

IN THE CONSTITUTIONAL COURT OF ZAMBIA

2017/CCZ/0006

AT LUSAKA

(Constitutional Jurisdiction)

IN THE MATTER OF ARTICLE 128 OF THE CONSTITUTION

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLE 134 OF THE
CONSTITUTION OF ZAMBIA

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLE 125 OF THE
CONSTITUTION OF ZAMBIA

IN THE MATTER OF SECTION 123(1) OF THE CRIMINAL PROCEDURE CODE CHAPTER
88 OF THE LAWS OF ZAMBIA

BETWEEN:

HAKAINDE HICHILEMA
HAMUSONDE HAMALEKA
MULEYA HACHINDA
MULILANDUBA LASTON
HALOBA PRETORIUS
CHAKAWA WALLACE

AND

GOVERNMENT OF THE REPUBLIC OF ZAMBIA



1ST PETITIONER

2ND PETITIONER

3RD PETITIONER

4TH PETITIONER

5TH PETITIONER

6TH PETITIONER

RESPONDENT

Coram: Chibomba PC, Sitali, Mulenga, Mulembe and Munalula, JJC on 15th June, 2017
and 28th March, 2018.

For the Petitioners:

*Mr. J. Sangwa, SC, of Simeza, Sangwa & Associates, with
Mr. J. J. Mwiimbu of Mwiimbu, Muleza & Company*

For Respondent:

*Mr. L. Kalaluka, SC, Attorney General, Mr. J. Simachela,
Chief State Advocate, and Mr. F. K. Mwale, Principal State
Advocate.*

RULING

Mulembe, JC, delivered the Ruling of the Court.

Cases referred to:

1. Kelvin Hang'andu & Co. v Webby Mulubisha (2008) 2 ZR 82
2. Hakainde Hichilema and another v Edgar C. Lungu and others 2016/CC/0034
3. Aaron v Shelton [2004] 3 All ER 560
4. Societe Nationale Des Chemis De Pur Du Congo (SNCC) v Joseph Nonde Kakonde SCZ Judgment No. 19 of 2013
5. Finance Bank Zambia Limited v Noel Nkhoma, Appeal No. 77/2015
6. Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited [1995-97] ZR 187
7. Godfrey Miyanda v The Attorney General 2016/CC/0006
8. Bank of Zambia v Jonas Tembo and Others (2002) ZR 103

Legislation referred to:

1. Penal Code, Chapter 87 of the Laws of Zambia
2. Criminal Procedure Code, Chapter 88 of the Laws of Zambia
3. Constitution of Zambia (Amendment) Act No. 2 of 2016
4. State Proceedings Act, Chapter 71 of the Laws of Zambia

Other works referred to:

1. Black's Law Dictionary, Ninth Edition, (West, 2009)
2. Journal of Law, Policy and Globalization, Vol. 20, 2013, IISTE
3. Halsbury's Laws of England, Fourth Edition, Volume 16

By Notice of Motion filed pursuant to Order X of the Constitutional Court Rules, the Respondent, the Government of the Republic of Zambia, applies for an order to substitute the Respondent and to set aside proceedings for duplicity and abuse of court process.

The brief background to this Notice of Motion is that the six Petitioners were arrested and charged with the offence of treason contrary to section 43(1)(d) of the Penal Code and were detained awaiting trial in the High Court. On 5th June, 2017 the Petitioners filed into this Court, a petition under cause number 2017/CCZ/0006 in which the following reliefs were sought:

- (a) **An order severing the proviso to section 123(1) of the Criminal Procedure Code, which reads:
Provided that any person charged with –**
- (i) **murder, treason or any other offence carrying a possible or mandatory capital penalty;**
 - (ii) **misprision of treason or treason-felony;**
 - (iii) **aggravated robbery; or**
 - (iv) **theft of motor vehicle, if such a person has previously been convicted of theft of motor vehicle;**
- shall not be granted bail by either a subordinate court, the High Court or Supreme Court or be released by any Police Officer.**
- (b) **An order that the Petitioners be at liberty to apply before the High Court for bail pending trial and that the High Court be at liberty to grant such bail if need be.**

When this matter came up for hearing of the petition on 15th June, 2017 the Attorney General, Mr. Kalaluka, SC, informed the Court that he had since filed a Notice of Motion which he wished us to hear and determine before the petition was heard.

