IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
(ORIGINAL JURISDICTION)

2021/CCZ/0012

IN THE MATTER OF: SECTIONS 3, 10, 11 AND 12 OF THE JUDGES (CONDITIONS OF SERVICE) ACT, CHAPTER 277 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: THE JUDGES (SALARIES AND CONDITION OF SERVICE) REGULATIONS 2018

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 122 AND 123 THE CONSTITUTION

AND

IN THE MATTER OF: ARTICLE 128 (3) OF THE CONSTITUTION

BETWEEN:

JOHN SANGWA **PETITIONER**

AND

THE ATTORNEY GENERAL **RESPONDENT**

THE LAW ASSOCIATION OF ZAMBIA **INTERESTED PARTY**

CORAM: MUNALULA ,DPC, SITALI, MULONDA,MULENGA, MUSALUKE, CHISUNKA, MULONGOTI, JJC ON 7TH DECEMBER, 2022 AND ON 31ST JULY, 2023

FOR THE PETITIONER: MR. M. NKUNIKA AND MS. K BWALYA OF SIMEZA SANGWA AND ASSOCIATES

FOR THE RESPONDENT: MS. C. MULENGA - DEPUTY CHIEF STATE ADVOCATE, ATTORNEY GENERAL'S CHAMBERS

FOR THE INTERESTED PARTY: MR. A.J. SHONGA JR. (SC) AND MR. N. NG'ANDU OF SHAMWANA AND COMPANY

J U D G M E N T

Mulenga, JC delivered the Judgment of the Court.

Cases referred to:

1. Mackin v New Brunswick (Minister of Finance), Rice v New Brunswick (2002 SCC/13)
2. Uganda Law Society v Attorney General (Constitutional Petition No. 52 of 2017)
3. Webby Mulubisha v The Attorney General (2018/CCZ/0013)
4. Mowrer v Rush 618 P.2d 886(1980)
5. Krispus Ayena Odengo v Attorney General and Parliamentary Commission (Constitutional Petition 30 of 2017) [2020] UGCA 31 (07 February, 2020)
6. Speaker of the Senate and Another v Attorney General and four Others, Sup. Ct. Advisory Opinion No. 2 of 2013 [2013] EKLR
7. Jayesh Shah v Judicial Complaints Commission (2021/CCZ/0013)
8. Communications Commission of Kenya and 5 Others v Royal Media Service Limited and 5 Others (Petition No. 14 of 2014)
9. Steven Katuka and Another v Attorney General and Others (Selected Judgment No. 29 of 2016)
10. Mutembo Nchito v Attorney General (2016/CCZ/0029)
11. R v Valente [1985] 2 S.C.R. 673
12. Chishimba Kambwili v Attorney General (2019/CCZ/009)
13. Henry Kapoko v The People (2016/CCZ/0023)
14. Daniel Pule and Others v Attorney General (Selected Judgment No. 60 of 2018)

Legislation referred to:

1. The Constitution of Zambia as amended by Act No. 2 of 2016
2. The Constitution of Zambia Act No. 1 of 2016
3. The Judges' Conditions of Service Act Chapter 277 of the Laws of Zambia
4. The Public Finance Management Act No. 1 of 2018
5. The Judiciary Administration Act No. 23 of 2016
6. The Emoluments Commission Act No. 1 of 2022
7. Statutory Instrument No. 80 of 2018
8. Statutory Instrument No. 47 of 2022

Other Materials referred to:

1. Final Report of the Technical Committee Drafting the Zambian Constitution dated April 2012
2. Muna Ndulo,*'Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System'* (2011) 2 Zambia Social Science Journal
3. Judiciary of Zambia 2021 Annual Report
4. Anthony Gubbay, *'The independence of the Judiciary with special reference to the Parliamentary control of tenure, terms and conditions of service and remuneration of Judges: Judicial Autonomy and Budgetary Control and Administration'*
5. Hon. Sir Gerard Brennan, *'Judicial Independence'* paper presented at the Australian Judicial Conference on 2nd November,1996
6. A. Rossell *'Judicial Independence and the Budget: A Taxonomy of Judicial Budgeting Mechanisms'* (2020) 5 Indiana Journal of Constitutional Design 11
7. National Commission to Review the working of the Constitution, *'A Consultation Paper on Financial Autonomy of the Indian Judiciary'* (2001) September, 26
8. World Bank(2022), *"Zambia Judicial Sector: Public Expenditure and Institutional Review Report" @World Bank*

Background

[1] The Petitioner, John Sangwa, filed the petition herein on 16th April, 2021. The parties consented to defer the hearing of the matter until after the 2021 general elections. The record of proceedings was subsequently filed on 2nd November, 2022 and the petition was heard on 9th December, 2022.

[2] We must state from the outset that we are alive to the fact that the issues raised in this Petition affect our pecuniary interest in that Statutory Instrument No. 80 of 2018 (hereinafter referred to as S.I. No. 80 of 2018) which was issued pursuant to sections 3 and 12 of the Judges Conditions of Service Act Chapter 277 of the Laws of Zambia (hereinafter referred to as JCSA), adjusted judges' salaries of which we are beneficiaries. However, the doctrine of necessity requires us to still determine this matter in line with our constitutional mandate.

[3] The Petitioner alleges that the Respondent has contravened the Constitution namely Article 122 on functional independence of the Judiciary and Article 123 on financial independence of the Judiciary. He states that this contravention of Articles 122 and 123 of the Constitution arises from the provisions of sections 3, 10, 11 and 12 of the JCSA and S.I. No. 80 of 2018 which confer powers on the President and the Executive to regulate the salaries and conditions of service for judges contrary to the demands of the Constitution on financial independence.

[4] In the premises, the Petitioner seeks reliefs as follows:

(a) An order of mandamus directed to and to compel the Minister responsible for finance to put in place, within 3 months or such period as the Court may deem appropriate from the date of the order, measures satisfactory to the Judiciary to ensure that the Judiciary is:

(i) Financially independent and becomes a self-accounting institution in line with Article 123(1) of the Constitution; and

(ii) Adequately funded in every financial year in line with Article 123(2) of the Constitution.

(b) A declaration that:

(i) Section 3 of the Act to the extent that it vests authority in the President to prescribe the emolument of the judges is *ultra vires* Article 122(3) and 123(1) of the Constitution and therefore null and void;

(ii) Section 12(1) of the Act to the extent that it confers power upon the President, by statutory instrument, to make regulations for the better carrying out of the provisions of the Act is *ultra vires* Articles 122(3) and 123(1) of the Constitution and therefore null and void;

(iii) Section 12(2) of the Act to the extent to which it confers authority on the President, by statutory instrument, to make Regulations prescribing the perquisites and other conditions of service of judges including but not limited to car loans, housing allowance; non-private practice allowance, funeral assistance, travelling on duty is *ultra vires* Article 122(3);

(iv) Section 10 of the Act to the extent that it empowers the Minister in consultation with the institution designated by Section 9 of the Act, by statutory order to fix the Judges' contributions towards the pension scheme is *ultra vires* Articles 122(3) and 123(1) of the Constitution and therefore null and void;

(v) Section 11 of the Act to the extent that it confers power upon the Minister in consultation with the institution created under Section 9 of the Act, on the advice of an actuary appointed by the said institution, to fix the amount of money to be paid from the revenues of the Republic towards the pensions and other benefits of the judges under the pension scheme is *ultra vires* Articles 122(3) and 123(1) of the Constitution and therefore null and void;

(vi) Statutory Instrument No. 80 of 2018, to the extent that it contains the salaries of judges prescribed by the President is *ultra vires* Articles 122(3) and 123(1) of the Constitution and therefore null and void; and

(vii) To the extent that the Minister responsible for finance has not initiated any legislation or put in place any measures to ensure that the Judiciary is financially independent and adequately funded, the Minister is in breach of Articles 122(3) and 123(1) of the Constitution.

