

IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA

2016/CC/0029



IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF ZAMBIA (AS AMENDED BY ACT NUMBER 2 OF 2016), CHAPTER 1 OF THE LAWS OF ZAMBIA.

AND

IN THE MATTER OF: AN APPLICATION UNDER ARTICLES 182(3), 143 AND 144 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA.

BETWEEN:

MUTEMBO NCHITO, SC

PETITIONER

AND

ATTORNEY GENERAL

RESPONDENT

Before Mulenga, Mulembe and Munalula, JJC in Open Court on 12th September, 2016 and 27th September, 2016

For the Petitioner: Mr. Nchima Nchito, SC and Mr. C. Hamwela of Nchito and Nchito

For the Respondent: Mr. A. Mwansa, SC, Solicitor General, Ms. M. Kalimamukwento and Mrs. K. N. Mundia, Assistant Senior State Advocates

JUDGMENT

Munalula, JC, delivered the Judgment of the Court

Cases referred to:

1. Kabimba v Attorney General and Lusaka City Council (1995-97) Z.R. 152

2. South African Informal Traders Forum and Others v City of Johannesburg and Others 2014 ZACC at p. 8
3. Attorney General of Grenada v The Grenada Bar Association, Civil Appeal No.8 of 1999
4. Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited (1995-97) Z.R. 187
5. The Law Association of Zambia v Ngosa Simbyakula and 63 Others, Cause no. 2016/CC/ 0011
6. American Cyanamid v Ethicon Ltd [1975] 1 ALL ER 504

Legislation referred to:

Constitution of Zambia, 1991, Article 58(2) and (3); Article 139(7)
Constitution (Amendment) Act 2 of 2016, Article 118(e); 128(1)(e); 144; 267(3)(e)
Constitutional Court Rules, S.I 37 of 2016, O.1 r.1; O. 9 r. 20; O.10 r. 2

Other works referred to:

Rules of the Supreme Court, (White Book) 1999 Edition, O.18 r.19(1) ; O. 59 r. 14(12); Explanatory notes under 59/14/41

This is a motion renewing an application for interim relief brought by the Petitioner in Cause no. 2016/CC/0029. The Petitioner was seeking a stay of the decision by his Excellency the President of the Republic of Zambia Mr. Edgar Chagwa Lungu to remove the Petitioner from the office of Director of Public Prosecutions.

The facts leading up to this motion, are not in dispute. The Petitioner was the Director of Public Prosecutions. By letter dated 10th March, 2015, the Republican President, suspended the Petitioner pursuant to Article 58(2)

and (3) of the Constitution of the Republic of Zambia pending the findings of an ad hoc Tribunal set up to investigate the Petitioner's conduct.

The Petitioner challenged, in several fora, the composition, procedure and impartiality of the Tribunal, leading to a delay in the holding of Tribunal hearings. The challenges ultimately proved unsuccessful in the Supreme Court. Armed by the Supreme Court decision, the ad hoc Tribunal proceeded to carry out its mandate.

Whilst the Tribunal was sitting to hear his case, the Petitioner turned to the Constitutional Court instituting Cause No. 2016/CC/004 to continue the challenge of the Tribunal's jurisdiction. The hearing of the matter was delayed by an application for interim relief to stay the decision of the President which was declined by the Court. Before the main matter in the Constitutional Court was heard, the Tribunal concluded its proceedings and rendered its decision.

The Tribunal delivered its decision to the President without copying the Petitioner. On the basis of its conclusion that the Petitioner had been found guilty of misconduct on two of the charges against him, the Tribunal recommended the Petitioner's dismissal. The President removed the Petitioner from the office of Director of Public Prosecutions on 9th August, 2016 pursuant to Article 144 of the Constitution as amended by the Constitution (Amendment) Act 2 of 2016.

The Petitioner then instituted a second action in the Constitutional Court, Cause No. 2016/CC/0029, challenging the constitutionality of his dismissal. The gist of his second action is that whilst his disciplinary hearing was not conducted by the Judicial Complaints Commission as the body created

under the said Article 144 to attend to such matters, his dismissal was made pursuant to the said provision. Consequently his dismissal was unconstitutional as procedure was not followed when he was deprived of the benefit of a hearing before the correct body.

Pending the hearing of the second action in the Constitutional Court, the Petitioner filed an application for interim relief before a single judge of this Court. The application before the single judge was an application to stay the decision made by the Republican President on 9th August, 2016 pursuant to Article 144 of the Constitution as amended removing the petitioner from his position as Director of Public Prosecutions.

When the matter came up for hearing on 16th August, 2016, the single judge of the Court made an *ex parte* order granting the stay and later heard the matter *inter parte* on 19th August, 2016. On 29th August, 2016, the single judge rendered the ruling discharging the *ex parte* stay and held that the Petitioner would not suffer irreparable harm if he did not get the relief sought as he could be adequately compensated in damages.

The Petitioner, dissatisfied with this decision, proceeded to move the full Court and refresh his application for interim relief. His dissatisfaction stems from his conclusion that the single judge's Ruling did not fully consider the irreversible constitutional implications of denying the application for interim relief should the Petitioner be successful subsequently, in the main matter.

A full Court of three judges proceeded to hear the interim application in open court on 12th September, 2016. Both parties relied on the skeleton arguments filed before the Court which they augmented at the hearing with oral submissions.

In his skeleton arguments filed on 31st August, 2016, the Petitioner began by arguing that the Court has jurisdiction to hear his application by virtue of O.1 r.1 and O. 10 r. 2 of the Constitutional Court Rules in conjunction with O. 59 r. 14(12) supported by explanatory notes under 59/14/41 of the Rules of the Supreme Court, (White Book) 1999 Edition. He referred to the case of **Kabimba v Attorney General and Lusaka City Council**¹ as authority for the claim that the Court has the power to grant a stay of proceedings against the State.

In arguing the substantive application for interim relief, the Petitioner relied on the case of **South African Informal Traders Forum and Others v City of Johannesburg and Others**² at p. 8 where it was stated that an applicant for such relief should show firstly, a prima facie right that is likely to lead to the relief sought in the main application. Secondly, the applicant should show the irreparable and imminent harm to the right that will be occasioned if the relief sought is not granted. Thirdly the applicant should show whether the balance of convenience favours the granting of relief sought. And finally, the applicant should show that there is no other remedy available.

To establish a prima facie case on the right to relief the Petitioner relied on the change in the law arising from the enactment of the Constitution (Amendment) Act 2 of 2016. The ad hoc Tribunal which determined his disciplinary hearing was set up under Article 58 of the Constitution which was repealed and not re-enacted by the Constitution (Amendment) Act 2 of 2016. Instead a new procedure was created under Article 144 of the Constitution as amended which mandates the Judicial Complaints Commission to handle matters of removal from the office of Director of

Public Prosecutions. The letter of removal from office makes reference to Article 144 when in the Petitioner's opinion, he was not accorded a hearing before the Judicial Complaints Commission.

He buttressed his argument with reference to Article 267(3)(e) which states that the law is continuously in force and a reference to an office, body or organisation where same have ceased to exist, is a reference to its successor or equivalent performing the functions. A reference to the ad hoc Tribunal therefore is a reference to the Judicial Complaints Commission as the applicable body to determine the removal from office of a person holding the position of Director of Public Prosecutions and this rendered the continued sitting of the ad hoc Tribunal illegal by operation of law.

The Petitioner averred that he was removed without being heard by the Judicial Complaints Commission in accordance with Article 144, and another person appointed to assume the office of Director of Public Prosecutions. As a result, irreparable harm had been caused to the Petitioner. His reinstatement to the office of Director of Public Prosecutions if he were to succeed in the main matter was improbable. Failure to grant relief would render the main matter an academic exercise. Whilst on the other hand, the Respondent would suffer no inconvenience if the stay of the presidential decision is granted, since someone else had been acting in the office for close to 17 months. The Petitioner further averred that should the President's actions be found to be unconstitutional, it would be a complex exercise to undo the appointment of the new office holder. Finally, the Petitioner pleaded that the hearing before this Court was the only remedy available to him.

The Petitioner was not present in person at the hearing of the motion. He was represented by his lawyers *Nchito and Nchito Advocates*. Mr. Nchima Nchito in presenting the Petitioner's case, reiterated the Petitioner's reliance on the affidavit and written heads of argument which he briefly augmented with an oral submission. He stated that the issue with regard to the application for a stay relates to the nature of the application which is a constitutional issue wherein the petitioner enjoys security of tenure in his office. Mr. Nchito submitted that the office of Director of Public Prosecutions enjoys security of tenure in order to enhance and uphold the separation of powers between the three arms of government; in short to ensure that there is no intermeddling. Thus the security of tenure is to protect the interests of the citizenry as well as to enhance the rule of law. In support of his claim he referred to the case of **Attorney General of Grenada v The Grenada Bar Association**³ which though of only persuasive value was relevant in the circumstances. He quoted the following pronouncements by the court in the *Grenada* case in relation to the law governing the office of Director of Public Prosecutions:

"This provision intrinsically links criminal justice with the concept of an independent and impartial judiciary. This provision makes it clear that the independence of the judiciary is a right granted for the benefit of the citizen as an incident of the constitutional guarantee of his right to have a fair trial."

Further that:

"Security of tenure is a cornerstone of the constitutional provisions for judicial independence. These provisions prescribe that the appointment of the judicial officer is an appointment until he reaches retirement age subject to a condition permitting his removal for inability or misbehaviour."

Mr. Nchito opined that security of tenure embedded in the office of Director of Public Prosecutions was intended to insulate the officer from the temptation to "cater" to the wishes of political offices in order to preserve or prolong his stay in office. Since the protection is for the benefit of the citizenry and damages would have to be for the citizenry and not the office holder, damages cannot atone when a constitutional office holder with security of tenure is removed from office. Only a stay of the presidential decision therefore can preserve the independence of the office.

Inexplicably, Mr. Nchito then made reference to the proviso in Article 139(7) of the Constitution of Zambia, 1991 (a provision which stands repealed by the Constitution (Amendment) Act no. 2 Of 2016) which stated that the power to remove a public officer as well as retire him or her could not be construed to include inter alia, the Director of Public Prosecutions. Hence the office holder cannot be retired in the national interest because of the need to protect the office from interference. Mr. Nchito argued that removing such office holder unconstitutionally and awarding damages was untenable as it was equivalent to removing the security of tenure of the office. It was therefore incumbent upon the Court to uphold the Constitution and protect the Petitioner until the Court had determined the constitutionality of his removal.

The Respondent opposed the Petitioner's application. They relied on their affidavit in opposition and skeleton arguments filed before the single judge of this Court on 18th August 2016. Only portions of the pleadings directly applicable to this motion are referred to in this ruling.

The Respondent called for the Court to dismiss the application as it amounted to a multiplicity of actions and was frivolous and vexatious. The Respondent submitted that the Petitioner had applied for various reliefs including the ones sought in this matter in another Court of equal jurisdiction, all of which amounted to multiplicity of actions and an abuse of Court process. Further that, since the issues raised by the Petitioner occurred before Cause no. 2016/CC/004 was disposed off, he should have exercised the option of amending his pleadings to include additional claims.

The Respondent cited the case of **Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited**⁴ in which the Supreme Court disapproved of the commencement of a multiplicity of procedures, proceedings and actions on the same subject matter between the same parties. Reference was made to O.18 r.19(1) of the Rules of the Supreme Court (White Book) 1999 Edition, which empowers the court to dismiss an action because it is *inter alia*, frivolous and vexatious or otherwise an abuse of the process of court.

In the Respondent's view, this motion is premature and should not have preceded the Court's decision in Cause No. 2016/CC/004 to pronounce itself on the jurisdiction of the ad hoc Tribunal. Thereafter the Petitioner's action ought to be by way of judicial review.

In oral submissions, the learned Solicitor General, Mr. A. Mwansa, SC opposed the claim that the removal of the Petitioner from office was unconstitutional and argued that staying the President's decision would be delving into the merits of the case and taking a position that the President's decision was unconstitutional. He further argued that there is in fact

nothing to be stayed by the Court as the decision in question had already been effected. Finally, he stated that no prejudice or damage would be suffered by the general citizenry if a stay was not granted as someone else had already been appointed to occupy the office and secure the public interests.

In his oral reply, Mr. Nchito, observed that the question of consolidating actions was not in issue as the Court had already ruled that the matters under Cause No. 2016/CC/ 0029 could proceed separately. Secondly, as there was already someone acting in the office of Director of Public Prosecutions no prejudice would be occasioned if the Petitioner remained suspended and was terminated by a subsequent finding by the Court. If on the other hand, the Petitioner stood dismissed at this point and he subsequently, succeeded in the main matter, there would be a risk of the country ending up with two substantive Directors of Public Prosecutions.

Thirdly, Mr. Nchito reiterated that the office of Director of Public Prosecutions enjoys security of tenure, taking away of which, was an assault on the rule of law and a prejudice to the citizenry. Finally he argued that there was 'something to be stayed' as the decision to remove and replace the Petitioner was still in process, and the newly appointed Director of Public Prosecutions had not yet been ratified by Parliament. He quoted Gardner J. in Kabimba v Attorney General and Lusaka City Council, where his Lordship stated that ***"...I am satisfied that where the purpose of an order has not been carried out, it can be stayed as proceedings within the meaning of O.53."*** Given the foregoing, Mr. Nchito argued that the balance of convenience lay in favour of the Petitioner and the Court

should use its power to stay the President's decision and grant the application for relief expeditiously.

Before we address the merits of this application we wish to make a preliminary point of procedure. This matter was commenced by summons under O.1 r. 1 of the Constitutional Court Rules, S.I. 37 of 2016, in conjunction with O. 59 r. 14 (12) of the Rules of the Supreme Court (White Book) 1999. It should have been commenced by notice of motion under O. 9 r. 20 using the appended form VI of the Constitutional Court Rules which relate to commencement of interlocutory applications. O. 9 r. 20 provides that:

“(1) An interlocutory application under the Act shall be by summons or notice of motion as the case may be.

(2) The summons and notice shall be in Forms V and VI set out in the Schedule.”

Under O.1 r. 1, resort to the White Book is available only in default, to fill a gap in the Constitutional Court Rules. And O.1 r.1 (1) states in part that:

“The jurisdiction vested in this Court shall, as regards practice and procedure, be exercised in the manner provided by the Act and these Rules...and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book)...”

However, in the interests of substantive justice and speedy disposal of the matter, the Court is relying on Article 128(1)(e) providing for the Court's jurisdiction and Article 118(e) cautioning against undue regard to technicalities in adjudicating on matters before it. This decision is however not intended to overlook compliance with prescribed procedures but is necessary in the peculiar circumstances of this case to enable us to pronounce ourselves on a matter that we consider to be of importance in

the development of the procedures to be followed in this Court. That said, we now proceed to the substantive claim for interim relief.

We begin, with the Respondent's opposition to the Petitioner's application for interim relief, on the grounds of multiplicity of actions and abuse of the court process. The Respondent asked the Court to dismiss the Petitioner's motion accordingly. We hasten to state that in view of the decision made by the Court at the hearing of Cause No. 2016/CC/004, to allow the two cases to run concurrently, we find the Respondent's claim untenable and are therefore in order to hear the application for interim relief on the merits.

The Petitioner states that the single Judge of this Court, did not fully consider the irreversible constitutional implications of denying him the interim relief. We wish to state from the outset that we have carefully considered the issues raised in the motion for interim relief. At the same time we have been mindful not to stray into matters which are the preserve of the Court yet to hear the main Petition. Therefore the only question before us is whether the interim relief in the form of a stay of the decision of the Republican President to remove the Petitioner from his position as Director of Public Prosecutions pending hearing of the Petition in this Cause should be granted.

A grant of interim relief is discretionary and provided for under O. 10 r. 2 (1) of the Constitutional Court Rules which states that "***Despite any provision to the contrary, the Court may hear and determine an application for an interim order.***" This Court has already had occasion to pronounce itself on interim relief in the case of **The Law Association of Zambia v Ngosa**

Simbyakula and 63 Others⁵. In that case Chibomba P.C. ruling on an application for interim relief relied on the principles enunciated in **American Cyanamid v Ethicon Ltd**⁶. In the **American Cyanamid** case, the House of Lords held that in order to decide whether there is adequate basis to grant an interlocutory injunction, the applicant should have a serious triable issue; damages should be unsuitable as a remedy and the balance of convenience ought to lie in the applicant's favour. These requirements are very similar to the ones outlined in the **South Africa Informal Traders Forum** case for grant of interim relief. Chibomba P.C. noted that whilst decisions of other courts are not binding on the Constitutional Court, the principles in this case are persuasive and are good law. They can therefore provide guidance to the Court. In her Ladyship's own words:

Departure from well settled principles of law should be resorted to where the circumstances of a particular case call for such departure....I must also observe here that the Constitutional Court cannot operate in a vacuum. Neither can it divorce itself from well settled and guiding principles of law and decided cases not only from the Zambian jurisdiction but from other courts in its quest to develop its own jurisprudence. The Court is enjoined to ensure that the values enshrined in the Constitution are taken into account.

The Petitioner relied on principles applied in the **South African Informal Traders Forum** case. He attempted to connect each principle to the elements of his case. In his submissions, he argued that the determination of his case by the ad hoc Tribunal as opposed to the Judicial Complaints Commission, the body mandated to deal with such matters under Article

144, showed that his dismissal was prima facie unconstitutional and therefore provided the basis for awarding interim relief.

The Petitioner further claimed that damages would not suffice in atonement if he was denied interim relief only to succeed in the main matter because the injury he was likely to suffer was to the integrity of security of tenure which was for the benefit of the general citizenry rather than himself. Furthermore, that his success in the main matter would result in the absurd situation of having two substantive office holders in the office of Director of Public Prosecutions. He therefore implored the Court to find that the balance of convenience lay in his favour.

Both the South African Informal Traders Forum and the American Cyanamid decisions are relevant in some aspects of this case. It is not for this Court to delve into the merits of the case at this preliminary stage or to weigh the evidence. However as observed by the single judge of this Court, the affidavit evidence prima facie discloses a serious issue to be tried and we have therefore proceeded to consider which way the balance of convenience lies.

The Petitioner has advanced a novel argument to tilt the balance of convenience in his favour by stating that the beneficiaries of the security of tenure reposed in the office of Director of Public Prosecutions are the general citizenry. We agree with the Petitioner that the office of Director of Public Prosecutions is key in the maintenance of separation of powers, a fundamental feature of constitutionalism. We also agree that the security of tenure of the office is intended to promote and preserve its integrity and

therefore its efficacy; all of which are in the interests of good governance and for the benefit of the people.

However, we cannot say at this point that in the peculiar circumstances of this case, the process resulting in the Petitioner's removal from office has violated the security of tenure of the office of Director of Public Prosecutions. Indeed this is the issue to be determined at the hearing of the substantive Petition. We further wish to point out that the Respondent too, represents the interests of the citizenry.

Articles 90 and 91(2) of the Constitution as amended are instructive. Article 90 states that executive authority derives from the people of Zambia and shall be exercised for the people's well being and benefit. Article 91(2) vests executive authority in the President. The power to appoint and disappoint a person to the office of Director of Public Prosecutions is an executive function. It is achieved through mandatory constitutional procedures and therefore should not be exercised lightly or arbitrarily in a manner disconnected from the tenets of constitutionalism. A decision to grant the interim relief sought in this matter will equally impact the people through its impact on the Respondent.

In the **American Cyanamid** case, Lord Diplock put the dilemma thus:

The object of an interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he would not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the Plaintiff's need for such protection must be weighed against the corresponding need of the Defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be

adequately compensated...if the uncertainty were resolved in the Defendant's favour at the trial.

This weighing of the competing protection against injury is also applicable when determining the need to grant interim relief in terms of a stay in the manner sought in this application.

We agree with the Respondent that a stay in this case would warrant taking a position against the decision by the President without having heard the substantive case. In the circumstances of this case, the balance of convenience has not tilted in the Petitioner's favour and therefore prudence enjoins us to maintain the status quo. We therefore deny the Petitioner's motion for a stay.

The motion is dismissed with costs to the Respondents. We enjoin the parties to expeditiously bring the matter to trial of the substantive issues.



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M. S. Mulenga
Constitutional Court Judge



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E. Mulembe
Constitutional Court Judge



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Prof. Justice M. M. Munalula
Constitutional Court Judge