In support of the Motion, the learned Attorney General relied on the Affidavit in support. The gist of this affidavit is that besides the petition filed before the Constitutional Court, the Petitioners also filed another petition in the High Court under Cause Number 2017/HP/0888. That the petitions before this Court and the High Court sought substantially the same remedies and were based on the same facts. Hence, the Respondent applied to stay the High Court

proceedings pending determination of the Notice of Motion before this Court.

It was also deposed that the proper party to any matter where the Government of the Republic of Zambia is sued is the Attorney General.

Although the Respondent did not file heads of argument, Mr. Kalaluka, SC, made oral submissions in support of the Notice of Motion. He contended that the position that the Attorney General is the proper party to be cited in any matter against the State is *res judicata* in that this Court did pronounce itself on this issue in Causes No. 2016/CC/0034 and 2016/CC/0033. He added that the first Petitioner herein was a party to the two proceedings mentioned and that he was not aware that the Rulings in those matters have been overturned by the full bench of this Court. He was, therefore, wondering whether this matter was intended to show defiance to the said Rulings of this Court.

On the issue of duplicity of actions and abuse of process, Mr. Kalaluka, SC, submitted that the Petitioners filed, on the same day, identical petitions in the High Court and in this Court. He pointed

out that the reliefs sought before the two courts were exactly the same. When asked by the Court on the status of the petition before the High Court, his response was that the Respondent had applied for the proceedings in the High Court to be stayed pending determination of the matter before this Court and that the High Court had reserved the application for ruling.

To demonstrate the similarities between the petition in the High Court and the one before this Court, the Attorney General referred to paragraph 50(a) and (b) of the petition before this Court and to paragraph 47(b) and (c) of the petition before the High Court which is attached to the Respondent's affidavit in support of the Notice of Motion as exhibit "JS1". Mr. Kalaluka, SC, submitted that the reliefs sought in both courts is the severance of the proviso to section 123 of the Criminal Procedure Code (CPC) on ground that the proviso is contrary to the Constitution and also for an order that bail should be granted. It was the learned Attorney General's contention that this is a case of duplicity of actions and, therefore, an abuse of the court process. He added that in the event of conflicting decisions from the two courts, it would lead to an embarrassment of the judiciary and

that, as a matter of public policy, it would not be in the interest of justice if this Court were to allow the two proceedings seeking the same reliefs to go ahead. It was the learned Attorney General's prayer that the petition before this Court be set aside for duplicity and for abuse of court process.

In opposing the Notice of Motion, learned counsel for the Petitioners, Mr. Sangwa, SC, relied on the arguments in the Petitioners' skeleton arguments in opposition filed, which he also augmented with oral submissions. In sum, State Counsel Sangwa's submission was that what is in contention in the petition before this Court is the constitutionality of section 123 of the CPC in relation to the provisions of Articles 134 and 125 of the Constitution of Zambia. And that the Petitioners' contention is that the Zambia Police Service, which is under the executive arm of Government, arrested and charged them and that, ultimately, it is the Republic of Zambia which is accountable while the Attorney General is the lawyer or advocate for the Republic of Zambia. In support of this argument, Article 177 of the Constitution was cited, with emphasis placed on Article 177(5)(c) thereof.

It was argued that the Constitution expects the Government of the Republic of Zambia to be a party to court proceedings and that in such a situation, the Attorney General will represent the Government. Hence, the Constitution seeks to strike a distinction between the Government as a party to proceedings and the Attorney General as advocate for the Government. Therefore, counsel argued, to substitute the Respondent with the Attorney General as proposed by Mr. Kalaluka, SC, in this case would entail the Attorney General being a party to the proceedings and at the same time being his own counsel in the same case. According to Mr. Sangwa, SC, this proposition is wholly untenable as it would render the provisions of Article 177(5)(c) of the Constitution redundant and, thus, a violation of the same provision. He further argued that in citing the Government of the Republic of Zambia as the Respondent, the Petitioners relied on Article 177 of the Constitution and not on section 12 of the State Proceedings Act, which provides that civil proceedings by and against the State shall be instituted by or against the Attorney General.

It was argued that any interpretation of section 12 of the State Proceedings Act which is counter to the position outlined in Article 177 would be *ultra vires* Article 177 and, hence, null and void as section 12 of the said Act does not purport to override the Constitution as it is subservient to the Constitution and cannot be relied upon as authority for the proposition that the Attorney General ought to have been cited as the respondent in this case. As such, the Attorney General's application to substitute the Respondent has no merit and it should be dismissed.

In response to the Attorney General's contention that by filing the two actions in which the same reliefs were sought in this Court and in the High Court, the Petitioners had engaged in multiplicity of actions which is an abuse of process, Mr. Sangwa, SC, drew our attention to the various authorities cited in the Petitioners' skeleton arguments which, according to him, outline how case law has evolved in Zambia over this issue starting with the case of **Kelvin Hang'andu & Co. v Webby Mulubisha**¹. In that case, the Supreme Court held that forum shopping was an abuse of court process and unacceptable. He

argued that the principles enunciated by the Supreme Court in those cases are not tenable in the current case.

In an effort to show a distinction between the petition in the High Court and the one before this Court, Mr. Sangwa, SC, submitted that in moving the High Court, the Petitioners relied on Article 28 of the Constitution concerning the Petitioners' rights guaranteed by Articles 13 and 18 in the Bill of Rights, alleging that their rights have been and continue to be violated and that Article 28 gives them the right to move the High Court which has power to enforce the provisions of the Bill of Rights, for redress. However, that in moving the Constitutional Court, the Petitioners have relied on Article 128 of the Constitution.

State Counsel Sangwa argued that the import of Articles 28 and 128 is that the High Court has original and unlimited jurisdiction over all constitutional matters or issues touching on the Bill of Rights, while the Constitutional Court, on the other hand, has original and unlimited jurisdiction over all other constitutional matters which do not involve the Bill of Rights. Therefore, given the above scenario, the possibility of the two courts issuing conflicting judgments is non-

existent, which point, according to Mr. Sangwa, SC, is at the heart of multiplicity of actions.

According to State Counsel Sangwa, what led to the Supreme Court pronouncing against multiplicity of actions was the rationale that there was only one High Court in Zambia and that judges of the High Court share the same jurisdiction. Hence, the situation in the current case is different as there are two separate courts with separate and distinct powers over constitutional matters and that the Petitioners have no choice but to issue two petitions under Articles 28 and 128 of the Constitution. As such, the issue of multiplicity of actions was not possible in this case where the Petitioners were seeking different remedies before the High Court and this Court. He added that although there may be similarities in the remedies sought in the two courts, the premise on which they were sought was different. Therefore, the motion by the Attorney General lacks merit and should be dismissed.

In augmenting the arguments in the Petitioners' skeleton arguments, Mr. Sangwa, SC, submitted, *inter alia*, that decisions in Causes 2016/CC/0034 and 2016/CC/0033, cited by the Respondent to

invoke the principle of *res judicata*, were by a single judge of the Court which are the subject of appeals before the full bench. Further, that the issue of who the proper party to proceedings involving the State has never been considered by the entire Court. He added that the two cases cited by the Respondent addressed totally different issues from the issues in the current case; that in Cause 2016/CC/0034 certain public officers were cited on account of violation of the Constitution and needed the Attorney General to be substituted in their position while in Cause 2016/CC/0033, the party was the Speaker of the National Assembly, who was included on the premise that he had violated the Constitution. Mr. Sangwa, SC, reiterated and stressed that the issue of citing the Government of the Republic of Zambia as the respondent has never been a subject of consideration in any judgment or ruling of the Constitutional Court. He then went on to largely reiterate the arguments in the Petitioners' skeleton arguments and maintained that the Respondent's argument on *res judicata* was devoid of merit. He added that the decisions of the Supreme Court which the Respondent relied upon as authority

on this issue are not binding on the Constitutional Court, which is yet to formulate its own jurisprudence, but are merely persuasive.