(c) An Order quashing:

(i) Sections 3, 10,11, and 12 of the Act for being inconsistent with Articles 122(3) and 123(1) of the Constitution; and

(ii) Statutory Instrument No. 80 of 2018, for being inconsistent with Articles 122(3) and 123(1) of the Constitution.

(d) In the event that the Statutory Instrument No. 80 of 2018, is declared null and void as prayed in clause (c) (i) and (ii) above an order that the declaration be suspended until the Judiciary as a self accounting institution has by Statutory Instrument formulated its own Regulations prescribing the prerequisites and other conditions of service of Judges including but not limited to car loans; housing allowance, non-private practice allowance; funeral assistance, and travelling on duty.

[5] The Petitioner contends that the petition should be considered within the broader context of the doctrine of separation of powers as enshrined in the constitutional framework. This is to ensure that effect is given to the underlying purpose of the financial autonomy of the Judiciary provided for in Articles 122(3) and 123 of the Constitution.

[6] The Petitioner highlighted the following three issues for determination; whether:

(1) Sections 3 and 12 of the Judges (Conditions of Service) Act (JCSA) to the extent that they confer authority on the President to prescribe the emoluments and other conditions of service, including car loans, housing allowance; non private practice allowance; funeral assistance and travelling allowance for Judges are *ultra vires* Articles 122(3) and 123 (1) of the Constitution and therefore, null and void.

(2) Statutory Instrument No. 80 of 2018, which contains the salaries of Judges as prescribed by the President contravenes Articles 122(3) and 123 (1) of the Constitution and therefore, null and void.

(3) The failure or omission by the Minister responsible for finance and the Legislature to enact legislation and put measures in place to promote the Judiciary's financial autonomy is a breach of Articles 122(3) and 123(1) of the Constitution.

Petitioner's submissions

[7] The Petitioner filed detailed submissions in support of the Petition and in reply to the Respondent's submission, the sum of which is outlined below.

[8] Addressing the first issue that sections 3, 10, 11 and 12 of the JCSA are inconsistent with the functional and financial independence of the Judiciary under Articles 122(3) and 123 of the Constitution, the Petitioner contends that by continuing to vest power in the Executive to prescribe emoluments, the impugned sections are inconsistent with Articles 122 and 123 of the Constitution which confer such authority on the Judiciary itself. Therefore, that the impugned sections are null and void. The Petitioner further highlighted the rationale of the framers of the Constitution as stated in the Final Report of the Technical Committee on Drafting the Zambian Constitution of April 2012 at page 447, that this was to ensure and enhance the independence, impartiality and efficiency of the Judiciary. Further, that the independence of the Judiciary is essential to protect it from politics of the ruling government and from economic manipulation that arises if its finances are at the discretion of the Executive and Legislative wings of government.

[9] In addition, the Petitioner cited the Canadian case of **Mackin v New Brunswick (Minister of Finance), Rice v New Brunswick**[1]and posited that in keeping with the doctrine of separation of powers, judicial independence has individual and institutional dimensions as well as three essential characteristics

of financial security, security of tenure and administrative independence. He further cited the case of **Uganda Law Society v Attorney General**[2] where the Constitutional Court of Uganda stated that judicial independence includes financial autonomy.

[10] In respect of the second issue on the constitutionality of S.I. No. 80 of 2018, the Petitioner's position was that the S.I. is *ultra vires* Articles 122 and 123 of the Constitution in so far as it contains salaries prescribed by the President. This is because financial affairs of the Judiciary are not for the Executive to determine but that the Judiciary alone must decide and manage its financial affairs independently as the doctrine of separation of powers only allows overlaps between the separate wings of government to foster accountability.

[11] The Petitioner further contended that in light of sections 6 and 21 of the Constitution of Zambia Act No. 1 of 2016 (hereinafter referred to as Act No. 1 of 2016), pre-existing laws can only be construed with the modifications, adaptations, qualifications and exceptions to bring them into conformity with the Constitution as amended when the same are not inconsistent with the Constitution. Any pre-existing laws that are not capable of being read into conformity with the Constitution as amended ought to be struck out for being void as they fall outside the scope of the transitional provisions.

[12] The Petitioner cited several of this Court's decisions on the supremacy of the Constitution as provided in Article 1 of the Constitution and prayed that based on the case of **Webby Mulubisha v The Attorney General**[3], S.I. No. 80 of 2018 should be struck off the statute book for its unconstitutionality.

[13] As regards the third issue on the alleged failure to enact legislation and implement a policy to promote the financial independence of the Judiciary, the Petitioner contended that the failure by the Legislature and the Minister responsible for finance (hereinafter referred to as the Finance Minister) to enact the necessary law and formulate a policy framework constitutes an omission which contravenes Articles 122(3) and 123(1) of the Constitution. According to the Petitioner, the absence of a legal framework to safeguard the financial autonomy of the Judiciary creates a vacuum that undermines the financial independence and ultimately the institutional independence of the Judiciary. He therefore prayed for an order of mandamus directing the Minister to put in place the requisite measures to secure the Judiciary's financial independence. The Petitioner anchored this position on the case of **Uganda Law Society v Attorney General**[2] wherein the Ugandan Constitutional Court observed as follows:

> **There is no doubt that the manner in which the Judiciary's financial autonomy is exercised would have been best clarified by an appropriate Act of Parliament. However, the absence of the requisite Act of Parliament is not an excuse for the Executive to**

continue to intrude into the financial decisions through the actions of the Ministers of Finance, Justice and the Secretary to the Treasury.

Clearly, there is no doubt in my mind that the powers of the Chief Justice under Article 133 of the Constitution have, in practice, been usurped by the Secretary to the Treasury. This is the clearest indication yet that the Judiciary is treated as a department under a Ministry as opposed to an arm of government. The absence of legislation to clarify the accounting function and personnel matters for the Judiciary is partly responsible for this confusion. However, the legislative vacuum cannot be an excuse for compromising the independence of the Judiciary.

[14] The Petitioner also contended that the provisions of the Judiciary Administration Act do not adequately provide for the administrative autonomy of the Judiciary in the management and utilisation of its funds. He argued that the Finance Minister should not have administrative control of the funds of the Judiciary and that without the autonomy to administer its funds, the constitutional provisions on financial and functional independence will not be realised. Reliance was placed on a paper by Professor Muna Ndulo titled *"Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System"* wherein he stated that:

The administration of monies allocated to the Judiciary should be under the control of the Judiciary. Moreover, financial autonomy is fundamental. Without it, the Executive seriously impinge upon judicial independence by limiting the Judiciary's access to funds voted to it by Parliament and/or by assuming control of the services and staff upon which the judiciary depends. Providing budgetary independence enables the Judiciary to control its own funds and to make use of them according to its own priorities. This is not the case in many African countries where the Judiciary is required to go "cap in hand" to the relevant government ministry with a request for funds. This results in the Executive being the sole decision maker regarding whether the judiciary is granted any or all of the funds requested and without proper checks, the

Executive is left to exercise such discretion according to its own policy or priorities or Presidential dictates.

[15] Citing Article 200, the Petitioner posited that the Minister had failed to put measures to safeguard the financial and functional autonomy of the Judiciary because as an independent arm of government there ought to be legislation establishing the Judiciary fund outside the Consolidated Fund to enable the Judiciary to accrue funds and settle its expenses autonomous of the office of Treasury. That short of this would demean the Judiciary to require it to go to the Executive "cap in hand" to get funds to operate. Extracts of the Judiciary of Zambia 2021 Annual Report were quoted in which it was stated that the Judiciary does not operate its own accounts for approved budgetary funds but that this is done through the centralised Treasury Single Account (TSA) set up in line with section 25 of the Public Finance Management Act No. 1 of 2018.

[16] Further, that the Treasury has to give approval for certain expenditure and disbursement of appropriated funds as provided in the Public Finance Management Act. That this all goes to show that the Judiciary is not financially independent in contravention of Articles 123 of the Constitution which requires that it should not be under the control or direction of a person or authority in the performance of its administrative functions and financial affairs. It was added that the fact that Article 123(1) requires the Judiciary to deal directly with the Ministry responsible for finance must be understood to mean that the Ministry's role in the financial affairs of the Judiciary must cause as little intrusion as

possible to ensure financial independence. The case of **Uganda Law Society v Attorney General**[2] was cited again as stating that:

> **As a self-accounting organ, the Judiciary is required to submit its budgetary estimates through the Chief Justice in respect of each financial year directly to the President and not anyone else. The said budget must be prepared by the Chief Justice or his delegate and not anyone else, and once presented to the President, it must be tabled before Parliament without revision.**
>
> **I adopt as highly persuasive the decision from the Lithuania Constitution Court that in handling its finances, the Judiciary should have minimal intrusion from the Executive branch. Further, it has been stated that there is a co-relation between resource allocation to the Judiciary and judicial independence.**

[17] The Petitioner contended that similarly in Zambia, the role of the Treasury office should be limited to co-ordination of the Judiciary's financial affairs in so far as it is necessary to transfer funds to the Judiciary Fund once established.

[18] It was further argued that as a self-accounting body, the Judiciary should be able to prepare its own budget and present it to the Executive for commentary before being tabled before the National Assembly for debate and approval. The decision of the Supreme Court of New Mexico in **Mowrer v Rush**[4] was cited as persuasive wherein it was stated that:

> **Authority for our ruling that any requirement that the Executive branch of government cannot first pass upon the Judiciary's budget, as a condition precedent to its submission to the Legislative branch of government, is overwhelming.**
>
> **..... Any requirement that the judicial branch first submit its budget request to the executive branch dilutes and could render impotent the inherent power of the Judiciary.**

[19] It is the Petitioner's contention that it is necessary for financial independence that the Judiciary should maintain autonomy in its budgetary procedures subject to the necessary checks and balances of the other arms of government. Doing so would also address the challenges highlighted in the 2021 Judiciary Annual Report for increased and consistent funding to meet operational and infrastructure needs.

[20] The Petitioner reiterated that Uganda is a good example of what financial independence of the Judiciary ought to be and cited the case of **Krispus Ayena Odengo v Attorney General and Parliamentary Commission**[5] wherein it was stated that:

> **Save for the requirement to present financial year estimates which are not to be reviewed before laying before Parliament by the President and which shall be presented by the President to Parliament every financial year for purposes of the next financial year, the Executive is not involved in the preparation and review of a budget of Parliament or the Judiciary for approval by Parliament. The only time and the only way the Executive gets involved is in making comments supporting the laying in Parliament of financial year estimates of revenue and expenditure of Government by the President...**
>
> **The said financial year estimates are presented by the President without revision to Parliament every financial year.**

[21] We were implored to adopt the position of the Ugandan Constitutional Court in the case of **Uganda Law Society v the Attorney General**[2] where an injunctive relief was granted to the effect that the budgetary process for the Judiciary should stop being treated in a similar manner as government

departments and the Executive was required to report every three months on the actions taken to ensure passage of necessary legislation.

[22] The Petitioner concluded that an order of mandamus should be granted to direct the Finance Minister to take steps to put in place policy or ensure a bill is tabled to safeguard and ensure the financial autonomy of the Judiciary.

[23] At the hearing of the matter, in response to questions put by the Court on the import of Article 122(3), the position advanced by both Ms. Bwalya and Mr. Nkunika was that the Judiciary is constitutionally meant to take a prominent role in the budgeting process and for it to manage and disburse funds as it deems fit. They argued that the current state of affairs in which the Secretary to the Treasury disburses funds to the institution was an affront to judicial independence.

Interested Party's submissions

[24] The interested party, in its skeleton arguments, essentially supported the Petitioner's arguments. It was submitted that in the absence of local judicial precedents, this Court should consider the aid of comparative interpretation and also use the purposive interpretation of the constitutional provisions which should be interpreted as an integral whole.

[25] To support the contention that the impugned sections contravene Articles 122 and 123 of the Constitution, the Interested Party cited the case of **Uganda**

Law Society v Attorney General[2] wherein the Ugandan Constitutional Court in considering a similar provision to Article 123 (1) stated at pages 34 and 37 that:

> **The sum total of the above precedents is that judicial independence includes judicial financial autonomy. The Judiciary must be able to control its own finances, budgeting processes as well as its funding needs. This is a logical consequence of the doctrine of separation of powers.**
>
> **It is impossible for an arm of government wholly dependent for its financial decisions and budgeting processes on another arm to be described as independent in any sense.**

[26] It was added that Article 123(1) of the Constitution which makes it mandatory for the Judiciary to deal with the Ministry responsible for finance appears to be a contradiction to the guaranteed financial independence when read with Article 183 on the functions of the Secretary to the Treasury and Article 114 (c) on powers of the Executive, through Cabinet, to approve the national budget for presentation to the National Assembly in accordance with Article 202(1) of the Constitution.

[27] The Interested Party highlighted the observations of the former Chief Justice of Zimbabwe, Anthony Gubbay, in a paper titled *"The independence of the Judiciary with special reference to the Parliamentary control of tenure, terms and conditions of service and remuneration of Judges: Judicial Autonomy and Budgetary Control and Administration"* as follows:

> **To secure financial autonomy, the Judiciary must have budgetary independence, that is to say, the ability of the Judiciary to exercise control over its own funds and apply these funds in accordance with its own priorities for the better administration of justice.**

[28] It was then contended that whilst the Judiciary and the Executive cannot be perfect strangers, the role of the Executive is to cooperate with the Judiciary in fulfilling its mandate under the Constitution. However, that the Judiciary remains accountable to the other branches of government, itself and the people as judicial accountability is imbedded in the Constitution.

[29] The Interested Party posited that the impugned sections of the JCSA threaten judicial independence as they grant monopoly to the Executive over the emoluments and conditions of service for Judges. Therefore, the four sections are void despite the transitional provisions in section 6 of Act No. 1 of 2016 because the impugned sections cannot continue in their current state in the face of the deeply rooted financial independence principle.

[30] Addressing the issue of S.I. No. 80 of 2018 being *ultra vires* the Constitution, the Interested Party endorsed the Petitioner's submission that the statutory instrument which is predicated on the impugned sections of the JCSA is a direct threat to the independence of the Judiciary because it created a perception that the Judiciary was at the mercy of the President. The paper by the former Chief Justice of Australia, Hon. Sir Gerard Brennan, A.C.K.B.E. titled *"Judicial Independence"* presented at the Australian Judicial Conference on 2nd November, 1996 was cited as stating that:

> **Independence of the modern judiciary has many facets. The external factors that tend to undermine independence are well recognized by the Judiciary but perhaps not so**

> **well recognised by the political branches of government or by the public. Some of the structures that preserve independence are well established. I need not canvass the twin constitutional pillars of judicial independence – security of tenure and conditions of service that the Executive cannot touch – except to say this: if either of these pillars is eroded, in time society will pay an awful price.**

[31] Further, the Interested Party yet again alluded to remarks by the former Chief Justice of Zimbabwe, Anthony Gubbay, in his paper cited at paragraph 26 wherein he stated that:

> **Another factor that has considerable bearing on the independence of the Judiciary is financial security – the receipt of adequate remuneration. Without it a judge cannot feel independent of the Executive. A judge's work and thinking must not be frustrated by lack of money. Many developing countries fall short of this requirement... Obviously, it is embarrassing to place the Judiciary at the mercy of Ministers or departments to plead for increases in salary and allowances. This tends to undermine its dignity.**

[32] The Interested Party noted that section 16 of the Judiciary Administration Act provides that the emoluments of Judges, among others, will be determined by the Emoluments Commission on recommendation of the Judicial Service Commission established under Article 202 of the Constitution. The Interested Party however, argued that despite the Emoluments Commission Act No. 1 of 2022 coming into operation on 28th June, 2022 by the publication of the Emoluments Commission Act (Commencement) Order, 2022, Statutory Instrument No. 47 of 2022, no evidence had been led by the Respondent to show that the Emoluments Commission had been duly constituted. Therefore, that the non-operationalisation of the Emoluments Commission and the

absence of the amendment or repealing and replacing of the JCSA, are no justifications for the continued prescription of Judges emoluments by the President in light of the current constitutional order that guarantees the independence of the Judiciary.

[33] In response to a question from the Court on how to sever the possibility of the Executive influencing the Judiciary through the Emoluments Commission, Mr Ng'andu offered that the appointing authority for members of the Emolument's Commission ought to be the Legislature instead of the President as it was an indirect way for the Executive to exercise its influence over the Judiciary.

[34] As regards the third issue on failure to enact legislation and implement policy that promotes financial independence of the Judiciary, the Interested Party noted that the Judiciary Administration Act No. 23 of 2016 was enacted in line with section 21 of Act No. 1 of 2016 and it clearly strengthens the functional independence of the Judiciary. It was however posited that more ought to be done to enhance financial independence of the Judiciary.

Respondent's submissions

[35] The Respondent's position was that the Judiciary has functional independence as envisaged in Article 122 of the Constitution. The Respondent further denied that sections 3, 10, 11 and 12 of the JCSA contravene the

Constitution and stated that the said sections are good law when read with sections 6 and 21 of Act No. 1 of 2016 and Article 272 of the Constitution. It was further stated that quashing the cited sections of the JCSA and Statutory Instrument No.80 of 2018 would create a lacuna and absurdity as the salaries received by Judges would be deemed illegal and liable to be refunded. Hence, that the impugned sections must be construed in light of the transitional provisions.

[36] It was argued that the import of sections 6 and 21 of Act No. 1 of 2016 is that existing legislation at the time of the amendment of the Constitution in 2016 are to be construed with necessary modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and that Parliament would make amendments required to bring existing law into conformity with the Constitution within the time frame it shall determine. That the process of facilitating the independence of the Judiciary was already underway, thus, the petition had been overtaken by events. Specifically, that the operationalization of the Emolument's Commission as read with Act No. 1 of 2016 justifies the existence of the four impugned sections. We were implored to interpret Articles 122 and 123 in light of section 6 of Act No. 1 of 2016 and invoke the spirit of the Constitution as stated in the Kenyan case of

Speaker of the Senate and Another v Attorney General[6].

[37] The Respondent argued that measures had been put in motion by the enactment of the Judiciary Administration Act which provides for the emoluments of Judges to be determined by the Emoluments Commission established under Article 232 of the Constitution. That the Emoluments Commission Act No. 1 of 2022 came into operation on 6th July, 2022 and provides for transitional provisions in section 36 to the effect that after the commencement of the Emoluments Commission Act all state organs, institutions or other authorities which were concerned with determination of emoluments would cease to do so. Further, that section 3 provides that the Emoluments Commission Act No. 1 of 2022 will prevail over provisions of any other written law which is inconsistent with it.

[38] The Respondent added that the establishment of several independent commissions by the Constitution, which include the Emoluments Commission and Judicial Service Commission under Article 220, are intended to serve as the 'people's watchdogs' and to perform their roles effectively without improper influence, fear or favour.

[39] The Respondent highlighted sections 6 and 21 of Act No. 1 of 2016 regarding transitional provisions and cited our decision in the case of **Jayesh Shah v Judicial Complaints Commission**[7] wherein we considered section 6

of Act No. 1 of 2016 and stated that existing laws which were not inconsistent with the Constitution were to continue in force but be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution. The Respondent further cited the case of **Communications Commission of Kenya and 5 Others v Royal Media Service Limited and 5 Others**[8]which discussed transition clauses as follows:

> **The transition Chapter and clauses in the Constitution are meant not only to ensure harmonious flow from the old to the new order, but also to preserve the Constitution itself, by ensuring that the rule of law does not collapse owing to disruptions arising from a vacuum in the juridical order.**

[40] The Respondent further submitted that the constitutional provisions should be interpreted in light of the principles this Court enunciated in the case of **Steven Katuka and another v Attorney General and Others**[9]. These include the requirements that all provisions touching on a matter should be considered together and be interpreted in a manner that advances the purposes of the Constitution and gives effect to its intent. That doing so would avoid an absurdity that may be created by striking out or declaring void certain legislation and which will not serve the interest of the Constitution or promote its purpose or objects.

[41] As regards the allegation concerning Article 123 of the Constitution, the Respondent stated that this should be read together with Article 232 of the

Constitution as well as sections 16, 17, 18, 19 and 20 of the Judiciary Administration Act which provide for the implementation of the financial independence of the Judiciary. Further, that the measures had been set in motion by the enactment of the Judiciary Administration Act to ensure that the Judiciary is financially independent and adequately funded.

[42] The Respondent added that there is functional independence of the Judiciary which is not attributable to a single factor but a combination of many factors including the fortitude of the individual adjudicators. The Kenyan case of **Communications Commission of Kenya and 5 Others v Royal Media Service Limited and 5 Others**[8] was cited in support of the assertion that a combination of a number of safeguards are needed to attain and guarantee independence from outside forces operationally. It was posited that the Judiciary cannot disengage from other players in public governance. The Respondent concluded that it had shown by the various constitutional and statutory provisions it had cited that the independence of the Judiciary, *vis a vis* its functional or operational independence and its financial independence, is provided for.

Consideration and Decision

[43] We have considered the submissions by the parties. We wish to restate the principles of interpreting the Constitution. The starting point is that all relevant provisions touching on the subject matter must be considered together as a

whole so as to give effect to the objectives of the Constitution. Further, words should be given their ordinary, plain and grammatical meaning as conveying the intent of the framers unless this would lead to absurdity, in which case, the other principles of interpretation should be called in aid to ensure that the purposive meaning is achieved. Article 267 also requires that the Constitution should be interpreted in accordance with the Bill of Rights and in a manner that advances the purposes and intent of the Constitution, the development of the law and good governance. We have these principles in mind as we consider the issues raised in this petition.

[44] The Petitioner has framed three issues for our determination and which have been argued by the parties. For convenience, we wish to restate them and these are - whether:

(1) Sections 3 and 12 of the Judges (Conditions of Service) Act (JCSA) to the extent that they confer authority on the President to prescribe the emoluments and other conditions of service, including car loans, housing allowance; non private practice allowance; funeral assistance and travelling allowance for Judges are *ultra vires* Articles 122(3) and 123 (1) of the Constitution and therefore, null and void.

(2) Statutory Instrument No. 80 of 2018, which contains the salaries of Judges as prescribed by the President contravenes Articles 122(3) and 123 (1) of the Constitution and is therefore, null and void.

(3) The failure or omission by the Minister responsible for finance and the Legislature to enact legislation and put measures in place to promote the Judiciary's financial autonomy is a breach of Articles 122(3) and 123(1) of the Constitution.

[45] We shall first address the issue whether the failure or omission of the Legislature and the Minister responsible for finance to enact legislation and put in place measures to promote the Judiciary's financial autonomy is a breach of Articles 122(3) and 123(1) of the Constitution.

[46] Articles 122(3) and 123(1) require that legislation should be enacted and measures put in place to ensure financial autonomy of the Judiciary. The position of the Petitioner and the Interested Party is that this has not yet been done thus falling short of the constitutional requirement and thereby undermining the financial independence of the Judiciary. The Respondent's position, on the other hand, is that the constitutional edict has been fulfilled by the enactment of the Judiciary Administration Act which ensures its functional and financial independence.

[47] The issue regarding the financial independence of the Judiciary is not unique to Zambia. This concept of financial independence is one of the factors that must be addressed in order to ensure and enhance judicial independence. We are alive to the fact that the concept of judicial independence is broad and has two main facets namely independence of the individual judges which includes issues of appointment, security of tenure, removal procedure and remuneration, among others, and the independence of the Judiciary as a State organ.

[48] In the Canadian case of **R v Valente**[11] the issue of judicial independence was stated as follows:

> **It is generally agreed that judicial independence involves both individual and institutional relationships:. . . . The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.**

[49] It is thus not in doubt that both aspects of individual and institutional independence are cardinal to ensure judicial independence. However, what is in issue in this matter is the independence of the Judiciary as a State organ and this is further restricted to financial independence and we shall therefore only address this aspect in this part of the judgment.

[50] Before addressing this narrow aspect, we wish to briefly discuss the issue of independence of the Judiciary as a State organ.

[51] Separation of powers requires that each of the three State organs is autonomous of the other organs with minimal intrusion. In the case of **Chishimba Kambwili v Attorney General**[12] we stated at pages J25-27 as follows:

> **Thus, the doctrine of separation of powers entails a system where each of the three branches of government acts or works independently of the others so as to foster democracy and accountability. ... That notwithstanding, the concept of checks and balances connotes that what is envisaged is not complete separation of powers. Within allowable limits, the concept of checks and balances ensures that no arbitrariness ensues in the exercise of what is otherwise legitimate functions to make the branches of government accountable to each other.**

[52] We reiterate that the issue of independence of the Judiciary or any other State organ does not mean absolute independence or isolation from the other State organs because that is not practical or tenable as there must be some overlaps and interlinking because of the issue of interdependence and accountability. This is recognised by the Constitution in Article 123 which provides that the Judiciary should be self-accounting, deal directly with the Ministry responsible for finance and be adequately funded. What is envisaged is sufficient institutional and operational autonomy to shield the Judiciary from both undue and high possibility of real influence and interference from the other two State organs.

[53] A key component of institutional independence is financial independence. Financial independence relates to the manner in which the institution budgets for, accesses and disburses funds for the performance of its functions. This requires that each State organ should have reasonably sufficient control and freedom from interference from the other two State organs. This independence must be apparent from both the legislation and policy measures so as to be objectively viewed as such.

[54] As rightly submitted by the parties, this matter regarding the financial autonomy of the Judiciary is coming up for the first time in this jurisdiction. It is therefore necessary for us to consider how other jurisdictions have addressed it. We have taken this approach before in the cases of **Henry Kapoko v The**

People[13] and **Daniel Pule and Others v Attorney General**[14]. The objective of this is to get a general view of how other jurisdictions have handled similar issues for persuasive value.

[55] The United Nations Basic Principles on Independence of the Judiciary of 1985 state that each member state has a duty to provide adequate resources to the Judiciary. The Commonwealth Magistrates and Judges Association (CMJA) issued the "*Statement of Principles on Funding and Resourcing of the Judiciary in the Commonwealth"* on 8th July, 2020 outlining six (6) principles relating to the Judiciary's independence, adequate resources, the role in the budgetary process, remuneration, training and access to justice along with confidence in the independent Judiciary. These principles highlight the need for the Judiciary to have authority to prioritize the allocation and use of resources in line with set transparent criteria. The Lusaka Seminar on Independence of Judges and Lawyers held in November 1986 (CIJL Bulletin Volumes 19-20, October, 1987) states in paragraph 49 that conditions should be created for the Judiciary to have greater say in the allocation of its funds.

[56] The issues of budgetary and financial independence have been handled differently in many jurisdictions depending on their peculiar circumstances. The papers A. Rossell *'Judicial Independence and the Budget: A Taxonomy of Judicial Budgeting Mechanisms'* (2020) 5 Indiana Journal of Constitutional Design 11 and National Commission to Review the working of the Constitution,

'A Consultation Paper on Financial Autonomy of the Indian Judiciary' (2001), reviewed a number of countries in America, Europe and Asia, among others regarding how they had been handling the issue of financial independence of judiciaries. What they reveal is a spectrum ranging from very high fiscal to the low fiscal autonomy. The high fiscal autonomy is where the budget is set by the judiciary or judicial conference comprising judges and transmitted, without any amendment by the executive but only comments, to the legislature for approval. The low fiscal autonomy is where the budget is prepared with some input from the judiciary administration and submitted to treasury for review and approval before appropriation by the legislature. We note that the common thread that runs through for many countries is that there should be enhanced involvement of the judiciary in the budgeting process and the disbursement of the appropriated funds according to its priorities.

[57] Closer to home, a case in point is that of **Krispus Ayena Odengo v Attorney General and Parliamentary Commission**[5] where the Ugandan Constitutional Court considered a provision along the lines of Article 123(1) of our Constitution and declared that subjecting funding of the judiciary to the executive arm of government unconstitutionally involved the executive in determining the financial priorities of the judiciary thereby compromising judicial independence. The Court directed that the judicial independence and self-accounting principles laid out in the Constitution of Uganda required that once

the Judiciary presented its budget to the President of Uganda, the same was to be laid as presented before the National Assembly and that in the alternative, the President or Ministry of Finance could offer comments on its contents. This is instructive on enhancing the judiciary's financial independence. However, we hasten to state that this Ugandan decision was based on their peculiar constitutional provisions regarding the presentation of the judiciary budget and that gives discretion to the Judiciary on whether to deal directly with the Ministry of Finance.

[58] In our case, the recent World Bank (2022) report on *"Zambia Judicial Sector: Public Expenditure and Institutional Review"* also touched on this subject of judicial independence and financial autonomy on page 35 in the following terms:

> **Although no country has entirely resolved the question of financial autonomy of the judicial branch, various reform attempts have been made across jurisdictions. Countries such as Ukraine and Lesotho pushed reforms to have separate bodies administer their judicial budgets. Zambia can draw inspiration from such reform efforts. As such, it may wish to consider establishing a commission to superintend the judiciary budget. For this budgetary autonomy to work, it should be accompanied by professional management. Further, best practices indicate that judiciaries must take a more active role in presenting the budget to the Legislature; in Zambia, the MoJ presents the budget on behalf of the Judiciary.**
>
> **Another way to promote judicial independence is to constitutionally guarantee the Judiciary a share of the national budget.**

We wish to quickly state that we endorse the findings and sentiments of the World Bank (2022) report on the need for the Judiciary to take a more active

role in the budgetary process and for the Judiciary to have a guaranteed adequate share of the national budget. This is what is envisaged by Articles 122(3) and 123 of the Constitution.

