

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

**2023/CCZ/0022**

IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA AS AMENDED BY ACT NO. 2 OF 2016

IN THE MATTER OF: ARTICLE 97 (1) OF THE CONSTITUTION OF ZAMBIA

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 97 (1) OF THE CONSTITUTION

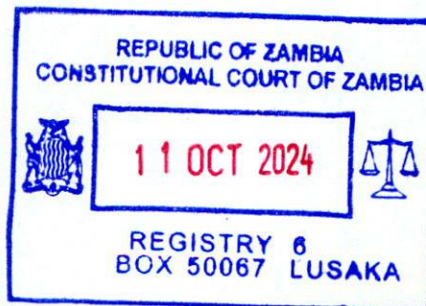
IN THE MATTER OF: REGULATION 10A (1) OF THE DEFENCE (REGULAR FORCE OFFICERS') REGULATIONS, 1960 OF THE DEFENCE ACT, CHAPTER 106 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: EFFECTS OF AN UNCONDITIONAL PARDON VIZ-A-VIS THE CAPACITY TO HOLD OFFICE BY THE PARDONED

AND

IN THE MATTER OF: AN UNCONDITIONAL PARDON OF MILDRED LUWAILE

BETWEEN:  
MILDRED LUWAILE  
AND  
ATTORNEY GENERAL



PETITIONER  
RESPONDENT

CORAM: **MUNALULA, PC, SITALI, MULENGA, MWANDENGA AND MULIFE JJC, ON 16<sup>TH</sup> APRIL, 2024 AND 11<sup>TH</sup> OCTOBER, 2024.**

For the Petitioner: Mr. Joseph Chirwa and Mr. F.S. Chipompela both of Messrs Joseph Chirwa & Company.

For the Respondent: Lieutenant Colonel J. Milanzi, Captain G. Musonda and Lieutenant C. Kalimi both of Attorney General's Chambers.

---

**JUDGMENT**

---



**Mulife, JC** delivered the Judgment of the Court.

**CASES REFERRED TO:**

1. Charles Mukanda v the Attorney General 2021/CCZ/0019.
2. Kabisa Ngwira v National Pension Scheme Authority 2019/CCZ/0017.
3. Godfrey Miyanda v the Attorney General (1985) Z.R. 185 (S.C).
4. Chama Mutambalilo v Attorney General 2019/CCZ/008.
5. Edward Jack Shamwana v Levy Patrick Mwanawasa 1994/SJ/93.
6. Masemola v Special Pensions Appeal Board and Another (2019) ZACC 39.
7. R v Foster (Barry) [1985] QB 115; [1984] 3 W.L.R 401.
8. M'membe and Post Newspaper Ltd (in Liquidation) v Mboози and Others Appeal No. 7 of 2021.
9. The People v Austin Chisangu Liato, Appeal No. 291/2014.
10. The People v Steven Masumba (2014/HP (unreported).
11. Hakainde Hichilema v Attorney General, Appeal No. 4 of 2019.
12. Godfrey Malembeka (suing as Executive Director of Prisons Care and Counselling) v Attorney General (2017) 2 Z.R. 286.
13. Ex-parte Galand, 4 WALL, 333.
14. Masiye Motel Limited v Resue Shoulders and Estates Agency (2010) Z.R. 172.
15. The People v Justin Simukonda 2020/CCZ/R002.
16. Davison Namukombo v The Attorney General 2016/CC/003.
17. Mutazu John v Anthony Huberty Kabungo and 2 Others 2024/CCZ/006.
18. Gough v Davies S.C 25 L.J. Ch 677; 4W.R.618.
19. Mutembo Nchito v The Attorney General (2016/CCZ/004) Selected Judgment No. 1 of 2016.
20. Rajendra Mandai v The State of Bihar & Ors Writ Petition 9 Criminal No. 252 of 2023.
21. Umkhonto Wesizwe Political Party and Jacob Gedleyihlekisa Zuma v Electoral Commission of South Africa and 2 Others Case No. 0015/24EC.



**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 Constitutional Court Rules, Statutory Instrument No. 37 of 2016.
3. The Defence (Regular Forces) (Officers) Regulations 1960, Defence Act, Chapter 106 of the laws of Zambia.
4. The Rules of the Supreme Court of England, 1999 Edition (White Book),

**WORKS REFERRED TO:**

1. Law Society of England Practice Point: The Royal Prerogative of Mercy dated 6<sup>th</sup> November 2015.
2. Oxford Advanced Learner's Dictionary of Current English, Seventeenth Edition.
3. Black's Law Dictionary, Abridged Sixth Edition. West Publishing Company, 1991.

**INTRODUCTION**

[1] When we heard this petition, we sat with Justices Sitali and Mulenga, who, due to circumstances beyond their control, are not available and so, the judgment is by the majority. It relates to an amended petition that was filed on 28<sup>th</sup> November, 2023 by Mildred Luwaile (Petitioner).

[2] The petition is alleging that the Respondent's agent, the Zambia Air Force (ZAF), breached Article 97(1) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of



2016 (the Constitution) and Regulation 10 A (1) of the Defence (Regular Forces) (Officers) Regulations 1960 of the Defence Act, Chapter 106 of the Laws of Zambia (Defence Force Regulations). The action relates to the prerogative of mercy granted to the petitioner *vis-a-vis* the termination of the Petitioner's employment by ZAF.

[3] The petition is made pursuant to Order IV, Rule 1 of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 (CCR). It is accompanied by an affidavit verifying facts, list of authorities and skeleton arguments.

[4] The petitioner is seeking the following reliefs:

- i. A declaration that an unconditional pardon by the President erases the offence the Petitioner was convicted of and the person is placed in a position prior to the conviction, and in the alternative an interpretation of the effect of an unconditional pardon on the right to office and status of an individual;*
- ii. A declaration that the dismissal of the Petitioner in the belief that the pardon was conditional, is illegal and unfair considering the pardon granted to the Petitioner by the President was unconditional;*
- iii. An order directing ZAF to reinstate the Petitioner by virtue of the unconditional pardon that was granted to the Petitioner;*
- iv. Such other orders as may seem just in the premises by this Court; and*
- v. Costs.*



**PETITIONER'S CASE**

- [5] The petitioner avers that she was enlisted as a direct entrant in ZAF on 22<sup>nd</sup> March, 2012. She completed her military training on 14<sup>th</sup> May, 2014, whereupon she was commissioned of the rank of Second Lieutenant. In April, 2016, she was promoted at the rank of Lieutenant, a rank she held until the termination of her employment.
- [6] On 22<sup>nd</sup> January, 2021, she was convicted and sentenced to six years simple imprisonment, by a subordinate court sitting at Lusaka, of the offence of assault of a child. As a result, ZAF terminated her commission and employment, a development that was communicated to her through a letter dated 21<sup>st</sup> October, 2021, authored by Lieutenant Colonel M. E. Zimba. The letter is exhibited to the affidavit verifying facts, marked "ML1".
- [7] That on 24<sup>th</sup> October, 2021, the President of the Republic of Zambia (the President), in exercise of his power of prerogative of mercy pursuant to Article 97(1)(a) of the Constitution, unconditionally pardoned her. In support of this, the petitioner exhibited a Government Gazette Notice, No.7048, marked exhibit "ML2" to the affidavit verifying facts.



- [8] Following the pardon, the petitioner, on two occasions, wrote to the ZAF Commander requesting to be reinstated. The two letters are exhibited to the affidavit verifying facts marked 'ML3' and 'ML4', respectively.
- [9] On 5<sup>th</sup> May, 2023, ZAF, through a letter authored by Brigadier General C. Chipasha, declined the petitioner's application for reinstatement. This was on the ground that her pardon was conditional and not unconditional as she was claiming. The letter is marked exhibit 'ML6' to the affidavit verifying facts.
- [10] Based on her belief that her pardon is unconditional, the petitioner contends that the respondent's termination of her employment and refusal to re-instate her, are unconstitutional. She also alleges that the termination of her employment by a Lieutenant Colonel, is unconstitutional and illegal as it violates Part 3 of the Defence Act, Chapter 106 of the Laws of Zambia (Defence Act) and regulation 10 A of the Defence Force Regulations which prescribe that a commissioned officer, who she was, can only be dismissed from employment by the President, upon the recommendation of the ZAF Commander.



