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SITALI, JC,..✓..23/04/18.....

MULENGA, JC,.....✓..23/04/18.....

MUNALULA, JC,..✓.....23/4/2018.....

SELECTED JUDGMENT NO.15 OF 2018

P. 589

IN THE CONSTITUTIONAL COURT **PETITION NO. 2017/CCZ/0011**

HOLDEN AT LUSAKA

IN THE MATTER OF: **ARTICLE 128 (1) (b) OF THE CONSTITUTION OF ZAMBIA CHAPTER 1 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF

ALLEGED CONTRAVENTION OF: **ARTICLE 118 (1) AND (2) (b) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA**

BETWEEN:

LLOYD CHEMBO **PETITIONER**

AND

THE ATTORNEY-GENERAL **RESPONDENT**

Sitali, Mulenga and Munalula JJC on the 14th February, 2018 and 23rd April, 2018

For the Petitioner : Mr. K. Hang'andu of Kelvin Hang'andu & Co.
For the Respondent: Mr. F.K. Mwale and Mrs. G.K. Tiku, Principal State Advocates, Attorney General's Chambers.

RULING

Cases referred to:

1. Wickson Mwenya v Nkandu Luo and the Attorney-General 2017/CCZ/009
2. Kapoko v The People 2016/CCZ/0026

3. Miyanda v The High Court (1984) Z.R. 62
4. Zambia Democratic Congress v Attorney-General (2000) Z.R. 6
5. Attorney-General v Law Association of Zambia (2008) 1 Z.R. 21
6. Codron v MacIntyre And Shaw (1960) R. & N. 418
7. Evans v Oregon Short R.R.C.51 Mont.107, 112; 149 P (1915)
8. *Ex parte* McCardle 74 US (7 Wall.7-10) 506.
9. Miyanda v Handahu (1993 – 94) Z.R. 187
10. Ministry of Home Affairs v Fisher [1980] A.C. 319
11. Stephen Katuka and Law Association of Zambia v The Attorney General and Ngosa Simbyakula and 63 Others CCZ Selected Judgment No. 29 of 2016

Legislation referred to:

Constitution of Zambia as amended by Act No. 2 of 2016
Constitutional Court Act No. 8 of 2016
Constitutional Court Rules S.I No. 37 of 2016

Works referred to:

Rules of the Supreme Court, 1999 edition (White Book)

Ronald Dworkin *Theories of Adjudication* reproduced in MDA Freeman, Lloyd's Introduction to Jurisprudence, 7th edition, 2001

Robert Alexy, *Rights and Liberties as Concepts,* in Michel Rosenfeld and Andras Sajo, The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, 2013

Gary J. Jacobsohn *Constitutional Values and Principles* in Michel Rosenfeld and Andras Sajo, The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, 2013

Max du Plessis, Glenn Penfold and Jason Brickhill, Constitutional Litigation, Juta, 2013

Alec Stone Sweet *Constitutional Courts* in Michel Rosenfeld and Andras Sajo, The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, 2013

Technical Committee Drafting the Zambian Constitution, First Draft Report

Technical Committee Drafting the Zambian Constitution, Final Draft Report

This Ruling relates to a Notice of Intention to Raise Issues *in Limine* filed by the Respondent to challenge this Court's jurisdiction to hear a Petition filed on 26th September, 2017 in the Constitutional Court by Lloyd Chembo (henceforth referred to as the "Petitioner") against the Respondent as 1st Respondent and the High Court for Zambia as 2nd Respondent.

The impugned Petition was filed under Order IV rule 1 of the Constitutional Court Rules S.I No.37 of 2016 (henceforth referred to as the CCR) in reaction to an order of the Industrial Relations Division of the High Court for Zambia, which adjourned for 11 months a partially heard matter in which the Petitioner has sued the National Pension Scheme Authority. The Petitioner prayed for the following substantive reliefs:

(1) **That the Court doth declare that the said adjourning constitutes an unconstitutional and thus unjust order in contravention and/or violation of Article 118 (1) and (2) (b) of the Constitution of Zambia.**

(2) **That the Court doth declare that the said adjournment constitutes an unconstitutional and thus unjust adjournment of legal proceedings in contravention of the right to justice without (undue) delay in contravention of violation of (*sic*) Article 118 (1) and (2) (b) of the Constitution of Zambia.**

(3) **That the Court doth order that the said adjournment be quashed and/or set-aside by order of certiorari and that the second Respondent, the High Court of Zambia be directed to adjudicate, determine or otherwise hear Petitioner's suit without undue delay and within an orderly trial schedule that ensures that the petitioner's constitutional right to receive justice without undue delay in**

conformity with Article 118 (1) and (2) (b) of the Constitution of Zambia is preserved.

The Petitioner also prayed for costs and any other order as the Court may deem just.

On 20th October, 2017 the Respondent filed Notice of Intention to Raise Issues *in Limine* pursuant to Order XXXIII rule 7 of the Supreme Court Practice (White Book) 1999 edition which allows the Court to dismiss a matter without hearing it. It reads:

33/7 Dismissal of action, etc., after decision of preliminary issue
If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

The Notice was addressed to a single judge of the Constitutional Court and raised the following issues:

(1) **Whether this Court has the jurisdiction to hear and determine a petition attempting to enforce the rights and freedoms as espoused under the Bill of Rights of the Constitution of Zambia.**
(2) **In the alternative whether the Petition was prematurely before this Court when the Petitioner failed to make a formal application for the abridgment of time in accordance with the High Court Rules.**
(3) **Whether this Court can grant an order of certiorari against a High Court judge.**

The Respondent sought to have the Petition dismissed with costs in the event that the issues raised were successful. The supporting affidavit deposed that the Petitioner was attempting to enforce his constitutional right to have a speedy trial but the Constitutional Court has no jurisdiction to hear and determine a petition attempting to enforce rights and freedoms properly couched under the Bill of Rights. The affidavit deposed in the alternative that the Petition was prematurely before this Court as there was no evidence on record that the Petitioner complied with the High Court procedure of formally applying to the High Court to seek leave to abridge time within which the matter could be heard nor did the record show that the court refused such application for abridgment of time.

The Respondent filed skeleton arguments in support of the Notice of Intention to Raise Issues *in Limine* and possible dismissal of the Petition for want of jurisdiction of the Constitutional Court in which it was argued that the action was brought under Order XXXIII rule 7 of the White Book as determination of the preliminary issue could render the trial of the case before this Court unnecessary. That the jurisdiction of this Court is set out in Article 128 of the Constitution of Zambia as amended by Act No. 2 of 2016 subject to Article 28 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia

(henceforth referred to as the "Constitution as amended"). That when the two provisions are read together, the right to be heard without delay that the Petitioner alleges has been contravened, is properly protected under the Bill of Rights and not under Article 118 (1) and (2) (b) of the Constitution as amended.

That Article 118 does not create justiciable rights but outlines some of the principles that judicial officers shall apply in the course of exercising their judicial authority. Therefore the proper provision that the Petitioner should rely on for the enforcement of his rights and freedoms is Article 18 (9) of the Constitution as amended which creates a justiciable right for the Petitioner to sue when his right to speedy justice and/or trial has arguably been violated. Further that the proper court to hear such a claim is the High Court and not the Constitutional Court. The case of **Wickson Mwenya v Nkandu Luo and Attorney-General**[1] in which this Court ordered that it has no jurisdiction in so far as the enforcing of rights and freedoms under the Bill of Rights is concerned and **Kapoko v The People**[2] holding that interpretation of the Constitution other than the Bill of Rights is the preserve of this Court by virtue of Article 128 (1) (a) were cited as authority.

In the alternative the Respondent argued that the matter was prematurely before the Constitutional Court as despite the claim of a protest and passionate plea for abridgment made before the High Court there was no evidence on record that the requisite application was made. The Respondent submitted that the High Court judge in question has control over his own diary and it is at the High Court judge's discretion to determine whether a matter can be properly set down for trial. That it could not be the intention of the Legislature to put in measures to police judicial officers who are acting judiciously.

On the Petitioner's prayer for an order of *certiorari* to lie against the High Court the Respondent averred that the jurisdiction of this Court does not comprehend the grant of orders of *certiorari.* That by virtue of Order 53 of the White Book, such an order ought to be made by an application for judicial review and exercised by the High Court against inferior courts or tribunals. The case of **Miyanda v High Court**[3] was cited as authority.

At the hearing Mr Mwale, Principal State Advocate, relied on the filed heads of argument and list of authorities. By way of augmenting, he averred that in the event the Court decides to dismiss the *in limine* application, it would be difficult for the judgment to be enforced as this Court has no

jurisdiction. He cited **Zambia Democratic Congress v Attorney-General**[4] and **Attorney-General v Law Association of Zambia**[5] in support of the assertion that the courts in Zambia frown upon making orders that are academic in nature.

He further averred that the Petitioner should have moved the court below to abridge time by relying on Order II of the High Court Rules or alternatively Order III of the White Book. That Article 118(1) and (2) (b) could then have been used as an authority in the application. That in the event the High Court turned down the application, the Petitioner could have gone to the Court of Appeal and subsequently the Supreme Court. Mr Mwale proceeded to demonstrate how the principles laid out in Article 118 are largely embedded in the Bill of Rights; thus the non-discrimination principle is found in Article 23; the "justice shall not be delayed" principle is found in Article 18(9); and the principle "to award adequate compensation" is found in Article 16(1). He added that in order to enforce the principles it is necessary to have resort to the Bill of Rights; that one cannot rely entirely on Article 118. That as Article 128 excludes this Court from enforcement of the Bill of Rights, the matter is not properly before us and we have no jurisdiction to entertain the Petition.

The Petitioner filed an initial affidavit and skeleton arguments opposing the Notice of Intention to Raise Issues *in Limine* in which he challenged the *in limine* application on the sole ground that it cannot be brought before a single judge of the Constitutional Court when the power to make a final order and determination of the Petitioner's rights is the sole preserve of the full Court. The argument was abandoned after the single judge of this Court observed on 17th November, 2017 that the argument did not respond to the issues raised by the application *in limine* and allowed the Petitioner more time to file fresh skeleton arguments. We shall therefore make no further mention of the abandoned argument.

We shall also make no further reference to the third *in limine* issue corresponding to the Petitioner's third prayer for an order of certiorari as by Consent Order made pursuant to Order V rule 4(a) and Order IX rule 19 of the CCR dated 28th November, 2017, the order of *certiorari* was expunged from the reliefs sought. By virtue of the same order, the 2nd Respondent was mis-joined from the proceedings.

The Petitioner's fresh submissions dated 24th November, 2017 oppose *in extenso* the *in limine* objection on the grounds that it is untenable. The Petitioner submitted that his Petition does not seek to enforce any

fundamental rights. That the subject matter of his cause of action as pleaded may in fact be lawfully adjudicated upon and enforced in the Constitutional Court instead of the High Court. That the cause of action is founded upon Article 118 (1) and (2) (b) of the Constitution as amended read together with sections 3 (2) and 5 *(sic)* of the Constitutional Court Act No.8 of 2016 (henceforth referred to as the CCA) whose express terms vest the Constitutional Court with both original and final jurisdiction to hear any alleged violation of a litigant's right to justice without delay. That the Petitioner alleges violation of his constitutional right and/or principle enshrined by Article 118 (1) and (2) (b) on account of the order given by the High Court adjourning his matter for 11 consecutive months so that the evidence of the defendant's sole witness might be taken.

The Petitioner further averred that the legal issues for adjudication are firstly, whether the Constitutional Court has original jurisdiction to rule upon a petition alleging a violation of the right to hearing of suit without delay. Secondly, whether the enforcement procedure of what he termed "the constitutional right" enjoining all courts of Zambia to ensure that justice shall not be delayed found in Article 118 is identical to the fundamental right to be brought, without undue delay before a court enshrined in Article 13(3) (a) and

the Constitution as amended. Related to this, whether it is the High Court or the Constitutional Court which has original jurisdiction to enforce the said rights. Finally, whether the 11 months adjournment constitutes a contravention of what he termed the "new judicial principle" of the Constitution that justice shall not be delayed in any legal cause, and if so which court has original jurisdiction to enforce it.

His proposition of the law was that the jurisdiction of each court is set out in its constitutive or enabling legislation as held in **Miyanda v High Court.**[3] That on the authority of **Codron v MacIntyre and Shaw**[6] affirmed in **Miyanda v High Court,**[3] improper invocation of the procedure for maintaining a suit does not bar the substantive right to relief from the proper Court. That on the authority of **Evans v Oregon Short R.R.Co**[7] want of jurisdiction howsoever caused defeats a cause of action. Further, that based on **Ex parte McCardle**[8] when a court disclaims jurisdiction, its only power other than awarding costs occasioned thereby is to announce the fact and relinquish the determination of any further business regarding the cause.

The Petitioner argued that Article 13(3) (a) and (b) of the Constitution of Zambia enshrines the fundamental right of a criminal defendant to be brought without undue delay before a court failing which the defendant ought to be

granted constitutional bail. That the said provision differs from Article 118(1) and (2) (b) which embodies the general principle applicable to all legal issues requiring speedy justice, in the sense that the former is subject specific whilst the latter is not so limited and binds courts in their exercise of both civil and criminal jurisdiction. Further, that a legislative provision must be given a literal construction unless doing so causes absurdity.

In applying the law to the facts, the Petitioner averred that, the *in limine* application seeks dismissal of the entire Petition on the ground that it is an attempt to enforce the fundamental civil right to a speedy hearing protected by Chapter III of the Constitution as amended, over which the High Court rather than the Constitutional Court has exclusive original jurisdiction. Further, that the Respondent was arguing that the express terms of Article 118 (1) and (2) (b) of the Constitution must be disregarded notwithstanding their express language, but had provided no authority to support the submission. That Article 118 (1) and (2) (b) enjoins, in plain language, every court to ensure that in any litigation, justice shall not be delayed. Consequently, the Respondent must demonstrate that Article 118 (1) and (2) (b) is flawed to the extent of its literal application creating an absurdity, before inviting this Court to abandon the provision altogether and finding that the

right to speedy justice is secured and enforced by means of Article 18 (9) as contenced. He cited **Miyanda v Handahu**[9] as authority for condemning the argument because where the language is plain there is no occasion to depart from the ordinary and literal meaning. He added that the Respondent's *in limine* application suffers from "the austerity of tabulated legalism" challenged by the decision in **Ministry of Home Affairs v Fisher**[10] because the Constitution is drafted in broad and ample style laying down principles of width and generality and calling for generous interpretation.

The Petitioner further averred that the Constitution has introduced a new justiciable constitutional principle that must be enforced exclusively by the Constitutional Court hence the enactment of the provision which is a corollary of Article 18 (9). That the justiciability of Article 118 (1) and (2) (b) is reaffirmed by Article 119 (1) vesting judicial authority in all courts in accordance with the Constitution and all other laws. That the provision differs from the Preamble which is non-justiciable and the Constitutional Court cannot ignore this fact without itself violating Article 118 or section 8 (1) (b) of the CCA which confers both original and final jurisdiction in the Court to determine a matter relating to a violation or contravention of the Constitution which does not involve the enforcement of the Bill of Rights.

At the hearing, Counsel for the Petitioner, Mr. Hang'andu augmented extensively despite reliance on the filed heads of argument. Counsel averred that the argument that he should have sought an *aggrievement* order in the High Court had no foundation in law or in the Constitution as amended. He argued that the language of "shall" employed in Article 118 means that the Article is mandatory. That section 8 (3) of the CCA which allows a person who alleges a contravention of the Constitution to petition the Court, and thus repeats Article 128 had not been taken into account by the Respondent.

Counsel wondered whether given the express provisions cited, it can be maintained that this Court has no jurisdiction on the Petition. That in fact when Article 118 (1) and (2) (b) which enshrines the right to justice without delay is read together with section 8 of the CCA which sets out the procedure, the provision becomes justiciable before the Constitutional Court as the court of first instance. That while the Constitution has justiciable and non-justiciable provisions, only the preamble which is aspirational is not justiciable; Article 118 which is in the main body of the Constitution cannot be non-justiciable. That there is no authority to that effect hence none having been provided.

As for the Respondent's argument that Article 18 (9) is a restatement of 118 (1) and (2) (b), Mr. Hang'andu drew a distinction between the phrase "without undue delay" found in Article 18(9) as well as Article 13 and the phrase "justice shall be administered by our courts without delay" found in Article 118 (1) and (2) (b). In his view the latter provision offers a higher level of protection as it refers to "delay" as opposed to "undue" delay. That relief lay in section 8 of the Constitutional Court Act read with Article 118 and not a mechanism that requires going back to the High Court under Article 28.

To accept the latter argument would in his view, be inviting this Court to disregard the clear provisions in section 8 of the CCA and Article 118 (1) and (2) (b) of the Constitution as amended. It would mean treating the Petition which involves violation of Article 118, which falls outside the Bill of Rights, as if it was alleging a fundamental rights violation when that is not the case. That if that is how the law protects litigants from delayed justice then why did the people of Zambia enact Article 118 and section 8. When prodded by the Court, Mr Hang'andu drew a distinction between constitutional and fundamental human rights which require the filing of a petition in the High Court. That what was before the Court, was a constitutional right.

On the abridgment process, he reiterated that whilst the procedure in Order II rule 2 of the High Court Rules is necessary to manage issues of time and adjournments, Article 118 (1) and (2) (b) creates an opportunity to state, in this case, that an 11 month adjournment is unconstitutional. It is not an alternative to the procedure provided in Order II rule 2. That Order II rule 2 does not violate Article 118 (1) and (2) (b). That the two are consistent and sit side by side, but that they serve two different purposes. That it is only the Constitutional Court that can make a pronouncement under Article 118 (1) and (2) (b) that delay arising from the lengthy adjournment is unconstitutional. He prayed that the *in limine* application be dismissed with costs.

In the reply filed on 30th November 2017, the Respondent disputed the suggestion by the Petitioner that they were saying Article 118 (1) and (2) (b) was absurd and its express terms should be disregarded. The Respondent averred that to the contrary, their submission was that there is nothing grammatically wrong with Article 118 (1) and (2) (b). That the Respondent adopts the principle therein that justice shall not be delayed. However that the Petitioner was relying on the wrong law and forum in trying to enforce the principle, since Article 118 (1) and (2) (b) does not create rights which a Petitioner can claim to have been violated against him. That it does not

create rights capable of being enforced by an individual. That the Article merely propounds the principles that courts should be guided by in the exercise of judicial authority. An individual claiming violation of Article 118 (1) and (2) (b) must rely on Article 18(9) which formulates the principle that justice should not be delayed as a fundamental right capable of being asserted, protected and enforced if violated.

Augmenting orally, Mr Mwale stated that no authority was cited for the claim that there is in the Constitution, constitutional rights which are distinct from fundamental rights. In his view, only fundamental rights are found in the Constitution. He conceded that the language in Article 118 is instructive and mandatory but maintained that both section 8(1) and (3) of the CCA and Article 128 of the Constitution as amended are subjected to Article 28 hence the removal of this Court from the picture as soon as rights are mentioned. That to hold otherwise would mean this Court reviewing the calendar of the High Court judge in question. Finally, that even as the Petitioner is maintaining that Article 118 (1) and (2) (b) is justiciable and even as the Respondent agrees with him, they are also saying that the Article must be read with Article 18 (9) as there is no difference between the two provisions.

We are indebted to Counsel for their spirited arguments. We have seriously considered the issues raised *in limine* which in our view ask two questions. Firstly, whether this Court has the jurisdiction to treat as justiciable and determinable before it, a claim of violation of the Petitioner's constitutional right to justice without delay, purportedly created in Article 118 (1) and (2) (b) of the Constitution as amended. Secondly and in the alternative, whether the Petitioner should have had resort to the High Court abridgment procedure before seeking relief before this Court.

We begin by settling some ancillary issues. Firstly, the parties cited Article 118 (1) and 118(2) (b). Article 118(1) provides that judicial authority derives from the people of Zambia and shall be exercised in a just manner and the exercise shall promote accountability. This provision has not been argued by the parties and having deemed it a non-issue, we see no need to mention it as we consider the issues raised by the *in limine* application. We shall therefore focus our attention on Article 118 (2) (b).

Secondly since both parties are agreed that the High Court is the court mandated to hear and enforce Part III of the Constitution of Zambia, that is the Bill of Rights, there is disagreement only as to whether the right in contention is founded upon a fundamental right enshrined in the Bill of Rights

and therefore within the mandate of the High Court, or whether it is an "other constitutional right" introduced by Article 118 (2) (b) which "right" not only lies outside the Bill of Rights but is by virtue thereof enforceable solely by the Constitutional Court.

Thirdly, we take cognizance that the Petitioner in arguing the issue at hand, averred that Article 118 (2) (b) and section 8 of the CCA ought to be interpreted literally unless the State can demonstrate that such interpretation would lead to an absurdity. That the manner in which the State was interpreting the provisions meant disregarding the provisions and their express intent. In response, the Respondent denied any absurdity in Article 118 (2) (b) or that its intent should be disregarded. We wish to agree with the Respondent that the Petitioner's averment is unfounded. It is misplaced and we shall say no more about it other than to reiterate what we said in **Stephen Katuka and Law Association of Zambia v the Attorney General and Ngosa Simbyakula and 63 Others**[11] and indeed have stated often time, that:

> **In terms of the general or guiding principles of interpretation, the starting point in interpreting words or provisions of the constitution or indeed any statute, is to first consider the literal or ordinary meaning of the words and articles that touch on the issue or provision in contention. This is premised on the principle that words or provisions in the constitution or statute must**

not be read in isolation. It is only when the ordinary meaning leads to absurdity that the purposive approach should be resorted to.

We now turn to the first substantive question, whether there is a constitutional right vested in Article 118 (2) (b). The Respondent has argued that the only rights found in the Constitution are fundamental rights enshrined in the Bill of Rights. In response, the Petitioner has distinguished the fundamental rights found in the Bill of Rights from other constitutional rights purportedly found elsewhere in the Constitution; in particular the "right found" in Article 118 (2) (b).

To adequately address the question and the arguments of both parties, we will first sum up the general nature of rights and thereafter consider the distinction drawn by the Petitioner between what he terms "fundamental rights" and "constitutional rights" before considering the content and genesis of Article 118 (2) (b) and the other relevant provisions of the Constitution. In our view this protracted approach is necessary in order to settle the question (without going into the merits of the case or interpreting provisions in the Bill of Rights) whether the first issue in the Notice of Intention to Raise Issues *in Limine* has merit.

It is trite that constitutional rights are legal rights derived from fundamental human rights. Fundamental human rights are moral entitlements articulated in international instruments. They are the most basic and universal rights that human beings are entitled to. Each person is so entitled by virtue of being born human. However they are not enforceable by courts of law until they are domesticated and thereby recognised as constitutional rights. As we demonstrate below, it is that process of domestication that provides clarity on the question raised by the parties.

We begin with Dworkin's averment in *Theories of Adjudication* (reproduced in MDA Freeman, **Lloyd's Introduction to Jurisprudence**, 7th edition at page 1434) that:

> **...concrete rights upon which judges rely must have two other characteristics. They must be institutional rather than background rights, and they must be legal rather than some other form of institutional rights.**

Robert Alexy, in his Chapter, *Rights and Liberties as Concepts,* in Michel Rosenfeld and Andras Sajo, **The Oxford Handbook of Comparative Constitutional Law** at pages 285 to 288, elaborates by proposing a three stage model of rights based on "(1) reasons for rights (2) rights as legal positions, and (3) the enforceability of rights. Our primary interest, as we

preside over the issues raised *in limine,* is all three stages and not just the "institutional dimension" of rights - specifically where rights as "legal positions and relations" are claimed in an action seeking enforcement of one or other legal right by bringing an action. Alexy explains the latter at pages 284 to 288 as follows:

> **Rights to something or claim rights are three-place relations of which the first element is the beneficiary or holder of a right...the second is the addressee of the right...and the third is the subject matter or object of the right....it does mean that rights imply duties ... This leads to the further corollary that there cannot exist rights without norms.**
>
> .....
>
> **[That the] right against the state ... combined with a power to challenge infringements before the Courts - is the core of constitutional rights. One might call this the 'centre thesis.'**

As indicated, our consideration of constitutional rights is broader. At pages 288 to 289 Alexy outlines three concepts of constitutional rights, namely, the formal, the procedural and the substantial. The formal concept applies where 'fundamental rights are defined as rights contained in a constitution, or in a certain part of it' or as 'rights endowed by the constitution with special protection.' The procedural concept 'focuses on the institutional problems connected with constitutional rights' such as recording and

providing the rights with special protection through judicial review in order to limit state authority and/ or entrenching the rights in order to protect them from the ability of parliamentary majorities to circumscribe them. The substantial concept holds that constitutional rights are human rights that have been recorded in a constitution with the intention of transforming them into positive law at the level of the constitution.

We did not find these concepts in Article 118 (2) (b). What we find is explained at pages 288 to 290, by Alexy as the need for a 'competence' of 'an instrument of the state' to be distinguished from a constitutional right. To elaborate: The framers of the Constitution as amended have domesticated human rights by locating them in a specific part which is called Part III or the Bill of Rights. They have provided for an enforcement mechanism within the same Part, specifically Article 28, and have entrenched Part III in Article 79(3) which Article is equally entrenched. Our Bill of Rights cannot be altered without a referendum; and in that regard we take judicial notice that the referendum in 2016 attempting to pass a new Bill of Rights failed and the Bill of Rights enacted in 1991 remains at the heart of the Constitution as amended.

At the same time, there are other parts of the Constitution as amended which create public institutions and set out their powers and the manner in which they shall exercise those powers such as Part VIII which houses Article 118 (2) (b). Part VIII sets out the Judiciary, its authority, structure and powers. We are of the considered view that the Petitioner misled himself by imputing constitutional rights to Article 118 (2) (b). Given the nature of legal rights, be they in the form of benefits, liberties or powers, we do not see how they can be effectively, securely or efficiently founded in constitutional provisions such as Article 118 (2) (b), that provide guidance on the manner in which courts are to conduct themselves as they perform their adjudicatory function. The Petitioner erred by attempting to equate a constitutional principle to a constitutional right. We are fortified in so finding by Gary Jeffery Jacobsohn on C*onstitutional Values and Principles* in Michel Rosenfeld and Andras Sajo, **The Oxford Handbook of Comparative Constitutional Law** who is helpful in explaining the relationship between principles and rights and why they do not always go hand in hand. He says:

> **...a principle is 'a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.' Principles ...are necessary for the correct judicial resolution of legal questions... A dimension not present in regard to rules sets them apart,**

namely the weight these principles carry in the legal order within which they function... [E]xplicit textual references to principles are very common in constitution documents...Many of these specific inscriptions ...suggest that another attribute of principles ...their special connection to individual rights rather than collective goals – is not a universal fixture in the constitutional domain...

Article 118 (2) (b) is a constitutional principle for the following additional reasons. Firstly, the marginal note that introduces Article 118 as "Principles of judicial authority" makes no reference to rights at all. Secondly, we perused the source of the Constitution as amended, being the recommendations in the Draft Constitution prepared by the Technical Committee on Drafting the Zambian Constitution (henceforth referred to as the TCDZC). In their Final Draft Report, the TCDZC recommended enactment of draft Article 49(1) as part of their proposed Bill of Rights. It reads as follows:

49. (1) A person has the right to have a dispute decided timely and to have a fair hearing before a court or, where appropriate, an independent and impartial tribunal.

(2) (e) to have the trial commenced and judgment given without unreasonable delay.

The rationale for the provision as stated at pages 42 to 43 of the First Draft Report of the TCDZC is as follows:

> **...access and right to justice should be guaranteed in a democratic society and ... this right needs to be enforced considering that citizens have always expressed concern about the ...delays in the disposal of cases by courts and the detention of suspects for long periods without trial. Accordingly, the Committee resolves to guarantee the right to justice in the Constitution, which will entail ...the right to a well-reasoned and expeditiously delivered judgment.**

The TCDZC envisioned that the constitutional rights or the rights enshrined in the proposed Bill of Rights should include the right to speedy trial. They also envisaged the enactment of what was to become Article 118. Their vision did not include any concept of right in Article 118. We say so because of the TCDZC's own rationalisation of their recommended version of Article 118 being the draft Article 147 at page 159 of the First Draft Report as follows:

> ... **The Committee further resolves to provide for the <u>principles that should guide a court</u> in exercising its jurisdiction....** *(emphasis ours)*

And in the TCDZC Final Draft Report at pages 424 to 425 as follows:

> **The Committee recalled its decision to introduce a new Article to provide for the principles and authority of each Arm of the State in the respective Parts dealing with each Arm.**

.....

The Committee resolved to introduce a new Article to provide for principles and authority for the Judiciary.

Draft Article 147 is word for word the same as Article 118. It is abundantly clear that there is no right recommended in what was finally enacted as Article 118 (2) (b). Rather, keeping faith with past Constitutions, a substantive right was recommended in the proposed Bill of Rights to replace Article 18(9) and sit side by side with what became Article 118 (2) (b). We accordingly find that the distinction drawn by the Petitioner between Article 18(9) and Article 118 (2) (b) is specious. The argument is a misguided attempt to justify the existence of a purported right which is not there. The argument is simply not tenable.

In our considered view, the duty placed on the courts by Article 118 (2) (b) does not by default create a constitutional right claimable by a dissatisfied litigant arguing a rights based entitlement. To illustrate the distinction concretely, we quote the relevant provisions. Articles 18 and 28 are part of the Bill of Rights and provide:

> **18(9) Any court or other adjudicating authority prescribed by law for determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial: and where**

proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

28(1) ...if any person alleges that any of the provisions of Articles 11 to 26 inclusive, has been, is being or is likely to be contravened in relation to him...that person may apply for re-dress to the High Court which shall (a) hear and determine the matter...and...make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive.

.....

(b) Any person aggrieved by any determination of the High Court under this Article may appeal to the Supreme Court

Articles 118 and 128 relating to the Judiciary lie outside the Bill of Rights in Part VIII of the Constitution as amended, and read:

118(2) In exercising judicial authority, the courts shall be guided by the following principles:

(b) justice shall not be delayed.

128 (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear-

(a) a matter relating the interpretation of this Constitution;

(b) a matter relating to a violation or contravention of this Constitution;

.....

(3) Subject to Article 28, a person who alleges that:

(a) an Act of Parliament or statutory instrument ;

(b) an action, measure or decision taken under law; or

(c) an act, omission, measure or decision by a person or an authority;

contravenes this Constitution, may petition the Constitutional Court for redress.

Article 128(1) subjects the jurisdiction of the Constitutional Court to Article 28. Section 8 of the CCA which we shall not reproduce, closely follows Article 128 hence we do not see in it any human rights enforcement mechanism. It is of general application. Trying to tie it to Article 118 (2) (b) is not helpful in the circumstances. This is because all related provisions when given their ordinary meaning and read as a whole reveal no absurdity to suggest a more nuanced interpretation of Article 118 (2) (b). When Article 118 is read in the light of Articles 128 and 28, it is evident that there is only one set of rights that maybe called constitutional rights and those rights lie in the Bill of Rights. It would be confusing to have the same rights located in two different Parts of the Constitution when the two Parts fall under the jurisdiction of different courts. That could not have been the intention of the framers of the Constitution.

We take note that the Petitioner argued that there is a fundamental difference between the protection offered by Article 18 (9) and the protection

purportedly introduced by Article 118 (2) (b) because the latter provides protection from "delayed justice" rather than "undue delay" found in the former. That there must be good reason for the new enactment.

We have seriously considered the point even though as we have already found, it is not feasible that an additional and stronger right would be positioned in Article 118 (2) (b) to be interpreted by a different court; that it would be located in a part of the Constitution that is easily altered by Parliament and therefore unsuitable as a repository for fundamental rights.

We agree with the Respondent that under our law, there is no separate set of rights known as constitutional rights distinguishable from rights in the Bill of Rights. That the right set out in Article 18 (9) is not replicated or supplemented by a right in Article 118 (2) (b). Therefore Article 118 (2) (b), does not create a parallel or alternative means of recording and enforcing constitutional rights; it merely alerts the courts to rights properly embedded in the Bill of Rights. Constitutional rights and the manner of their enforcement (for the two go together) are explicitly and justifiably elsewhere in the Constitution as amended. We say so not only because of the conceptualisation and domestication of rights in our Constitution but also

because of more practical considerations as demonstrated. Rights must be properly couched as legal claims supported by corresponding obligations and an enforcement mechanism in order for them to be enforceable in a court of law as constitutional rights. Hence the Respondent's argument that Article 118 merely guides the courts to adjudicate expeditiously is sound and correct. The first issue *in limine* has merit.

We now turn to the second issue *in limine*. In the alternative the Respondent argued that the Petition was prematurely before this Court as the Petitioner failed to make a formal application for the abridgment of time in accordance with the High Court Rules. In response, the Petitioner acknowledged the availability of the abridgment process but argued that what he sought from this Court was a declaration that Article 118 (2) (b) had been violated or contravened.

The Petitioner relied on Article 128 of the Constitution as amended and section 8 of the CCA giving the Court both original and final jurisdiction. Whilst we accept that individuals can come to this Court directly where they are raising a constitutional violation, we take note that the Petitioner has not denied that he had at hand a speedy and cost effective option to have his

concerns addressed. It was his desire to express his outrage over the 11 month adjournment that prompted him to bring the matter to us. He opted to petition the Constitutional Court, when he did not have to do so.

Much as we hear the Petitioner's plea, we must point out that this Court does not operate in a vacuum. There is comity between the courts constituting the Judiciary. This Court works hand in hand with other courts so that matters before it and before other courts are heard and determined in an orderly and efficient manner. The nature and status of this Court is such that it deals with direct violations of the Constitution. By virtue of Article 1(5) a matter relating to the Constitution is heard by the Constitutional Court. The rest of the law is adequately handled by other courts. We are also convinced that hearing this matter would not be an acceptable way of employing scarce judicial resources. More so as Article 198 of the Constitution as amended enjoins us to ensure prudent and responsible use of public resources. It is therefore our considered view that the impugned Petition is not ripe for hearing as a constitutional violation before this court.

We are fortified in taking this view by the approach of the South African Constitutional Court summed up in Max du Plessis, Glenn Penfold and Jason Brickhill, *Constitutional Litigation,* at page 38 that:

> **The term 'ripeness' may also be used where alternative remedies have not been exhausted, or an issue can be resolved without resort to the Constitution. The Constitutional Court has explained the latter principle, which is an aspect of constitutional avoidance as follows: '[t]he concept of ripeness also embraces the general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course that should be followed'.**

Further, Alec Stone Sweet in his Chapter *Constitutional Courts* in Michel Rosenfeld and Andras Sajo, **The Oxford Handbook of Comparative Constitutional Law** says at page 823 that:

> **Individuals, firms and groups may be authorised to petition the [Constitutional Court] when they believe their rights have been violated, <u>after all other remedies have been exhausted</u>** *(emphasis ours)*

The 11 month adjournment did not mature into a constitutional issue before it was brought to this Court and the Petitioner should have resorted to remedies available in the High Court. We therefore find that the second issue *in limine* also has merit.

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It is the Ruling of this Court that both issues *in limine* succeed. The effect of the Notice of Intention to Raise Issues *in Limine* succeeding in its entirety is that the Petition filed on 26th September, 2017 is dismissed forthwith. In the interest of developing our constitutional jurisprudence, each party shall bear their own costs.

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A.M. Sitali
Constitutional Court Judge

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M.S.Mulenga
Constitutional Court Judge

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M. M. Munalula
Constitutional Court Judge