[59]The rationale for Articles 122 and 123, respectively, as outlined at pages 446 and 448 of the Report of the Technical Committee on Drafting the Zambian Constitution dated 30th December, 2013 is stated as follows:

> **The rationale for the Article was that the principle of independence was the cornerstone of the Judiciary in its administration of justice, and therefore, needed to be provided for in the Constitution.... The Committee further observed that the Constitution should guarantee the independence of the Judiciary from any person or state organ.**
>
> **...the provision was necessary in order to ensure and enhance the independence, impartiality and efficiency of the Judiciary. The Committee, however, observed that, like any other Government institution, the Judiciary should be subject to the superintendence and prescription by the Minister responsible for finance before submission of the estimates of revenue and expenditure by the Government to the National Assembly.**

[60] It is apparent that the rationale is that the Judiciary, as one of the three State organs, must have enhanced independence and impartiality. This is based on the doctrine of separation of powers and is essential for the Judiciary to perform its oversight function on the other two State organs and for its own enhanced efficiency and accountability.

[61] Articles 122(3) and 123 of the Constitution provide as follows:

> **122(3) The Judiciary shall not, in the performance of its administrative functions and management of its financial affairs, be subject to the control or direction of a person or authority.**

> **123(1) <u>The Judiciary shall be a self-accounting institution</u> and shall deal directly with the Ministry responsible for finance in matters relating to its finances.**
>
> **(2)<u>The Judiciary shall be adequately funded</u> in a financial year to enable it affectively carry out its functions.** (emphasis added)

[62] Article 122(3) of the Constitution provides that the Judiciary shall not be subject to the control or direction of a person or authority in the performance of the administrative functions and management of financial affairs.

[63] Article 123 provides for financial independence of the Judiciary. Clause (1), which is in issue, provides that the Judiciary shall be a self-accounting institution and shall deal directly with the Ministry responsible for finance in relation to its finances. What is envisaged then is that the Executive, through the Minister responsible for finance would play some role in relation to the finances of the Judiciary. Clause (2) mandates that the Judiciary shall be adequately funded to enable it effectively carry out its functions.

[64] Self-accounting requires that the Judiciary should have control over the financial accounting function. Therefore, the preparation of the budget and release or accessing of funding to the Judiciary should not be hampered by the Executive's discretion over the level of funding and access thereto. This should be reflected in the administrative and institutional relationship of the Judiciary with the other two State organs. Parliament must legislate that the Judiciary is adequately funded. The funds, once appropriated by Parliament, should be under the control of the Judiciary. The Judiciary is equally expected to be

accountable for the funds. This is what is required to fulfill the demands of Article 123 of the Constitution.

[65] We say so having considered the other constitutional provisions that touch on the issue of finances which impact on the Judiciary so as to consider the issue holistically. These are Articles 114, 183 and 200 of the Constitution. Article 114 provides for the functions of Cabinet which include approving and presenting the national budget to the National Assembly. Article 183 mandates the Secretary to the Treasury with the responsibility to prepare the national budget and for financial management and expenditure of public monies appropriated to State organs, among others. Article 200 establishes a Consolidated Fund for revenues and other monies accruing to the Treasury and gives room for a public fund established for a specific purpose and for a State organ or institution to retain monies for defraying expenses.

[66] We begin with whether the issue of financial independence in Articles 122(2) and 123(1) has been adequately addressed by the Judiciary Administration Act as submitted by the Respondent.

[67] The Judiciary Administration Act relates to the general administration of the Judiciary. It provides, among others, that the funds of the Judiciary comprise money appropriated by Parliament, fees and grants, among others and that proper books of accounts should be kept and audited annually. Section 22 provides that the Government will provide, equip and maintain court houses.

This shows that the funds appropriated by Parliament for the Judiciary are for the general administration and salaries for staff and that court infrastructure is to be financed separately by the Government.

[68] Both the Petitioner and the Interested Party have acknowledged that the Judiciary Administration Act has addressed the issue of administrative independence to a large extent and that of financial independence to some extent but not to the level required by the Constitution. It is our considered view that the Judiciary Administration Act is a step in the right direction and has indeed addressed the issue of administrative independence to a large extent.

[69] In determining financial independence, the two issues that should be considered are the budgetary process and the accessing of the funds. This is due to the fact that the law and the modalities for budgeting and accessing funds have a significant impact on the Judiciary's financial independence.

[70] In terms of budgets, Article 183 of the Constitution mandates the Secretary to the Treasury to prepare the national budget which encompasses all the State organs and Article 114 gives the responsibility to Cabinet to approve and present the national budget to the National Assembly. This is the framework that the Judiciary is required to operate in. However, these provisions must be read in light of Articles 122(3) and 123 as regards the Judiciary budget and budgeting process. Article 123 mandates that the financial independence of the Judiciary should be enhanced. This should be the guiding principle as the Judiciary deals

directly with the Ministry responsible for finance in the budgeting process. It requires that the Judiciary should have a more active role in the budget process that should also address its priorities and the issue of adequate funding or adequate share of the national budget.

[71] Both the Judiciary Administration Act and the National Planning and Budget Act No. 1 of 2020 do not adequately address these issues in the budget process. The process has a bearing on the issue of under-budgeting for the Judiciary arising from pre-determined budget ceilings. This is an issue that was also identified in the recent World Bank report on *"Zambia Judicial Sector: Public Expenditure and Institutional Review"* at page 38 in the following terms:

> **The results indicate that budget allocations to the judiciary sector have been on the declining trajectory for the past six years.**
>
> **Further, the Judiciary does not have discretion in the amounts allocated to it. Like any other spending agency, the MoFNP and the Executive determine the Judiciary budget ceiling. The dominance and importance of the ruling party in the executive make the Judiciary susceptible to the political will of the ruling party. This trend has continued despite the constitutional provision for a financially independent Judiciary.... Addressing these funding gaps will require devising robust, innovative and sustainable financing mechanisms.**

It is thus our firm view that the budget process for the Judiciary needs to be addressed to bring it in line with the constitutional provisions requiring not just financial independence but also adequate funding for the Judiciary.

[72] As regards access to funds and disbursements, Article 183 of the Constitution mandates the Secretary to the Treasury with the responsibility of financial management and expenditure of public monies appropriated to State

organs and Article 200 provides for establishment of the Consolidated Fund and any public fund for specific purposes. We similarly wish to state that these provisions should be read in light of Articles 122(3) and 123 in relation to the Judiciary. This entails that the funds appropriated or accruing to the Judiciary should be under the control of the Judiciary in terms of access and disbursements as required by the constitutional provision on self accounting and financial independence.

[73] However, this has not been addressed by either the Judiciary Administration Act or the Public Finance and Management Act No. 1 of 2018 which provides for the institutional and regulatory framework for the management of public funds. For instance, section 30(2) of the Public Finance and Management Act empowers the Secretary to the Treasury to limit or suspend expenditure of any institution despite the fact that Parliament appropriated the funds in issue in the Appropriation Act. This section currently applies to the Judiciary and explains why budgetary allocations by Parliament to the Judiciary are generally not availed in full and may not be accessible as and when required. The Petitioner has rightly highlighted these inadequacies in the Public Finance and Management Act as outlined, in part, in the Judiciary Annual Report for 2021. This requires streamlining in view of the constitutional provision mandating financial independence. The World Bank (2022) report on *"Zambia Judicial Sector: Public Expenditure and Institutional Review"* identified as one of

the priority recommendations, the need to **'enhance budget performance within the Judiciary by developing efficient expenditure mechanisms and resource mixes'**. This issue of access to funds and disbursement is key in ensuring financial independence as it is an avenue where the Executive plays a crucial role in determining whether or not the Judiciary accesses even the funds that are appropriated by Parliament.

[74] It is thus apparent that the issue of financial independence of the Judiciary has not been adequately addressed by way of the Legislature enacting appropriate legislation and the Minister responsible for finance putting up policy measures in line with Articles 122(3) and 123 of the Constitution. This is, in our view, a contravention of the Constitution and must be addressed by Parliament and the Respondent in consultation with the Judiciary as a matter of urgency. The constitutional provisions need to be actualized through legislation, policies, processes and mechanisms to ensure that Articles 122(3) and 123 are realized in full as required by Act No. 1 of 2016. We note that this issue has been outstanding for many years since the constitutional amendments of 2016.

[75] The Petitioner sought a declaration against the Minister responsible for finance for being in breach of Articles 122(3) and 123(1) of the Constitution and a consequent order of mandamus for the Minister to put in place measures to ensure that the Judiciary is financially independent, self accounting and adequately funded.

[76] However, in view of the facts of this matter, which require Parliament to enact enabling legislation as required by Act No. 1 of 2016, we grant the following declaration and orders:

1. We declare that to the extent that the Respondent has not put in place legislation and measures to ensure that the Judiciary is fully financially independent and adequately funded, the Respondent is in breach of Articles 122(3) and 123 of the Constitution.

2. Parliament is hereby enjoined, as a matter of priority and expeditiously in accordance with section 6(2) of Act No. 1 of 2016, to ensure that appropriate legislation is enacted to fully actualize the financial independence of the Judiciary and that the Judiciary is adequately funded as required by Articles 122(3) and 123 of the Constitution. In the same vein, the Attorney General, in consultation with the Judiciary, should at the earliest opportunity sign off Bills to effect the constitutional provisions, as mandated by Article 177(5)(b) of the Constitution.

3. To ensure that progress is being monitored in this area, we order and direct that the Minister responsible for finance should submit reports to Parliament on the measures being taken to ensure that the Judiciary is financially independent and self-accounting and adequately funded every six (6) months from the date of the Judgment until the legislation and measures are fully effected as required by the Constitution.

[77] We turn to consider the next issue, namely, whether sections 3 and 12 of the JCSA, to the extent that they confer authority on the President to prescribe

emoluments for judges, are *ultra vires* Articles 122(3) and 123 (1) of the Constitution and therefore null and void.

[78] In sum, the Petitioner argues that based on the rationale of the Technical Committee on the articles in issue, to the effect that the financial independence of the Judiciary should be enhanced, the continued vesting of power in the President or Executive arm of Government to prescribe emoluments, pensions and conditions of service for judges runs afoul the entrenched financial and functional independence of the Judiciary. The Interested Party's arguments are essentially in support of the Petitioner's position.

[79] The Respondent denies that there is contravention of the Constitution and argues that the impugned sections and the statutory instrument should be considered in light of the transitional provisions in Act No. 1 of 2016 and construed with such modifications as required. This is said to be in line with our decision in the case of **Jayesh Shah v Judicial Complaints Commission**[7].

[80] We wish to first outline the impugned sections 3, 10, 11 and 12 of the JCSA which provide as follows:

> **3. There shall be paid to a Judge such emoluments as the President may, by statutory instrument prescribe.**
>
> **10. A Judge shall contribute towards the cost of the pension scheme described in this Act at the rate of seven and one quarter per centum of his pensionable emoluments or at such other rate as the Minister may fix by statutory order in consultation with the institution designated by section nine.**

11. There shall be paid in the institution designated by section nine from the general revenues of the Republic such amount calculated with regard to the pensions and other benefits payable under the pension scheme described in this Act as may be fixed by the Minister in consultation with that institution following the advice of an actuary appointed by the institution.

12. (1) The President may, by statutory instrument, make Regulations for the better carrying out of the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the President may, by statutory instrument, make Regulations prescribing the perquisites of office and other conditions of service of a Judge, including but not limited to the following:

(a) car loans;
(b) housing allowance;
(c) non-private practice allowance;
(d) funeral assistance;
(e)travelling on duty. ***(Emphasis added)***

[81] We note that sections 3 and 12 of the JCSA have been on the statute book in their current state from 1996 when the conditions of service for judges were separated from those of other constitutional office holders. The impugned sections were based on constitutional provisions that were prevailing at that time. The constitutional amendments of 2016 brought about the changes upon which this petition is based in that Articles 122 and 123 confer and enhance the functional and financial independence of the Judiciary. As we have already noted, Article 122(3) mandates that the Judiciary must not be subject to the control or direction of a person or authority in the performance of its administrative functions and management of its financial affairs while Article 123(1) requires that the Judiciary should be self-accounting and deal directly with the Ministry responsible for finance.

[82] The parties have rightly acknowledged that following the enactment of the Constitution of Zambia (Amendment) Act No. 2 of 2016, sections 3 and 12 of the JCSA to the extent that they confer authority on the President to prescribe emoluments for judges have been affected and cannot continue to stand in their current state.

[83] However, in any constitutional amendment, it is not expected or envisaged that all the changes take place overnight. Hence, transitional provisions are enacted which address what should happen in the interim and how the changes are to be effected in an orderly manner. This is to avoid creating chaos and vacuums in the entire governance system which would end up undermining the very intended purposes of the amendment. It is in light of this that we have had transitional provisions with each major constitutional change in our jurisdiction. With respect to the 2016 constitutional changes, the transitional provisions are contained in the Constitution of Zambia Act No. 1 of 2016 (hereinafter referred to as Act No. 1 of 2016).

[84] In the case of **Mutembo Nchito v Attorney General**[10] we had occasion to consider the relationship of Act No. 1 of 2016 *vis a vis* the Constitution of Zambia, 1991 and the Constitution of Zambia (Amendment) Act No. 2 of 2016 and stated as follows on pages J28-J29:

Act No. 1 of 2016 is the enabling or effectuating Act of the constitutional amendments and in it are all the relevant provisions for ensuring a seamless transition from one constitutional order to another.

[85] It therefore, follows that the changes brought about by Articles 122(3) and 123(1) in relation to sections 3 and 12 of the JCSA are to be read in light of the provisions of Act No. 1 of 2016 as well as the other relevant constitutional provisions touching on this issue.

[86] In terms of the other constitutional provisions, what is of relevance are Articles 232 and 264 which touch on the issue of who or what institutions should prescribe the emoluments for judges post the 2016 constitutional amendments. Article 232 establishes the Emoluments Commission and Article 264 provides that emoluments of a judge shall be determined by the Emoluments Commission, as prescribed.

[87] These provisions were intended to change the system from the existing provisions of sections 3 and 12 which mandated the President to prescribe emoluments and other conditions of service for judges through the issuance of statutory instruments and an Act of Parliament, respectively, to a position where the emoluments are set by the Emoluments Commission.

[88] We have considered the submission by the Petitioner that judicial independence requires that the emoluments of judges should be set by the Chief Justice or the Judiciary itself. This submission is not supported by the Constitution because when Articles 122(3) and 123(1) are read in light of Article

264, among others, it is apparent that the Constitution itself has taken that responsibility to another body outside the Judiciary, namely the Emoluments Commission. We opine that this takes away from the financial independence of the Judiciary envisaged by Articles 122(3) and 123(1) of the Constitution.

