IN THE CONSTITUTIONAL COURT HOLDEN AT LUSAKA (CONSTITUTIONAL JURISDICTION) **2022/CCZ/001**

IN THE MATTER OF: **ARTICLE 1 (5) AS READ TOGETHER WITH ARTICLE 128 (1), & (3) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 OF THE LAWS OF ZAMBIA. THE JURISDICTION OF THE CONSTITUTIONAL COURT**

IN THE MATTER OF: **ARTICLE 1 (1), (2), (3) AND (4) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 OF THE LAWS OF ZAMBIA. THE SUPREMACY OF THE CONSTITUTION, ITS CONTRAVENTION IS ILLEGAL AND THAT ALL PERSONS IN ZAMBIA, STATE ORGANS AND STATE INSTITUTION ARE BOUND BY IT**

IN THE MATTER OF: **ARTICLE 2 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO.2 OF 2016 OF THE LAWS OF ZAMBIA. THE RIGHT AND DUTY TO DEFEND THE CONSTITUTION FROM BEING OVERTHROWN, SUSPENDED OR ILLEGALLY ABROGATED**

IN THE MATTER OF: **ARTICLES 124, 127, 130 AND 133 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO.2 2016 OF AS READ TOGETHER WITH SECTIONS 2, 3, 4 AND 5 SUPERIOR COURTS (NUMBER OF JUDGES) ACT NO. 9 OF 2016 OF THE LAWS OF ZAMBIA. THE ESTABLISHMENT OF SUPERIOR COURTS, MINIMUM AND MAXIMUM NUMBER OF JUDGES FOR EACH COURT RESPECTIVELY**

IN THE MATTER OF: **ARTICLES 8 AND 9 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO.2 OF 2016 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: **ARTICLE 220 (2) (B) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO.2 OF 2016 OF THE LAWS OF ZAMBIA**

BETWEEN:

INSTITUTE OF LAW, POLICY RESEARCH	**PETITIONER**
AND HUMAN RIGHTS LTD	
AND	
THE ATTORNEY GENERAL	**RESPONDENT**

CORAM: Munalula, Mulenga, Musaluke, Chisunka and Mulongoti, JJC on 15th June, 2022 and on 21st October, 2022

For the Petitioner: **Mr. M. Batakathi, Muyatwa Legal Practitioners**
Mr. J. Chirwa, Ferd Jere and Company
Mr. B. Mwelwa, Linus Eyaa and Partners

For the Respondent: **Mr. M. Muchende, SC, Solicitor General**
Mr. S. Mujuda, Principal State Advocate
Mr. K. Chifulo, State Advocate

JUDGMENT

Mulenga, JC delivered the Judgment of the Court.

Cases cited:

1. **Dipak Patel v Minister of Finance and Attorney General (2020/CCZ/005**
2. **South Dakota v North Carolina 192 [1904] 192 V.S. 286**
3. **Faustine Kabwe and Aaron Chungu v Justice Ernest Sakala and 2 others SCZ Judgment No. 25 of 2012**
4. **Samuel Miyanda v Raymond Handahu SCZ Judgment No. 5 of 1994**
5. **Gift Luyako Chilombo v Biton Manje Hamaleke (2016/CCZ/ A004)**
6. **Nkhata and Four Others v The Attorney General (1966) Z.R.124**

Legislation referred to:

1. **The Constitution of Zambia as amended by the Constitution of Zambia Act No.2 of 2016**
2. **The Superior Courts (Number of Judges) Act No. 9 of 2016**

Work referred to:

S.G.G. Edgar, Craies on Statute Law, Seventh Edition, 1971, Sweet and Maxwell

Introduction

(1) At the time of hearing this matter, we sat with Hon. Mr. Justice M.K. Chisunka, but at time of delivering this Judgment he was indisposed. This is therefore a majority Judgment.

(2) The Petitioner, Institute of Law, Policy Research and Human Rights Ltd, filed the Petition on 12th January, 2022 against the Attorney General alleging that the Judicial Service Commission and the President have contravened the constitutional edicts as the current number of judges in the superior courts falls below the minimum set by the Constitution. The Petitioner is thus calling upon this Court to determine the constitutionality of the incongruence that currently exists between the constitutional provisions that provide for a particular number of judges in superior courts, and the reality on the ground.

(3) In this matter, it is common cause that the number of judges in the Supreme Court, Constitutional Court, Court of Appeal and High Court are all currently below stipulated numbers in the Constitution and the Superior Courts (Number of Judges) Act No. 9 of 2016. Further, it is not in dispute

that the appointment of judges is an elaborate process provided in Article 140 which requires the conjunctive role of the Judicial Service Commission, the President and the National Assembly. The Judicial Service Commission recommends individuals for appointment as judges of the superior courts and the President appoints the judges subject to ratification by the National Assembly.

Petitioner's Case

(4) The Petition outlines that while the Constitution stipulates the minimum number of judges as thirteen (13) for the Supreme Court and Constitutional Court, the Superior Courts (Number of Judges) Act No. 9 of 2016 retains the same number as the maximum number of judges for each of the two courts. Further, that in the case of the Court of Appeal and the High Court, the Constitution does not stipulate the minimum number of judges while the Superior Courts (Number of Judges) Act prescribes the maximum number of nineteen (19) and sixty (60), respectively.

(5) The Petition also states that there are currently ten (10) judges in the Supreme Court, eight (08) in the Constitutional Court, thirteen (13) in the Court of Appeal and fifty-two (52) in the High Court. That in the light of the number of judges in the superior courts being below the prescribed

number, the Judicial Service Commission and the President have contravened Articles 124, 127, 130 and 133 of the Constitution as read with sections 2,3,4 and 5 of the Superior Courts (Number of Judges) Act.

(6) The Petitioner concludes that the inability, failure and omission by the Judicial Service Commission to recommend and consequently, the President to appoint, is a contravention of the Constitution.

(7) Based on this, the Petitioner seeks the following reliefs:

1. **An order that the inability, failure and/or omission by the Judicial Service Commission to identify and recommend those who are qualified to be appointed as judges of the Supreme Court, Constitutional Court, Court of Appeal and High Court is unconstitutional and therefore unlawful;**
2. **An order of mandamus compelling the Judicial Service Commission to immediately identify and recommend those who are qualified to be appointed as judges of the Supreme Court, Constitutional Court, Court of Appeal and High Court, and the President of the Republic of Zambia through the Respondent to fill all vacancies in Superior Courts in order to comply with the Constitution of Zambia and the Superior Courts (Number of Judges) Act No. 9 of 2016.**
3. **An order that costs for the cause be borne by the Respondent; and**
4. **Any other reliefs as the Court may deem fit.**

(8) In the skeleton arguments in support of the Petition, the Petitioner argues that Article 91 (3) of the Constitution requires the Republican President, in the exercise of executive authority, to respect, uphold and safeguard the Constitution and the rule of law and that by virtue of Article 1 (2) and (3), an act or omission that contravenes the Constitution is illegal. It is the Petitioner's contention that in light of the provision for 13

judges of the Supreme and Constitutional Courts, 19 judges for the Court of Appeal and 60 judges for the High Court, the intention of the framers of the Constitution was that the same be the minimum number of judges in each superior court. Setting out the specific applicable constitutional provision for each superior court and the corresponding provisions in the Superior Courts (Number of Judges) Act, the Petitioner posited that since the preserve to appoint judges rests solely with the President pursuant to Article 140 of the Constitution, based on the recommendation of the Judicial Service Commission, the failure to exercise this power is illegal and unconstitutional.

(9) At the hearing, the Petitioner's counsel, Mr. Mwelwa, stated that the thrust of the Petition was that the Respondent had failed to comply with the mandatory provisions of the Constitution and the Superior Courts (Number of Judges) Act and therefore breached the Constitution. Further, that there was no provision to the effect that the Respondent has to comply with the constitutional and statutory provisions when office spaces and finances were available. That the law requires that from 2016 and going forward, the number of judges in the superior courts should not be less than what is prescribed.

(10) Mr. Chirwa, co-counsel for the Petitioner, added that the statement by the Respondent in the affidavit in opposition, to the effect that there is no provision requiring that the number of judges should at all times be equal to what is stipulated and that there was need to have enough office space and funding before new judges can be appointed, in essence promoted the suspension of the Constitution. He submitted that had the framers of the Constitution intended that the availability of office space and funding should be the consideration, they would have so stated. Further, that had they intended that the appointments should be done progressively, they would have equally so stated as was the case in Article 120 (4) which provides for progressive devolution of some courts to the provinces and districts.

(11) Hence, that the sitting President, as well as his predecessor, continued to perpetuate the abrogation of the Constitution, which must be stopped. Furthermore, that if the Judicial Service Commission had not made recommendations, it should be compelled to do so or if the Judicial Service Commission recommended but the President has not appointed then he should be compelled to do so.

(12) In response to the question from the Court on whether evidence had been tendered as to whether or not recommendations were made, Mr.

Batakathi, co-counsel for the Petitioner, stated that the fact that appointments have not been made to fill up the courts is evidence of failure to act by the President and the Judicial Service Commission and therefore a contravention in terms of Article 1 (2) of the Constitution. It was counsel's further submission that in line with this Court's previous decisions that the literal rule of interpretation should be employed where no absurdity arises, this should be used in this case as the constitutional and statutory provisions are clear and plain using the word 'shall' which is mandatory as regards the number of judges. He concluded that should this Court hold that the number of judges in the superior courts has not been met since the constitutional amendment in 2016, it should direct that the Judicial Service Commission and the President should comply with the provisions of the Constitution.

Respondent's position

(13) The Respondent in its Answer admitted that the Constitution as read with the Superior Courts (Number of Judges) Act does provide for a specific number of judges of the superior courts and that the current number of judges fell below what was prescribed. However, it was stated that there was no failure or neglect on the part of the Judicial Service Commission to perform its constitutional duty. That the appointment of

judges is a progressive prescription or function and is subject to a number of administrative considerations such as office space, funding and recurring vacancies on account of resignations, retirements and deaths. It was added that there was no timeframe provided for making the appointments and that Article 274 requires that the function should be performed as occasion requires.

(14) The Respondent averred that Articles 126, 129,132 and 135 that speak to the minimum number of judges for sittings and what constitutes the full bench of appellate courts are of more significance as they are couched in mandatory terms and are tied to the functionality of the superior courts unlike the provisions on the composition of superior courts which the Petitioner invokes in this Petition.

(15) The Respondent, in the affidavit in opposition added that in the execution of its constitutional mandate, the Judicial Service Commission always identifies and makes recommendations for appointment of suitable candidates as was the case as recent as 2021 when twelve (12) judges were appointed. Further, that the Petitioner will be put to strict proof of the allegations of contravention of the Constitution.

(16) In the skeleton arguments, the Respondent urged us to read Articles 124, 127, 130 and 133 that touch on composition of the courts in the light

of the provisions of Articles 126, 129, 132 and 135, respectively relating to the number of judges that constitute a court. That this is in keeping with this Court's guidance in **Dipak Patel v Minister of Finance and Attorney General**[1] that all relevant provisions bearing on a subject matter must not be isolated but must be considered as a whole in order to give effect to the objective of the Constitution.

(17) The Respondent further submitted that Articles, 124, 127, 130 and 133 do not indicate the period within which the Judicial Service Commission and the President ought to act so as to justify the Petitioner's stance that there has been a contravention of the Constitution. This is more so that the appointment of judges requires the meeting of various factors which make it impractical to consistently keep to the requisite maximum number of judges for each superior court. Further, Articles 259, 264, 265 and 267 (3) (a) of the Constitution were cited in support of the factors to be considered.

(18) The Respondent urged us to interpret the relevant provisions of the Constitution and the Superior Courts (Number of Judges) Act as merely fixing the maximum number of judges required for the sake of certainty. The Respondent urged us to dismiss the Petition.

(19) In augmenting the Respondent's skeleton arguments, the learned Solicitor General, Mr. Muchende, SC submitted that the issue was whether the reliefs sought could be granted. That the first relief was for an order that the failure by the Judicial Service Commission to recommend persons for appointment was unconstitutional when it had not been proved that the Judicial Service Commission had failed to perform their duty. The second relief for an order of mandamus cannot stand for the same reason and further that there is also no proof that the Judicial Service Commission had made recommendations to the President on which he was to act as required by Article 140 of the Constitution. Hence, that the Petitioner needed to prove their case with facts.

