

IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA

2022/CCZ/0022

(Constitutional Jurisdiction)

IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA CHAPTER
1, VOLUME 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: ARTICLE 266, 160 AND PART X1 OF THE
CONSTITUTION OF ZAMBIA CHAPTER 1,
VOLUME 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: LOCAL GOVERNMENT ACT NO. 2 OF 2019
OF THE LAWS OF ZAMBIA

BETWEEN:

IKELANGE TOWN COUNCIL

AND

NATIONAL PENSION SCHEME AUTHORITY

ATTORNEY GENERAL

CORAM: SITALI, MULONDA, MULENGA, MUSALUKE AND CHISUNKA JJC. ON
7TH DECEMBER, 2022 AND 30TH MARCH, 2023.

FOR THE APPLICANT:

MS. ETHEL SIWALE (IN-HOUSE COUNSEL)

FOR THE 1ST RESPONDENT:

MRS. M. H. KAYOMBO AND MRS. O. Z.
CHIRWA (IN-HOUSE COUNSEL)



APPLICANT

1ST RESPONDENT

2ND RESPONDENT

FOR THE 2ND RESPONDENT:

MR. PAUL KACHIMBA, PRINCIPAL STATE
ADVOCATE - ATTORNEY GENERAL'S
CHAMBERS

JUDGMENT

Musaluke, JC, delivered the Judgment of the Court.

Cases referred to:

1. Stickrose Limited v The Permanent Secretary and the Ministry of Finance (1999) Z.R. 155
2. The Rating Valuation Consortium and D W Zyambo & Associates v Lusaka City Council and Zambia National Tender Board SCZ Selected Judgment No. 13 of 2004
3. Lusaka City Council v Grace Mwamba and 4 Others SCZ Judgment No. 21 of 1999
4. Bric Back Limited T/A Gamamwe Ranches v Neil Kirkpatrick 2020/CCZ/A002
5. Gervas Chansa v The Attorney General CCZ 2019/CCZ/004

Legislation referred to:

1. The Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016.
2. The National Pension Scheme Act No. 40 of 1996
3. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia
4. The Local Government Act No. 2 of 2019

Introduction

[1] By way of originating summons, the Applicant herein commenced this action seeking interpretation and determination of the following questions:

- i. **Whether a Local Authority being part of Local Government created and performing functions as provided for under Part XI of the Constitution and also being an entity of the governance system of Zambia is amenable to any criminal prosecution?**
- ii. **Whether a Local Authority defined in Article 266 of the Constitution as a Council and its secretariat consisting of persons appointed by the Local Government Service Commission can be regarded as a “Person” as defined in the said Article for purposes of any criminal prosecution?**
- iii. **Whether a Local Authority managed by a Council and employees appointed by the Local Government Service Commission who are officers of the Local Government Service, are amenable to criminal prosecution for Central Government’s failure or delay to pay or remit NAPSA contributions for employees in the Local Government Service?**
- iv. **And if so, whether a Principal Officer of a Local Authority who is an employee of the Local Government Service and not permanently assigned to a particular Local Authority can take plea and stand trial on behalf of the Local Authority and suffer the consequences of such prosecution for the Government’s failure to pay NAPSA contribution?**

- v. And also, whether a criminal judgment obtained against a local Authority as a result of such prosecution, may only be enforced after one (1) year from the date of delivery of such judgment in terms of the provisions of Article 160 of the Constitution?
- vi. The Petitioner [sic] therefore prays that the criminal proceedings in Mwinilunga Subordinate Court be declared a nullity.

[2] The originating summons were accompanied by an affidavit in support deposed to by Ms. Ethel Siwale, in her capacity as Director of Legal Services for Choma Municipal Council.

Background Facts

- [3] The questions before this Court emanate from a criminal prosecution before the Mwinilunga Subordinate court. The Applicant was indicted for its failure to remit statutory contributions in the sum of ZMW 825,799.81 and 20% cumulative penalty of ZMW 5,485,963.68 contrary to section 15(1) and (2) as read with section 51(1)(d) and (2) of the National Pension Scheme Act No. 40 of 1996 ('NAPSA Act').
- [4] Following the Applicant's failure to remit the said statutory contributions, a complaint was issued pursuant to section 90 of the Criminal Procedure Code before the Mwinilunga Subordinate Court

and summons served on a Mr. Trophius Kufanga in his capacity as Council Secretary of the Applicant.

- [5] When the matter came up for plea at the Subordinate Court, the Applicant raised a preliminary issue as to who should take plea in that the principal officer named in the summons had no *locus standi* as he could not be sued by virtue of his office. The presiding Magistrate however, ruled that the Applicant through its Council Secretary was to take plea in a representative capacity. Following the said ruling, the Applicant made an application to refer to this Court the questions raised in the preliminary issue but the trial court refused to refer the said questions on the basis that they did not raise any constitutional issues. The Applicant then decided to move this Court by way of originating summons seeking interpretation of the questions outlined in paragraph 1 above.

Applicant's submissions

- [6] On 20th October, 2022 the Applicant filed submissions and skeleton arguments in reply to the 1st Respondents opposition.
- [7] The thrust of the Applicant's submission centered on explaining the system of governance in Zambia and the establishment and functions

of the Local Authorities as spelt out under Part XI, particularly Article 151(1) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution) and also sections 3, 16 and 56 of the Local Government Act.

[8] It was submitted that the totality of the Government of the Republic of Zambia is made up of the National Government and the Local Government. That the Applicant being a local authority is in actual sense government at a local level to whom the functions of the National Government have been transferred through decentralization.

[9] It was argued that a local authority is not a 'person' as contemplated under Article 266 of the Constitution where a 'person' is defined to mean an individual, a company or an association of persons whether corporate or unincorporate.

[10] As regards the issue of whether employees appointed by the Local Government Service Commission are amenable to criminal prosecution for the National Government's failure to pay or remit National Pension Scheme Authority (NAPSA) contributions, the Applicant argued that councils perform functions on behalf of the National Government from whom they receive funding through the

national treasury. Further, that, local authority employees are employed by the Local Government Service Commission but assigned to work in the local authorities and therefore, they are not employees of the local authorities. That Government's failure to pay NAPSA contributions on behalf of its employees cannot therefore, be superimposed on the local authorities.

[11] On the issue of whether or not a principal officer of a local authority who is an employee of the Local Government Service Commission and not permanently assigned to a particular authority can take plea and stand trial on behalf of a local authority, it was submitted that unlike members and directors of companies, who are representatives of those companies, the principal officer of a local authority is not a representative of a particular local authority. That despite being an officer of a local authority, he or she still remains an officer employed by the Local Government Service Commission and is amenable to be transferred from one local authority to another.

[12] It was therefore submitted that prosecuting a council secretary in this matter amounts to prosecuting public officers for the failures of the Government. To support this position, the Applicant referred the Court to the case of **Stickrose Limited v Permanent Secretary and**

Ministry of Finance¹ where the Supreme Court held that public officers need protection of the law and not to be individually harassed by way of civil actions as a means of enforcing judgments against the State.

- [13] On the fifth question posed, the Applicant submitted that as a local authority, it enjoys special status and no judgment against it can be enforced immediately as provided for under Article 160 of the Constitution. That as a consequence, a judgment of the criminal proceedings before the Subordinate Court against the Applicant can only be enforced after one year.
- [14] It was the Applicant's further argument that the 1st Respondent cannot use criminal prosecution to recover penalties owed by it as the 1st Respondent has the ability to recover the said penalties through civil action.
- [15] When the matter came up for hearing on 7th December, 2022 the Applicant made brief oral submissions by restating the contents of the written submissions. The Applicant, further, urged the Court to take judicial notice of the fact that the equalization fund to local authorities is not disbursed on time and not regulated, and also that generally any

funding from the Government does not come timely and in full. That this entails delays in salary payments and NAPSA contributions by local authorities.

1st Respondent's Opposition

[16] On 13th October, 2022 the 1st Respondent filed an affidavit in opposition together with skeleton arguments and a list of authorities in opposition to the Applicant's originating summons.

[17] The 1st Respondent in the affidavit in opposition deposed to by its Legal Officer – Regulatory and Enforcement, Mrs. Ostridah Chola Zyambo, averred that the Applicant is established as a body corporate capable of suing and being sued in its corporate name and to do all things that a corporate body may do. Further, that local authorities including the Applicant are led by a Council Secretary who is the principal officer and chief executive officer. That, Local Authorities are granted financial control and accountability over the monies distributed to the said entities by the Ministry of Finance annually under the Local Government Equalization Fund. That, therefore, the Applicant is responsible for the remittance of the monthly contributions under the NAPSA Act for the employees under it.

[18] The 1st Respondent also contended that the Applicant is defined under the NAPSA Act as a contributing employer required to remit monthly statutory contributions in respect of its employees, failure to which the Applicant is liable for offences and penalties under the said Act. It was averred that the Applicant's application before this Court does not raise any constitutional issues as the Applicant is not precluded from being prosecuted in criminal and civil actions.

[19] In the skeleton arguments, the 1st Respondent submitted that there is no provision in the Constitution that suggests that local authorities are not amenable to criminal prosecution for abrogation of statutes such as the NAPSA Act. That section 6 of the Local Government Act in fact creates local authorities as body corporates with adequate legal *persona* to do all such acts and things as body corporates. That, contrary to the Applicant's assertion, local authorities are independent from the National Government and that this independence can be discerned from the provisions of Article 152(2) of the Constitution which provides that the National Government and the Provincial Administration will not interfere with the functions of local authorities.

[20] As regards the question whether or not a local authority as defined under Article 266 of the Constitution can be regarded as a "person", it

was the 1st Respondent's submission that the definition of a 'person' under Article 266 of the Constitution, extends to corporate bodies such as the Applicant. That the Applicant's establishment as a corporate body with separate legal personality is evidenced by a number of decided cases in this jurisdiction, all emanating from legal proceedings where local authorities sued parties or were sued in their corporate name. Among the cases cited to show that local authorities have sued and have been sued before were: **The Rating Valuation Consortium and D W Zyambo v Lusaka City Council and Zambia National Tender Board²** and **Lusaka City Council v Grace Mwamba and 4 Others³**.

[21] Regarding the third question on whether or not a local authority managed by a council and employees appointed by the Local Government Service Commission is amenable to criminal proceedings for Government's failure or delay to pay or remit NAPSA contributions, it was the 1st Respondent's submission that the mandate to prosecute the Applicant for its failure to remit statutory pension contributions is founded on the provisions of section 51(1) of the NAPSA Act, which provides that any person who fails to pay any contribution within the specified period is guilty of an offence. Further, that local authorities

being contributing employers under section 12 of the NAPSA Act, are mandated to remit statutory contributions on behalf of their employees. As such, the failure to remit pension contributions is sanctioned as a criminal offence regardless of whether or not the Applicant attributes its failure to remit NAPSA contributions to the delay by the National Government to fund local authorities.

[22] In response to the fourth question raised by the Applicant, it was the 1st Respondent's submission that both the Constitution and the Local Government Act under Article 154(4) and section 2 respectively, provide that local authorities may be led by a council secretary who is the principal officer and chief executive officer. That, therefore, the council secretary would only be taking plea in his capacity as chief executive officer of the local authority and not in his individual capacity.

[23] In response to the fifth question raised in which the Applicant alleges that a criminal judgment obtained against a local authority as a result of a criminal prosecution may only be enforced after one (1) year from the date of delivery of such judgment, it was the 1st Respondent's submission that it would be a legal mischief for judgments in criminal actions instituted against local authorities to only be executed after a

one (1) year period. It was submitted that it could not have been the intention of the framers of the Constitution in enacting Article 160 to create circumstances for local authorities to commit criminal offences and hide behind the shield created under Article 160 of the Constitution.

[24] At the hearing, the 1st Respondent relied on the written submissions and made brief oral arguments. It was argued that it is trite that a body corporate is liable to criminal prosecution except for criminal matters that attract a custodial sentence. That in this case, the offences stipulated under section 51 of the NAPSA Act provide for punishment that includes a fine and that this is because the offender could either be a natural person or a body corporate as is the case in this matter.

[25] The 1st Respondent also emphasized that the proceedings in the Subordinate Court at Mwinilunga are not against an individual but against the Applicant and that whoever occupies the office as principal officer at any given time is the person to stand in the dock and take plea in their representative capacity.

2nd Respondent's Position

[26] The 2nd Respondent having not filed an opposition to the Applicant's originating summons, did not advance any oral submissions.

Determination

[27] We have considered the originating summons, the affidavit and skeleton arguments in support. We have also considered the affidavit and the arguments in opposition to the originating summons by the 1st Respondent.

[28] The issue for determination thus is whether or not the questions posed by the Applicant in the originating summons are constitutional questions falling within the purview of this Court's jurisdiction and if so, whether or not they are meritorious.

[29] Article 128 (1) (e) of the Constitution gives this Court jurisdiction to determine whether or not a matter falls within the jurisdiction of the Constitutional Court and it provides as follows:

128(1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear-

(e) whether or not a matter falls within the jurisdiction of the Constitutional Court.

[30] It is therefore, imperative that before we proceed any further, we to determine whether or not the questions raised in the originating summons before us fall within our jurisdiction. The starting point is Article 1 (5) of the Constitution, which provides that a matter relating to

the Constitution shall be heard by this Court. Article 128 (1) (a) and (b) further provide that this Court has jurisdiction to hear a matter relating to the interpretation, or violation or contravention of the Constitution.

[31] It is thus clear that the jurisdiction of this Court is limited by the Constitution itself. In our decision in the case of **Bric Back Limited T/A Gamamwe Ranches v Neil Kirkpatrick**⁴ we held as follows:

The Constitutional Court of Zambia is a specialised Court, set up to resolve only constitutional questions. In that sense, it is separated from the general court hierarchy under which matters move from the lower courts up to the final court of appeal. This Court exemplifies what the learned author Andrew Harding in *The Fundamentals of Constitutional Courts* calls a centralised system as opposed to a diffused system. In the latter, a supreme court has general jurisdiction over civil and criminal matters as well as constitutional issues. In our case, the Constitutional Court exists only for constitutional matters hence it is separate and additional to the Supreme Court which has general jurisdiction. In the Zambian court system, all questions of a general nature, including procedural questions, must proceed through the courts of general jurisdiction”.

[32] In light of the provisions of Articles 1 (5) and 128 (1) (a) and (b) of the Constitution and the guidance given in the **Bric Back**⁴ case, we reiterate that the jurisdiction of this Court as regards interpretation of the Constitution can only be invoked where an application seeks to resolve constitutional questions.

[33] The definition of a constitutional question was given in the case of **Gervas Chansa v The Attorney General**⁵ in which we held as follows:

A constitutional question is defined in the blacks' law dictionary as a legal issue resolved by the interpretation of the Constitution rather than the statute.

[34] It is clear that a constitutional question is one that can be resolved by the interpretation of the Constitution rather than a statute. Thus, where a question does not invite the Court to interpret a provision of the Constitution, the same is not a constitutional question. With that said, we now proceed to address each of the questions raised by the Applicant seriatim and determine whether or not they raise any constitutional questions subject for determination by this Court.

[35] The first question is whether a local authority being part of the Local Government created and performing functions as provided for under Part XI of the Constitution and also being an entity of the governance system of Zambia is amenable to criminal prosecution.

[36] At the outset, although we note that the Applicant in moving this Court, relied on the provisions of Articles 160 and 266 and Part XI of the Constitution, the Applicant does not point the Court to any specific provision of Part XI of the Constitution which this Court should

interpret. An applicant who approaches this Court for constitutional interpretation must formulate the constitutional questions in such a manner that they specify clearly the provisions upon which the Applicant seeks the Court's interpretation.