[89] Having determined that the Emoluments Commission is the body mandated to prescribe emoluments for judges post the 2016 constitutional amendments, the issue is whether sections 3 and 12 of the JCSA are *ultra vires* Articles 122(3) and 123(1) of the Constitution and therefore void. In the case of **Webby Mulubisha v Attorney General**[3] we reiterated that the supremacy of constitutional provisions is beyond question as provided in Article 1(1) and therefore any provision of a statute or statutory instrument that is inconsistent with the Constitution is void to the extent of the inconsistency. The issue then is whether the impugned sections ought to be declared null and void.

[90] The transitional provisions in section 6 of Act No. 1 of 2016 required Parliament to enact legislation regarding the Emoluments Commission and consequent changes to sections 3 and 12 of the JCSA to bring them in line with the constitutional provisions. Parliament subsequently enacted the Judiciary Administration Act No. 23 of 2016 which provides in section 16 that the emoluments for judges shall be determined by the Emoluments Commission on recommendation by the Judicial Service Commission. However, this provision could not take effect in the absence of the required enactment of legislation for

the Emoluments Commission as required by Articles 232 and 264 of the Constitution. The constitutional provisions, as well as section 16 of the Judiciary Administration Act, took effect after Parliament enacted the Emoluments Commission Act No. 1 of 2022. Section 18 of the Emolument Commission Act provides for a relevant authority responsible for recommending emoluments, which is the Judicial Service Commission in respect to the Judiciary, to submit proposals on emoluments as required.

[91] The period within which the two pieces of legislation were passed shows that there was a big gap between the passing of the constitutional amendments in 2016 and the effecting of legislative changes to bring the law into conformity with the Constitution.

[92] The issue then is what was to prevail in the meantime, between the passing of the constitutional amendments in 2016 and the enactment of the Emoluments Commission Act in 2022, as regards the setting of emoluments for judges.

[93] The transitional provisions in Act No. 1 of 2016, in particular sections 6 and 21, are instructive. Section 6 (1) requires that existing laws, at the time of the coming into effect of the constitutional amendments of 2016, were to continue in force but be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution as amended. Section 6 (2) mandates Parliament to amend existing

law to bring it into conformity with, or to enact legislation to give effect to, the Constitution and gives it latitude to determine the period within which to do so. We wish to quickly state that this latitude is not a license for Parliament to inordinately delay the amendment of existing laws or the mandatory requirement to enact legislation to give effect to the constitutional provisions. This was only meant to give Parliament sufficient time to carry out its mandate in a planned manner.

[94] Section 21 of Act No. 1 of 2016 provides as follows:

> **21. Subject to section *six*, where an Act of Parliament is required to give effect to an Article of the Constitution as amended, that Article shall come into effect upon the publication of the Act of Parliament or such other date as may be prescribed by, or under, the Act of Parliament.**

[95] In terms of section 21 of Act No. 1 of 2016, the provisions of Article 264 of the Constitution therefore came into effect upon the publication of the Emoluments Commission Act in 2022. Further, the Emoluments Commission Act in section 36 outlines transitional provisions which state that after commencement of the Act, any State organ or authority concerned with the determination of emoluments, including that of a judge, shall cease to be responsible for the same.

[96] It further provides in section 3 that subject to the Constitution, where there is an inconsistency between the provisions of the Act and any provisions of any written law, the provisions of the Act will prevail. This entails that the provisions

of the JCSA, in particular sections 3 and 12, were overridden by the Emoluments Commission Act upon its coming into effect.

[97] Since Article 264 only came into effect on the publication of the Emoluments Commission Act, sections 3 and 12 of the JCSA provided the much needed fall-back position in order to avoid the gap which would otherwise have arisen prior to the enactment of the Emoluments Commission Act, regarding which authority should prescribe the judges' emoluments.

[98] We reiterate that sections 3 and 12 of the JCSA were necessary and continued to apply during the transitional period prior to the enactment of the Emoluments Commission Act based on Act No. 1 of 2016. Further, after the enactment of the Emoluments Commission Act which provides that its provisions will prevail where there is a conflict with any other law, the Emoluments Commission Act has since taken care of the alleged conflict of sections 3 and 12 of the JCSA with the Constitution. That being the case, the question of the two sections being unconstitutional or contravening the Constitution does not arise. In the circumstances of this case, the declarations and orders sought in relation to sections 3 and 12 of the JCSA under reliefs (b) and (c) will not serve any useful purpose for the reasons given. We therefore decline to grant the declarations and orders sought to that effect.

[99] In view of section 3 of the Emoluments Commission Act, Parliament must make consequential amendments to the Judges Conditions of Service Act (JCSA) to bring the impugned sections into conformity with the constitutional provisions. We therefore order that the Respondent, who is mandated by Article 177(5) (b) of the Constitution to sign Bills for presentation to Parliament, must urgently take the necessary amendments to Parliament.

[100] As regards sections 10 and 11 of the JCSA, we also find that in so far as they mandate the Minister to fix the amounts of judges' contributions towards the pension scheme, the same is inconsistent with Articles 122(3) and 123(1) on the independence of the judiciary and are therefore void to the extent of inconsistency. This is notwithstanding that these provisions are practically redundant because there has been no pension scheme for judges since amendments were made to the JCSA in 2006. We similarly decline to grant the declarations relating to sections 10 and 11 of the JCSA under relief (b) as they will not serve any useful purpose for the reason we have given. However, we equally order that the Respondent should appropriately amend the two sections to bring them into conformity with Articles 122(3) and 123(1) of the Constitution.

[101] The last issue for our determination is whether S. I. No. 80 of 2018 which prescribes salaries for judges by the President contravenes Articles 122(3) and 123(1) of the Constitution.

[102] The Petitioner and the Interested Party submitted that since S. I. No. 80 of 2018 was issued by the President pursuant to section 3 contrary to Article 122(3) and 123(1) which confers such authority on the Judiciary itself based on the mandated financial independence, it contravenes the Constitution. The Respondent argued that based on the transitional provisions in sections 6 and 21 of Act No. 1 of 2016, the S. I. does not contravene the Constitution.

[103] Statutory Instrument No. 80 of 2018 was anchored on section 3 of the JCSA which provided for the President to prescribe the emoluments. In view of this fact, our position on the issue regarding the constitutionality of sections 3 and 12 of the JCSA in relation to the transitional provisions equally addresses the statutory instrument that was issued pursuant to those sections. We reiterate that the prescribing of emoluments for judges is still reposed in an institution outside the Judiciary. When this is considered in light of sections 6 and 21 of Act No. 1 of 2016, we are of the considered view that the S. I. was covered by the transitional provisions prior to the enactment of the Emoluments Commission Act as required by the Constitution.

[104] We thus decline to grant the declaration, under relief (b),that S. I. No. 80 of 2018 is null and void and *ultra vires* Articles 122(3) and 123(1) of the Constitution. The consequent order sought to quash the S.I. under relief (c) is equally declined. The further order sought by the Petitioner was that should the S. I. be declared null and void, the declaration should be suspended until the

Judiciary as a self-accounting institution prescribes its own conditions of service. The order sought falls off in view of our decision regarding the impugned S. I.

[105] In view of the fact that this petition has raised very important and novel issues, we order that each party is to bear its own costs.

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M. M. MUNALULA JSD
DEPUTY PRESIDENT, CONSTITUTIONAL COURT

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A. M. SITALI
CONSTITUTIONAL COURT JUDGE

.....

P. MULONDA
CONSTITUTIONAL COURT JUDGE

.....

M. S. MULENGA
CONSTITUTIONAL COURT JUDGE

.....

M. MUSALUKE
CONSTITUTIONAL COURT JUDGE

.....

M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE

.....

J. Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE