

Cases referred to:

1. Dipak Patel v Minister of Finance 2020/CCZ/05
2. Steven Katuka and Law Association of Zambia vs Attorney General and Ngosa Simbyakula and 63 Others [2016] Z.R. 226
3. Zambia National Commercial Bank v Musonda and Others (2018) 2 ZR. 35
4. Frederick Jacob Titus Chiluba v Attorney General, SCZ, Appeal No. 25 of 2002
5. Webby Mulubisha v Attorney General 2018/CCZ/0013
6. Isaac Mwanza v The Attorney General 2021/CCZ/0045
7. Vincent Lilanda and Others v Attorney General 2020/CCZ/004
8. Jonas Zimba v Attorney General 2022/CCZ/007
9. Godfrey Miyanda v Attorney General 2016/CCZ/006
10. Major Isaac Masonga v The People [2009] ZR. 242
11. Ikelenge Town Council v National Pension Scheme Authority and Attorney General 2022/CCZ/0022
12. Michael Mbuyu Mutwena v Attorney General 2021/CCZ/0038

Legislation referred to:

1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by Constitution of Zambia (Amendment) Act No. 2 of 2016
2. The Constitutional Court Act, No. 8 of 2016
3. The Constitutional Court Rules, Statutory Instrument No. 37 of 2016

[1.0] INTRODUCTION

[1.1] Sometime in September 2022, the Drug Enforcement Commission (DEC) issued notices of seizure against property that was allegedly owned by the former President, Dr. Edgar Chagwa Lungu. The seizure prompted the Zambia Community Development Initiative Programme (applicant) and caused it to institute this suit on 11th October, 2022 seeking interpretation on whether the DEC's action offended the Constitution.

[1.2] In terms of interest in the subject matter of the suit, the applicant averred that it was a body formed to protect the welfare and rights

of citizens above the age of 60. Intrinsicly, the former President who is in that age category was entitled to its protection, hence the suit.

[2.0] THE APPLICANT'S CASE

[2.1] The applicant's case was set out in the supporting affidavits filed into Court on 11th October, 2022 and 13th February, 2023. They were deposed to by its Managing Director, Mr. Hendrix Nyambe, who averred that the DEC seized two properties, numbered LUS/38478 and LUS/28479, which were allegedly owned by the former President, Dr. Edgar Chagwa Lungu. The investigations carried out by the DEC subsequently revealed that he did not own the property.

[2.2] In the applicant's view, the DEC acted illegally and in disregard of the former President's right to immunity from criminal proceedings, his status and standing. As a result, thereof, the applicant seeks the Court's interpretation on the extent of immunity that the former President enjoys under the Constitution.

[2.3] More particularly, the applicant invites the Court to determine the following questions:

- a) **Whether the decision of the Drug Enforcement Commission to unlawfully enter and search the**

property of the Former Republican President, Dr. Edgar Chagwa Lungu contravened Article 98 (4) of the Constitution of Zambia Amendment Act No. 2 of 2016?

- b) Whether a purported forfeiture or seizure of any asset belonging to a former head of State before the lifting of immunity contravenes the Constitution?
- c) Whether the former President of Zambia's immunity extends to exemption from searches, interviews, summons and institution of criminal proceedings in Zambia?

[2.4] In further support of the application, learned counsel filed skeleton arguments where it was submitted that the applicant had *locus standi* in this matter in terms of **Article 2** of the **Constitution** which, provides that:

Every person has the right and duty to—

- (a) defend this Constitution; and
- (b) resist or prevent a person from overthrowing, suspending or illegally abrogating this Constitution.

[2.5] Counsel also cited **Article 128 (3)** of the **Constitution** on the argument supporting *locus standi* that:

Subject to Article 28, a person who alleges that—

- (a) an Act of Parliament or statutory instrument;
- (b) an action, measure or decision taken under law; or
- (c) an act, omission, measure or decision by a person or an authority;

contravenes this Constitution, may petition the Constitutional Court for redress.

