

**IN THE CONSTITUTIONAL COURT OF ZAMBIA 2022/CCZ/006  
HOLDEN AT LUSAKA  
(CONSTITUTIONAL JURISDICTION)**

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

**IN THE MATTER OF: ARTICLES 1(5), 128, 173(1) (a) (c) (g),  
180 (7), 216 (c) and 235(b) OF THE  
CONSTITUTION OF ZAMBIA Act,  
CHAPTER 1, VOLUME 1 OF THE LAWS  
OF ZAMBIA**

**IN THE MATTER OF: THE STATE PROCEEDINGS ACT,  
CHAPTER 71, and VOLUME 6, OF THE  
LAWS OF ZAMBIA**

**IN THE MATTER OF: SECTION 8 OF THE CONSTITUTIONAL  
COURT ACT, 2016 COURT ACT, ACT  
No.8 OF THE LAWS OF ZAMBIA**

**BETWEEN:**

**MILINGO LUNGU**

**AND**

**ATTORNEY GENERAL**

**ADMINISTRATOR GENERAL**

**GILBERT ANDFORD PHIRI**



**PETITIONER**

**1<sup>st</sup> RESPONDENT**

**2<sup>nd</sup> RESPONDENT**

**ALLEGED CONTEMNOR**

**Coram: Munalula PC, Shilimi DPC, Mulonda, Mulenga,  
Chisunka, Mwandenga and Mulife, JJC on the 16<sup>th</sup> November,  
2023 and 6<sup>th</sup> December, 2023.**

For the Petitioner:

Mr. S. Sikota, SC of Central  
Chambers appearing with Mr.

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|-------------------------------------|---|
|                                     | J. Zimba of Messrs. Makebi Zulu, Advocates  |
| For the 1 <sup>st</sup> Respondent: | Mr. R.M. Simeza, SC appearing with Mr. N. Ngoma from Messrs. Simeza Sangwa Associates |
| For the 2 <sup>nd</sup> Respondent: | Mr. K.M. Kalumba, Acting Assistant Administrator General                              |
| For the alleged Contemnor:          | Ms. M. Mwiinga of Messrs. PNP Advocates   |

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## RULING

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Mwandenga, JC delivered the Ruling of the Court.

**Work referred to:**

**Rules of the Supreme Court, 1999 Edition (White Book)**

**Introduction**

1. On 16<sup>th</sup> November, 2023 we heard and dismissed the Notice of Motion by the Alleged Contemnor to raise preliminary points of law to the Petitioner's application for an Order of Committal for Contempt against the Alleged Contemnor dated the 2<sup>nd</sup> February, 2023. When we dismissed this Notice of Motion we said we would give our reasons later. We now do so.

2. This Notice of Motion, according to the Alleged Contemnor was made pursuant to Order 52(2) and (3), Order 52/1/22 as read with Order 14A of the Rules of the Supreme Court (RSC) White Book, 1999 Edition.
3. This Notice of Motion was supported by an affidavit sworn by the Alleged Contemnor (the affidavit in support) as well as Skeleton Arguments.
4. On the 17<sup>th</sup> February, 2023 the Petitioner filed his affidavit in opposition to the Notice of Motion to Raise Preliminary Points of Law to the Petitioner's Application for an Order of Committal for Contempt (the affidavit in opposition) as well as Skeleton Arguments.
5. On the 24<sup>th</sup> February, 2023 the Alleged Contemnor filed his affidavit in Reply to affidavit in opposition (the affidavit in Reply) as well as Skeleton Arguments.

### **Factual Background**

6. The factual background to this Notice of Motion is that it is a sequel to a Notice of Motion for an Order for Committal of the Alleged Contemnor purportedly made pursuant to Order 52/1

and Order 52/4(1) of the RSC filed on 29<sup>th</sup> December, 2022 (the Committal Motion) by the Petitioner which is also before this Court.

7. According to the affidavit in support of the Committal Motion, the Alleged Contemnor had issues to raise hence his filing this Notice of Motion.

### **The alleged Contemnor's case**

8. In this Notice of Motion, the Alleged Contemnor makes an application for the determination of the following questions of law:

- “1. Whether or not the Director of Public Prosecutions is amenable to contempt proceedings?**
- 2. Whether or not, in the circumstances of the case, the Director of Public Prosecutions of Zambia can be arraigned before Court in his personal capacity?**
- 3. Whether or not the Director of Public Prosecutions can be arraigned under a matter where no court order with a penal notice was served on him?**
- 4. Whether or not the Petitioner has sought the mandatory consent of the Attorney General in initiating these proceedings?**
- 5. Whether or not the motion should be dismissed with costs for being scandalous, frivolous, vexatious and an abuse of the court process? ....”**

### **The Petitioner's case**

9. On account of the conclusion that we have reached in this matter we think that it is not necessary for us to reproduce the salient aspects of the Petitioner's affidavit in opposition as well as his arguments save to say that the Petitioner opposed this Notice of Motion.

### **The hearing of the Motion**

10. At the hearing of this Notice of Motion, by agreement, the parties elected to rely on the various filed documents pertaining to this Notice of Motion.

### **The issues for determination**

11. We have reviewed and scrutinized the sum and substance of the filed documents pertaining to this Notice of Motion and the Committal Motion and we have come to the conclusion that most of the pertinent issues that the Court is being asked to determine in this Notice of Motion and in the Committal Motion are by and large integrally linked.

12. In this regard it is noted that in the Alleged Contemnor's affidavit in opposition to the Committal Motion, he deposes in the material respects as follows:

**"13. That I am advised by my advocates and verily believe the same to be true that I as Director of Public Prosecutions cannot be subject of contempt proceedings in relation to my office.**

**14. That I am further advised by my advocates and verily believe the same to be true that I cannot be arraigned in my personal capacity for matters relating to conduct of my duties.**

**15. That I was not served with any court order with a penal notice stopping me from exercising my functions as Director of Public Prosecutions...."**

13. A perusal of the arguments advanced by the Alleged Contemnor in support of this Notice of Motion and in opposition to the Committal Motion will reveal that they are by and large word for word the same. According to the Alleged Contemnor, the thrust of the arguments in respect of this Notice of Motion is that *"...the Petitioner's application for an Order for Committal is entirely irregular and incompetently before the Court and must be dismissed with costs...."* and in respect of the Committal Motion is that

*“...the Petitioner’s application for an Order for Committal lacks merit in its entirety and must be dismissed with costs....”*

14. Clearly therefore, indeed the pertinent issues in this Notice of Motion are integrally linked to the pertinent issues in the Committal Motion.
  
15. With the foregoing matters in mind, in our view, the issue for determination is whether in *casu* this Notice of Motion is properly before the Court. This Notice of Motion according to the caption thereof, is made pursuant to Order 52(2) and (3) and Order 52/2/22 as read with Order 14A of the RSC. A perusal of Orders 52(2) and (3) and Order 52/1/22 (which in fact must be note 52/1/22) of the RSC will reveal that these provisions do not provide for the raising of preliminary points of law. The former provides for how applications for leave for committal orders must be made and while the latter provides for the explanatory notes on the subject *“Words written or spoken, calculated to interfere with the course of justice.”* In the circumstances we shall take it that this

Notice of Motion is only made pursuant to Order 14A of the RSC.

16. While Order 14A of the RSC provides for raising of preliminary points of law in appropriate cases, the procedure must be used for *bona fide* purposes and not for purposes that *inter alia* may end up unnecessarily delaying proceedings and/or causing multiple hearings over the same issue or issues. In *casu* the Alleged Contemnor filed his affidavit in opposition to the Committal Motion on the 2<sup>nd</sup> February, 2022 and on the same day he also filed this Notice of Motion.
17. Since by its nature, an application under Order 14A of the RSC will decide the rights of the parties and terminate the action or otherwise dispose of it if successful, practice requires that the affidavit for use in the proceedings under Order 14A of the RSC may depose only to such facts as the deponent is able of his own knowledge to prove not statements of information or belief with sources and grounds thereof. In essence therefore, an application under



Order 14A of the RSC is not an interlocutory application.

The explanatory note 14A/2/8 of the RSC reads that:

**“The summons should be supported by affidavit evidence deposing to all material facts to the questions of law or construction to be determined by the Court. For purposes of O.41. r. 5(2), proceedings under O.14A are not interlocutory proceedings, since by its nature, the application will decide the rights of the parties and will terminate the action or otherwise finally dispose it of...and therefore, the affidavits for use in proceedings under O.14A may depose only to such facts as the deponent is able of his own knowledge to prove (O.41., r.5(1).”** (Emphasis supplied)

18. A perusal of the affidavits which the Alleged Contemnor and the Petitioner deployed in this Notice of Motion will reveal that all the three affidavits in issue are based on matters (save for a few paragraphs which are in any event insignificant in *casu*) from advice that was given to the deponents by their respective advocates and not from their own personal knowledge. To this extent the affidavits do not meet the requirements for affidavits to be used in applications under Order 14A of the RSC. This invariably means that this Notice of Motion is not supported by any

evidence. This is fatal to this Notice of Motion as it has no limbs to stand on.

19. With the immediate foregoing matters in mind, we firmly opine that this Notice of Motion is not properly before the Court.

**Conclusion**

20. It was for the forgoing reasons that we dismissed the Notice of Motion immediately after we heard it. No order for costs is made.



**Prof. M.M. Munalula**  
**Constitutional Court President**



**A.M. Shilimi**  
**Constitutional Court Deputy**



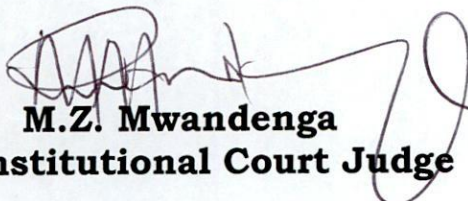
**P. Mulonda**  
**Constitutional Court Judge**



**M.S. Mulenga**  
**Constitutional Court Judge**



**M.K. Chisunka**  
**Constitutional Court Judge**



**M.Z. Mwandenga**  
**Constitutional Court Judge**



**K. Mulife**  
**Constitutional Court Judge**