

IN THE CONSTITUTIONAL COURT OF ZAMBIA

HOLDEN AT LUSAKA

(Constitutional Jurisdiction)

IN THE MATTER OF:

IN THE MATTER OF:

IN THE MATTER OF:

BETWEEN

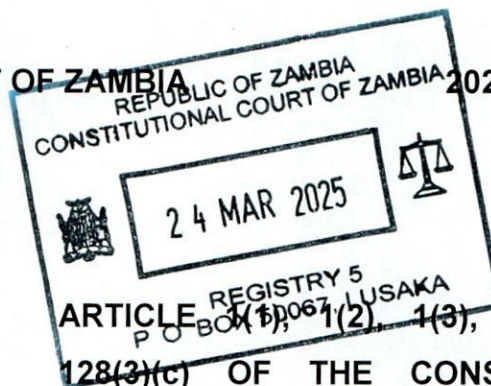
MIZA PHIRI JR.

AND

ISAAC MWANZA

ZAMBIA CIVIL LIBERTIES UNION

THE ATTORNEY GENERAL



ARTICLE 128(1), 128(3)(c) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA

ALLEGED CONTRAVENTION OF ARTICLE 128 (1) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA BY ISAAC MWANZA AND ZAMBIA CIVIL LIBERTIES UNION (ZCLU) IN INSTITUTING THE PROCEEDINGS UNDER CAUSE NUMBER 2024/CCZ/008

THE PETITION FOR LEGALISATION OF HOMOSEXUALITY AND UNNATURAL PRACTICES UNDER CAUSE NO. 2024/CCZ/008

PETITIONER

1<sup>ST</sup> RESPONDENT

2<sup>ND</sup> RESPONDENT

3<sup>RD</sup> RESPONDENT



**CORAM: Munalula, PC, Musaluke and Mulife JJC on 2<sup>nd</sup> December, 2024 and 24<sup>th</sup> March, 2025.**

For the Petitioner:	In - Person
For the 1 <sup>st</sup> Respondent	In - Person
For the 2 <sup>nd</sup> Respondent	Mr. Isaac Mwanza, Executive Director
For the 3 <sup>rd</sup> Respondent	Mr. N. Mwiya, Principal State Advocate

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## **RULING**

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**Musaluke, JC**, delivered the Ruling of the Court.

**Cases referred to:**

1. Michelo Chizombe v Edgar Chagwa Lungu and Others 2023/CCZ/0021 (Ruling)
2. Benjamin Mwelwa v The Attorney General and Others 2020/CCZ/007
3. Godfrey Malembeka (Prisons Care and Counselling Association) v The Attorney General and Another CCZ Selected Judgment No 34 of 2017
4. Benard Shajilwa and 4 Others v The Attorney General 2018/CCZ/004
5. Charles Chihinga v New Future Financial Company Limited 2020/CCZ/003
6. Martin Chilukwa v The Attorney General 2022/CCZ/0030
7. Abel Mulenga and Others v Mabvuto Adan Avuta and Others, The Attorney General (2006) Z.R. 33
8. Wang Ying Zhuang v Youjun Zhunang and 4 Others 2020/CCZ/0015
9. Dickson Ndhovu and 4 Others v Road Development Agency 2022/CCZ/005
10. Aristogerasimos Vangelatos and Another v Metro Investments Limited and Others SCZ, Selected Judgment No. 35 of 2016
11. John Sangwa v The Attorney General 2021/CCZ/0035

12. Bric Back Limited T/A Gamamwe Ranches v Neil Kirkpatrick 2020/CCZ/A002
13. Gervas Chansa v The Attorney General 2019/CCZ/004
14. Bizwayo Newton Nkunika v Lawrence Nyirenda & Another 2019/CCZ/005

**Legislation referred to:**

The Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016

The Constitutional Court Act No. 8 of 2016

The Penal Code Chapter 87 of the Laws of Zambia

The Constitutional Court Rules Statutory Instrument No. 37 of 2016

**1.0 Introduction**

1.1 On 2<sup>nd</sup> December, 2024 when the matter came up for scheduling pursuant to Order IX rule 16 of the Constitutional Court Rules Statutory Instrument No. 37 of 2016 (the CCR), we directed the parties to address us through written submissions on whether or not the petition herein falls within the jurisdiction of this Court.

1.2 This is therefore, a ruling on the issue of whether or not the petition herein falls within the jurisdiction of this Court.

**2.0 Background**

2.1 A background to this ruling is that, on 25<sup>th</sup> November, 2024 Mr. Miza Phiri Jr. (the Petitioner) filed a petition before this Court



pursuant to Articles 1(1), 1(2), 1(3), 1(5), 2(a)(b), 128(1)(b) and (128 (3)(c) of the Constitution of Zambia, Chapter 1 of the laws of Zambia as amended by Act No. 2 of 2016 (the Constitution).

2.2 The Petitioner's petition was triggered by a petition filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein on 31<sup>st</sup> May, 2024 which is yet to be determined before this Court under Cause No. 2024/CCZ/008. In that cause, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are seeking to challenge the constitutionality of section 155 (a) and (c) of the Penal Code Chapter 87 of the Laws of Zambia (the Penal Code) on the basis that the said provision contravenes the Constitution.

2.3 By filing his petition, the Petitioner alleges that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have violated Article 128 of the Constitution by bringing the petition under cause No. 2024/CCZ/008 before the Constitutional Court as opposed to the High Court. He alleges that, the petition by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents under cause No. 2024/CCZ/008 relates to contravention of the Bill of Rights which is outside the jurisdiction of this Court.



2.4 The Petitioner further alleges that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have contravened Articles 128 and 1(5) of the Constitution by moving this Court to interpret an Act of Parliament being the Penal Code which is outside its jurisdiction.

2.5 In light of the above allegations, the Petitioner seeks the following declaratory orders from this Court:

(a) A declaration and Order that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of filing the Petition under Cause No. 2024/CCZ/008 in the Constitutional Court contravenes Article 128 and 28 of the Constitution of Zambia;

(b) A declaration and Order that the proceedings under Cause No. 2024/CCZ/008 are a nullity as the Constitutional Court is lacking the requisite Jurisdiction to entertain them; and

(c) Any other relief that court shall deem fit.

2.6 The petition was accompanied by an affidavit verifying facts sworn by the Petitioner which repeats the contents of the petition.

### 3.0 **Petitioners' submissions**

3.1 In complying with the Court's directive for the parties to file written submissions on whether or not the petition herein falls within the jurisdiction of this Court, the Petitioner filed his submissions on 13<sup>th</sup> December, 2024. In his submissions, he



highlights the law pursuant to which his petition is anchored and cites Article 2 of the Constitution, which gives a right and duty on every person to defend the Constitution and Article 128(3) of the Constitution which allows any person alleging breach of the Constitution to petition the Constitutional Court for redress. He also places reliance on Order IV rule 1 and 2 of the Constitutional Court Rules (CCR) which guides on what should be contained in a petition.

- 3.2 The Petitioner cites the decisions of this Court on the extent of its jurisdiction to entertain actions before it. These cases being: **Michelo Chizombe v Edgar Chagwa Lungu and Others<sup>1</sup>** and **Benjamin Mwelwa v The Attorney General and Others.<sup>2</sup>**
- 3.3 The Petitioner also cites of the cases of **Benjamin Mwelwa v The Attorney General and Others<sup>2</sup>**, **Godfrey Malembeka (Prisons Care and Counselling Association) v The Attorney General and Another<sup>3</sup>** and **Bernard Shajilwa and 4 Others v The Attorney General<sup>4</sup>** where we have held that claims alleging violation of the Bill of Rights as contained in Part III of the Constitution, lie in the High Court and not this Court.



- 3.4 The Petitioner also submits that Articles 8 and 9 of the Constitution on the national values and principles being relied upon by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in cause No. 2024/CCZ/008 are by themselves non-justiciable. He cites the cases of **Charles Chihinga v New Future Financial Company Limited**<sup>5</sup> and **Martin Chilukwa v The Attorney General**<sup>6</sup> as authorities for this submission.
- 3.5 In light of the above authorities, it is the Petitioner's submission that this Court possesses the requisite jurisdiction to entertain his petition on the strength of Articles 1(5), 2 and 128 of the Constitution and that there is no law that explicitly prohibits him from bringing his petition before this Court.
- 3.6 It is the Petitioner's further submission that he could not apply for joinder under cause No. 2024/CCZ/008 as it is not the appropriate avenue through which this petition could have been brought to challenge the constitutionality of the proceedings under cause No. 2024/CCZ/008. He argues that an application for joinder can only be granted where an applicant demonstrates sufficient interest in the subject matter of the suit. For this argument, he places reliance on the Supreme Court decision in



the case of **Abel Mulenga and Others v Mabvuto Adan Avuta and Others and Attorney General**.<sup>7</sup> The Petitioner contends that he is not interested in the subject matter of the suit under cause No. 2024/CCZ/008. Rather, that he is raising alarm on the alleged contravention of the Constitution in the initiation of the proceedings under cause No. 2024/CCZ/008. The Petitioner also submits that the power to join a party to proceedings is discretionary. In buttressing this point, the Petitioner submits that he did in fact make an application on behalf of Heart of Mercy Zambia for leave to join the proceedings under cause No. 2024/CCZ/008. That the application was however, dismissed by the Court on grounds that Heart of Mercy Zambia failed to demonstrate sufficient interest to be joined to those proceedings.

- 3.7 Regarding the ruling of the Court under cause No. 2024/CCZ/008, the Petitioner submits firstly, that the said ruling was not a final determination on the question of jurisdiction as the Court used the phrase "*preliminary assessment*" before making the orders thereunder. Secondly, that the Court made the findings based on the material placed before it by the parties under that cause. That should the Court find that the said ruling



was a final determination on jurisdiction then this petition is justified as the Petitioner will show at trial that the ruling under cause No. 2024/CCZ/008 on determination of its jurisdiction was arrived at *per incuriam*.

3.8 Finally, the Petitioner alternatively submits that as the alleged contravention of the Constitution by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents potentially goes to the root of the adjudicative authority of the Court, the Court should consider consolidating the proceedings under this cause with those under cause No. 2024/CCZ/008 or staying either one.

#### 4.0 **1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions**

4.1 The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their submissions on 20<sup>th</sup> December, 2024. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that the issue of jurisdiction to hear and determine the petition under cause 2024/CCZ/008 was already determined by this Court in its ruling delivered on 29<sup>th</sup> July, 2024. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents therefore, submit that this petition is improperly before Court and its commencement is an abuse of court process through forum



shopping and duplicity of actions as the Petitioner was aware of the ruling under cause No. 2024/CCZ/008.

4.2 Emphasizing the argument that the petition herein is an abuse of court process by the Petitioner, reliance is placed on this Court's decision in the case of **Wang Ying Zhuang v Youjun Zhunang and 4 Others**<sup>8</sup> where this Court frowned upon a litigant commencing a separate action while being fully aware of similar pending matters.

4.3 It is submitted that the Petitioner herein is fully aware of the proceedings under cause No. 2024/CCZ/008 as he had in his capacity as secretary general of Heart of Mercy, made an application to join the petition on 9<sup>th</sup> July, 2024 before commencing the petition. That therefore, his actions amount to an abuse of process.

4.4 The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further submit that the petition herein does not disclose any contravention of the Constitution as Article 1(1) of the Constitution has merely been cited in a blanket manner so as to give the Court the impression that there is an alleged constitutional contravention when in fact not.



4.5 The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further argue that the Petitioner's petition constitutes forum shopping, an act that undermines the integrity of the judicial system. The case of **Dickson Ndhlovu and 4 Others v Road Development Agency**<sup>9</sup> is cited wherein this Court explained forum shopping as connoting a party's tendency to commence a series of actions before different courts in a bid to get a favourable outcome.

4.6 The 1<sup>st</sup> and 2<sup>nd</sup> Respondents pray that the petition herein be dismissed in its entirety as it is vexatious, an abuse of court process, scurrilous and ill-founded. They also pray for costs.

#### 5.0 **3<sup>rd</sup> Respondent's submissions**

5.1 The 3<sup>rd</sup> Respondent filed his submissions on 20<sup>th</sup> December, 2024. The thrust of the 3<sup>rd</sup> Respondent's submissions is that the petition herein does not call upon this Court to determine a constitutional issue, it does not disclose a cause of action and is frivolous.

5.2 It is the 3<sup>rd</sup> Respondent's further submission that the general principle at law on bringing actions before court is that there must be an underlying legal wrong in order to successfully ground a



cause of action. That in constitutional cases in particular, an act complained of must constitute a violation of the Constitution in clear circumstances.

5.3 It is the 3<sup>rd</sup> Respondent's submission therefore, that the petition herein has not met this basic principle of law. That the failure by the Petitioner to disclose how the action complained of is a contravention of the Constitution, is a failure to properly raise a constitutional issue, and the matter cannot therefore, come under the jurisdiction of this Court.

5.4 The 3<sup>rd</sup> Respondent prays that the petition be dismissed.

#### 6.0 **Petitioner's submissions in reply**

6.1 The Petitioner filed his reply to the Respondents' submissions on 21<sup>st</sup> January, 2025.

6.2 In response to the Respondents' assertion that the petition herein does not disclose a cause of action, it is the Petitioner's argument that the petition herein does indeed disclose a cause of action as it alleges that this Court in terms of Article 128 of the Constitution, does not possess the requisite jurisdiction to hear the petition under cause No. 2024/CCZ/008. Relying on the Supreme Court



case of **Aristogerasimos Vangelatos and Another v Metro Investments Limited and Others**<sup>10</sup>, it is the Petitioner's submission that where a court does not possess the requisite jurisdiction to hear a matter and proceeds to hear it regardless, then that matter borders on violation of the Constitution. The Petitioner further contends that Articles 2 and 128 of the Constitution not only allow the Court to handle a matter alleging an actual contravention of the Constitution but also gives this Court jurisdiction to deal with a matter touching on a potential or impending violation of the Constitution.

- 6.3 On the assertion that the petition herein is an abuse of court process and an attempt at re-litigating a settled matter, it is the Petitioner's submission firstly, that he has never been a party to the proceedings under cause No. 2024/CCZ/008. Secondly, that though the Petitioner made an application to join Heart of Mercy Zambia to the proceedings under Cause No. 2024/CCZ/008, the issues raised in the joinder application were different from the issues raised in this petition, thus, the ingredients necessary for a finding that this petition amounts to re-litigation are not present.



- 6.4 The Petitioner also argues that this Court can apply the doctrine of *per incuriam* as regards its ruling in the petition Cause No. 2024/CCZ/008. He believes that it is settled law that a court can depart from its previous decision and that the court can do so even though the doctrine is not expressly pleaded. He argues that the threshold to be met is that the earlier decision was clearly wrong and there is need to apply the doctrine of *per incuriam* in the interest of justice. He argues that in the interest of justice, we should apply this doctrine to this case as he believes that the earlier ruling of this Court under cause No. 2024/CCZ/008 was clearly wrong.
- 6.5 Lastly, reacting to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' prayer for costs in the event of a finding that this Court has no jurisdiction to hear this matter, it is the Petitioner's submission that it has been the custom of this Court not to award costs in constitutional matters or public interest litigation. That even where a matter appears frivolous, it is imperative that the Court investigates the intention of the Petitioner. On the strength of the case of **John Sangwa v The Attorney General**<sup>11</sup>, the Petitioner submits that in the event of the Court holding that it has no jurisdiction to entertain his



petition, no order for costs should be made against him as his petition is neither an abuse of court process, frivolous nor vexatious.

## 7.0 **Determination**

7.1 The Petitioner's prayer is that we dismiss the petition under cause 2024/CCZ/008 as he believes that it contravenes the Constitution.

7.2 We are of the considered view that the Petitioner's petition is ill-grounded and frivolous for the reasons we now give.

7.3 The Constitution under Article 1 (5) provides that a matter relating to the Constitution shall be heard by this Court.

7.4 This Court's mandate to hear and determine matters before it is grounded in Article 128 of the Constitution, the Constitutional Court Act and the Constitutional Court Rules. The Constitution, under Article 128 provides 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.

7.5 Section 8 of the Act repeats the text of Article 128 of the Constitution.

7.6 Relevant to the petition before us is Article 128 (1) (b) of the Constitution which gives this Court the original and final jurisdiction to determine a matter relating to a violation or contravention of the Constitution. Further, subject, to Article 28,



Article 128 (3) (c) of the Constitution gives a right to a person who alleges that an act, omission, measure or decision by a person or an authority contravenes the Constitution, to petition this Court for redress.

- 7.7 The Petitioner claims that he approached this Court by way of the petition so that the petition filed under cause No. 2024/CCZ/008 can be dismissed for violation of the Constitution. He based that allegation on the fact that Article 128 (3) (c) of the Constitution gives him the right to seek redress for the alleged contravention of the Constitution by the Respondents' action to file a petition under cause No. 2024/CCZ/008.
- 7.8 The Petitioner clearly misapprehended the text in Article 128 (3) (c) of the Constitution and misled himself in believing that he could challenge a petition filed in this Court through another petition. We will explain why this is a misapprehension.
- 7.9 The import of Article 128 of the Constitution as regards the Court's original and final jurisdiction is that it only deals with specific constitutional questions that need resolution. In the case of **Bric Back Limited T/A Gamamwe Ranches v Neil Kirkpatrick**<sup>12</sup> we aptly held as follows:



The Constitutional Court of Zambia is a specialized court set up to resolve only constitutional questions. In that sense, it is separate from the general court hierarchy under which matters move from lower courts up to the final court of appeal. This Court exemplifies what the learned author Andrew Harding in *Fundamentals of Constitutional Courts* calls a centralized system as opposed to a diffused system. In the latter, a supreme court has general jurisdiction over civil and criminal matters as well as constitutional issues. In our case, the Constitutional Court exists only for constitutional matters hence it is separate and additional to the Supreme Court which has general jurisdiction. In the Zambia court system, all questions of general nature, including procedural questions, must proceed through the courts of general jurisdiction.

7.10 Bearing in mind the provisions of Articles 1 (5) and 128 of the Constitution and the guidance given in the **Bric Back**<sup>12</sup> case, we reiterate that the jurisdiction of this Court as regards interpretation of the Constitution or a matter relating to the violation or contravention of the Constitution can only be invoked where an application seeks to resolve constitutional questions. What then are constitutional questions?

7.11 The definition of a constitutional question was given in the case of **Gervas Chansa v The Attorney General**<sup>13</sup> in which we held as follows:



**A constitutional question is defined in the blacks' law dictionary as a legal issue resolved by the interpretation of the Constitution rather than the statute.**

7.12 Where a question does not invite the Court to interpret a provision of the Constitution, that question therefore, is not a constitutional question.

7.13 Coming to the case at hand, the Petitioner's petition which he filed in order to stop another petition pending before Court is indeed not a constitutional question which can be heard and determined as envisaged by Articles 1 (5) and 128 of the Constitution.

7.14 The spirit of the Constitution is that, subject to Article 28 of the Constitution when one alleges constitutional breach or seeks interpretation of the Constitution, the Court is obliged to entertain such matter. This is what we guided in the case of **Bizwayo Newton Nkunika v Lawrence Nyirenda & Another**<sup>14</sup> that:

**We note that the Respondents have put up spirited arguments as to why they feel that the Petitioner should be curtailed and not be allowed to proceed and present his arguments on the alleged contravention of the Constitution. Our mandate is that when an allegation of the violation or contravention of the Constitution is presented before Court, the allegation must be**



**heard and determined. As the Petitioner has specifically alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have contravened and continue to contravene Articles 70 (1) (d) and 72 (2) (b) of the Constitution, these allegations ought to be heard and determined by this Court on their merit.**

7.15 It is therefore, a misapprehension for the Petitioner to wish to curtail a petition before Court by alleging constitutional breaches through another petition. That procedure is neither provided for under the Constitution, the Act nor the CCR.

7.16 If a person disagrees or has objections to a petition before Court, the avenue open to that person is to challenge that petition by applying to be added as a party to the proceedings if he satisfies the requirements for joinder and not by commencing another action.

7.17 We reiterate that this Court's mandate subject to Article 28 of the Constitution is that when an allegation of the violation or contravention of the Constitution is presented before Court, the allegation must be heard and determined. In that determination, litigants and potential litigants have to trust the Court process by avoiding heretical means of curtailing that process.



7.18 We therefore, dismiss the Petitioner's petition as there is no procedure that allows a petition to be filed to stop another petition pending determination before Court. In short, the petition does not raise a constitutional question to be resolved by this Court.

7.19 As we conclude, we wish to frown upon the Petitioner's conduct in this matter. The evidence on record discloses that the Petitioner, acting in his capacity as the Secretary General of Heart of Mercy Zambia, a society registered under the Societies Act, did make an application to join the petition under cause No. 2024/CCZ/008. Before the joinder application could be heard, the Petitioner commenced this matter before this Court to challenge the petition under cause No. 2024/CCZ/008. The application for joinder was subsequently dismissed by the Court on grounds that Heart of Zambia failed to demonstrate sufficient interest in the matter.

7.20 We find that this conduct by the Petitioner amounts to an abuse of court process, forum shopping.

7.21 As rightly noted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, this Court has in numerous decisions, frowned upon the practice by litigants of



commencing fresh actions on issues that are already pending before the Courts. In the case of **Wang Ying**<sup>8</sup>, we held as follows:

**The reasons against duplicity or multiplicity of actions are among others, to ensure that the parties are not vexed twice over the same issue and that all issues touching on a particular subject matter are as much as possible finally determined in one action.**

7.22 The Petitioner being an Advocate, ought to know that such conduct is not only unacceptable but also may amount to professional misconduct.

## 8.0 **Conclusion**

8.1 In sum, we find that the petition filed by the Petitioner in this case amounts to an abuse of court process and is ill-founded as no petition can be filed to challenge another petition pending hearing and determination before Court. Consequently, we order that this petition be dismissed forthwith.

8.3 On the authority of section 30 of the Constitutional Court Act, we are inclined to use our discretionary power and award costs against the Petitioner as we view his conduct and his overall

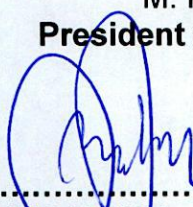


action to be an abuse of court process, frivolous and vexatious.

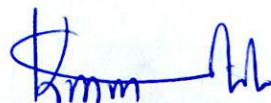
The costs will be taxed in default of agreement.



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



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M. MUSALUKE  
**Constitutional Court Judge**



.....  
K. MULIFE  
**Constitutional Court Judge**