioner and the 2nd Respondent did not file any court process in this Notice of Motion.

The 1st Respondent's case

7. In the affidavit in support, it was *inter alia* deposed that:

7.1 On 21st May, 2021 the Petitioner was appointed by way of Court Order, as Provisional Liquidator for Konkola Copper Mines Plc ("KCM");

7.2 The activities of the Petitioner in his capacity as Provisional Liquidator for KCM have been the subject of investigations by the Anti-Money Laundering Unit of the Drug Enforcement Commission ("DEC") and that the Petitioner has since appeared before the Subordinate Courts and taken plea on charges of theft and money

laundering and of being found in possession of property suspected to be proceeds of crime.

7.3 The Petitioner was later purportedly granted immunity by the then Director of Public Prosecutions ("DPP"), after which a *nolle prosequi* was entered in respect of the two matters in the Subordinate Courts;

7.4 The Petitioner sought recourse from this Court, alleging constitutional breaches against the Respondents. He accordingly filed an application on 26th April, 2022, to stay criminal proceedings in the Subordinate Courts pending the hearing and determination of his Petition on grounds that the arrests and arraignments were an abuse of the court's process and were a breach of the purported immunity agreement between the Petitioner and the DPP; and

7.5 Following the application referred to in paragraph 7.4 above, the stay of proceedings in the Subordinate Courts was granted by the single Judge. The 1st Respondent now seeks an order to set aside, discharge or reverse the Ruling.

The 1st Respondent's arguments

8. In the skeleton arguments in support of this Notice of Motion, the issue of jurisdiction of this Court to stay criminal proceedings was addressed first. It was submitted that this Court does not have jurisdiction to stay criminal proceedings before the Subordinate Courts pending the determination of a Petition or otherwise. To support this submission, the case of **Bowman Lusambo v Attorney General**¹ was cited in which the full bench of this Court referred to Article 128 of the Constitution and stated as follows:

6.5 Thus, the Constitutional Court has original jurisdiction in all matters alleging contravention of the Constitution and for interpretation of the Constitution. The Court has appellate jurisdiction in matters relating to appeals involving elections of Members of Parliament and councillors. Therefore, whatever interim or interlocutory Order the Court issues must be in line with its jurisdiction as provided in the Constitution....

6.7 What we deduce from Article 128 (2) is that, a Court in this current case for instance, the Subordinate Court where the Petitioner is appearing for criminal charges should have determined that a question relating to the Constitution had arisen. Thereafter, it should on its own motion, have stayed the proceedings before it and referred the question to this Court for determination.

9. It was argued that this Court had placed emphasis in the above case, on the fact that a stay of proceedings was not an avenue for one to appeal or stifle criminal proceedings before the Subordinate Courts through a pending litigation to this Court or some other proceedings.
10. It was the 1st Respondent's contention that the single Judge of this Court did not have the requisite jurisdiction to stay criminal proceedings pending the determination of the Petition.
11. In arguing as to what amounts to jurisdiction, a Kenyan case was cited, namely, **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited²**, in which it was held as follows:

... jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. (Emphasis theirs)

12. Relying on the Supreme Court of Zambia case of **Antonio Ventriglia and Another v Finsbury Investments Limited³** it was submitted that the Ruling of the single Judge was a

nullity as there was no jurisdiction to stay the criminal proceedings. It was therefore prayed that the said Ruling be set aside, discharged or reversed.

13. In addition to the above arguments, it was submitted that the Ruling of the single Judge essentially arrested the criminal proceedings before the Subordinate Courts. It was added that this Court in the **Bowman Lusambo v Attorney General**¹ case, emphasised that this Court cannot grant a stay whose effect was to arrest criminal proceedings. This Court stated:

6.14 Thus, as observed in the case of **Rajan Mahtani** which followed the decision in **C and S** case, there are no interlocutory appeals in criminal matters and that the criminal justice system has its own procedure. Furthermore, that "It was for this reason that civil procedure must not be used to abort criminal investigations to prosecutions." To go round on an interlocutory appeal in criminal matters by way of judicial review is misconceived...

6.15 ...For avoidance of doubt, we wish to state that civil proceedings cannot be used to arrest criminal proceedings in any circumstances. Be that as it may be, the current application fails for being misconceived as it is not supported by the Constitution under Article 128 (2)....

14. It was inter alia on the basis of the above, that the 1st Respondent submitted that the Ruling of the single Judge in

essence arrested the criminal proceedings before the Subordinate Courts.

15. The 1st Respondent therefore implored this Court to set aside, discharge or reverse the Ruling in the interest of justice.

The hearing of this Notice of Motion

16. At the hearing, Counsel for the 1st Respondent, Mr. Robert M. Simeza, SC in augmenting the written arguments made brief oral submissions which were in essence similar to the written arguments.

17. Counsel for the 2nd Respondent Mr. K.M. Kalumba, opted to adopt the application of the 1st Respondent in its entirety.

18. Counsel for the Petitioner Mr. M. Chitambala, submitted in opposition to this Notice of Motion on points of law. The arguments can be summarized as follows:

18.1 That this Notice of Motion was incompetently before this Court on the grounds that the procedure for challenging or seeking to reverse or annul the decision of a single Judge of this Court is prescribed; namely, that any party dissatisfied with a decision of a single Judge of this Court ought to challenge such a decision by way of appeal before the full Court pursuant to Order 59 Rule 14 (12) of the

Rules of the Supreme Court of England, (1999 Edition)
(RSC);

18.2 That it therefore follows that an appeal against a decision of a single Judge or application challenging a decision of a single Judge brought before the full Court pursuant to Order 9 Rule 20 of the CCR is clearly incompetent and therefore this Court has no jurisdiction to entertain such an application;

18.3 That this Court in the cases of **Potiphar Tembo v Tasila Lungu and Electoral Commission of Zambia⁴** and **Margaret Mwanakatwe v Charlotte Scott and Attorney General⁵** proceeded to dismiss the applications that sought to challenge the decision of a single Judge by way of motion instead of an appeal as prescribed by Order 59 Rule 14(12) of the RSC;

18.4 That the incompetence of the 1st Respondent's application was further compounded by the said Order 59 Rule 14(12) of the RSC which makes it mandatory for an appeal against a decision of a single Judge to be filed within 10 days of the decision of the single Judge;

- 18.5 That it followed that any appeal intended to be filed after the expiration of the 10-day period can only be filed with leave of the Court;
- 18.6 That the absence of an Order for leave renders the application fatally incompetent;
- 18.7 That where a Court lacks jurisdiction, any decision it makes in the proceedings amounts to nothing; and
- 18.8 That further and in the alternative the power to grant a stay by a single Judge is guaranteed by the Constitutional Court of Zambia Act, No.8 of 2016, (the Act) that derives its authority from the Constitution of Zambia (Amendment) Act, No. 2 of 2016 (the Constitution).
19. In the light of the Petitioner's submissions, we were urged to dismiss this Notice of Motion for being incompetently before the Court as, according to the Petitioner, this Court has no jurisdiction to grant any relief prayed for by the 1st Respondent.
20. State Counsel Simeza in reply *inter alia* submitted that:

- 20.1 The issues that were dealt with by this Court in the **Potiphar Tembo v Tasila Lungu and Electoral Commission of Zambia**⁴ case which made reference to the case of **Margaret Mwanakatwe v Charlotte Scott and Attorney General**⁵ were exactly the same issues that came for determination before this Court in the case of **Bowman Lusambo v Attorney General**¹ and that this Court had an opportunity to address the question of the procedure to follow on an application from a decision of a single Judge to the full Court;
- 20.2 That there was absolutely no irregularity in the procedure that was invoked by the 1st Respondent as Order 59 of the RSC was inapplicable;
- 20.3 That the argument that this Notice of Motion was incompetent because Order 59 Rule 14(12) of the RSC makes it mandatory for an appeal against a decision of a single Judge to be filed within 10 (ten) days was a total misunderstanding of the provisions applicable in this case and a deliberate disregard of the decision of this Court in the **Bowman Lusambo v Attorney General**¹ case; and

20.4 On the argument that the power to grant a stay was guaranteed by the Act which derived its authority from the Constitution, he submitted that the jurisdiction of this Court under Article 128 does not give the Court power to grant a stay in the circumstances of this case.

21. State Counsel prayed that this Notice of Motion be allowed

Consideration of this Motion

22. We have considered this Notice of Motion together with the affidavit evidence, oral and written submissions made by the parties.

23. The record shows that the 1st Respondent relied on Order IX Rule 20 of the CCR and the inherent jurisdiction of this Court. The former provides for interlocutory applications.

24. The parties have made broad ranging submissions in support of their respective cases. We however, shall not rehash the arguments because, in our view, the cardinal issue which must be determined is: Whether this Notice of Motion is properly before us. The other cardinal issue is whether in the circumstances of this case, the impugned Ruling should or should not be set aside, discharged or reversed;

25. This Notice of Motion was prompted by the decision of this Court in the case of **Bowman Lusambo v Attorney General**¹.

In that case this Court specifically disagreed with the impugned Ruling. This Court said:

6.8 We are therefore, of the firm view that although the CCR provide for application for interlocutory or interim orders, the interim order for stay is incorporated in the Constitution such that one need not apply for a stay in this Court. In this regard, we are inclined to disagree with the Milingo Ruling by the single Judge for holding that Article 128 (2) mandates the Constitutional Court to stay proceedings pending determination of the Petition or matter before it as it is the Court before which a question regarding the Constitution arises that should stay proceedings. We are mindful though that that ruling was not challenged by way of appeal to the full Court. (Emphasis supplied)

26. Against this background we are of the view that the application to set aside, discharge or reverse the Ruling is properly before us.

27. And for the reasons we shall advance below we are of the view that this Notice of Motion engages our inherent jurisdiction.

28. What then is the meaning of inherent jurisdiction? **The Halsbury's Laws of England (4th Edition), 1982, Vol. 37, at p. 23**, describes the inherent jurisdiction of the court as follows:

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

29. In the case of **Bremer Vulkan Schiffbau Maschienfabrik v South India Shipping Corporation Limited**⁶ Lord Diplock speaking on the subject of dismissing a pending action for want of prosecution persuasively said:

The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an 'inherent power' the exercise of which is within the 'inherent jurisdiction' of the High Court. It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice. (Emphasis supplied)

30. From the foregoing matters, it is palpably clear that inherent jurisdiction is considered to be part of the court's power to do all things reasonably necessary to ensure fair administration of justice within its jurisdiction. In other words that inherent

power is found within the very nature of a court of law, unlike power conferred by statute.

31. This Court has the authority to hear and determine, the application to set aside, discharge or reverse a decision of the single Judge under and by virtue of its inherent jurisdiction because the interest of justice demands that the decision of this Court in the case of **Bowman Lusambo v Attorney General**¹ in so far as it concerns or touches on the Ruling of the single Judge be given its full meaning and effect, otherwise the administration of justice will be put into disrepute.

32. Accordingly we endorse our decision in the **Bowman Lusambo v Attorney General**¹ that this Court does not have jurisdiction to grant a stay of proceedings in another Court. It invariably follows that the single Judge did not have jurisdiction to grant the stay of criminal proceedings in the Subordinate Courts.

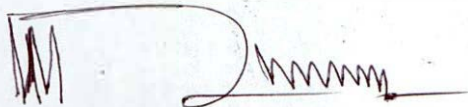
33. What then is the fate of a decision that is made by a Court without the requisite jurisdiction? It is trite law that jurisdiction is everything and any order made without jurisdiction is a nullity.

34. In this matter, therefore, the impugned Ruling is a nullity.

For the avoidance of doubt the Ruling of the single Judge staying criminal proceedings against the Petitioner in the Subordinate Courts is hereby discharged. We make no order for costs.



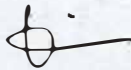
Prof. M.M. Munalula
Constitutional Court President



A.M. Shilimi
Constitutional Court Deputy President



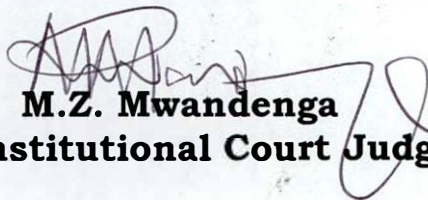
P. Mulonda
Constitutional Court Judge



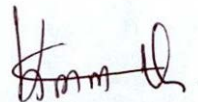
M.S. Mulenga
Constitutional Court Judge



M.K. Chisunka
Constitutional Court Judge



M.Z. Mwandenga
Constitutional Court Judge



K. Mulife
Constitutional Court Judge