

SELECTED JUDGMENT NO. 21 OF 2019

P.665

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

SCZ/8/024/2016

BETWEEN:

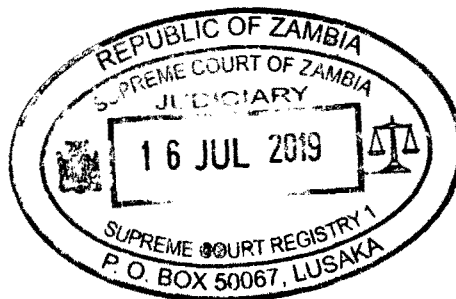
THE PEOPLE

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS
(EX-PARTE RAJAN MAHTANI (DR.))

APPLICANT

RESPONDENT



Coram: Mwanamwambwa, DCJ, Musonda and Mutuna, JJS
on 23rd January, 2017 and 16th July, 2019

For the Applicant: Mr. J. P. Sangwa, SC, Simeza, Sangwa
Associates

For the Respondent: Mr. F. Imasiku, Acting Principal State Advocate

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

1. Lusaka City Council v Adrian Mumba: (1977) Z.R. 420
2. Godfrey Miyanda v The Attorney-General: (1985) Z.R. 185
3. Richard Nsofu Mandona v Total Aviation and Export Limited &
Three Others: SCZ Appeal No. 82/2009

4. **Zambia National Commercial Bank PLC: Selected Judgment No. 24 of 2018**
5. **Kapoko v The People, Selected Judgment No. 43 of 2016**
6. **Spiros Konidaris v Ramlal Kanji Dandiker: Appeal No. 57 of 1999**
7. **Jones v MBNA International Bank [2000] EWCA Civ. 314**

Legislation referred to:

1. **The Constitution of Zambia Act No. 1 of 2016: Sections 6, 21**
2. **The Constitution of Zambia (Amendment) Act No. 2 of 2016
(Articles:1, 92 (6), 94 (8), 120 (3) (a), 125 (2) (a), 128, 130, 131,
266 and 272**
3. **The Supreme Court Act, Chapter 25 of the Laws of Zambia: Rules
48 and 50**
4. **The Court of Appeal Act No. 7 of 2016**
5. **The Constitutional Court Act No. 8 of 2016.**
6. **The interpretation and General Provisions Act, CAP 2 of the Laws
of Zambia: section 14(3)**
7. **The Defence Act, 1955**
8. **Practice Direction No. 1 of 2016**

Other Works referred to:

1. ***Halsbury's Laws of England***
2. ***Oxford Advanced Learner's Dictionary***

The delay in having this judgment delivered is deeply regretted. At the time when we heard this motion and right through the extended period over which the initial draft underwent review by

the full court, the Hon. the Deputy Chief Justice, Mr. Justice M. S. Mwanamwambwa was a member of the panel which heard the motion. The Hon. Mr. Justice Mwanamwambwa having since retired, this judgment is by the majority.

By this Motion, it has been sought on behalf of Dr. Rajan Mahtani (**“the Respondent”**), to have a Ruling of a single Judge of this Court whereby that single Judge granted leave to the Attorney General to appeal against an earlier judgment of a High Court Judge who had quashed the decision of the Director of Public Prosecutions (**“the DPP”**) to have the respondent criminally prosecuted set aside and the Attorney General’s application seeking leave to appeal to this Court dismissed.

The background facts and circumstances surrounding the Motion before us are of undoubted perspicuity and have been well set out in the applicant’s Arguments in Support of the Motion.

The respondent and members of a Ndola-based business family known as the Ventrighias had been embroiled in a bitter and somewhat toxic shareholding wrangle in respect of a private limited

company known as Zambezi Portland Cement Limited (“the company”). This wrangle culminated in the setting in motion of the machinery of criminal justice against the respondent at the instigation of the Ventrighias who had accused the respondent of having forged share transfer instruments relating to the company.

In the month of June 2015, the respondent moved the High Court of Zambia seeking leave to commence judicial review proceedings against the decision of the DPP to criminally prosecute him for allegedly forging the share transfer instruments as alluded to above. By a Ruling dated 25th June, 2015, the High Court granted leave to the respondent who, accordingly, proceeded to file a Notice of Motion seeking judicial review on 29th June, 2015. On 19th November, 2015, a Judge of the High Court delivered judgment in which he quashed the decision of the DPP to prosecute the respondent on the ground that such prosecution was *ultra-vires* the Constitution and illegal.

On 11th December 2015, the Attorney General applied before that High Court Judge seeking leave to appeal to this Court against the said High Court judgment of 19th November 2015.

On 5th January, 2016, the President of the Republic of Zambia, in exercise of his constitutional authority, assented to a National Assembly of Zambia Bill relating to the Constitution of Zambia (Amendment) Act No. 2 of 2016, which repealed and re-enacted the entire Constitution of Zambia, except for Part Three and Article 79 thereof. On the same day, the President also gave his assent to a like Bill which birthed the Constitution of Zambia Act No. 1 of 2016. Both pieces of legislation came into effect on 5th January, 2016.

On 21st January 2016, the High Court Judge earlier referred to refused to grant leave to the Attorney General to appeal against his decision quashing the DPP's decision to prosecute the respondent. On 4th February, 2016, the Attorney General, being dissatisfied with the decision of the Judge of the High Court, renewed his application seeking leave to appeal before a single

Judge of this Court pursuant to the provisions of Rules 48 and 50 of the Supreme Court Rules, CAP. 25. The single Judge subsequently appointed the 24th February, 2016 as the date for the hearing of the Attorney General's application. On 22nd February, 2016, the Respondent took out a Notice of Motion seeking to dismiss the Attorney General's application on the ground that, in the light of the provisions of Article 125 of the Amended Constitution, this Court lacked the constitutional authority or jurisdiction to grant leave to appeal to this Court against the decision of the High Court. For completeness, the appellate jurisdiction which Article 125 (2) (a) of the Amended Constitution vested in this Court only related to appeals from the Court of Appeal.

On 24th February, 2016, the parties appeared and argued the Attorney General's motion before the single Judge of this Court. On 1st March, 2016, that is, before the single Judge could deliver his Ruling, the Chief Justice of Zambia issued Practice Direction No. 1 of 2016 which sought to provide guidance on how matters which were before the various courts in the Republic of Zambia

before 5th January, 2016, were to be dealt with in the light of the constitutional changes which had arisen and the consequential creation of new superior courts. The Practice Direction also guided on how those matters that arose after 5th January, 2016, including appeals, were to be treated by the courts.

On 21st March, 2016, the parties' respective advocates were called by the single Judge of this Court to address him on the effect of the Practice Direction referred to above on the application which had been argued before him. The respondent's advocates attended before the Judge and were heard, but the Attorney General did not attend.

On 25th April, 2016, the single Judge of this Court delivered his Ruling in which he granted the Attorney General leave or permission to appeal to this Court against the decision of the High Court Judge.

In his Ruling, the single Judge identified the issues which had fallen for his determination as being the following:

- “(a) Whether or not a single judge of the Supreme Court sitting alone has jurisdiction to hear and determine an application for leave (to appeal) in view of the Constitution of Zambia Act, No. 1 of 2016 and the Constitution of Zambia (Amendment) Act;**
- (b) The effect of transitional provisions in legislation and the position of parties who claim to have accrued rights under earlier legislation; and**
- (c) The validity and effect of Practice Direction No. 1 of 2016.”**

With regard to the issue of whether or not a single judge of this Court had jurisdiction to hear and determine an application for leave (to appeal) in the light of the enactment of the Constitution of Zambia Act No. 1 of 2016 and the Constitution of Zambia (Amendment) Act No. 2 of 2016, the single judge reasoned that the absence of necessary legislation to effectuate or operationalise the constitutional provisions which had created the Court of Appeal and the Constitutional Court meant that the existing law was to remain in force until such time as the necessary legislation was put in place. To support this reasoning, the single judge made reference to Section 6 of the Constitutional of Zambia Act No. 1 of 2016 which we recited early on in this judgment. According to the

single Judge, Section 6 was deliberately embedded in the Constitution of Zambia Act No. 1 of 2016 in order to allow for the continued operation of existing laws during the period when measures were being taken to operationalise the new constitutional provisions relating to the new courts through the enactment of the requisite legislation. In the view of the learned single Judge, it could not have been the intention of the legislature to create a vacuum as a consequence of the new legal or constitutional order in the country. The learned single Judge further reasoned that the vacuum which would ensue if State Counsel Mr. Sangwa's argument were to be accepted was going to unleash 'ghastly' and 'chaotic' consequences such as paralyzing the progression of actual or potential appeals arising from the High Court. According to the single judge, it was in order to avoid the aforesaid undesirable state of affairs that transitional provisions had been embedded in the Constitution of Zambia Act No. 1 of 2016. The learned single Judge accordingly concluded his reflections around the first of the three issues which he had identified as having fallen for his determination by making the following observation:

“... If I accepted [Mr. Sangwa, S.C’s] argument, it would effectively mean that all appeals from the High Court would be paralysed and by the time legislation is in place, litigants would have lost the opportunity to appeal within time to the Supreme Court. It is my considered view that the above referred to provisions of the Constitution support the argument that I have jurisdiction to hear and determine this application” (at p. R.12 of the Ruling).

With respect to the second issue which the learned single Judge had identified as having fallen for his determination, namely, the function of the transitional provisions which had been embedded in the Constitution of Zambia Act No. 1 of 2016 *vis-à-vis* the Applicant’s accrued rights, the Judge started off by making reference to Section 14 (3) (c) of the Interpretation and General Provisions Act, CAP. 2 of the Laws of Zambia which enacts as follows:

“14 (3) Where written law repeals in whole or in other written law, the repeal shall not:
(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed.”

The Judge then went on to make reference to the case of **Lusaka City Council v Adrian Mumba¹** in which we considered

the effect of Section 14 (3) (c) of CAP. 2 and proceeded to hold as follows:

- “(i) Section 14 (3) (c) of the Interpretation and General Provisions Act does not preserve rights of the public at large; only the specific rights of individuals who have, before the repeal, satisfied any conditions necessary for their acquisition can survive.**
- (ii) When the respondent appealed to the Local Government Service Commission specifically under the provisions of Section 17 of Cap.477 the train of events provided for by Sections 17 and 18 of Cap. 477 was set in motion, and all the provisions relating to the conduct of appeals came into effect together with the statutory right of appeal to the High Court given by Section 18 (2). Both the respondent and the appellant became special persons who were entitled to the right of appeal given by Section 18 (2) as opposed to other members of the community.**
- (iii) At the time of the repeal of Cap. 477 the appellant had a contingent right to appeal if and when an adverse decision was made by the Local Government Service Commission; the right did not accrue only when the adverse decision was made.**

The principles which we laid down in the case of **Lusaka City Council v. Adrian S. Mumba**¹ were subsequently re-affirmed in the case of **Godfrey Miyanda v The Attorney-General**², whose

facts were that, the appellant joined the Zambia Army as a cadet officer at a time when the Defence Act, 1955 was in force. That statute provided, *inter alia*, that officers could only be dismissed after they had been given an opportunity to be heard on any allegations against them. By the time the appellant in that matter was receiving his commission, the statute under whose terms he had been engaged had been repealed and re-enacted, with the repealing statute omitting the terms referred to above which had been in the repealed statute. The appellant was later summarily dismissed and the issue arose as to whether or not he had an accrued or acquired right not to be dismissed without being afforded an opportunity to exculpate himself. In our judgment, we found for the appellant and held, *inter alia*, that:

“(iii) The appellant’s attestation during the currency of the Defence Act, 1955, set in motion the relevant claim of events sufficient for the rights to accrue and be acquired despite their being at the time inchoate and contingent upon his successful completion of the cadet officer’s course and being granted a commission.”

Adverting to the matter at hand, the single Judge noted that the judgment of the High Court was delivered on 19th November,

2015 and that, on 11th December, 2015, the applicant filed summons for leave to appeal to the Supreme Court, which application the learned High Court Judge had declined to grant on 21st January, 2016. According to the learned single Judge:

“As at 5th January, 2016 when the Constitution was amended, the applicant had already set in motion the chain of events necessary to prosecute an appeal. It is my considered view that after judgment was delivered on 19th November, 2015, both the applicant and the respondent had a right to appeal to the Supreme Court. The appellant exercised this right on 11th December, 2015 by filing in summons for leave to appeal. The applicant was not seeking to enforce an abstract right conferred by the repealed Constitution, but seeking to enforce a specific right which existed as at 5th January, 2016.”

With regard to the third and final issue relating to the Practice Direction which the learned single Judge had identified as having fallen for his determination and around which Mr. Sangwa, S.C. contended that the powers which had previously been available to the Chief Justice to promulgate the same (Practice Directions) pursuant to Articles 92 (6) and 94 (8) of the Constitution had since been taken away by Article 120 (3) (a) of the Amended Constitution, the single Judge, while accepting Mr. Sangwa’s argument, repeated

the views which he had expressed in relation to the first issue which we exposed early on in this judgment. In this regard, the Judge reasoned that, as the process and procedures which, in terms of Article 120 (3) (a) of the Amended Constitution, the new courts had to follow were yet to be enacted, the Chief Justice still retained the powers which had been available to that office prior to the amendment which had arisen in order to facilitate a smooth transition.

The single Judge accordingly concluded his Ruling by dismissing the respondent's Notice of Motion to dismiss the application seeking leave to appeal and unequivocally affirming that he had the requisite jurisdiction to hear and determine the Applicant's renewed application for leave to appeal to this Court.

The Respondent has now filed a motion against the Ruling of the single Judge seeking to have this Court set aside that Ruling.

The grounds on which the Respondent seeks the reversal of the decision of the single Judge have been set out in the Notice of Motion in the following terms:

- “1. That Sections 6 and 21 of the Constitution of Zambia Act No. 1 of 2016 and Article 272 (f) of the Constitution of Zambia as amended by Act No. 2 of 2016 are of no application to the appellate jurisdiction of the Supreme Court of Zambia as conferred by Article 125 (2) of the Constitution;**
- 2. That the Attorney General (the Appellant) did not have any accrued right of appeal to the Supreme Court of Zambia as at 5th January, 2016; and**
- 3. That Article 120 of the Constitution of Zambia as amended by Act No. 2 of 2016 does not require any statutory enactment to take effect.”**

In his Arguments filed in support of the Motion, the Respondent set out the grounds upon which he anchored the same in the following terms:

- (a) The Honourable Judge of the Supreme Court exceeded the extent of his authority by engaging in the interpretation of the Constitution aimed at harmonising the various provisions of the Constitution, namely, Articles 125, 128, 130, 131, 266 and 272 of the Constitution; Articles 92 and 94 of the Constitution in force prior to 5th January, 2016; and with Sections 6 and 21 of the Constitution of Zambia Act, 2015, contrary to the provisions of Article 128 of the Constitution.**
- (b) The Honourable Judge of the Supreme Court misdirected himself on points of law by holding that based on Sections 6 and 21 of the Constitution of Zambia, 2015, a single Judge of the**

Supreme Court had jurisdiction to hear and decide an application for leave to appeal to the Supreme Court against the decision of the High Court “in view of the Constitution of Zambia Act No. 1 of 2016 and the Constitution of Zambia (Amendment) Act No. 2 of 2016.”

- (c) The Honourable Judge of the Supreme Court misdirected himself on points of law by holding that, based on the transitional provisions in the Constitution of Zambia Act, 2015, the Attorney General had accrued the right to appeal to the Supreme Court against the decision of the High Court.**
- (d) The Honourable Judge of the Supreme Court misdirected himself on points of law by holding that Practice Direction No. 1 of 2016, was valid in that the Chief Justice had power to issue the said Practice Direction in view of the provisions of Articles 92 (6) and 94 (8) of the Constitution, repealed since 5th January, 2016.**

Mr. Sangwa, S.C., learned counsel for the respondent confirmed having filed written Arguments which he proposed to argue in the same order in which they have been presented above.

A point worthy of immediate note is that the grounds numbered ‘a’ and ‘d’ in the Arguments in support of the Motion are radically or materially different from the grounds which occur in the Motion while ground No. 3 of the Motion appears to have been

abandoned. Having regard to the conclusions which we have reached in this judgment, we have deemed it unnecessary to pronounce ourselves on the ground numbered 'a' in the respondent's Arguments in the specific manner in which the ground invites us to.

Mr. Sangwa, S.C., argued with respect to the ground numbered 'a' in the Respondent's Arguments, that, in arriving at the decision to grant the Attorney General leave to appeal to the Supreme Court against the decision of the High Court, the single Judge of this Supreme Court appropriated the authority to interpret the various provisions of the Constitution to itself.

According to counsel, the Ruling of the single Judge was replete with the single Judge's own interpretations of the various provisions of the Constitution in spite of the Court's attention having been drawn to the provisions of Article 1 (3) of the Constitution, which stipulates that the Constitution is binding on *"all persons in Zambia, State organs and State Institutions."* Mr. Sangwa, S.C., further observed that, during the hearing of the Motion, it was pointed out to the single Judge that since there was

no consensus between the Attorney General and the Applicant as to the import of the various provisions of the Constitution, “*a matter relating to the interpretation of [the] Constitution*” had arisen and that, consequently, the single Judge was bound to refer that matter to the Constitutional Court pursuant to the provisions of Article 128 (2) of the Constitution.

The learned State Counsel further complained that, in spite of having taken note of the provisions of Article 128, the single Judge ignored the said provisions and went on to interpret the various provisions of the Constitution in issue, which exercise culminated in the Judge’s determination that the Attorney General had the right to appeal to the Supreme Court against the decision of the High Court.

In the view which was taken by Mr. Sangwa, S.C., as the Motion which is now before us cannot be resolved without engaging in the interpretation of various provisions of the Constitution, he was renewing the respondent’s position that this Court does not have the authority to interpret the Constitution and that, accordingly, a reference should, instead, be made to the

Constitutional Court of the Republic of Zambia, pursuant to Article 128 (2) of the Constitution, so that the Constitutional Court can determine the jurisdiction of this Court, in particular, whether or not it has appellate jurisdiction over matters determined by the High Court. In this regard, Mr. Sangwa, S.C. opined that, once the Constitutional Court has offered the necessary guidance, this Court can then proceed to decide this Motion. Counsel further reasoned that, should this Court agree with the respondent's proposition as canvassed in the context of the first ground then there would be no cause for us to consider the rest of the grounds to reverse the decision of the single Judge.

Notwithstanding his proposition as set out above, Mr. Sangwa, S.C. proposed to address the other grounds on which this Motion is founded, just in case we rejected his invitation in ground one.

In relation to the second ground of the Motion, the respondent's counsel began by noting that the position of the single Judge was that, Sections 6 and 21 of the Constitution of Zambia Act, 2016, conferred jurisdiction on a single Judge of this Court to

hear and decide the application for leave to appeal to this Court against the decision of the High Court in view of the Constitution of Zambia Act, 2016 and the Constitution of Zambia (Amendment) Act, of 2016.

Learned State Counsel then went on to quote the following passage from the Ruling of the single Judge:

***“Furthermore, Article 272 (f) of the Constitution states that Parliament may enact legislation to give effect to an Article or a provision of the Constitution. A reading of Section 21 clearly shows that even if the Court of Appeal has been established, it shall only come into being or operational upon enactment of the Act of Parliament relating to it. The same argument applies to the provisions relating to the establishment and jurisdiction of the Constitutional Court. Similarly, it shall be necessary to amend the Supreme Court Act, Chapter 25 of the Laws of Zambia in order for the Supreme Court to exercise its jurisdiction as conferred by Article 125 (2) of the Constitution. I therefore do not find merit in State Counsel Sangwa’s argument that Article 125 of the Constitution does not need an Act of Parliament to take effect. At present, the only recourse is the existing law which, according to Section 6 of the Act No. 1 of 2016 shall continue in force after 5th January 2016, until such time as the relevant legislation is effected (Counsel’s emphasis).*”**

According to Mr. Sangwa, S.C., the single Judge of this Court misapprehended the respondent’s Motion which had been before

him. Counsel argued that the Motion had nothing to do with the transitional provisions but with a very simple question, namely, whether, given the provisions of Article 125 of the Constitution, the Supreme Court has jurisdiction to hear an appeal against a decision of the High Court. The said Article reads:

- “125. (1) Subject to Article 128, the Supreme Court is the final court of appeal.**
- (2) The Supreme Court has –**
- (a) *appellate jurisdiction to hear appeals from the Court of Appeal; and***
 - (b) *jurisdiction conferred on it by other laws.***
- (3) The Supreme Court is bound by its decisions, except in the interest of justice and development of jurisprudence” (Counsel’s emphasis).**

Mr. Sangwa, S.C. reminded us that this provision came into effect on 5th January, 2016 and clearly enjoins this Court to hear appeals from the Court of Appeal as well as any other matters that may be stipulated by other laws. In the view of counsel, Article 125 (1) was complete and effective from the date when the Republican President assented to the Constitution (Amendment) Bill, 2016. According to Mr. Sangwa, the provision did not require Parliament to pass an Act of Parliament in order for it to take effect.

Mr. Sangwa, S.C. further posited that the single Judge's reference to Sections 6 and 21 of the Constitution of Zambia Act 2016, was, therefore, misplaced as they were not relevant to the issues before Court. In this regard, counsel quoted Section 6 which reads:

“6.(1) Subject to the other provisions of this Act, and so far as they are not inconsistent with the Constitution as amended, existing laws shall continue in force after the commencement of this Act as if they had been made in pursuance of the Constitution as amended, but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution as amended.

(2) Parliament shall, within such period as it shall determine, make amendments to any existing law to bring that law into conformity with, or to give effect to, this Act and the Constitution as amended.

According to Mr. Sangwa, S.C., Section 6 deals with the continuity of laws which were in force before 5th January 2016. Such laws, counsel argued, were to continue in force after the amendment of the Constitution as if they had been made pursuant to the Constitution as amended. Furthermore, such laws had to

be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution as amended.

Mr. Sangwa further argued that, the basis of the applicant's motion was not a mere piece of legislation but the provisions of Article 125 of the Constitution, which deals with the jurisdiction of the Supreme Court.

Learned counsel also contended that the single Judge's reliance on Section 21 of the Constitution of Zambia Act was also misplaced. That provision reads:

“Subject to Section six, where an Act of Parliament is required to give effect to an Article of the Constitution as amended, that Article shall come into effect upon the publication of the Act of Parliament or such other date as may be prescribed by, or under, the Act of Parliament.”

According to Mr. Sangwa, the Motion which had been before the single Judge was not about whether “the Court of Appeal was in force” or whether or not Article 130, (which created the Court of Appeal) was in force but about the jurisdiction of the Supreme Court. Counsel argued that the Judge had misapplied Section 21

which, in counsel's view, applies to Articles of the Constitution whose operation had been postponed or delayed and for which Parliament had been given authority to stipulate when such provisions could become operational. According to learned State Counsel, Article 130 was not one of the Articles whose operation had been postponed or delayed.

In the view taken by Mr. Sangwa, S.C., the language of the said Article is categorical. It reads:

“There is established the Court of Appeal which consists of such number of judges as prescribed.”

In counsel's view, the import of this Article was that, with effect from the date of the Presidential assent to the Bill relating to the Constitution of Zambia (Amendment) Act, 2016, the Court of Appeal was created. What only remained to be provided, State Counsel Sangwa argued, was the number of judges of the Court. It was Mr. Sangwa, S.C.'s further contention that the non-operationalisation of the Court of Appeal was largely on account of “*administrative failure*” and not that the said Article needed to be actuated by the enactment of any legislation by Parliament.

Mr. Sangwa also posited that the single Judge's reliance on Article 272 (f) of the Constitution was also misplaced. This Article reads:

"272. 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;**
- (b) Provides for a process or procedure to be taken, followed or prescribed;**
- (c) Requires an action, a measure or decision to be taken or provided;**
- (d) Requires a remedy or compensation to be given;**
- (e) Prohibits an action or measure;**
- (f) Deals with a specific subject-matter or general matter that would require to be legislated on in order to give effect to the Constitution; or**
- (g) Generally requires something to be prescribed.**

Mr. Sangwa, S.C. argued that Article 272 is an Article of general application which confers authority upon Parliament to make legislation in the circumstances enumerated from (a) to (g) above. In his view, the situation before the court did not fall under any of the situations stipulated in the said Article. Counsel also complained that, although the single Judge made reference to the said provision, his lordship made no effort to demonstrate the

nexus between the said Article and the Motion which was before the court or Article 125 of the Constitution, which was in issue.

Mr. Sangwa accordingly concluded that it was a misdirection on the part of the single Judge to have held that Sections 6 and 21 of the Constitution of Zambia Act, 2016 and Article 272 (f) of the Amended Constitution, 2016, conferred authority on the Supreme Court to entertain applications from the High Court.

In relation to the third ground upon which the respondent's Motion is anchored, Mr. Sangwa, S.C. argued that the single Judge of this Court misdirected himself in having relied upon Section 14 (3) (c) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia as having preserved the Attorney General's accrued right to appeal against the decision by which the Applicant's prosecution was quashed by a High Court Judge.

Mr. Sangwa, S.C. complained that, in point of fact, it was never even the contention of the Attorney General that he had an accrued right of appeal but that this issue of an 'accrued right' had been raised by the single Judge on behalf of and for the purpose of

assisting the Attorney General. In this regard, Mr. Sangwa opined that the single Judge had stepped outside his proper function as an independent and impartial adjudicator whose role was to adjudicate only upon issues which the parties had canvassed and nothing else.

Mr. Sangwa further contended that, even assuming that the Attorney General had raised the issue of an accrued right, Section 14 (3) (c) of the Interpretation and General Provisions Act, CAP. 2 as well as all the cases that the single Judge had cited and relied upon in relation to that statutory provision had no application to the Motion and the issues which had been at play before the single Judge. According to counsel, what was in issue before the single Judge was Article 125 of the Constitution and not the Interpretation and General Provisions Act, CAP.2.

Citing Section 2 of the Interpretation and General Provisions Act, Mr. Sangwa, S.C. argued that it was evident from this Section that this statute only applied to the interpretation of “written law” which, by definition, did not include the Constitution of Zambia.

According to learned State Counsel, the Interpretation and General Provisions Act has no application *vis-à-vis* the interpretation of the Constitution of Zambia which has its own interpretation provision in Article 267. Mr. Sangwa, S.C. accordingly concluded his arguments around the third ground by submitting that the single Judge had seriously erred when he relied on the Interpretation and General Provisions Act, CAP. 2 and that, the single Judge's error could only be remedied by having his decision reversed.

The last ground around which the single Judge's Ruling was being assailed was that its author had erred when he placed reliance upon Practice Direction No. 1 of 2016 which had been issued by or on behalf of the Chief Justice of the Republic of Zambia. In this regard, Mr. Sangwa, S.C. quoted the following passage from the Ruling under attack:

"My view is that the provisions of Sections 6 and 21 of Act No. 1 of 2016 and Article 272(f) of the Act No. 2 of 2016 come into play. Up until such a time that the relevant Acts will be enacted to give effect to Article 120(3) of the Constitution, the Chief Justice can issue Practice Direction pursuant to the powers flowing from Articles 92(6) and 94(8) of the Constitution in order to facilitate a

smooth transition pending the enactment of various pieces of legislation.”

Mr. Sangwa specifically criticized the single Judge’s position that the Chief Justice had authority to issue the Practice Direction in question pursuant to the provisions of the repealed Articles 92(6) and 94(8) of the Constitution, a proposition which counsel viewed as wholly untenable.

Mr. Sangwa went on to quote the Practice Direction in question which reads in part:

“(c) Appeals from the High Court And Industrial Relations Court:

- i) Appeals from the High Court and the Industrial Relations Court before the enactment of the Constitution of Zambia (Amendment) Act shall be determined in accordance with the law in force before the enactment of the Constitution of Zambia (Amendment) Act;**
- ii) *Appeals from the High Court and the Industrial Relations Court after the enactment of the Constitution of Zambia (Amendment) Act shall continue to lie to the Supreme Court until the Court of Appeal is operational and functional. Consequently, leave to appeal will continue to be granted by the High Court to the Supreme Court.***
(Emphasis ours)

According to Mr. Sangwa, S.C., this Practice Direction had no effect on the application which was before the single Judge and that it was, in fact, illegal. In Mr. Sangwa's view, the Practice Direction violated the Constitution in that it sought to cloth the Supreme Court with the authority, which it no longer had, to continue to hear and decide appeals from the High Court notwithstanding the amendment of the Constitution. In State Counsel's estimation, the decision of the single Judge on this point ignored the meaning and purpose of Practice Directions, as well as the practice and procedure which govern them as the learned authors of *Halsbury's Laws of England* have suggested in the following paragraph:

"Practice Directions. Practice Directions provide a source of civil procedural law. They provide directions as to matters of practice and procedure for the assistance and guidance of litigants in the conduct of their proceedings, and in the administration of civil justice generally, and they are of enormous value to the courts, to practitioners and to all who are involved in the civil judicial process (Counsel's emphasis).

Mr. Sangwa argued that Practice Direction No. 1 of 2016, is not a source of civil procedural law, but seeks to confer, in the

circumstance of this case, authority on the Supreme Court to hear appeals from the High Court. This, according to counsel, has never been the purpose of Practice Directions. In this regard, counsel sought succor, yet again, from *Halsbury's Laws*:

There is thus a vital and essential distinction between substantive law and procedural law. The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties. Everyone is entitled to enjoy such legal rights or status but equally is liable to perform or comply with his legal duties. The function of practice and procedure is to provide the machinery or the manner in which legal rights or status and legal duties may be enforced or recognized by a court of law or other recognized or properly constituted tribunal (Counsel's emphasis).

Mr. Sangwa went on to argue that, ordinarily, Practice Directions are supposed to address matters of practice and procedure which, he contended, the Practice Direction in question did not do but, instead, deals with the substantive issue of the jurisdiction of this Court. According to counsel, this is not tenable

at law because the jurisdiction of the Supreme Court is already covered under Article 125 of the Constitution.

Mr. Sangwa, S.C. further contended that the foundation of the decision of the single Judge was difficult, if not impossible, to comprehend given that the respondent's motion was on the jurisdiction of the Supreme Court as provided for under Article 125 of the Constitution and not the jurisdiction of the Court of Appeal. Mr. Sangwa opined that had the foregoing been the issue, the respondent would have expressly canvassed this issue before the single Judge.

According to Mr. Sangwa, to hold that the Chief Justice still had powers under Articles 92 (6) and 94 (8) of the Constitution, which Articles existed prior to 5th January 2016, would constitute violation of the provisions contained in Article 79 of the Constitution.

Counsel further observed that Articles 92(6) and 94(8) were part of the Constitution before the amendments which took effect on 5th January, 2016. Articles 92(6) of the Constitution gave the

Chief Justice discretionary authority to *“make rules with respect to the practice and procedure of the Supreme Court in relation to jurisdiction and powers of the Supreme Court”* while Article 94(8) conferred similar authority on the Chief Justice to *“make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and power conferred on it by clause 7.”*

According to Mr. Sangwa, SC, the effect of the single judge’s decision is that the said Articles are still in force when the same (i.e. Articles 92 and 94 of the Constitution) were wholly repealed by the Constitution (Amendment) Act, 2016, and, in their place, other provisions had been introduced which had superseded them.

In conclusion, Mr. Sangwa, S.C. prayed that if we agree with him by accepting that, indeed, Article 125 of the Amended Constitution does not vest appellate jurisdiction in the Supreme Court over matters decided by the High Court, then the Ruling of the single Judge dated 25th April, 2016, granting the Attorney General leave to appeal to this Court against the decision of the High Court quashing the DPP’s decision should be reversed with costs to be paid by the Attorney General to the respondent.

In the alternative, state counsel, Mr. Sangwa, prayed that in the event that we take a contrary view, then a reference should be made to the Constitutional Court in line with the provisions of Article 128 of the Constitution so that the Constitutional Court can determine the appellate jurisdiction of this court over matters decided by the High Court.

At the hearing, Mr. Sangwa, S.C., indicated that he wished to orally emphasise a few points relating to the Respondent's written Arguments. In this regard, Mr. Sangwa, S.C., informed us that he had the opportunity to examine the Arguments which had been filed in response by the Attorney General and that he desired to clarify a few matters which occur in those Arguments. In this connection, Mr. Sangwa began by observing that the issue which had been before the single Judge was not whether or not legislation had been passed to actuate the Article in the amended Constitution which had created the Court of Appeal. In counsel's view, the issue which was before the single Judge was that, following the changes which had arisen in relation to the Constitution and which changes came into force on 5th January, 2016, and, having regard to the

language which is employed in Article 125 of the amended Constitution, this Court lacked appellate jurisdiction over matters which had been decided by the High Court. Counsel emphasized that the language of Article 125 of the amended Constitution was very clear.

Mr. Sangwa, S.C., then went on to state that the other issue which he had canvassed before the single Judge was that, as differences of opinions existed between the parties in relation to the interpretation of Article 125, the only course of action which was open to the single Judge was to refer the matter to the Constitutional Court instead of the single Judge conferring jurisdiction upon himself and proceeding to interpret various provisions of the Amended Constitution. Mr. Sangwa further submitted that it was wrong for the single Judge to proceed in the manner he did as he ought to have referred the matter to the Constitutional Court in accordance with Article 128 (2) of the Amended Constitution. On the basis of the above Arguments, Mr. Sangwa invited us to vacate the order of the single Judge.

With regard to the Practice Direction in issue, Mr. Sangwa, S.C., reiterated the contention in his written Arguments to the effect that the same was not only illegal and unconstitutional but its issuance did not disclose the source of its authority, not even on the face of the document.

Mr. Sangwa also reiterated his contention that Practice Directions are typically reserved for matters of a procedural nature as opposed to substantive matters. Learned counsel concluded his oral augmentation by inviting us to vacate the order of the single Judge on the basis that it was not sound at law. Mr. Sangwa also reiterated his written invitation for us to refer this matter to the Constitutional Court in the event that we do not agree with his first proposition so that the Constitutional Court can determine the authority of this court.

During the question and answer session which followed Mr. Sangwa's presentation, counsel indicated to us that the crafting and enactment of the Constitution of Zambia Act No. 1 of 2016 and the Constitution (Amendment) Act No. 2 of 2016 had not been well managed. Counsel noted, in particular, that the Constitutional

amendment was effected in a manner which suggested that both the Court of Appeal and the Constitutional Court emerged and became operational soon after the Republican President had assented to the amending Bill.

On being reminded by the Court about certain principles which guide judicial decision-making such as the principle or presumption of presumed continuity; the presumption that the Court intends to avoid an unworkable and impracticable result and other similar principles, Mr. Sangwa, S.C, reacted by expressing the opinion that while legal presumptions are useful guides to the interpretation of statutes, they cannot override the law. In his words:

“This Court is completely shackled by the law”.

With regard to the status of Practice Direction No. 1 of 2016, Mr. Sangwa opined that the current Article 136 (2) (c) of the Amended Constitution has not retained the powers to issue Practice Directions which had been available to the Chief Justice pursuant to Articles 92 and 93 of the old Constitution. In the view

of Mr. Sangwa, Practice Direction No. 1 of 2016 lacked the necessary legal foundation.

Mr. Sangwa also expressed the view that the Practice Direction in question did not even arise pursuant to a Statutory Instrument. It was also the view of learned State Counsel that the Practice Direction was *ultra-vires* the Supreme Court of Zambia Act in that it even broadens or purports to broaden the jurisdiction of the Supreme Court.

Mr. Sangwa also made the final point that the applicant did not rely on the Practice Direction in question because it arose well after the respondent had moved the single Judge.

For his part, Mr. Imasiku, the learned counsel for the Attorney General also filed Arguments in response to the Respondent's Notice of Motion. At the hearing, counsel confirmed his reliance upon those Arguments.

In relation to grounds one and two of the Motion, Mr. Imasiku supported the decision of the single judge on the basis that the absence of a Court of Appeal rendered appeals thereto untenable.

Mr. Imasiku contended that appeals from the High Court to the Court of Appeal could only become a reality once legislation had been enacted to actuate the Court of Appeal. In this regard, counsel proceeded to quote Section 6 of the Constitution of Zambia Act No. 1 of 2016 which provides as follows:

“6 (1) “Subject to the other provisions of this Act and so far as they are not inconsistent with the Constitution as amended, existing laws shall continue in force after the commencement of this Act as if they had been made in pursuance of the Constitution as amended but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution as amended.”

Counsel also cited Section 21 of the Constitution of Zambia No. 1 of 2016 which deals with transitional provisions and provides as follows:

“Subject to Section six, where an Act of Parliament is required to give effect to an Article of the Constitution as amended, that Article shall come into effect upon the publication of the Act of Parliament or such other date as may be prescribed by or under, the Act of Parliament.”

Counsel further quoted Article 272 (f) of the Constitution of Zambia (Amendment) No. 2 of 2016 which provides that:

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

(f) Deals with a specific subject matter or general matter that would require to be legislated on in order to give effect to the Constitution.”

According to the Attorney General’s counsel, the above Article is very clear in that it provides that Parliament may enact legislation to give effect to an Article or a provision of the Constitution.

Mr. Imasiku also supported the single Judge’s reasoning that a reading of Section 21 clearly showed that even if the Court of Appeal had been established, it was only going to come into being or operational upon enactment of the Act of Parliament relating to it. He also supported the single Judge’s position that the above reasoning equally applied to the establishment and jurisdiction of the Constitutional Court. In the absence of the two Courts, Section 6 of the Constitution of Zambia Act No. 1 of 2016, served the purpose of allowing existing laws to remain in force until such a time as relevant legislation is enacted to operationalise the new Courts adding that it would be unjust to expect persons or entities

which were parties to continuing or existing court actions to wait indefinitely for the operationalisation of the Court of Appeal before such parties could lodge their respective appeals.

The Attorney General's counsel accordingly concluded his arguments relating to grounds one and two by submitting that the single Judge had the necessary jurisdiction to hear and determine the Attorney General's application.

With regard to the third ground, the Attorney General's counsel supported the reasoning of the single Judge on the issue of accrued rights. According to him, the single Judge took into consideration Section 14 (3) (c) of the Interpretation and General Provisions Act, CAP. 2 of the Laws of Zambia which generally protects accrued rights when a law is wholly or partially repealed. The relevant portion of that Section provides that:

“14 (3) Where written law repeals in whole or in other written law, the repeal shall not:

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed.”

Applicant and Respondent had a right of appeal to the Supreme Court. The Appellant exercised this right on 11th December, 2015 by filing in Summons for Leave to Appeal. The Applicant was not seeking to enforce an abstract right conferred by the repealed Constitution, but seeking to enforce a specific right which existed as at 5th January, 2016.” (Emphasis is added by Attorney General’s counsel)

Counsel for the Attorney General also supported the reasoning of the single Judge in relation to the promulgation of Practice Direction No. 1 of 2016 by the Honourable the Chief Justice.

Mr. Imasiku concluded his written arguments by submitting that, until such a time as the relevant laws had been enacted, the Chief Justice could issue Practice Directions pursuant to the powers flowing from Articles 92 (6) and 94 (8) of the Constitution for the purpose of facilitating a smooth transition pending the enactment of various relevant pieces of legislation.

In his oral augmentation of his written arguments, Mr. Imasiku only made the point that the Chief Justice had authority pursuant to Article 136 (2) (c) as read with Article 118 (2) (e) to

promulgate Practice Directions. He also submitted that Section 28 of the Supreme Court Act, CAP. 25 also gives the Chief Justice authority to make Rules, including those promulgated via Practice Directions. Counsel accordingly concluded his arguments by urging us to uphold the single Judge.

We are grateful to counsel for the two sides for their helpful exertions. Indeed, we are doubly grateful to Mr. Sangwa, S.C., learned counsel for the respondent, for the concise and perspicuous manner in which he summarised and laid out the purpose for which he had approached us with the respondent's Notice of Motion.

As we understood Mr. Sangwa, S.C., the position of the respondent is that, in order to resolve this Motion, there is need to engage in the exercise of interpreting various provisions of the amended Constitution, which exercise, counsel maintained, this Court has no constitutional authority to undertake. Having regard to the foregoing, Mr. Sangwa has invited us, on the faith of Article 128 (2) of the Amended Constitution, to refer this matter to the Constitutional Court so that that Court:

“... can determine the jurisdiction of the Supreme Court, specifically, whether [this Court] has appellate jurisdiction over matters determined by the High Court.”

According to Mr. Sangwa, S.C.:

“Once the Constitutional Court has guided [upon the matter we have set out in the preceding paragraph], this Court [can then] proceed to decide this Motion [in accordance with] the Constitutional Court’s [guidance].”

According to Mr. Sangwa S.C., if we proceed in the manner as proposed by himself above, there would be no cause for us to consider the other grounds of this Motion on the basis of which the respondent seeks to have the single Judge’s decision reversed by ourselves.

Before we begin to reflect around the issues which this motion raises, we propose to briefly make a comment or so about Mr. Sangwa, S.C’s emphatic proposition that this Court is completely ‘shackled’ by the Amended Constitution in the sense that it has no constitutional authority to interpret provisions of the Amended Constitution and must, necessarily, defer to the Constitutional Court which, the argument went, is the sole and exclusive repository of that authority.

Although we still await an authoritative pronouncement by the Constitutional Court itself as to whether, and the extent to which, Courts of law in the Republic of Zambia, other than the Constitutional Court, can make pronouncements touching upon the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No.2 of 2016, we did express the following views in **Richard Nsofu Mandona v Total Aviation and Export Limited & Three Others**⁴ upon the subject when we said that investing the constitutional authority to interpret constitutional provisions in the Constitutional Court did not mean that:

“...every time the Constitution is mentioned in arguments made before this court, we [must] close our records of appeal and rise until the Constitutional Court determines any such arguments. Making observations on obvious constitutional provisions as we determine disputes of a non-constitutional nature, is not, in our view, necessarily averse to the letter and spirit of the Constitution nor would it encroach or usurp the jurisdiction of the Constitutional Court. This Court, as any other superior court for that matter, is made up of judges of note, capable in their own way of

understanding and interpreting the Constitution”
(pp.J15-16).

Leaving aside the fact that the conclusion which we have reached in this matter upon the key invitation which Mr. Sangwa, S.C., the learned counsel for the respondent extended to us when we heard this motion does not accord with the respondent’s desire, we have taken the liberty not to confine ourselves in the manner that counsel had invited us to. Instead, we have considered it necessary to react and give our reflections on all the issues which counsel laid before us on the basis that, contrary to the position which Mr. Sangwa, SC took, we do not, for now, and on account of the observation which we made earlier, consider the issues in question to be the exclusive and sacred domain of the Constitutional Court.

As we begin to reflect around Mr. Sangwa’s invitation and the issues which this Motion raises, we propose to begin our expedition by locating the issues in question in their appropriate historical context.

As can be recalled from the earlier narrative of this judgment, the respondent had sought to have the single Judge from whose decision this Motion arose dismiss the Attorney-General's application for leave to appeal to this Court against the refusal by a High Court Judge to grant the leave in question.

The respondent's counsel's motivation for the relief which he was seeking on the respondent's behalf was that, following the enactment of the Amended Constitution, 2016, this Court lacked the necessary constitutional authority to entertain appeals other than those arising from the Court of Appeal (and those involving Articles 28 and 79 of the Constitution). Accordingly, it stood to reason (and, it was Mr. Sangwa, S.C.'s contention) that the appeal which the Attorney General had mounted against the decision of the High Court in question could only lie to the Court of Appeal.

At the time when the aforesaid proposition was being canvassed, the Court of Appeal existed, albeit in name only following the enactment of the Amended Constitution in 2016. In point of fact, other than the broad constitutional framework, there was no detailed legislation to operationalise the Court of Appeal at

the time. Indeed, for all practical purposes, the Court of Appeal only existed within the contemplation of the amended Constitution.

The point being made here is that the circumstances which were prevailing at the time when the single Judge pronounced the Ruling which is now being assailed were materially different from those which were prevailing at the time when we heard this Motion in January, 2017. Needless to say, at the time when we heard this Motion, both the Court of Appeal and the Constitutional Court had been operationalised following the enactment of the Court of Appeal Act No. 7 of 2016 and the Constitutional Court Act No. 8 of 2016. The enactment of the two statutes had also facilitated the promulgation of detailed Rules which were to regulate the operation of the two new Courts.

One of the arguments which Mr. Sangwa, S.C., advanced before us was that the non-operationalisation of the Court of Appeal following its creation by the Amended Constitution of 2016 was largely attributable to what he described as *an “administrative failure”* as opposed to the need to have the constitutional provision (namely, Article 130) actuated through the enactment of

appropriate legislation (in this case, the Court of Appeal Act No. 7 of 2016) by the ‘Zambian Parliament.’

With the greatest respect to Mr. Sangwa, S.C., the non-operationalisation of the Court of Appeal was not hampered by some “*administrative failure*” as he suggested, but, rather, by the absence of enabling legislation (that is, both the principal legislation in the form of the Court of Appeal Act as well as the subsidiary legislation, in the shape of the court’s Rules) to operationalise the new court. In this regard, we agree with or accept the contention which was canvassed on behalf of the Applicant and which was to the effect that, although Article 130 of the Amended Constitution established the Court of Appeal, such establishment merely existed *within the contemplation of the Amended Constitution* and required to be actualised and given reality through the enactment of legislation to give effect to Article 130 as envisaged in Article 272 (f) of the said Constitution.

In our view, given that the *bare* enactment of Article 130 of the Amended Constitution could not have birthed a functional Court of Appeal, the framers of this Constitution deemed it

appropriate to enact Article 272 of the same Constitution which creates the constitutional framework for Parliament to enact legislation for the purpose of giving “*effect*” to provisions in the Constitution such as Article 130 “*which confers a function or jurisdiction [on an] institution*” such as the Court of appeal is conferred with by Article 131.

According to *the Oxford Advanced Learner’s Dictionary*, the word ‘*effect*’ as used in the expression or the words “*to give effect to*” in Article 272 means “*to cause something to occur*”, or “*to achieve something*”. It can scarcely be contested, indeed, that the establishment and functioning of the Court of Appeal as we know it today would hardly have been a reality without Article 130 of the Amended Constitution having been materially complimented by Article 272 (f). In truth, Mr. Sangwa, S.C.’s suggestion, in effect, that Article 130 of the Amended Constitution had birthed a Court of Appeal which immediately became functional following the enactment of the Amended Constitution was, with due respect, more fictitious than real. Indeed, it was both unworkable and impracticable that an appeal could be successfully filed to the

Court of Appeal on 5th January, 2016 merely by virtue of the prescribed constitutional formalities relating to the creation of this court having been completed on that day.

In its recent judgment which was handed down on 13th June, 2018 in the case of **Zambia National Commercial Bank PLC⁴**, the Constitutional Court of Zambia (“the ConCourt”) observed that, although the former Industrial Relations Court had been re-created as the Industrial and Labour Relations Division of the High Court of Zambia under the amended Constitution, that Court had to continue applying or following the processes and procedures which had been prescribed for it prior to the coming into force of the Constitutional changes in question. In this regard, the ConCourt cited Article 120(3)(a) of the amended Constitution, 2016 which provides to the effect that “*the processes and procedures of the Courts ... shall be prescribed.*”

The ConCourt further cited Article 266 of the amended Constitution which defines the word ‘prescribed’ as meaning “*...provided for in an Act of Parliament.*” The ConCourt accordingly

concluded in the **Zambia National Commercial Bank PLC⁴** case that:

“...until new legislation is enacted to provide for the processes, procedures and jurisdiction of the Industrial Relations Division [of the High Court] the Court [had to continue using] the existing processes and procedures...” (at P. J20).

Citing its earlier decision in **Kapoko v The People⁵**, the ConCourt further noted “*good order and stability of [the Zambian] legal system*” dictated that the law remained continuously in force even as the country was migrating to a new constitutional order.

We entirely agree with the views and observations which the ConCourt made in the **Zambia National Commercial Bank PLC⁴** case as we have endeavoured to extrapolate them above.

In his arguments, Mr. Sangwa, S.C. criticised the single Judge for having relied upon Sections 6 and 21 of the Constitution of Zambia Act No. 1 of 2016 which, in the view of learned State Counsel, he considered to have had no relevance to the Motion which had been placed before the single Judge. According to Mr. Sangwa, S.C., the Motion which had been deployed before the single Judge required him to solely focus on the question whether,

in the light of Article 125 of the Amended Constitution, the Supreme Court could entertain appeals other than those arising from the Court of Appeal.

In the view that we have taken and for the sake of elucidating our views upon all the issues flowing from the Motion now before us, the meaning and effect of any provision of the Amended Constitution as part of the Laws of the Republic of Zambia cannot be properly or fully appreciated in complete isolation from or independently of other relevant provisions in the Constitution of Zambia Act No. 1 of 2016, in particular, such key provisions of general application as Sections 6 (which deals with the continued operation of existing laws) and Section 21 (which deals with transitional provisions).

Indeed, having regard to what we canvassed early on in this judgment in the context of the relationship between Articles 130 and 272 of the Amended Constitution, the complimentary nature of Sections 6 and 21 cannot, as learned State Counsel appears to have suggested, be ignored. Accordingly, we do not share Mr. Sangwa, S.C.'s view that the single Judge's reference to and

reliance upon Sections 6 and 21 of the Constitution of Zambia Act No. 1 of 2016 was misplaced.

Thus far, we are of the considered view that the single Judge proceeded realistically in the face of the challenges which came to the fore as a consequence of the Constitution of Zambia Act No. 1 of 2016 and the Constitution of Zambia (Amendment) Act No. 2 of 2016 having been drafted and enacted in a manner which had assumed the immediate operationalisation of the Court of Appeal and the Constitutional Court. As Mr. Sangwa, S.C. generously acknowledged, it would have been far neater and more practicable if the coming into force of the provisions in the Amended Constitution relating to the creation of the Constitutional Court and the Court of Appeal had been delayed or postponed pending the enactment of the relevant actualising legislation.

Perhaps the point can also be made that legal drafting, including that which involves the drafting of a country's supreme law-its Constitution-is never an end in itself, but a means to some desired end.

When all is said and done, and given the very extra-ordinary circumstances with which the single judge had been confronted, we do not think that it was open to the single judge to proceed unrealistically by engaging in the pure fiction of pretending that a functional Court of Appeal had arisen merely because the requisite constitutional process or formalities had been exhausted.

As we observed in **Spiros Konidaris v. Ramlal Kanji Dandiker**⁶:

“The learned trial Judge himself dealt with this matter from the more realistic view point that the events that had happened in between could not be ignored. It would be a pure fiction to pretend that there is any relationship of landlord and tenant which survived and still subsisted.”

Turning to the third ground of the Motion, while we acknowledge that the single Judge’s articulation relating to the accrual of the applicant’s right to appeal was unassailable, we agree with and acknowledge the validity of the point which Mr. Sangwa, S.C. raised, namely that, as counsel for the Attorney General neither raised nor canvassed this subject, either before the single judge or ourselves (bearing in mind the fact that we were re-hearing the respondent’s renewed application) it ought not to have

formed part of the Judge's substantive reflection in his Ruling as it did. In this regard, it is worth pointing out that in an accusatorial or adversarial system of justice such as we have in this country, a judge has to constantly remain alive to the following reminder by May, L.J. in the English Court of Appeal judgment in **Jones v. MBNA International Bank**⁷:

"Civil trials are conducted on the basis that the court decides the factual and legal issues which [the parties] bring before the court."

With regard to the last ground of the Motion, we note that the single Judge acknowledged the irregularity of the Practice Direction in question and proffered his very sound views upon the matter which we entirely adopt.

Although we have come this far, we have not forgotten Mr. Sangwa, S.C's invitation for us to proceed in accordance with Article 128 (2) of the Amended Constitution, and refer this matter to the Constitutional Court,

"... so that the Constitutional Court can determine the jurisdiction of the Supreme Court, specifically, whether it has appellate jurisdiction over matters determined by the High Court."

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obvious constitutional provisions as we determine disputes of a non-constitutional nature, is not, in our view, necessarily averse to the letter and spirit of the Constitution Court nor would it encroach or usurp the jurisdiction of the Constitutional Court. This Court, as any other superior court for that matter, is made up of judges of note, capable in their own way of understanding and interpreting the Constitution”
(ppJ15-16).

With respect to the issue of whether or not this Court **has** appellate jurisdiction over matters determined by the High Court (other than those covered under the Bill of Rights), our reaction would be that we have no such jurisdiction and would neither seek to push that open door nor flog that dead horse. In reaching this conclusion, we are in no way faulting the single Judge whose decision was informed by extra-ordinary circumstances which had materially changed even before we heard this motion, nor are we in any doubt that the single Judge was alive to the constitutional position. Having said the foregoing, we do not think that there is anything surviving in respect of the first ground of the motion which can be the subject of anything requiring the legitimate intervention of the Constitutional Court in the way of that new

Court being called upon to educate this much older Court as to the nature and scope of its jurisdiction.

In sum, the motion has failed.

Although this motion has failed, our considered view is that it has raised issues of undoubted public and constitutional importance. Consequently, we make no order as to costs.

(RETIRED)

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M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

.....
M. MUSONDA
DEPUTY CHIEF JUSTICE

.....
N. K. MUTUNA
SUPREME COURT JUDGE