

(Constitutional jurisdiction)

IN THE MATTER OF ALLEGED

CONTRAVENTION OF:

ARTICLE 128 OF THE
CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF 2016

AND IN THE MATTER OF ALLEGED

CONTRAVENTION OF:

ARTICLE 8 (d) OF THE
CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF 2016

AND IN THE MATTER OF ALLEGED

CONTRAVENTION OF:

ARTICLE 9 (1) (c) OF THE
CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF 2016

AND IN THE MATTER OF ALLEGED

CONTRAVENTION OF:

ARTICLE 92 (2) (e) (f) OF THE
CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF 2016

AND IN THE MATTER OF ALLEGED

CONTRAVENTION OF:

ARTICLE 173 (1) (i) (j) OF THE
CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF 2016

AND IN THE MATTER OF ALLEGED

CONTRAVENTION OF:

ARTICLE 259(1) (a) OF THE
CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF 2016

AND IN THE MATTER OF ALLEGED

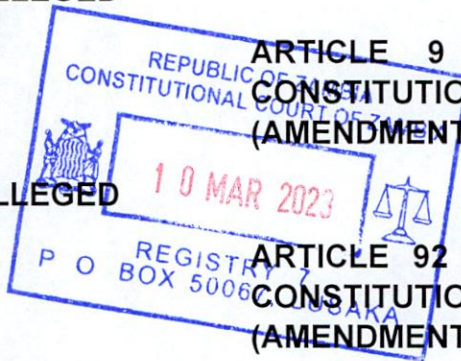
CONTRAVENTION OF:

ARTICLE 5 (1) (2) (a) (b) OF THE
EMPLOYMENT CODE ACT NO. 3
OF 2019

AND IN THE MATTER OF ALLEGED

CONTRAVENTION OF:

CHAPTER II, NO. 23 OF THE
TERMS AND CONDITIONS OF
SERVICE FOR PUBLIC SERVICE
JUNE 2003



AND IN THE MATTER OF ALLEGED

CONTRAVENTION OF:

CHAPTER VIII, NO. 163(a) OF THE
TERMS AND CONDITIONS OF
SERVICE FOR PUBLIC SERVICE
JUNE 2003

BETWEEN:

MARTIN CHILUKWA
AND
THE ATTORNEY GENERAL



PETITIONER

RESPONDENT

CORAM: MULONDA, MUSALUKE AND CHISUNKA JJC, ON 15TH FEBRUARY,
2023 AND 10TH MARCH, 2023.

FOR THE PETITIONER:

MARTIN CHILUKWA (IN
PERSON)

FOR THE RESPONDENT:

NO APPEARANCE

JUDGMENT

Musaluke, JC, delivered the Judgment of the Court.

Cases referred to:

1. Law Association of Zambia and Chapter One Foundation Limited v The Attorney General 2019/CCZ/0013/14
2. Bernard Shajilwa and 4 Others v The Attorney General 2018/CCZ/004
3. Charles Chihinga v New Future Financial Company Limited 2020/CCZ/003

Legislation referred to:

1. **The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016.**

1.0 Petitioner's case

- 1.1 The background to this matter is that the Petitioner has been employed as District Administrative Officer (DAO) since 2021 and stationed at Mafinga District of Muchinga Province.
- 1.2 The Petitioner alleges that on 6th September, 2021 all District Commissioners (DCs) were put on leave by the Secretary to the Cabinet and directed that the DAOs would act as DCs for administrative convenience.
- 1.3 That subsequently, DCs' contracts were terminated on 10th November, 2021 and new DCs were appointed.
- 1.4 The Petitioner alleges that the new DCs were appointed on political grounds with no requisite qualifications and or without merit and the act of appointing new DCs failed to provide equal opportunities for DAOs to be promoted to the position of DC. The Petitioner claims that this in essence discriminated against him and other DAOs.
- 1.5 The Petitioner further alleges victimisation as he claims that he has been transferred from Lavushimanda District to a remote Mafinga

District without being paid acting allowance as DC and settling allowance at Lavushimanda contrary to Public policy.

- 1.6 In written submissions filed in Court, the Petitioner argues that he brings this action by virtue of Article 2 of the Constitution which provides that every person has a right and duty to defend the Constitution. He further argues that Article 128 of the Constitution also empowers him to bring an action in this Court when he notices a violation of the Constitution by any person in the Republic of Zambia.
- 1.7 The Petitioner submits that the Respondent has breached Articles 8 (d), 9 (1) (c), 173 (1) (i) (j), 173 (3) and 259 (1) (a) of the Constitution on the appointment of DCs mainly from the United Party for National Development (UPND) political party without providing an adequate and equal opportunity for appointment or promotion to the DAOs who were acting as DCs.
- 1.8 He argues that the action by the Respondent to appoint unqualified and inexperienced DCs mostly from the UPND political party was not based on merit and this contravened Articles 173 (1) (i) (j) and 259 (1) (a) of the Constitution.
- 1.9 The Petitioner submits that the Article 8 (d) of the Constitution has been contravened by the Respondent as the appointment of the DCs discriminated against the DAOs on political grounds and further

that constitutional values and principles on non-discrimination contained in State recruitment policy when making appointments were not followed and this violated Article 9 (1) (c) of the Constitution.

1.10 The Petitioner further submits that Article 173 (3) of the Constitution which provides that a public officer shall not be victimised or discriminated against or removed from office, reduced in rank or otherwise punished without just cause or due process was breached when he was transferred to the remote Mafinga District simply because he was seeking administrative redress to the alleged violations of the Constitution by the Respondent.

1.11 The Petitioner has advanced other arguments as regards the breach of the Employment Code and the Public Service Terms and Conditions of Employment of Service 2003. He has also cited cases in the realm of employment law. All these are not relevant to this petition as we will explain later in this judgment.

1.12 Based on these claims, the Petitioner, prays for the following:

- (a) That appointment of the DCs from UPND is discriminatory and a breach of Articles 8 (d), 9(1) (c) and 173(1) (j) of the Constitution and section 5(1) and (2) (b) of Employment Code and therefore, the appointment of DCs should be declared null and void.**
- (b) That the Court should order the Respondent to present before Court for validation, verified and certified qualifications for the new DCs. That this is in accordance with Article 259(1) (a) of the Constitution and section 13 of the Constitutional Court Act.**

- (c) A declaration that the appointment of the new DCs was not based on merit and was not in conformity of Article 173(1) (i) of the Constitution and therefore, is null and void.
- (d) An order that the Government should expire all contracts of the DCs with no requisite qualifications.
- (e) That after this Court's order, the Government should provide adequate and equal opportunity for appointment of the DCs to all eligible DAOs.
- (f) An order that within one month of the Court's order, the Respondent should write to all DAOs letters of acting appointment as DCs for the period 6th September, 2021 to 10th November, 2021.
- (g) An order that within a period of two months the DAOs be paid acting allowance as DCs for the period they acted in accordance with Employment Code.
- (h) A declaration that the transfer of the Petitioner from Lavushimanda District to Mafinga District was discriminatory and unfair.
- (i) An order that the Petitioner be paid a sum of K112, 770.46 as settling allowance.
- (j) Compensation for injury to feelings and loss of respect among peers and the public due to unfair treatment, denial of conditions of service and unfair transfer.
- (k) Costs and interest.

1.13 At the hearing, the Petitioner entirely relied on the petition, affidavit in support and skeleton arguments or record.

2.0 Respondent's case

2.1 The Respondent neither filed an answer nor skeleton arguments to the petition. The Respondent was also not present at the hearing of the petition.

3.0 Determination

3.1 We have considered the petition, affidavit in support and skeleton arguments filed by the Petitioner herein.

3.2 The Petitioner herein moved this Court purportedly pursuant to Articles 8 (d), 9 (1) (c), 128(3) (c) ,173 (1) (i) (j),173 (3) and 259 (1) (a) and of the Constitution.

3.3 Article 128(1) of the Constitution sets out the jurisdiction of this Court and provides as follows:

Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear-

- (a) a matter relating to the interpretation of the Constitution;**
- (b) a matter relating to a violation or contravention of this Constitution**
- (c) a matter relating to the President, Vice President or election of a President;**
- (d) appeals relating to the election of a Member of Parliament and councilors; and**
- (e) whether or not a matter falls within the jurisdiction of the Constitutional Court.**

3.4 Article 128(3) further provides as follows:

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.**

- 3.5 This Court thus enjoys exclusive jurisdiction over constitutional matters as provided for under Article 128 subject to Article 28 of the Constitution.
- 3.6 When discussing the jurisdiction of this Court in the case of the **Law Association of Zambia and Chapter One Foundation Ltd v The Attorney General**¹, we stated that the jurisdiction of this Court though extensive, is still limited by the Constitution itself in Article 128 which is subject to Article 28.
- 3.7 The jurisdiction of the Court was also spelt out in the case of **Bernard Shajilwa and 4 Others v The Attorney General**² wherein we held as follows:

We wish to point out that under Article 1(5) as read with Article 128(1) (a) (b), (2) and (3) this Court has exclusive jurisdiction only over constitutional matters. It is however, precluded from adjudicating upon human rights claims enshrined in the Bill of Rights or Part III of the Constitution as amended.

- 3.8 The core issue for determination in this case therefore, centers on whether or not there are constitutional issues raised by the petition. We are of the considered view that indeed, the petition raises some constitutional issues that need to be addressed and some non-constitutional issues that will not be dealt with for lack of jurisdiction.
- 3.9 The Petitioner has alleged violation of Articles 8 and 9 of the Constitution which provide as follows:

8. The National values and principles are-

- a. morality and ethics;
- b. patriotism and national unity;
- c. democracy and constitutionalism;
- d. human dignity, equity, social justice, equality and non-discrimination;
- e. good governance and integrity; and
- f. sustainable development.

9 (1) The national values and principles shall apply to the-

- a. interpretation of this Constitution;
- b. enactment and interpretation of the law; and
- c. development and implementation of State Policy.

3.10 In the case of **Charles Chihinga v New Future Financial Company Limited**³ when discussing the issue of Articles 8 and 9 of the Constitution we held as follows:

A plain reading of Article 9 of the Constitution shows that the values and principles are to be applied in the interpretation of the Constitution, the enactment and interpretation of laws and they also act as a guide to developing and implementing State policy. The national values and principles are not only symbolic but also influence the aspirations of society in the interpretation and application of the law and are meant to guide public officers and policy makers.

It follows that the national values and principles as provided for under Article 8 of the Constitution must be taken into account when this Court is interpreting the Constitution. In fact the Constitution

itself has reinforced this theory of interpretation of the Constitution by providing under Article 267(1) as follows:

This Constitution shall be interpreted in accordance with the Bill of Rights and in a manner that-

- (a) promotes its purposes, values and principles;
- (b) permits the development of the law; and
- (c) contributes to good governance.

It is therefore our considered view that when a matter is brought before us for determination, we are obligated to take into account the national values and principles when interpreting the Constitution. The national values and principles by themselves are not justiciable. A litigant that comes to this Court must cite a provision of the Constitution that needs interpretation or which has allegedly been breached. It is only during the interpretation process that the Court is called upon to do so in is such manner that will promote the Constitution's purposes, values and principles. The values and principles are also to be considered in the development and implementation of State policy. (Emphasis added).

3.11 It follows therefore, that the mere mention of Articles 8 and 9 of the Constitution by the petition herein does not invoke our jurisdiction as provided for under Article 128 of the Constitution. As we guided in the **Chihinga**² case, the national values and principles by themselves are not justiciable.

- 3.12 The Petitioner has not demonstrated how these two Articles in the Constitution have not been considered in the implementation and development of State policy by the Respondent. The only link to Articles 8 and 9 of the Constitution is when the Petitioner alleges that the Respondent failed to adhere to constitutional values and principles of non-discrimination contained in the State recruitment policy when making appointments of the DCs and that this breached Article 9 (1) (c) of the Constitution.
- 3.13 The Petitioner has not brought any evidence to Court to demonstrate how the appointments of the DCs breached Article 9 (1) (c) of the Constitution apart from generalizing that most DCs appointed were UPND aligned unqualified and inexperienced individuals with nothing to validate this allegation.
- 3.14 The claim that the Respondent violated Articles 8 and 9 of the Constitution, therefore, fails.
- 3.15 As regards the assertion that the Respondent has breached Article 173 of the Constitution, the Petitioner argues that the appointment of new DCs was not based on merit and was not in conformity of Article 173(1) (i) of the Constitution.

3.16 Article 173 gives a synopsis on the guiding values and principles of the public service. Specifically Article 173 (1) (i) and (j) provides as follows:

- (i) **merit as the basis of appointment and promotion;**
- (j) **adequate and equal opportunities for appointments, training and advancement of members of both gender and members of all ethnic groups.**

3.17 We agree that these guiding values and principles of the public service as espoused in Article 173 must be followed by those charged with responsibilities to do so. As the Petitioner has rightly argued, there should be merit when officers in the public service are being appointed or promoted. Further all citizens in the Republic ought to be given adequate opportunities when it comes to appointments, training and advancement with great emphasis taken on gender parity and ethnic diversity.

3.18 The Petitioner has alleged that the appointments of DCs mostly from the UPND political party is an abrogation of Article 173 (1) and (j) of the Constitution as these were not based on merit and that an opportunity was never availed to him to be considered for appointment more so that he is a serving public service worker who in fact had acted as a DC.

3.19 The petitioner also alleges that the appointed DCs do not have requisite grade twelve certificates or bachelor degrees to qualify for appointment to that position. In support of this allegation, he cites Article 259 (1) (a) of the Constitution which provides as follows:

(1) Where a person is empowered to make a nomination or an appointment to a public office, that person shall ensure—

(a) that the person being nominated or appointed has the requisite qualification to discharge the functions of the office, as prescribed or specified in public office circulars or establishment registers;

3.20 The Petitioner has, however, not provided any evidence to substantiate these allegations. His allegation that most DCs appointed are from the UPND political party with no requisite academic qualifications comes with no material to prove this allegation. The Petitioner ought to go further than making a mere allegation, he should provide evidence to support this allegation. Further, the Petitioner has not provided us with any evidence that DAOs were not considered for appointment as DCs.

3.21 Without any proof that the values and principles as provided for in Article 173 (1) (j) of the Constitution were not applied in the appointment of the DCs, we cannot make a finding that Article 173 (1) (j) of the Constitution was breached. Further, no proof was presented to prove allegations that Article 259 (1) (a) of the

Constitution was breached by appointing individuals who had no requisite academic qualifications. These claims, therefore, fail as the Petitioner has not generated any evidence to curdle his claims.

3.22 The Petitioner also claims that Article 173 (3) of the Constitution was breached by the Respondent when he was transferred to the remote Mafinga District simply because he was seeking administrative redress to the alleged violations of the Constitution by the Respondent.

3.23 Our take on this claim is that, the Petitioner is a public service worker whose conditions are governed by the Public Service Terms and Conditions of Employment of Service 2003. The issue as regards his transfer from one District to another is purely governed by the employer/employee relationship which is outside the jurisdiction of this Court as provided for under Article 128 of the Constitution.

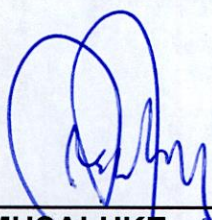
3.24 It is, therefore, our finding that all employment related issues that have been pleaded by the Petitioner such as his transfer from one District to another, payment of settling allowance and payment of acting allowance are outside this Court's jurisdiction. Such matters can be handled by other courts with competent jurisdiction. These claims are, therefore, not competently before this Court and they fail.

3.25 Overall, this petition has no merit and is dismissed.

3.26 We order each party to bear own costs.



P. MULONDA
CONSTITUTIONAL COURT JUDGE



M. MUSALUKE
CONSTITUTIONAL COURT JUDGE



M.K. CHISUNKA
CONSTITUTIONAL COURT JUDGE