IN THE CONSTITUTIONAL COURT **2023/CCZ/005**
HOLDEN AT LUSAKA
(ORIGINAL JURISDICTION)

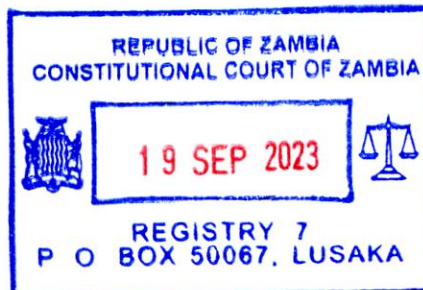
IN THE MATTER OF: **ARTICLES 1, 2, 92(2)(e), 120-135, 140, 141, 210(1) and 220(2)(b) AS READ TOGETHER WITH ARTICLE 128(1)(a)(b), 128(3)(b)(c) AND 9(1) OF THE CONSTITUTION OF ZAMBIA.**

IN THE MATTER OF: **APPOINTMENT OF THE DEPUTY PRESIDENT AND JUDGES OF THE CONSTITUTIONAL COURT IN CONTRAVENTION OF ARTICLE 140(1)(b) AS READ TOGETHER WITH ARTICLE 173(1)(i)(j) AS READ TOGETHER WITH ARTICLES 210(1) AND 8(d)(e) OF THE CONSTITUTION OF ZAMBIA.**

IN THE MATTER OF: **INTERPRETATION OF THE TYPE OF SPECIALISED TRAINING AND EXPERTISE REQUIRED FOR APPOINTMENT OF JUDGES OF THE CONSTITUTIONAL COURT AND SPECIALISED COURTS.**

IN THE MATTER OF: **INTERPRETATION OF WHETHER OFFICES OF THE PRESIDENT AND DEPUTY PRESIDENT OF COURT OF APPEAL ARE ADMINISTRATIVE IN NATURE WHOSE VACANCY IS FILLED BY APPOINTMENT FROM AMONG JUDGES BY THE CHIEF JUSTICE**

BETWEEN



ISAAC MWANZA **1ST PETITIONER**

MAURICE MAKALU **2ND PETITIONER**

AND

ATTORNEY GENERAL **RESPONDENT**

CORAM: Mulonda, Mulenga, Musaluke, Chisunka and Mulongoti, JJC, on 29th June, 2023, 5th July, 2023 and 19th September, 2023

For the 1st Petitioner: **In Person**

For the 2nd Petitioner: **Mr. M. Zulu, Mr. J. Zimba and Mr. N. Botha of Makebi Zulu Advocates and Mrs. M. Musonda-Mwape of Lungu Simwanza and Company**

For the Respondent: **Mr. M. Kabesha, SC, Attorney General, Mr. M. Muchende, SC, Solicitor General, Ms. C. Mulenga, Acting Chief State Advocate and Mr. M. Katungu, Principal State Advocate, Attorney General's Chambers**

J U D G M E N T

Judgment of the Court delivered by **Presiding Judge.**

Cases referred to:

1. **Maxwell Mwamba and Stora Solomon Mbuzi v Attorney General SJ No.10 of 1993, Appeal No.12 of 1993.**
2. **Steven Katuka and the Law Association of Zambia v The Attorney General, Ngosa Simbyakula and 63 Others CCZ Selected Judgment No. 3 of 2017.**
3. **Katiba Institute v Judicial Service Commission, Chief Justice of Kenya, Law Society and ICJ (Kenya Chapter) Constitutional Petition 18 of 2022.**
4. **Hakainde Hichilema and Another v Attorney General, SCZ, Appeal No. 4 of 2019.**
5. **Milford Maambo and Others v The People CCZ Selected Judgment No. 31 of 2017.**
6. **Sean Tembo v Attorney General, 2022/CCZ/002**

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**
2. **The Judiciary Administration Act No. 23 of 2016**
3. **The Court of Appeal Act No. 7 of 2016**
4. **The Service Commissions Act No. 10 of 2016**
5. **The Superior Courts (Number of Judges) Act No. 9 of 2016**

6. **The Interpretations and General Provisions Act, Chapter 2 of the Laws of Zambia**
7. **The Economic and Financial Crimes (Division of Court) Order 2022, Statutory Instrument No. 5 of 2022**
8. **The Judicial Service Commission Regulations, 1998**

Other works referred to:

1. **The Universal Charter of the Judge 1999**
2. **The Commonwealth Principles on the Accountability of and the Relationship between the Three branches of Government 2003**
3. **The Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence 1998**
4. **The Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers, 2019**
5. **The National Assembly Standing Orders Number 165, 174 and 175**
6. **The Report of the Technical Committee on Drafting of the Zambian Constitution, December, 2013**
7. **Jan van Zyl Smit, The Appointment, Tenure and Removal of Judges under Commonwealth Practice (Report of Research undertaken by Bingham Centre for the Rule of Law) 2015**
8. **Garth Thornton, Legislative Drafting, Fourth Edition, Butterworths, 1996**

Introduction

[1] This is a Judgment on the Petition filed by Isaac Mwanza (1st petitioner) and Maurice Makalu (2nd petitioner) pursuant to Article 128 (1) (a) (b) and 128 (3) (b) (c) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution) alleging contravention of the Constitution by the respondent in the manner the respondent appointed twenty (20) judges of the superior courts.

[2] Article 140 of the Constitution reposes the power to appoint judges in the office of the President, who appoints on recommendation of the

Judicial Service Commission (JSC) subject to ratification by the National Assembly.

[3] The petitioners assail the transparency of the process adopted by the JSC in recommending suitable persons for appointment and allege that some of the Judges appointed did not meet the requisite criteria set by the Constitution.

[4] The respondent, on the other hand, asserts the independence of the JSC in the manner it discharges its constitutional duty of recommending persons for appointment as judges and that the appropriate body before whom such a challenge, as brought by the petitioners, ought to be the Parliamentary Select Committee of the National Assembly which scrutinizes the persons recommended for appointment as judges.

[5] From the respective positions of the parties, the Petition at hand thus calls upon this Court to consider key constitutional provisions relating to the appointment of judges.

Petitioners' case

[6] The petitioners have invited us to resolve the following issues whether:

(i) in the absence of provisions in the Constitution and the law on where authority to appoint the President and Deputy President of the Court of Appeal lies, the offices of President and Deputy President of the Court of Appeal are administrative offices whose appointment is reserved for the Chief Justice as head of the Judiciary;

(ii) pursuant to Article 140(1)(b), a legal practitioner qualifies for appointment as a Judge of the Constitutional Court if the person has

specialised training in any other field apart from human rights and constitutional law;

(iii) a legal practitioner without experience in human rights or constitutional law can be appointed Judge of the Constitutional Court if they have the required 15 years' experience after their admission to the bar, and have specialised training in any other field as stipulated in the Constitution and the law; and

(iv) pursuant to Article 220(2)(b) as read together with Article 173(1)(i)(j) of the Constitution, the Judicial Service Commission is required to be fully transparent in calling for applications from suitably qualified persons for appointment to the position of Judge of a superior court so as to ensure merit, adequate and equal opportunities for appointment of a Judge as required by the Constitution.

[7] Based on these allegations and questions raised, the petitioners seek the following eleven (11) remedies-

(i) A declaration that Article 220(2) as read with Articles 173(1)(i)(j) and 210(1) compels the Judicial Service Commission to make recommendations on the recruitment of Judges from among legal practitioners following a transparent process and system that provide for adequate and equal opportunities for appointments and promotions and as such the positions of Judge ought to have been advertised;

(ii) A declaration that the failure by the Judicial Service Commission to advertise existing vacancies in respect of judges of superior courts, deprives qualified and deserving legal practitioners of equal opportunities for appointment to the office of a Judge of our superior courts, as appropriate, in contravention of Article 173(1)(i)(j) of the Constitution as amended;

(iii) A declaration that the recommendations, appointments and promotion of Judges of Superior Courts by the Judicial Service Commission are unconstitutional for breach of Articles 8(d)(e), 173(1)(i)(j) and 210(1) of the Constitution;

(iv) A declaration that the Respondent is in dereliction of its constitutional duty for failing to provide a system that is fair, equitable, transparent and competitive in hiring services of legal practitioners as Judges in the Judicial organ of the State and hence it has violated Articles 8(d)(e), 173(1)(i)(j) and 210(1) of the Constitution;

(v) A declaration that the required specialised training or expertise for a person to be appointed to the bench of the Constitutional Court or

specialised courts is limited to training in human rights and constitutional law, and relevant expertise to hear specific matters, respectively;

(vi) **A declaration that the Constitution and the law does not confer the authority to any person to appoint the President and Deputy President of the Court of Appeal and their appointment, from among the judges of the Court, is an administrative matter reserved for the Chief Justice as head of the Judiciary;**

(vii) **An order quashing all recommendations and appointments of Judges notified by State House in the press statement of 13th February, 2023 for contravening Articles 8(d)(e), 141(1)(b) and 173(1)(i)(j) of the Constitution;**

(viii) **A declaration that the Constitution and the law does not confer authority on any person to appoint the President and Deputy President of the Court of Appeal and the Chief Justice as head of the Judiciary has authority to make such appointments;**

(ix) **A further order directing the Judicial Service Commission to conduct a transparent, competitive recruitment system of Judges through advertisement and interviews based on principles in Article 8(d)(e) and 173(1)(i)(j) of the Constitution;**

(x) **The appointment of a High Court Judge who had less than 10 years' experience as a legal practitioner, contravenes the Constitution, is unconstitutional, null and void; and**

(xi) **Any other reliefs the Court may deem fit.**

[8] In the skeleton arguments in support of the Petition, the petitioners argued that the selection, recommendation and eventual appointment of twenty (20) superior court judges not only breached Articles 8(d) (e) and 173(1) (i) (j) of the Constitution, but also defied the rule of law, constitutionalism, principles of good governance, accountability and transparency.

[9] The petitioners cited works of eminent scholars and non-binding international instruments on best practices on the appointment of judges

with a common thread being that all judicial appointments to all levels of the Judiciary should be made on merit through a transparent and accountable process. The international instruments referred to include; The Universal Charter of the Judge (1999), The Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government (2003), The Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence (1998) and The Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers (2019).

[10] It is the petitioners' argument that in line with the national values and guiding principles of public service in Article 8(d) (e) and Article 173 (1) (i) (j) of the Constitution, the appointment of judges should be done in a manner that extols constitutionalism, good governance, integrity, transparency and accountability. According to the petitioners, the Constitution demands merit and equal opportunity-based appointments and that these tenets should inform the procedure adopted by the JSC before making recommendations to the President.

[11] The petitioners contended that the President's role in the appointment of judges is limited to the mandatory role of appointing judges recommended by the JSC which he exercised in grave error with regard to the appointment of the twenty (20) judges.

[12] The petitioners allege lack of transparency on the part of the JSC on the basis that there is no set procedure preceding recommendations, which should ensure that persons are appointed or promoted on merit. They further allege that failure to advertise the vacancies in the superior courts denied all suitably qualified legal practitioners an opportunity to be interviewed and assessed for possible recommendation and appointment as judges.

[13] Regarding the appointment of the Deputy President of the Constitutional Court (Judge Arnold Shilimi), the petitioners submitted that he has no judicial history, experience in adjudication or competence in managing judicial affairs, lacks specialized training in human rights or constitutional law and therefore his appointment is without merit. In support of this submission, the petitioners have exhibited Justice Shilimi's resume marked "IM-3" in the affidavit verifying facts and his curriculum vitae (CV), marked "IMR3" in their affidavit in reply.

[14] Assailing the appointment of Justice Mwiinde Siavwapa as Judge President of the Court of Appeal, the petitioners had two main contentions. Firstly, that the Constitution does not specifically prescribe that the Judge President of the Court of Appeal is to be appointed by the President as this appointment ought to be administratively done by the Chief Justice in accordance with section 21 of the Judiciary Administration Act No.23 of 2016. Secondly, that his appointment lacked

merit as it disregarded seniority at the bar and bench of other serving judges.

[15] It is also alleged that the appointment of Justice Greenwell Malumani as High Court Judge is untenable as he had not attained the requisite ten years post bar admission as required by Article 141 (1) (d) of the Constitution.

[16] As regards Justice Kenneth Mulife, the petitioners argued that his elevation to the Constitutional Court was untenable as there was an action before the Courts of law questioning his competence and impartiality.

[17] The petitioners also made a general submission to the effect that the appointments of judges to the Economic and Financial Crimes Court was supposed to be made by the President and not the Chief Justice. Further, that all appointees to that court were required to have the relevant expertise as required by Article 141(2) of the Constitution and that Statutory Instrument No. 5 of 2022 which set up the court does not specify qualifications or specialization of the judges.

[18] Orally augmenting their written submissions, the 1st petitioner reiterated the written arguments and further relied on views of the Law Association of Zambia (LAZ) made to the Parliamentary Select Committee on the appointment of Justice Shilimi, to the position of Deputy President of the Constitutional Court, to the effect that he did not meet the requisite

constitutionally set qualifications to be appointed as a Judge of the Constitutional Court.

[19] The 1st petitioner called on us to protect the values espoused in Article 173 of the Constitution to prevent appointments based on patronage, a tendency which the 2016 constitutional amendments broke away from.

[20] Canvassing the first question brought for interpretation on where the power to appoint the Judge President and Deputy Judge President of the Court of Appeal lies, the 1st petitioner offered that the power lies with the Chief Justice in his administrative role based on the Report of the Technical Committee on the Drafting of the Zambian Constitution, in not prescribing the two positions in the Constitution. He reasoned that the appointment of the Judge President and Deputy Judge President of the Court of Appeal is comparable to that of judges in charge in the High Court.

[21] On behalf of the 2nd petitioner, Mr. Zulu submitted that Articles 140 and 141 of the Constitution require that at the time the JSC recommends persons for appointment as judges of superior courts they should ensure that the recommended persons meet the criteria set by the Constitution. He argued that this was not the case with their recommendation of Justice Malumani as at the date of his appointment by the President, the appointee did not meet the requisite number of years at the bar. It therefore, follows that his appointment by the President and subsequent

ratification by the National Assembly, were equally in breach of the Constitution.

[22] As regards the appointment of Justice Shilimi, Mr. Zulu argued that he had no specialised training in constitutional law or any experience in human rights going by the curriculum vitae he submitted to the Parliamentary Select Committee. Further, that the JSC erred in making the recommendation that Judge Shilimi met the criteria set for appointment as a Judge of the Constitutional Court.

[23] With reference to the appointment of Judge President and Deputy Judge President of the Court of Appeal, Mr. Zulu adverted to the principle that *'express mention of one thing, is the exclusion of another'* to highlight the omission by the Constitution to expressly include the appointment of the two stated judge positions on the list of Judges to be appointed by the President under Article 140 of the Constitution. He emphasised that the President has no power to appoint the Judge President and the Deputy Judge President of the Court of Appeal.

[24] Mr Zulu reiterated the petitioners' submission on the Economic and Financial Crimes Court set up by Statutory Instrument No. 5 of 2022. Demurring the time limitation set by Article 67(3) of the Constitution on challenges aimed at impugning the constitutionality of statutory instruments, he submitted that the bare lapse of time did not make a

statutory instrument constitutional and that to hold otherwise would be an absurdity which this Court cannot allow.

[25] Mr. Zimba, co-counsel for the 2nd petitioner, added that before a nominee appears before the Parliamentary Select Committee of the National Assembly that individual ought to have possessed the qualifications espoused in Article 141 of the Constitution. That the appearance before the Parliamentary Select Committee is therefore purely for purposes of scrutiny.

Respondent's case

[26] The respondent opposed the Petition, contending that it was premature and an abuse of court process. The respondent averred that the JSC has set its own criteria which guides its recommendations made to the President and that transparency is achieved at ratification stage where the Parliamentary Select Committee invites views from members of the public.

[27] The respondent argued that the Petition does not reveal any cause of action as no specific constitutional provision has been indicated as having been violated by the JSC before it made its recommendations to the President.

[28] The respondent argued that the Petition was vague as it did not state the name of the particular High Court Judge who had not met the requisite number of years as a legal practitioner and is thus speculative.

[29] In oral augmentation of the respondent's position, the learned Solicitor General submitted that the values set out under Article 173 of the Constitution were not applicable to the JSC as it did not fall in the definition of public service as laid down by Article 266 of the Constitution. The Solicitor General further submitted that the relevant provisions on the appointing process for judges were Articles 140, 141, 219 and 220 of the Constitution as read with the Judiciary Administration Act of 2016. That the said provisions, did not require the advertisement of positions before JSC could recommend persons for appointment as judges of superior courts. This practice was said to be commonplace in commonwealth countries. Kenya was cited as an example of where selection of judges is done in camera while scrutiny of the appointed judges is publicly done through the National Assembly.

[30] Citing regulation 17 of The Judicial Service Commission Regulations, 1998, which gives the JSC discretion to advertise positions of judicial staff, the Solicitor General offered that it did not apply to judges as regulation 1(2)(a) expressly excludes applicability to judges. That, it therefore, follows that advertisements as proposed by the petitioners were not a legal requirement for recruitment of judges.

[31] The learned Solicitor General highlighted how the current selection process has worked to recruit judges who have been of invaluable addition to the institution and has therefore, afforded equal opportunity to all worthy candidates. He also referenced the scrutiny process governed by Article 95 as read with the National Assembly Standing Orders 165, 174 and 175.

[32] In all, the respondent argued that the appointment of the twenty (20) judges was done in compliance with the law.

[33] On the specific challenges to the appointment of Justice Arnold Shilimi and Justice Greenwell Malumani, the Solicitor General argued that the two ought to have been made parties to the proceedings and on the strength of **Maxwell Mwamba and Stora Solomon Mbuzi v Attorney General**[1], he argued that no adverse order can be made against someone without giving them an opportunity to be heard. We were urged to pick a leaf from the case of **Steven Katuka and Others v Ngosa Simbyakula and 63 Others**[2] where all the affected parties were joined to the proceedings.

[34] With reference to the appointment of the Judge President and Deputy Judge President of the Court of Appeal, it was the Solicitor General's submission that Article 140(e) of the Constitution also covers the appointment of the two positions although not expressly mentioned.

[35] On the set up of the Economic and Financial Crimes Court, the Solicitor General submitted that this issue fell outside the scope of the Petition as it is not covered by any of the prayers in the Petition. Furthermore, that the issue was time barred by virtue of Article 67(3) of the Constitution.

[36] Ms. Mulenga, the Acting Chief State Advocate, urged us to take note of the nature of national values and that so long as the persons appointed were competent and of proven integrity, their appointments did not defy the national values. Further, that in rendering our decision, regard has to be had to the core principles of judicial independence and supremacy of the rule of law.

[37] Mr. Katungu, the Principal State Advocate reiterated the submissions by the learned Solicitor General and the Acting Chief State Advocate. He questioned the veracity of the CVs produced for Justice Shilimi and Justice Malumani.

Petitioners' Reply

[38] In reply to the respondent's contention that the Petition had not revealed a cause of action, the petitioners argued that the cause of action revealed in their Petition was that the recommendation and appointment of judges of the superior courts on 13th February, 2023 contravened Article 173 (1) (i) and (j) as read together with Article 8 (d) and (e) of the

Constitution. This, they submitted, was supported by the material facts included in other paragraphs of the Petition.

[39] Offering submissions in reply to the oral submissions made by the respondent, the 1st petitioner maintained that Article 173 applies to all State Organs. Further, citing the Kenyan case of **Katiba Institute v Judicial Service Commission, Chief Justice of Kenya, Law Society and ICJ (Kenya Chapter)**[3], it was argued that transparency is important in the appointment of Judges.

[40] The 1st petitioner took time to point out the difference between the dictates of Articles 94 and 95 of the Constitution. In his estimation the latter required ratification of appointments and not approval. That ratification is a verification process as gleaned from the Report of the Technical Committee on the Drafting of the Zambian Constitution, 2013 recorded on pages 242-248.

[41] We were urged to extol a system of appointment that guarantees meritocracy, equal opportunity to all qualified persons and transparency over the practice of 'head hunting'. The 1st petitioner submitted that this would check the discretion of the JSC.

[42] On the issue of whether or not the aspect of the Economic and Financial Crimes Court fell within the purview of the Petition, the 1st petitioner submitted that it did by virtue of the question seeking the Court's

guidance on the requisite specialisation that Judges of that Court ought to have.

[43] In further reply on behalf of the 2nd petitioner, Mr. Zulu pointed out that the acknowledgment on the part of the learned Solicitor General that he was representing the Judges whose appointments had been impugned was an indication that the said judges had been heard. Further, that any reservations on the excerpts of curriculum vitae produced in the matter should have come earlier and that the Attorney General's Chambers could have sought instructions to show a contrary position. Having not done so, it was Mr. Zulu's submission that the respondent's contention cannot stand.

[44] With regard to the applicability of Article 173 to the JSC, Mr. Zulu highlighted that all commissions established by the Constitution are subject to the Constitution in its entirety. Taking this argument further with respect to the appointment of Justice Shilimi and Justice Malumani, it was submitted that the JSC is thus bound by Article 141 in ensuring that the recommended persons met the requirements.

[45] In reply to the respondent's position on the appointment of the Judge President and Deputy Judge President of the Court of Appeal, Mr. Zulu stated that the expansive reading of Article 140(e) would amount to reading into the Constitution, the type of judicial activism the Supreme Court discouraged in the case of **Hakainde Hichilema and Another v**

Attorney General.[4] To anchor his position on this issue further, Mr. Zulu urged us to consider the Report of the Technical Committee on the Drafting of the Zambian Constitution with regard to the appointment of Judge President and Deputy Judge President of the Court of Appeal.

[46] Mr. Zimba added to the oral reply by pointing out that while Article 67 sets a time limit for challenging the constitutionality of a Statutory Instrument, Article 1 (1) did not do so. He rationalised that the constitutionality of any written law should be open for challenge.

[47] Mr. Zimba also distinguished the appointment process of judges in Zambia from that of the United States which he opined was a nominee system of appointment.

Determination

[48] We have considered the Petition, the Answer, the accompanying affidavits together with the written arguments filed by the parties and the oral arguments made by counsel. The main issue for determination in this matter is whether, on the evidence before us, the respondent contravened Articles 8 (d) (e), 141(1) (b) and (d), 173 (1) (i), (j), 210 (1) and 220 (2) (b) of the Constitution.

[49] To determine whether or not the above provisions has been contravened invariably requires us to interpret the Constitution. We will therefore,

begin by highlighting the relevant principles that relate to the interpretation of the Constitution.

[50] In the case of **Milford Maambo & Others v The People**[5], we endorsed the position that the correct approach of interpreting the Constitution is to apply the literal rule of interpretation, thereby, giving the words used in the Constitution their plain and ordinary meaning. The literal rule of interpretation should only be vacated where the plain and ordinary meaning leads to an absurdity.

[51] Further, in the case of **Stephen Katuka and Law Association of Zambia v The Attorney General, Ngosa Simbyakula and 63 Others**[2], we stated that when interpreting the Constitution, the relevant words or provisions must not be read in isolation rather, they must be read together and the entire Constitution must be considered as a whole to achieve the objective of the Constitution.

[52] In addition to the above mentioned principles, Article 267 of the Constitution instructs us to interpret the Constitution in accordance with the Bill of Rights and in a manner that promotes its purposes, values and principles; permits the development of the law and contributes to good governance. We will therefore, be guided by these principles as we consider the issues before us.

[53] We note that the alleged contravention of the Constitution, in the Petition before us, relates to the appointment of judges of the superior courts

communicated through a Press Release from the Office of the President dated 13th February, 2023, and exhibited as "IM1" in the petitioners' affidavit verifying facts. In the main, the Petition challenges the appointment of the judges, and seeks relief which, for the most part, is declaratory in nature. Stemming from the remedies sought, we discern that the Petition challenges the appointment of the judges on four grounds, that:

i. **The principles of good governance, fairness, equity, transparency, merit and equal opportunity enumerated in Articles 8(d)(e),141(1)(b),(d), 173(1)(i),(j), 210 and 220(2)(b) of the Constitution were contravened due to the failure to advertise the vacant positions of judge within the superior courts;**

ii. **The appointment of a Constitutional Court judge without the specialised training or experience in human rights or constitutional law is unconstitutional;**

iii. **The appointment of a High Court Judge with less than ten years experience as a legal practitioner is unconstitutional; and**

iv. **The appointment of the Judge President of the Court of Appeal by the President is unconstitutional.**

[54] We proceed to determine the four grounds by examining the constitutional provisions that encompass the contraventions alleged.

The requirement to advertise the position of Judge

[55] Relief (i), (ii),(iii), (iv), (vii) and (ix) all raise one main issue, that is, the allegation that the respondent contravened Articles 8 (d),(e), 173 (1) (i),(j), 210 and 220 (2) (b) of the Constitution by failing to advertise the vacant positions of judge and also to hold public interviews. That this

was contrary to the principles of good governance, fairness, equity, transparency, merit and equal opportunity provided for in the articles of the Constitution referred to above. Consequently, the appointments of the judges are, unconstitutional and invalid.

[56] In effect this allegation impugns the appointment of the judges on the basis that the process that culminated in their appointments as judge did not include advertisements of the vacant positions and therefore, the appointments contravened the Constitution. It is important to note that the contravention alleged relies on the non-advertisement of vacant positions of judge within the superior courts.

[57] The question, therefore, is whether or not the Constitution provides for the advertisement of vacant positions within the superior courts. Put differently whether there is a mandatory requirement in the Constitution to advertise vacant positions of judge in the superior courts prior to the recommendation by the JSC to the President.

[58] To determine this issue, we shall begin by examining the relevant constitutional provisions that relate to the appointment of a judge before we consider the alleged breach of the provisions enumerated. The starting point is Article 140 of the Constitution which provides that:

> **The President shall, on the recommendation of the Judicial Service Commission and subject to ratification by the National Assembly, appoint the Chief Justice; Deputy Chief Justice; President of the Constitutional Court; Deputy President of the Constitutional Court; and other judges.**

[59] A literal interpretation of Article 140 of the Constitution reveals that the JSC recommends the names of legal practitioners to the President and those names are subject to ratification by the National Assembly in order for them to be appointed as judge. The Constitution is silent on the procedure to employ when the JSC is identifying names for recommendation for appointment as judge to the President.

[60] The petitioners allege that Articles 8 (d) (e), 173 (1) (i) (j), 210 (1) and 220 (2) (b) of the Constitution were breached on account of the failure to advertise the positions and publicise the interviews prior to the impugned appointment of the judges.

[61] Article 210 of the Constitution provides that:

> **210. (1) A State organ, State institution and other public office shall procure goods or services, in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, as prescribed.**
>
> **(2) A major State asset shall be sold, transferred or otherwise disposed of, as prescribed, subject to the approval of the National Assembly signified by a vote of at least two-thirds of the Members of Parliament.**

[62] It is apparent to us that Article 210 of the Constitution provides for public procurement and the disposal of state assets relating to public finance and budget. It is, therefore, inapplicable and irrelevant to this suit impugning appointments of judges. There is, therefore, no contravention of Article 210 (1) of the Constitution as alleged.

[63] Article 220 (2) (b) of the Constitution provides that:

> **220. (1) There is established the Judicial Service Commission.**
> **(2) The Judicial Service Commission shall—**
>
> **(b) make recommendations to the President on the appointment of judges;**

[64] A reading of Article 220 (2) (b) of the Constitution shows that it provides that the JSC is mandated to make recommendations to the President on the appointment of judges. This Article, however, does not contain specific details on how the recommendations are to be made. Applying the plain and ordinary meaning of the words in Article 220 (2) (b) of the Constitution settles the issue that it does not provide for the requirement of advertising of positions or the publicizing of interviews for those seeking to be appointed as judge.

[65] Further, Article 8 (d) and (e) of the Constitution, alleged to have been breached, provide that:

> **The national values and principles are-**
> **(d) human dignity, equity, social justice, equality and non-discrimination;**
> **(e) good governance and integrity;**

[66] Article 173 (1) (i) and (j) of the Constitution also alleged to have been breached, provide that:

> **The guiding values and principles of the public service include the following —**
> **(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;**

[67] Although Article 8 (d) of the Constitution provides for national values of equity, equality and non-discrimination and Article 173 (1) (i) and (j) of the Constitution guides that the principles of merit and equal opportunity are the basis for appointment and promotions in the public service. The petitioners have not demonstrated how the appointment of the judges under Article 140 of the Constitution was without merit or equal opportunity. Articles 8 (d) and (e) and 173(1) (i) and (j) of the Constitution also do not contain a mandatory requirement for the advertising of a vacancy for the position of judge. Other related legislation such as the Service Commissions Act No. 10 of 2016 are equally silent on the need for advertising vacancies within the superior courts and let alone subjecting those identified to public interviews.

[68] The upshot is that the process for the appointment of judges enshrined in the Constitution does not require advertisements to be made or interviews to be publicly broadcast. If the framers of the Constitution had intended for the appointment of judges to be advertised and interviews made public, they would have expressly provided for such advertisements and public interviews. Thus, an appointment to the office of judge cannot be unconstitutional on account of not being advertised because there is no mandatory requirement in the Constitution to advertise vacancies occurring within the superior courts or publicize the interviews for those shortlisted for judgeship.

[69] The petitioners merely stated that the vacancies to the position of judge were not advertised and the interviews were not made public. This, however, does not prove that Article 140 which provides for the appointment of judges was breached. It also does not prove that the said appointments went against the principles of equity, equality, non-discrimination, merit and equal opportunity just because the positions were not advertised.

[70] In addition, the petitioners did not substantiate the allegations that deserving and qualified legal practitioners were deprived of the opportunity to be appointed as judges. The petitioners have equally failed to show that the Constitution requires that promotion among judges should be based on seniority on the bench. The result is that the petitioners have not demonstrated that the impugned appointment of judges in this case was without merit or equal opportunity or that the appointments breached Articles 8 (d), (e),173 (1) (i) (j) and 220 (2) (b) of the Constitution. Consequently, we decline to grant relief (i), (ii),(iii), (iv), (vii) and (ix) in the Petition.

[71] Before we conclude on this issue, we have the following to say on the JSC process leading to the recommendation of names for judgeship to the President for appointment to the superior courts.

[72] In a Commonwealth Compendium and Analysis of Best Practice on the Appointment, Tenure, and Removal of Judges under Commonwealth Principles, it is observed on the criteria for judicial office as follows:

> **The requirement of the *Commonwealth Latimer House Principles* that judges should be appointed 'on the basis of clearly defined criteria and by a publicly declared process' conveys a fundamental commitment to transparency. At a minimum, the public must be informed of the characteristics that qualify persons for judicial office and the procedures that are followed when an individual applies, or is considered for the appointment.**

[73] We note that the above criteria essentially obtains in our jurisdiction in that the qualifications or requirements for appointment as a judge are outlined in the Constitution and relevant legislation and therefore in the public domain. As regards the requirement for a judicial appointments commission that is recommended in the compendium referred to above, this, in our jurisdiction is taken care of as the JSC recommends the appointment of judges. In our view, what requires enhancing in terms of transparency for judge appointments are the procedures to be followed when an individual applies or is being considered for appointment. Currently, the process is not outlined anywhere in the Constitution or in the Service Commissions Act or in any Act of Parliament as procedure to be followed by the JSC in the recommendation of judges for appointment.

[74] It is our considered view that judicial office especially that of judge, in large measure is held together by a public perception that those who

seek justice will find it before an impartial and competent judge. The allegations such as the ones raised by the petitioners can only, in our view, be forestalled by putting in place a transparent procedure that leaves little room for assailing recommendations made by the JSC. We recommend that the Legislature puts in place a law to that end.

Appointment to the Constitutional Court

[75] Under relief (v) of the Petition, the petitioners seek a declaration that a person appointed to the Constitutional Court must have specialised training or experience in human rights or constitutional law.

[76] Article 141 (1)(b) of the Constitution provides that:

> **141(1) A person qualifies for appointment as a judge if that person is of proven integrity and has been a legal practitioner, in the case of the —**
>
> **(b) Constitutional Court, for at least fifteen years and has <u>specialised training or experience in human rights or constitutional law;</u>** (Emphasis ours)

[77] It is clear that Article 141(1) (b) of the Constitution provides that a person qualifies for appointment as judge if that person is of proven integrity and has been a legal practitioner, in the case of the Constitutional Court, for at least fifteen years and has specialised training or experience in human rights or constitutional law. The petitioners have invited us to give an interpretation of 'specialised training' that is required for one to be

appointed as a Constitutional Court Judge under Article 141(1)(b) of the Constitution.

[78] It is our considered view that Article 141 (1) (b) entails that for one to qualify for appointment as a Constitutional Court Judge that person must possess at least one of either specialised training in human rights or constitutional law or they must have experience in human rights or constitutional law. That is to say, if one only has specialised training in human rights or constitutional law, that person qualifies for appointment as a Constitutional Court Judge even though they do not have experience in human rights or constitutional law, and vice versa.

[79] We thus grant the declaration prayed for by the petitioners that qualification for appointment as a Constitutional Court Judge under Article 141(1) (b) of the Constitution requires one to have specialised training or experience in human rights or constitutional law in addition to the requisite attainment of 15 years as a legal practitioner.

[80] Before we leave this issue, it was argued by the petitioners that the Deputy President of the Constitutional Court, Justice Shilimi, does not have the specialized training or experience in constitutional law or human rights as required by Article 141(1) (b) of the Constitution.

[81] A perusal of the CV of Justice Shilimi exhibited in the petitioners' affidavit in reply marked "IMR3" at page 143 of the Record of Proceedings reads, in part, as follows:

1. **One of the core modules for my Master's Degree at Cambridge was the Law of International Institutions which focused extensively among others the operations and impact of Global Rights Bodies such as the Human Rights Committee (an Independent expert body, located at the United Nations, established to monitor compliance with the International Covenant on Civil and Political Rights), the African Commission and Court on Human and people's Rights and other global Human Rights Bodies on International Human Rights.**
2. **The International Law of Peace covered areas such as The State and the Individual, looking at such issues as acquisition of nationality, the rights of refugees and Human Rights Fundamental Freedoms with particular reference to the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms among others.**

[82] Further, the CV shows that Justice Shilimi worked as Senior Legal Counsel at *Shelter–Afrique* from 1996 – 2004 where he was involved in the protection and promotion of the socio-economic rights of citizens of post–conflict member Countries such as Burundi, Rwanda, Liberia and Sierra Leone with emphasis on shelter as a basic human right.

[83] In our considered view, Justice Shilimi's CV, shows *prima facie*, that he has the relevant training and experience in human rights as required by the provisions of Article 141 (1) (b) of the Constitution for him to be appointed as judge of the Constitutional Court.

High Court Judge

[84] The petitioners allege that the respondent appointed a High Court judge namely Justice Malumani, who had less than 10 years experience as a legal practitioner. The petitioners argued that this appointment

contravened Article 141(1)(d) of the Constitution and it was, therefore, unconstitutional, null and void. The petitioners contend that the High Court Judge did not qualify for appointment as judge because he had not attained the ten years experience as a legal practitioner on 13th February, 2023, the date he was appointed as he was nine (9) days shy of the requisite 10 years.

[85] It is imperative to examine the constitutional provisions that concern the appointment and qualification for appointment as a High Court judge in order to ascertain whether the respondent contravened the Constitution when the President appointed the High Court Judge.

[86] The relevant provisions are Articles 140 and 141(1)(d) of the Constitution which provide that:

> **140.The President shall, on the recommendation of the Judicial Service Commission and subject to ratification by the National Assembly, appoint the —**
>
> **(a) Chief Justice;**
> **(b) Deputy Chief Justice;**
> **(c) President of the Constitutional Court;**
> **(d) Deputy President of the Constitutional Court; and**
> **(e) other judges.**
>
> **141. (1) A person qualifies for appointment as a judge if that person is of proven integrity and has been a legal practitioner, in case of the –**
>
> **(d) High Court, for at least ten years.** (Emphasis ours).

[87] It is clear from a literal interpretation that Article 140 of the Constitution stipulates that the appointment of a judge by the President is subject to

ratification by the National Assembly. The question that arises, therefore, is the meaning and purpose of the words "subject to" contained in Article 140 of the Constitution.

[88] The learned author, Garth Thornton in his work, Thornton's Legislative Drafting 4th Edition, page 101-103 states that the term 'subject to' is used where there is a risk of inconsistency in a provision or a law and the words 'subject to' are inserted to make it clear which one prevails. The author articulates that the words 'subject to' are drafted into a provision to show that there are words in the provision that are intended to be subservient to other words in the same provision which are dominant. This, therefore, entails that the words that follow the term 'subject to' are dominant and the subservient words before the term "subject to" are invariably conditional or dependant on the dominant words.

[89] The use of the term 'subject to' in Article 140 of the Constitution is followed by the words ratification by the National Assembly. This entails that, the words 'ratification by the National Assembly' are the dominant words in Article 140 of the Constitution. The President's appointment of a judge is, therefore, subservient, conditional or dependant on the National Assembly ratifying that judge that has been recommended for appointment by the JSC.

[90] The words 'subject to' in Article140 of the Constitution connote that when the National Assembly does not ratify, the recommendation for appointment by the JSC will not result in the appointment to the office of judge. It is, therefore, only when the recommendation has been ratified by the National Assembly that the appointment as judge is made by the President. The question that falls for determination is whether the High Court Judge had attained the requisite ten years experience as a legal practitioner when he was appointed after the ratification by the National Assembly.

[91] Page 137 of the Record of Proceedings shows that the ratification process begun on 24th February, 2023, and going by his CV the High Court Judge qualified for appointment by clocking ten years as a legal practitioner some two days before the commencement of the ratification process on 22nd February, 2023. In view of this, it is clear that at the time of ratification by the National Assembly on 29th March, 2023, the High Court Judge had attained the mandatory ten years experience, as required by Article 141(1) (d) of the Constitution.

[92] We find that the impugned appointment of the High Court Judge did not, therefore, contravene Article 141(1)(d) of the Constitution as the appointment came after ratification. We thus decline to grant relief (x).

Appointment of Judge President and Deputy Judge President of the Court of Appeal

[93] Under relief (vi) and (viii) in the Petition, it is alleged that neither the Constitution nor any written law confers authority on any person to appoint the Judge President and the Deputy Judge President of the Court of Appeal, and thus, their appointments are an administrative matter reserved for the Chief Justice. The question, therefore, is, who should appoint the Judge President and Deputy Judge President of the Court of Appeal.

[94] To answer this question, it is important to review the relevant provisions of the Constitution and Acts of Parliament touching on the Judge President and the Deputy Judge President of the Court of Appeal.

[95] Article 130 of the Constitution establishes the Court of Appeal and provides for its composition in the following terms:

> **There is established the Court of Appeal which consists of such number of judges <u>as prescribed</u>**. (Emphasis ours)

[96] Article 130 plainly stipulates that the Court of Appeal shall consist of such number of judges as set out in an Act of Parliament. To this end, section 4 of the Superior Courts (Number of Judges) Act No. 9 of 2016 provides that:

> **There shall be nineteen judges of the Court of Appeal, <u>including the Judge President and the Deputy Judge President</u>.** (Emphasis ours)

[97] Additionally, section 2 of the Court of Appeal Act No. 7 of 2016, defines Judge President and Deputy Judge President in these terms:

> **"Deputy Judge President" means the Deputy Judge President of the Court appointed under section three**;
>
> **"Judge President" means the Judge President of the Court appointed under section three;** (Emphasis ours)

[98] Section 3 of the Court of Appeal Act No. 7 of 2016, provides that:

> **The Court of Appeal shall consist of the Judge President and the Deputy Judge President, and such number of Judges as may be prescribed.**

[99] It is clear to us that Article 130 of the Constitution provides for the composition and number of judges of the Court of Appeal, by prescribing them in Acts of Parliament being the Court of Appeal Act No. 7 of 2016 and the Superior Courts (Number of Judges) Act No. 9 of 2016. These Acts of Parliament give effect to Article 130 of the Constitution by stipulating that the Court of Appeal shall consist and be composed of the nineteen judges including the Judge President and Deputy Judge President of the Court of Appeal.

[100] The petitioners argue that the express omission of the two positions in Article 130 of the Constitution suggests that the appointment of Judge President and Deputy Judge President is a preserve of the Chief Justice as he exercises his administrative duties under Article 136 of the Constitution. They liken the two positions to that of Judge -in- Charge of the High Court, an office administratively constituted by the Chief Justice. They also advert to the presumption of construction of

documents to the effect that an *'express mention of one thing is the exclusion of another.'*

[101] The respondent, on the other hand, finds solace in Article 140(e) of the Constitution that grants power to the President to appoint other judges on recommendation of the JSC and subject to ratification by the National Assembly.

[102] We have considered the arguments by the parties. In order to resolve the issue, we consider it imperative to have recourse to the Report of the Technical Committee on the Drafting of the Zambian Constitution. At page 471-472, the Technical Committee initially provided for the positions of President and Deputy President of the Court of Appeal. The Technical Committee, however, removed the two positions by providing in general terms that the composition of the Court of Appeal should be prescribed. This is in line with the current provision in Article 130 which provides that the Court of Appeal shall consist of such number of judges as prescribed. In this case, this is the Court of Appeal Act and the Superior Courts (Number of Judges) Act which outline the composition to include the Judge President and the Deputy Judge President.

[103] It follows that this prescription as mandated by the Constitution has to be read in light of Article 130. Thus the Judge President and Deputy Judge President are captured under 'other judges' that have to be appointed by the President under Article 140 of the Constitution. These

positions cannot be likened to that of Judge-in-Charge in the High Court because the Superior Courts (Number of Judges) Act does not provide for the position of Judge-in-Charge as regards the composition of the High Court. This is a clear distinction showing that the two positions of Judge President of the Court of Appeal and Judge-in-Charge of the High Court cannot be classified in the same bracket.

[104] Further, Article 140 of the Constitution expressly provides for the appointment of the Chief Justice, Deputy Chief Justice, President of the Constitutional Court, Deputy President of the Constitutional Court and other judges. Article 140 lists specific positions of judges, followed by a general reference to other judges, to be appointed by the President. Thus, on the principle of *ejusdem generis* the inclusion of Judge President and Deputy Judge President of the Court of Appeal can be inferred.

[105] The rationale of this principle lies in the fact that the framers must be taken to have inserted the general words in case something which ought to have been included among the specifically enumerated items, has been omitted.

[106] Article 140 (e) of the Constitution would serve this purpose in the matter at hand as the Court can construe the words "other judges" as covering the appointment of the Judge President and Deputy Judge President of the Court of Appeal. This does not, as is suggested by the petitioners,

call on the Court to read words into the Constitution as the intention of the framers is clear that the positions of Judge President and Deputy Judge President of the Court of Appeal fall within the genus covered by Article 140 of the Constitution.

[107] In so stating, the presumption of *'express mention of one thing, is the exclusion of another'* has been dislodged by a clear intention gathered from the relevant constitutional and statutory provisions as observed above.

[108] Consequently, we find that the petitioners' contention that the Judge President and the Deputy Judge President of the Court of Appeal ought to be appointed by the Chief Justice is not supported by the Constitution or any written law and it, therefore, lacks merit. In view of this, relief (vi) and (viii) in the Petition fail.

Conclusion

[109] Before we conclude, we take note of the petitioners' submission with regards to the Economic and Financial Crimes Court and the appointment of Justice Mulife in the face of the alleged pending litigation. Our perusal of the Petition reveals that these issues were not pleaded. Our decision in the case of **Sean Tembo v Attorney General**[6] is instructive where we elucidated that oral or written submissions cannot amend a Petition.

[110] In sum, all the claims in the Petition fail, save for relief (v) for which we have granted the declaration that qualification for appointment as a Constitutional Court Judge under Article 141(1) (b) of the Constitution requires one to have specialised training or experience in human rights or constitutional law in addition to the requisite qualifications.

[111] Each party to bear own costs.

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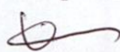
P. MULONDA
CONSTITUTIONAL COURT JUDGE



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M. S. MULENGA
CONSTITUTIONAL COURT JUDGE

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M. MUSALUKE
CONSTITUTIONAL COURT JUDGE

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M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE

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J. Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE