

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

2023/CCZ/001

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

IN THE MATTER OF: ARTICLE 1 (2), (3) AND (5) OF THE CONSTITUTION  
OF THE REPUBLIC OF ZAMBIA AS AMENDED BY  
ACT NO. 2 OF 2016.

AND IN THE MATTER OF: ARTICLE 2 OF THE CONSTITUTION OF THE  
REPUBLIC OF ZAMBIA AS AMENDED BY ACT NO,  
2 OF 2016

IN THE MATTER OF: ARTICLE 120 (1) (2) AND (3) OF THE  
CONSTITUTION OF ZAMBIA ACT NO. 2 OF 2016

IN THE MATTER OF: ARTICLE 122 OF THE CONSTITUTION OF ZAMBIA  
ACT NO. 2 OF 2016

IN THE MATTER OF: ARTICLE 128 (3) (a) (b) AND (c) OF THE  
CONSTITUTION OF THE REPUBLIC OF ZAMBIA AS  
AMENDED BY ACT No. 2 OF 2016

IN THE MATTER OF: ARTICLE 8 (a), (c) AND (d) OF THE CONSTITUTION  
OF THE REPUBLIC OF ZAMBIA AS AMENDED BY  
ACT No. 2 OF 2016

IN THE MATTER OF: ARTICLE 133 (c) OF THE CONSTITUTION OF  
ZAMIBA ACT No. 2 OF 2016

IN THE MATTER OF: ARTICLE 134 (a), (b), AND (c) OF THE CONSTITUTION  
OF ZAMBIA ACT No. 2 OF 2016

IN THE MATTER OF: THE DECISION BY THE CHIEF JUSTICE TO  
CONSTITUTE THE ECONOMIC AND FINANCIAL  
CRIMES COURT IN THE SUBORDINATE COURT  
ADMINISTRATIVELY

IN THE MATTER OF: THE DECISION BY THE JUDGE IN CHARGE OF THE  
PRINCIPAL REGISTRY TO TRANSFER CERTAIN  
MATTERS TO THE ECONOMIC AND FINANCIAL  
CRIMES COURT ADMINISTRATIVELY

BETWEEN:

BOWMAN LUSAMBO

AND

THE ATTORNEY GENERAL

PETITIONER

RESPONDENT



**Coram: Shilimi- DPC, Musaluke, Chisunka, Mwandenga and Kawimbe JJC on the 12<sup>th</sup> October, 2023 and 25<sup>th</sup> January, 2024**

*For the Petitioner: Mr. J. Zimba of Messrs Makebi Zulu Advocates*

*For the Respondent: Mr. M. Kabesha, SC -Attorney General, Mr. C. Mulonda, Principal State Advocate and Mr. N. Mwiya Principal State Advocate*

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## **JUDGMENT**

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**Shilimi-DPC**, delivered the Judgment of the Court.

**Cases Referred to:**

1. **Dipak Patel v Minister of Finance and Attorney General. 2021/CCZ/005**
2. **Maxwell Chongu and Greenside Suppliers and Investments Limited v The Attorney General, 2022/HPEF/004**
3. **Richard Nsofu Mandona and Total Aviation and Export Limited, Zambia National Commercial Bank Plc, Zambia National Oil Company Limited (In Liquidation) Indeni Petroleum Refining Company-Appeal No. 82/2009**
4. **Supreme Court Advocates - On - Record v Union of India on 6<sup>th</sup> October, 1993, AIR 1994 Supreme Court 268, 1993 (4) SCC 441**
5. **Sean Tembo v Electoral Commission of Zambia and Attorney General 2021/CCZ/007**
6. **Re-Special Courts bill of India, 1978 INSC 247.**

**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. **Subordinate Courts Act, Chapter 28 of the Laws of Zambia.**
3. **Service Commissions Act No. 10 of 2016**
4. **Judiciary Administration Act No. 23 of 2016**
5. **The Economic and Financial Crimes (Division of Court) Order, 2022, Statutory Instrument No. 5 of 2022.**

## 1. INTRODUCTION

**[1.1]** The Petitioner is a citizen of the Republic of Zambia who has had his property restricted by law enforcement agencies, arrested and arraigned before the Economic and Financial Crimes Court (EFCC). He filed a Petition on 31<sup>st</sup> January, 2023 and an Amended Petition on 3<sup>rd</sup> February, 2023 against the Attorney General, alleging various breaches of the Constitution of Zambia (Amendment Act No. 2 of 2016) (the Constitution), on the part of the Chief Justice of the Republic of Zambia, the Judicial Service Commission, (JSC) and the Resident Magistrate before whom he was arraigned.

**[1.2]** In his Petition, the Petitioner alleges that the setting up of the EFCC in both the High Court and Subordinate Court by the Chief Justice, the transferring of the ten Magistrates by the JSC and the alleged interpretation of the Constitution by the Resident Magistrate under cause No. 2SPE/024/22 are in breach of Articles 120 (1) - (4), 136(2) (a), 122, 199 (1) and 128(2) of the Constitution respectively.

**[1.3]** The petitioner thus seeks the following remedies:

- (i) An Order and declaration that the setting up of the EFCC administratively at Subordinate Court level is in breach of Articles 120(3) (c) of the Constitution and is therefore unconstitutional and illegal;
- (ii) A declaration that the decision by the Resident Magistrate to interpret the provisions of the Constitution under Article 18, 118(a) and 118(b) in an application for Constitutional reference under cause No. 2SPE/024/22 is in excess of the Court's jurisdiction and in breach of Article 128 of the Constitution;
- (iii) That the exercise of judicial authority in the manner the Magistrate did under cause No. 2SPE/024/22 when she interpreted the Constitution is in breach of Article 119(1) of the Constitution and is therefore void and illegal;
- (iv) An order and declaration that the setting up of the EFCC in the High Court following pronouncements by the Executive and supported by the Judiciary amounts to Setting up Courts for a targeted group of individuals;
- (v) An order and declaration that the transferring of ten Magistrates by the Judicial Service Commission using Section 6(e) of the Judicial Service Commission Act contravenes Article 122 of the Constitution;
- (vi) A declaration that the setting up of the EFCC at the High Court level, without stating it's composition is in breach of Article 120(3) (a) and (b) of the Constitution and is therefore unconstitutional;
- (vii) An order that costs for this cause be borne by the Respondent; and
- (ix) Any other reliefs the Court may deem fit.

## 2. BACKGROUND

**[2.1]** The antecedents to this petition as outlined in the Affidavit verifying facts are that following public statements made by the President, of the Republic of Zambia, (The President) and

the Chief Justice, an administrative arrangement was made for the setting up of the EFCC at the Subordinate Court Level and that later statutory Instrument No. 5 of 2022 was promulgated in respect of a similar court as a division of the High Court.

**[2.2]** That the Petitioner is a person facing divers criminal charges before the Subordinate Court in Lusaka otherwise classified as the EFCC under cause No. 2SPE/024/22. He took plea in the above cause and on the day appointed for the commencement of trial, his Advocates made an application for the Magistrate to refer the matter to the Constitutional Court to determine some constitutional questions. It is alleged that on the day appointed by the Resident Magistrate for delivery of the Ruling, she went ahead and delivered the Ruling wherein she construed the provisions of the Constitution with regards to the question of the constitutional reference.

**[2.3]** Further, that on 20<sup>th</sup> May, 2022, the cadres from the ruling party, the United Party for National Development (UPND) stormed the Lusaka Subordinate Court demanding for the

overhaul of the Judiciary to weed out judicial workers whom they termed were allegedly working against the current regime. That between the 21<sup>st</sup> and 23<sup>rd</sup> May, 2022, the JSC transferred ten Magistrates from Lusaka who were handling several different cases without their consent. The JSC confirmed that it had transferred ten Magistrates out of Lusaka but explained that the decision was not influenced by politics.

**[2.4]** The Petitioner, however, contends that the provisions of Section 6(e) of the Service Commissions Act which empowers the JSC to transfer judges and judicial officers contravenes Article 136(2)(a) and 120(1)-(4) of the Constitution and that it compromises the independence and effectiveness of the Judiciary.

### **3. The Petitioner's Case**

**[3.1]** The Petition is supported by an Affidavit verifying facts and sworn by the Petitioner. He did not file skeleton arguments.

**[3.2]** In his oral arguments, the Petitioner stated that this was a matter challenging the constitutionality of the creation of the EFCC at High Court level and the EFCC administratively at

the Subordinate Court. He invited the Court to note that the system of Courts in Zambia is a creature of the Constitution and that Article 120 of the Constitution provides for the composition of the Judiciary. That Article 120(3) of the Constitution provides for matters that ought to be prescribed and provides as follows:

- 120 (3) The following matters shall be prescribed:
- (a) Processes and procedures of the Courts;
  - (b) Jurisdiction, powers and sittings of the Industrial Relations Court, Commercial Court, Family and Children's Court and other specialized Courts;
  - (c) Classification and divisions of the Subordinate Courts;
  - (d) Classification and divisions of the Local Courts;
  - (e) Jurisdiction and composition of Subordinate Courts, Small Claims Courts, Local Courts and other prescribed Courts; and
  - (f) Grading of judicial officers and staff of subordinate Courts, Local Courts and other prescribed Courts.

**[3.3]** He argued that Article 133 of the Constitution provides for establishment and composition of the High Court and that Article 133(3) of the Constitution gives the Chief Justice power to constitute by Statutory Instrument specialized Courts of the High Court but that when it comes to divisions of the Court, they are created by the Constitution. He referred

the Court to Article 133(2) of the Constitution which establishes divisions of the High Court that is the Industrial Relations Court, the Commercial Court, the Family and Children's Court all as divisions and that there is nowhere in the Constitution where the Chief Justice has been given power to constitute divisions of the High court.

**[3.4]** He further argued that in fact, the constitution of divisions having been created by the Constitution, any attempt to create a division would be attempting to create legislation, which authority under Article 61 rests with the National Assembly.

**[3.5]** It was his submission that the exercise of this power by the Chief Justice is only limited to an extent of setting up specialized Courts to attend to particular needs of a particular time and not divisions to become permanent features of the Court. That Statutory Instrument No. 5 of 2022 setting up the EFCC as a division of the High Court was therefore illegal and unconstitutional.

**[3.6]** He also argued that the setting up of the EFCC without any rules speaking to its composition is a breach, of Article



120(3)(a) and (b) of the Constitution and therefore unconstitutional.

- [3.7] He further submitted that the setting of the EFCC administratively at the Subordinate Court Level is a violation of Article 120(3)(c) of the Constitution and therefore unconstitutional. That this is for the reason that by Article 266 of the Constitution, prescription is by an Act of Parliament as confirmed by this Court in the case of **Dipak Patel v Minister of Finance and Attorney General** <sup>1</sup>.
- [3.8] He also argued that the setting up of the EFCC, which was preceded by pronouncements by the Executive and supported by the Judiciary, is unconstitutional on account that it is targeted at particular individuals.
- [3.9] With regard to the transfer of ten Magistrates by the JSC, it was the Petitioner's submission that the same was irregular on the basis of the background leading to the transfer that is allegations that some people were aligned to a particular regime and therefore ought to be transferred.
- [3.10] The Petitioner finally called upon this Court to pronounce itself that the job of the Judiciary is to provide an oversight on

the Executive and the Legislature and not to talk about the provisions of water, clinics and other social amenities to the citizens.

#### **4. Respondent's Case**

**[4.1]** The Respondent filed an Answer to the Petition, and Affidavit in opposition to the Petition both dated 3<sup>rd</sup> March, 2023.

**[4.2]** In his answer to the Petition, the Respondent stated that the EFCC though established administratively at the Subordinate Court Level, is administered by the Subordinate Courts Act, Chapter 28 of the Laws of Zambia in terms of jurisdiction and powers. That no new Subordinate Courts have been created and that the existing Magistrates have been merely assigned additional responsibilities.

**[4.3]** With regard to the EFCC at the High Court level, the Respondent stated that the composition of the Court is provided for by Statutory Instrument No. 5 of 2022.

**[4.4]** The Respondent further stated that the Magistrate did not at any point interpret the Constitution and there was therefore no breach of Articles 128(2) and 119(1) of the Constitution as alleged.

- [4.5]** With regard to the transfer of Magistrates, the Respondent stated that the transfers were not in breach of Article 122 of the Constitution as Magistrates are transferrable.
- [4.6]** The Affidavit in opposition was sworn by Mr Exnobert Zulu, the Chief Registrar and Director of Court Operations. He deposed that the transfer of Judges and Judicial Officers by the JSC does not compromise the effectiveness of the Judiciary but that instead it enhances its effectiveness. Additionally, that it does not in any way breach the Constitutionally protected independence of the Judiciary.
- [4.7]** He further deposed that no consent of the Judge and Judicial Officer is needed under the law for a transfer to be effected.
- [4.8]** He finally, further deposed that, Section 4 of Statutory Instrument No. 5 of 2022, otherwise known as the Economic and Financial Crimes (Division of Court) Order, 2022, does in fact provide for the composition of the court.
- [4.9]** The Respondent's case was further supported by skeleton arguments also filed on 3<sup>rd</sup> March, 2023. Therein and with regard to the establishment of the EFCC administratively at Subordinate Court level, it was contended that the Subordinate Court Act, Chapter 28 of the Laws of Zambia has

already prescribed the powers and jurisdiction of the Subordinate Court and is therefore in compliance with Article 120(3) of the Constitution.

**[4.10]** In this respect, the Respondent referred the Court to Section 7 and 24 of the Subordinate Court Act which provide as follows:

- 7. Subject to the operation of any express statutory provision providing otherwise and to the provisions of the Act and the Criminal Procedure Code, all Magistrates shall have and may exercise in all respects, equal power, authority and jurisdiction, and subject as aforesaid, any Magistrate may exercise all and any part of the jurisdiction by this Act or otherwise vested in a Subordinate Court, and for such purpose, shall be and forms a court.**
- 24. The Chief Justice may, by order under his hand and the seal of the High Court, authorise an increased jurisdiction in civil causes and matters to be exercised by the Magistrate named in the Order, within the district prescribed in the Order, and to the extent specified in the order. Such order may, at any time, be revoked by the Chief Justice by an instrument under his hand and the Seal of the High Court.**

**[4.11]** With regard to criminal jurisdiction, the Respondent referred the Court to Section 19 of the Subordinate Court Act which provides as follows:

19. In the exercise of their criminal jurisdiction, Subordinate Courts shall have all the powers and jurisdiction conferred on them by the Criminal Procedure Code, this Act or any other law for the time being in force.

**[4.12]** It was, based on the above stated provisions of the Subordinate Court Act, argued that the Subordinate Court has in-fact been conferred with power and jurisdiction. That the jurisdiction of the Subordinate Court can only be challenged if the Court goes beyond its prescribed power.

**[4.13]** On the Petitioner's contention that the setting up of the EFCC at the High Court without any rule speaking to its composition, breached Article 120 (3)(a) and (b) of the Constitution, the learned Attorney General submitted that Article 120 does not provide for composition of the court at High Court level.

**[4.14]** However, and notwithstanding the provisions of Article 120 of the Constitution, he submitted that the Economic and Financial Crimes (Division of Court) Order, 2022 does in fact provide for the composition of the court under Section 4, which provides as follows:

**4. The Economic and Financial Crimes Court shall consist of a judge or such other numbers of judges of the court as may be determined by the Chief Justice.**

[4.15] It was argued by the Respondent that the Petitioner's contention that the conceived EFCC in the High Court has no composition as mandated and in breach of Article 120 of the Constitution was misplaced and ill fated.

[4.16] With regard to the Petitioner's submission that the setting up of the EFCC in the High Court following pronouncements by the Executive and supported by the Judiciary amounts to setting up courts for a targeted group of individuals, the Respondent referred this Court to the persuasive decision of the High Court in the case of **Maxwell Chongu v Greenside Suppliers and Investments Ltd and the Attorney General**<sup>2</sup> wherein the court at page R29 of its Ruling stated as follows:

Further, this court is not constituted by a speech, rather it is constituted by law namely Statutory Instrument No. 5 of 2022 and Article 133 (3) of the Constitution and by this law, the target is a class of offences and not a class of persons. Therefore, the court was established on the same thematic principles as other Divisions of the High Court such as the Industrial Relations Division, the Commercial Division and the Children and Family Division.

Under the circumstances, the question of non-discrimination and equality of persons before the law as envisaged by Article 8 (d) or any other relevant provision of the Constitution does not arise because the court was not constituted for any specific class of individuals.

We further dismiss the Petitioner's fears arising from the interaction between the Head of State and the judges during the 2022 Judicial Annual Conference. The fears are unfounded as it is a tradition for the sitting head of state or his delegate, to open the Annual Judicial Conference. Just to cite one example among many, former president Edgar Chagwa Lungu.....

- [4.17] The Respondent urged this court to find persuasion in the High Court Ruling cited above and adopt the reasoning therein.
- [4.18] On the Petitioner's allegation that the Resident Magistrate interpreted the Constitution in cause No. 2 SPE/024/22 in breach of Article 119 (1) of the constitution it was the Respondent's submission that at no point did the Magistrate interpret the constitution.
- [4.19] It was submitted that the Magistrate in fact warned herself in her Ruling exhibited in the Petitioner's affidavit verifying facts when she stated that:

I must state that it is not lost on me, to state that I have no jurisdiction to interpret the Constitution. I will thus be mindful in my discussion of this application and make a deliberate effort to read within the ambits of my jurisdiction.

[4.20] The Respondent also referred the Court to the persuasive decision of the Supreme Court of Zambia in the case of **Richard Nsofu Mandona and Total Aviation and Export Limited, Zambia National Commercial Bank PLC, Zambia National Oil Company Limited (in Liquidation) Indeni Petroleum Refinery Company<sup>3</sup>** where the Court stated as follows:

Where, however, a matter arises whose substance is primarily interpretation of a provision of the Constitution, this court would be obliged to refer such matter to the Constitutional Court in terms of Article 128(1) to which we have alluded. This does not in any case mean that every time the Constitution is mentioned in arguments made before this court, we shall close our records of appeal and rise until the Constitutional Court determines any such arguments. Making observations on obvious constitutional provisions as we determine disputes of non-constitutional nature, is not in our view necessarily averse to the letter and spirit of the Constitution nor would it encroach or usurp the jurisdiction of the Constitutional Court.

[4.21] Based on the Richard Mandona case cited above, the Respondent submitted that the Magistrate did not interpret the Constitution as alleged. It was his contention that the Magistrate merely made observations on obvious



constitutional provisions as she determined a dispute of a non-constitutional nature.

- [4.22]** With regards to the Petitioner's contention that the act of transferring ten magistrates by the JSC as per Section 6(e) of the Judicial Service Commission Act (sic) is in contravention of Article 122 of the Constitution, it was the Respondent's submission that there is no such Judicial Services Commission Act in the Zambian Statute books. He further stated that perhaps, the Petitioner was referring to the Service Commissions Act, 2016.
- [4.23]** The Respondent further submitted that the contention by the Petitioner that the transfer of the Magistrates was exercised by the JSC under the control or influence of persons, other than that of the Judiciary and in violation of Article 122 of the Constitution, was speculative as it was not supported by any evidence.
- [4.24]** That notwithstanding, the Respondent referred the Court to the provisions of Section 6 (e) of the Service Commissions Act No. 10 of 2016 which provides as follows:

6 (e) The functions of the Judicial Service Commission are as provided in the Constitution and to :-

(e) perform such other functions as are necessary or incidental to the regulation of human resource management in the Judicial Service.

**[4.25]** Further, that Section 23 of the Judiciary Administration Act No. 23 of 2016 provides as follows:

23. (1) The Commission may make regulations for the better carrying out of the provisions of this Act.
- (2) Without limiting the generality of Subsection (1), regulations may be made for or with respect to-
- (f) the transfer or secondment of any person holding any office

**[4.26]** The Court was also referred to Section 29(a) of the Terms and Conditions of service for the Public Service which provides as follows:

29. (a) An officer may be transferred to any duty station where his or her services are required.

**[4.27]** Based on the above provisions, it was the Respondent's submission that the transfer of the Judges and Magistrates was done under the law and there was therefore nothing unconstitutional about the transfer. It was further submitted that no consent was required under the law to transfer a Magistrate and that the transfer of Judges and Judicial

Officers by the JSC does not compromise the effectiveness of the Judiciary but instead enhances its effectiveness. Further, that the transfers did not in any way breach the constitutionally protected independence of the Judiciary.

[4.28] In this respect, the court was referred to the case of **Supreme Court, Advocates – On- Record v Union of India**<sup>4</sup> in which the Supreme Court of India stated as follows:

The entire gamut in respect of the transfer of judges is covered by *Union of India v Sankal Chand Itimatlal Sheth and Anr* (1978) 1 SCR 423, AIR 1977 SC 2328 and *SP Gupta and Ors etc v Union of India and Ors etc* (1982) 2 SCR 365: (AIR 1982 SC 149). It was held by majority in both the decisions that there is no requirement of prior consent of the judge before his transfer under Article 122.

The power of transfer can be exercised only in 'public interest' i.e. for promoting better administration of justice throughout the country..... any transfer in accordance with the recommendation of the Chief Justice of India cannot be treated as punitive or an erosion in the independence of the judiciary.

[4.29] This Court was urged to find persuasion in the above Indian Supreme Court case and apply it to the case at hand.

## 5.0 Petitioner's Reply

[5.1] In reply, the Petitioner, reiterated his earlier submission that classification and divisions of the Subordinate Courts is a matter to be prescribed and that the use of the term prescribed means that this would be done by an Act of Parliament. Further, that a careful look at Article 120(3) of the Constitution shows that there is the use of the word 'shall', which means that there can be no discretion in the manner in which, the Subordinate Court is set up or even classified and or divided.

[5.2] The Petitioner also submitted that, it is not in dispute that in the Subordinate Court, there is what is called "The Economic and Financial Crimes Court", which is a creation of an administrative action by the Chief Justice and not a creature of prescription as provided for by the Constitution. This it was submitted, was illegal and a violation or breach of the Constitution. It was noted that Article 266 of the Constitution defines the word "prescribed" as:

**"Prescribed" means provided for in an Act of Parliament.**

**[5.3]** The Petitioner referred this Court to the case of **Sean Tembo v ECZ and Attorney General**<sup>5</sup> citing also the case of **Dipak Patel**<sup>1</sup> in which this Court in both cases endorsed the meaning of the word “prescribed” to mean provided for by an Act of Parliament. It was stated that it was not in dispute that the powers and jurisdiction of the Subordinate Court as a court are already prescribed in the Subordinate Court Act, Chapter 28 of the Laws of Zambia, but that the issue at hand, however, was the EFCC, which is a division of the Subordinate Court, is not provided for by any Act of Parliament and that there is therefore, no prescription creating this Court or such a division.

**[5.4]** It was further submitted that Article 120 (3) of the Constitution makes in mandatory that in constituting a Court, the following matters shall be prescribed:

**3 The following matters shall be prescribed: (a) processes and procedures of the courts; (b) jurisdiction, powers and sittings, of the Industrial Relations Court, Commercial Court, Family Court, Children’s Court and other specialised courts.**

**[5.5]** In light of the above constitutional provision, it was submitted that the EFCC at the Subordinate level has no prescription as to its establishment, its procedures and processes and its

sitting. That this state of affairs does not qualify such a court to have the blessing of the law.

[5.6] With regard to the EFCC at the High Court level, it was the Petitioner's submission that the EFCC in that Court has no composition, no rules and processes and procedures as mandated and is in breach of Article 120 of the Constitution.

[5.7] The Petitioner also referred the Court to the pronouncements made by the Republican President and the Chief Justice after change of government that stolen public assets would be recovered. Further, that an EFCC whose main purpose would be to recover stolen assets and money would be set up. This he argued was proof that these courts were targeted at a specific group of people.

[5.8] The Petitioner in support of his argument referred this Court to the case of **Re Special Courts bill of India**<sup>6</sup> in which the court had this to say:

A special court had the ability to infringe the provisions of the constitution more specifically violating the provision that sets out the principle of equality before the law by giving others special and speedy trials that would entail that others are to be formed more by the law which is blatantly unconstitutional, further it was observed that it is not allowable for parliament or state legislature to overlook or

side step the scheme of the constitution by accommodating the foundation of a common or criminal court corresponding to a high court in a state, or by method of an extra or subsequent high court or a court other than a court subordinate to the High Court.

[5.9] Finally on this issue it was the Petitioner's submission that the institution of the EFCC following Executive pronouncements is unconstitutional and further prejudiced against the Petitioner and others who are similarly circumstanced, thus, discriminatory in nature and an abrogation of the national values and principles as contained under Article 8 of the Constitution. He urged the Court not to endorse the **Maxwell Chongu and Greenside Suppliers and Investments Ltd v Attorney General**<sup>2</sup> case and instead invited it to adopt the position in the case of **Re Special Courts bill of India**<sup>6</sup>.

[5.10] With regard to the interpretation of the Constitution by the Resident Magistrate, the Petitioner submitted that despite warning herself that she had no jurisdiction to interpret the Constitution, she proceeded to interpret Article 18 (1) and 118 of the Constitution in breach of Article 128 and 119 (1) of the Constitution.

**[5.11]** On the issue of the transfer of Magistrates, it was the Petitioner's submission that the Judiciary enjoys the exercise of such human resource power as provided for under Section 6 (e) of the Service Commissions Act. However, if such power is exercised under the control or influence other than that of the Judiciary or the Constitution, then it is unconstitutional because it contravenes Article 122 of the Constitution. He argued further that the transfer of magistrates although provided for would still be unconstitutional if such power is exercised without the necessary independence and autonomy of the Judiciary as exhibited in this case.

**[5.12]** Finally, and with regard to the issue of provision of amenities and social services, the Petitioner argued that reference by the Chief Justice in his speech that the EFCC at the level of the subordinate court was designed to offer specialised, fast-track court services to recover, illicitly obtained wealth compromised the independence of the Judiciary. He particularly argued that the speedy process established under the EFCC to enable the Government channel resources to the provision of amenities and social services



was a violation of Article 90 of the Constitution. That the provision of amenities and social services was the duty of the Executive and not the Judiciary citing Article 90 as follows:

**90. The Executive authority derives from the people of Zambia and shall be exercised in a manner compatible with the principles of social justice and for the people's well-being and benefit.**

**[5.13]** It was further argued that pursuant to Article 90 of the Constitution, the provision of amenities is vested in the Executive and not the Judiciary. Further, that the background to the setting up of the EFCC at Subordinate Court level as expressed by the Chief Justice in his speech is contrary to Article 90 of the Constitution

## **6.0 Consideration and Decision**

**[6.1]** We have carefully considered the arguments advanced by the parties regarding the issues raised in the petition. Arising from the reliefs sought, the main issues for determination as we see them are **whether the setting up of the EFCC at the High Court and Subordinate Court violate Articles 120 (3) (a) and (b) of the Constitution, whether the Resident Magistrate interpreted the Constitution in breach of Article 128 of the Constitution and whether the**

**transferring of the ten Magistrates by the JSC contravened Article 122 of the Constitution.**

**[6.2]** For convenience, we shall deal with reliefs (i), (iv) and (vi) first and simultaneously because they relate to the same issue, namely the Constitutionality of the setting up of the EFCC at the Subordinate and High Court levels. Reliefs (ii) and (iii) shall be dealt with secondly and also simultaneously as they relate to the same issue of the alleged interpretation of the Constitution by the Resident Magistrate. Relief (v) shall be dealt with subsequently.

**[6.3]** Regarding reliefs (i), (iv) and (vi), Article 120 (3) (a) and (b) sets out some of the matters that need to be prescribed under the system of court and provides as follows:

**120 (3) The following matters shall be prescribed:**

- (a) Processes and procedures of the courts;**
- (b) Jurisdiction, powers and sittings, of the Industrial Relations Court, Commercial Court, Family Court, Children's Court and other specialised courts**

**[6.4]** The issue for our consideration therefore, is whether the creation of the EFCC at the Subordinate Court level administratively and at the High Court level by way of a

Statutory Instrument violate Article 120 (3) (a) and (b) of the Constitution.

**[6.5]** With regard to the EFCC at the Subordinate Court level, it is not in dispute that this court is a Subordinate Court with the processes and procedures of the Court, jurisdiction and powers prescribed under the Subordinate Court Act, Chapter 28 of the laws of Zambia. This court was, by administrative arrangement, to hear and determine matters relating to economic and financial crimes in addition to its existing jurisdiction. Other specialised courts in the Subordinate Court have been established in a similar manner and these include the Gender Based Violence Court and the Road Traffic Safety Agency Fast Track Court.

**[6.6]** It is therefore, clear that the Chief Justice did not violate Article 120 (3)(a) and (b) of the Constitution when he set up the EFCC at the Subordinate Court level. This claim is bereft of merit and is accordingly dismissed.

**[6.7]** With regard to the setting up of the EFCC at the High Court, it was the Petitioner's argument that setting up of the EFCC at the High Court level without stating its composition is in breach of Article 120 (3)(a) and (b) of the Constitution. He

further argued that the setting up of the EFCC in the High Court following pronouncements by the Executive and supported by the Judiciary amounts to setting up courts for a targeted group of individuals.

**[6.8]** A perusal of Article 120 (3) (a) and (b) of the Constitution shows that the provision does not speak to the composition of the court at the High Court level and this argument is therefore misplaced. However, and notwithstanding the provisions of Article 120 (3) (a) and (b) of the Constitution the Chief Justice in exercise of the powers contained in section 3 of the High Court Act, nevertheless made an Order establishing the EFCC as a division of the Court by way of statutory Instrument No. 5 of 2022, with its composition clearly provided for, under section 4 as follows:

**4 The Economic and Financial Crimes Court shall consist of a judge or such numbers of judges of the court as may be determined by the Chief Justice.**

**[6.9]** Further, and in relation to the jurisdiction of the EFCC, rules and procedures, Section 3 of Statutory Instrument No. 5 of 2022 constituting this court provides as follows:

**3. The Economic and Financial Crimes Court shall, in addition to the jurisdiction of the Court under Article 134 of the**

Constitution, hear and determine matters relating to economic and financial crimes, and corruption. (emphasis added).

[6.10] The composition of the court is provided for under Section 4 of the Statutory Instrument No. 5 of 2022 and the Rules of the High Court are applicable to this division of the High Court. Further and in terms of Article 120 (3) of the Constitution, divisions of courts are specialised courts and the argument that by the creation of the EFCC, the Chief Justice was attempting legislation is misconceived. The court is therefore properly constituted and its creation does not violate Article 120 (3)(a) and (b) of the Constitution. This claim is ill-fated and is dismissed for lack of merit.

[6.11] With regard to the claim that the EFCC was created following pronouncements by the Executive and supported by the Judiciary and therefore, meant to target a group of individuals, we are inclined to agree with the High Court ruling in the case of **Maxwell Chongu and Greenside Suppliers and Investments Ltd v Attorney General**<sup>2</sup> where the court at page R30 of its ruling stated as follows:

Further, this court is not constituted by speech. Rather, it is constituted by law namely Statutory Instrument No. 5 of

2022 and Article 133 (3) of the constitution and by this law, the target is a class of offences and not a class of persons. Therefore, the court was established on the same thematic principles as other Divisions of the High Court such as the Industrial Relations Division, the Commercial Division and the Children and Family Division.

Under the Circumstances, the question of non-discrimination and equality of persons before the law as envisaged by Article 8 (d) or any other relevant provision of the Constitution does not arise as the Court was not constituted for any specific class of individuals.

[6.12] We further find that the Indian case of **Re Special Courts bill of India**<sup>6</sup> is inapplicable as specialised courts are specifically provided for under Article 133 (3) of the Constitution. It is therefore, our considered view that the EFCC having been established by law to target a specified class of offences, does not in any way violate Articles 8 and 9 (1)(a) of the Constitution. This claim has therefore no merit and fails.

[6.13] With regard to Reliefs (ii) and (iii), the Petitioner also claimed that the Resident Magistrate in her Ruling on the matter of **the People v Bowman Lusambo and Another** 2SPE/04/22 interpreted Articles 18 (1) and 118 of the Constitution in breach of Articles 128 and 119 (1) of the Constitution.

[6.14] We have perused the Ruling of the Magistrate and find that the Resident Magistrate, Hon. Faides Hamaundu, made reference to constitutional provisions and applied the same to the facts. This in our view does not amount to interpreting the Constitution as envisaged by Article 128 of the Constitution. Whereas the interpretation of the Constitution is the preserve of this Court, other courts are at liberty to make reference to and apply obvious constitutional provisions.

[6.15] *In casu*, the Resident Magistrate in fact warned herself in her Ruling when she stated that:

I must state that it's not lost on me, to state that I have no jurisdiction to interpret the constitution. I will thus be mindful in my discussion of this application and make a deliberate effort to read within the ambits of my jurisdiction.

[6.16] We also wish to refer to the decision of the Supreme Court of Zambia in the case of **Richard Nsofu Mandona and Total Aviation and Export Limited, Zambia National Commercial Bank Plc, Zambia National Oil Company Limited (In Liquidation) Indeni Petroleum Refinery Company**<sup>7</sup> where the Court stated as follows:

Where however a matter arises whose substance is primarily interpretation of a provision of the Constitution, this Court would be obliged to refer such matter to the Constitutional Court in terms of Article 128 (1) to which we have alluded. This does not in any case mean that every time the Constitution is mentioned in arguments made before this Court, we shall close our records of appeal and rise until the Constitutional Court determines any such arguments. Making observations on obvious constitutional provisions as we determine disputes of a non constitutional nature is not in our view, necessarily averse to the letter and spirit of the Constitution nor would it encroach or usurp the jurisdiction of the Constitutional Court.

**[6.17]** Having found that the Resident Magistrate, Hon. Hamaundu did not interpret the Constitution as alleged by the Petitioner, the claim that Articles 8 and 9 (1) (a) were violated fails for lack of merit.

**[6.18]** We now wish to consider Relief (v) concerning the issue of the transfer of the ten Magistrates by the Judicial Service Commission. It is the Petitioner's contention that the transfer of the ten Magistrates from Lusaka allegedly following the storming of the Lusaka Subordinate Court by the ruling party carders demanding the overhaul of the Judiciary to weed out judicial officers allegedly working against the current regime, was in contravention of Article 122 (1) and (3) of the



Constitution, which provides for the functional independence of the Judiciary, as follows:

**122 (1) In the exercise of the Judicial authority, the Judiciary shall be subject only to this Constitution and the law and not be subject to the control or direction of a person or an authority.**

**(3) The Judiciary shall not, in the performance of its administrative functions and management of its financial affairs, be subject to the control or direction of a person or an authority.**

**[6.19]** It was the Petitioners further submission that the transfer of Magistrates although rightly provided for under the law, should still be held to be unconstitutional if such power is exercised without the necessary independence and autonomy of the judiciary.

**[6.20]** We note that the Petitioner has conceded that the JSC enjoys the exercise of such human resource power as provided for under Section 6 (e) of the Service Commissions Act but contends that the power was exercised under the control or influence other than that of the Judiciary or the Constitution in contravention of Article 122 of the Constitution. No evidence was however led or proved to substantiate this allegation.

**[6.21]** In terms of the law, Section 6 (e) of the Service Commissions Act No. 10 of 2016 provides as follows:

**6** The functions of the Judicial Service Commission are as provided in the Constitution and to  
**(e)** Perform such other functions as are necessary or incidental to the regulation of human resource management in the judicial service.

**[6.22]** Further, Section 23 of the Judiciary Administration Act No. 23 of 2016 provides that:

**23 (1)** The Commission may make regulations for the better carrying out of the provisions of this Act  
**(2)** Without limiting the generality of Subsection 1, regulations may be made for or with respect to –  
**(f)** the transfer or secondment of any person holding any office.

**[6.23]** Section 29 (a) of the terms and conditions of service for the Public Service further provides that:

**29 (a)** an officer may be transferred to any duty station where his or her service are required.

**[6.24]** It is clear from the above provisions, therefore, that the JSC has the right to transfer any judicial officer to any duty station where his or her services may be required. There is no law that requires the consent of any such officer before a transfer is effected. In the absence, therefore, of any evidence that

the JSC in the exercise of its power to transfer the ten Magistrates was influenced by the alleged demonstration by UPND cadres at the Subordinate Court at Lusaka, this claim also fails for lack of merit.

[6.25] In arriving at this decision, we are also persuaded by the decision of the Indian Supreme Court in the case of **Supreme Court Advocates-On-Record v Union of India**<sup>4</sup> in which the court stated as follows:

The entire gamut in respect of the transfer of judges is covered by *Union of India v Sankal Chand Itimatlal Sheth and Anr* (1978) 1 SCR 423, AIR 1977 SC 2328 and *SP Gupta and Ors etc v Union of India and Ors etc* (1982) 2 SCR 365: (AIR 1982 SC 149). It was held by majority in both the decisions that there is no requirement of prior consent of the judge before his transfer under Article 122.

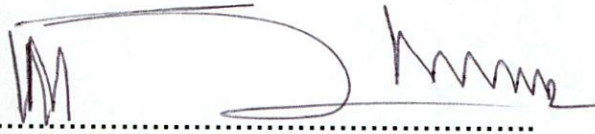
The power of transfer can be exercised only in 'public interest' i.e. for promoting better administration of justice throughout the country..... any transfer in accordance with the recommendation of the Chief Justice of India cannot be treated as punitive or an erosion in the independence of the judiciary.

[6.26] Finally, although arguments were led by the Petitioner for a declaration that the provision of amenities and social services is the duty of the Executive and not the Judiciary, this claim was not pleaded in the Amended Petition. We therefore, find

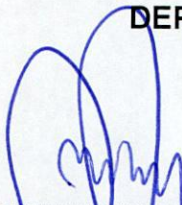
that there is no constitutional issue for our consideration. The purported claim is therefore misconceived and accordingly dismissed.

7. Consequently, the Petition is wholly dismissed forthwith for lack of merit.

8. We make no order as to costs.



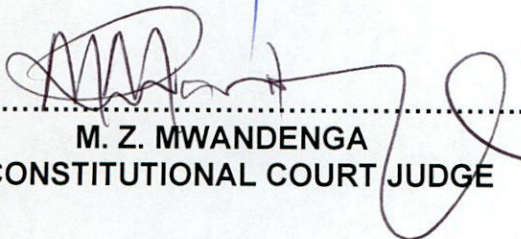
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**A. M. SHILIMI**  
**DEPUTY PRESIDENT – CONSTITUTIONAL COURT**



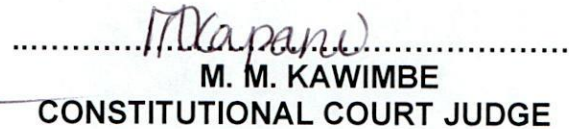
.....  
**M. MUSALUKE**  
**CONSTITUTIONAL COURT JUDGE**



.....  
**M. K. CHISUNKA**  
**CONSTITUTIONAL COURT JUDGE**



.....  
**M. Z. MWANDENGA**  
**CONSTITUTIONAL COURT JUDGE**



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**M. M. KAWIMBE**  
**CONSTITUTIONAL COURT JUDGE**