

IN THE CONSTITUTIONAL COURT OF ZAMBIA

2022/CCZ/006

HOLDEN AT LUSAKA

(Constitutional Jurisdiction)

IN THE MATTER OF:

THE CONSTITUTION OF ZAMBIA,
CHAPTER 1, VOLUME 1, OF THE
LAWS OF ZAMBIA

IN THE MATTER OF:

ARTICLES 1(5), 128, 173(1)(a)(c)(g),
180(7), 216(c) and 235(b) OF THE
CONSTITUTION OF ZAMBIA, THE
CONSTITUTION OF ZAMBIA ACT,
CHAPTER 1, VOLUME 1 OF THE LAWS
OF ZAMBIA



IN THE MATTER OF:

THE STATE PROCEEDINGS ACT,
CHAPTER 71 OF THE LAWS OF
ZAMBIA

IN THE MATTER OF:

SECTION 8 OF THE CONSTITUTIONAL
COURT ACT, 2016 OF ZAMBIA

BETWEEN:

MILINGO LUNGU

PETITIONER

AND

ATTORNEY GENERAL

1ST RESPONDENT

BOYD MUNALULA

2ND RESPONDENT

THE DRUG ENFORCEMENT

COMMISSION (DEC)
ADMINISTRATOR GENERAL

3RD RESPONDENT
4TH RESPONDENT

Coram: Hon. Mr. Justice M. Musaluke in Chambers. On the 19th day of May, 2022.

For the Petitioner Mr. S. Sikota S.C., of Central Chambers and
Mr. M. Chitambala of Messrs. Lukona
Chambers

For the 1st, 2nd and
3rd Respondents Mr. Joe Simachela, Chief State Advocate; Mr.
Chibesa Mulonda, Principal State Advocate
and Mr. Joseph Akapelwa, Principal State
Advocate

For the 4th Respondent: Ms. Sharon Kasoma Nguni (In-house Counsel)

RULING

Cases referred to:

1. Kambarange Kaunda v The People (1990-1992) Z.R. 215
2. R. Croydon Justices ex parte Dean (1993) Q.B. 769
3. R. v Bloomfield (1996) EWCA Crim 1801
4. R. v Abu Hamza (2007) 2 WLR 226
5. Chu Piu Wing v Attorney General (1984) HKLR 411

6. Bob Shilling Zinka v Attorney General (1991) SJ (SC)
7. C & S Investments Limited Ace Car Hire Limited, Sunday Maluba v The Attorney General (2004) Z.R. 216
8. Rajan Lekraj Mahtani and John Sangwa v The People SCZ No. 21 of 2019
9. JCN Holdings Limited v Development bank Zambia (Appeal) No. 87 of 2012
10. Owners of Motor Vessel " Lillian S v Caltex Oli (Kenya) Limited 1989) KLR 19
11. American Cyanamid Co v Ethicon Ltd (1975) UKHL1
12. Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others, Application 5 of 2014; [2014] eKLR
13. Charles Onyango Obbo v the Attorney General, Supreme Court Constitutional Petition Appeal No.2 of 2002
14. Bizwayo Nkunika v Lawrence Nyirenda and Another 2019/CCZ/005

Legislation referred to:

1. The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016
2. Constitutional Court Rules Statutory Instrument No. 37 of 2016
3. Penal Code Chapter 87 of the laws of Zambia
4. Prohibition and Prevention of Money Laundering Act No. 14 of 2001

Other works referred to:

1. Chris Corns, Judicial Termination of Defective Criminal Prosecutions – Stay of Applications. University of Tasmania Law Review Volume 16 No.1 1997.

2. DiSarro, Anthony, A Farewell to Harms: Presuming Irreparable Injury in Constitutional Litigation (August 8, 2011). Harvard Journal of Law and Public Policy Vol. 35, No. 2, 2012.

1.0 INTRODUCTION

- 1.1 This is an application by the Petitioner to stay the criminal proceedings before the subordinate court pending the hearing of the petition before this Court. The application was made pursuant to Order 10 rule 2 of the Constitutional Court Rules (CCZ) as contained in Statutory Instrument No. 37 of 2016.

2.0 BACKGROUND

- 2.1 The background to this matter in so far as is relevant to the application herein is that on 21st May, 2021 the Petitioner was appointed by way of a Court Order, as Provisional Liquidator for Konkola Copper Mines Plc ("**KCM**").
- 2.2 In discharging his duties as provisional Liquidator, the Petitioner allegedly engaged in various criminal activities which have been a subject of investigation by the Anti -Money Laundering Investigations Unit of the Drug Enforcement Commission ("**DEC**"). The Petitioner has since been indicted, appeared in court, taken plea and two separate trials have commenced before the subordinate court in respect to these allegations.
- 2.3 The Petitioner was later granted immunity from prosecution by the State in so far as matters relating to his dealing with KCM are concerned, which was executed between the National

Prosecutions Authority as represented by the Director of Public Prosecution ('the DPP') and the Petitioner (herein after referred to as the 'Immunity Agreement') at Lusaka, in the Lusaka District of the Lusaka Province of the Republic of Zambia on the 22nd March, 2022. Pursuant to the immunity agreement aforesaid, the DPP on 5th April, 2022, discontinued the matters at the subordinate court before Honourable Felix Kaoma and Honourable Jennipher Bwalya by entering a *nolle prosequi* in respect of those matters.

- 2.4 However, on 7th April, 2022 the 3rd Respondent acting through the 2nd Respondent as Senior Investigations Officer, proceeded to re-arrest the Petitioner on the same charges that were subject of the *nolle Prosequi* entered in the proceedings before Honourable Felix Kaoma. The Petitioner was charged with the offences of theft and Money Laundering of K4.4 million belonging to KCM (In provisional Liquidation) and being found in possession of property suspected to be proceeds of crime.
- 2.5 It is against this backdrop that the Petitioner decided to seek recourse from this court, alleging constitutional breaches as against the Respondents. On 8th April, 2022 the Petitioner was arraigned before Honourable Sanford Ngobola, for the offence of being found in possession of property reasonably suspected to be proceeds of crime, contrary to section 71 of the Forfeiture of Proceeds of crimes Act.

3.0 APPLICATION TO STAY CRIMINAL PROCEEDINGS PENDING HEARING OF THE PETITION

3.1 The application to stay criminal proceedings pending the hearing of the petition was made by way of summons accompanied by an affidavit and skeleton arguments all dated 26th April, 2022.

3.2 The affidavit in support was sworn by **Mr. Milingo Lungu**, the Petitioner herein who deposed that on 21st May, 2019 he was appointed as Provisional Liquidator for KCM Plc with the following duties:

- i. Carry on the business so far as is necessary for beneficial winding up;
- ii. Make any compromises or arrangements with creditors;
- iii. Make any agreements on all questions relating to or affecting the company or its assets;
- iv. Take possession custody and control of all the assets of the Respondent and Sale the real and personal property and things in action of the Respondent by Public tender or private contract;
- v. Execute in the name or on behalf of the Respondent all deeds, receipts and other documents and for that purpose use where necessary the company seal;
- vi. Appoint a legal practitioner or other agent to undertake any function which the liquidator is unable to perform personally. (a copy of the said Court Order was produced and marked ML1)

3.3 That by an agreement as read with the addendum, it was agreed with the 4th Respondent that the Petitioner shall be entitled to remuneration as follows:

(a)An advance against Commission equivalent to the salary of the Chief Executive Officer

(b)A Commission of 10% on all sales (a copy of the said agreement and addendum was produced and marked as exhibit “ML2”)

3.4 The Petitioner averred that he was later arrested and charged for the offence of theft of K4.4 million kwacha belonging to KCM (In Provisional liquidation), contrary to section 272 of the Penal Code Chapter 87 of the laws of Zambia and Money laundering of the said K4.4 million, contrary to section 7 of the Prohibition and Prevention of Money Laundering Act No. 14 of 2001. On 26th October, 2021 the Petitioner was arraigned and took plea of not guilty to the said offences, trial commenced and six prosecution witnesses were called before Honourable Felix Kaoma at the Lusaka subordinate court

3.5 That the Petitioner was further arrested and charged for the offence of theft of K17.25 Million belonging to KCM (Provisional Liquidation) contrary to section 272 of the Penal Code and Money Laundering of the said 17.25 million contrary to section 7 of the Prohibition and Prevention of Money Laundering Act. On 7th March, 2022 the Petitioner was arraigned and took plea of not guilty to the said offences, trial commenced and two prosecution witnesses were called before Honourable Jennipher Bwalya at the Lusaka subordinate court.

- 3.6 That by a letter dated 9th March, 2022, the 4th Respondent purported to suspend the Petitioner from the conduct of his duties as Provisional Liquidator pending an enquiry into the purported complaint made by ZCCM-IH, concerning the performance of his duties, to which he objected to in a letter dated 11th March, 2022 on grounds that the 4th Respondent did not possess any powers to suspend him. Following the objection, an impasse ensued on account that no payment by KCM (In Provisional Liquidation) could be honored by any bank on account that the 4th Respondent had no authority to transact for and on behalf of the said KCM(In Provisional Liquidation).
- 3.7 That in order to resolve the impasse, the Petitioner was invited to the office of the Solicitor General, in the company of his Legal Representative Mr. Lusenga Mulongoti, to explore the settlement of the dispute over control of KCM (In Provisional Liquidation). That present in the meeting were the Petitioner, Mr Mulongoti, the Solicitor General-Mr. Marshall Muchende SC and the Principal Private Secretary to his Excellency the President and that it was agreed in the said meeting that;
- i. The Petitioner immediately resigns his position as Provisional Liquidator;
 - ii. That an assessment of his fees be undertaken by an independent auditor with the participation of the Petitioner;

- iii. That the inquiry into the purported complaint by ZCCM -IH commenced by the 4th Respondent be discontinued;
- iv. That the state shall support any decision by the DPP to drop charges and confer immunity for acts done in the performance of the petitioner's duties as Provisional Liquidator

3.8 The said terms agreed in the meeting were reduced into two agreements namely the '**Consent Settlement Agreement**' dated 17th March, 2022 and made between the Petitioner and the 4th Respondent and the '**Immunity Agreement**' dated 22nd March, 2022 made between the petitioner and the DPP.

3.9 That pursuant to the Consent settlement Agreement aforesaid, the Petitioner resigned as Provisional Liquidator of KCM (In Provisional Liquidation) on 17th March, 2022. Further, that pursuant to the Immunity Agreement, the DPP on 5th April, 2022 discontinued the matters before the subordinate courts by entering a *nolle prosequi* in respect of the said matters.

3.10 That on 6th April, 2022 the Petitioner received a call out from the 3rd Respondent herein to appear before the Anti-Money Laundering Unit on the same day at 15:00hrs, however, that due to the short notice, Mr. Sakwiba Sikota SC, on behalf of the Petitioner requested that the petitioner be allowed to make his appearance the following day 7th April, 2022. Upon attendance at the 3rd Respondent's

Office, the 3rd Respondent acting through the 2nd Respondent, a Senior Investigations Officer in the employ of the 3rd Respondent proceeded to arrest the Petitioner on the same charges that were subject of the *Nolle Prosequi* entered in the proceedings before Honourable Kaoma and in addition, raised a further charge that the K4.4 million was used to acquire two properties in Mass Media and Sunningdale residential areas and the same were seized.

- 3.11 That on 8th April, 2022 the Petitioner was arraigned at the subordinate court before Honourable Sanford Ngobola for the offence of being found in possession of property reasonably suspected to be proceeds of crime contrary to section 71 of the Forfeiture of Proceeds of crimes Act.
- 3.12 The petitioner has contended that the proceedings before Honourable Ngobola relate to the conduct of his duties as Provisional liquidator for KCM (provisional Liquidation) on the premise that the warn and caution statement alleged that the property which is subject of the proceedings was obtained using funds allegedly stolen from KCM (In provisional Liquidation). That the DPP having agreed not to prosecute him in relation to any matters arising out of the Petitioner's conduct as Provisional Liquidator, the arrest occasioned on 7th April, 2022 by the 2nd Respondent, his arraignment before the subordinate courts on 8th April 2022 and the threats by the 2nd and 3rd Respondent of further arrests and arraignments is an abuse of the criminal process, oppressive and vexatious and is likely to bring the

administrative justice into disrepute. And that the activities complained of constitute a breach of the binding immunity agreement between the Petitioner and the DPP.

- 3.13 The Petitioner stated that the petition before this Court enjoys good prospects of success which shall be rendered nugatory or an academic exercise, if the criminal proceedings are not stayed.
- 3.14 In the Petitioner's arguments in support of the application, it was contended that the issue for determination is: *whether criminal proceedings may be instituted in breach of an unconditional agreement or promise not to prosecute.*
- 3.15 In addressing the above question, it was contended that where a prosecutor makes an unconditional promise of non-prosecution, the principle of fairness that underpines the due process of law, demands that the promise be enforced and that breach of such a promise, is an abuse of process. As such, that the conduct of the 1st, 2nd and 3rd respondent is ultra vires Articles 173(1)(a)(g) and 180(7) of the Constitution as amended by Act No. 2 of 2016 (the Constitution), which require public officers and constitutional office holders to exercise integrity, fairness, professional and accountable in their actions.
- 3.16 In buttressing the above point, reliance was placed on Zambian and foreign authorities namely: **Kambarange Kaunda v The People**¹, **R. Croydon Justices ex parte Dean**², **R. v Bloomfield**³ and **R. v Abu Hamza**⁴ that support the position that a prosecution in breach of an

unconditional promise not to prosecute amounts to an abuse of criminal proceedings. Further, that in the case of **Chu Piu Wing v Attorney General**⁵, it was held that:

“There is clear public interest to be observed in holding officials of the state to promises made by them in full understanding of what is entailed by the bargain.”

3.17 That in the present case, the petitioner entered into an agreement with the DPP, following representations and undertakings made by various state agents, to the effect that once he resigns and submits himself to an audit, then the charges against him would be dropped and an indemnity granted. That the agreement was made in the public interest and upon examining the strength of the cases against the Petitioner. Consequently, that the Petitioner held his end of the bargain by resigning as agreed, and the DPP held her end of the bargain as agreed by entering *nolle prosequis* in relation to the charges before the court.

3.18 In relation to the arrest of the Petitioner by the 2nd and 3rd Respondents on the 7th April, 2022 on the same or similar charges on which a *nolle prosequi* had been entered, and also the threats by the said 2nd and 3rd Respondent to continue with investigations into the Petitioner's conduct as Provisional Liquidator, it was the Petitioner's submission that whilst the 3rd Respondent has statutory powers to arrest and investigate, the said powers ought to be exercised judiciously as per the case of **Bob Shilling**

Zinka v The Attorney General⁶. That to use powers for any purposes other than the legitimate purpose is unreasonable, *malafide* and an abuse of power.

3.19 The petitioner went on to submit that the purpose of an investigation is to identify the offender, gather and secure credible and admissible evidence for purpose of criminal proceedings and that the purpose of an arrest is to secure the offender to attend criminal proceedings. That criminal proceedings are therefore the legitimate purpose of the powers of investigation and arrest. There having been a clear and unequivocal agreement not to prosecute, that the continued investigations and arrests in respect to the Petitioner's conduct as Provisional Liquidator serve no legitimate purpose.

3.20 In persuading this Court to grant the stay of proceedings, it was contended that as the Petitioner herein is seeking the remedies of certiorari and prohibition in relation to the decisions of the 1st, 2nd and 3rd Respondent to initiate or continue criminal proceedings, an application for stay was being sought to protect the efficacy of the proceedings in the event that the Petitioner is successful, adding that if the 1st, 2nd and 3rd Respondent were allowed to follow through the criminal proceedings and the proceedings completed before the conclusion of this matter, the matter herein would be rendered an academic exercise. Further, that the grant of the stay will prevent multiplicity of actions which are likely to bring the administration of justice into

disrepute. In addition, that as the petition herein alleges constitutional breach, the criminal proceedings subject of the petition ought to be stayed as is the case with proceedings before the subordinate court, the basis that this Court has a final say on constitutional matters.

3.21 The Petitioner urged me to grant the interim relief sought pursuant to Order 10 rule 2 of the CCR, to prevent the continued abuse of constitutional powers by the Respondents.

3.22 **1ST, 2ND AND 3RD RESPONDENT'S OPPOSITION TO AN APPLICATION FOR STAY**

3.23 The 1st, 2nd and 3rd Respondents, opposed the application for stay by filing an affidavit in opposition and skeleton arguments on 3rd May, 2022.

3.24 In the said affidavit in opposition sworn by Mr. Mulilo Dimas Kabesha, SC, as Attorney General for the Republic of Zambia, the 1st, 2nd and 3rd Respondents averred in response as follows:

3.25 That the issues in respect to the matters before Honourable Felix Kaoma and Honourable Jennipher Bwalya were currently on-going criminal proceedings against the Petitioner to which the Petitioner has been charged and arraigned, before the courts of law. As such, that the deponent was restrained from delving into the merits and demerits of the said allegations.

- 3.26 It was further averred that the office of the Solicitor General did amicably engage the Petitioner for purposes of the Petitioner relinquishing his position as Provisional Liquidator for KCM (in Liquidation). That the negotiations were premised on the civil matters affecting the KCM (In liquidation) operations following the serious criminal allegations against the Petitioner and to avert the imminent catastrophe of the mine flooding and workers going for months on-end without their salaries, following the suspension of the Petitioner as Provisional Liquidator, by the 4th Respondent. That the said negotiations culminated into an unconditional resignation of the Petitioner subject only to the conditions of the 4th Respondent as contained in the Consent Settlement Agreement signed between the Official Receiver and the Petitioner, requiring the Petitioner to cooperate with the forensic auditors and transferring his powers over the bank accounts of KCM to the 4th Respondent.
- 3.27 That there was neither mention of immunity, interference with the powers of the Director of Public Prosecutions whatsoever in the said Consent Settlement Agreement nor was there such a condition in the resignation letter of the Petitioner as Provisional Liquidator for KCM (In Liquidation) of 17th March, 2022. Additionally, that the Petitioner's resignation as Provisional Liquidator for KCM (In Liquidation) was done pursuant to the Consent

Settlement Order whose terms and conditions did not include the granting of immunity to the Petitioner.

3.28 The 1st, 2nd and 3rd Respondents stated that the purported immunity agreement dated 22nd March, 2022 and its constituent terms and conditions is against public interest and abuse of the court process and therefore illegal, unconstitutional and void and could not be the basis for the DPP entering a *nolle prosequi* as alleged. In addition, that the Petitioner's petition has no good prospects of success to warrant a stay of on-going criminal investigations or criminal proceedings as the DPP's functions are limited to prosecutions only and has no power to stop the investigative wings from arresting or re-arresting any offender and that civil proceedings cannot be used to arrest criminal investigations or criminal proceedings.

3.29 In their skeleton arguments, the 1st, 2nd and 3rd Respondents sought determination of the question:

Whether or not civil proceedings can be used to arrest criminal proceedings or criminal investigations and whether this court has jurisdiction to do so

3.30 In addressing this question, it was submitted that it is a settled principle of law in this jurisdiction that civil proceedings cannot be used to arrest criminal investigations. The 1st, 2nd and 3rd Respondents were fortified in their submission by the case of **C & S**

Investments Limited Ace Car Hire Limited, Sunday Maluba v The Attorney General⁷ and the case of **Rajan Lekraj Mahtani and John Sangwa v The People⁸** to the effect that civil proceedings cannot be used to arrest criminal investigations and that criminal investigations can only be arrested on cogent reasons.

- 3.31 That in *casu*, there are no cogent reasons to warrant arresting criminal investigations as the purported immunity agreement is void.
- 3.32 Premised on the above, it was submitted that this Court has no jurisdiction to grant an order staying criminal investigations, as doing so will jeopardize the criminal justice system.
- 3.33 With regard to the question of jurisdiction, it was submitted that this Court is devoid of jurisdiction to arrest criminal proceedings. In support of this preposition, reference was made to the provisions of Article 128(1) of the Constitution as regards the jurisdiction of this Court.
- 3.34 It was submitted that jurisdiction is paramount and must be decided before any other issue as guided by the Supreme Court in the case of **JCN Holdings Limited v Development bank Zambia⁹**. Further, that in the case of **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited¹⁰** it was guided that;

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of

*proceedings pending other evidence. A court of law
downs its tools in respect of the matter before it the
moment it holds the opinion that it is without
jurisdiction”.*

3.35 In sum, it was argued that having established that civil proceedings cannot be used to halt criminal investigations, the net effect is that the Petitioner's application to stay criminal proceedings, should be dismissed for want of jurisdiction.

3.36 **4TH RESPONDENT'S OPPOSITION TO AN ORDER FOR
STAY**

3.37 The 4th Respondent in opposing the application for stay of criminal proceedings, filed an affidavit in opposition on 4th May, 2022 which was sworn by Chibesa Kankasa Maimbo, as Deputy Administrator General and Official Receiver. The 4th Respondent admitted in part the assertions by the Petitioner to the effect that as KCM (In Provisional Liquidation) did not have a committee of inspection, the Official receiver was mandated by law to step in. The 4th Respondent also admitted the contents of the Petition in so far as the signing of the Consent Agreement is concerned. In refuting the rest of the assertions, it was stated that it was not in the mandate of the 4th Respondent to arrest or prosecute the Petitioner.

4.0 ANALYSIS AND DETERMINATION

- 4.1 I have carefully considered the application before me, the skeleton arguments and the authorities cited by the parties together with the affidavit evidence on record.
- 4.2 It is evident from the submissions by counsel for the parties herein that in their efforts to each establish a case for their representative clients, counsel attempted to delve into matters that are best suited for argument at the hearing of the substantive constitutional petition. The case law cited by the Petitioner's counsel on what amounts to an abuse of process are equally more applicable to the substantive petition than to the application before me. This is not encouraged. As was held by **Lord Diplock** in **American Cyanamid Co v Ethicon Ltd**¹¹ that:

"It is not the courts function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the status of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. These are matters to be dealt with at the trial."

- 4.3 This being an interlocutory application, all this Court is concerned with at this stage is whether or not the Petitioner has made out a case for a stay of criminal proceedings in the subordinate court. That said the issue for determination as I see it is as follows:

Whether or not the Constitutional Court has jurisdiction to order a stay of criminal proceedings pending determination of a petition for constitutional breaches.

4.4 The application for stay was anchored on the provisions of Order 10 rule 2 of the CCR which reads as follows:

(1) (Despite any provision to the contrary, the Court may hear and determine an application for an interim order.

(2) An application under subrule (1) may be made *ex parte* and the Court may grant such order *ex parte* on such terms as the court may consider reasonable.

4.5 It is clear that this Court has power under the above order to hear and determine an application for an interim order. At the conclusion of which the Court may or may not grant the interim relief sought. The remedies that this Court may grant whether interim or final are set out under **Order IV of the CCR** and include; *declaration, mandamus, certiorari, prohibition, restitution, damages and any other remedy that the court may consider just.*

4.6 In the Kenyan case of **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others**¹², the Court particularized the range of interlocutory/interim orders that the courts may grant as follows:

The domain of interlocutory Orders is somewhat ruffled, being characterized by injunctions, Orders of stay, conservatory Orders and

others.....

.....*The concept of 'stay Orders' is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light."*

- 4.7 The 1st, 2nd and 3rd Respondents have raised the issue of lack of jurisdiction of this Court in dealing with the application before me. In addressing the issue of this Court's jurisdiction, I am guided by the guidance given by the court in the Kenyan case of **Owners of Motor Vessel "Lillian S" v Caltex Oil**¹⁰ earlier cited.
- 4.8 Further, in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank and 2 Others**¹³, the court stated as follows regarding a court's jurisdiction:
- "A court's jurisdiction flows from the Constitution or Legislation or both. Thus a court of law can only can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred by law"*
- 4.9 The issue of jurisdiction is therefore very paramount and it is imperative for the Court to ascertain its jurisdiction in determining issues brought before it.
- 4.10 In establishing the Court's jurisdiction in this matter, the starting point is obviously Article 1(1) of the

Constitution, which states that the Constitution is the Supreme law of the land and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.

4.11 Article 1(5) of the Constitution further provides that a matter relating to this Constitution shall be heard and determined by the Constitutional Court.

4.12 Article 128(1) of the Constitution is the principle Article that gives this Court its jurisdiction and provides as follows:

Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear—

- (a) a matter relating to the interpretation of this Constitution;**
- (b) a matter relating to a violation or contravention of this Constitution;**
- (c) a matter relating to the President, Vice-President or an election of a President;**
- (d) appeals relating to election of Members of Parliament and councillors; and**
- (e) whether or not a matter falls within the jurisdiction of the Constitutional Court.**

4.13 Further, Article 128(2) of the Constitution provides that:

Subject to Article 28 (2), where a question relating to this Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court.

4.14 Article 128(3) of the Constitution provides that:

Subject to Article 28, a person who alleges that-

- (a) an Act of Parliament or statutory instrument;**

- (b) 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.

- 4.15 It is clear from the above provisions, that the Constitution clothes this Court with jurisdiction to hear and determine any matter alleging breach and/or violation of the Constitution or any question relating to the Constitution. Therefore, any person that alleges that action, measure or decision taken under law, an act, omission, measure or decision by a person or an authority contravenes this Constitution, may petition the Constitutional Court for redress. This is what we held in the case of **Bizwayo Nkunika v Lawrence Nyirenda and Another**¹⁴.
- 4.16 Article 128(2) of the Constitution, clearly states that were a constitutional question arises in any court, the person presiding before that court is mandated to refer that constitutional question to this court for determination.
- 4.17 The net effect of the said constitutional reference under Article 128(2) of the Constitution, is that the proceedings before the trial court be it civil or criminal, are stayed pending the determination of the constitutional question before the Constitutional Court. Where a reference is not made, a party to the proceedings is at liberty to approach this Court and ask for determination of constitutional issues in question.

- 4.18 It is therefore my considered view that where a constitutional issue arises in any criminal proceedings, the constitutional issues raised take precedence over the criminal proceedings, as guided by Article 128(2) of the Constitution. In such instances, the criminal proceedings ought to be stayed pending determination of the constitutional questions and issues.
- 4.19 Premised on the above, I find that this Court has by virtue of Article 128(2) of the Constitution, the requisite jurisdiction to determine an application for stay of criminal proceedings pending the determination of constitutional questions and or issues before it.
- 4.21 The question is whether or not I should grant the interim Order of stay of criminal proceedings, pending determination of constitutional breaches raised by the Petitioner in this cause.
- 4.22 It is a known fact that criminal prosecutions can be stayed by an interim order and the learned author Chris Corns in his book titled 'Judicial Termination of Defective Criminal Prosecutions – Stay of Applications' notes that the grounds for staying a prosecution are categorized as follows:-

(i) When the continuation of the proceedings would constitute an abuse of the process;

(ii) When the resultant trial would be unfair to the accused; and

(iii) When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.

4.23 Without attempting to delve into the merits of the main matter, the Petitioner has in the instant case, challenged the constitutionality of his re-arrest on 7th April, 2022 by the 2nd and 3rd Respondents and his subsequent charges and arraignment before the subordinate court following the execution of an immunity agreement between himself and the Government of the Republic of Zambia as represented by the DPP. The Petitioner has particularly alleged the following:

- i. That the continuous disregard of the bargain agreements and Petitioner's rights, the 1st, 2nd and 3rd Respondent on 7th April 2022 conspired to re-arrest and prosecute the Petitioner on facts founded on the performance of his duties as Provisional Liquidator of Konkola Copper Mines Plc (In Provisional Liquidation)
- ii. In breach of the bargain, agreements and Petitioner's rights, the 2nd and 3rd Respondents have continued with investigations and threatened the Petitioner with further arrests and re-arrests on facts founded on the performance of his duties as Provisional Liquidator KCM (In provisional Liquidation)
- iii. That the Respondents have constitutional duty to maintain high levels of intergrity, professionalism

- and fairness in the conduct of their duties pursuant to article 173 and 216(c) of the Constitution
- iv. That the 2nd and 3rd Respondents' actions and threatened action are bringing the administration of justice into disrepute and are ultra vires Articles 173(1)(a),(c) and(g), 180(7) as well as 216 (c) of the Constitution
 - v. That the DPP having undertaken and agreed not to prosecute matters arising out of the Petitioner's acts and omission in the performance of his duties as Provisional Liquidator for KCM (In Provisional Liquidator), the continued investigations, arrests and re-arrests and prosecution concerning matters connected to KCM PLC(In Provisional Liquidation serve no legitimate purpose and are mala fides, oppressive and an abuse of criminal proceedings in breach of and ultra vires Article 180(7) and 216(c) of the Constitution of Zambia
 - vi. That the DPP having undertaken and agreed not to prosecute matters arising out of the Petitioner's acts and omission in the performance of his duties as Provisional Liquidator for KCM(In Liquidation), the continued custody, possession and restriction of books, documents , bank accounts and properties of the Petitioner serve no legitimate purpose and are mala fides, oppressive and an abuse of criminal proceedings in breach of and ultra vires Articles 170(1),180(7) and 216(c) of the Constitution of Zambia.

4.24 It is apparent that the petition herein raises constitutional issues and questions that require determination by the

Constitutional Court. It is therefore, my considered view that allowing the criminal proceedings to continue will be prejudicial to the Petitioner as the constitutional issues raised ought first to be determined by the Constitutional Court.

- 4.25 I take cognizant of the Supreme Court judgment in the case of **C & S Investments Limited Ace Car Hire Limited, Sunday Maluba v The Attorney General**⁷ to the effect that civil proceedings cannot be used to arrest criminal investigations and that criminal investigations can only be arrested on cogent reasons.
- 4.26 I agree with this reasoning as it clearly stated that criminal investigations can only be arrested through civil proceedings on cogent reasons. There is therefore, no blanket direction that criminal investigations cannot be arrested by civil proceedings in this jurisdiction. If there are cogent reasons like violation of the Constitution during criminal investigations, the Constitution empowers courts to intervene and halt those breaches.
- 4.27 Furthermore, the judgment in the **C & S Investments Limited Ace Car Hire Limited**⁷ case was in fact addressing “**criminal investigations**” and not “**criminal proceedings**”. Criminal proceedings in this instant denote where a suspected has been investigated, arrested and arraigned before a court to answer criminal charges as is the case with the Petitioner before Court. The record before me is that the Petitioner is already

appearing before the subordinate court following his arraignment on 8th April, 2022. It is these proceedings that he seeks this Courts' intervention. This Court has the mandate under Article 128 (2) of the Constitution to have proceedings in any court whether civil or criminal to be stayed pending determination of constitutional issues raised.

4.28 This issue was also equally addressed in the in the Ugandan case of **Charles Onyango Obbo v the Attorney**¹³ General where the Supreme Court opined as follows:

“Where a court refers a question that arises in proceedings before it, it must await the decision of the question by the Constitutional Court, and “dispose of the case in accordance with that decision”. The rationale for these provisions is obvious. The Constitution is the basic law from which all laws and actions derive validity. Where the constitutional validity of any law or action awaits determination by the Constitutional Court, it is important to expedite the determination in order to avoid applying a law or taking action whose validity is questionable.

4.29 Premised on the foregoing, I hereby grant the Petitioner's application for stay of criminal proceedings before the subordinate court so as to preserve the integrity of the proceedings in this Court where allegations of the breach of the Constitution have been raised. I am aided in this regards by the words of the learned author Anthony

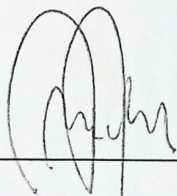
DiSarro, in his article: A Farewell to Harms: Presuming Irreparable Injury in Constitutional Litigation, where he writes as follows:

“A court should be free to preserve the status quo so that it can adjudicate constitutional claims in an orderly fashion. It should not permit a plaintiff’s claim to become moot by refusing to enjoin unlawful action before the claim is determined.”

4.31 This ruling therefore, denotes that no party, interested individual or entity is to take action in the criminal proceedings currently before the subordinate court involving the Petitioner until this Court determines the petition on constitutional issues raised before it.

4.30 I order that each party will bear their own costs incidental to this application.

Delivered at Lusaka this 19th day of May, 2022.

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a series of loops and a final flourish.

M. Musaluke
Constitutional Court Judge