As regards the Respondent's arguments that by filing the two petitions in two different courts seeking similar reliefs, the Petitioners were engaging in multiplicity of actions, Mr. Sangwa, SC, stressed that this was a fiction as there would be no conflict of decisions in regard to the matters before the two courts. According to him, the remedies being sought were different.

In reply, the learned Attorney General relied on the written heads of argument filed in reply. On the issue of who ought to have been the proper Respondent, it was argued that this issue is *res judicata* as this Court pronounced itself on the issue in the case of **Hakainde Hichilema and another v Edgar C. Lungu and others**² in Causes No. 2016/CC/0034 and 2016/CC/0033 involving the same parties.

In advancing the principle of *res judicata*, the Respondent called in aid the cases of **Aaron v Shelton**³; **Societe Nationale des Chemis de Pur du Congo v Joseph Nonde Kasonde**⁴; and, **Finance Bank Zambia Limited v Noel Nkhoma**⁵.

In the alternative, it was submitted that while Article 177 of the Constitution provides that the Attorney General shall represent the Government in civil proceedings to which the Government is a party, the same should be read together with section 12 of the State Proceedings Act.

In reply to the second issue raised, it was argued that the cases cited by learned State Counsel for the Petitioners in their skeleton arguments, namely, **Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited**⁶, and, **Kelvin Hang'andu & Co. v Webby Mulubisha**,¹ show that the courts have always disapproved of forum shopping and multiplicity of actions and that the offensive actions involve commencing another action involving similar issues between the parties before different courts.

It was contended that the test for multiplicity of actions and forum shopping has been satisfied in the case *in casu* as, in both the petition in the High Court and the one before this Court, the Petitioners seek the same relief of severing the proviso to section 123(1) of the CPC. Reference was made to paragraph 50(a) of the petition in this Court

and paragraph 47(c) of the petition in the High Court. It was the Attorney General's contention that the Petitioners had clearly engaged in multiplicity of actions and forum shopping with the potential of having two conflicting judgments from this Court and from the High Court.

As regards the Petitioners' contention that this Court and the High Court have different jurisdictions, the Attorney General's response was that this does not aid the Petitioners' case in that despite the different jurisdictions between the two courts, the possibility of two conflicting judgments being delivered, where one court decides to sever the proviso while the other does not, still remains. And that if that happens the two courts would find themselves in an embarrassing situation which would bring the administration of justice and the Judiciary into ridicule.

Therefore, the Respondent agrees with the Petitioners that while the High Court has jurisdiction to secure the enforcement of the Bill of Rights and this Court has jurisdiction to interpret the whole Constitution, including the Bill of Rights, the jurisdictions of the High Court and Constitutional Court are not mutually exclusive as

suggested by the Petitioners. Hence, in countering the point made by the learned State Counsel for the Petitioners that the purpose of Article 28 of the Constitution is to secure the enforcement of the Bill of Rights and any other objective has to be sought or pursued outside the provisions of Article 28, his argument was still that the interpretation of the Bill of Rights is another objective that cannot be sought under Article 28 but under the interpretation jurisdiction of this Court, as the High Court enforces the Bill of Rights while the interpretation is by this Court.

In winding up his oral submissions on this aspect, Mr. Kalaluka, SC, reiterated the point that bringing two identical claims before the two courts has potential for conflicting decisions and, hence, the Respondent's prayer that the petition before this Court should be set aside with costs to the Respondent.

In response to the submission by Mr. Sangwa, SC, as regards the issue of the proper party to proceedings involving the State, that this has never been considered by the entire bench of the Constitutional Court and premising this contention on the provisions of Article 129(1) and (2) of the Constitution, Mr. Kalaluka, SC, contended that

one judge constitutes the Constitutional Court when hearing an interlocutory matter. Hence, interlocutory decisions are final and binding on the parties as the two Rulings referred to have not been set aside. He, therefore, disagreed with State Counsel Sangwa's assertion that Article 28 of the Constitution should be construed to mean that a party can seek the same relief before different courts. Mr. Kalaluka SC, wound up his submissions by reiterating the Respondent's contention that the situation in the present case is forum shopping and an abuse of the court process.

