

IN THE CONSTITUTIONAL COURT OF ZAMBIA

2024/CCZ/006

HOLDEN AT LUSAKA

(Constitutional Jurisdiction)

IN THE MATTER OF: ARTICLE 128 (2) OF THE CONSTITUTION OF
ZAMBIA

AND IN THE MATTER OF: ARTICLE 128 (3) OF THE CONSTITUTION OF
ZAMBIA

AND IN THE MATTER OF: SECTION 8(2) OF THE CONSTITUTIONAL COURT
ACT NO. 8 OF 2016

AND IN THE MATTER OF: SECTION 8 (3) OF THE CONSTITUTIONAL COURT
ACT NO. 8 OF 2016

AND IN THE MATTER OF: THE DEFENCE ACT, CHAPTER 106 OF THE LAWS
OF ZAMBIA

AND IN THE MATTER OF: RULE 21 (f) OF THE DEFENCE FORCE
(PROCEDURE) RULES

BETWEEN:

MUTAZU JOHN

PETITIONER

AND

ANTHONY HUBERT KABUNGO

1ST RESPONDENT

GOLDEN NG'ANDE

2ND RESPONDENT

ATTORNEY GENERAL

3RD RESPONDENT

CORAM: Munalula, PC, Shilimi, DPC and Mulife, JC in Chambers on 29th May, 2024, 4th June, 2024 and 26th July, 2024.

APPEARANCES:

For the Petitioner: Colonel C Nhamboteh- Messrs Calisto Nhamboteh Legal Practitioners.

For the Respondent: Colonel. M. Namwawa and Lieutenant Colonel Ngolwe- Attorney General's Chambers.

RULING

Mulife JC, delivered the Ruling of the Court.

Cases referred to:

1. Gervas Chansa v Attorney General 2019/CCZ/004.
2. Conservation Advocates Zambia Limited v Attorney General 2023/CCZ/0018.
3. Owen Mayapi v Attorney General 2019/CCZ/003.
4. Richard Nsofu Mandona v Total Aviation and Export Limited, Zambia National Commercial Bank, Zambia National Oil Company (in Liquidation) and Indeni Petroleum Refinery Company, Appeal No. 8 of 2019.
5. Wilson Mwenya v Nkandu Luo and the Attorney General 2017/CCZ/009.
6. Benjamin Mwelwa v Attorney General 2017/CCZ/0010.

7. Bowman Lusambo v Attorney General 2023/CCZ/001.
8. Isaac Mwanza and Maurice Makalu v Attorney General 2023/CCZ/005.
9. The People v Justin Simukonda 2020/CCZ/R002.
10. Davison Namukombo v The Attorney General 2016/CC/003.
11. Milungo Lungu v The Attorney General and Administrator General 2022/CCZ/006.

Statutes referred to:

1. Constitution of Zambia (Amendment) Act No. 2 of 2016.
2. Constitutional Court Act No. 8 of 2016.
3. Defence Act, Chapter 106 of the Laws of Zambia.
4. Constitutional Court Rules, 2016 (Statutory Instrument No. 37 of 2016).

Other works to referred to:

1. Report of the Technical Committee on Drafting the Zambian Constitution, 30th December, 2013.

INTRODUCTION

[1] A three-judge panel was constituted to schedule the petition *in casu* by virtue of Order IX, Rule 16 of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016. At the scheduling conference on 29th May,

2024, we directed the parties to make oral submissions on the question of the Court's jurisdiction over the matters raised in the petition.

- [2] The need to inquire into the jurisdiction of the Court was prompted by the nature of the allegations in the petition (contravention of Part III of the Constitution and statutory provisions – the Defence Act) and the summons (prayer for an order of stay of the subject criminal proceedings), which prima facie, suggest that the Court is destitute of jurisdiction.
- [3] On 4th June, 2024, we heard the oral submissions and decided to dismiss the petition for want of jurisdiction and advised that we would give our reasons later, which we now do in this ruling.

BACKGROUND

- [4] The petition was filed into Court by John Mutazu (petitioner) on 27th May, 2024, pursuant to Article 128 (2)(3) of the Constitution of Zambia as amended by Amendment Act No. 2 of 2016 (Constitution); section 8 (2) (3) of the Constitutional Court Act No. 8 of 2016 (CCA) and Rule 21(f) of the Defence Force (Procedure) Rules, Chapter 106 of the Laws of Zambia.

- [5] The petitioner is alleging contravention of Articles 18 (1) and 128 (2) of the Constitution as read with Section 8 (2) of the CCA, 2016 by the Respondents.
- [6] Averments in support of the foregoing allegations are as follows: the Petitioner is a Warrant Officer Class II in the Zambia Army. On 10th May, 2024, he was arraigned for various criminal charges before a court-martial that was convened through an order of the 2nd Respondent, a Garrison Commander at the Zambia Army Headquarters. In support of this, the petitioner tendered a 'Garrison Commander's Orders' exhibited as 'MJ1' in his affidavit in support of the petition. The court-martial is being presided over by the 1st Respondent as court-martial President.
- [7] The 3rd respondent has been sued pursuant to section 12 of the State Proceedings Act, Chapter 71 of the Laws of Zambia on account of being a principal of the 1st and 2nd respondents.
- [8] Arising from the foregoing, the petitioner has two complaints namely, the composition of the court-martial and the conduct of its proceedings.
- [9] The Petitioner sought the following remedies:

- (a) *declaration that Rule 21 (f) of the Defence Force (Procedure) Rules in respect of trial of soldiers by Court-Martial composed of lay persons without the appointment of a judge advocate, contravenes Article 18(1) of the Constitution of Zambia and is therefore null and void;*
- (b) *A declaration that the trial of the Petitioner by a court-martial composed of lay persons without a Judge Advocate contravenes Article 18(1) of the Constitution and is therefore null and void;*
- (c) *A declaration that the refusal by the 1st Respondent to hear, record and refer the constitutional question at paragraph 15 supra to the Constitutional Court or the High Court was a grave contravention of Article 128 (2) of the Constitution of Zambia as read with Section 8 (2) of the Constitutional Court Act, 2016;*
- (d) *A prohibition order to prevent the convening of court-martial without the appointment of a judge advocate;*
- (e) *Any other reliefs the Court may consider just, and;*
- (f) *Costs.*

[10] In the interim, the petitioner had filed a summons for an order of stay of the stated criminal proceedings (Summons).

HEARING

[11] At the time of the hearing, the respondent had not yet filed an answer to the petition and affidavit in opposition to the summons. This was occasioned by the Court's direction under Order IX, Rule 16 to first determine the question of the Court's jurisdiction.

[12] On behalf of the petitioner, Colonel Nhamboteh submitted that Articles 1 (5) and 128 of the Constitution as well as section 8 of the CCA, bestows the Constitutional Court with the jurisdiction to entertain the subject petition.

[13] Counsel contended that by Article 128(2) of the Constitution, where a question relating to the Constitution arises in a court, a person presiding in that court shall refer the question to the Constitutional Court. That in the event the person declines to make a referral, as was the position in the subject petition with regards to the questions in exhibit 'MJ2', the affected person is entitled to invoke Article 128(3) of the Constitution and section 8(3) of the CCA, by directly petitioning the Constitutional Court on the question relating to the Constitution. That this is the foundation of the current petition.

[14] Counsel cited the cases of *Gervas Chansa v Attorney General*¹ and *Conservation Advocates Zambia Limited v Attorney General*², to posit that this Court has jurisdiction to entertain constitutional issues. That in light of the stated cases, this Court has jurisdiction to entertain the subject petition because it raises constitutional issues.

[15] Counsel submitted that although by Article 28 of the Constitution, the High Court has jurisdiction to hear and determine allegations of violations of fundamental rights and freedoms in Articles 11 to 26 (Part III) of the Constitution and to enforce the stated provisions, it no longer has jurisdiction to invalidate legislation for being unconstitutional. That

the power to invalidate legislation for being unconstitutional is now reposed in the Constitutional Court.

[16] It is counsel's submission that the petitioner is not seeking to enforce provisions guaranteeing fundamental rights and freedoms. Rather, he is seeking an invalidation of provisions of the Defence Act for being unconstitutional. Counsel cited the case of *Owen Mayapi v Attorney General*³ to demonstrate that this Court has power to strike down a statutory provision for being unconstitutional.

[17] In conclusion, counsel urged us to entertain the petition. He did not address us on whether or not we have jurisdiction to entertain the summons for a stay of court martial proceedings.

[18] In response, Colonel Namwawa, counsel for the respondent, submitted that this Court has no jurisdiction to entertain the subject petition. That this is because the petitioner did not raise in the court-martial, any question relating to the Constitution as there is no evidence of such on record. Against this background, the petition is improperly before this Court.

- [19] Further, that even assuming that the petitioner raised the issues which are subject of this petition in the court-martial, they would not merit a referral to this Court as they are destitute of constitutional substance.
- [20] That it is not every time that the Constitution is mentioned that there should be a referral to this Court. In support of this, counsel cited the Supreme Court's judgment in the case of *Richard Nsofu Mandona v Total Aviation and Export Limited, Zambia National Commercial Bank, Zambia National Oil Company (in Liquidation) and Indeni Petroleum Refinery Company*⁴.
- [21] That this implies that the court before which the alleged constitutional issue is raised, has power to determine whether or not a referral to this Court is merited.
- [22] It was counsel's submission that the correct mode of redressing the petitioner's grievance relating to his preliminary issues which were dismissed by the court-martial, is an appeal to the Supreme Court and not petitioning this court. That this is in light of section 136 of the Defence Act which empowers a party that is dissatisfied with the court-martial's decision, to appeal to the Supreme Court.

- [23] Citing Article 28(1) of the Constitution and the cases of *Wilson Mwenya v Nkandu Luo and the Attorney General*⁵ and *Benjamin Mwelwa v Attorney General*⁶, counsel submitted that this Court lacks jurisdiction to entertain claims relating to the violation of Part III of the Constitution. That it is only the High Court which has such jurisdiction. That in light of the foregoing and considering that the petition is alleging contravention of Article 18(1) of the Constitution, by the court-martial, the proper forum is the High Court and not this Court.
- [24] As regards the summons, counsel cited the case of *Bowman Lusambo v Attorney General*⁷ in which we held that civil proceedings cannot be used to stay criminal proceedings. Accordingly, the summons is misplaced.
- [25] We were urged to dismiss the petition for want of jurisdiction.
- [26] In reply, Colonel Nhamboteh maintained that as averred in the petition, the petitioner was prevented by the 1st Respondent from raising the alleged constitutional questions outlined in exhibit 'MJ2'.
- [27] Counsel submitted that away from the case of *Bowman Lusambo v Attorney General*⁷, this Court must guide on what happens where there

is refusal by a court for whatsoever reason, to refer a constitutional question to this Court.

[28] Counsel maintained that the High Court only has power to interpret provisions of Part III of the Constitution with respect to enforcement. However, the power to interpret the stated provisions with respect to the constitutionality of an enactment and its invalidation where merited, is reposed in this Court. That this power is founded on Article 1(5) of the Constitution which according to counsel, empowers this Court to entertain matters emanating from the entire Constitution. Counsel cited Article 128 of the Constitution as well as section 8 of the CCA to emphasise this argument.

CONSIDERATION AND DECISION

[29] Without going into the merits of the petition, we have considered the nature of the reliefs sought taking into account the parties' oral submissions on our jurisdiction.

[30] Arising from counsel's rival views, there is only one question for determination by this Court which is: ***whether this Court has the jurisdiction to invalidate, for contravention of the Bill of Rights, a***

defence force court martial regulation as well as the composition of a constituted court-martial?

[31] Provisions empowering us to make this determination are Article 128(1)(e) of the Constitution and its replica, section 8(1)(h) of the CCA. For obvious reasons, we hereunder only reproduce the provisions of Article 128(e) of the Constitution thus:

128. (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear—(e) whether or not a matter falls within the jurisdiction of the Constitutional Court.

[32] That said, we shall now examine Articles 1(5) and 128 of the Constitution, the provisions under contention. Article 1(5) provides as follows: *“a matter relating to this Constitution shall be heard by the Constitutional Court”*.

[33] Our literal interpretation of this provision is that it bestows this Court with unlimited jurisdiction over the entire Constitution. This perspective is supported by the *Report of the Technical Committee on Drafting the Zambian Constitution, 30th December, 2013 (Report of the Technical Committee)* on page 9 in the following terms: *“...The Committee further resolved to provide for the Constitutional Court to have jurisdiction over constitutional matters.”*

[34] Of note however, is that Article 128 introduced limitations on the Constitutional Court's entire jurisdiction by making it 'subject to Article 28' of the same Constitution. As shall be demonstrated in due course, this is in recognition of the implications of the 2016 failed referendum namely, the continued vesting of original jurisdiction over Part III of the Constitution, in the High Court exclusively and appellate jurisdiction in the Supreme Court.

[35] Article 128 states as follows:

128. (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear—

(a) a matter relating to the interpretation of this Constitution;

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

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

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

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

(2) Subject to Article 28 (2), where a question relating to this Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court.

(3) Subject to Article 28, a person who alleges that—

(a) an Act of Parliament or statutory instrument;

(b) an action, measure or decision taken under law; or

(c) an act, omission, measure or decision by a person or an authority; contravenes this Constitution, may petition the Constitutional Court for redress.

(4) A decision of the Constitutional Court is not appealable to the Supreme Court

[36] Article 28 of the Constitution states as follows:

(1) Subject to Clause (5) if any person alleges that any of the provisions of Articles 11 to 26 inclusive, has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall-

(a) hear and determine any such application;

Determine any question arising in the case of any person which is referred to it in pursuance of clause (2);

and which may, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive.

(2)... (b) any person aggrieved by any determination of the High Court under this Article may appeal therefrom to the Supreme Court:

Provided that an appeal shall not lie from a determination of the High Court dismissing an application on the ground that it is frivolous and vexatious.

[37] In our view, Article 28 is unambiguous. In terms of jurisdiction over Part III, it envisages only two courts - the High Court as the exclusive court of first instance and the Supreme Court as the appellate court.

[38] In the case of *Isaac Mwanza and Maurice Makalu v Attorney General*⁸, we stated as follows about the term 'subject to':

... 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 words 'subject to' are drafted into a provision to show that there are words in the provisions 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 that follow the term 'subject to' are invariably conditional or dependent on the dominant words.

[39] As highlighted already, the use of the term 'subject to' in the entire Article 128 of the Constitution, is always followed by the words 'Article 28'. This entails that the words 'Article 28' are the dominant words in Article 128 of the Constitution. Put differently, in exercising each of its

respective powers outlined in the entire Article 128 of the Constitution, the Constitutional Court shall yield to the provisions of Article 28 of the Constitution by way of not straying into Part III as Article 28 has reserved it for the High Court and the Supreme Court in their exclusive specified capacities.

[40] Colonel Nhamboteh appears to depart from this standpoint only on the basis of Articles 1(5) and 128 of the Constitution which he claims, have extended jurisdiction over Part III, to the Constitutional Court.

[41] We dismiss this argument because the 2016 failed referendum, left Part III of the Constitution unaltered and unaffected by the 2016 amendments including the new Court system. This is explained in part, why appeals from the High Court arising from Part III, still lie directly to the Supreme Court and not the Court of Appeal.

[42] To suggest, as Colonel Nhamboteh has done, that Articles 1(5) and 128 of the Constitution have altered the jurisdictional content of Part III of the Constitution, is to impute that the two provisions have amended the stated part of the Constitution. The suggestion would be

unconstitutional for violating Article 79(3) of the Constitution which expressly prescribe a referendum, as a mode of amending Part III.

[43] For avoidance of doubt, we hereunder reproduce Article 79(3) of the Constitution:

79 (3) a bill for the alteration of Part III of this Constitution or this Article shall not be passed unless before the first reading of the bill in the National Assembly it has been put to a National referendum with or without amendment by not less than fifty percent of the persons entitled to be registered as voters for the purposes of Presidential and Parliamentary Elections.

[44] In the absence of a referendum conducted in accordance with Article 79(3) of the Constitution, we reiterate, the status of Part III remains as it was prior to the 2016 constitutional amendments. Accordingly, it follows that the Constitutional Court or indeed any court aside of the High Court and Supreme Court, cannot be introduced into Part III of the Constitution otherwise than by a referendum conducted in accordance with Article 79(3).

[45] Further, in light of the definition of the term 'bill of rights' under Article 266 of the Constitution, we are taken aback by Colonel Nhamboteh's suggestion that Articles 1(5) and 128 of the Constitution, have stripped the High Court of jurisdiction to interpret and invalidate statutory enactments for contravening Part III. The definition of the term is

comprehensive enough as to include the powers which counsel is alleging, the High Court has now been stripped of.

[46] For avoidance of doubt, we hereunder reproduce the provisions of Article 266 of the Constitution:

bill of rights means the human rights and fundamental freedoms set out in Part III, and includes their status, application, interpretation, limitations, derogations, non-derogations and enforcement.

[47] In any event, we have previously guided, in the cases of *The People v Justin Simukonda*⁹ and *Davison Namukombo v The Attorney General*¹⁰ that until Part III of the Constitution is amended after a referendum, matters relating to contravention of Articles 11 to 26 will continue to be determined by the High Court.

[48] Turning to the summons, the same was anchored on the Petition which we have already dismissed. It being a settled principle of law that an interim order cannot exist in a vacuum, the summons has collapsed following the failure of the petition to which it was tied.

[49] Be that as it may, we guided already in the case of *Bowman Lusambo v Attorney General*⁷, that civil proceedings cannot be used to arrest criminal proceedings in any circumstances. Similarly, in the case of *Milungo Lungu v The Attorney General and Administrator General*¹¹,

we guided that this Court has no jurisdiction to grant a stay of proceedings in another Court.

CONCLUSION


[50] By the current arrangement of the Constitution, the Constitutional Court has no jurisdiction over Part III of the Constitution. Original jurisdiction over this Part is vested in the High Court exclusively. The Supreme Court holds appellate jurisdiction.

[51] Accordingly, the petition is dismissed for want of jurisdiction. The summons is equally dismissed as it was tied to the petition.

[52] Parties shall bear their respective costs.



.....
M.M. Munalula (JSD)
President of the Constitutional Court



.....
A.M. Shilimi
Deputy President of the Constitutional
Court



.....
K. Mulife
Constitutional Court Judge