[2.6] Counsel further called in aid **Section 11 (2)** of the **Constitutional Court Act**, which provides:

Subject to subsection (1), a Court proceeding may be instituted by-

- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.

[2.7] To illustrate our general jurisdiction on interpretation, counsel drew our attention to the case of **Dipak Patel v Minister of Finance**¹ where we stated that:

Further, it is settled law that another primary principle in interpreting the Constitution is that where the words used in a provision of the Constitution are clear and unambiguous, they must be given their plain or natural meaning. In other words, the provisions of the Constitution should be construed in such a way that they are given their literal meaning unless a literal meaning results in absurdity or causes conflict with other provisions of the Constitution or the subject for interpretation.

[2.8] Counsel also referred us to our decision in the case of **Steven Katuka and Law Association of Zambia v Attorney General and Ngosa Simbyakula and 63 Others**² where we stated our interpretive jurisdiction emphasising the principle of the literal rule of interpretation of statute.

[2.9] He next adverted to the case of **Zambia National Commercial Bank v Musonda and Others**³ where we opined that:

When interpreting the Constitution, all the relevant provisions, bearing on the subject of interpretation should be considered together as a whole to give effect to the objective of the Constitution. This means that the Constitution should not be segregated from the other provisions touching on the matter which is the subject of interpretation.

[2.10] Counsel then addressed the DEC's perceived violation of the former President's immunity by referring us to **Article 98 (4)** of the **Constitution**, as follows:

Subject to clause (9), the President or a person performing executive functions, as provided in Article 109, is immune from criminal proceedings, which immunity continues after that person ceases to hold or perform the functions of that office.

[2.11] We were also referred to **Article 98 (5)** of the **Constitution** that:

Where there is prima facie evidence that a person who held the office of President or who performed executive functions committed an offence whilst in office or during the period that person performed executive functions, the President shall submit a report, outlining the grounds relating to the offence allegedly committed, to the National Assembly, requesting the National Assembly to remove the immunity from criminal proceedings of that person.

[2.12] To demonstrate a circumstance when a former President's immunity had been properly lifted, counsel invited us to note the case of **Frederick Jacob Titus Chiluba v Attorney General**⁴ where the Supreme Court opined that:

The learned judge found that there was no impropriety in lifting the appellant's immunity for purposes of facilitating

investigations into the allegations made against him in the Special Session Address to Parliament on 11th July, 2002. He also found that the National Assembly's decision to lift the appellant's immunity was not ultra vires the Constitution.

[2.13] Counsel next submitted that the DEC's seizure of the former President's properties was excessive. Further, that it triggered the commencement of criminal proceedings against him, in the absence of the National Assembly approval. As a result, thereof, the former President's rights were violated.

[2.14] It was also contended that, the DEC's action offended the principle of Constitutional supremacy provided in **Article 1 (2) and (3) of the Constitution** that:

- (2) An act or omission that contravenes the Constitution is illegal.
- (3) This Constitution shall bind all persons in Zambia, State organs and State institutions.

[2.15] Counsel went on to cite the case of **Webby Mulubisha v Attorney General**⁵ where we reinforced the principle of Constitutional supremacy. We stated that:

The supremacy of the Constitutional provisions is beyond question. That being the case, any provisions in our statute book which runs afoul a provision of the Constitution such as Article 165 (2) (a) is void to the extent of the inconsistency...

[2.16] It was next asserted that the applicant, who was rightfully before Court, was entitled to seek our interpretive jurisdiction. More so that, the issues raised in the application were not personalised

nor contentious, but rather broad and prospective on the former President's right to immunity. Counsel then concluded with a prayer to Court urging it to grant the reliefs that were placed before it.

[3.0] THE RESPONDENT'S CASE

[3.1] On behalf of the respondent, Mr. Emmanuel Khondowe, Senior Investigations Officer at the DEC, filed an opposing affidavit into Court on 6th February, 2023. He deposed that while undertaking a property verification exercise, for the purpose of investigations, DEC seized properties namely, LUS/38478 and LUS/28479. The notice of seizure was eventually lifted and the findings communicated to the parties who were involved.