We have accorded careful consideration to the affidavit evidence and to the written and oral arguments advanced by the parties. We find that two main issues have been raised by this Notice of Motion. The first is whether, in proceedings involving the State or in which the State has an interest, the proper party that should be cited is the Attorney General and not the Government of the Republic of Zambia. The second issue is whether the petition filed before this Court should be dismissed on the ground that it is an abuse of the court process as the Petitioners have engaged in multiplicity of actions by filing a similar petition in the Constitutional Court seeking

substantially similar or same relief as in the one filed before the High Court under Cause No. 2017/HP/0888.

In regard to the first issue, the learned Attorney General invoked the principle of *res judicata*, arguing that this issue has already been settled in Causes No. 2016/CC/0034 and 2016/CC/0033. Further, that Article 177(5)(c) of the Constitution should be read together with section 12 of the State Proceedings Act which provides that civil proceedings by and against the State shall be instituted by or against the Attorney General.

Learned State Counsel Sangwa opposed this assertion and contended that the issue of who the proper party is to proceedings involving the State has never been considered by the full bench of this Court. It was his contention that Article 177(5)(c) envisages that the Government of the Republic of Zambia can be a party to proceedings, with the Attorney General acting as counsel.

Halsbury's Laws of England, 4th Edition Volume 16 in paragraph 975 outlines the essential elements of *res judicata*. It reads as follows:

“In order that a defence of *res judicata* may succeed it is necessary to show not only that the cause of action was the same, but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second.

A plea of *res judicata* must show either an actual merger, or that the same point had been actually decided between the same parties. Where the former judgment has been for the defendant, the conditions necessary to estop the plaintiff are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed." (*our own emphasis*)

The above quote was cited with approval by the Supreme Court in the case of **Bank of Zambia v Jonas Tembo and Others**⁸ where it was held that:

- (i) In order that the defence of *res judicata* may succeed, it is necessary to show that the cause of action was the same, but also that the plaintiff had an opportunity of recovering and but for his own fault might have recovered in the first action that which he seeks to recover in the second.
- (ii) A plea of *res judicata* must show either an actual merger or that the same point had been actually decided between the same parties.

Article 177(5)(c) of the Constitution reads:

“(5) The Attorney General is the chief legal adviser to the government and shall –

- (c) represent the Government in civil proceedings to which Government is a party;”

And section 12(1) of the State Proceedings Act provides that:

“Subject to the provisions of any other written law, civil proceedings by or against the State shall be instituted by or against the Attorney General as the case may be.”

In Cause No. 2016/CC/0034, one of the matters referred to by the learned Attorney General to argue the point of *res judicata*, the

learned single judge of this Court, in reference to section 12(1) aforesaid had this to say:

“This provision is in line with Article 177(5)(c) of the Constitution as amended which provides that the Attorney General shall represent the Government in civil proceedings to which the Government is a party.”

We endorse the position taken by the learned single Judge.

We hold that Article 177(5)(c) of the Constitution and section 12(1) of the State Proceedings Act are clear and unambiguous. The Attorney General is the proper party to proceedings involving the Government of the Republic of Zambia. To make the point clearer, we find Article 272(a) of the Constitution instructive. It reads:

“Parliament may enact legislation to give effect to an Article or a provision in this Constitution which –

(a) confers a function or jurisdiction on a person, office, institution, council or commission;”

Reading Article 177(5)(c) of the Constitution and section 12 of the State Proceedings Act in the light of Article 272(a) above, it is clear that section 12 of the State Proceedings Act provides a clear mechanism for the implementation of Article 177(5)(c) of the Constitution. Stated in another way, section 12 of the State Proceedings Act facilitates or prescribes the execution of the function of the Attorney General as provided in Article 177(5)(c) of the

Constitution. We further note that the repealed Article 54(2)(c) of the Constitution was couched in similar terms to Article 177(5)(c). Article 54(2)(c) was in these terms:

“Without prejudice to the general functions under clause (1), the functions of the Attorney-General shall be to –

....

(c)represent the Government in courts or any other legal proceedings to which Government is a party;

We, therefore, cannot accept the interpretation placed on Article 177(5)(c) on behalf of the Petitioners by State Counsel Sangwa as to do so would be to place a construction on Article 177(5)(c) that produces an unworkable or impracticable result. That could not have been the intention of the framers of the Constitution. We agree with the position taken by the learned Attorney General and find merit in the assertion that the proper party to proceedings involving the State or where the State has an interest, is the Attorney General.

The second issue is whether in the circumstances of this case, the Petitioners, by filing the two petitions in question before two different courts, have engaged in duplicity or multiplicity of actions. Put another way, does the filing of two seemingly identical petitions in the High Court and in the Constitutional Court, on the same day and

by the same parties and seeking similar remedies, amount to duplicity or multiplicity of actions and that, as such, is an abuse of process?

In this matter and as can be deduced from the submissions by both parties and the authorities cited, it is common cause that the courts in our jurisdiction abhor duplicity or multiplicity of actions and forum shopping. However, the pertinent question for determination in this Motion is whether, in the circumstances of this case, the Petitioners have engaged in duplicity of actions.

It is also common cause that the circumstances leading to the two petitions are the same and the Petitioners acknowledged this fact in paragraph 22 of their skeleton arguments. It is also not in dispute that currently, the Constitution of Zambia gives the Constitutional Court and the High Court separate jurisdiction in that Article 28 of the Constitution gives the High Court jurisdiction to enforce Part III of the Constitution which contains the Bill of Rights, while Article 128 of the Constitution gives the Constitutional Court the mandate to, *inter alia*, interpret the provisions of the Constitution. Therefore, the nature and the relief sought guides a party as to which court he

or she must commence his or her action. In other words, the High Court is the judicial organ that the Republican Constitution mandates to enforce the Bill of Rights and any person who alleges that his or her rights enshrined in the said Bill of Rights have been violated must seek enforcement, redress or relief in the High Court. The Constitution of Zambia clearly defines the jurisdiction of the High Court in relation to the Bill of Rights.

On the other hand, the Constitution of Zambia has also clearly defined the jurisdiction of the Constitutional Court as Article 128(1)(a) of the Constitution provides that the Constitutional Court has original and final jurisdiction to interpret the Constitution. Article 267(1) of the Constitution also mandates the Constitutional Court to interpret the Constitution in accordance with the Bill of Rights.

To ably determine the question whether or not by filing the two petitions the Petitioners have engaged in duplicity, we have cautiously examined the reliefs sought in the petition before the High Court and the one before us. We have also considered the submissions by the Petitioners that the two courts play separate roles

in regard to constitutional matters and the arguments that the danger of a conflict in decisions does not arise and is a mere fiction. We have also considered the Respondent's contention that the remedies sought before the two courts come to the same thing, that is, severing the proviso to section 123 of the CPC and that in the event that the two courts reach conflicting decisions on the severance of the said proviso, an awkward and embarrassing situation could arise, thereby placing the judicial system and the administration of justice into ridicule.

Pages 8 to 9 of the Record indicate the reliefs the Petitioners seek before this Court, which we have referred to at the beginning of this Ruling. We have also referred to exhibit "JS1" to the Respondent's Affidavit in Support of the Notice of Motion which is the petition before the High Court. Paragraph 46 outlines the reliefs the Petitioners seek in the High Court. Paragraph 46(b) and (c) read as follows:

- (b) **Section 123(1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia, to the extent to which it purports to deny any Police Officer, Subordinate Court, High Court or the Supreme Court the power to decide whether to grant bail or not to any person charged with murder, treason or any other offence carrying a possible or mandatory capital penalty; misprision of treason or treason felony; aggravated robbery; or theft of motor,**

if such a person has previously been convicted of theft of motor vehicle is ultra vires Article 11 of the Constitution of Zambia in that the limitations imposed by Section 123(1) of the Criminal Procedure Code do not come within the ambit of the Bill of Rights or Article 13 of the Constitution and hence null and void.

- (c) Section 123(1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia, to the extent to which it purports to deny any Police Officer, Subordinate Court, High Court or the Supreme Court the power to decide whether to grant bail or not to any person charged with murder, treason or any other offence carrying a possible or mandatory capital penalty; misprision of treason or treason felony; aggravated robbery; or theft of motor, if such a person has previously been convicted of theft of motor vehicle is ultra vires Article 13(3)(b) of the Constitution and hence null and void.

We have compared the above reliefs with those in the petition before this Court. Clearly, the Petitioners' ultimate objective, based on the reliefs they are seeking, is to have the proviso to section 123(1) of the CPC obliterated by way of orders or declarations either from this Court or the High Court.

Article 1(1) of the Constitution provides that the Constitution of Zambia is the supreme law of the Republic of Zambia and that **“any other written law, ... that is inconsistent with its provisions is void to the extent of the inconsistency”**.

Clearly, this is the main relief the petitioners seek from both the High Court and this Court. Therefore, there can be no doubt that what the Petitioners have done is to use alternative routes to reach the

same destination, namely, the severance of the impugned proviso to section 123(1) of the CPC. As such, there is merit in the Respondent's apprehension that if the two courts reach different or conflicting decisions regarding the issue whether or not the proviso to section 123(1) of the CPC should be severed for being contrary to the Constitution, such a development could cause the Judiciary and the administration of justice embarrassment and ridicule.

We therefore agree that to file two identical petitions in two different courts, on the same day by the same parties, seeking essentially the same remedies, is inimical to constitutional orderliness. In **Godfrey Miyanda v The Attorney General**⁷, this Court opined that:

"The constitution exists as a minimally unified, coherent, functioning document. Its various parts and portions should work towards a coherent, ascertainable purpose, which is to provide a stable constitutional order in pursuit of national values and principles...."

We repeat this in the current case because what we have before us is a situation where two superior courts, having jurisdiction over constitutional matters, albeit, in different roles, are put in a situation where they have to pronounce on the constitutionality of the same provision of a law, the proviso to section 123(1) of the CPC. In the event of conflicting decisions, as the Respondent has rightly argued,

and we agree, different signals would be sent from the same Judiciary on the constitutionality of the same law. As stated above, that would not only undermine the integrity of the Judiciary but also result in *confusion* in the administration of criminal justice.

With regard to the question whether or not the Petitioners' action of filing petitions in two different courts seeking the same reliefs amounts to duplicity or multiplicity of actions and forum shopping, which amounts to abuse of the court process, the learned authors of the Journal of Law, Policy and Globalization on "*The Abuse of Legal Process in Nigeria: The Remedies*", stated that:

"The situations that may give rise to an abuse of court process are indeed inexhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:

- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds. (*our own emphasis*)

Even more persuasive, Zambian courts have frowned upon parties engaging in multiplicity of actions or forum shopping as

acknowledged by both parties in this case. We note in particular that the Petitioners have made extensive reference to what the courts have said in their skeleton arguments. In **Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited**⁶ the court said:

“We listened to the arguments in this appeal; and would like to immediately affirm the judge on his disapproval of the action taken in this matter whereby one action is pending and some other steps are being pursued. We also disapprove of parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter....that in the considered opinion of this court the justice of the case demands that the parties must raise whatever they wish to raise with the court in the earlier action....”

And in **Kelvin Hang'andu & Co. v Webby Mulubisha**¹ the Supreme Court said:

“Once a matter is before court in whatever place, if that process is properly before it, the court should be the sole court to adjudicate all issues involved, all interested parties have an obligation to bring all issues in that matter before that particular court. Forum shopping is abuse of process which is unacceptable.”

We are persuaded and disagree with learned State Counsel Sangwa that the said principles are not tenable in the current case. We find that the above principles apply and are apt to the two petitions filed by the Petitioners in the High Court and before this Court where the two causes were filed on the same day before the two courts and they involve the same parties and essentially the same relief is sought, the

severance of the proviso to section 123(1) of the CPC. The potential for two conflicting decisions being handed down by the two courts is high. We therefore find merit in regard to this limb of the motion.

On the whole, we find merit in the Respondent's Motion and set aside the petition under 2017/CCZ/0006.

Considering this matter raised important constitutional issues, each party shall bear their own costs.



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H. Chibomba
President
Constitutional Court



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A. M. Sitali
Constitutional Court Judge



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M. S. Mulenga
Constitutional Court Judge



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E. Mulembe
Constitutional Court Judge



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M. M. Munalula
Constitutional Court Judge