

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

2022/CCZ/009

IN THE MATTER OF: ARTICLES 1(5) AND (2) AS READ TOGETHER WITH ARTICLE 128(1)(B) AND (3)(B)(C) OF THE CONSTITUTION OF ZAMBIA CHAPTER 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: ARTICLE 1(1)(2) (3)(4), 8, 9 143 AND 144 OF THE CONSTITUTION OF ZAMBIA CHAPTER 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 216, 177(4) 180(7) AS READ TOGETHER WITH ARTICLES 235 AND 236 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA.

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 91(3)(A) (E) AND 144(2) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA.

IN THE MATTER OF: ACTIONS AND DIRECTIVES BY THE PRESIDENT OF THE REPUBLIC OF ZAMBIA AND MINISTER OF JUSTICE AS REGARDS THE REMOVAL OF THE DPP

IN THE MATTER OF: VINCENT B. MALAMBO SC BEING CONFLICTED TO HEAD THE IMPENDING HEARING OF ALLEGED MISCONDUCT BY THE DPP

BETWEEN:



ISAAC MWANZA

PETITIONER

AND

THE ATTORNEY GENERAL

RESPONDENT

**Coram: Munalula DPC, Sitali, Mulonda, Chisunka and
Mulongoti JJC on 27th July, 2022 and 2nd
March, 2023**

For the Petitioner: Mr. J. Chirwa of Messrs Ferd Jere and Co.

For the Respondent: Mr. P. Kachimba Principal State Advocate

JUDGMENT

Mulonda, JC, delivered the Judgment of the Court

Cases referred to:

- 1. Milford Maambo and Others v The People 2016/CC/R001**
- 2. R v Street Magistrate Stipendiary Court and Others Ex Parte Pinochet Urgate (NO.2) (1991) 1 ALL ER 557**
- 3. Tumey v Ohio 273 US 510 (1927)**
- 4. Commonwealth Coatings Corp v Continental Casualty Co. 393 US 145 (SC)**
- 5. Lloyd Chembo v The Attorney General 2017/CCZ/0011**
- 6. Christopher Shakafuswa and Another v Attorney General and Another, 2018/CCZ/005**
- 7. Dan Pule and 2 Others v Attorney General and 2 Others Selected Judgment No. 60 of 2018**
- 8. President of the Republic of South Africa and 2 Others v South African Rugby Football Union and 3 Others (1999) ZA CC II (1999) ZA CC II**

**9. Gouriet v Union of Post Office Workers and others (1978) AC
435**

Legislation referred to:

- 1. The Constitution of Zambia (Amendment) Act No. 2 of 2016**
- 2. The Judicial Code of Conduct Act No. 13 of 1999**

INTRODUCTION

[1] This is a judgment of a petition filed by Isaac Mwanza, (the Petitioner) pursuant to Article 128(1)(b) and 3(b) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 (hereinafter “the Constitution”). The petitioner alleges that the respondent contravened Article 216 of the Constitution when the President interfered with the operations of the Anti-Corruption Commission (hereinafter “the ACC”) and the Drug Enforcement Commission (hereinafter “DEC”) by summoning their officials to discuss criminal cases and compelling them to resuscitate closed cases. He further alleges that the actions by the Minister of Justice and the President, of holding press briefings on 20th and 25th April, 2022 respectively where they condemned the decision of the Director of Public Prosecutions (hereinafter “the DPP”) to enter a *nolle prosequi* in the

case of Milingo Lungu before a determination is made by the Judicial Complaints Commission (hereinafter “the JCC”) as to whether the DPP abused her powers, is tantamount to interference with the independence of the office of DPP and contravened Articles 91(3), 144(2) and 180(7) of the Constitution and is therefore illegal.

THE PETITIONER’S CASE

[2] The facts as set out in the petition and the affidavit verifying facts are that between December 2021 and 5th April, 2022, DEC arrested former Konkola Copper Mines Liquidator, Milingo Lungu. Criminal proceedings against him were later discontinued by the DPP following an indemnity agreement between the parties. On 7th April, 2022, the DEC reportedly re-arrested Mr. Milingo Lungu and instituted fresh criminal proceedings based on the same facts without the knowledge of the DPP.

[3] The DPP is alleged to have written a letter to the DEC Director General asking her to explain why Mr. Milingo Lungu was re-arrested without her knowledge and consent. Following these events, citizens from a cross section of society lodged complaints to the JCC alleging that the decision by the DPP to enter a *nolle prosequi* in

favour of Mr. Lungu and writing a letter to DEC amounted to incompetence and gross misconduct.

- [4] On 20th April, 2022, the Honourable Minister of Justice, Mulambo Haimbe SC, in the company of the Attorney General and staff from the Ministry of Justice and Special Assistant to the President for Legal and Press, namely, Mr. Christopher Mundia and Mr. Anthony Bwalya, respectively, held a press briefing at the Ministry of Justice Headquarters. The Honourable Minister of Justice reported that Government found significant lapses on the part of the DPP.
- [5] That the Honourable Minister of Justice asked the JCC to expedite the hearing of complaints against the DPP. It was contended that since there was a relationship between the Honourable Minister and Mr. Vincent B. Malambo SC, the Chairperson of the JCC, as both are partners in the law firm Malambo and Company, the Chairperson of the JCC had a conflict of interest in the DPP's case and he ought to recuse himself. Further, that Mr. Chad Muleza, the Vice Chairperson of the JCC, also had a conflict of interest as an advocate for the President in several matters.
- [6] It was the petitioner's contention that following the press briefing,

the President reached a conclusion that the DPP was wrong to write to the DEC Director General Mary Chirwa and to also sign an Immunity Agreement with Milingo Lungu. That on this conclusion, the President asked citizens to make complaints to the JCC against the DPP. It was further contended that DEC had since made a complaint to the JCC against the DPP but that the said complaint is illegal and unconstitutional as DEC is not a legal person at law and cannot interfere with the independence of the office of the DPP.

- [7] The petitioner averred that during his press briefing, the President disclosed that he had summoned the ACC to discuss a matter involving a high-profile person in the last regime who was investigated and expressed displeasure on the decision by the ACC to close the case and added that the closed case would be resuscitated. That the President then guided the ACC on how to handle similar cases. It was further contended that the President further encouraged DEC to arrest Mr. Milingo Lungu as many times as they wanted and instructed Zambia Police to ensure that Raphael Nakachinda paid for his sentiments against the President. The petitioner stated that the said directions by the President are in

contravention of Article 216 of the Constitution. It was contended that the actions of the Minister of Justice and the President, in finding that the decision of the DPP was wrong, amounted to interference with the independence of the office of the DPP and contravened the Constitution and was therefore illegal.

- [8]** The Petitioner filed an affidavit verifying facts which mostly repeated the assertions in the petition. He added that on 24th September, 2021, the Secretary to the Cabinet caused to be published a notice in the Government Gazette, Notice No. 1123 titled “Statutory Functions, Portfolio and Composition of Government” in which the ACC was placed under the Office of the President and DEC under the Ministry of Home Affairs and Internal Security. The petitioner contended that following the DPP entering a *nolle prosequi* in the criminal proceedings of Milingo Lungu, on 12th April, 2022, a citizen named Chama Fumba filed a complaint against the DPP at the JCC.
- [9]** On 26th April, 2022, the Daily Nation Newspaper reported and published the signed Consent Settlement Agreement dated 15th March, 2022 between Milingo Lungu as KCM Liquidator and Natasha Kalimukwa, the Official Receiver, and an Immunity

Agreement dated 22nd March, 2022 between Milingo Lungu and the DPP.

[10] The Petitioner seeks the following reliefs:

- i. An Order and declaration that the action by the President of the Republic of Zambia to find the DPP culpable before an investigation is undertaken by a competent authority contravenes Articles 144(2), 91(3)(a)(e) and 180(7) of the Constitution.**
- ii. An Order and declaration that the action by the President to summon and discuss criminal cases with the Anti-Corruption Commission, compelling investigative agencies to resuscitate closed cases and issuance of instructions to investigative wings contravene the Constitution and amount to political interference in the discharge of functions by law enforcement agencies, is unfair and thus unconstitutional;**
- iii. An Order and declaration that the announcement by the Executive through the Minister of Justice that it has found anomalies in the conduct of the DPP, in the absence of a legitimate body undertaking an inquiry, offends Article 144(2) of the Constitution, is improper, unlawful and therefore, unconstitutional;**
- iv. An Order and declaration that the directive by the Minister of Justice to the Judicial Complaints Commission on how to handle the intended proceedings against the DPP violates Article 144(2) of the Constitution, and therefore illegal;**
- v. An Order and declaration that the placing of the Anti-Corruption Commission under Office of the President and DEC under the Ministry of Home Affairs and Internal Security contravenes Article 216(b) of the Constitution of Zambia and is unconstitutional and thus illegal;**
- vi. An Order and declaration that the DPP cannot be subjected to a disciplinary process for performing a lawful act in her official capacity and any such move is unconstitutional and contravenes Article 180(7) of the Constitution;**
- vii. An Order and declaration that the DEC lacks capacity to initiate a complaint against the DPP and a report made by the Commission to the Judicial Complaints Commission is unconstitutional, illegal and contravenes Articles 144(2) and 180(7) of the Constitution;**

- viii. **An Order that Mr. Vincent B. Malambo has a conflict of interest due to his relationship with the Minister of Justice and therefore must recuse himself as his participation will deny the DPP a fair hearing and therefore render the intended proceedings unconstitutional;**
- ix. **An Order that Mr. Chad Muleza has a conflict of interest due to his relationship with the Republican President therefore must recuse himself from a fair hearing and therefore render the intended proceedings unconstitutional; (sic)**
- x. **An Order that costs for this cause be borne by the Respondent and;**
- xi. **Any other reliefs the Court may deem fit.**

PETITIONER'S ARGUMENTS IN SUPPORT OF THE PETITION

[11] In the petitioner's skeleton arguments, it is submitted that the DPP is a constitutional office holder and is the chief prosecutor for the Government and the head of the National Prosecutions Authority (NPA). That according to Article 180(4) of the Constitution, the DPP may:

- (a) institute and undertake criminal proceedings against a person before a court, other than a court-martial, for an offence alleged to have been committed by that person;**
- (b) take over and continue criminal proceedings instituted or undertaken by another person or authority; and**
- (c) discontinue, at any stage before judgment is delivered, criminal proceedings instituted or undertaken by the DPP or another person or authority.**

[12] It was submitted that in exercise of the DPP's powers under Article 180(4) as read together with section 8 of the National Prosecutions Authority Act, the DPP has unfettered powers and is not subject to

the control or direction of any person or body. The petitioner submitted that this position is cast in stone and concrete under Article 180(7) of the Constitution and was confirmed by this Court in the case of **Milford Maambo and Others v The People**¹ wherein this Court opined that:

The factors which are set out in clause (7) of Article 180, and which the DPP must consider, are meant to guide the DPP in the performance of the functions of that office and are not in anyway intended to place a fetter on the discretion the DPP enjoys in the performance of the functions of that office as set out in Article 180(4)...

The Constitution has expressly provided that the DPP is not subject to any person or authority in the exercise of the functions of that office.

[13] In light of this authority, the petitioner submitted that the DPP's powers are unfettered and are not subject to the control of any person or body in respect of entering a *nolle prosequi*. That the DPP is not required to offer an explanation or give reasons for discontinuing a matter through a *nolle prosequi*. He argued that the actions by the President, the Minister of Justice and the DEC amount to interference in what is supposed to be an independent office of the DPP.

[14] It was submitted that the President as the Head of State and Government is expected to respect, uphold and safeguard the

Constitution. The Petitioner argued that the President is also expected to promote and protect the rights and freedoms of individuals and these freedoms and rights ascribe to those accused of having committed crimes and those facing allegations of misconduct. It was his contention that the President is not expected to act in a manner that is prejudicial to the freedoms and rights of any citizen in whatever circumstance.

[15] It was argued that finding the DPP guilty by the President and Minister of Justice before a hearing by the JCC undermined the Constitution, freedoms and rights of individuals as well as the rule of law in line with Article 93 of the Constitution. Similarly, it was submitted that the Minister of Justice is required to uphold the rule of law by not interfering in the operations of independent institutions such as the DPP and JCC.

[16] It was further submitted that the JCC is established under Article 236 of the Constitution as read with section 20 of the Judicial (Code of Conduct) Act. It was his contention that the JCC being an adjudicative body has quasi-judicial functions and is effectively bound by the principles expected from such bodies. The petitioner submitted that Article 216 of the Constitution as amended outlines

the principles that bind the JCC.

[17] The petitioner also referred us to section 29 of the Judicial (Code of Conduct) Act which provides as follows:

(1) A person present at a meeting of the Committee who has a direct or indirect interest, in the subject matter under consideration, shall as soon as practicable disclose such interest.

(2) A disclosure of interest made under subsection (1) shall form part of the record of the proceedings in which it is made.

(3) Any person who contravenes subsection (1) commits an offence and shall be liable upon conviction to a fine not exceeding five thousand penalty units or to imprisonment for a period not exceeding one year, or to both.

[18] It was the Petitioner's submission that both the President and the Minister of Justice interfered with the independent operations of the JCC by making statements that are prejudicial to the intended proceedings against the DPP and directing the JCC to expedite the said proceedings. He contended that making *prima facie* findings against the DPP is the preserve of the JCC.

[19] In arguing that Mr. Vincent B. Malambo SC and Mr. Chad Muleza as Chairperson and Vice Chairperson, respectively for the JCC were conflicted in hearing the DPP's case, the petitioner referred us to **Black's Law Dictionary (9th Edition)** where conflict of interest is defined as a real or seeming incompatibility between one's private

interests and one's public or fiduciary duties. He also referred us to a commentary by State Counsel Vincent B. Malambo entitled; "**The Judicial Code of Conduct and Judges Ethics**" where he said the following:

The Judiciary is bequeathed with the moral custody of society itself. Neither with money nor force of arms, the judiciary has to keep and maintain the fabric of society clean and intact. The moral force of the judiciary is itself founded on, ventilated and sustained by the faith the people have in it. Faith, confidence and acceptability cannot be commanded, they can only be earned. He who wishes to stand on a higher moral pedestal, he who wishes to sit in judgment over others must be willing to live by a higher moral code. To live by a higher set of rules and stand in the glare of public judgment is to pass the test of the super being.

[20] It was submitted that the Chairperson and all members of the JCC must be above both real and/or seeming conflict between their private interests and public fiduciary duties. The petitioner argued that the relationship of the Chairman of the JCC and the Minister of Justice on one hand and that of Mr. Chad Muleza with the President on the other hand contradicts the above high held principles. He contended that there was an actual conflict between the private interests of the two Commissioners with their expected public fiduciary duties. According to the petitioner, this was exacerbated by the utterance made by both the President and the Minister of Justice as well as the relationship shown between the two

Commissioners and members of the Executive.

[21] It was submitted that there was a plethora of authorities on the recusal of Judges in situations where real or perceived conflict exists and that these authorities apply to persons sitting in tribunals with quasi-judicial and adjudicative functions such as the JCC. He referred us to the case of **R v Street Magistrate Stipendiary Court and Others Ex Parte Pinochet Urgate (No.2)**² as well as the case of **Tumey v Ohio**³ where it was held that to subject a person to proceedings where the judge has a direct, personal or substantial interest is a denial of due process of the law. He further cited the case of **Commonwealth Coatings Corp v Continental Casualty Co.**⁴ where it was stated that:

A judge should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct.

[22] In light of the authorities referred to, it was contended that the only option for the two Commissioners is to disqualify and recuse themselves in order to preserve the sanctity of the proceedings as their participation will be tainted by their business relations or friendships with the appointing authority.

[23] The petitioner referred to Article 18(9) of the Constitution which provides that:

Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial;

[24] It was submitted that where there are proceedings for such a complaint against the DPP by DEC, only JCC can find the DPP with a *prima facie* case in line with Article 144(2) of the Constitution. That the acts of the respondent are therefore illegal and unconstitutional.

[25] It was the petitioner's contention that the respondent has interfered in the operations of independent institutions such as the DPP and the JCC. Further, that by their own admission, the respondent had directed independent institutions like ACC and DEC on who to arrest and what case to pursue and that these acts undermine the rule of law and are unconstitutional.

[26] In the petitioner's oral arguments, it was submitted by Mr. Chirwa that the independence of the office of DPP is constitutionally entrenched and is a matter of public interest. He argued that it is the aspiration of every Zambian that the office of DPP is insulated

from interference from any person, authority or body. In this regard, the Constitution has put in place measures to promote the independence of this office and one of the safe guards is that the DPP cannot be removed at the whims of the Executive.

[27] It was submitted that it was evident that there had been a calculated attempt by the members of the Executive as seen by the statements of the President and the Minister of Justice who had found the DPP with a *prima facie* case before she had been subjected to due process. Mr. Chirwa further submitted that the petitioner had demonstrated that as a result of the utterances by the President and the Minister of Justice, the DPP would be subjected to a biased and partial tribunal and a flawed process that had already determined the outcome of the hearing. He argued that the Court has a duty to prevent all these which amount to interference with the office of DPP and goes against what the framers of the Constitution intended.

[28] Counsel further submitted that the proceedings against the DPP are unconstitutional and illegal because the DPP cannot be questioned whatsoever in the discharge of her constitutional functions. He referred us to the case of **Milford Maambo and**

Others v The People¹. He argued that allowing these proceedings to proceed amidst allegations of a flawed process and a biased adjudication will perpetuate a situation where the coming of a new government would entail removal of the DPP which threatens the independence of the office.

THE RESPONDENT'S CASE

[29] For its part, the respondent admits the fact that the DPP entered a *nolle prosequi* in criminal proceedings involving Milingo Lungu which action prompted various members of the public to file complaints before the JCC against the DPP.

[30] It is admitted that on 20th April, 2022 the Minister of Justice Honourable Mulambo Haimbe SC, held a press conference in which he addressed the public over Government's concern regarding the conduct of the DPP in entering a Consent Settlement Agreement and Immunity Agreement with Milingo Lungu. It was averred that the statement of the Minister of Justice does not in any way infringe on the independence of the JCC.

[31] It was further averred that the allegations of the President giving

direction to the Commissions is demurred because a decision or instruction of the President is required to be in writing under his signature. According to the respondent, there was no such instruction or interference with the independence of the ACC, DEC and JCC. It was contended that on 7th April, 2022, DEC acted on its own volition to re-arrest and charge Milingo Lungu. It was further asserted that there were no constitutional issues raised regarding the independence of the JCC and the allegations against Mr. Vincent B. Malambo and Mr. Chad Muleza.

[32] Further, that the petitioner was not the right person to raise these issues. It was averred in the alternative that the allegations are premature and not ripe for determination by this Court as the JCC has neither constituted itself nor begun to deliberate on the complaint in issue.

RESPONDENT'S SKELETON ARGUMENTS

[33] In the respondent's skeleton arguments, it was submitted that no arm of Government has the right to infringe on the functions of independent Government institutions such as commissions.

[34] It was submitted that Article 91 of the Constitution provides that the President is the Head of State and Government and that he is the head of the Executive. Additionally, that Article 90 of the Constitution guides the Executive on how they should exercise their power and that in doing so it must uphold and safeguard the Constitution. That the duty of the President is always to ensure that Executive decisions are made in the interest of the people and he is expected to promote and protect the rights and freedoms of individuals.

[35] The respondent also referred to Article 93 of the Constitution which provides as follows:

A decision or instruction of the President shall be in writing under the President's signature.

[36] It was submitted that in light of this provision, the President cannot make an executive decision without the decision being made in writing under his signature. It was argued that at no point did the President issue written instructions directing the two independent organs being the ACC and DEC on how to proceed in handling their work as required under Article 93(1) of the Constitution.

[37] It was the respondent's submission that Article 216 of the

Constitution provides for the independence of commissions and entails that ACC and DEC enjoy independence in the performance of their functions which is constitutionally guaranteed. It was contended that ACC by Government Gazette No. 1123 of 2021 was placed under the Office of the President. That it is premised on this that ACC only has an obligation to render reports on its investigations to the President but is not subject to the control or direction of the President in the performance of its functions. It was submitted that ACC, DEC and JCC were therefore independent commissions free from the external influence such as the Executive's interference.

[38] The respondent submitted that the statement by the Honourable Minister of Justice was merely an opinion on the conduct of the DPP and did not amount to a decision over her office as alleged by the petitioner.

[39] It was submitted that it is in the interest of justice that matters before judicial bodies are disposed of timely and as such the Minister of Justice did not violate Article 144(2) by encouraging the JCC to expedite the hearing of the complaints against the DPP

before it.

[40] With regard to the alleged conflict of interest relating to Mr. Vincent B. Malambo SC and Mr. Chad Muleza, it was submitted that the JCC is an independent Commission tasked to hear complaints against a judge or judicial officer including the DPP and is mandated to be impartial and act with dignity, professionalism and propriety. It was contended that in the event that a judge or judicial officer appears before the Commission, they have a right to raise their concerns regarding the independence, impartiality or bias of the Commission before the Commission members.

[41] The respondent invited us to make a determination on whether the petitioner is at liberty to seek this relief in light of this Court's decision in the case of **Lloyd Chembo v The Attorney General**⁵ wherein we stated that:

It is therefore our considered view that the impugned Petition is not ripe for hearing as a constitutional violation before this Court.

We are fortified in taking this view by the approach of the South African Constitutional Court summed up in Max Du Plessis, Glen Penfold and Jason Brickhill, Constitutional Litigation at page 38 that:

The term "ripeness" may also be used where alternative remedies have not been exhausted, or an issue can be resolved

without resort to the Constitution. The Constitutional Court has explained in the latter principle which is an aspect of constitutional avoidance as follows: 'the concept of ripeness also embraces the general principles that where it is possible to decide any case, civil or criminal, without raising a constitutional issue, that is the course that should be followed.'

Further, Alec Stone in his Chapter Constitutional Courts in Michel Rosenfeld and Andreas Sajó, *The Oxford Handbook of Comparative Constitutional Law* says at page 823 that:

Individuals, firms and groups may be authorized to petition the Constitutional Court when they believe their rights have been violated, after all other remedies have been exhausted.

The 11 month adjournment did not mature into a constitutional issue before it was brought to this Court and the Petitioner should have resorted to remedies available in the High Court.

[42] It was the respondent's contention that in light of the authorities cited above, the reliefs sought by the petitioner are premature or not ripe to be heard before this Court. It was submitted that the petitioner had no *locus standi* over the reliefs sought under reliefs (vi) to (ix). The respondent prayed that the petitioner's petition be dismissed with costs to the respondent.

[43] In the respondent's oral arguments, Mr. Kachimba reiterated the respondent's written arguments and added that the petitioner's petition lacks merit and should be dismissed with costs.

THE PETITIONERS'S REPLY

[44] In the petitioner's arguments in reply it was his submission that

the President by his own admission stated that he discusses cases with and directs law enforcement agencies on which persons to pursue. He argued that unconstitutional and illegal instructions are rarely issued pursuant to Article 93(1) of the Constitution but common in a manner and fashion that the President disclosed whilst holding a press briefing on 25th April, 2022 at State House. It was his contention that the petition established an action where the President disclosed having given written or unwritten instructions by mere discussion or in whatever form to the ACC over cases that it was handling and as such the President was in breach of the constitutional independence of the ACC. The petitioner asked the Court to take judicial notice that presidential pronouncements are automatically official Government policy.

[45] It was submitted that the Government Gazette Notice No. 1123 of 2021 had put ACC under the Office of the President and as submitted by the respondent, the ACC has an obligation to render reports on its investigations to the Republican President. According to the petitioner, this placed ACC under the direction and control of the office of the President contrary to the spirit and intent of Article

216(b) of the Constitution. He referred us to section 14(1) of the Anti-Corruption Commission Act No. 3 of 2012 which requires the Commission to submit a report concerning its activities during its financial year.

[46] The petitioner submitted that the issue in contention was not the submission of annual reports to the President, but the President summoning the Director General of the ACC and its staff to discuss the detail of persons being investigated and giving the ACC guidance on what to do as these two are different issues. He contended that in any case section 14 of the Anti-Corruption Commission Act is unconstitutional as it violates Article 216 of the Constitution and urged us to declare it as such.

[47] It was submitted that the President interfered with the operations of independent commissions and breached the provision that requires him to respect the Constitution. In reply to the arguments on the independence of the JCC, it was submitted that the reliefs he sought under reliefs (vi) and (ix) are firm and well-grounded at law as the duty to defend the Constitution is imposed on every person as guided by Article 2 of the Constitution.

[48] He submitted that the framers of the Constitution envisaged that defending of the Constitution happens before a breach occurs and to suggest that the petitioner waits until the DPP appears before the JCC before he can exercise his right to defend the Constitution flies in the teeth of Article 2 of the Constitution. He referred us to this Court's decision in **Christopher Shakafuswa and Another v Attorney General and Another**⁶ in which we stated the following:

“It follows that the Constitutional Court’s jurisdiction comes in different forms...a) the abstract or pre-emptive review of statutes; b) concrete review in the form of a constitutional reference; and c) the constitutional complaint which permits individuals to approach the court directly on the basis of both questions and violations. Thus under the Constitutions of some countries, “everyone possesses the right to petition” the Constitutional Court directly through an “actio popularis or popular action” thereby initiating abstract review of statutes as the petitioner need not show that the law referred to has actually harmed her[him] personally. Our Article 128 has been formulated to take care of such eventualities. It is evident that there will be a tension between interpretation of the Constitution in order to pre-empt difficulties in the application of the constitutional provisions and the principles of ripeness. However, it is also clear from Article 128 that this Court has a duty to answer questions about the Constitution that have been brought to its attention.

[49] It was submitted that the issues raised in this matter were of public interest and as such the petitioner exercised the constitutional mandate to defend the Constitution. He submitted that this Court has pronounced itself on *locus standi* in the case of

Daniel Pule and 2 Others v Attorney General and 2 Others⁷. It was the petitioner's submission that the case of **Lloyd Chembo v Attorney-General**⁵ was cited out of context because that case is distinguishable to the case in *casu*. He argued that in that case the question was about a petitioner who was forum shopping by not utilizing the proper channels of addressing his concerns. In that case this Court at page R32 guided as follows:

Much as we hear the Petitioner's plea, we must point out that this Court does not operate in a vacuum. There is a comity between the courts constituting the Judiciary. This Court works hand in hand with other courts so that matters before it and other courts are heard and determined in an orderly and efficient manner. The nature of this Court is such that it deals with direct violations of the Constitution. By virtue of Article 1(5) a matter relating to the Constitution is heard by the Constitutional Court. The rest of the law is adequately handled by other courts.

[50] It was submitted that it is premised on this decision that the respondent argued that the petitioner's complaint in the case was not ripe. That the respondent seems to have read the issue of ripeness in isolation and ignored the context in which it was used. The petitioner submitted that the issue of ripeness was competently dealt with in the case of **Christopher Shakafuswa and Another v The Attorney General and another**⁶ already referred to. He submitted that the petitioner had shown that there was an actual

breach in the conduct of the President, the Minister of Justice and the DEC and that there was threatened breach in respect of the impending hearing against the DPP by the JCC and its composition.

[51] It was his contention that he had shown that the alleged breaches before this Court are ripe for adjudication as this Court is clothed with the jurisdiction to hear and determine all cases in which constitutional breaches are alleged. He argued that there were several breaches to the Constitution which the respondent had lamentably failed to counter.

[52] In the petitioner's oral arguments in reply, Mr. Chirwa submitted that Article 93(1) had been misconstrued by the respondent and argued that illegal directions cannot be in writing and it would be absurd if such a thing happened. Mr. Chirwa submitted that Section 14(1) of the ACC Act No. 3 of 2012 only requires for commissions such as ACC to present a report of its activities and not receive directions from the President. He contended that Exhibit IM6 and IM7 show that the President stated that he gives directives to these institutions.

[53] With regard to the respondent's argument that the Minister of

Justice was merely giving an opinion, he submitted that this was speculative and questioned the capacity in which the Minister was encouraging the JCC to expedite its proceedings when there were no proceedings at that particular time. He further questioned the capacity in which the Minister found anomalies in the functioning of the independent office of the DPP when only the JCC can do that after due process. Mr. Chirwa also questioned in what capacity the Minister was encouraging members of the public to report the DPP to the JCC and whether he knew what was to be reported. He contended that these actions revealed the amount of interference in the independence of that office.

[54] He further submitted that while the JCC may be independent as submitted by the respondent, the provisions of the State Proceedings Act stipulate that the JCC's conduct can be questioned by suing the Attorney General who is the Chief Government legal adviser. He reiterated that this Court is empowered to hear any intended or threatened or actual breach of the Constitution. He submitted that the petitioner who had come complaining against the breach of the Constitution could not be told to go back to the JCC as this would

be tantamount to this Constitutional Court abdicating its constitutional responsibility which is to defend the Constitution.

ANALYSIS AND DECISION

[55] We have considered the petition, the affidavit verifying facts, the affidavit in opposition, the affidavit in reply and skeleton arguments by the parties. We will determine the issues raised in the petition as we consider each relief sought as highlighted earlier in this judgment.

[56] The petitioner alleges that the utterances regarding the conduct of the DPP made by the President and the Minister of Justice at press conferences held on 20th April, 2022 and 26th April, 2022, respectively interfered with the independence of the office of DPP and that of the JCC. Under reliefs (i), (iii) and (iv), it was contended that the actions of the President and the Minister of justice contravened Articles 144(2), 91(3)(a)(e) and 180(7) of the Constitution.

[57] According to the petitioner, the President's statements made to the press that the DPP was wrong to have granted Milingo Lungu

immunity made a determination prior to investigation of the matter by the JCC and as such is in breach of Articles 144(2), 91(3)(a)(b) and 180(7) of the Constitution. He further alleges that the Executive through the Minister of Justice's announcement that they found anomalies in the conduct of the DPP in the absence of a legitimate body undertaking an inquiry offends Article 144(2) of the Constitution.

[58] In determining the petitioner's allegations, we will begin by looking at the statements made by the President. It is not disputed that the President addressed a press conference where he expressed that the DPP was wrong when she granted Milingo Lungu immunity and wrote to the Director General of DEC inquiring why DEC had re-arrested Milingo Lungu without her consent. We have considered exhibit IM 6 at page 32 of the record of proceedings where the President is reported to have stated, *inter alia*, that:

No one has the legal right to offer immunity to anybody, not the DPP, she has no legal right...

Let us not abuse judicial process, she has no right, there is no one in State House who has any legal power to offer immunity to anybody...

What should happen here, the law is clear here. If the DPP has transgressed her rights, the framers of the institutions were very clever, you complain to the Judicial Complaints

Commission and I think people have done that already...

What matters to us is to follow the law. Anyone aggrieved about the conduct of the DPP is to complain to the Judicial Complaints Commission...

The DPP has no power to arrest, the DPP has power to prosecute, that is separation of power.

[59] With respect to the statement by the Minister of Justice set out at pages 24 to 30 of the record of proceedings, particularly at page 29 in paragraphs 2, 3, 4 and 5 of the Press Statement the Minister said that:

The question that begs the answer is whether the learned DPP has exercised her functions within the confines of the law and in the public interest. Our initial assessment in answer to that question is that there have been significant lapses on the part of the DPP which require thorough independent and fair investigation by relevant bodies.

In this regard we are aware that various citizens have approached the Judicial Complaints Commission with complaints against the DPP.

The JCC's mandate, among other things is to independently investigate and consider such complaints with a view ultimately to redressing them in accordance with the law.

Suffice to say, however, that as custodians of the public interest and given the importance of the matters at hand, the Ministry urges the JCC to expedite its consideration of the Complaints before it so as not only to afford the learned DPP a platform on which to explain her actions. (emphasis added.)

[60] The record of proceedings shows that the President made utterances at page 32 of the record of proceedings expressing his displeasure at the DPP's actions giving Milingo Lungu immunity.

The Minister of Justice also equally expressed his opinion about the conduct of the DPP. What is left for our determination is whether these statements by the President and the Minister of Justice amounted to interference with the office of DPP and that of the JCC. The starting point will be to consider the meaning of the word interference. According to **Black's Law Dictionary Tenth Edition**, interference means:

“The act of meddling in another’s affairs; An obstruction or hindrance”

[61] In light of the above definition, can it be said that the utterances by the President and the Minister of Justice amounted to meddling in the affairs of the office of DPP and the JCC? According to the Constitution, a direction or instruction by the President has no force of law unless it is reduced in writing and is signed by the President. This is provided for in Article 93(1) of the Constitution which provides that:

A decision or instruction of the President shall be in writing under the President’s signature.

[62] It is our view that while an utterance or a statement by the President can have the effect of influencing policy, such an

utterance will amount to interference if it takes the form of an instruction made in writing by the President setting out a specific directive or instruction to a body or authority that enjoys independence under the Constitution.

[63] It is our considered view that in the absence of such written instruction, a statement by the President cannot, on its face, be deemed as interference with the lawful operation of a body or authority.

[64] Still on the issue of the President's interference, the petitioner has under relief (ii) alleged that the action by the President summoning the ACC to discuss criminal cases and compelling investigative agencies to resuscitate closed cases and issuing instructions to investigative wings contravened the Constitution and amounted to political interference in the discharge of the functions of enforcement agencies.

[65] He contends that the President admitted at the press briefing that he summoned officers from ACC, DEC and Zambia Police to State House and gave instructions on how they should perform their functions or investigate cases. The respondent vehemently disputes

this and contends that the President gave no such instruction as the Constitution is clear as to what form an instruction of the President should take.

[66] We have interrogated the provisions of Article 216 of the Constitution which provides for the independence of commissions and other independent offices. It provides that:

A commission shall –

(a) be subject only to this Constitution and the law;

(b) be independent and not be subject to the control of a person or an authority in the performance of its functions;

(c) act with dignity, professionalism, propriety and integrity;

(d) be non-partisan; and

(e) be impartial in the exercise of its authority

[67] The respondent contends that the President did not contravene Article 216 of the Constitution by giving independent commissions instructions on how to conduct cases. In considering the petitioner's allegations we had occasion to consider the South African decision in the case of **The President of the Republic of South Africa and 2 Others v South African Rugby Football Union and 3 Others**⁹. We refer to this decision only for persuasive value as the same is not binding on this Court. In that case the South African Constitutional

Court had to determine, among other things, whether by a press statement made by the President, he abdicated his powers under the Constitution to be the appointing authority of a Commission of Inquiry.

[68] The South African Constitutional Court in hearing the appeal had this to say at page 40 of the judgment:

Even if it is assumed that the President uttered the words attributed to him in the press statement (and that is the highwater mark of the respondents' case) this would not, on its own, evince an intention by the President to abdicate his powers and would not establish even a purported delegation to the Minister by the President of his constitutional power to appoint commissions of inquiry.

We cannot, therefore, accept that the text of the press statement, on its own, can establish that an abdication of responsibility occurred.

In law, the appointment of a commission only takes place when the President's decision is translated into an overt act, through public notification. In addition, the Constitution requires decisions by the President which will have legal effect to be in writing." (Emphasis added)

[69] In the decision referred to, the Constitutional Court emphasized that decisions of the President ought to be in writing in order to have legal effect. This is a similar position with the Zambian position as contained in Article 93(1). We have combed the record and have found no evidence of a written instruction from the President to commissions and investigative agencies on how to conduct cases.

[70] It is our view that in the case before us, the press statements could not be elevated to the status of instructions as suggested by the petitioner in the absence of any written instruction by the President as stipulated in Article 93(1) of the Constitution.

[71] This is so as the President's statement was not supported by any act that could be interpreted as an instruction to any person or body on the conduct of their lawful authority. While it was argued that such utterances would amount to interference in the operation of an independent institution or body, these utterances do not by themselves amount to an action that can be interpreted as interference by the President. It is therefore our view that in the absence of any act to support the utterances by the President, there is nothing to support the petitioner's claims envisaged under relief (ii).

[72] The petitioner also alleged that the President contravened Article 91(3)(a)(e) of the Constitution through his utterances.

[73] Article 91(3) of the Constitution provides as follows:

(3) The President shall, in exercise of the executive authority of the State –

- (a) respect, uphold and safeguard this Constitution;**
- (b) safeguard the sovereignty of the Republic;**
- (c) promote democracy and enhance the unity of the Nation;**
- (d) respect the diversity of the different communities of Zambia;**
- (e) promote and protect the rights and freedoms of a person;
and**
- (f) uphold the rule of law.**

[74] We have analyzed the utterances by the President at the press briefing which we have highlighted above. It is our view that the petitioner has failed to demonstrate how the President contravened Article 91(3) of the Constitution in the said press statement.

[75] With respect to the alleged contravention of Article 144(2) of the Constitution by the President and the Minister of Justice, the petitioner contended that the President and the Minister of Justice's utterances at their respective press conferences regarding the DPP's decision to enter a *nolle prosequi* in the Milingo Lungu case and subsequently granting him immunity amounted to pre-determining the matter that is solely the preserve of the JCC.

[76] Article 144(2) provides that:

The Judicial Complaints Commission shall, where it decides that a prima facie case has been established against a judge, submit a report to the President.

[77] Article 144(2) of the Constitution is clear on the procedure for the removal of a Judge which procedure is applicable to the removal of a DPP. It stipulates that where the JCC establishes a *prima facie* case against a judge, and in this case the DPP, they shall submit a report to the President. Notable from the press statements is that the President and the Minister of Justice each implored the relevant authorities to investigate the conduct of the DPP.

[78] It is our view that utterances by both the President and the Minister of Justice took cognizance that the JCC is the relevant institution to handle a matter relating to the removal of a judge or the DPP. Both the statements recognized the need to follow the due process of the law in investigating the actions of the DPP. The record is clear that at the time of the press conference, there was no complaint or case before the JCC against the DPP. We are therefore of the considered view that Article 144(2) of the Constitution is not applicable in the present facts and was therefore cited out of context.

[79] With respect to the alleged contravention of Article 180(7) of the Constitution, we have considered Article 180(7) of the Constitution which provides that:

The Director of Public Prosecutions shall not be subject to the direction or control of a person or an authority in the performance of the functions of that office, except that the Director of Public Prosecutions shall have regard to the public interest, administration of justice, the integrity of the judicial system and the need to prevent and avoid abuse of the legal process.

[80] We have considered the above provision in light of the impugned utterances by the President and the Minister of Justice. In addressing the petitioner's allegation, we have considered the rationale of Article 180(7). We found it relevant to consider that prior to the 2016 amendment to the Constitution, Article 56(7) allowed the Attorney General to give directions to the DPP on matters relating to public policy. According to the Technical Committee on the Draft Constitution, it was necessary to provide that the office of DPP should not be subject to the direction or control of any person or authority in the performance of the functions of the office as the previous provision infringed on the independence and impartiality of the DPP.

[81] Article 180(7) of the Constitution now enjoins the DPP to operate

without any direction or control from any person or an authority in the performance of their functions. The record reveals that the utterances made at the press conferences were made following the DPP having exercised her powers under Article 180 of the Constitution. The petitioner has failed to prove that the exercise of these powers was subject of any control or direction by the President or the Minister of Justice by their utterances.

[82] It is our considered view that the statements by the President and the Minister of Justice did not suggest how the DPP is to carry out her lawful functions but was rather a call to the public to complain to the relevant institutions to investigate the alleged misconduct in the DPP's exercise of her powers. Further, that in the interest of justice, the matter should be expedited. In our view these utterances were merely opinions that were made by the President and the Minister of Justice as is seen from the call to have the relevant authorities investigate the matter and appropriately handle the matter.

[83] We are of the view that the petitioner has failed to prove that the President and the Minister of Justice contravened Article 180(7) of

the Constitution through their utterances. In view of the aforementioned, we accordingly find no merit in reliefs (i),(ii), (iii) and (iv).

[84] With respect to relief (v), the issue for our determination is whether the placing of the ACC under the Office of the President and DEC under the Ministry of Home Affairs and Internal Security contravenes Article 216.

[85] According to the respondent, placing the ACC under the Office of the President does not interfere with the independence of the ACC because it was done merely for purposes of submitting annual reports by the ACC to the President.

[86] The ACC and DEC are placed under the office of the President and the Ministry of Home Affairs and Internal Security, respectively, by Gazette Notice 1123 of 2021. The Notice sets out the Institutions created by statute and the government office that they fall under. The essence of the Gazette notice is to disclose to members of the public the structure of government institutions and their functions. The petitioner contends that placing the ACC under the office of the President interferes with the independence of the Commission which

is contrary to Article 216 of the Constitution.

[87] We have carefully considered the arguments raised to support this allegation and we are of the view that Gazette Notice 1123 of 2021 having been created under the authority of the Statutory Functions Act, placing the ACC under the Office of the President does not compromise the independence of the ACC. We say so because a perusal of Gazette Notice 836 of 2016, a precursor to the impugned Gazette Notice, equally placed the ACC under the President's portfolio.

[88] We hold the view that placing the ACC under the President's portfolio is not novel and cannot, by itself, constitute a constitutional breach. Similarly, the Petitioner has not demonstrated how placing the DEC under the Ministry of Home Affairs and Internal Security is ultra vires the Constitution. We therefore find that there is no merit in this argument and relief (v) fails and is dismissed.

[89] Under relief (vi), the issue for our determination is whether the DPP can be subjected to disciplinary process for performing a lawful act in her official capacity and whether such a move contravenes

Article 180(7) of the Constitution.

[90] It is our view that while Article 180(7) of the Constitution is clear on the independence of the office of DPP, this is not to say that the DPP cannot be removed from office if found wanting subject to the disciplinary procedures specified in the Constitution. This is where Article 144 of the Constitution comes in. This provision is invoked in the following instances:

- (a) Where there is a mental or physical disability that makes the DPP incapable of performing their functions;
- (b) incompetence;
- (c) gross misconduct; or
- (d) bankruptcy

[91] These four instances are provided for under Article 143 of the Constitution and the removal procedure is provided for in Article 144 of the Constitution. It is only where one of these instances has been raised that a removal procedure against a DPP can arise.

[92] That said, the petitioner has not presented a factual context of the actions that the DPP is facing removal for to enable this Court make

a pronouncement on the relief sought. What is before us in *casu* are utterances in the press calling for the JCC to investigate the DPP's actions. We therefore find no merit in this relief.

[93] With respect to whether DEC can initiate a complaint against the DPP under relief (vii), section 25 of the Judicial Code of Conduct Act provides that:

“(1) Any member of the public who has a complaint against a judicial officer or who alleges or has reasonable grounds to believe that a judicial officer has contravened this Act shall inform the Authority.

(2)

(3) A person who has a complaint or allegation against any judicial officer shall lodge it with-

(a) the Secretary; or

(b) the clerk of court in the area where the incident or circumstances giving rise to the complaint or allegation occurred;

(4)....

(5) A complaint shall include the following:

(a) the name, physical and postal address of the person making the complaint

(b) the complainant's age; and

(c) A detailed statement including facts of the incident of circumstances giving rise to the complaint.”

[94] We have also considered the definition of a person under Article 266 of the Constitution. It provides as follows:

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

[95] It is our view that DEC is captured as an unincorporated entity under the definition of a person under Article 266. It therefore follows that DEC qualifies to be considered as a person that is capable of making a report to the JCC. To further support this position, we have considered the functions of DEC that are provided under Section 14 of the **Narcotic and Psychotropic Substances Act** which provides that:

(1) The Commission may, after an investigation into an alleged offence under this Act, make recommendations that the Commission considers necessary to an appropriate authority.

(2) An appropriate authority shall, within thirty days of the date of receipt of the recommendation of the Commission under subsection (1), make a report to the Commission on the action taken by the appropriate authority.

[96] While we note that this provision is specific to the aforementioned Act, it is a demonstration of the fact that DEC is capable of making recommendations or representations to appropriate institutions where there is a perceived offence.

[97] It is therefore our considered view that the DEC qualifies to make a report to the JCC as provided by section 25 of the Judicial (Code of

Conduct) Act. We find therefore no merit in this claim and accordingly dismiss it.

[98] With regard to the alleged conflict of interest, under reliefs (viii) and (ix) the petitioner has alleged that there is a potential conflict of interest because the Minister of Justice is a partner in a law firm with the Chairperson of the JCC, Mr. Vincent B. Malambo SC. Further, that Mr. Chad Muleza, a member of the JCC is an associate of the President and that the two should therefore recuse themselves from hearing the proceedings relating to the DPP.

[99] The respondent has argued that the petitioner has no *locus standi* to raise a conflict of interest claim and seek the recusal of members of the JCC because he is not a party to the proceedings before the JCC.

[100] The starting point in determining this issue is establishing this Court's jurisdiction as stipulated under the Constitution. Article 128 of the Constitution clothes this Court with jurisdiction to hear and determine matters relating to the Constitution. Article 128 states as follows:

(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; (b) a matter relating to a violation or contravention of this Constitution;

(c) a matter relating to the President, Vice-President or an election of a President;

(d) appeals relating to election of Members of Parliament and councillors;

and

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

[101] A careful analysis of the reliefs sought by the petitioner under (viii) and (ix) reveals that he asks this Court to determine whether there is a conflict of interest between named members of the JCC on the one hand and their relationship with the President and the Minister of Justice on the other hand. According to the petitioner, the alleged conflict of interest is likely to prejudice the DPP if she appears before the JCC based on the statements attributed to them. He is further asking this Court to order the recusal of the two named members of the JCC, namely; Mr. Vincent Malambo, SC and Mr. Chad Muleza, to ensure that no bias is suffered by the DPP in the proceedings. We are of the considered view that this issue falls outside our mandate as stipulated by Article 128 of the Constitution. We said in **Shakafuswa and Another v The Attorney General and Another**⁶ that, it is clear from Article 128 that this

Court has a duty to determine questions about the Constitution that have been brought to its attention. The allegations of a potential conflict of interest do not raise any constitutional issues that can clothe us with jurisdiction to entertain the claims. We therefore find that this claim is incompetently before us and it accordingly fails.

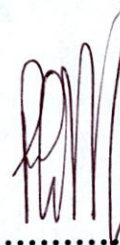
[102] In conclusion, we find that all the substantive claims and reliefs sought by the Petitioner have no merit. In view of the nature of this action, we order that each party bears their own costs.



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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. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE



.....
J. Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE