

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

2021/CCZ/0017

IN THE MATTER OF: **Articles 1, 2, 8, 9, 173 and 177 of the
Constitution of Zambia (Amendment) Act No. 2.
Of 2016**

IN THE MATTER OF: **Part IV of the State Proceedings Act, Chapter
71 of the Laws of Zambia**

IN THE MATTER OF: **Privileges exercised by the Attorney General
Relating to payment of Judgment Debts**

IN THE MATTER OF: **A Consent Order dated 21st September, 2009
executed in the Supreme Court Relating to
costs under SCZ/8/74/2003, SCZ/269/2000 and
Appeal No. 10 of 2000**

BETWEEN:

JAYESH SHAH

SHALEETHA MAHABEER

AND

THE ATTORNEY GENERAL

RESPONDENT

Coram: Mulenga, Mulonda, Munalula, Musaluke and Mulongoti, JCC on
14th October, 2021 and on 25th January, 2022

For the 1st Petitioner: In person

For the 2nd Petitioner: Mr. J. Madaika and Mr. M. Mwanza of J and M
Advocates

For the Respondent: Mr. M. M. Lukwasa, Deputy Chief State Advocate,
Attorney General's Chambers



1ST PETITIONER

2ND PETITIONER

J U D G M E N T

Mulenga, JC delivered the Judgment of the Court

Cases Cited:

1. Zambia Seed Company Limited v Chartfield International (PVT) Ltd (1999) Z.R. 151 (SC)
2. Attorney General v Law Association of Zambia (2008) Z.R. 21
3. Attorney General v Nigel Kalonde Mutuna and Others SCZ Judgment No. 88 of 2012
4. Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)
5. Nyathi v MEC for the Department of Health Gauteng and Another 2008 5 SA 94 (CC)
6. Shamwana and 7 Others v The People (1985) Z.R.41 (SC)
7. Hussein Safieddinne v The Commissioner of Lands and Others SCZ Selected Judgment No. 36 of 2017
8. Steven Katuka and LAZ v Attorney General, Ngosa Simbyakula and Others (2016) Z.R. 226
9. Benjamin Mwelwa v Attorney General and others 2020/CCZ/1007 (Unreported)

Legislation referred to:

1. The Constitution of Zambia Act No. 1 of 2016
2. The Constitution of Zambia (Amendment) Act No. 2 of 2016
3. The State Proceedings Act Chapter 71 of the Laws of Zambia
4. The Evidence Act Chapter 43 of the Laws of Zambia
5. The Compensation Fund Act No. 43 of 2016

Works referred to:

The Report of the Technical Committee on Drafting the Constitution dated 13th December, 2013

INTRODUCTION

[1] The Petitioners filed a Petition on 28th April, 2021 in which they seek the following reliefs against the Respondent:

- (i) A declaration that the provisions of the State Proceedings Act, in so far as they provide immunity to the Respondent from execution for recovery of Judgment debts are not to be read to provide discretion to the Respondent to whom and when to pay Judgment Creditors.
- (ii) An Order that the Respondent is bound by the tenets of good governance, integrity, equity, social justice, equality, and non-discrimination enacted under Article 8 of the Constitution of Zambia (as amended) in the manner that funds from the Government revenue are paid out to Judgment Creditors
- (iii) An Order that the Respondent is bound to pay Judgment Creditors in the order in which Judgments are awarded, that is, on an earliest to latest basis, and that there is no discretion to selectively pay some judgment creditors whilst leaving out other earlier Judgment Creditors.
- (iv) An Order that the payment of funds to judgment creditors must be in a predictable, open and transparent manner and that there should be no discretion to disqualify judgment creditors based solely on criteria invented by the Respondent outside the laws of Zambia and /or court process;
- (v) An order that any disqualification or refusal to pay any judgment debt by the Respondent should be strictly on the basis of valid court orders obtained through the judicial process and not based on selective criteria of the Respondent acting unilaterally outside the court process;
- (vi) An order that the Respondent must publish a schedule of payments in order of priority based on objective criteria to be pronounced by this Court and that the Respondent should not deviate from this schedule of payments and new payments must be added to said schedule based on the date of judgment or date of agreement for payment;
- (vii) A declaration that the Respondent's refusal to pay the judgment debt owed to the Petitioners' under the Consent Order executed in the Supreme Court between the Petitioners and Respondent is unconstitutional;
- (viii) An order that the Respondent is bound by court orders and does not enjoy immunity to disobey court orders;
- (ix) An order that the conduct of the Respondent is illegal and in breach of the Constitution;
- (x) An order that the Respondent as a constitutional appointee and principal lawyer in Zambia has failed to uphold his constitutional duty to uphold the Constitution;
- (xi) Costs of and incidental to these proceedings; and
- (xii) Such other declaration or order that the Court may deem fit.

[2] The Petition was accompanied by affidavits verifying facts and in reply as well as skeleton arguments in support and reply. The Respondent filed an Answer on 30th July, 2021 supported by an affidavit and skeleton arguments in opposition.

BACKGROUND FACTS

[3] The facts giving rise to this matter are common cause between the parties. These are that the Petitioners were jointly successful parties in three (3) cases under cause numbers SCZ/8/64/2003, SCZ/269/2000 and Appeal No. 10 of 2000 in which the Supreme Court awarded them costs. Following negotiations, the Petitioners and the Respondent settled and filed a consent order relating to costs on 21st September, 2009 in which the Respondent was to pay K250,000,000.00 (unrebased) for each case and the total for the three cases was K750,000,000.00 (unrebased). It was further agreed in the consent order that the amount should be fully liquidated not later than 30th November, 2009 after which any outstanding amount would accrue interest at current bank lending rate from the date of the judgment to the date of full payment. The certificate of judgment with respect to the consent order was filed on 11th March, 2019 as exhibited on pages 42-43 of the record of proceedings.

[4] It is further not in dispute that to date no payment has been made towards liquidating the sum in the consent order. The Petitioners' lawyers wrote several letters requesting for payment. On 28th March, 2011, the then Solicitor General on "without prejudice" basis wrote requesting that the Petitioners consider forgoing the interest on the outstanding payment so as to "greatly enhance the speed" of concluding the issue. This request was repeated by another office holder of Solicitor General on 16th September, 2014. By the letters dated 29th March, 2021 and 17th October, 2014 respectively, the Petitioners' counsel responded that the Petitioners had already agreed to forgo interest at the time of executing the consent order on 21st September, 2009 and that accordingly the interest that was due and payable was that which accrued from 30th November, 2009 to date of payment. It was stated in the letter of 17th October, 2014 that the Petitioners were willing to consider a reduction in interest rate once given a firm date when payment would be made.

PETITIONERS' CASE

[5] The Petitioners in their Petition and joint affidavit verifying facts outlined the facts as stated under the background above and we shall therefore not repeat the same for the sake of brevity. In their affidavit verifying the petition, the Petitioners added that the Respondent has taken advantage of the position

at law which prohibits execution of a judgment debt against it, hence the sought reliefs including a declaration that the Respondent's actions were unconstitutional.

[6] The Petitioners in their skeleton arguments dated 7th June, 2021 referred to the case of **Zambia Seed Company Limited v Chartfield International**¹ to the effect that the Respondent was bound by the consent order executed by the parties. It was argued that based on section 17 of the State Proceedings Act, Chapter 71 of the Laws of Zambia, costs may be awarded against the State and its failure to pay them is a willful evasion of a lawful court order.

[7] It was submitted further that the Court must take judicial notice of the fact that there have been various judgments against the State in matters concluded well after 2009 in which the Respondent has honoured its payments to judgment creditors. This, it is argued, raised the inference that the Petitioners have been treated unfairly and discriminated against in comparison to other judgment creditors. Further, that the passage of time and failure to pay them is indicative of illegality in the manner in which their debt has been left outstanding since 2009 and as such is a breach of the Constitution.

[8] The Petitioners submitted further, that pursuant to Article 8 of the Constitution, the Respondent was bound by the tenets of good governance,

integrity, equity, social justice, equality and non-discrimination which require that funds are paid out to judgment creditors on an earliest to latest basis. The Petitioners contended that the refusal to settle the judgment debt on costs inclusive of interest was in breach of the consent order and was unconstitutional and discriminatory because the Respondent was cherry picking who to pay based on a criteria that had no basis in law, equity, justice or good governance. They added that there was no discretion to pay some judgment creditors while leaving out others as this indicated a lack of predictability, openness and transparency. Hence, the Respondent should be compelled to pay judgment debts in chronological order and in a predictable manner.

[9] It was further argued that the Respondent was legally bound to obey court orders and judgments and could not unilaterally vary the terms of a consent order in the absence of an appeal or legal challenge. The Petitioners cited the cases of **Attorney General v Law Association of Zambia**² and **Attorney General v Nigel Kalonde Mutuna and Others**³ relating to the supremacy and binding nature of the Constitution to press their point.

[10] The Petitioners added two South African cases for persuasive value namely **Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and**

Others⁴ and **Nyathi v MEC for the Department of Health Gauteng and Another⁵**. In the latter case, the Constitutional Court of South Africa found that a provision which is similar to section 3 of our State Proceedings Act was unconstitutional as it was an unjustifiable limitation on rights to equality and access to courts. In conclusion, the Petitioners submitted that the State Proceedings Act only provides immunity from execution for recovery of judgment debts but does not provide discretion on which judgment creditors to pay and when to pay. The failure of the Respondent to pay the Petitioners in accordance with the consent order is an abrogation of the Constitution.

[11] At the hearing, the 1st Petitioner augmented the Petitioners' skeleton arguments and submitted that the Respondent had, in 2009 and January, 2010, paid what was agreed in another consent order executed in the High Court as well as for another High Court matter and informed him that payment under the consent order in issue would be done under the allocation for the following year. When prodded by the Court as to what the constitutional issues were in this matter, the 1st Petitioner stated that the two constitutional issues were; firstly, whether the Respondent as a constitutional appointee had power under the Constitution to hold the Petitioners at ransom to waive interest before a payment could be made. Secondly, whether the Attorney General, is so

powerful in terms of the Constitution, that he refuses to abide by or make conditions when the Supreme Court has already made an order. The 1st Petitioner added that Article 125 provides that the Supreme Court is a final court of appeal and in terms of Article 2 all have a duty to abide by the Constitution.

[12] The 1st Petitioner, in addressing the Respondent's reference to the Compensation Fund Act, asked this Court to determine whether the Compensation Fund Act of 2016 was applicable to the consent order of 2009. Regarding the defence of *res judicata* the 1st Petitioner contended that the Respondent had not exhibited any cause number, ruling or order of the Supreme Court where the issues raised in this Petition were pronounced upon. He prayed that the reliefs sought be granted.

[13] Mr. Madaika, learned Counsel for the 2nd Petitioner also augmented the Petitioners' skeleton arguments and submitted that this was not a debt collection matter but the Petitioners were seeking this Court's intervention to compel the Respondent to establish and implement a precise, predictable and verifiable practice in terms of payment of judgment orders. Counsel contended that the current practice was not guided by any statute or the principles in Articles 1, 8, 173 and 177 of the Constitution but instead the Respondent was

using toxic discretion to decide whom and when to pay. Mr. Madaika added that the Constitution intends that any public office must have a system in which public funds are properly and equitably distributed in a predictable manner. Further, that in the absence of the Respondent binding itself to such a mechanism, this Court should compel the Respondent to provide such a framework and at least make all payments in chronological order as opposed to cherry picking which opens doors to malpractices such as favouritism and corruption.

RESPONDENT'S CASE

[14] The Respondent, in the Answer stated that the amount in the consent order was not liquidated because the understanding was that the Treasury would directly fund the same by 30th November, 2009 outside the then internal administrative framework for settling judgment debts. The Respondent thus had not liquidated the amount because to date no funds were received directly from the Treasury for onward payment to the Petitioners. It was further stated that the request to forgo the interest was never a condition for payment of the sums due as alleged by Petitioners. Therefore, that the Respondent neither refused to pay nor discriminated against the Petitioners and did not cherry pick whom to pay. Further, that when funds are available judgment debts are

settled chronologically as and when they fall due. In this vein, it was stated that there were a number of judgment creditors whose debts were contracted long before the Petitioners' but have not been settled due to lack of funds.

[15] The Respondent further posited that the Petitioners were not entitled to any of the reliefs sought and that the petition was an abuse of court process, frivolous and vexatious on account of being *res judicata*.

[16] The affidavit in support of the Answer was deposed to by Fredson Kongo Yamba, Secretary to the Treasury. He averred that his responsibilities were enshrined in Article 183 of the Constitution as amended. Further, that the requests for waiver of interest were based on past interactions between the Petitioners and the Respondent and were not intended to deny the Petitioners the fruit of their judgment. It was added that moneys paid towards judgment creditors and non-judgment creditors are included in annual budgets. However, that there had been erratic payments of judgment and non-judgment creditors due to budgetary constraints beyond the control of the Respondent.

[17] It was further deposed that there was no failure, neglect or refusal by the Respondent to settle the consent sum and that the Respondent did not discriminate or exercise blanket arbitrary discretion as alleged by the

Petitioners. It was concluded that this petition was an attempt to obtain this Court's judgment and enforce it against the judgment of another competent court.

[18] The Respondent posited, in the skeleton arguments, that in this matter, the values and principles in Article 8 have to be read with Article 183 (1) of the Constitution which provides for the appointment of the Secretary to the Treasury whose functions include financial management and expenditure of public monies to State organs, State institutions, local authorities or other prescribed bodies. It was submitted that in terms of settling claims against the State, Article 209 (1) created the Compensation Fund whose management is prescribed in the Compensation Fund Act No. 43 of 2016.

[19] The Respondent contended that both the Compensation Fund Act and the State Proceedings Act do not provide for the order of priority in relation to payment of compensation but places a duty on the Compensation Fund Committee to pay successful litigants. Further, that these two Acts do not provide for actual or exact dates for liquidation of debts or for the macro-management of the Compensation Fund Committee. But that this is left to the Compensation Fund Committee to consider in line with its functions. Therefore,

that the delay in settling the claim did not amount to and could not be interpreted as an infringement of one's rights.

[20] The Respondent then extensively submitted on *res-judicata* and argued that the claims being sought by the Petitioners were already adjudicated upon by the Supreme Court, whose decisions are final. Consequently, that the Petition was an abuse of court process and ought to be dismissed.

[21] The Respondent's Counsel, Mr. Lukwasa in augmenting the Respondent's skeleton arguments submitted that since the Constitutional Court and the Supreme Court rank equivalently this matter that was competently adjudicated upon by the Supreme Court cannot be entertained by this Court. Further, that the Petitioners' allegation of breach of their constitutional right as enshrined in the Bill of Rights was within the purview of the High Court.

[22] Addressing the allegation of selective payment of creditors by the Attorney General, Mr. Lukwasa, posited that the Compensation Fund Act establishes the Compensation Fund Committee that is responsible for effecting payment to judgment creditors and not the Attorney General. Therefore, that the allegations of selectiveness and compromise or corruption against the Attorney General has no basis. In responding to the argument that the

Compensation Fund Act of 2016 is not applicable to the Petitioners' claim that arose in 2009, it was Mr. Lukwasa's submission that all payments of judgment creditors fall under the Compensation Fund Committee and that currently there cannot be two institutions, namely the Compensation Fund Committee and the Attorney General, both attending to judgment creditors. Further, that the Petitioners were aware that all pending payments including their own and others such as those to pensioners, which go as far back as 1996, were transferred to the Compensation Fund Committee.

[23] In responding to the question by the Court on whether the Compensation Act applied retrospectively to the pending unpaid creditors, Mr. Lukwasa submitted that the position was that there was only one institution, the Compensation Fund, which deals with such payments including the Petitioners' issue. He added that whether the Compensation Fund Act applied retrospectively did not disadvantage any judgment creditors. Further, that the Petitioners had approached the Attorney General with a view to have their judgment settled outside the then internal framework for settling judgment debts and that this was what resulted in the consent order. Hence, that the Petitioners were trying to circumvent the Compensation Fund Committee and perhaps get their payment quickly otherwise they had to queue up before the

Compensation Fund. He added that under the Compensation Fund whoever gets the judgment first will get paid first.

PETITIONERS' REPLY

[24] In the affidavit in reply, the 1st Petitioner reiterated what was stated in the affidavit in support of the Petition. He averred that the Petition was not *res-judicata* as the issues raised were never adjudicated upon by the Supreme Court. It was his position that there were no prolonged constraints but that the Respondent intentionally neglected to make payment to the Petitioners.

[25] The 1st Petitioner added, that the insinuation by the Respondent that they were still making payments that accrued prior to 2009 and that there were no payments to other judgment creditors after 2009 was not true. It was reiterated that the Respondent has an unfair, non – transparent and irregular process of making payments to judgment creditors. Therefore, that there was failure, neglect and refusal to pay the Petitioners which was inexcusable and had no legal basis.

[26] In the skeleton arguments in reply by the 2nd Petitioner, it was argued that contrary to the Respondent's submission that the Compensation Fund Act did not provide for the order of priority in payment of compensation, the

principles of transparency, accountability and equity in section 3 of the Compensation Fund Act meant that there should be an order of priority in settlement of claims. Further, that the Respondent's submission otherwise was admitting being in breach of the principles and that the delay was inexcusable unless the Respondent was stating that no payments were made to judgment creditors pertaining to claims after 2009.

[27] The 2nd Petitioner further submitted that some assertions by the deponent of the Respondent's affidavit in support of the Answer were hearsay statements, particularly in paragraphs 7 to 15 and paragraph 17 because the deponent was using the word "believes". A number of cases were cited including the case of **Shamwana and 7 Others v The People**⁶ on what constitutes hearsay statements. It was argued that these are statements of what was not personally perceived by the deponent and therefore cannot establish the truth of the same. Section 3 (1) of the Evidence Act Chapter 43 of the Laws of Zambia was further cited to the effect that a statement shall be admitted in evidence if the deponent had personal knowledge of the matters dealt with by the statement. It was submitted that this was not the case with respect to the deponent of the Respondent's affidavit and further that there

was no proof or evidence of the averments being alluded to. It was contended that consequently, there was no valid defence to the Petition.

[28] As regards the defence of *res judicata*, the 2nd Petitioner argued that this claim was misleading and a misapprehension of facts and that there was no proof to show that there was an earlier decision on the reliefs sought which hinge on the interpretation of the Constitution on alleged violations and contraventions of the Constitution. It was added that none of the three elements of the principle of *res judicata* discussed in the case of **Hussein Safieddinne v The Commissioner of Lands and Others**⁷ had been proved as alleged by the Respondent. It was concluded that the reliefs sought should be granted with costs.

[29] In the oral submissions in reply, the 1st Petitioner maintained his earlier submissions and in addressing the submission on the Bill of Rights, he contended that the Petition had been brought pursuant to Articles 1, 2, 8, 9, 37, 133 and 177 of the Constitution which were outside the Bill of Rights. Further, that it was in the interest of justice for this Court to determine whether the Attorney General was abiding by the constitutional authority in discharging the constitutional duty.

[30] Counsel for the 2nd Petitioner, Mr. Madaika, argued in reply that the Respondent had not stated the law or legal framework under which all the judgment debts were transferred to the Compensation Fund Committee. Further, that if there was a lacuna in the law, the Attorney General must introduce a bill in Parliament to clear the lacuna. In the absence of this, it was Counsel's argument that the Respondent was acting on discretion that had no basis in the law. Further, that the evidence on record did not include any letter or memorandum to show that the Respondent made the referral of all judgment debts to the Compensation Fund Committee.

[31] It was Mr. Madaika's contention that all debts prior to 2016 were entirely subject to the Attorney General's discretion and that this is what this Court was being asked to cure in order for the Respondent to be compelled to set up formulae and rules on how the debts arising prior to 2016 should be dealt with. Mr. Madaika added that section 3 of the Compensation Fund Act provides for the guiding principles of transparency, accountability and equity in the payment of compensation but that these were not present in the manner the Respondent had been conducting himself, which was shrouded in mystery. He concluded that the Petition should be upheld and the Petitioners' prayers granted.

EVALUATION AND DECISION

[32] We have considered the Petition, Answer, the respective affidavits and skeleton arguments in support, opposition and reply. The factual basis of this Petition is not in contention and is outlined under the background above.

[33] Before we consider this matter, we wish to reiterate the principles applicable to the interpretation of the Constitution. The starting point is that the Constitution, as the supreme law, ranks above all other laws as provided in Article 2 of the Constitution as amended. The other principle is that the words or provisions in the Constitution or statute must not be read in isolation but that all relevant provisions bearing on a subject for interpretation must be considered together as a whole in order to give effect to the object of the Constitution.

[34] Further, Article 267(1) enjoins this Court to interpret the Constitution in accordance with the Bill of Rights and in a manner that promotes the Constitution's purposes, values and principles. Therefore, the Court must have in mind the broad objects and values that underline a subject matter.

[35] Furthermore, as we stated in the case of **Steven Katuka and LAZ v Attorney General, Ngosa Simbyakula and 63 Others**⁸ the primary

principle in interpreting the Constitution is that the meaning of the words, text or clause should be given the literal meaning derived from the language used and only when there is ambiguity or where the literal interpretation will lead to absurdity should other principles of interpretation, such as the purposive approach, be resorted to. The purposive approach is where the interpretation of a constitutional provision is considered in the light of the general legislative purpose. This requires the Court to ascertain the meaning and purpose of the provision in light of the context and historical origins where necessary.

[36] We have taken all this into account in determining the Petition. We wish to first deal with the defence of *res judicata* that was heavily relied on by the Respondent. Our short answer is that the issue of *res judicata* is misconceived in this matter as the essential requirements have not been proved. The cardinal point is that the issues raised by the Petitioners herein have not been shown to be the same issues which were the subject of the actions before the Supreme Court or decided upon by the Supreme Court. It is not enough to simply point to the consent order as being the common subject in the two Courts.

[37] We now proceed to consider the Petition. In this matter, the Petitioners cited some provisions of the Constitution particularly Articles 1, 2, 8, 9, 173 and 177 as having been allegedly contravened.

[38] Articles 1 and 2 provide for the supremacy of the Constitution and that every person has a right and duty to defend the Constitution, respectively. Article 8 outlines the national values and principles and Article 9 provides for the application of the national values and principles in the interpretation of the Constitution, the enactment and interpretation of the law and in the development and implementation of state policy. Article 9 further provides for the Republican President to report the progress made in the application of the national values and principles to Parliament once every year. Article 173 outlines the values and principles of the Public Service while Article 177 constitutes the office of Attorney General and the functions.

[39] These are the provisions on which this Petition is anchored. We must state that Article 8 applies to the Respondent in that the Respondent is bound by the tenets of good governance, integrity, equity, social justice, equality and non-discrimination. To this we would also add that Article 173 (1) (e) in its guiding values and principles of the public service includes prompt, efficient and timely response to people's needs. Article 173 (2) goes on to state that these guiding principles are binding on all state organs and institutions. This issue is not in contention.

[40] We have outlined the Articles in order to put the issue of the reliefs sought in perspective. We wish to state at the outset that on perusal of the Petition, it does not outline particulars of contravention of the highlighted constitutional provisions or give sufficient particulars of the alleged contravention. The Petition contains general statements and allegations regarding the exercise of discretion by the Respondent.

[41] Further, there are no specific allegations of contravention of the Articles of the Constitution with respect to any provisions of either the State Proceedings Act or the Compensation Fund Act. The case of **Benjamin Mwelwa v Attorney General and others**⁹ is instructive on the required substance of the Petition wherein this Court stated that:

We hold the firm view that it is not sufficient to allege a breach of a statutory or constitutional provision without setting out the facts, in sufficient detail, which are the basis of the claim against the Respondent and entitle the Petitioner to the reliefs sought.

A Petition must contain a clear and concise outline of the particular constitutional provision allegedly contravened and in what respect the particular constitutional provision is contravened. Therefore, the unfortunate facts herein notwithstanding, a matter must properly raise constitutional issues for it to come under the jurisdiction of this Court. There must be clear substantive issues that raise constitutional considerations as provided in Article 128 of the

Constitution. In the absence of such jurisdictional issues, parties have to raise their grievances and issues in the appropriate courts. Hence, our prodding of the Petitioners on what constitutional issues required this Court's attention in view of the general allegations and reliefs sought.

[42] The Petitioners, when prodded, argued that their Petition raises the following constitutional issues:

1. Whether the Compensation Fund Act of 2016 is applicable to the consent order in issue executed in 2009.
2. Whether the Attorney General, as a constitutional position, has power or can refuse to abide by an order of the Supreme Court to pay costs based on Article 2 of the Constitution.

[43] We wish to state that the two issues above framed by the Petitioners do not reveal constitutional issues. The first issue as framed is anchored on the Compensation Fund Act and whether this Act is applicable to the consent order of 2009. This issue is clearly not a constitutional issue as envisaged by Article 128 of the Constitution on the jurisdiction of this Court.

[44] We have however considered the Respondent's submission that based on Article 209 establishing the Compensation Fund and the subsequent enactment of the Compensation Fund Act of 2016 all the pending judgment debts, including the Petitioners' judgment debt and other debts which go as far back as 1996,

now fall under the Compensation Fund. It was further argued that the Respondent cannot pay judgment debts outside the Compensation Fund Act as it has no statutory mandate to do so. The Petitioners, on the other hand, argued that their judgment debt does not fall under the Compensation Fund Act of 2016 which came after the consent order was executed in 2009 because the Compensation Fund Act framework did not apply retrospectively.

[45] We have considered the respective arguments. Following the enactment of the Constitution of Zambia (Amendment) Act No. 2 of 2016, the manner in which the Respondent can make decisions relating to settling judgment debts against the State have a criteria set by law. Article 209 provides:

209. (1) There is established a Compensation Fund for the purpose of settling claims against the State.

(2) The management of the Compensation Fund shall be prescribed.

[46] Article 209 (1) of the Constitution provides for the establishment of a Compensation Fund for the purpose of settling claims against the State such as the judgment debt owed to the Petitioners. We have considered the rationale for this provision by the framers of the Constitution as stated in the Report of the Technical Committee on Drafting the Constitution dated 13th December, 2013 which states that:

The rationale for the Article was that a Compensation Fund was necessary in order to settle claims against the State. The Committee observed that the availability of a Compensation Fund would ensure that funds were set aside to settle judgment debts. In addition, the Committee observed that Government did not have in place a Compensation Fund and as such, it took long to settle claims against the State. The Committee, therefore, resolved to provide for the Compensation Fund in the Constitution.

[47] It is clear that the Compensation Fund established in Article 209 was intended to deal with the challenges of settling claims against the State in a timely, transparent and equitable manner. Prior to the constitutional amendment of 2016, the payment of judgment debts was done through the office of Attorney General which had an internal administrative framework as submitted by the Respondent. The process was not outlined in any legislation or instruments and was thus not open to public scrutiny and it took long to settle claims against the State. This is the situation which the framers of the Constitution as amended sought to address, based on public outcry, through the establishment of the Compensation Fund in Article 209. The establishment of the Compensation Fund was also to ensure that funds were set aside to settle judgment debts.

[48] Article 209 provides further at clause (2) that the management of the Compensation Fund shall be prescribed. The word "prescribed" is defined in Article 266 to mean "provided for in an Act of Parliament".

[49] It follows that a specific Act of Parliament would set out the criteria for the payment of judgment debts owed by the State and the order in which payments must be made. Article 272 of the Constitution provides as follows:

272. Parliament may enact legislation to give effect to an Article or a provision in this Constitution which—

- (a) confers a function or jurisdiction on a person, office, institution, council or commission;**
- (b) provides for a process or procedure to be taken, followed or prescribed;**
- (c) requires an action, a measure or decision to be taken or provided;**
- (d) requires a remedy or compensation to be given;**
- (e) prohibits an action or measure;**
- (f) deals with a specific subject-matter or general matter that would require to be legislated on in order to give effect to the Constitution; or**
- (g) generally requires something to be prescribed.**

[50] In line with Article 209 (2) Parliament proceeded to give effect to this provision by enacting the Compensation Fund Act No. 43 of 2016.

[51] Following the enactment of the Compensation Fund Act, it was envisaged based on sections 9 and 16 (2) of the Constitution of Zambia Act No. 1 of 2016, which provides for the transitional provisions, that whatever matter was pending before any office, including that of the Attorney General and its internal committee, would continue either before it or before a corresponding office or authority as established under the Constitution as amended, which in this case is the Compensation Fund Committee. In the case of **Steven Katuka and LAZ v Attorney General and Ngosa Simbyakula and 63 Others**⁸ we explained the role which transitional provisions serve and stated at page J74 that:

As can be seen from the above provisions, Act No 1 of 2016 provides for savings and transitional provisions between the 1991 Constitution and the Constitution as amended. Therefore, Act No. 1 should be read together with the 1991 Constitution and the Constitution as amended. To that extent, we do not agree with the suggestion that Act No. 1 of 2016 is a stand-alone Act because it is an instrument that provides for smooth transition from the 1991 constitutional regime to the current constitutional order.

[52] A reading of Article 209 that does not take into account the transitional provisions and leads to a situation where there are two parallel offices or institutions dealing with judgment debts, differently, is an absurdity. As we stated in the principles of constitutional interpretation, where a literal interpretation leads to absurdity, the Court must read into the provision in order to give it the purposive interpretation that is in line with the general legislative purpose. A clear reading of Article 209 does not show that its intention was to have the Compensation Fund only apply to judgment debts post 2016 to the exclusion of the long outstanding judgment debts that were the basis of the concern in framing the provision.

[53] Therefore, based on the establishment of the Compensation Fund in Article 209, it cannot be said that there are two parallel systems of handling judgment debts, namely, the Attorney General's office for those arising prior to the 2016 constitutional amendments and the Compensation Fund, established under Article 209, for those arising after the 2016 constitutional amendments.

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• [54] We reiterate that Article 209 envisages the handling of judgment debts by the Compensation Fund in a transparent, accountable and equitable manner. We wish to add that with the establishment of the Compensation Fund by the Constitution, serious attention must be given to allocating and disbursing adequate funds to the Compensation Fund to ensure that outstanding and new judgment debts are promptly cleared. Having judgment debts remain owing for significant periods of time erodes the principle of justice that successful litigants should timely access the fruits of their judgments or court orders. This is what good governance requires and what the framers of the Constitution as amended had in mind.

[55] The second issue raised by the Petitioners is regarding whether the office of Attorney General as constituted in Article 177 of the Constitution has power to refuse to abide by an order of the Supreme Court to pay costs based on Article 2 of the Constitution. Article 2 of the Constitution provides that every person has a right and duty to defend and resist or prevent a person from overthrowing, suspending or illegally abrogating the Constitution. Article 1 (3) of the Constitution provides that the Constitution shall bind all persons, State organs and State institutions. These provisions are of a general nature.

[56] The Petitioners have argued that the Respondent's non-settlement of the agreed costs as outlined in the consent order from September, 2009 to date amounts to refusal to abide by an order of the Supreme Court and is therefore unconstitutional. The Respondent, on the other hand, contended that it has not refused to pay the judgment debt in the consent order but has been unable to do so due to budgetary constraints. The Respondent added that it was due to this state of affairs that the judgment debt for the Petitioners as well as other judgment debts that go as far back as 1999 had not been settled. Further, that the requests to waive interest were based on past interactions between the parties.

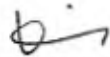
[57] Our understanding of the Petitioners claim in its entirety is that the Respondent has failed to pay a judgment debt and that the continued failure to pay constitutes a violation of the Constitution. We hasten to repeat what we have stated above that the Petitioners have not sufficiently shown a constitutional issue as required and in view of the provisions of Article 209 of the Constitution.

[58] Further, in this matter the Petitioners have targeted the office of Attorney General which no longer makes disbursements to judgment creditors based on Article 209 of the Constitution. We wish to reiterate what we have stated above

that matters to do with the Compensation Fund Act have to be taken before the appropriate courts and can only be brought to this Court under its jurisdiction as provided in Article 128 of the Constitution.

[59] Therefore, the two issues raised by the Petitioners have failed.

[60] This Petition fails and is hereby dismissed. In the circumstances of this matter, we order each party to bear its own costs.



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M.S. Mulenga
Constitutional Court Judge



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P. Mulonda
Constitutional Court Judge



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M. M. Munalula
Constitutional Court Judge



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M. Musaluke
Constitutional Court Judge



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J. Z. Mulongoti
Constitutional Court Judge