## PETITIONER'S ARGUMENTS

- [11] In her skeleton arguments, the petitioner submitted that the petition is properly before this Court on the basis of Article 128 of the Constitution read with section 8 of the Constitutional Court Act No. 8 of 2016 (CCA).
- [12] The petitioner then cited the cases of *Charles Mukanda v the Attorney General*<sup>1</sup> and *Kabisa Ngwira v National Pension Scheme Authority*<sup>2</sup>, to posit that an action to challenge the constitutionality of an Act of Parliament or Statutory Instrument, should be commenced before this Court by way of a petition.
- [13] Citing the case of *Charles Mukanda v the Attorney General*<sup>1</sup>, the petitioner submitted that Article 97 (1) of the Constitution empowers the President to conditionally or unconditionally pardon a convict. Further, that an unconditional pardon wipes out a conviction thereby restoring the convict to his or her pre-conviction legal status. That the same position applies to her as she was unconditionally pardoned.
- [14] That according to regulation 10 A (1) of the Defence Force Regulations and the case of *Godfrey Miyanda v the Attorney General*<sup>3</sup>, only the President has power to cancel her appointment and terminate her employment. As a result, her dismissal by Lieutenant Colonel E.M. Zimba, is illegal.



**RESPONDENT'S CASE**

- [15] The respondent opposed the petition. In doing so, he filed an answer, affidavit in opposition as well as list of authorities and skeleton arguments on 12<sup>th</sup> December, 2023.
- [16] He admits the petitioner's claim that she was enlisted in the ZAF. Further, that her commission was cancelled and her employment terminated due to her stated conviction.
- [17] He denies having contravened the Constitution based on the following: that the Presidential pardon in issue was conditional and that it was only a remission of the remainder of the petitioner's prison term.
- [18] In support of the assertion that the pardon was conditional, the respondent exhibited to the affidavit in opposition a Zambia Correctional Service Letter of Release, Order of Release and the Government Gazette Notice, collectively marked as exhibit 'HM 4'.
- [19] The respondent avers that the petitioner's pardon being conditional, renders the termination of her employment lawful and not in violation of Article 97(1) of the Constitution. That this is because a conditional pardon does not absolve a convict of her liabilities or conviction.



- [20] Further, that the fact that the petitioner was informed about the termination of her employment by a letter that was authored by a Lieutenant Colonel, does not vitiate the termination. That this is because the decision to terminate her employment was in fact made by the President and the Lieutenant Colonel's letter, was only a channel of communicating the President's decision.
- [21] That the channel of communicating a termination of employment in ZAF is as follows: the termination is communicated to the Ministry of Defence, which in turn writes to the ZAF Commander. The ZAF Commander in turn writes to the affected officer's commanding officer who notifies the affected officer. That this was the channel that was adopted in the present case. And, in support of this channel, the Respondent exhibited to the affidavit in opposition, three letters marked exhibit 'HM1', 'HM2' and 'HM3', respectively.
- [22] Exhibit 'HM2' is a letter dated 12<sup>th</sup> October, 2021 authored by the Permanent Secretary in the Ministry of Defence, Dr. Felix V. Phiri. It was notifying the ZAF Commander about the President's decision to terminate the petitioner's employment.
- [23] Exhibit 'HM1' is a letter dated 15<sup>th</sup> October, 2021 authored by Colonel I. Tembo on behalf of the ZAF Commander. It was notifying the



petitioner's commanding officer about the petitioner's dismissal from employment.

- [24] Exhibit 'HM3' is otherwise denoted as exhibit 'ML1' in the petitioner's affidavit in support of the petition. It is referred to in detail in paragraph 6 of this judgment.

## **RESPONDENT'S ARGUMENTS**

- [25] In her skeleton arguments, the respondent first submitted that the petitioner's alleged breach of Regulation 10 A (1) of the Defence Force Regulations, is outside the jurisdiction of this Court as conferred by Article 128 of the Constitution and section 8 of the CCA. That this is because the said provisions do not empower this Court to entertain claims regarding violations of Acts of Parliament or statutory instruments.
- [26] In support of the foregoing argument, the respondent cited the case of *Chama Mutambalilo v Attorney General*<sup>4</sup>.
- [27] That in any case, the petitioner's claim about breach of Regulation 10 A (1) of the Defence Force Regulations in the manner her employment was terminated, is anchored on a misconception of established channels of communicating termination of employment in ZAF. That in the subject case, the petitioner was dismissed from employment in



accordance with Regulation 10 A (1) of the Defence Force Regulations and the dismissal was properly communicated to her in accordance with channels established by the Defence Act.

[28] Further, that according to sub-regulation 3 of Regulation 10 A of the Defence Force Regulations, the President's decision to terminate employment in accordance with Regulation 10 A (1) of the Defence Force Regulations, is final.

[29] It is further the respondent's contention that the petitioner's quest for an interpretation of the effect of an unconditional pardon on the right to office and status of an individual, is a sole preserve of the High Court by virtue of Article 28 of the Constitution.

[30] That similarly, the petitioner's implied invitation to this Court to determine whether her alleged pardon was conditional or unconditional, does not raise any constitutional issue. Under the circumstances, the Court lacks jurisdiction to entertain it.

[31] In the event that we find that the foregoing question raises a constitutional issue, the respondent argues that we deem the pardon conditional.

[32] The respondent cited the Supreme Court of Zambia's case of *Edward Jack Shamwana v Levy Patrick Mwanawasa*<sup>5</sup> to demonstrate that it is



only an unconditional pardon which erases the conviction completely and restores a convict to his or her pre-conviction legal status.

- [33] To underscore the effect of an unconditional pardon, the respondent further referred us to the observation made by the Constitutional Court of South Africa in the case of *Masemola v Special Pensions Appeal Board and Another*<sup>6</sup>, wherein the Court said at page 17:

*In this case, and given the particular wording of the presidential pardon, the applicant received what is generally referred to as full pardon. The President also directed that the applicant's conviction be expunged from the record. The result being that for all intents and purposes, the applicant, with effect from 21 July, 2011, is legally to be treated as a person who has not been convicted of the offence. The Applicant is with effect from the date of pardon no longer affected by any legal disqualifications that are as a result of his conviction. He is no longer subject to any civil or statutory disabilities that are imposed on a person convicted of offences.*

- [34] That according to the case of *R v Foster (Barry)*<sup>7</sup> and *Law Society of England Practice Point: The Royal Prerogative of Mercy dated 6<sup>th</sup> November 2015*, a free (unconditional) pardon relieves the convict of all penalties and other consequences of the conviction. However, the conviction is not quashed as only courts have power to quash a conviction.

- [35] The respondent submits that to determine the class of a pardon, recourse must be had to the wording of the Order of Release which in the present case, points to a conditional pardon.



**PETITIONER'S REPLY**

[36] In her reply to the respondent's answer filed on 29<sup>th</sup> January, 2024, the petitioner reiterates that her pardon is unconditional and that her dismissal from employment, was illegal.

[37] In her skeleton arguments in reply filed on 29<sup>th</sup> January, 2024, the petitioner firstly maintains that her employment was terminated by Lieutenant Colonel E.M. Zimba and not the President, contrary to Regulation 10 A (1) of the Defence Force Regulations. That the violation of Regulation 10 A (1) of the Defence Force Regulations, raises a constitutional issue and is therefore within the jurisdiction of this Court as conferred by Article 128 of the Constitution. That this is because Regulation 10 A (1) of the Defence Force Regulations, must be read with Article 93 of the Constitution which prescribes that a decision or instruction of the President shall be under the hand of the President, a requirement which the respondent has failed to exhibit.

[38] In view of the foregoing, the petitioner adds that the case of *Mutambalilo v Attorney General*<sup>4</sup> cited by the respondent, is a demonstration of this Court's willingness to interpret the provisions of Acts of Parliament as they relate to the Constitution.



[39] Further, that her omission to highlight a violation of Article 93 of the Constitution, in relation to the termination of her employment, is not fatal. That this is because this Court has the mandate to do substantial justice as well as to defend the Constitution and sanctity and credibility of the Court. In support of this proposition, the petitioner referred us to the case of *M'membe and Post Newspaper Ltd (in Liquidation) v Mboози and Others*<sup>8</sup> in which the Supreme Court stated that:

*...it is an age old and well-established principle that every court has power to act ex debito justitiae [as of right] to ensure that it exists for real and substantial administration of justice*

[40] The petitioner advanced further arguments regarding her pardon. She first cited the definition of the word according to the *Oxford Advanced Learner's Dictionary of Current English, Seventeenth Edition* and *Black's Law Dictionary, Abridged Sixth Edition*.

[41] *Black's Law Dictionary, Abridged Sixth Edition* and the *Edward Jack Shamwana*<sup>5</sup> case, were further cited for the definitions and effects of 'conditional and 'unconditional' pardons. Flowing from this, the petitioner submits that both pardons have the same effects as both serve the purpose of terminating the conviction and attached punishment. That the difference is that whereas an unconditional



pardon is irrevocable, a conditional pardon is revocable upon failure of a set condition.

[42] That said, the petitioner contends that she was granted a pardon as opposed to a remission of her sentence. That this is because although the statements explaining the prerogative of mercy signify a remission of her prison sentence, her Order of Release refers to Article 97(1)(a) of the Constitution which relates to pardons.

[43] It is the petitioner's contention that if the prerogative of mercy was about the remission of her sentence, the Order of Release could have referred to the appropriate constitutional provision namely, Article 97(1)(c) of the Constitution.

[44] Further, that since she has not violated the conditions prescribed in the Order of Release, the pardon liberates her from all legal infirmities arising from the conviction.

## **THE HEARING**

[45] At the hearing, Mr. Chirwa, counsel for the petitioner, informed the Court that the petitioner would rely on the petition, affidavit verifying the petition, and skeleton arguments. Similarly, Lieutenant Colonel Milanzi, counsel for the respondent, informed the Court that the respondent would rely on the respondent's answer to the petition,



affidavit in opposition to the affidavit verifying the petition and skeleton arguments.

[46] Both counsel also made oral submissions which are largely a recital of the written arguments outlined above except that on behalf of the petitioner, Mr. Chirwa added that in the *Charles Mukanda*<sup>1</sup> case, whose facts are identical to the subject matter, this Court guided that the correct mode of commencement is by way of petition and not originating summons. Accordingly, that the petitioner had commenced the subject action by way of a petition.

[47] On grounds of a petition not being a pleading, Counsel went on to introduce a claim and prayer which are not expressly stated in the petition. He claimed that Regulation 10A of the Defence Force Regulations is discriminatory as it violates Articles 9(1)(a), 8(d) and 23 of the Constitution. He explained that whereas Article 9(1)(a) of the Constitution requires this Court to apply national values and principles in interpreting the Constitution, Article 8(d) of the Constitution prescribes non-discrimination as one such national value and principle. Further, that every person in Zambia must be treated equally in light of Article 23 of the Constitution which proscribes discrimination.



- [48] Counsel submitted that Regulation 10A of the Defence Force Regulations discriminates on the basis of occupation because it disqualifies pardoned military officers from reinstatement when similarly-circumstanced professionals, such as lawyers and politicians, regain their careers after being pardoned. To demonstrate this, counsel cited the cases of *Edward Jack Shamwana v Levy Patrick Mwanawasa*<sup>5</sup>, *The People v Austin Chisangu Liato*<sup>9</sup> and *The People v Steven Masumba*<sup>10</sup>.
- [49] Based on the foregoing alleged inconsistency, counsel urged us to invalidate Regulation 10A of the Defence Force Regulations since it is subservient to the Constitution as provided by Article 1(1) of the Constitution.
- [50] In response to the petitioner's prayer that Regulation 10 A of the Defence Force Regulations should be invalidated on grounds of discrimination, Lieutenant Colonel Milanzi, on behalf of the respondent, submitted that the prayer is ultra-vires the jurisdiction of this Court as the correct forum to determine that issue is the High Court. In support of this proposition, counsel cited the cases of *Hakainde Hichilema v Attorney General*<sup>11</sup> and *Godfrey Malembeka v Attorney General*<sup>12</sup>.



- [51] Further, that the prayer should not have been raised *viva voce* but should have been expressly stated in the petition so as to give notice to the respondent.
- [52] It was counsel's submission that even assuming that the presidential prerogative in issue was an unconditional pardon, it would not entitle the petitioner to a reinstatement as the pardon operates prospectively thereby only obliterating future disabilities relating to the pardoned offence. That in the present case, the pardon was conferred after the petitioner's employment had already been lawfully terminated.
- [53] In support of the prospective effect of a pardon, counsel cited the case of *Ex-parte Galand*<sup>13</sup>.
- [54] Based on the foregoing, counsel urged us to dismiss the petition with costs.
- [55] In reply, Mr. Chirwa contended that a pardon has retrospective and not prospective effect. In support of this, he cited the case of *Masiye Motel Limited v Rescue Shoulders and Estates Agency*<sup>14</sup>. He submitted that in this regard, the petitioner is entitled to a reinstatement as the pardon has obliterated her conviction which triggered the termination of her employment.



[56] Counsel further submitted that the petitioner's mere mention of a breach of Article 23 of the Constitution, should not be used to defeat the petition. That this is because this Court has the mandate to resolve disputes alleging violation of the Constitution.

[57] Counsel submitted that the respondent is not entitled to costs because the petition is not vexatious. That to the contrary, it is the respondent which must be condemned in costs for having violated the Constitution.

[58] In conclusion, he reiterated the petitioner's prayers.

## **CONSIDERATION AND DECISION**

[59] We have considered the petition, answer, reply, respective affidavits as well as skeleton arguments and list of authorities. We have equally considered counsel's oral submissions for which we are indebted.

[60] The central issue in dispute and for determination by this Court, as we discern from the petition and answer, is the nature and effect thereof, of the prerogative of mercy that was granted to the petitioner under Article 97(1) of the Constitution. However, we shall first state our position with regards the question which counsel for the petitioner posed *viva voce* namely, whether or not Regulation 10A (1) of the Defence Force Regulations is discriminatory against pardoned military personnel.



[61] We decline to entertain the question because Article 128 of the

Constitution precludes us from entertaining questions such as the subject one, which emanate from part three of the Constitution. This, we underscored in the cases of *The People v Justin Simukonda*<sup>15</sup>, *Davison Namukombo v The Attorney General*<sup>16</sup> and *Mutazu John v Anthony Huberty Kabungo and 2 Others*<sup>17</sup>.

[62] The central issue for determination, Article 97(1) of the Constitution, is the sole provision which provides for the various acts of prerogative of mercy. It empowers the President to conditionally or unconditionally pardon a convict; substitute a less severe form of punishment imposed on a convict; or remit the whole or part of a fine, penalty or forfeiture, imposed on a convict by a court.

[63] Article 97(1) provides that:

*(1) The President may, on the advice of the Advisory Committee—*

*(a) conditionally or unconditionally, pardon a person convicted of an offence;*

*(b) substitute a less severe form of punishment imposed on a person by a court; or*

*(c) remit the whole or part of a fine, penalty or forfeiture.*

[64] We shall first determine whether or not we have jurisdiction to entertain the petition. And crucial to the determination is Article 128 of the



Constitution, which confines our jurisdiction to resolving issues relating to the Constitution except the bill of rights. These include matters relating to the interpretation, violation or contravention of the Constitution.

[65] For completeness, the provision is reproduced hereunder:

*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. (Underlining is ours for emphasis)*



- [66] We wish to first state that the *Charles Mukanda*<sup>1</sup> case mentioned in paragraph 23 of this judgment, presented this Court with a prior similar question. However, that case was dismissed for having been commenced by way of an originating summons instead of a petition.
- [67] We have no hesitation in finding that the petition raises a constitutional issue. This is because a determination of the nature of the prerogative of mercy in dispute, requires us to interpret a constitutional provision - Article 97(1) of the Constitution. We accordingly proceed to consider the petition.
- [68] The petitioner herein has properly come by petition. The petitioner was convicted and sentenced to six years simple imprisonment for the offence of assault on a child, a development which triggered the termination of her employment. In due course, she was set at liberty by the President, in the exercise of his power of prerogative of mercy pursuant to Article 97 (1) of the Constitution.
- [69] The petitioner's release from prison, has triggered rival opinions from the parties as regards the nature of the prerogative of mercy accorded to her and the effect thereof, on her terminated employment.
- [70] According to the petitioner, the prerogative of mercy in issue, is an unconditional pardon. That this is according to her Order of Release



which cites Article 97(1) (a) of the Constitution as the enabling provision. On this understanding, she is demanding to be reinstated in her job since an unconditional pardon has obliterated the legal disqualification which triggered the termination of her employment.

[71] In the event we find that she was conditionally pardoned, the petitioner has implored us to deem the pardon unconditional since she has not violated the conditions attached to her discharge from the correctional facility.

[72] To the contrary, the respondent contends that the prerogative of mercy in issue, is a conditional pardon. The condition being a remission of the remainder of her prison sentence. That under the circumstances, the conviction still stands thereby disqualifying her from reinstatement in her former employment.

[73] Clearly, the parties' attention is fixated on a pardon because the Order of Release cites Article 97(1)(a) of the Constitution, a provision that solely relates to pardons (conditional or unconditional). They are only at variance as regards the type and effect of the pardon. Thus, whereas the petitioner contends that it is an unconditional pardon, the respondent contends that it is a conditional pardon.



[74] In addition, we are of the view that the controversy as to the nature of the prerogative of mercy in issue has further been triggered by the ambiguity in the Order of Release. Thus, whereas the wording of the Order of release is synonymous with the language in Article 97(1)(c) of the Constitution relating to a remission, the Order of Release suggests that it is anchored on Article 97(1)(a) of the Constitution, which as stated already, relates to a pardon (conditional or unconditional). We say so because of the relevant passages of the Order of Release which we shall reproduce at appropriate stages of this judgment

[75] We shall begin with the law on prerogative of mercy. Due to a dearth of domestic jurisprudence on the subject matter, we have sought guidance from identical jurisdictions particularly England (from whence we adopted the concept of prerogative of mercy) and nearer home, South Africa. Accordingly, we have adopted the approach laid down in the cases of *Gough v Davies*<sup>18</sup> and *Masemola v Special Pensions Appeal Board*<sup>6</sup>, respectively.

[76] In the case of *Gough v Davies*<sup>18</sup>, one of the foundational cases on the subject of prerogative of mercy in England, the court determined the question of the effect of a remission solely by construing the enabling law. It expressed this approach at page 934 in the following terms:



...the question is entirely upon the statute as to the effect of a pardon in the penal colony. At first, only a limited effect was given. The governor was empowered to pardon convicts in a qualified manner; so that such pardon should take effect only in the colony. Afterwards, it was provided that he should send to the Government in England a list of names of persons to be pardoned from time to time and these persons were to be pardoned under the Great Seal. Now the names are transmitted to the Secretary of State and he forwards them to Her Majesty who graciously intimates her approval; and the effect of such a proceeding is regulated by 5 Geo. 4, c.84, s.26 upon which the question in this case turns...the statute might certainly have been more clearly expressed... (underlining is ours for emphasis).

[77] In the cases of *Masemola v Special Pensions Appeal Board*<sup>6</sup>, the Constitutional Court of South Africa determined the class and effect of the respective pardons under consideration, by construing both the enabling legislation and specific wording of the pardons.

[78] *Clearly, the* combined effect of the two cases is that in the event of ambiguity, as is the position in the present matter, the class and effect of a prerogative of mercy can be ascertained by construing the enabling provision of the law and the wording of the document conveying the prerogative of mercy. In this matter, the enabling provision is Article 97(1) of the Constitution whereas the document conveying the prerogative of mercy, is the Order of Release.



- [79] Relying on the approach laid down in the cases of *Gough v Davies*<sup>18</sup> and *Masemola v Special Pensions Appeal Board*<sup>6</sup>, we are of the firm view that the text of the Order of Release is unambiguously conveying a remission in this matter.
- [80] That this is so can be discerned from a literal interpretation of the entire Order of Release. Nowhere does it mention the term 'pardon'. Instead, it mentions the term 'remission' throughout its body yet the two prerogatives of mercy visibly exist separately under the enabling provision, Article 97(1) of the Constitution.
- [81] The Order of Release is boldly headed: "**REMISSION OF SENTENCES**". Following the heading, is the main body. It comprises the preamble and operative part. The preamble sets out the purpose, aim and justification for the Order of Release which clearly points to a remission. The operative part is essentially the part by which the objective of the Order of Release is carried into effect, i.e, remission of the sentences.
- [82] To illustrate, the first paragraph of the preamble highlights the fact that persons set out in schedules "A", "B" and "C" of the Order of Release (the petitioner inclusive), were convicted of various offences; sentenced to various terms of imprisonment and are serving their



respective prison sentences in different correctional centres throughout the Republic of Zambia.

[83] The second paragraph of the preamble reads:

*WHEREAS the said persons are serving their sentences in different Correctional centres throughout the Republic and WHEREAS it is desirable that I grant them remission of the remainder of their sentences to commemorate Independence Day... (the underlining is ours for emphasis)*

[84] Clearly the second paragraph of the preamble means and must be understood to mean that the President expressed a desire to grant remissions of the remainder of the concerned convicts' prison sentences to commemorate Independence Day.

[85] Turning to the operative part of the Order of Release, the first part reads:

*NOW THEREFORE, in exercise of the powers vested in me by Article 97(1)(a) of the Constitution of Zambia, I Hakainde Hichilema, President of the Republic of Zambia **DO HEREBY REMIT** the remainder of sentences imposed upon the persons whose names are set out in "A" hereto.*

[86] Clearly the foregoing excerpt means and must similarly be understood to mean that the President remitted the remainder of the sentences of the concerned convicts.

[87] In the concluding operative part of the Order of Release, it reads:



*AND DO HEREBY ORDER that the said persons be released from custody immediately upon the condition that during the period up to the respective dates when they have completed serving their sentences, they do not commit offences similar to the ones for which they were convicted and sentenced...*

[88] The foregoing portion means and must be understood to mean that as a consequence of the remissions granted, the President ordered the release of the concerned convicts. Nowhere is it suggested that the concerned persons have been pardoned.

[89] We further dismiss the suggestion by the respondent that in this case, a remission has been used as a condition in a pardon. We do so because in our view, having been enacted in different parts of Article 97(1), the framers of the Constitution designed the two prerogatives of mercy to be mutually exclusive and to serve distinct purposes in the criminal justice system.

[90] Had the framers of the Constitution intended that a pardon and a remission should overlap, they could have expressly stated so. Alternatively, they would not have enacted a remission as a separate prerogative from a pardon.

[91] Based on the foregoing, we find that Article 97(1)(a) of the Constitution, was inadvertently cited on the Order of Release. This is



so because the cited provision is at variance with the consistent and clear wording of the Order of Release.

[92] We hasten to state that the inadvertent citing of Article 97(1) (a) of the Constitution on the Order of Release cannot vitiate the envisaged remission. We said in the case of *Mutembo Nchito v The Attorney General*<sup>19</sup> that a reference to a wrong provision of the law in itself, does not vitiate the exercise of power so long as such power exists and can be traced to a legitimate source at law. In the present case, the President's power to grant a remission exists and can be traced to a legitimate source available at law namely, Article 97(1)(c) of the Constitution.

[93] In view of the above, we find the parties' opinions that the prerogative of mercy in issue is an unconditional or conditional pardon, as the case may be, to be a misconception. We accordingly dismiss the first and second reliefs being sought by the petitioner.

[94] As regards the effect of a remission in relation to the petitioner, we hold that it does not obliterate her conviction and attendant legal disqualifications (the conviction and sentence), which triggered the termination of her employment. Rather, it reduces the period of her incarceration. In coming to this conclusion, we are persuaded by the



Supreme Court of India in the case of *Rajendra Mandai v The State of Bihar and Others*<sup>20</sup> that a remission

*...mitigates the sentence of punishment awarded and which does not, in any way, wipe out the conviction...the act of remission of the State does not undo what has been done judicially. The punishment awarded through a judgment is not overruled but the convict gets benefit of a liberalised policy of State pardon.*

[95] A similar holding was made by the Electoral Court of South Africa in the case of *Umkhonto Wesizwe Political Party and Jacob Gedleyihlekisa Zuma v Electoral Commission of South Africa and 2 Others*<sup>21</sup>.

[96] In any event, the foregoing position is plainly expressed in the wording of the Order of Release in the sense of halting the petitioner's incarceration on condition that she does not commit a similar offence during the remainder of her prison term. The words do not, by any stretch of the imagination, expunge the petitioner's conviction or sentence. We accordingly dismiss the third relief being sought by the petitioner.



[97] In light of the foregoing, we decline to grant the declarations and order sought by the petitioner under reliefs (i), (ii) and (iii) of the amended petition, which reliefs, we have quoted at paragraph 4 of this judgment.

[98] Relief (iv) is *'for such other orders as may seem just in the premises by this Court'*. Given the fact that these proceedings were and are misconceived and/or without merit, there is no other relief that the Court may deem just to grant the petitioner.

[99] Relief (v) is for costs. As the Petition enabled us to settle an important constitutional issue relating to the prerogative of mercy, each party shall bear own costs.

## **CONCLUSION AND ORDERS**

[100] Article 97(1) of the Constitution, empowers the President to exercise various acts of prerogative of mercy in the criminal justice system. These include pardons (conditional or unconditional) and remissions.

[101] In the event of ambiguity, the class and effect of an act of prerogative of mercy can be ascertained from the enabling provision under Article 97(1) of the constitution and the specific wording of the Order of Release signed by the President. Based on the wording of the Order of Release, the petitioner in the present case, was granted a remission under Article 97(1)(c) of the Constitution. The remission entails that her



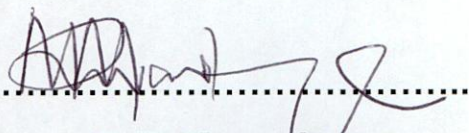
conviction remains intact and the legal disqualification which triggered the termination of her employment is not extinguished.

[102] The petition fails for want of merit and is accordingly dismissed.

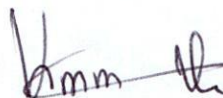
[103] Parties shall bear own costs.



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



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



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