

FOR YOUR SIGNATURE PLEASE

Prof MM MUNALULA PCC. ✓ 26/9/2023

M. S MULENGA JC. ✓ 28/09/2023

J.Z MULONGOTI JC. ✓ 28/9/2023

M.Z MWANDENGA JC. 25/9/2023 ✓

K. MULIFE JC. ✓ 28/9/2023

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

2022/CCZ/0028

**IN THE MATTER OF: CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF 2016**

**IN THE MATTER OF: ARTICLES 128 (1) (a) (b) (c) AND (3) (b)
(c) OF THE CONSTITUTION OF
ZAMBIA (AMENDMENT) ACT NO. 2 OF
2016**

**IN THE MATTER OF: ARTICLE 177 OF THE
CONSTITUTION (AMENDMENT) ACT
NO. 2 OF 2016**

**IN THE MATTER OF: ARTICLES 93, 143, 144, 180, 181,
182 AND 236 OF THE CONSTITUTION
OF ZAMBIA (AMENDMENT) ACT NO. 2
OF 2016**

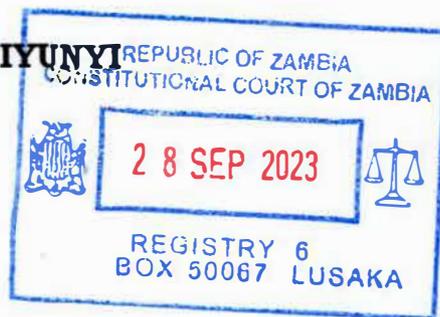
**IN THE MATTER OF: SECTION 8 (1) (a) (b) (h) AND (3) (b)
AND (c) OF THE CONSTITUTIONAL
COURT ACT NO. 8 OF 2016**

BETWEEN:

FULATA LILLIAN SHAWA SIYUNYI

AND

ATTORNEY GENERAL



PETITIONER

RESPONDENT

**Coram: Munalula PC, Mulenga, Mulongoti, Mwandenga and
Mulife JJC on 13th June, 2023 and 28th September,
2023**

For the Petitioner:

**Mr. A. Mwansa SC of Messrs. AMC
Legal Practitioners**

For the Respondent:

Mr. M. Muchende, SC, Solicitor-General, Mr. S. Mujuda, Principal State Advocate and Ms. A. Chisanga, Senior State Advocate, Attorney General's Chambers

JUDGMENT

Mwandenga, JC, delivered the Judgment of the Court.

Cases referred to:

1. **Steven Katuka (Suing as Secretary General of the United Party for National Development) v Attorney General, Ngosa Simbyakula and Others 2016/CC/0010, 2016/CC/0011**
2. **Derrick Chitala v Attorney-General (1995/1997) Z.R 91**
3. **North Western Energy Company Limited v The Energy Regulation Board (2011) Z.R Vol.2 512**
4. **Mutembo Nchito v Attorney General, Selected Judgment No.1 of 2016**
5. **Corruption Watch NPC, Freedom Under The NPC and Council For The Advancement of South African Constitution v President of The Republic of South Africa and Others CCT:337/17 and CCT:13/18**
6. **Faustine Mwenya Kabwe, Aaron Chungu and John Sangwa v Judicial Complaints Authority and Attorney General 2009/HP/0996**
7. **Zambia National Commercial Bank Plc. v Musonda and Others [2018] ZMCC 12**
8. **Dipak Patel v Minister of Finance and Attorney General (2021) ZMCC 12**
9. **Kalid Mohammed v Attorney General (1982) Z.R. 49**
10. **Wilson Masauso Zulu v Avondale Housing Project (1982) Z.R. 172**
11. **F.D. Kankomba and Others v Chilanga Cement Plc. (2002) SCZ Appeal No.30**
12. **Jonas Zimba v Attorney General 2022/CCZ/007**

13. **Gervas Chansa v The Attorney General 2019/CCZ/004**
14. **Ikelenge Town Council v National Pension Scheme Authority – 2022/CCZ/0022**

Legislation referred to:

1. **The Constitution of Zambia (Amendment) Act, No. 2 of 2016**
2. **The Judicial (Code of Conduct) Act, No. 13 of 1999**
3. **The Judicial (Code of Conduct) (Amendment) Act, No. 13 of 2006**
4. **The Statutory Functions Act, Cap 4 of the Laws of Zambia**
5. **The Official Oaths Act, Cap 5 of the Laws of Zambia**

Other Works referred to:

1. **De Smith Woolf and Jowell on Judicial Review of Administrative Action, 5th Edition (1995)**
2. **Black's Law Dictionary 10th Edition, by Bryan A Garner, Thomson Reuters**

Introduction

- 1.1 We wish to state from the outset that since we, as Judges, are subject to the processes of the Judicial Complaints Commission (JCC) which is at the centre of some of the issues arising in this matter, we have dealt with this matter out of necessity. With that said we now delve into the consideration of the matter.
- 1.2 By an amended Petition filed on the 9th December, 2022 (the Petition), Fulata Lillian Shawa Siyuni (the Petitioner) is alleging the contravention of Articles 177 (5) (a) and (c), 93 (1), 143 (b) (c) and (d) and 144 (4) (a) of the Constitution of Zambia as

amended by Act No.2 of 2016 (the Constitution) in the manner she was suspended and removed from office as the Director of Public Prosecutions (DPP) of the Republic of Zambia.

1.3 The Petitioner seeks the reliefs which have been couched in the following manner:

- “(i) An order that the Attorney General being the Chief Legal Advisor to the government of the Republic of Zambia that represents the government in civil matters to which the government is a party, the custodian of public policy and public interest, is mandated to prosecute all Complaints initiated by the JCC and those lodged with JCC by other persons and therefore his failure to prosecute the Complaints filed with the JCC is unconstitutional and the hearing that ensued before the JCC without the Attorney General are null and void ab initio and of [SIC] legal effect;***
- (ii) An order that pursuant to Article 93(1) of the Constitution, all instructions and decisions of the President are supposed to be in writing and under the signature of the President and the decision by the Attorney General contained in his letter dated 4 August, 2022 on the request made by the DPP to the appointing, the President, for a waiver of the Oath of Office is not the decision of the President and the same is in direct breach of Article 93(1) of the Constitution and of no legal effect;***
- (iii) An order that the decision by the JCC to hear the Director of Public Prosecutions alone in her defence, after the finding of a prima facie case against her and the President suspending her, is unconstitutional and in direct breach of Article 144(4)(a) of the Constitution of Zambia (Amendment) Act No.2 of 2016***

and therefore the proceedings that ensued are null and void ab initio and of no legal effect;

(iv) An order that the JCC was in direct breach of Article 144(4) (a) of the Constitution of Zambia (Act) No.2 of 2016 when:

(a)the JCC kept evidence favourable to the Petitioner (letter dated 27 December, 2021 from Gaston Sichilima) to itself;

(b)the JCC allowed the Complainant to introduce new evidence post the closure of the Complainant's case;

(c) the JCC curtailed the production by RW 8 of evidence favourable and relevant to the investigations and the Petitioner;

(d)the JCC stopped the Petitioner from calling Sipheliano Phiri, Principal State Advocate as a Witness for your Petitioner.

(v) An order that for purposes of the hearing pursuant to Article 144(4)(a) of the Constitution of Zambia (Amendment) Act No. 2 of 2016, the JCC did not form a proper quorum and therefore that the hearing that ensued is null and void ab initio and of no legal effect;

(vi) An Order that the purported suspension and subsequent removal from Office of the Petitioner as DPP is null and void ab initio and of no legal effect;

(vii) That the Petitioner is entitled to such consequential orders as this Court may deem fit and appropriate;

(viii) That it may be ordered that the costs of and incidental to this Petition be borne by the Respondent."

Factual background

- 2.1 The background facts of this Petition can be discerned from the Petition, the Affidavit Verifying the Facts sworn by the Petitioner, the Respondent's Answer filed on 17th January, 2023, the affidavit styled as Affidavit in Opposition to the Affidavit Verifying Facts sworn by one Naisa Makeleta filed on 17th January, 2023 as well as the Petitioner's Bundle of Documents filed on 9th May, 2023 and are as follows:
- 2.2 The Petitioner was at all material times the DPP and Head of the National Prosecutions Authority (NPA) having been appointed as such by the former President Mr. Edgar Chagwa Lungu on 10th March, 2015. The Petitioner remained in that office and performed her functions accordingly until she was suspended on 14th September, 2022 by the current President, Mr. Hakainde Hichilema (the President).
- 2.3 Between 20th November, 2021 and 15th August, 2022 a total of 11 Complaints were lodged against the Petitioner with the JCC but only two of the Complaints were heard by the JCC.

These were lodged by Elizabeth Chitika of the Movement for Multi-Party Democracy and Tobias Milambo and two Others.

2.4 Prior to hearing the Complaints, the JCC wrote to the Petitioner and requested her to respond to all Complaints but she indicated to the JCC that she was constrained from responding to the allegations made against her because the same hinged on information that she had come across in the course of her duties as DPP which she could not divulge without authority from the President in keeping with her Oath of Office. The Petitioner also wrote to the President asking for clearance so that she could respond to the allegations but by letter dated 3rd May, 2022 to the Petitioner, the Special Assistant to the President–Legal stated *inter alia* that there was no provision in the Constitution that empowered the President to waive the Oath of Office. Subsequently, the Respondent wrote to the Petitioner’s Advocates a letter dated 4th August, 2022 denying the waiver.

2.5 Following the denial of the waiver by the Respondent, the JCC proceeded to hear the two Complaints. On the

scheduled date of hearing, the Petitioner acting by her Counsel raised objections about the fact that the Respondent did not have the authority to deny her request for the waiver that she sought from the President. Her position being that the denial had to be under the hand and signature of the President in keeping with the provisions of Article 93(2) of the Constitution. The Petitioner's objections in this regard were overruled by the JCC. On the scheduled day of hearing, the Petitioner then sought and obtained an adjournment so that she could go and prepare herself for the hearing.

2.6 The hearing of the Complaints by the JCC aforesaid was not prosecuted by the Respondent but by the Complainants' own Counsel on account of the fact that the JCC had directed that the Respondent should recuse himself from the Complaints except one submitted by the Drug Enforcement Commission (DEC) and that the Complainants were at liberty to appoint Counsel of their own choice. The Petitioner's objections in this regard were overruled by the JCC and the proceedings went ahead in the absence of the Petitioner as her Counsel walked out of the hearing of the

JCC on 2nd September, 2022. At the conclusion of the hearing the JCC found that a *prima facie* case had been established against the Petitioner and informed the President and recommended for her suspension from office as DPP. The Petitioner was by letter dated 14th September, 2022 accordingly suspended by the President from her office as DPP and the JCC was accordingly informed.

2.7 After the finding of the *prima facie* case and her suspension, the JCC went on to hear the Petitioner's case in the absence of the Complainants. The Petitioner's objections in this regard were overruled by the JCC. Counsel for the Petitioner subsequently informed the JCC that his client had opted to remain silent but would call witnesses. The Petitioner called her witnesses and they were cross-examined and re-examined accordingly. After the conclusion of the hearing, the JCC rendered a report to the President *inter alia* stating that it had found that the Complaints against the Petitioner had been substantiated and recommended the removal of the Petitioner from office and the Petitioner was so removed on 14th October, 2022 by the President.

The Petitioner's Arguments

3.1 The Petitioner's arguments dealt with the alleged constitutional breaches which can be summarized under three Heads as follows:

- (a) That the Respondent abdicated his constitutional duty by not prosecuting the Complaints contrary to Article 177(5)(a) and (c) of the Constitution (**Head "A"**);
- (b) That the decision to deny the Petitioner a waiver of the Oath of Office in respect of all the Complaints lodged with the JCC was made and communicated by the Respondent and not the President contrary to Article 93(1) of the Constitution (**Head "B"**); and
- (c) That the JCC failed to hold a full hearing of the Complaints after the Petitioner was suspended from office as DPP pursuant to Article 144 (4) (a) of the Constitution (**"Head "C"**).

Head "A"

3.2 Under Head "A" it was submitted that the Respondent abdicated his constitutional duty when he acceded to the call

from the JCC for him to recuse himself from prosecuting the Complaints against the Petitioner.

3.3 It was submitted that the Respondent is not only the Chief Legal Adviser to the Government, but also represents the Government in civil matters. That overall, the Respondent is the custodian of public interest and public policy and that in the performance of his functions, the Respondent is not subject to the direction or control of any person or authority. In this regard Article 177 (4) and (5) (c) of the Constitution were called in aid.

3.4 Whereas the proceedings before the JCC were not civil proceedings per se but an inquiry and/or investigation into the conduct of a Judge or DPP, it was submitted that as the proceedings take the adversarial form the Respondent was the officer who should prosecute these cases before the JCC.

3.5 It was submitted that it was a notorious fact and an acceptable practice in this country, that the Respondent always prosecuted such matters. Examples were given of the cases of the former DPPs Mebeelo Kalima, Mukelabai

Mukelabai and Mutembo Nchito, SC which were prosecuted by the then sitting Attorney Generals.

3.6 Submissions about public interest and public policy were advanced and in this regard the Petitioner called in aid a paper presented in March, 2013 by the Right Hon. Dominic Grieve QC, MP, Attorney General of the United Kingdom at Queen Mary University of London School of Law and it was submitted that public interest considerations can only be made by the person charged to protect the public and not a lawyer that earns a fee. The case of **Steven Katuka (suing as Secretary General of the United Party for National Development) v Attorney General, Ngosa Simbyakula and Others**¹ a decision of this Court was called in aid of the position that the Respondent was the custodian of public interest and policy.

3.7 Consequently, it was submitted that the Respondent was and is properly placed and had a constitutional mandate to prosecute all Complaints filed with the JCC.

Head “B”

- 3.8 Under Head “B” the thrust of the submissions was that the decision of the President to refuse to grant the Petitioner a waiver of the Oath of Office in respect of the matters complained of by members of the public against the Petitioner and lodged with the JCC and the purported denial of the waiver by the Respondent was *ultra vires* Section 5(1) and (2) and Section (6) of the Official Oaths Act, Chapter 5 of the Laws of Zambia (the Official Oaths Act) and was unconstitutional when read together with Article 182 (1) and (3) and Article 93 (1) of the Constitution.
- 3.9 It was submitted that having taken the Statutory Oath of Office the Petitioner could only respond to the Complaints in her defence if the President granted her authority to directly or indirectly transmit any information or matter that was made known to her by reason of her office in keeping with the Oath of Office as contained in the seventh schedule to the Official Oaths Act.
- 3.10 It was further submitted that the letter from the Respondent denying the Petitioner a waiver of the Oath of Office in

respect of the Complaints was *ultra vires* the provisions of Article 93 (1) of the Constitution which provides that:

“A decision or instruction of the President shall be in writing under the President’s signature.”

3.11 According to the Petitioner the grant or denial of the waiver sought by the Petitioner ought to have been in writing and under the signature of the President.

3.12 Therefore, it was submitted that the letter by the Respondent was not only illegal but also unconstitutional. To buttress her submissions on the issue of illegality the Petitioner called in aid a book by the learned authors **De Smith Woolf and Jowell on Judicial Review of Administrative Action** and the cases of **Derrick Chitala v Attorney General²** and **North-Western Energy Company Limited v The Energy Regulation Board³**.

3.13 It was submitted that the continued refusal by the President to grant the Petitioner the waiver of the Oath of Office in respect of the Complaints contravened the provisions of Section 11 of the Official Oaths Act and therefore deprived the Petitioner of the right to a fair hearing that is guaranteed by the Constitution.

3.14 It was submitted that the failure by the President to respond under his signature, assuming the Respondent was instructed to respond, to the request made by the Petitioner to waive her Oath of Office in respect of the Complaints contravened the provisions of Article 93 (1) of the Constitution and was therefore unconstitutional.

3.15 It was submitted that the purported denial by the Special Assistant to the President-Legal and the Respondent to grant the waiver of the Oath of Office in respect of the Complaints against the Petitioner lacked authority.

3.16 It was submitted that the power exercised by both the Special Assistant to the President-Legal and the Respondent can only be exercised by the President.

Head “C”

3.17 Under Head “C” it was submitted that from inception the sittings of the JCC consisted of four Commissioners namely: Judge Prisca M. Nyambe (Rtd), SC, Mrs Ireen M. Kunda, SC, Mr. A. Dean Mwansa Mumba, and Mr. Chad H. Muleza.

3.18 It was submitted that the sittings of the JCC were inconsistent with the membership as constituted. That the

Members of the JCC varied from time to time and from sitting to sitting as members took turns to either excuse or absent themselves from the scheduled sittings, or simply joined the proceedings amid course.

3.19 Whereas Section 28 (3) of the Judicial (Code of Conduct) Act No. 13 of 1999 (the JCCA) provides for three Commissioners to form a quorum, it was submitted that there were four Commissioners that sat to hear the Complaints against the Petitioner contrary to Section 28(3) of the JCCA which provides that:

“Three Commissioners of the Authority shall form a quorum at any meeting of the Authority.”

3.20 Then the Petitioner went on to cite Section 28(6) of the JCCA which provides that:

“A decision of the Authority shall be by a majority of the members present and voting at a meeting.”

3.21 In this regard it was submitted firstly that the number of Commissioners permitted by law to sit and hear a matter ought to be an odd number, three or all five Commissioners may sit and hear a matter. Secondly, that once the Commissioners constitute themselves into a quorum, the

Commissioners so constituted should, according to the Petitioner be present at every hearing of the matter until the matter is disposed of in keeping with the rules of natural justice and fair hearing.

3.22 In the circumstances it was submitted that the hearing of the Complaints that ensued ought to be considered null and void *ab initio*.

3.23 It was submitted that at the hearing, after the finding of a *prima facie* case against the Petitioner, the JCC had wrongly directed that the hearing was for the Petitioner only, as the Complainants had already been heard at the time of determining whether or not there was a *prima facie* case against the Petitioner.

3.24 The Petitioner's submissions in this regard, according to the Petitioner were anchored on Article 144 (4) (a) and (6) of the Constitution to press the point that the JCC ought to have heard all parties concerned at the hearings that ensued after the Petitioner was found with a *prima facie* case. Article 144(4)(a) and (6) of the Constitution provide as follows:

“144 (4) The Judicial Complaints Commission shall, within thirty days of a judge being

suspended from office in accordance with clause (3)-

(a) hear the matter against the judge on the grounds specified in Article 143 (b),(c) and (d), or....

(6) The proceedings under clause (4) (a) shall be held in camera and the Judge is entitled to appear, be heard and represented by a legal practitioner or other person chosen by the judge.
(Underlings by the Petitioner)

3.25 It was submitted that the reference to “*the proceedings under clause 4(a)*” under clause 6 of Article 144 of the Constitution denotes the hearing of the parties *de novo* as opposed to hearing the Judge or DPP only. That accordingly, the Petitioner was entitled to hear the evidence of the Complainants together with their witnesses and subject them to cross-examination where appropriate and/or necessary.

3.26 It was submitted that the hearing that ensued without hearing the Complainants, followed by the Petitioner was conducted in contravention of Article 144 (4) (a) of the Constitution and therefore null and void *ab initio*.

3.27 It was submitted that at the hearing of the Complaint filed by Tobias Milambo and 2 others, the Complainants attempted at Evidence-in-Chief stage to introduce into their evidence fresh evidence of a Ruling delivered by Justice L. Musona dated 16th August, 2019 in Cause No.2019/HPC/248, but its production was objected to and the JCC upheld the objection. It was submitted that however, the JCC later called the Registrar Commercial List of the High Court to produce the ruling thereby aiding the Complainant's case. This procedure, according to the Petitioner was highly irregular as the Complainants had already closed their case.

3.28 It was submitted that:

- (a) the JCC kept evidence favorable to the Petitioner's case (i.e., a letter dated 27th December, 2021 from Gaston Sichilima) to itself;
- (b) the JCC curtailed the production by RW8, Liswaniso Mulozi, Acting Principal Regulation Officer at the Road Transport and Safety Agency (RTSA), of

evidence favorable and relevant to the investigations and the Petitioner; and

- (c) the JCC stopped the Petitioner from calling Sipheliano Phiri, a Principal State Advocate from the NPA as a witness for the Petitioner.

3.29 It was submitted that for the foregoing and on the authority of the judgment of the Supreme Court of Zambia in the case of **Mutembo Nchito v Attorney General** ⁴ that we should review the procedure used in the removal of the Petitioner and hold the same to be not only illegal, but also unconstitutional. In this regard the Petitioner cited the following passage from the case of **Mutembo Nchito v Attorney General** ⁴:

“Although Article 58(4) of the Constitution leaves the President with no discretion with regards to the recommendation of the Tribunal, we do not agree with the Respondent that the said Article closes the doors to judicial checks on the recommendation itself. The recommendation of the Tribunal, being its final decision, is subject to Judicial review. Accordingly, the Respondent retains the liberty to ask the Court to review the procedure used by the Tribunal to arrive at the recommendation and could even apply for a stay of the said decision.”

- 3.30 The Petitioner also invited the Court to take a leaf and apply the reasoning of the Constitutional Court of South Africa in the case of **Corruption Watch NPC, Freedom Under the NPC, and Council for the Advancement of South African Constitution v President of the Republic of South Africa and Others**⁵ in which the Court, according to the Petitioner, reviewed the procedure that was used in the removal of Mr. Mxolisi Sandile Oliver Nxasana as National Director of Public Prosecutions and held the same to have been unconstitutional.
- 3.31 In closing the arguments, the Petitioner repeated the prayers and reliefs sought in the Petition.
- 3.32 At the hearing of the Petition the Petitioner's Counsel Mr. A Mwansa, SC relied on the Petition and the Petitioner's Heads of Arguments filed into Court on 9th December, 2022. State Counsel augmented his written arguments by making spirited oral arguments which were substantially the same as the filed written arguments. We shall therefore not rehash them in this Judgment.

The Respondent's Arguments

- 4.1 The Respondent's arguments were dealt with in accordance with the reliefs sought by the Petitioner.
- 4.2 Concerning the first relief the Respondent submitted in his written Skeleton Arguments that he only represents the Government in civil proceedings to which the Government is a party.
- 4.3 Relying on Article 236 (2) (d) of the Constitution, the Respondent submitted that the JCC is not an adjudicating authority but is an investigative tribunal in nature and thus there is nothing wrong with the procedure it adopted in interrogating the Complaints. In this regard the case of **Faustine Mwenya Kabwe, Aaron Chungu and John Sangwa v Judicial Complaints Authority and Attorney General**⁶ a High Court decision was called in aid of his submission for its persuasive value.
- 4.4 Relying on the above High Court judgment, the Respondent submitted that the JCC is an investigative tribunal in nature and thus as per its investigative mandate could interrogate the Petitioner and other

persons appearing before it as it was empowered to do so by Section 27 of the JCCA.

4.5 The Respondent closed his submissions under the first relief by submitting that the JCC in regulating its own procedure did not require the Respondent to prosecute the Complaints in the light of the investigative nature of its authority.

4.6 The Respondent begun his submissions under the second relief by discussing the principles of how the Constitution must be interpreted. In this regard the Respondent called in aid the case of **Zambia National Commercial Bank Plc.**

v Musonda and Others⁷ where we observed that:

“A further principle of constitutional interpretation is that all the relevant provisions bearing on the subject for interpretation should be considered together as a whole in order to give effect to the objective of the Constitution. This means no one provision of the Constitution should be segregated from the others and considered alone.”

4.7 The Respondent also relied on the case of **Dipak Patel v Minister of Finance and Attorney General**⁸ where we re-echoed the above principle.

- 4.8 The Respondent consequently submitted that Article 93 (1) of the Constitution should not be read in isolation from other relevant Articles. In this regard it was submitted that whilst it was true that Article 93(1) of the Constitution provides that the decision or instruction of the President shall be in writing under the President's signature, Article 91 (2) of the Constitution provides that in exercising his duties the President can delegate.
- 4.9 Relying on the cases of **Kalid Mohammed v Attorney General**⁹, **Wilson Masauso Zulu v Avondale Housing Project**¹⁰ and **F.D. Kankomba and Others v Chilanga Cement Plc**¹¹ the Respondent submitted that it was trite law that he who asserts must prove.
- 4.10 Concerning the allegation by the Petitioner that the decision by the Respondent contained in his letter dated 4th August, 2022 on the Petitioner's request to the President for a waiver of the Oath of Office, was not the decision of the President, the Respondent submitted that the Petitioner had to prove that the President did not make that decision.

4.11 The Respondent called in aid Article 91 (2) of the Constitution which provides that:

“The executive authority of the State vests in the President and, subject to this Constitution, shall be exercised directly by the President or through public officers or other persons appointed by the President.”

4.12 It was submitted that from the above Article the President can delegate his executive authority to the public officers or other persons appointed by the President. Further it was submitted that the Respondent was a public officer and therefore the President can exercise his authority directly or through the Respondent.

4.15 The Respondent concluded his submissions under the second relief by positing that the Petitioner had alleged that the decision by the Respondent was not a decision of the President but had not shown that the President did not instruct the Respondent to make the decision.

4.16 The thrust of the Respondent’s submissions under the third relief is that the procedure that applies to the removal of a Judge also applies to the DPP, but that the

Constitution does not go further to state the procedure to be used.

4.17 It was submitted that the JCC did not breach the Constitution as the Petitioner was suspended from office after a *prima facie* case had been established against her and that she was subsequently removed from office after the hearings that ensued after the finding of a *prima facie* case against her.

4.18 It was submitted that the procedure and practice of the JCC was as prescribed under the JCCA as amended by the Judicial (Code of Conduct) Amendment Act No. 13 of 2006 (JCCA No. 13 of 2006). In this regard the Respondent called in aid Section 28 (1) of the JCCA which provides:

“Subject to the other provisions of this Act the Authority may regulate its own procedure”.

4.19 The Respondent concluded his submissions under the third relief by submitting that in line with the JCC’s procedure, the determination of whether a Complaint or allegation of misconduct amounts to gross misconduct

could only be done at the end of the hearing and upon assessment of the evidence.

4.20 The thrust of the Respondent's submissions under the fourth relief is that the JCC is a statutory body whose creation is provided for under Article 236 (1) of the Constitution and its functions are provided for under Article 236 (2) thereof as follows:

**“...(a) enforce the Code of Conduct for Judges and Judicial Officers;
(b) ensure that Judges and Judicial Officers are accountable to the people for the performance of their functions;
(c) receive complaints lodged against a Judge or Judicial Officer, as prescribed;
(d) hear a complaint against a Judge or Judicial Officer as prescribed;
(e) make recommendations to the appropriate institution or authority for action; and
(f) perform such other functions as prescribed.”**

4.21 The Respondent concluded his submissions under the fourth relief by submitting that the JCC regulates its own procedure as per Section 28 (1) of the JCCA.

4.22 The Respondent's submissions under the fifth relief related to the issues of the composition and quorum

of the JCC. In this regard Sections 20 (1) and 28(3) of the JCCA were called in aid.

4.23 Section 20 (1) provides that:

“There is hereby constituted a Judicial Complaints Authority which shall consist of five members who have held or qualified to hold high judicial office”.

4.24 Section 28 (3) provides that:

“Three members of the Committee shall form a quorum at any meeting of the Committee”.

4.25 The Respondent submitted that the JCC hearings had at least 3 members, therefore, a quorum was formed. That there was no law that says that the quorum should be of an uneven number or odd number, and that the law was that if there were three members of the JCC at any meeting then the quorum had been formed.

4.26 The Respondent concluded his submissions under the fifth relief by submitting that the Petitioner’s contention that four (4) members at a sitting means that the JCC did not form a proper quorum and therefore the hearing that ensued is null and void *ab*

initio and of no legal effect is far-fetched when the law was clear.

4.27 Concerning the claim for the sixth relief it was reiterated that the procedure used for the suspension and removal of the Petitioner as DPP was lawful as provided for under Article 144 of the Constitution.

4.28 The Respondent did not make any submissions on the seventh relief concerning or touching on the Petitioner's entitlement or otherwise to such consequential orders as this Court may deem fit and appropriate.

4.29 The Respondent prayed that the Petition be dismissed with costs.

4.30 At the hearing of the Petition the Solicitor General Mr. M Muchende, SC relied on the Answer, the Affidavit in Opposition to the Petitioner's Affidavit Verifying Facts and the Respondent's skeleton arguments in support of the Answer. The Solicitor General augmented the skeleton arguments by making spirited oral arguments which were

substantially the same as the filed written arguments. We shall therefore not also rehash them in this Judgment save to say that the Solicitor General submitted that Article 91 (2) of the Constitution must be read together with Section 9(1) of the Statutory Functions Act, Chapter 4 of the Laws of Zambia (the Statutory Functions Act) which provides that:

“Where the President is vested with any statutory function, the discharge of such function by the President may be signified under the hand of the Vice President, a Minister, the Secretary to the Cabinet, the Attorney General, Deputy Minister or Permanent Secretary:

Provided that Proclamations and warrants shall be issued only under the hand of the President.”

In this regard the Solicitor General submitted that in *casu* there is nothing to suggest that the Petitioner was seeking a proclamation or a warrant from the President.

4.31 Further on the issue of costs, the Solicitor General, unlike in his written submissions left it to the discretion of the Court.

Reply

5.0 At the hearing Mr. Mwansa, SC also made oral arguments in reply which were again substantially the same as the Petitioner's written arguments and therefore we shall not also rehash them in this Judgment save to say that on the Respondent's position on the provisions of the Section 9 of the Statutory Functions Act, State Counsel submitted that Section 9 of the Statutory Functions Act was subsidiary to Article 93(1) of the Constitution which is couched in mandatory terms.

Consideration of the Petition

6.1 We have considered the Petition, the Affidavit Verifying the Facts in the Petition, the Answer to the Petition and Affidavit in Opposition to the Affidavit Verifying Facts in the Petition as well as the

Petitioner's Bundle of Documents. We have also considered the respective parties written and oral submissions and the authorities cited. At the outset, we must point out that although the reliefs are couched as orders, in essence the orders sought by the Petitioner appear to be declarations. In seeking the said "orders" the Petitioner desires to challenge the manner in which she was suspended and removed from office as the DPP. In challenging her suspension and removal from office, she alleges that there were constitutional breaches that were committed in the process which breaches have been summarized in paragraph 3.1 of this Judgment.

6.2 We shall now consider whether the Petitioner is entitled to the reliefs sought. In this regard we shall deal with the reliefs sought seriatim.

6.3 The first relief sought is anchored on the alleged breach of Article 177 (5) (a), (c) and/or (e) of the Constitution which provides that:

"(5) The Attorney-General is the Chief Legal adviser to the Government and shall-

- (a) be head of the Attorney-General's Chambers;...
- (c) represent Government in civil proceedings to which Government is a party;...
- (e) perform other functions, as prescribed." (Emphasis supplied)

6.4 In support of the first relief sought the Petitioner contended that the Complaints before the JCC being public interest matters or issues, were supposed to be prosecuted by the Respondent as the custodian of public interest and policy and not the Complainants' lawyers. For the proposition that the Respondent is the custodian of public interest and policy, the Petitioner relied on our decision in the case of **Steven Katuka and Law Association of Zambia v Ngosa Simbyakula and Attorney General.**¹

6.5 The Petitioner mainly contended that the Respondent was and is properly placed and has a constitutional mandate to prosecute all Complaints filed with the JCC as these matters are of public interest in keeping with the Respondent's mandate to represent the Government in civil proceedings, despite the

Petitioner being cognizant of the fact that proceedings before the JCC were not civil proceedings per se.

6.6 On the other hand, the Respondent contended that in keeping with Article 177 of the Constitution which clearly sets out the functions of the Respondent, the Respondent only represents the Government in civil proceedings to which the Government is a party.

6.7 The Respondent also contended that in regulating its own procedure the JCC did not require the Respondent to prosecute the matters before it. According to the Respondent this was in the light of the investigative nature of the JCC's mandate.

6.8 Under the first relief sought, it is not necessary for us to determine whether the proceedings before the JCC are civil proceedings as envisaged under Article 177 (5) (c) of the Constitution since the Petitioner is cognizant of the fact that the proceedings are not civil proceedings per se.

6.9 Despite the Petitioner conceding that the proceedings before the JCC are not civil proceedings, she however, posited that since the said proceedings take an adversarial form, they should therefore have been prosecuted by the Respondent. The Respondent on the other hand posited that the JCC in regulating its own procedure did not require the Respondent to prosecute the Complaints in the light of its investigative nature.

6.10 Article 177 (5)(a), (c) and (e) of the Constitution provides that the Respondent is the Chief Legal Advisor to the Government and must represent the Government in civil proceedings to which the Government is a party and to perform other functions, as prescribed. In Article 266 of the Constitution "*prescribed*" is defined as meaning "*...provided for in an Act of Parliament.*"

6.11 In *casu* the Petitioner ought to have shown or established that the Respondent was required to perform prosecutorial functions on behalf of the

Government in the proceedings brought by private individuals before the JCC as part and parcel of performing his functions under the Constitution. In other words, the Petitioner should have supported her position by providing evidence of relevant provisions of the law that prescribe that the Respondent should be prosecuting all matters before the JCC on account of the fact that such proceedings were adversarial in form. In the absence of such evidence, it is not possible for us to agree with the Petitioner that the Respondent ought to have prosecuted the Complaints on account of the fact that proceedings before the JCC were adversarial in form.

6.12 We need also to point out that it was the JCC which directed that the Complainants were at liberty to engage Counsel of their own choice to prosecute the Complaints before it except the one that was submitted by the DEC. In this regard the Respondent posited that the JCC in regulating its own procedure

did not require the Respondent to prosecute the Complaints. We shall revert to the issue of the JCC having power to regulate its own procedure at a later stage in this Judgment. Suffice it to say at this juncture that we agree with the Respondent that he was not required to prosecute the Complaints as Article 177(5) (a) and (c) of the Constitution does not provide for the Respondent to prosecute Complaints for and on behalf of the Complainants before the JCC.

6.13 We wish to add that in the pre-2016 amendment to the Constitution, *ad hoc* tribunals were set up *vis a vis* the removal of the DPP. The Respondent played an active role in the removal proceedings of the DPP on account of initiating the process, which heavily involved the Republican President who would not only set up the *ad hoc* tribunal but would also formulate the terms of reference for the investigative task of the tribunal. It was therefore, proper to have the Respondent lead in the proceedings before the

tribunal. The current removal procedure through the JCC does not involve the President save for the President acting on the reports submitted by the JCC to the President. This position is amplified by Article 216 (b) of the Constitution which emphasizes the independence of Commissions as they carry out their functions. Hence, the Respondent has no role in the prosecution of a complaint before the JCC unless it is within what is envisaged by Article 177 (5) (a), (c) and (e) of the Constitution.

6.14 Overall the Petitioner has failed to establish that the Respondent was and is properly placed and has a constitutional mandate to prosecute all Complaints filed with the JCC and not the Complainants or their lawyers. For the avoidance of doubt, we wish to state that Article 177 (5) (a) and (c) of the Constitution does not mandate the Respondent as the custodian of both public interest and public policy, to prosecute all Complaints lodged with the JCC against all judicial officers, including the DPP. The prosecution of such

Complaints ought to be done by the Complainants themselves or through Counsel of their choice or in the manner that the JCC directs.

6.15 With the foregoing matters in mind, there is therefore no basis upon which we can hold that the failure by the Respondent to prosecute the Complaints before the JCC was unconstitutional and that the hearing that ensued before the JCC without the Respondent was null and void *ab initio* and of no legal effect. The first relief sought is therefore, dismissed for want of merit.

6.16 The second relief sought is anchored on the alleged breach of Article 93 (1) of the Constitution which provides that:

“A decision or instruction of the President shall be in writing under the President’s signature.”

6.17 In the main, the Petitioner takes issue with the fact that the denial of the waiver was communicated by the Respondent, as that was allegedly *ultra vires* Article 93 (1) of the Constitution as read together

with Section 5 (1) and (2) and Section 6 of the Official Oaths Act.

6.18 Section 5 (1) and (2) of the Official Oaths Act, provide as follows:

“(1) The Chief Justice, the Deputy Chief Justice, a judge of the Supreme Court, a puisne Judge or Commissioner of the High Court shall not enter upon the duties of his office unless he has taken and subscribed the Oath of Allegiance as set out in the Sixth Schedule and the Judicial Oath as set out in the fifth schedule, and both oaths shall be administered by and subscribed before the President.

(2) A Judicial officer appointed to an office under Article 91 (1) (c) of the Constitution or a person lawfully appointed to act in or perform the functions of that office, shall not enter upon the duties of his office unless he has taken and subscribed the Oath of Allegiance and the Judicial Oath as set out in the fifth schedule, and both oaths shall be administered by and subscribed before the Chief Justice.”

6.19 Section 6 of the Official Oaths Act provides as follows:

“The Oath of Office shall be in the form set out in the Seventh Schedule.”

6.20 In seeking the second relief, emphasis was placed by the Petitioner on the fact that the grant or denial of the waiver sought ought to have been in writing and under the signature of the President.

6.21 From the wording of Section 5 (1) and (2) and Section 6 of the Official Oaths Act, it is clear that these provisions relate to the taking of the Judicial Oath and the Oath of Office by certain judicial officers (and by necessary implication the DPP) but do not provide for the waiver of the Oath of Office or the mode of communicating the same. In the circumstances we see no nexus whatsoever with the matter before us and the provisions that the Petitioner seeks to rely on to press the point that the communication of the denial of the waiver by the Respondent was *ultra vires* Article 93 (1) of the Constitution as read together with Section 5 (1) and (2) and Section 6 of the Official Oaths Act. In the circumstances we have no hesitation in saying that

both Section 5(1) and (2) and Section 6 of the Official Oaths Act are irrelevant in *casu*.

6.22 Notwithstanding the foregoing, in our view, the real issue to be determined when considering whether or not the Petitioner is entitled to the second relief is whether the communication of the decision by the Respondent contained in his letter dated 4th August, 2022 relating to the Petitioner's request to the President for a waiver of the Oath of Office was in direct breach of Article 93 (1) of the Constitution and of no legal effect.

6.23 The Petitioner's position on this issue is that the denial of the waiver was supposed to be under the hand and signature of the President in keeping with Article 93 (1) of the Constitution. Therefore, the decision communicated by the Respondent by letter dated the 4th August, 2022 was null and void and of no legal effect.

6.24 The Respondent on the other hand has approached this issue from the following angles:

- (i) that Article 93 (1) of the Constitution should not be read in isolation from Article 92 (1) of the Constitution;
- (ii) that the Petitioner ought to have proved that the decision communicated by the Respondent in the letter dated 4th August, 2022 was not made by the President; and
- (iii) that the President can directly exercise his authority himself or through public officers or other persons appointed by the President.

6.25 We note that Article 93 (1) of the Constitution indeed provides that decisions or instructions of the President must be under the hand and signature of the President. We also note that Article 91 (2) of the Constitution provides that the President can exercise executive authority directly or through public officers or other persons appointed by him. We further note that Section 9(1) of the Statutory Functions Act, provides for the

manner in which the discharge of any statutory function (i.e., the powers and duties conferred by an Act of Parliament) by the President may be signified under the hand of certain designated public officers.

6.26 In *casu* the denial of the waiver sought was without doubt communicated to the Petitioner by the Respondent by letter dated 4th August, 2022 to the Advocates of the Petitioner. In the material respects the Respondent said:

“...Kindly be informed that the waiver of the official oath of office being sought by the Director of Public Prosecutions (DPP), Mrs. Lillian Fulata Shawa Siyuni in respect of the allegations levelled against the DPP and lodged with the Judicial Complaints Commission is hereby denied....”

6.27 The Petitioner also wishes to rely on Article 182 (1) and (3) of the Constitution in aid of her quest to show *inter alia* that the communication by the Respondent of refusal to grant her the waiver was unconstitutional. Article 182(1) and (3) of the Constitution provide in clear terms that:

“(1) Subject to this Article, the Director of Public Prosecutions shall retire from office on attaining the age of sixty years....

(3) The Director of Public Prosecutions may be removed from office on the same grounds and procedure as apply to a judge.”

6.28 A perusal of Article 182 (1) and (3) of the Constitution will show that both sub-clauses relate to the mandatory retirement age of the DPP (being sixty years) and the removal of the DPP on the same grounds and procedure as those that apply to a judge. Clearly Article 182 (1) and (3) of the Constitution do not provide for the waiver of the Oath of Office or how the same is to be communicated. In *casu*, the Petitioner is alleging that the denial to grant her a waiver of the oath of office was communicated to her by the Respondent who has no authority to do so. As Article 182 (1) and (3) of the Constitution do not deal with the issue of waiver of Oath of Office or matters incidental thereto we are of the view that both sub-clauses are equally irrelevant in *casu*.

6.29 Having held that Section 5(1) and (2) and Section 6 of the Official Oaths Act and Article 182 (1) and (3) of the Constitution are irrelevant in *casu* we shall now consider if indeed the communication of the denial of the waiver of the Oath of Office by the Respondent was unconstitutional in view of the provisions of Article 93 (1) of the Constitution.

6.30 We must hasten to state that Article 93(1) of the Constitution does not specifically deal with the issue of waiver of the Oath of Office. Article 93(1) of the Constitution merely but deals with the manner in which a decision or instruction of the President must be set out. Article 93(1) of the Constitution has to be read in the light of other constitutional provisions touching on the issue, in particular, Article 91 of the Constitution. Article 91 (2) of the Constitution vests executive authority in the President of Zambia and recognizing the immense task and roles expected in the execution of these duties, the provision further states that the

exercise of such executive authority may be delegated to public officers or other persons appointed by the President. It would be impractical to expect the President to personally carry out all the functions envisaged as falling under executive authority and the delegation of duties as provided in Article 91(2) of the Constitution is therefore a necessity.

6.31 Article 93(1) of the Constitution provides that all instructions and decisions of the President are to be in writing and signed off by the President. This requirement is aimed at promoting the principles of accountable governance as written instructions and decisions can be easily reviewed for legality and constitutional astuteness than verbal ones. It also speaks to the formality of the institution of Presidency. It is a requirement tied to instructions and decisions of the President, thus when he delegates, the requirement to have the written decision or requirement under the signature of the

President falls off. It is then for the delegated officer to so issue and sign off whatever decision as the case may be. To hold otherwise would be to unnecessarily fetter the President's inherent power to delegate, which power has expressly been provided for in Article 91(2) of the Constitution. However, the delegation should be in writing in keeping with Article 93(1) of the Constitution.

6.32 In order to prove that the President was required to communicate under his hand the decision on the waiver of oath of office, there should be proof that the particular act is one that the President is mandated to do personally and not allowed to delegate in keeping with Section 9(1) of the Statutory Functions Act as read with Article 91(2) of the Constitution. Under the Statutory Functions Act only proclamations and warrants must be issued under the hand of the President. The Respondent argued at the hearing of this matter that in *casu* there is nothing to suggest that the

Petitioner was seeking a proclamation or warrant when she requested for the waiver of her oath of office. In this regard, we agree with the Respondent's argument.

6.33 Therefore, there is no basis upon which the Petitioner can rely on Article 93(1) of the Constitution in order to press the point that the letter dated 4th August, 2022 by the Respondent was in direct breach of Article 93(1) of the Constitution and is of no legal effect.

6.34 In view of the foregoing, we come to the conclusion that the second relief sought has no merit and is therefore dismissed.

6.35 The third and fourth reliefs sought are interlinked and will be dealt with together. Both these reliefs are anchored on the alleged breach of Article 144 (4) (a) of the Constitution.

6.36 Article 144 (4) (a) of the Constitution provides that:

“The Judicial Complaints Commission shall, within thirty days of the Judge being suspended from office, in accordance with clause (3)-

(a)hear the matter against the Judge on the grounds specified in Article 143(b), (c) and (d);...”

6.37 An examination of Article 144 (4) (a) of the Constitution reveals that the Constitution provides the roadmap for the hearing of the matter of a Judge or DPP who has been suspended by the President. Crucial in this regard is the fact that the matter of the suspended Judge or DPP must be heard within 30 days from the suspension. As drafted, the Article does not provide the procedure that the JCC must follow when hearing the matter and in the circumstances therefore, recourse should be had to the JCCA as read together with the JCCA No. 13 of 2006.

6.38 Section 28 of the JCCA provides an insight as to how the JCC must handle Complaints before it. Section 28 provides as follows:

“Subject to the other provisions of this Act, the committee may regulate its own procedure.” (Emphasis supplied)

6.39 Clearly from this provision, the JCC has, subject to other provisions of the JCCA which prescribe its procedure, the power to determine how matters before it must be dealt with. We, however, note that the JCCA has not undergone any amendment following the 2016 constitutional amendments and the provisions in the JCCA relate to the Judicial Complaints Authority as an investigative committee and not as an oversight body that the JCC currently is. This clearly shows the inadequacy of the provisions post the 2016 constitutional changes on the procedure for the removal of a Judge or DPP. These require to be urgently amended in order to clarify inter alia the procedure to be followed both pre and post the finding of the *prima facie* case so that all concerned can be aware beforehand of the procedures that must be followed. This is more so in view of the fact

that while Article 144 of the Constitution elaborately lays out the procedure for removal, it does not spell out what is involved by “*hearing of the matter*” after the finding of the *prima facie* case.

6.40 Be the foregoing as they maybe, in *casu* the Petitioner takes issue with the manner in which the JCC went ahead to hear the Complaints against her after the finding of a *prima facie* case. We reiterate that the JCC has the right to regulate its own procedure in accordance with Section 28 of the JCCA. But more importantly, as the Constitution does not provide for the procedure that the JCC has to follow when hearing Complaints under Article 144 (4) (a) of the Constitution, there is no basis in the circumstances of this case upon which the Petitioner can allege a contravention of the Constitution *vis a vis* the hearing which the Petitioner has taken issue with.

6.41 In view of the foregoing, we opine that the claims for the third and fourth reliefs have no merit and are therefore dismissed.

6.42 The fifth relief sought is also anchored on Article 144 (4) (a) of the Constitution. We did not see it fit and proper to consider it together with the claims for third and fourth reliefs although it also brings into this matter the alleged breach of Article 144 (4) (a) of the Constitution, as we are of the view that it brings into this matter another aspect namely that of quorum. Therefore, we shall consider the fifth relief sought separately.

6.43 The thrust of the Petitioner's arguments under the fifth relief sought is first that the number of Commissioners permitted by the law to sit and hear a matter ought to be an odd number of three or all five Commissioners. Secondly, that once the Commissioners constitute themselves into a quorum, according to the Petitioner the

Commissioners so constituted should be present at every hearing of the matter until the matter is disposed of in keeping with the rules of natural justice and fair hearing.

- 6.44 On the other hand, the thrust of the Respondent's position under the fifth relief sought is that the JCCA stipulates the composition of the membership and quorum of the JCC. The Respondent calls in aid Sections 20 and 28 (3) of the JCCA. Section 20 of the JCCA provides that:

“There is hereby constituted a Judicial Complaints Authority which shall consist of five members who have held or are qualified to hold high judicial office.”

- 6.45 Section 28 (3) of the JCCA provides that:

“Three members of the Authority shall form a quorum at any meeting of the Authority.”

- 6.46 Both Sections 20 and 28 (3) of the JCCA are very clear. Section 20 of the JCCA provides that the composition of the JCC is five members who have held or are qualified to hold high judicial office. Section 28(3) of the JCCA on the other hand

provides that three members of the JCC form a quorum at any meeting of the JCC.

6.47 A perusal of Article 144 (4) (a) of the Constitution will reveal the fact that no provision is made for the quorum and/or membership requirements for the JCC when hearing complaints. It is therefore, clear that the membership and quorum requirements for the JCC are purely statutory and not constitutional matters. We stated in the case of **Gervas Chansa v The Attorney General**¹³ as to what a constitutional question is, as follows:

“A constitutional question is defined in black’s law dictionary as a legal issue resolved by the interpretation of the Constitution rather than the Statute.”

6.48 Another occasion to pronounce ourselves on what a constitutional question is, arose in the case of **Ikelenge Town Council v National Pension Scheme Authority and Attorney General**¹⁴ where we said:

“It is clear that a constitutional question is one that can be resolved by the interpretation of the Constitution rather

than a statute. Thus, where a question does not invite the Court to interpret a provision of the Constitution, the same is not a constitutional question.

6.49 In view of the foregoing, we opine that the fifth relief sought does not raise any constitutional question for determination by this Court and it therefore has no merit and is dismissed.

6.50 The sixth relief sought is anchored on the alleged constitutional breaches set out in the Petition and on the authority of the Judgment of the Supreme Court of Zambia, in the case of **Mutembo Nchito v Attorney General**⁴ as well as the South African case of **Corruption Watch NPC, Freedom Under The NPC, and Council For The Advancement of South African Constitution v President of the Republic of South Africa and Others**.⁵ In this regard the Petitioner urges this Court to review the procedure used in her removal from office as DPP and to hold the same not only to be illegal, but also unconstitutional.

6.51 On the other hand, the Respondent submits that the procedure used for the suspension and subsequent removal of the Petitioner as DPP was lawful in keeping with Article 144 of the Constitution. According to the Respondent the President suspended the Petitioner after a *prima facie* case was established against her and the Petitioner was thereafter heard by the JCC and a recommendation for her removal from office was made to the President after the JCC concluded that the complaints against the Petitioner had been substantiated. As such, according to the Respondent, the suspension and removal of the Petitioner as DPP were of legal effect.

6.52 Under the sixth relief sought the Petitioner is essentially challenging the manner in which she was suspended and removed from the office as DPP. In order to resolve the issues arising under the sixth relief sought we must begin by examining Article 182 (3) of the Constitution. This Article deals

with the issue of the removal from office of the DPP and it provides in clear terms that:

“The Director of Public Prosecutions may be removed from office on the same grounds and procedure as apply to a Judge.”

6.53 The grounds and procedure for the removal of a judge are provided for in Articles 143 and 144 of the Constitution. Article 144 of the Constitution provides that:

“(1) The removal of Judge may be initiated by the Judicial Complaints Commission or by a complaint made to the Judicial Complaints Commission, based on the grounds specified in Article 143.

(2) The Judicial Complaints Commission shall, where it decides that a prima facie case, has been established against a Judge, submit a report to the President.

(3) The President shall within seven days from the date of receiving the report, submitted in accordance with clause (2) suspend the Judge from office and inform the Judicial Complaints Commission of the suspension.

(4) The Judicial Complaints Commission shall, within thirty days of the judge being suspended from office, in accordance with clause (3)-

(a)hear the matter against the Judge on the grounds specified in Article 143 (b) (c) and (d) or....

(5)Where the Judicial Complaints Commission decides that an allegation based on a ground specified in Article 143 (b) (c) and (d) is-

(a) not substantiated, the Judicial Complaints Commission shall recommend, to the President, the revocation of the Judge's suspension and the President shall immediately revoke the suspension; or

(b) substantiated, the Judicial Complaints Commission shall recommend, to the President the removal of the Judge from office and the president shall immediately remove the Judge from office.

(6) The proceedings under clause (4)(a) shall be held in camera and the judge is entitled to appear to be heard and be represented by a legal practitioner or other person chosen by the Judge..."
(Emphasis supplied)

6.54 Article 143 of the Constitution provides that:

"A Judge shall be removed from office on the following grounds:

- (a) mental or physical disability that makes them incapable of performing judicial functions;**
- (b) incompetence;**
- (c) gross misconduct; or**
- (d) bankruptcy.”**

6.55 For purposes of these proceedings we have substituted “Judge” with “the Director of Public Prosecutions” in both Articles 143 and 144 of the Constitution for ease of reading and/or understanding the purport and meaning of these Articles in so far as they apply to the DPP.

6.56 In the case of **Jonas Zimba v The Attorney General**¹² we said:

“It is our conclusion that on a proper reading of all the relevant Articles, the DPP is amenable to the disciplinary process of the JCC. The DPP may be removed from office in accordance with Article 183 (3) as read with Articles 143 and 144.”

6.57 From the foregoing matters, it is clear that although the DPP is a Constitutional Office holder who is entitled to retire on attaining the age of sixty years, the DPP can be removed on the grounds and through the procedure that are

provided for in the Constitution before he or she attains the age of sixty years.

6.58 In paragraphs 2.2 to 2.7 of this Judgment we have narrated the facts leading to the suspension and removal of the Petitioner as DPP and therefore we shall not rehash them. But suffice it to say that it is trite that the Petitioner was on 14th September, 2022 and 14th October, 2022 respectively suspended and removed from her office as DPP by the President. It now behoves us to consider and determine whether the Petitioner is entitled to the sixth relief.

6.59 We are of the view that the procedure used in the case of **Mutembo Nchito v Attorney General**⁴ that was before the Supreme Court cannot apply in *casu* as the said case was before the Supreme Court on an appeal of judicial review proceedings that had been heard and determined by the High Court. The matter before us is not one for judicial review proceedings but was commenced by a

Petition alleging constitutional breaches and seeking certain reliefs outlined earlier in this Judgment.

6.60 We are also of the view that this is not a proper case in which we can take a leaf and apply the reasoning of the Constitutional Court of South Africa in the case of **Corruption Watch NPC, Freedom Under The NPC, and Council For The Advancement of South African Constitution v President of the Republic of South Africa And Others**⁵ as suggested by the Petitioner because the Constitutional Court of South Africa did not actually review the case relating to the removal of Mr. Nxasana as National Director of Public Prosecutions of South Africa. The actual review was conducted by the Gauteng Division of the High Court, Pretoria and the Constitutional Court of South Africa merely dealt with an application to confirm the order that was made by the Gauteng Division of the High Court, Pretoria and related

appeals against the order of the same Court. This was in accordance with the particular constitutional provisions and laws of the Republic of South Africa. In *casu* the matter before us is a Petition through which the Petitioner is seeking certain reliefs outlined earlier in this Judgment.

6.61 In considering whether the Petitioner is entitled to the sixth relief the following questions must be answered:

(a) Was the suspension of the Petitioner as DPP null and void *ab initio* and of no legal effect?; and

(b) Was the subsequent removal from office of the Petitioner as DPP null and void *ab initio* and of no legal effect?

6.62 In keeping with Article 144 (1) and (2) of the Constitution, after conducting its preliminary investigations and establishing a *prima facie* case against the Petitioner, the JCC was obliged to submit a Report to the President who in turn was

within 7 days obliged, after receiving the report in keeping with Article 144 (3) of the Constitution, to suspend the Petitioner from office and inform the JCC of the suspension. Provisions of Article 144 (1), (2) and (3) of the Constitution are couched in mandatory terms. In *casu* this is what was actually done. In the circumstances we are of the view that the suspension of the Petitioner from the office of DPP cannot be faulted through these proceedings alleging constitutional breaches. The suspension was not null and void *ab initio* and was of legal effect.

6.63 The fact that the President suspended the Petitioner and informed the JCC about the suspension triggered the procedure for hearing the Petitioner in accordance with Article 144 (4) (a) of the Constitution which is also couched in mandatory terms. As per Article 144 (4) (a) of the Constitution, the hearing was to take place within 30 days from the suspension of the Petitioner.

From the Petition, the Affidavit Verifying Facts, the Answer, the Affidavit in Opposition to the Affidavit Verifying Facts and the Petitioner's Bundle of Documents, it is clear that the JCC heard the Petitioner within the prescribed period and came to the conclusion that the allegations against the Petitioner had been substantiated. In keeping with Article 144 (5) (b) of the Constitution, which is also couched in mandatory terms, the JCC was obliged to recommend to the President the removal of the Petitioner from the office of DPP and the President was in turn obliged to immediately remove the Petitioner from the office as DPP. In *casu* this is what was also actually done. In the circumstances, the removal of the Petitioner as DPP cannot be faulted through these proceedings alleging constitutional breaches. The removal was not null and void *ab initio* and was of legal effect.

6.64 In concluding, we are not oblivious of the fact that the Petitioner in coming before us had taken issue

with a number of alleged constitutional breaches. Earlier in this Judgment we have dealt with those issues and we do not wish to rehash them but suffice it to say that the Petitioner has failed to establish any constitutional breaches that she alleged.

6.65 In the net result we are of the view that the Petitioner is not entitled to the sixth relief. The sixth relief sought is dismissed for want of merit.

6.66 Given the position that we have taken in this matter we are of the view that the Petitioner is not entitled to any consequential orders and in similar vein the Petitioner is not entitled to the costs of and occasioned by this Petition. For the avoidance of doubt reliefs “vii” and “viii” are dismissed.

6.67 We are alive to the fact that the Respondent prayed in his written submissions that the Petition be dismissed and that costs be for the Respondent but however in the Solicitor General’s oral submissions he left the issue of costs in the

Court's discretion. We are also alive to the fact that indeed we have the discretion to award costs in the matters that come before us but given the nature and importance of the issues that were canvassed before us by the Petitioner and also the Respondent we are of the view that it will be just and fair that each party should bear their own costs.

Conclusion

6.68 In the sum, the Petition fails in its entirety and it is dismissed. We reaffirm that each party shall bear their own costs.



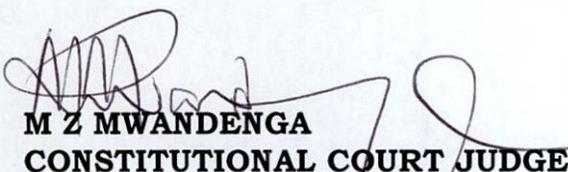
**Prof M M MUNALULA (JSD)
PRESIDENT OF THE CONSTITUTIONAL COURT**



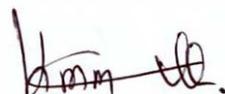
**M S MULENGA
CONSTITUTIONAL COURT JUDGE**



**J Z MULONGOTI
CONSTITUTIONAL COURT JUDGE**



**M Z MWANDENGA
CONSTITUTIONAL COURT JUDGE**



**K MULIFE
CONSTITUTIONAL COURT JUDGE**