[3.2] According to Mr. Khondowe, there was nothing in the law that prevented DEC from seizing the assets of the former President even when he enjoyed immunity from criminal proceedings. In any case, the seizure was part of the DEC investigative procedure and as such, law enforcement agents could carry out inquiries against the former president.

[3.3] The respondent's case was further supported by learned counsel's skeleton arguments. Therein, it was contended that the applicant's case was wrongly before Court because it overlooked principles on

the doctrine of constitutional interpretation. More particularly, the application raised issues which were personalised, contentious and not set out with certainty. In fortifying the assertion that the applicant's case was wrongly before court, counsel referred us to the case of **Isaac Mwanza v Attorney General**⁶ where we laid down the threshold test for applicants seeking constitutional interpretation.

[3.4] In illuminating our jurisprudence on the mode of commencement for matters involving constitutional interpretation, counsel cited the case of **Vincent Lilanda and Others v Attorney General**⁷ where we stated *inter alia* that:

...The applicant's allegations of contravention of the Constitution have constrained us to pause and consider our jurisdiction under the Constitution and the law. We say so because the mode of commencement determines the jurisdiction of this Court...

[3.5] Counsel, thereafter, proceeded to argue that the Court has no jurisdiction to hear the applicant's case because the issues raised were personalized and contentious. As such, they required trial to establish the facts and the correct position of the law.

[3.6] Counsel argued that the first question in the application was personalized because it specifically referred to the former President. On the other hand, that there were no issues raised in questions two and three of the application requiring constitutional

interpretation at all. To buttress the argument, counsel cited the case of **Jonas Zimba v Attorney General**⁸ where we stated *inter alia* that:

Based on the applicant's own statement and our reading of the manner in which the question is framed, we find that the essence of question 2 is to seek interpretation of identified articles of the Constitution...Our summation of the principles established by our jurisprudence and applicable to the use of originating summons for purposes of interpreting Constitutional provisions is as follows:

First, the issues raised must relate solely or exclusively to interpretation of Constitutional provisions.

[3.7] On Article 98 (4), (5) and (8) of the Constitution, counsel argued that the only way the Republican President could draw the conclusion that there was *prima facie* evidence against a former President, was through an investigation envisaged under **Article 98 (5) of the Constitution**.

[3.8] It was further contended that in the absence of an investigation, there could be no basis for the lifting of immunity of a former President. Counsel then averred that a criminal investigation was distinguishable from criminal proceedings, emphasising that seizure of property was incidental to a criminal investigation and not proceedings. For this assertion, we were referred to case of **Godfrey Miyanda v Attorney General**⁹ where we stated that:

The Constitution does not therefore, protect persons who have held the office of President from wanton criminality committed

during their tenure. Modern Constitutions use the mechanism of head of state immunity to avoid unnecessary disruption in the execution of executive functions. This immunity applies to the proper and honest execution of the functions of the President and not to deliberate acts or omissions that, by definition, amount to felonious activity.

[3.9] Counsel also similarly cited the case of **Frederick Jacob Titus Chiluba v Attorney General**⁴ to demonstrate the process of removal of immunity of a former President.

[3.10] Counsel concluded the arguments with a prayer to Court to dismiss the applicant's case for want of jurisdiction. In the alternative, and if the Court were to hold that it had jurisdiction, the respondent would proceed on the basis that criminal investigations preceded the lifting of immunity of the former President.

[4.0] HEARING

[4.1] We held the hearing of the application on 29th June, 2023. Learned counsel for the parties both placed reliance on their rival affidavits and arguments filed herein.

[4.2] Learned counsel for the applicant, Mr. Mwelwa briefly augmented his arguments, by submitting and reiterating that the respondent had disregarded **Article 98(5)** of the **Constitution**. As far as he was concerned, the provision did not envisage any criminal

investigations against the former President when a *prima facie* case had not been established.

[4.3] Counsel also argued that *prima facie* evidence was the only means by which, the former President's immunity could be lifted. To buttress the assertion, counsel referred us to the case of **Major Isaac Masonga v The People**¹⁰, where the Supreme Court held *inter alia* that fair trial begins with investigations. Mr. Mwelwa then submitted that if **Article 98** of the **Constitution** extended to criminal investigations, then it would be at variance with the Supreme Court decision and therefore, unconstitutional.

[4.4] Counsel averred that according to the **Major Isaac Masonga**¹⁰ decision, all courts have a mandatory duty to guarantee a fair trial which, in his view, begins at the time of investigations. Equally, that this was to ensure that investigations are conducted in a fair manner on all suspects regardless of their status. Mr. Mwelwa next submitted that all courts have a constitutional duty to administer justice and guarantee procedural justice for all litigants.

[4.5] Consequently, the Court was obligated to protect the former President's right to fair trial and procedural justice by ensuring that the respondent adheres to **Article 98(5)** of the **Constitution**.

[4.6] In reply, learned counsel for the respondent, Ms. Mulenga, briefly reiterated that the applicant's case was wrongly before Court. It had not met the threshold test for constitutional interpretation and had raised personalised and contentious issues. Thus, the application was rendered wholly incompetent and liable to be dismissed in its entirety.

[4.7] In rejoinder, Mr. Mwelwa asserted that the applicant was rightfully before Court and its case met the threshold requirements on constitutional interpretation. He emphasized that there was only one surviving former President who had been subjected to injustice, contrary to **Article 98(5)** of the **Constitution**.

[4.8] He also averred that, the former President's case had been merely used as an example to protect the rights to fair trial and procedural justice for all future former Presidents. Mr. Mwelwa concluded by reiterating the applicant's earlier prayer.

[5.0] **ANALYSIS AND DETERMINATION**

[5.1] We have considered the application, evidence adduced and the arguments of learned counsel tendered in support, and rebuttal to the issues raised herein. Suffice to state, at the outset, that the Court's interpretive jurisdiction is set out in **Article 128(1)(a)** of the **Constitution** as follows:

128. (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear-
(a) a matter relating to the interpretation of this Constitution; ...

[5.2] In terms of the canons of our interpretive function, we exhaustively elucidated in the case of **Isaac Mwanza v The Attorney General**⁶ that:

- 4.1 The Court's jurisdiction to interpret the Constitution is found in Article 128(1)(a) read with the Constitutional Court Act No. 8 of 2016 (henceforth the "Act") and the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 (henceforth the "Rules"). The Constitution, the Act and the Rules should be read as a whole in order to fully comprehend the Court's power in interpreting the Constitution.
- 4.2 Therefore, we are of the considered view that relevant portions of Article 128 of the Constitution with relevant portions of section 8 of the Act and Order IV of the Rules is adequate for functional understanding of the said power and resolving the issue at hand. It will provide the basis upon which to address the correctness of the mode of commencement in this matter.
- 4.3 Article 128 of the Constitution provides in part:
 - (4) A decision of the Constitutional Court is not appealable to the Supreme Court.
- 4.4 Relevant portions of section 8(1) of the Act provide:
 - 8 (1) Subject to Article 28 of the Constitution, the court in exercise of its original and final jurisdiction may determine-
 - (a) A matter relating to the interpretation of the Constitution
 - (b) A matter relating to a violation or contravention of the Constitution...
 - (2) Subject to Article 28(2) of the Constitution, where a question relating to the Constitution arises in a court, the person presiding in that court shall refer the question to the Court.
 - (3) Subject to Article 28 of the Constitution, a person who alleges that-
 - (a) an Act of Parliament or statutory instrument
 - (b) an action, measure or decision taken under any written law; or
 - (c) an act, omission, measure or decision by a person or an authority contravenes the Constitution, may petition the court for redress.
- 4.5 And relevant portions of Order IV of the Rules provide:

1(1) Except as otherwise provided in the Constitution, the Act and these Rules, all matters under the Act brought before the Court shall be commenced by a petition ...

2(2) A matter relating to the interpretation of the Constitution shall be commenced by originating summons.

4.6 This Court's jurisdiction under Article 128 (1) (a) of the Constitution, section 8(1) (a) of the Act and Order IV rule 2 (2) of the Rules is to provide sole or exclusive interpretation of the Constitution. The prescribed mode for commencing matters for the sole or exclusive interpretation of the court is originating summons.

[5.3] We reiterated this position in the case of **Jonas Zimba v Attorney**

General⁸, that matters brought by way of originating summons to the Court, must relate exclusively to the interpretation of constitutional provisions.

[5.4] Hence, flowing from the law, as applied to the facts of this case, ours is to determine, the issue, whether the matter before us can be determined by way of originating summons?

[5.5] In so doing, we find it convenient to begin our analysis from the case of **Vincent Lilanda and Others v The Attorney General**⁷, where we laid down the threshold test for invoking our interpretive jurisdiction. Therein, we listed five (5) fundamental principles that are applicable in the use of originating summons in constitutional interpretation as follows:

- i. The question(s) must relate solely or exclusively to interpretation of constitutional provisions.

- ii. The question(s) must be of general nature avoiding personalization.
- iii. The question(s) should be prospective in their effect so as to guide future conduct or decision making.
- iv. The question(s) should not contain contentious matters, which necessitate a proper trial to settle the facts and/ or the law.
- v. There must be a legitimate purpose to the interpretation.

[5.6] We have considered the contested positions of the parties, and applied the relevant law to the facts of this case. In the first place, we find that the applicant has indeed wrongly moved the Court under originating summons. We say so because its application is founded on issues that are personalised and contentious. To illustrate the point, the application specifically refers to the former President's properties, namely, LUS/38478 and LUS/28479, which were allegedly seized by the DEC. This type of particularity in our view, goes against our interpretive jurisdiction of dealing with issues that are general in nature and seek a legitimate purpose for interpretation.

[5.7] In fact, Mr. Mwelwa, the applicant's counsel confirmed the personalized nature of this case, when he submitted that it specifically referred to the former President, as the victim; and

emphasized that he was the only surviving former office holder. Further, that he is the person who had suffered injustice, contrary to **Article 98(5)** of the **Constitution**.

[5.8] As we draw to our conclusion, we briefly wish to address a misconception that arose from Mr. Mwelwa's submissions on the status of our Court. Sufficient to state that after the enactment of the 2016 Constitution, two courts of equal ranking were created at the zenith of the Zambian judicial estate, namely the Supreme and Constitutional Courts.

[5.9] The Supreme Court was allocated final jurisdiction in all civil and criminal matters. On the other hand, the Constitutional Court was assigned original and final jurisdiction in all constitutional matters, according to **Article 128** of the **Constitution**.

[5.10] The consequence is that both Courts are at liberty to make law and precedents independent of the other. In so doing, the judgments of either Courts are only of persuasive value to the other, and not binding as Mr. Mwelwa seemed to suggest. We therefore, categorically state that we are not bound by the decision in the **Major Isaac Masonga** case, which in any event, does not turn on the facts of this application. Moreover, the rights to fair trial and procedures are guaranteed under the Bill of

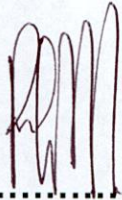
Rights. It is common place that this part of the Constitution is outside this Court's jurisdiction.

[6.1] Finally, we hold that the applicant's case is wrongly before us and is dismissed in its entirety.

[6.2] The parties will bear their own costs.



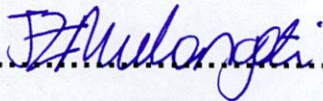
A.M Shilimi
Deputy President, Constitutional Court



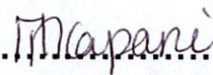
P. Mulonda
Constitutional Court Judge



M. Musaluke
Constitutional Court Judge



J.Z Mulongoti
Constitutional Court Judge



M. M. Kawimbe
Constitutional Court Judge