(20) The Solicitor General's further submission was that in determining this matter, this Court should also consider the provisions of Article 116 (1) of the Constitution as read with the Ministers (Prescribed Number and Responsibilities) Act No. 26 of 2016 which demonstrates that in both cases there is no requirement that there should be the prescribed number of ministers or judges at all times. Further, that dynamics change and that even in the case of High Court Judges which were indicated as 52 in the Petition, the current number was 50 due to the removal of two judges.

That the practicality of vacancies being filled immediately they arise was doubtful to warrant such an order.

(21) With regard to the provisions brought for interpretation, Mr. Mujuda, the Principal State Advocate, submitted that reading Articles 124, 127, 130 and 133 together with other relevant provisions including Articles 129, 132 and 135 gives effect to the objective of the Constitution. That this principle and the literal rule are not mutually exclusive as they can be done simultaneously. The cases of **South Dakota v North Carolina**[2] and **Dipak Patel v The Minister of Finance and The Attorney General**[1] were cited in support.

(22) Mr. Mujuda reiterated that Articles 124, 127, 130 and 133 should not be read in isolation of Articles 126, 129, 132 and 135 as the intention was to prescribe the maximum number of judges and that currently all the superior courts were fully functional.

(23) Mr. Chifulo, the State Advocate, pressed the argument that all the relevant constitutional provisions should be read together, including Article 267 (3) (a) of the Constitution, in order to give effect to the objective of the Constitution.

Petitioner's Reply

(24) The Petitioner, in the skeleton arguments in reply, submitted that no legal provision or authority had been cited by the Respondent on the explanation regarding the intervening factors, such as office space and funding, involved in the appointment of judges. Rather, that the explanation communicates that the authorities involved in the appointment of judges will only adhere to constitutional provisions when it is convenient, and that this is against the rule of law.

(25) The Petitioner argued that accepting the explanation offered by the Respondent would amount to suspension of the Constitution and a contravention of Article 3 of the Constitution. That it is a further contravention of Article 265(1) which requires adequate funding for public offices to enable them effectively perform their functions.

(26) We were invited to adopt a plain reading of Articles 124, 127, 130 and 133 of the Constitution as read with sections 2, 3, 4 and 5 of the Superior Courts (Number of Judges) Act to the effect that the superior courts cannot have the number of judges less than the stipulated number, which is the minimum. That this intention is not only expressed in the Constitution but effected in the Superior Courts (Number of Judges) Act in mandatory language. By way of illustration, the provisions relating to

the Supreme Court being Article 124 and section 2 of the Superior Courts (Number of Judges) Act were discoursed.

(27) Citing the cases of **Faustine Kabwe and Aaron Chungu v Justice Ernest Sakala and 2 Others**[3] and **Samuel Miyanda v Raymond Handahu**[4] the Petitioner submitted that there is no need to resort to other interpretative principles as the plain and ordinary meaning of the words are unambiguous and the intention of the framers of the Constitution is clear that they intended to set a minimum number of judges to be appointed to all superior courts.

(28) Responding to the argument that the Constitution does not lay down the timeframe within which the President and the Judicial Service Commission are supposed to ensure that the number of judges in superior courts keep to the stipulated number, the Petitioner pointed out that the contravention of the Constitution in this respect has been going on since 2016 when the constitutional amendments came into effect in light of Article 1 (2) and (3) of the Constitution.

(29) Mr. Chirwa, in addressing the Respondent's argument that the reliefs sought could not be granted because no evidence had been tendered, submitted that this would be tantamount to asking this Court to abdicate its responsibility under Article 128 on the basis of technicalities. Counsel

contended that by virtue of section 13 (2) of the Constitutional Court Act No. 8 of 2016, this Court could on its own motion summon any witness including the Judicial Service Commission should the relief or prayer seem speculative.

(30) Addressing the Respondent's reference to the Ministers (Prescribed Number and Responsibilities) Act in relation to Article 116 which provides that the President shall not appoint more than 30 ministers, Mr. Chirwa argued that this is different from the issue at hand because the prescribed number of judges is in mandatory terms. In conclusion, he submitted that this Petition is about the composition of the courts and not whether there is a full bench, which is a procedural issue.

(31) Mr. Batakathi posited that Article 140 is couched in mandatory terms that the President shall appoint judges on recommendation by the Judicial Service Commission. Therefore, that the Respondent's argument amplifies the failure to comply with the mandatory provisions in that if it was the Respondent's position that the Judicial Service Commission made recommendations to the President, then the President has fallen afoul of the Constitution by not acting on it. Counsel reiterated that the mere fact that the courts are not constituted as per requirement is enough evidence that there has been a failure on the part of the appointing authorities.

(32) With regard to the submission that there is no set timeframe, counsel contended that the Petition is not about whether the courts can function or not but that there has been failure to comply with the mandatory provisions of the Constitution and the Superior Courts (Number of Judges) Act.

Determination

(33) We have duly considered the issues arising in this Petition and the positions taken by the parties. Key in this matter is the issue of interpretation of the constitutional provisions on the composition of superior courts and the appointment of judges. We have stated in a number of decisions that in interpreting constitutional and statutory provisions, the starting point is to consider the literal meaning of the words in the provisions and that where the literal interpretation would result in absurdity the purposive interpretation should be considered including the mischief that was intended to be addressed. This also requires the ascertaining of the objective or purpose of a provision. Further, that no provision should be read in isolation but in light of all the other provisions that have a bearing on the subject matter.

(34) The central issue is whether Articles 124, 127, 130 and 133 of the Constitution have been contravened by the Judicial Service Commission

and the President based on the fact that the prescribed number of judges of the superior courts has not been met. We will determine the issue by considering the following:

1. Whether the number of judges composing the superior courts as outlined in the Constitution and the Superior Courts (Number of Judges) Act are the minimum or maximum.
2. Whether the current composition of the superior courts, which is below the prescribed numbers, is a contravention of Articles 124, 127, 130 and 133 by the Judicial Service Commission and the President.

(35) The first issue is whether the numbers of judges comprising the superior courts as outlined in the Constitution and the Superior Courts (Number of Judges) Act are the minimum or maximum.

(36) The Petitioner went to great lengths to contend that Articles 124 and 127 of the Constitution set thirteen (13) as the minimum number of judges that should compose the Supreme and the Constitutional Courts. The argument that 13 is the minimum number was based on the fact that paragraph (c) in both articles refers to an alternative of having a higher number based on the prescription under an Act of Parliament. The

Respondent's position is that these are the current prescribed maximum numbers.

(37) Articles 124, 127, 130 and 133 provide as follows:

> **124. There is established the Supreme Court which consists of—**
> **(a) the Chief Justice;**
> **(b) the Deputy Chief Justice; and**
> **(c) eleven other judges or a higher number of judges, as prescribed.**
>
> **127. There is established the Constitutional Court which consists of—**
> **(a) the President of the Constitutional Court;**
> **(b) the Deputy President of the Constitutional Court; and**
> **(c) eleven other judges or a higher number of judges, as prescribed.**
>
> **130. There is established the Court of Appeal which consists of such number of judges as prescribed.**
>
> **133. (1) There is established the High Court which consists of—**
> **(a) the Chief Justice, as an *ex-officio* judge; and**
> **(b) such number of judges as prescribed.** (emphasis added)

(38) These constitutional provisions deal with the establishment and composition of the four superior courts. Articles 124 and 127 set the number of judges of the Supreme and Constitutional Courts as thirteen (13) and gives Parliament the latitude to prescribe a higher number as necessary in an Act of Parliament. Pursuant to these constitutional provisions the Superior Courts (Number of Judges) Act currently prescribes the maximum number of Judges for the Supreme and Constitutional Courts as thirteen (13).

(39) In discussing the rationale for the precursor to Article 124, the Report of the Technical Committee on the Drafting of the Constitution states in part at pages 459 and 460 that:

> **The Committee, however, observed that seven (7) other Judges provided in the current Constitution were not adequate for the future and, therefore resolved to increase the number to eleven (11).**
>
> **The Committee amended the marginal note to read "Establishment and Composition of Supreme Court." The Committee also amended paragraph (c) of the Article so that it reads "eleven other Judges or such number of judges as prescribed." The Committee observed that the amendment <u>was necessary in order to take into account future expansion of the Supreme Court without the need to amend the Constitution</u>. (emphasis added)**

(40) It is thus clear that what is provided for in Articles 124 and 127 is the maximum number of judges for the two apex courts that may be prescribed. The latitude that is provided, for a higher number than 13 to be prescribed as maximum, is for purposes of future expansion should the need arise. The framers of the Constitution were alive to the fact that it is easier to amend an Act of Parliament than the Constitution, hence the deliberate move in this regard.

(41) As regards the number of judges of the Court of Appeal and the High Court, Articles 130 and 133 do not stipulate the same but require that the number of judges for the Court of Appeal and the High Court should be provided for in an Act of Parliament in line with the definition of the word 'prescribed' in Article 266. Consequently, the Superior Courts (Number of

Judges) Act No. 9 of 2016 was enacted and currently provides for nineteen (19) Court of Appeal judges and sixty (60) High Court judges.

(42) Sections 2, 3, 4 and 5 of the Superior Courts (Number of Judges) Act provide as follows:

> **2. <u>There shall be</u> thirteen judges of the Supreme Court, including the Chief Justice and the Deputy Chief Justice.**
>
> **3. <u>There shall be</u> thirteen judges of the Constitutional Court, including the President and the Deputy President.**
>
> **4. <u>There shall be</u> nineteen judges of the Court of Appeal, including the Judge President and the Deputy Judge President.**
>
> **5. <u>There shall be</u> sixty judges of the High Court.**(emphasis added)

The phrase "there shall be" is essentially prescribing the composition of the courts. As regards the word "shall" we stated in the case of **Gift Luyako Chilombo v Biton Manje Hamaleke**[5] that:

> **In its ordinary usage, "shall" is a word of command and is normally given a compulsory meaning because it is intended to show obligation and is generally imperative or mandatory. It has the potential to exclude the idea of discretion and impose an obligation which would be enforceable particularly if it is in the public interest.**

(43) In this matter, this means that the prescribed numbers are the mandatory maximum. Whether this can be stretched to mean that it is compulsory to always have the maximum number of judges at all times, as posited by the Petitioner, is an issue that requires to be proved.

(44) The learned authors of <u>Craies on Statute Law</u> state at pages 260 to 262 that there is no universal rule on how to determine in what

circumstance or when mandatory enactments are to be considered directory or obligatory and therefore that the courts must consider the real intention and scope of the legislation. Further, that where an absolute enactment is contravened, the law would treat the thing done as invalid and void.

(45) In *casu*, can it be said that having the number of judges below the prescribed maximum would render the courts invalid or void? Our answer is no. It follows that while it is desirable to have the maximum number of judges for each court, where the numbers are below the maximum it does not translate into an illegality or contravention.

(46) The second issue for consideration is whether the current composition of the superior courts, which is below the prescribed numbers, amounts to a contravention of the Constitution by the Judicial Service Commission and the President.

(47) We note that the current numbers of judges in all the four superior courts are below the maximum numbers stipulated by the Constitution and the Superior Courts (Number of Judges) Act. With this undisputed factual basis, the Petitioner argues that this is a contravention of the Constitution on the part of the appointing authorities, being the Judicial Service Commission and the President. The Respondent counters by

highlighting the resource considerations that inform judicial appointments and more so that the Constitution has not set the timeframe within which the Judicial Service Commission and the President are supposed to appoint the judges. The Respondent further posited that the prescribed maximum composition has no impact on the current operation of the courts and on the available number of judges that constitute a full bench, in terms of the appellate courts. Furthermore, that the exigencies of life make it unrealistic for the respective courts to have the maximum prescribed number of judges at every given time.

(48) We note that the Petitioner has treated the composition of the four courts as one. However, as we have highlighted above, the Constitution only states the number of judges for the two apex courts, the Supreme Court and the Constitutional Court but with the requirement that a higher number may be prescribed in an Act of Parliament. The numbers for the Court of Appeal and the High Court are entirely left to be prescribed in an Act of Parliament. This was also the position prior to the 2016 constitutional amendments as the maximum number of judges comprising the Supreme Court and High Court were equally prescribed in an Act of Parliament, namely, the Supreme Court and High Court (Number of Judges) Act Chapter 26 of the Laws of Zambia. Therefore, the prescription

of the maximum numbers of judges for all the superior courts is as provided in the Superior Courts (Number of Judges) Act.

(49) In the case of the two apex courts, Articles 126 and 129 of the Constitution further contain mandatory provisions on the sittings of the courts and the number of judges that constitute a full bench. As regards the rationale for Article 126, it was stated by the Technical Committee on Drafting the Constitution that there was need to provide for the number of Judges to constitute a bench for sittings of the Supreme Court and accordingly, that a bench would comprise three (3) judges and a full bench would consist of not less than five (5) judges. The two articles are currently cast in similar terms. Further, section 4 of the Superior Courts (Number of Judges) Act has a provision on similar lines with regard to the Court of Appeal. It is on this basis that the Respondent argued that these are the minimum numbers required for the courts to be functional and that all the courts have judges above this mandatory minimum.

(50) That notwithstanding, the main issue is whether having the number of judges below the maximum prescribed contravenes the Constitution.

(51) Article 1(1) and (3) of the Constitution speaks to the supremacy of the Constitution and its binding nature on all persons in Zambia. As a court, our role in any constitutional matter is to set out the law in a

manner that advances its purposes as required by Articles 1 (3), 8 and 9 of the Constitution.

(52) The prescription of the maximum numbers is there to ensure functionality of courts and the speedy dispensation of justice. It also addresses situations where the number of judges for one reason or another falls below what is required in a given situation and affects the sittings of the courts. We further note the Respondent's position that there have been appointments made overtime and that in the past year (2021) twelve judges were appointed.

(53) We will address some pertinent submissions tendered by the parties with respect to the intervening factors and the timeframe for making appointments.

(54) As regards the resource considerations, while we appreciate the financial and infrastructure implications that are attached to appointments, the constitutional edicts were put in place after thorough consultations and thus the financial implications cannot be a valid excuse. Courts play a critical role in the governance of the country and in ensuring access to justice. Hence, what is required is for the State to ensure that resources are made available for the required infrastructure and funding for courts.

(55) Regarding the timeframe for making appointments, we note that the Constitution is silent as to when the maximum number of judges are to be filled. Article 267 (3) (a) provides that:

> **A provision of this Constitution shall be construed according to the doctrine that the law is continuously in force and accordingly—**
> **a. a function may be performed, as occasion requires, by the person holding the office to which the function is assigned;...**

(56) Further, Article 274 provides that where a timeframe is not specified for the performance of a function, the same is to be done as occasion requires. These provisions are echoed in sections 24 and 36 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia which speak to time for exercise of power and what is to prevail where no timeframe is prescribed, respectively.

(57) We note that while Article 274 uses the permissible word of 'may', the core functions of the Judicial Service Commission and the President as expressed in Articles 220(2)(b) and 140 are mandatory. The phrase 'as occasion requires' does not indeed connote a defined timeframe within which a function is to be performed, however, in our considered view it connotes that a function may be performed as need arises.

(58) In light of the provisions of Article 274 regarding the timeframe for making appointments; the finding above that the prescribed numbers of

Judges are the maximum; and the fact of the appointments being made overtime including in the past year, 2021, the Petitioner has not proved that the Judicial Service Commission and the President have contravened Articles 124, 127, 130 and 133 of the Constitution by not meeting the prescribed number of Judges of the superior Courts. Consequently, we cannot grant the reliefs sought by the Petitioner.

(59) The Petition fails and is hereby dismissed. In view of the important issues raised, we order each party to bear their own costs.

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M.M. MUNALULA. JSD
DEPUTY PRESIDENT, CONSTITUTIONAL COURT

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M.S. MULENGA
CONSTITUTIONAL COURT JUDGE

.....

M. MUSALUKE
CONSTITUTIONAL COURT JUDGE

.....

J.Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE