IN THE CONSTITUTIONAL COURT OF ZAMBIA **2016/CC/0029**
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

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

19 OCT 2016

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

THE ATTORNEY GENERAL **RESPONDENT**

Before the Honourable Mr. Justice E. Mulembe on the 19th day of October 2016.

For the Petitioner : **In Person**
Mr. C. Hamweela, Messrs Nchito & Nchito Advocates

For the Respondent : **Mr. A. Mwansa SC, Solicitor General**
Mrs. K Mundia, Assistant Senior State Advocate

RULING

Case cited:

1. **Mutembo Nchito v. Attorney General, 2016/CC/0004**
2. **Attorney General v Mutembo Nchito, Selected Judgment No. 1 of 2016**
3. **Michael Nsangu and Others v. Pontiano Mwanza and others, Appeal No 78/2002**
4. **R.H.M. Foods Limited v. Bovril Limited [1982] 1 ALL E.R. 673**

Legislation referred to:

1. **Constitutional Court Rules, Statutory Instrument No. 37 of 2016**
2. **Constitutional Court Act No. 8 of 2016**
3. **Constitution of Zambia (Amendment) Act No. 2 of 2016**
4. **Constitution of Zambia Act No. 1 of 2016**
5. **State Proceedings Act, Chapter 71 of the Laws of Zambia**
6. **Judicial (Code of Conduct) Act No. 13 of 1999**
7. **Chiefs Act, Chapter 287 of the Laws of Zambia**

Other works referred to:

1. **Introduction to English Law, D.C.M Yardley, ed., 9th Edition (1984)**

This is an application for discovery by the Petitioner, Mutembo Nchito, SC, to compel the Respondent to furnish the Report the President of the Republic of Zambia, His Excellency Mr. Edgar Chagwa Lungu, relied on to relieve the Petitioner of his duties as Director of Public Prosecutions. The application was made pursuant to Order 10 Rule 2 of the **Constitutional Court Rules.**[1]

The gist of the Petitioner's Affidavit in Support of the application is that the President of the Republic of Zambia, in relieving him of his duties as Director of Public Prosecutions, relied on a report of the Mutembo Nchito Tribunal but that this report has not been availed to him, despite, he claims, his entitlement to challenge the contents of the report. He further deposed that he had raised the issue concerning bias and conflict of interest over two members of the Tribunal and that, if the President relied on the Tribunal's report, the Petitioner was entitled to see it. And

that in the absence of the report, he has been unable to lodge an appeal as regards how the Tribunal dealt with the questions of bias and conflict of interest.

At the hearing of this application, the Petitioner relied on the Affidavit in Support and Skeleton Arguments which he augmented with oral submissions. He submitted that, except for the letter from His Excellency the President, informing him that he had been removed from office as Director of Public Prosecutions pursuant to Article 144 of the Constitution as amended, he had nothing else and he has challenged this because, as far as he was concerned, there were no proceedings under Article 144 in which he was involved. He argued that he only had an indication from the State that his removal was based on a report of the Mutembo Nchito Tribunal.

Mr. Nchito, SC, submitted that as the party most affected by the Mutembo Nchito Tribunal report, he has not been availed a copy of the report and that this is what has prompted this application as he wondered how, as a Constitution office holder, he could appear before a Tribunal which hears more than 50 witnesses and makes its findings and recommendations that he be removed from office without affording him a copy of the report.

He contended that one of the first challenges he faced with the Tribunal was that after it was constituted following very public allegations against him, it sought to sit in camera. Now even its decision is "in camera" even to the affected party. He argued that it was wrong and wondered what tenet of justice was being relied on. The Petitioner submitted that though the matter before the Court affected him directly, the principles surrounding the case were way more important as they affected constitutional office holders. He questioned whether a judge could be removed without being afforded the reasons. He, thus, disagrees with the Respondent's position that, according to Article 144, the Petitioner was not entitled to a copy of the Tribunal report.

Mr. Nchito, SC, questioned the law pursuant to which he was being removed. That, however, according to the Respondent's skeleton arguments, which is consistent with the letter from the President, he was being removed pursuant to Article 144, but that according to his reading of Article 144 the assumption is that a *prima facie* case has been found against him and wondered when he would go, or be put, on his defence.

The Petitioner acknowledged that this Court, in **Mutembo Nchito v. Attorney General**[1] ruled that the Tribunal was entitled to continue but that the question is under which law - the repealed Constitution or the

Constitution as amended? If it was the repealed Constitution, he was questioning the basis upon which the Court could apply repealed law. In his view, the Constitution was not an ordinary piece of legislation which could be kept alive via the Interpretation and General Provisions Act. He submitted that the report could help the Court determine which laws were applicable.

The Petitioner submitted that, despite his concerns regarding bias on the part of some Tribunal members and also holding proceedings in camera, the Supreme Court in **Attorney General v Mutembo Nchito[2]**, disagreed with him. He said he argued before the Supreme Court that once the report was delivered to the President, the President had no discretion but to act on the Tribunal's findings and recommendations. That is why he needed the issues of bias and proceedings in camera to be dealt with at the beginning but that the Supreme Court instead stated:

> **"Although Article 58(4) of the Constitution leaves the President with no discretion with regard to the recommendation of the Tribunal, we do not agree with the Respondent that the said Article closes the door 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."**

The Petitioner wondered how he could challenge a decision without the report. Mr. Nchito, SC, submitted that all he was asking was that the Tribunal favours him with a report. He was not asking the President

who was not even the author of the report but was asking the Court to order the Tribunal to avail him the report so that he could proceed with the challenge. According to him, this Court has power to order the production of a document relevant to the Court necessary for the determination of a case pursuant to section 13 of the **Constitutional Court Act**[2].

In the Affidavit in Opposition to the application for discovery, the deponent Ms. Mubanga Kalimamukwento, averred that the Petitioner was not entitled to any report and that the alleged bias is not a constitutional issue over which the Constitutional Court has jurisdiction. Further, that no application was made for the Constitutional Court to consider the issue of bias. Ms. Kalimamukwento deposed further that taking issue with some members of the Tribunal by the Petitioner does not entitle him to the report.

In the Skeleton Arguments, the Respondent began by quoting Article 182(3), of the **Constitution of Zambia (Amendment) Act**[3], which reads:

> **"The Director of Public Prosecutions may be removed from office on the same grounds and procedure as apply to a judge."**

It was contended by the Respondent that in view of the above provision, it was a known fact that the Petitioner had brought two actions before the Court challenging his dismissal as Director of Public Prosecutions

and the manner in which that decision was arrived at. The Respondent cited Articles 143 and 144(1) of the Constitution which stipulate the grounds upon which a judge may be removed and how the process is initiated, respectively. My attention was drawn to paragraph 19 of the Petitioner's affidavit in support of application for interim relief dated 10th August, 2016, to which a letter addressed to the Petitioner from the President dated 9th August, 2016 was attached. Reference was also made to another letter to the Petitioner from the President dated 10th March, 2015 which is referred to in paragraph 11 of the same affidavit. It was argued that the two letters cite Article 144 of the Constitution as amended and Article 58(2) and (3) of the Constitution before amendment, respectively. Article 58(2) and (3) provided as follows:

> **"(2) A person holding the office of Director of Public Prosecutions may be removed from office only for incompetence or inability to perform the functions of his office whether arising from infirmity of body or mind or misbehaviour and shall not be so removed except in accordance with the provisions of this Article.**
>
> **(3) If the President considers that the question of removing a person holding the office of Director of Public Prosecutions from office ought to be investigated, then –**
>
> **(a) he shall appoint a tribunal which shall consist of a Chairman and not less than two other members, who hold or have held high judicial office;**
>
> **(b) The tribunal shall inquire into the matter and report on the facts thereof to the President and advise the President whether the person holding the office of Director of Public Prosecutions ought to be removed from office under this Article for incompetence or inability or for misbehaviour."**

It was the Respondent's contention that the Petitioner has consistently argued in the instant case and in Cause No. 2016/CC/0004 that the Tribunal acted under repealed authority and that the two letters aforementioned were inconsistent with each other and procedurally unsound. The Respondent argued that the letter of 9th August, 2016 was legally sound. I was, thus, invited to consider the provisions of Section 16(1) of the **Constitution of Zambia**[4] which reads:

> **"Unless otherwise provided under the Constitution as amended, proceedings pending before court or tribunal shall continue to be heard and determined by the same court or tribunal or may be transferred to a corresponding court or tribunal established under the Constitution as amended."**

It was the Respondent's position that the effect of Section 16 allowed proceedings before a court or tribunal to continue to be heard and determined by the same court or tribunal in the absence of specific provisions to the contrary in Act No. 1 of 2016. It was the Respondent's contention that the use of the word "shall", in Section 16 makes it mandatory for proceedings to continue before the same court or tribunal, while the use of the word "may" in relation to the transfer of proceedings entailed discretion. It was pointed out that this is the basis upon which the Tribunal proceeded and concluded its sittings. Citing Section 10(1) of Act No. 1 of 2016, it was contended that this demonstrates that the

Judicial Complaints Commission was the successor to the *ad hoc* Tribunal established under repealed Article 58 of the Constitution.

On the Petitioner's claim that he was entitled to the Tribunal's report, the Respondent's assertion was that the Petitioner was demanding a report from a tribunal whose jurisdiction he had refused to recognise and that there is no legal basis for the Petitioner to be shown the findings of the Tribunal or any that placed a duty on the President to furnish a copy of the report to him. It was the contention of the Respondent that perusal of Article 144 of the Constitution as amended placed no such duty on the President or corresponding right on the Petitioner. Reference was made to Article 144(2) which stipulates that:

> **"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."**

According to the Respondent, even repealed Article 58 did not place a duty on the President to furnish a report or corresponding right to the Petitioner entitling him to a report.

Citing Section 16 of the **State Proceedings Act**[5], it was contended that this Court is not mandated to compel the President to furnish any report as this would amount to an order for specific performance on the Head of State. The Respondent advanced the argument that constitutional

proceedings fell in the category of civil proceedings as envisaged in the State Proceedings Act. To buttress the point, the Respondent referred me to the following words from **Introduction to English Law**[1]:

> **"The difference between civil law...and criminal law turns on the difference between two different objects which the law seeks to pursue – redress or punishment. The object of civil law is the redress of wrongs by compelling compensation or restitution: the wrong doer is not punished; he only suffers so much harm as is necessary to make good the wrong he has done. The person who has suffered gets a definite benefit from the law, or at least, he avoids a loss. On the other hand, in the case of crimes, the main object of the law is to punish the wrong doer; to give him and others a strong inducement not to commit the same or similar crimes, to reform him if possible, and perhaps to satisfy the public sense that wrongdoing ought to meet with retribution."**

The Respondent concluded on this point by submitting that Section 16 of the State Proceedings Act was applicable to these proceedings. And none of the reliefs sought in the petition filed on 10th August, 2016 requires the President to furnish any report and, thus, the application was without merit and should be dismissed.

In his Skeleton Arguments, the Petitioner argued, in response to the Respondent's contention that the Petitioner was not entitled to any report, that this was a breach of the Petitioner's right to due process.

According to the Petitioner, the Supreme Court has clearly guided in the case of **Attorney General v. Mutembo Nchito**[2] that the Tribunal's report is subject to review. He contended that at law, if a document is in issue, it was necessary to produce it before the Court. In this respect,

the Petitioner cited section 25(1)(b)(i) of Act No. 8 of 2016, which provides as follows:

> **"The Court may, on hearing of an appeal –**
> ...
> **(b) where necessary or expedient in the interests of justice –**
> **(i) order the production of a document, exhibit or other thing connected with the proceedings, the production of which appears to the Court necessary for the determination of the case;"**

He submitted that the report relied on by the President to dismiss him has not been publicised and that it is unclear which allegations made against him that the Tribunal upheld and the reasons for the findings. Therefore, discovery was necessary not only to uphold the Petitioner's rights but to assist the Court to properly adjudicate the matters in dispute.

In response to the Respondent's position that the Tribunal was the predecessor of the Judicial Complaints Commission in terms of Section 10(1) of the Act No. 1 of 2016, the Petitioner's position was that this is not so. To fortify his argument, he cited Article 267(3)(e), which reads:

> **"A provision of this Constitution shall be construed according to the doctrine that the law is continuously in force and accordingly –**
> ...
> **(e) a reference to an office, body or organisation, where that office, body or organisation has ceased to exist, is a reference to its successor or to the equivalent office, body or organisation performing the functions."**

He argued that the Constitution as amended abolished the procedure of removing the Director of Public prosecutions by an *ad hoc* tribunal and

replaced it with the Judicial Complaints Commission. Therefore, he contended, the Tribunal's actions could not be deemed to be those of the Judicial Complaints Commission because, prior to the constitutional amendments, there was the Judicial Complaints Authority established by Part VI of the **Judicial (Code of Conduct) Act**[6]. Therefore, the Petitioner's argument was that, the Respondent's interpretation of sections 10 and 16(1) of the Constitution of Zambia Act, that the *ad hoc* Tribunal was the predecessor to the Judicial Complaints Commission under Article 144, could not stand. He maintained that the report should be produced for a proper determination of the matter.

In opposing this application, the learned Solicitor General, Mr. A. Mwansa SC, also relied on the Respondent's affidavit in opposition and skeleton arguments filed.

Mr. Mwansa, SC, submitted that section 13 of Act No. 8 of 2016 had been quoted out of context and was not applicable at discovery stage where the parties have not filed bundles of documents they wished to rely upon. He submitted that section 13 does not deal with discovery of Court documents, but with summoning and compelling attendance of witnesses. Mr. Mwansa argued that at the interlocutory stage, what is envisaged in section 13 of Act No. 8 of 2016 was not tenable, but was

applicable when the Court was hearing a substantive matter. Mr. Mwansa submitted that section 13 aforesaid was to be read together with Order 6 rule 7(1) and (2) of the Constitutional Court Rules, that:

> **"(1) A person, whether a party or not in a cause or matter, may be summoned to produce a document, without being summoned to give evidence.**
> **(2) Where a person causes a document referred to in sub-rule (1) to be produced, the Court or judge of the Court may dispense with the person's personal attendance."**

According to the learned Solicitor General, Order 6 rule (1) and (2) does not apply to an interlocutory application. He submitted that the Tribunal was appointed pursuant to Article 58 of the Constitution before amendment. Mr. Mwansa, SC, focused on Article 58(3)(b) and submitted that under that provision the Tribunal was mandated to report the facts of the inquiry to no person other than the President. He cited the case of **Mutembo Nchito v. Attorney General**[1] in which this Court confirmed the jurisdiction of the Tribunal even after the coming into effect of the Act No. 2 of 2016.

The Solicitor General also referred to the Supreme Court judgment in **Attorney General v Mutembo Nchito**[2]. He argued that the Supreme Court was referring to the recommendation of the Tribunal and not the report. He stated that the Petitioner was part of the proceedings before the Tribunal, he was part of the investigations, he called witnesses and he testified himself. Mr. Mwansa, SC, argued that it was a notorious fact

that all the parties before the Tribunal had access to the record of proceedings. What the parties are not entitled to is the report as the law is clear that it is given only to the President. It would entirely be within the discretion of the President to avail the Petitioner the report.

Mr. Mwansa, SC, further submitted that matters heard in camera must remain in camera. He also stated that the Tribunal stood disbanded by operation of law and its mandate had come to an end. He stressed the point that Article 144 was merely cited as an analogy to stress the argument that even under the Constitution as amended, there is no mandate on the part of the Judicial Complaints Commission to render a report to any other person but the President. Mr. Mwansa, SC, submitted that according to Article 144(2), the first report is where the Judicial Complaints Commission establishes a *prima facie* case against a judge (in this case, the Director of Public Prosecutions). That is the preliminary stage and that Article 144(5)(a) and (b) deal with the final stages of the inquiry. Again the recommendation is only made to the President and not any other person.

To stress his point that the President could not be compelled to avail the report, Mr. Mwansa, SC, referred to the case of **Michael Nsangu and Others v. Pontiano Mwanza and others**[3] in which the Supreme Court

addressed the question whether the President could be compelled to appoint a commission of inquiry in terms of section 4(2) of the **Chiefs Act**[7], which states:

> **"Where the President deems it expedient to inquire or cause inquiry to be made into the question of the withdrawal of the recognition accorded to a person under this Act, he may by statutory order, suspend the recognition so accorded until such time as the inquiry has been completed and the President has made a decision on the question."**

The Supreme Court stated in relation to section 4(2) of the Chiefs Act that:

> **"These provisions are crustal clear. Whatever elastic interpretation we may put on these provisions we cannot give them the interpretation that the High Court has power to order the President to appoint a Commission of Inquiry...The decision to appoint a Commission of Inquiry lies within the discretion of the President."**

Mr. Mwansa, SC, submitted that Article 58 was clear that the report ought to be given to the President and that there can be no elastic interpretation that can be put on the provision so that this Court is crowned with the power to order the President to give the report to the Petitioner unless in exercise of the President's discretion. The same in his view applied to Article 144(5)(b). The Solicitor General went on to submit that if this Court were to compel the President to avail the report to the Petitioner, it would be contrary to the provisions of section 16 of the State Proceedings Act and tantamount to an order of specific performance not permissible under the law.

Mr. Mwansa, SC, concluded by submitting that the application for discovery should be denied. He argued that the Petitioner remained at liberty to challenge the recommendations of the Tribunal by way of Judicial review as guided by the Supreme Court and not by way of petition. He submitted that this Court has no jurisdiction in judicial review matters as that remained the preserve of the High Court. The Petitioner's application, he submitted, was not tenable.

In reply, Mr. Nchito, SC, began by opposing the Solicitor General's position that the Constitutional Court has no judicial review jurisdiction. He argued that the jurisdiction of this Court was defined in Article 128 where the Constitutional Court has original and final jurisdiction to hear a matter relating to the interpretation of the constitution. He stated that his allegation had to do with a violation or contravention of the constitution. As to whether or not the Constitutional Court has judicial review jurisdiction, he referred to Order 15 rule 1 of the Constitutional Court Rules, which provides the remedies for judicial review and wondered how this Court could give those remedies if it had no judicial review jurisdiction. He further argued that the High Court's jurisdiction was limited to Article 28 of the Constitution and that a question for interpretation of the constitution has to come to the Constitutional

Court. The Constitutional Court, he argued, has exclusive jurisdiction in Constitutional matters save for Article 28.

Mr. Nchito, SC, submitted that the Respondent cannot hide behind the State Proceedings Act as that would be defeating the ends of justice to say evidence should not be produced because it would be against the State Proceedings Act. He wondered how the Respondent could say that the Petitioner is entitled to challenge the decision of the Tribunal but that he was not entitled to have its decision. In his view the Supreme Court did not have in mind the Constitutional Court at the time it made its decision. Thus, he still wondered how he could challenge a decision, whether by way of judicial review or petition if he did not have the report. He reiterated his position that the Respondent should not shield itself behind the State Proceedings Act.

In his view, the **Nsangu** case referred to by the Respondent dealt with a totally different matter. It was asking the President to exercise a discretion, whereas, in the current case, the President had already exercised his discretion in that the Tribunal was appointed, to which he was called and heard and all he was now asking is that since the decision has been communicated to the President, could he be availed

with the report. Mr. Nchito, SC, argued that he was not asking that the President be ordered.

Referring to Order 6 rule 7, Mr. Nchito argued that even before the evidential stage the Court can still utilize its powers under section 13 of the Constitutional Court Act as clarified in Order 6 rule 7. It can never be argued that a person affected by a decision of a tribunal such as this one, was not entitled to its decision.

I have considered the forceful arguments of both parties in this application. In the midst of the number of points raised on both sides, the central issue that falls for my consideration is whether this Court can order discovery of the report of the Mutembo Nchito Tribunal. I choose to restrict myself only to that aspect.

At the core of the Petitioner's claim is that the President's letter of dismissal cited Article 144 of the Constitution as amended as the basis of the dismissal. The Petitioner argues that he was not aware of any proceedings under Article 144. He brought this application for the Court to order the discovery of the report of the Tribunal; that it be availed to him as the party most interested in the proceedings of the Tribunal. The Petitioner cited Section 13(1) of the Constitutional Court Act, which states:

"The Court may, in any suit or matter in which the Court is exercising original jurisdiction –

(a) summon a person to give evidence or produce a document in that person's possession or power;"

The learned Solicitor General contended that the Petitioner quoted Section 13 out of context and that the provision was not applicable at discovery stage. In **R.H.M. Foods Limited v. Bovril Limited**[4], it was held that an order for discovery could be necessary for disposing fairly of the cause or matter. That has been the gist of the Petitioner's claim in this matter, when he argues that as the person most affected by the decision of the Mutembo Nchito Tribunal, he is entitled to its decision or report.

This Court deals with matters relating to the interpretation and application of the Constitution. It is within the confines of the Constitution that justice is assured to everyone within the jurisdiction. Therefore, the Court, in its endeavour to assure constitutional justice can, and should, where appropriate, exercise the powers in section 13 of the Constitutional Court Act. In the interests of affording constitutional justice the Court, ordinarily, should not shy away from unlocking its mandate in section 13 of the Constitutional Court Act if the documents to be discovered would assist in a fair final disposal of the matter.

The foregoing notwithstanding, I hasten to remind myself that the gist of the Petitioner's claim is discovery of a document whose backdrop is a constitutional provision. While it may be argued, as the Petitioner has done, that the contents of the report are relevant to the Court's final determination of the matter – particularly in identifying what law, repealed Article 58 or current Article 144, that the Tribunal relied on- the difficulty arises in the nature of the document the Petitioner would like to have access to. The cardinal issue is that this is not just any ordinary document whose availability is being requested. Its source is founded on constitutional provisions.

This Court in the case of **Mutembo Nchito v. Attorney General**[1], adjudged that, on the basis of the transitional provisions in section 16 of the Constitution of Zambia Act, the Mutembo Nchito Tribunal could continue to conduct proceedings pending before it and bring them to a logical close; that the transition was provided for in order for pending proceedings to be concluded in an orderly manner to avoid abrupt stoppage and the attendant effects. The point of contention in this matter is whether, having concluded its work, the Tribunal's report can be availed to interested parties, specifically the Petitioner, and not just the President.

My considered view is that a determination of that question elevates the issue to the level of the interpretation to be placed on Article 144(5)(b). Article 144(5)(b) states:

> **"Where the Judicial Complaints Commission decides that an allegation based on a ground specified in Article 143(b), (c) and (d) is –**
>
> **(a) ...;**
>
> **(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."**

I took the liberty to exercise patience of mind; to reflect carefully, over and over, on the Petitioner's application. I have now come to the conclusion that, undoubtedly, this application raises a deep constitutional issue over which, unfortunately, I cannot stretch my jurisdictional zone. The report or recommendation of the Tribunal in question has its roots in the constitutional provision cited above. As I have indicated earlier, the answer to the question whether or not the report of the Tribunal can be made available to any other person other than the President calls for an interpretation of the meaning and intent of Article 144(5)(b) of the Constitution. Such interpretation is the preserve of the Court exercising its jurisdiction as stipulated in Article 128(1)(a), and duly constituted in accordance with the provisions of Article 129(1), of the Constitution. Determination of the question, then, clearly borders on finality in terms of understanding the meaning of Article 144(5(b). That is jurisdiction I do not have.

The application for discovery is accordingly denied. It is imperative that this case now proceeds to the hearing of the substantive matter and a final resolution. The issues raised are of considerable public interest and I, therefore, make no order as to costs.

Dated this 19th day of October, 2016

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E. MULEMBE
JUDGE