[37] In the case of **Gervas Chansa v The Attorney General**⁵, we guided that constitutional matters must be properly framed for us to exercise our jurisdiction.

[38] Question one as framed does not raise any constitutional issue for us to determine. It is therefore, outside our jurisdiction and we will not consider it.

[39] The second question posed by the Applicant is whether a local authority as defined under Article 266 of the Constitution can be regarded as a person for purposes of criminal prosecution.

[40] We are of the view that a constitutional issue has been raised in this question. We have perused the definition of person under Article 266 of the Constitution which provides as follows:

“person” means an individual, a company or an association of persons, whether corporate or unincorporate.

[41] It is clear from a reading of the above definition that a person at law includes both natural persons and juridical persons such as a company, association, bodies whether corporate or unincorporate. As local authorities are juridical persons capable of suing and being sued in their corporate name, they qualify as persons under Article 266 of the Constitution.

[42] It is therefore, not correct to assert that the concept of corporate personality only applies to corporations established under the companies Act. The second question is therefore, answered in the affirmative that a local authority is a person as defined under Article 266 of the Constitution for purposes of criminal prosecution.

[43] The third question raised is whether or not a local authority managed by a Council Secretary and employees appointed by the Local Government Service Commission is amenable to criminal proceedings for Government's failure or delay to pay or remit NAPSA contributions for employees in the local authorities.

[44] We note that the question has not directed us to any provision of the Constitution upon which it seeks interpretation. The 1st Respondent in response to the question, relied on the provisions of sections 51 and

12 of the NAPSA Act. We find that these provisions are not constitutional and therefore, resolving the question based on these provisions would amount to this Court offering a statutory interpretation as opposed to a constitutional interpretation. In the premise, we find that this question does not disclose any constitutional issue to warrant determination by this Court. This question therefore, does not fall within the jurisdiction of this Court.

[45] The Applicant's fourth question is whether or not a principal officer of a local authority who is an employee of the Local Government Service Commission and not permanently assigned to a particular local authority can take plea and stand trial on behalf of the local authority and suffer the consequences of such prosecution for National Government's failure to remit funds to local authorities to pay NAPSA contributions.

[46] Similarly, this question has not specified the provision of the Constitution which requires interpretation by this Court. In the absence of such provision, we find that there is no constitutional question to be resolved by this Court. This question therefore, does not fall within the jurisdiction of this Court.

[47] The fifth question is whether or not a criminal judgment obtained against a local authority as a result of such prosecution may only be enforced after one (1) year from the date of delivery of such judgment in terms of the provisions of Article 160 of the Constitution.

[48] The key to this question lies in the examination of Article 160 of the Constitution which provides as follows:

A person who obtains a judgment against a local authority may enforce the judgment against the local authority after one year from the date of the delivery of the judgment. (Emphasis added).

[49] We are of the considered view that Article 160 of the Constitution makes it mandatory for a judgment against a local authority to be enforced only after one year. This means that, local authorities are provided with immunity against execution of judgments obtained against them for a period of one year from the delivery of such judgments. The discretion to enforce the judgment against a local authority therefore, only applies after one year from the date of delivery of the judgment. The judgment creditor may, therefore, only opt to enforce the judgment obtained against a local authority after the lapse of one year from its delivery.

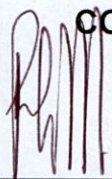
Conclusion

[50] In conclusion, we find that the Applicant's originating summons lacks merit and is dismissed.


[51] We order each party to bear own costs.



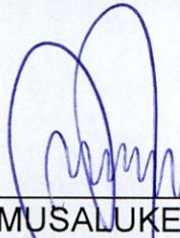
A. M. SITALI
CONSTITUTIONAL COURT JUDGE



P. MULONDA
CONSTITUTIONAL COURT JUDGE



M. S. MULENGA
CONSTITUTIONAL COURT JUDGE



M. MUSALUKE
CONSTITUTIONAL COURT JUDGE



M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE