IN THE CONSTITUTIONAL COURT OF ZAMBIA **2024/CCZ/0016**

HOLDEN AT LUSAKA

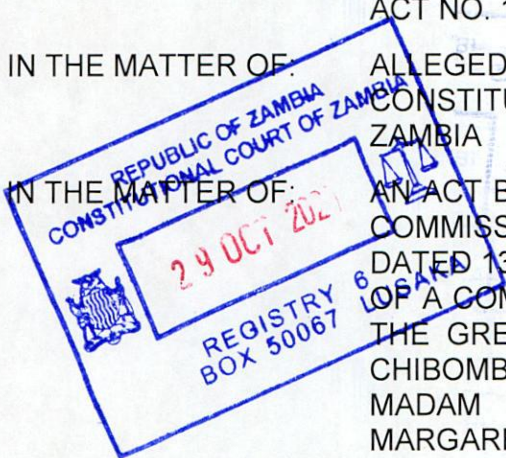
(*Constitutional Jurisdiction*)

IN THE MATTER OF: ARTICLES 1 AND 2 (A) (B) AS READ TOGETHER WITH ARTICLES 128(1) (A) (B) AND 128 (3) (B) (C) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: ARTICLES 1 (2) AND 8(D) (E) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: ARTICLES 5 AND 236 (2) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA AS READ TOGETHER WITH THE JUDICIAL (CODE OF CONDUCT) ACT NO. 13 OF 1999

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 5 (2) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA



IN THE MATTER OF: AN ACT BY COMMISSIONERS OF JUDICIAL COMPLAINTS COMMISSION TO REVIEW AND /OR VACATE ITS RULING DATED 13TH OCTOBER 2017 CONCERNING THE MATTER OF A COMPLAINT BY THE PETITIONERS, ON BEHALF OF THE GREEN PARTY, AGAINST MADAM JUSTICE HILDA CHIBOMBA, MADAM JUSTICE MUNGENI MULENGA, MADAM JUSTICE ANIE SITALI, MADAM JUSTICE MARGARET MUNALULA AND MR JUSTICE PALAN MULONDA

IN THE MATTER OF: AN ACT TO EXERCISE POWER THAT IS NOT CONFERRED TO THE JUDICIAL COMPLAINTS COMMISSION BY OR UNDER THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA OR THE JUDICIAL (CODE OF CONDUCT) ACT NO. 13 OF 1999

BETWEEN:

PETER SINKAMBA PETITIONER

AND

JUDICIAL COMPLAINTS COMMISSION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

BEFORE HON. MR. JUSTICE KENNETH MULIFE IN CHAMBERS ON 9TH AND 29TH OCTOBER, 2024.

For the Petitioner: In Person

For the 1st and 2nd Respondent: Mrs. B. M. Tamuwanga and Mrs M. N. Mbao of Attorney General's Chambers.

RULING

Cases Referred to:

1. Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others 2016/CCZ/0031.
2. Milingo Lungu v the Attorney General 2022/CCZ/006.
3. Dora Siliya, Maxwell Moses Boma Mwale and Hastings Sililo v Attorney General, the Electoral Commission of Zambia and Wynter Munacaambwa Kabimba (joined to the proceedings in his capacity as Secretary General of Patriotic Front) (2013) 1 ZR 104.
4. Nyampala Safaris Zambia Limited and Others v Zambia Wildlife Authority and Others SCZ/8/179/2003.
5. Law Association of Zambia v Ngosa Simbyakula and 63 Others 2016/CC/0011.
6. Mutembo Nchito S.C v Attorney General 2016/CC/0029.
7. Vangelatos v Metro Investments Limited S.C.Z No. 21 of 2013.
8. Ruth Kumbi v Robinson Kalebu Zulu (2009) Z.R 183.
9. Holman v Ford Motors Co, 239 50.2d 40.
10. Bowman Lusambo v Attorney General 2023/CCZ/001.
11. Joshua Ndipyola Banda v the Attorney General 2022/CCZ/0010.

Legislation Referred to

1. Constitution of Zambia as amended by Act No. 2 of 2016.
2. Constitutional Court Act No. 8 of 2016.
3. Constitutional Court Rules, Statutory Instrument No. 37 of 2016.

INTRODUCTION

[1] This is a ruling on the petitioner's summons for an interim order of stay of the decision of the President of the Republic of Zambia (President) dated 23rd September, 2024, to suspend Judges A.M. Sitali, M.S. Mulenga and P. Mulonda (the Judges), from their respective offices of Judge of the Constitutional Court.

[2] The summons was filed into Court on 2nd October, 2024, accompanied by an affidavit in support (the affidavit in support) and skeleton arguments. It is anchored on Order IX Rule 20 (1) read with Order X Rule 2 (1) (2) of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 (CCR). It was made *ex parte* but was heard *inter partes* upon the Court's directive.

THE PARTIES' CASE

[3] Antecedents to the summons are outlined in the affidavit in support, the petitioner's petition filed into court on 27th September, 2024 in respect of the main matter (the petition) and an affidavit in support of the petition. They are as follows: pursuant to Article 144(3) of the Constitution of Zambia as amended by Act No. 2 of 2016 (the Constitution), the President suspended the Judges from office, based

on a report of the 1st respondent made pursuant to Article 144(2) of the Constitution. This followed a finding, by the 1st Respondent, of a *prima-facie* case against the Judges upon consideration of a complaint that was launched by Moses Kalonde. The complaint is marked as exhibit 'BG1' in the respondent's affidavit in opposition to the summons.

[4] In his affidavit in support and skeleton arguments, the petitioner contends that the President's impugned decision should be stayed because it is based on a complaint that is res judicata. The complaint is res judicata because it was previously launched by the petitioner in which he alleged gross misconduct and incompetence in the manner the Judges (alongside two others), handled the presidential election petition of *Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others*[1].

[5] That by a ruling dated 13th October, 2017, marked as exhibit 'PS1' in the Affidavit in support of the petition, the 1st respondent acquitted the Judges of the allegations. This notwithstanding, the complaint leading to the impugned decision of the President, similarly alleges gross misconduct and incompetence in the manner the Judges handled the same presidential election petition.

[6] Aggrieved with the respondent's impugned report, the petitioner

launched the petition in which he is alleging that the complaint is res judicata because it was determined as demonstrated in exhibit 'PS1' in the affidavit in support of the summons.

[7] Further, that by entertaining the complaint, the 1st respondent was in effect reviewing its decision conveyed in exhibit 'PS1', an act which contravenes various provisions of the Constitution as the 1st respondent is destitute of the power of review.

[8] Accordingly, the petition is seeking the subject order of stay and various declarations against the 1st respondents' stated acts.

[9] In his skeleton arguments, the petitioner cited *Order IX Rule 20(1) and Order X Rule 2 (1) (2) of the CCR,* and the ruling of a single judge in the case of *Milingo Lungu v the Attorney General*[2], to posit that this Court has power to grant the sought order of stay.

[10] Further, the Petitioner cited an article by Anthony DiSarro entitled: *'A Farewell to Harms Presuming Irreparable Injury in Constitutional Litigation',* to suggest that the sought order of stay, is essential in order to preserve the status quo and to avoid the petition becoming an academic exercise.

[11] He further cited the *Bangalore Principles of Judicial Conduct 2002*

and the United Nations Basic Principles on the Independence of the Judiciary 1985, to posit that judges enjoy security of tenure and independence in the discharge of their functions.

[12] The petitioner prayed for the sought order pending the Court's determination of the constitutionality of the respondents impugned actions.

[13] The respondents are opposed to the summons. In doing so, they filed into court, an affidavit in opposition and a list of authorities as well as skeleton arguments, on 8th October, 2024. The affidavit in opposition avers as follows: first, that the petitioner lacks locus standi to launch the petition. And second, that the sought order is not tenable because the Judges were suspended in accordance with the procedure prescribed by the constitution thus the respondent recommending for their suspension after establishing a prima-facie case against the Judges and the President suspending the Judges as per the mandatory requirements of the Constitution in order to facilitate for a disciplinary hearing.

[14] The proceedings leading to a finding of a prima-face case against the Judges are exhibited to the affidavit in opposition marked 'BG2'.

[15] It was further deposed that judges' security of tenure does not shield an erring judge from disciplinary proceedings.

[16] In their skeleton arguments and list of authorities, the respondents jointly reiterated that the petitioner lacks locus standi in this matter as he has not demonstrated how he is affected by the President's impugned decision. In support of this proposition, they relied on the Supreme Court of Zambia's case of *Dora Siliya, Maxwell Moses Boma Mwale and Hastings Sililo v Attorney General, the Electoral Commission of Zambia and Wynter Munacaambwa Kabimba (joined to the proceedings in his capacity as Secretary General of the Patriotic Front)*[3].

[17] That in the circumstances of this case, it is the Judges themselves who have locus standi which they have already exercised by way of instituting proceedings in the High Court and obtaining an order staying proceedings before the 1st respondent.

[18] It was further argued that the fact that the petitioner launched a complaint with the 1st respondent in 2016, does not confer him with the locus standi. Additionally, by Article 177 of the Constitution, it is the Attorney General who has the mandate of protecting public interest and not the petitioner as he purports in the petition.

[19] It was the respondents' further argument that contrary to the petitioner's suggestion, Order X, Rule 2 (1) of the CCR does not provide for an order of stay. That by extension of Order 1, rule 2 of the CCR, the provision which provides for an order of stay, is Order 59/13/2 of the

Rules of the Supreme Court of England (White Book). Further, that according to Order 59/13/2 of the White Book, a stay is a discretionary remedy; can only be granted where there are good reasons and special circumstances; and that the appeal must have prospects of success.

[20] On similar terms, the respondents cited the Supreme Court of Zambia's case of *Nyampala Safaris Zambia Limited and Others v Zambia Wildlife Authority and Others*[4]. Flowing from this, it was argued that in the present case, the petitioner has not demonstrated any good reasons or exceptional circumstances or serious questions necessitating the sought order of stay.

[21] It was further argued that the petitioner has failed to demonstrate irreparable injury that he is likely to suffer; the prospects of success of his petition or that he would suffer prejudice in the event that the sought order is not granted. Reliance for this proposition was placed on the ruling of a single Judge of this Court in the case of *Law Association of Zambia v Ngosa Simbyakula and 63 Others*[5], where it was held that principles on interim orders laid down in the cases of American Cyanamid v Ethicon Limited and South Africa Informal Traders Forum v City of Johannesburg and Others, are applicable to this Court. He listed the principles as follows: that the applicant would suffer irreparable harm if not granted the order of stay and that the balance of convenience

should tilt in favour of retaining the status quo until the court has finally disposed of the main dispute.

[22] It was also submitted that it is undesirable for the Court to interfere with proceedings which are at an interlocutory stage. That this is against the backdrop that the suspension of the Judges is an offshoot of an interlocutory decision of the 1st respondent. In support of this proposition, the case of *Mutembo Nchito S.C v Attorney General*[6], was cited, where, according to the respondents, the Supreme Court of Zambia expressed the view that judicial review of a preliminary decision of an administrative tribunal, should only be exercised in exceptional circumstances as it poses the danger of straying into the merits of the preliminary issue. That courts should only intervene when it is absolutely clear that the applicant would suffer a fundamental failure of justice.

[23] The respondents further argued that the sought order of stay is not tenable in the present case because there is nothing to stay as the Judges have already been suspended. Reliance for this proposition was placed on the case of *Aristogerasimos Vangelatos and Another v Metro Investments Limited and Others*[7], in which the Supreme Court of Zambia declined to grant an order of stay on the ground that the plaintiffs had already taken possession of the contested property.

[24] Coagulating the argument further, the respondents adverted to the case of *Ruth Kumbi v Robinson Caleb Zulu*[8], where it was held that a stay of execution is granted in order to maintain the status quo of the parties pending the application before the Court. That in the present case, the status quo of the Judges is that they have already been suspended.

[25] Based on the foregoing, I was urged to dismiss the summons with costs.

[26] In his skeleton arguments in reply filed into Court on 9th October, 2024, the petitioner recited his arguments in support of the summons save to add as follows: that by virtue of Articles 1(1) (2) (3) (5), 128 (1) (a) (b) (c), 128 (3) (b) (c), 5 (2) and 8 (d) and (e) of the Constitution, he has locus standi in this matter. That the case of *Dora Siliya, Maxwell Moses Boma Mwale and Hastings Sililo v Attorney General, the Electoral Commission of Zambia and Wynter Munacaambwa Kabimba (joined to the proceedings in his capacity as Secretary General of the Patriotic Front)*[3], is distinguishable from this matter because it was decided prior to the enactment of Article 2 (a) and (b) of the Constitution which confers locus standing on every person to defend the Constitution. Additionally, that by virtue of the same provision, the duty to defend the Constitution goes beyond the Attorney General.

[27] The petitioner argued that Order 59/13/2 of the White Book relates to the Court's appellate and not original jurisdiction. That the subject

summons falls within the realm of the Court's original jurisdiction and the applicable provisions are Order X, rule 2(1) and XV, rule1 of the CCR. The provisions empower this Court to grant interim orders, including the order being sought.

[28] The petitioner added that the power to grant interim reliefs such as the one being sought, is incidental to the jurisdiction of this Court as conferred by Article 119 (2) (b) as read with Article 1 (5) and 128 (3) (b) of the Constitution. Section 25 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia, was cited to reinforce this position.

[29] On the strength of the case of *Holman v Ford Motors Co*[9], it was submitted that an order of court would be empty if orders and judgments could not be stayed pending review.

[30] The petitioner contends that there are compelling reasons warranting the order being sought. These are as follows: the recommendation that led to the suspension of the Judges is res judicata; sanctioning Judges based on their judicial decisions undermines the independence in the legal system; and that the foregoing, tilt the balance of convenience in favour of the sought order.

[31] The petitioner contended that the order being sought is designed to prevent the continued enforcement of a decision while the matter is being heard. He reiterated his prayer for the order.

[32] At the hearing of the summons on 9th October, 2024, the parties relied on their respective documents on record. They augmented the same with oral submissions which however are a recital of their respective documents. For the avoidance of repetition, I shall not recite the oral submissions save to state that the petitioner contended that the 1st respondent does not have the power to review its decision as it now purports by rehearing a complaint that is res judicata.

DETERMINATION

[33] I have considered the summons, affidavit evidence and the parties' oral and written arguments. The issue for determination is whether or not this is a proper case in which to grant the order of stay being sought. However, I will first consider the question raised by the respondents that the petitioner lacks locus standi to launch the summons. The consideration is superseding because the question goes to the root of the summons.

[34] According to the respondents, the petitioner lacks locus standi to launch the summons because he is not personally affected by the President's impugned decision. The petitioner's counter-argument is that he has

locus standi principally bestowed by Article 2 of the Constitution which empowers 'every person' to defend the constitution.

[35] Having examined the question, I have concluded that it is not proper for consideration by a single judge. This is because its determination has the potential to lead me into making a decision that may bring finality to the petition, a realm which by virtue of section 4 of the Constitutional Court Act No. 8 of 2016, is exclusively reserved for the full Court. Quoting only relevant portions, the provision states as follows; '*a single judge of the Court may exercise a power vested in the Court not involving …a final decision in the exercise of its original jurisdiction'*.

[36] I shall now consider the question whether or not this is a proper case in which to grant the order being sought. It suffices to first correct the respondents' suggestion that the applicable provision to the summons is Order 59/13/2 of the White Book and not Order X, rule 2(1) of the CCR. The suggestion is misconceived because Order 59/13/2 of the White Book clearly relates to this Court's appellate jurisdiction and not its original jurisdiction.

[37] Accordingly, Order 59/13/2 of the White Book is inapplicable to this matter since the petition is before the Court in the exercise of its original jurisdiction. The applicable provision under the circumstances is Order X, rule 2(1)(2) read with Order IX, Rule 20(1) of the CCR relating to the

mode of commencement of interlocutory applications. The omission to expressly mention an order of stay in Order X, rule 2(1) of the CCR, should not be a basis for excluding the provision's applicability to the relief because the term 'interim order' referenced in the provision, is wide enough to cover an order of stay. This, the Constitutional Court, guided in the case of *Bowman Lusambo v Attorney General*[10].

[38] The foregoing notwithstanding, the overriding question is whether or not a decision that has been implemented can be stayed. The question is pertinent because the decision being sought to be stayed had already been implemented at time of the summons.

[39] The law is well settled that an order of stay cannot issue where the decision or judgment sought to be stayed has already been implemented. The basis for the principle is logically that there would be nothing to stay once a decision or judgment has been implemented. The case of *Aristogerasimos Vangelatos and Another v Metro Investments Limited and Others*[7] cited by the respondents embodies this principle.

[40] Similarly, the case of *Joshua Ndipyola Banda v The Attorney General*[11]**,** is illustrative. Therein, the Petitioner sought an order to stay the President's decision to remove him from the office of High Court Judge. The presiding single judge ruled that there was nothing to stay because the President's decision had already been implemented.

[41] In view of the foregoing, the subject summons should fail on the very ground of seeking to stay a decision that has already been implemented. I accordingly find it academic to consider other principles governing applications for orders of stay.

CONCLUSION

[42] In conclusion, I find the summons not only misconceived but also, frivolous because at the time it was launched, the petitioner was aware that the impugned decision, had already been implemented. I accordingly dismiss the summons.

[43] Parties shall bear their respective costs.

DATED AT LUSAKA THIS 29TH DAY OF OCTOBER,2024.

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KENNETH MULIFE

CONSTITUTIONAL COURT JUDGE.