

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

2022/CCZ/0027

IN THE MATTER OF:

ARTICLE 180 (4) (c) AND (8) OF THE
CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF 2016

IN THE MATTER OF:

A DECISION OF THE RESIDENT
MAGISTRATE AT LUSAKA

BETWEEN:

PETER ZULU

AND

CHITALU CHILUFYA

KAKULUBELWA MULALELO

WILSON LUNGU

BONAVENTURE CHILINDE

ZAKIR HUSSEIN MOTALA

CHOMBA KAOMA

IMRAN LUNAT

ABDURRAUF ABDURRAHIM MOTALA

HONEYBEE PHARMACY LIMITED

JOSEPH CHIRWA

ATTORNEY GENERAL



APPLICANT

1st RESPONDENT

2nd RESPONDENT

3rd RESPONDENT

4th RESPONDENT

5th RESPONDENT

6th RESPONDENT

7th RESPONDENT

8th RESPONDENT

9th RESPONDENT

10th RESPONDENT

11th RESPONDENT

CORAM: Shilimi, DPC, Mulonda and Chisunka, JJC on 14th June, 2023 and 3rd August, 2023.

APPEARANCES:

For the Applicant: Mr. N. Yalenga – Messrs. Nganga Yalenga and Associates.

For the 1st, 2nd, 4th, 5th, 6th, 7th, 8th and 9th Respondents: Mr. S.F. Chipompela – Messrs. Tutwa S. Ngulube and Company (on behalf of Mr. L. Kalaluka, S.C., in his capacity as caretaker of Tutwa S. Ngulube and Company).

For the 3rd Respondent: Mr. G.K. Mwamba – Messrs. Gill & Seph Advocates.

For the 10th Respondent: Mr. T. Munalula – Messrs. Lusenga Mulongoti Advocates (sitting in for Mr. M. Batakathi of Muyatwa Legal Practitioners).

For the 11th Respondent: Mr. P. Kachimba – Principal State Advocate, Attorney General's Chambers.

R U L I N G

Chisunka, JC, delivered the Ruling of the Court.

Cases referred to:

1. Bric Back Limited T/A Gamamwe Ranches v Neil Kirkpatrick, 2021/CCZ/0002
2. Bampi Aubrey Kapalasa and Another v Attorney General, 2021/CCZ/0011, 2021/CCZ/0014
3. Wang Shunxue v Attorney General and Wang Qinghai, 2021/CCZ/003
4. Alfonso Kaziche Phiri v Banda Ackleo I.A and Electoral Commission of Zambia, 2022/CCZ/A004
5. Isaac Mwanza v Attorney General, 2021/CCZ/0045

6. **Jonas Zimba v Attorney General, 2022/CCZ/0007**
7. **Joseph Malanji and Another v Attorney General and Another, 2022/CCZ/0018**

Legislation referred to:

1. **The Rules of the Supreme Court of England, 1965 (1999 Edition)**
2. **The Constitution of Zambia (Amendment) Act No. 2 of 2016**
3. **The Constitutional Court Rules, Statutory Instrument No. 37 of 2016**
4. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia**

Introduction

1. This Ruling decides an application by the 3rd Respondent for an Order to dismiss the Applicant's action for want of jurisdiction and abuse of court process. The application is made pursuant to order 14A and order 18 rule 19(1)(d) of the Rules of the Supreme Court of England, 1965 (1999 Edition) as read together with Articles 128(1) and 134(b) and (c) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the 'Constitution').

Background

2. The background to this application is that the Applicant who describes himself as an advocate and Zambian national, commenced an action by way of Originating Summons on 13th October, 2022, against the Respondents. The relevant underlying

facts to the Originating Summons as per the affidavit verifying facts sworn by the Applicant, are that:

- 2.1 On 19th January, 2021, the 10th Respondent made a complaint before the Subordinate Court at Lusaka alleging that he suspected the 1st – 9th Respondents of having committed criminal offences in respect of their participation in the award of a contract to the 9th Respondent to supply medical kits valued at USD\$ 3,792.761.28 to the Government of the Republic of Zambia.
- 2.2 On the same date, the 10th Respondent filed a notice of withdrawal of his complaint before the Subordinate Court. Despite the notice of withdrawal, the 10th Respondent's complaint was processed and issued cause number 2SPD/027/21 and allocated to Magistrate Chibabula Chinunda (the 'Magistrate') on 26th January, 2021. The Magistrate, however, acquitted the 1st - 9th Respondents of the criminal offences presented in the 10th Respondent's complaint.
- 2.3 A search conducted by the Applicant at the Subordinate Court at Lusaka, revealed that the 10th Respondent had merely made a complaint of suspected criminal conduct but had not proceeded further to obtain the authority of the Director of

Public Prosecutions (the 'DPP') to conduct a private prosecution.

- 2.4 In the absence of authority or instruction from the DPP to conduct a private prosecution, the Magistrate could not proceed to deal with the matter and acquit the 1st – 9th Respondents because he did not have jurisdiction to do so.
3. Based on these facts, the Applicant by way of Originating Summons posed the following questions for us to determine:
- i. **Whether it was lawful and in compliance with Article 180(4)(c) of the Constitution for the Resident Magistrate at Lusaka to have proceeded to acquit the 1st – 9th Respondents on a complaint made by the 10th Respondent in the absence of authority from the Director of Public Prosecutions to proceed with a private prosecution?**
 - ii. **Whether it was lawful and in compliance with Article 180(8) of the Constitution for the Resident Magistrate to acquit the 1st – 9th Respondents when the 10th Respondent withdrew his Complaint in the absence of authority from the Director of Public Prosecutions to discontinue the prosecution?**
4. On 25th November, 2022, the 3rd Respondent filed this application for an Order to dismiss the Applicant's Originating Summons for want of jurisdiction and abuse of court process. The application advanced the following questions for determination:
- i. **Whether, in terms of Article 128(1) as read with Article 134(b) and (c) of the Constitution, this Honourable Court is possessed with the requisite jurisdiction to review the decision of the Subordinate Court;**
 - ii. **Whether in terms of Article 128(1) of the Constitution, the questions before this Honourable Court impugning the jurisdiction of the**

Resident Magistrate are properly before this Honourable Court given that the jurisdiction of the Subordinate Court is neither prescribed in Article 180 of the Constitution nor anywhere in the Constitution but in Acts of Parliament;

- iii. Whether the proceedings herein by the Applicant amount to abuse of court process given that the issues raised in these proceedings have already been adjudicated upon by the High Court and are now subject of an appeal in the Court of Appeal; and
 - iv. Whether, in view of the decision of this Honourable Court in the case of *Wang Shunxue v Attorney General and Another*, 2021/CCZ/003, this Honourable Court can be called upon to once again pronounce itself on whether a private citizen requires prior authorisation of the Director of Public Prosecutions (DPP) before instituting criminal proceedings.
5. This is the context under which the 3rd Respondent's application to dismiss the Applicant's Originating Summons for want of jurisdiction and abuse of court process came before us.

Affidavit Evidence and Arguments in Support of the Application to Dismiss Action

6. The 3rd Respondent's application was supported by an affidavit in support sworn by himself. He deposed that:
- 6.1. The Originating Summons *in casu*, seeks a determination of the legality of the decision of the Magistrate to acquit the 1st – 9th Respondents under cause number 2SPD/027/21. At the time of commencing the Originating Summons, the question pertaining to the legality of the Magistrate's decision was already before the High Court pending determination. On 31st

October, 2022, the High Court delivered its Ruling and annulled the Magistrate's decision to acquit the 1st – 9th Respondents.

- 6.2. In its Ruling the High Court addressed the question whether the complainant under cause number 2SPD/027/21 required prior authorisation from the DPP before instituting criminal proceedings against the 1st – 9th Respondents. The High Court also addressed the question whether the Magistrate had jurisdiction to acquit the 1st – 9th Respondents. Being dissatisfied with the Ruling of the High Court, the 3rd Respondent appealed the said Ruling to the Court of Appeal.
- 6.3. Given that the decision of the Magistrate to acquit the 1st – 9th Respondents has already been adjudicated upon by the High Court and is before the Court of Appeal, it is an abuse of court process to have two different Court's deal with the same subject matter as there is a danger that the administration of justice may be brought into disrepute if the two court's arrive at conflicting decisions.
7. The 3rd Respondent's written skeleton arguments and oral submissions in support of the application were to the effect that the Originating Summons ought to be dismissed for want of jurisdiction and abuse of court process on the basis that:

7.1. This Court has no jurisdiction to review the decisions of the Subordinate Court. As per Articles 128(1) and 134 of the Constitution, the jurisdiction of this Court is limited to resolving constitutional matters. The jurisdiction to review the decisions of the Subordinate Court is vested in the High Court. Thus, this Court has no jurisdiction to review the legality of the decision of the Magistrate to acquit the 1st- 9th Respondents under Cause No. 2SPD/027/21. In support of this submission, the 3rd Respondent relied on the case of *Bric Back Limited T/A Gamamwe Ranches v Neil Kirkpatrick*¹, where we stated that:

The jurisdiction of this Court does not extend to review of judgments and rulings in such instances...The Constitutional Court of Zambia is a specialised Court set up to resolve only constitutional questions.

7.2. Pursuant to Articles 120(1)(a) and (3)(a) and 180 (4)(c) and (8) of the Constitution, the question of the jurisdiction of the Subordinate Court is not a constitutional one that warrants the intervention of this Court. Article 180 of the Constitution deals with the functions and powers of the DPP and does not provide for the jurisdiction of the Subordinate Courts.

7.3. The power to acquit an accused person by the Subordinate Court is prescribed in section 201 of the Criminal Procedure

Code, Chapter 88 of the Laws of Zambia (the 'CPC'). Thus, the questions that the Applicant submits in his Originating Summons are improperly before this Court because they impugn the jurisdiction of the Magistrate, which jurisdiction is not prescribed in the Constitution and cannot, therefore, warrant the invocation of Article 128(1) of the Constitution.

- 7.4. The 3rd Respondent cited the case of ***Bampi Aubrey Kapalasa and Another v Attorney General***² and argued that the Applicant's Originating Summons amounts to an abuse of court process on the basis that it raises an identical question which was determined by the High Court and is now before the Court of Appeal.
- 7.5. Additionally, this Court already determined the issue as to whether a private citizen requires the authorisation of the DPP to institute criminal proceedings in the case of ***Wang Shunxue v Attorney General and Another***³. As guided in the case of ***Bampi Aubrey Kapalasa***², this Court should refrain from pronouncing itself on an issue that was already determined and dismiss the said issue for being an abuse of court process.
8. Counsel for the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondents informed the Court that they supported the 3rd

Respondent's application. Counsel for the 11th Respondent submitted that the 11th Respondent would be guided by the decision of the Court.

Affidavit Evidence and Arguments in Opposition to the Application to Dismiss Action

9. **The Applicant** filed an affidavit in opposition, list of authorities and skeleton arguments on 31st January, 2023. The affidavit was sworn by the Applicant and it disclosed that the Applicant's Originating Summons is meant to conclude the constitutional issues which have been raised on the basis of this Court's jurisdiction to hear matters relating to the interpretation of the Constitution.
10. In his written skeleton arguments, the Applicant submitted that:
 - 10.1. This Court is clothed with original and final jurisdiction to determine any and all issues that relate to the interpretation of the Constitution. This is so despite the High Court's annulment of the Magistrate's decision to acquit the 1st - 9th Respondents and the subsequent appeal to the Court of Appeal.
 - 10.2. Despite the decision in the case of *Wang Shunxue*³, the question as to whether the decision of the Magistrate to acquit the 1st – 9th Respondents was legal, still remains, particularly that there is no evidence to show that a private prosecution was conducted.

11. During the hearing, Counsel for the Applicant informed the Court that he relied on the Applicant's affidavit in opposition, list of authorities and skeleton arguments appearing in the consolidated record of motion. In augmenting the written arguments, Counsel submitted that:

11.1. The issue for determination in the Applicant's Originating Summons is to determine whether the decision of the Magistrate to acquit the 1st - 9th Respondents under Cause No. 2SPD/027/21 was a violation of Article 180 the Constitution. This issue is, therefore, within the ambit of this Court's jurisdiction under Article 128 of the Constitution.

11.2. In the case of *Alfonso Kaziche Phiri v Banda Ackleo, I.A and Electoral Commission of Zambia*⁴, this Court elucidated the fact that it has original and appellate jurisdiction. The Applicant is, therefore, inviting this Court to exercise its original jurisdiction in the determination of his Originating Summons. In particular, this Court has been approached to determine whether, on the facts herein, there was conformity with Article 180 of the Constitution. Once this Court makes a determination, all related issues before the other court's would have been determined in accordance with the decision of this Court as the principle of

stare decisis ensures that lower courts are bound by the decision of this Court.

The 3rd Respondent's Reply

12. In reply to the Applicant's arguments in opposition, Counsel for the 3rd Respondent argued that:

12.1. Article 180 of the Constitution does not deal with the jurisdiction of the Subordinate Court. What the Applicant impugns in his Originating Summons is the decision of the Magistrate to acquit the 1st - 9th Respondents and not the powers of the DPP. Thus, the Magistrate did not draw the power to acquit from Article 180 of the Constitution. It was section 201 of the CPC that the Magistrate relied on to acquit the 1st - 9th Respondents.

12.2. The Applicant's reliance on the case of *Bampi Aubrey Kapalasa*² did not help him because that case frowned upon re-litigating issues that had already been dealt with by other courts of competent jurisdiction. The Applicant's Originating Summons was, therefore, improperly before the Court for want of jurisdiction and abuse of court process.

Issues for Determination

13. The 3rd Respondent's application poses four questions for determination. These questions appear at paragraph 4 of this Ruling. It is imperative to note that the four questions raised in the application go to the jurisdiction of this Court. We are of the view that the main issue encompassing all four questions in this application is whether or not the Applicant's Originating Summons should be dismissed for want of jurisdiction and abuse of court process.

Evaluation and Determining the Issues

14. We have considered the 3rd Respondent's application to dismiss the Applicant's Originating Summons together with the affidavit evidence, list of authorities and the skeleton arguments filed by the parties and the oral arguments. In determining the main issue, we propose to answer the four questions presented for determination as they have been posed in the 3rd Respondent's application.

Question 1

15. In question one, the 3rd Respondent contends that the Applicant's Originating Summons is an invitation to this Court to review the legality of the Magistrate's decision to acquit the 1st - 9th Respondents under Cause No. 2SPD/027/21. He argues that this Court has no jurisdiction to review a decision or ruling of another

court of competent jurisdiction. The Applicant on the other hand, asserts that this Court has original jurisdiction to determine his Originating Summons under Article 128 of the Constitution.

16. It is apparent that this question presupposes that the Applicant's Originating Summons is a review of the decision of the Magistrate's decision under Cause No. 2SPD/027/21. The Applicant, however, did not approach us by way of a review. The Applicant filed an Originating Summons through which he states that he seeks this Court's interpretation of Article 180 (4)(c) and (8) the Constitution.
17. As per Article 128(1)(a) of the Constitution and Order IV Rule 2(2) of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 (the 'CCZ Rules'), this Court has original jurisdiction to hear matters relating to the interpretation of the Constitution if those matters are commenced by Originating Summons, provided that the Originating Summons is properly before the Court and complies with the principles that govern such matters.
18. There being no review presented before this Court, our considered view is that question one has no relevance. It therefore, fails and is dismissed.

Question Two

19. Under this question, the 3rd Respondent argues that the questions contained in the Applicant's Originating Summons are improperly before us and that we have no jurisdiction to hear and determine them. The 3rd Respondent advances this argument on the ground that the issue in the Originating Summons is the jurisdiction of the Subordinate Court and that it is not provided in the Constitution, therefore, leaving this Court without jurisdiction to entertain the Originating Summons.
20. In our considered view the issue for determination under this question is not the jurisdiction of the Subordinate Court. The issue is as the 3rd Respondent put it, whether the questions in the Applicant's Originating Summons impugning the decision of the Magistrate are properly before us. To put it another way, whether or not this Court has jurisdiction to hear and determine the two questions the Applicant has presented in the Originating Summons. The two questions are reproduced at paragraph 3 of this Ruling
21. The starting point when dealing with a jurisdictional issue in a matter relating to the interpretation of the Constitution is the mode of commencement. As already stated, for this Court to have jurisdiction to hear a matter for interpretation of the Constitution that matter must be commenced by Originating Summons and it must

adhere to the principles that govern matters commenced by that mode of commencement.

22. The principles that govern matters concerning the interpretation of the Constitution are, therefore, of utmost relevance in determining whether or not we have jurisdiction. In the cases of *Isaac Mwanza v Attorney General*⁵, *Jonas Zimba v Attorney General*⁶ and *Joseph Malanji and Another v Attorney General and Another*⁷ we espoused the following principles vis-à-vis matters for interpretation:

22.1. Matters brought by Originating Summons must relate solely or exclusively to the interpretation of constitutional provisions and the questions or issues raised must:

22.1.1. be constitutional questions;

22.1.2. seek to interpret identified Articles of the Constitution; and

22.1.3. be of a general nature and must not be personalised or contentious.

23. In this case, it is clear that the two questions in the Applicant's Originating Summons are personalised and contentious because they name specific persons and concern the conduct of those persons. In particular, the two questions challenge the legality and

proprietary of the Magistrate's decision under Cause No. 2SPD/027/21. These types of questions are ripe for determination under a petition due to their personalised and contentious nature. This position is supported by the submissions made by Counsel for the Applicant who, in his oral arguments, argued that the issue in the Originating Summons is whether the Magistrate violated Article 128 of the Constitution. This submission reveals that the Applicant alleges a violation of the Constitution and therefore, the Applicant's action must have been commenced by way of petition in accordance with Order IV Rule 1 and 2(c) of the CCZ Rules.

24. The result is that the two questions in the Applicant's Originating Summons are unsuitable for determination by way of Originating Summons. We, therefore, have no jurisdiction to entertain the Applicant's Originating Summons because it was commenced using the wrong mode. In light of this, our considered view is that both questions in the Applicant's Originating Summons are improperly before us and are accordingly dismissed.

Question Three and Four

25. The Applicant's Originating Summons having been dismissed under question two for want of jurisdiction, it follows that delving into questions three and four would serve no practical purpose as they have been rendered *otiose*.

Conclusion

26. From the foregoing, it is clear that the two questions for determination in the Applicant's Originating Summons are not properly before us as they are personalized and highly contentious and can only be determined by way of petition. We, therefore, find merit in this application that this Court does not have jurisdiction to entertain the Applicant's Originating Summons due to the wrong mode of commencement employed by the Applicant.

Orders

27. Accordingly, we make the following orders:

- 27.1. The 3rd Respondent's application to dismiss the Applicant's action for want of jurisdiction is upheld.
- 27.2. The Applicant's Originating Summons is hereby dismissed.
- 27.3. Each party to bear their own costs.



A. M. SHILIMI
DEPUTY PRESIDENT
CONSTITUTIONAL COURT



P. MULONDA
CONSTITUTIONAL COURT JUDGE



M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE