

IN THE CONSTITUTIONAL COURT OF ZAMBIA  
IN THE CONSTITUTIONAL COURT REGISTRY  
HOLDEN AT LUSAKA  
(CONSTITUTIONAL COURT JURISDICTION)

2024/CCZ/0024

IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT,  
NO.2 of 2016

AND

IN THE MATTER OF: ORDER IV RULE OF THE CONSTITUTIONAL COURT RULES

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLE 210 OF THE  
CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO.2  
OF 2016

AND

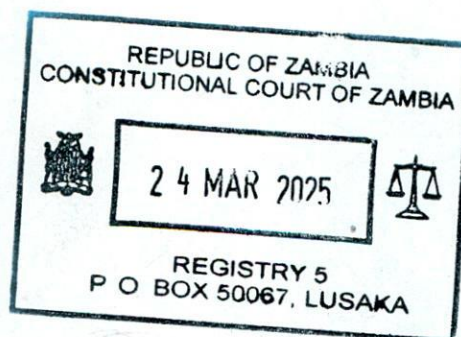
IN THE MATTER OF: THE TRANSACTION INVOLVING MOPANI COPPER MINES  
(MCM) AND INTERNATIONAL RESOURCES HOLDINGS  
(IRH)

BETWEEN:

MILES BWALYA SAMPA

And

ATTORNEY GENERAL



PETITIONER

RESPONDENT

Coram: Mwandenga JC on the 11<sup>th</sup> March 2025 and 24<sup>th</sup> March, 2025

For the Petitioner: Ms. J.L. Sipalo from Messrs. Mosha and Company  
For the Respondent: Mr. M. Muchende SC, Solicitor General with Mr. C. Mulonda, Acting Deputy Chief State Advocate and Mrs. R.C. Mulolani, State Advocate from the Attorney General's Chambers.



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## **RULING**

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### **Cases referred to:**

1. Mutembo Nchito v Attorney General, 2016/CCZ/006
2. Sean Tembo v Attorney General, 2023/CCZ/009
3. Air Canada and Others, Secretary of State for Trade and Another (No.2), Pan American World Airways Inc v British Airports Authority and Another, [1983] 1 ALER 161
4. Simeza Sangwa & Associates v Hotelier Limited and Ody's Work Limited, (SCZ 8 402 of 2012)
5. D.E Nkhuwa v Lusaka Tyre Services Limited, (1977) Z.R 43
6. Nahar Investments Limited v Grindlays Bank International Zambia Limited, (1984) Z.R. 81
7. Mbazima v Tobacco Association of Zambia, (SCZ 8 of 2021)
8. Deltamune (PTY) and 13 Others v Tiger Brands and 2 Others, [2022] ZASCA 15

### **Statutes referred to:**

1. The Constitution of Zambia (Amendment) No.2 of 2016
2. The Constitution Court Rules, Statutory Instrument No.37 of 2016
3. The Access to Information Act, No.24 of 2023

### **1.0 Introduction and background**

- 1.1 The Petitioner, Miles Bwalya Sampa who describes himself as a citizen of Zambia and a duly elected Member of Parliament for Matero Constituency, commenced the Petition in this matter on the 16<sup>th</sup> December, 2024 (the Petition) against the Respondent, the Attorney General of the Republic of Zambia, alleging contravention of Article 210 of the Constitution of Zambia (Amendment) Act No.2 of 2016 (the Constitution). The Petitioner is seeking the following reliefs:



- (a) A declaration that the transaction involving Mopani and IRH contravenes Article 210 of the Constitution of Zambia and is, therefore, unconstitutional. The natural consequence of finding that an act is unconstitutional is that such an act is null and void.
- (b) A declaration that the Respondent, through the Honourable Minister of Mines and Minerals Development, acted in breach of Article 210 of the Constitution by failing to subject the transaction to parliamentary approval.
- (c) An order nullifying the transaction for want of compliance with the constitutional requirement of parliamentary oversight and approval.
- (d) An order directing the Respondent to ensure that any future transactions involving major state assets comply strictly with the constitutional provisions governing such transactions, particularly those requiring approval and public accountability.
- (e) Such further or other reliefs as the Honourable Court may deem just and equitable under the circumstances.

1.2 On the 25<sup>th</sup> February, 2025 during the interlocutory stages of these proceedings, the Petitioner filed an *ex parte* summons for leave to issue a *subpoena duces tecum* and *ad testificandum* against three intended witnesses namely:- Honourable Paul Kabuswe (the Minister of Mines and Minerals Development, Dr. Hapenga Kabeta (Permanent Secretary Ministry of Mines and Minerals Development) and Dr. Joseph Vibetti (Chief Executive Officer, Zambia Consolidated Copper Mines Investment Holdings Limited (the Application). As I did not deem it proper for the Application to be heard *ex parte*, I decided that the Application be heard *inter parte* hence the hearing that took place on the 11<sup>th</sup> March, 2025.



1.3 On the 25<sup>th</sup> February, 2025 the Petitioner also filed an Affidavit in Support of the Application sworn by the Petitioner (the Affidavit in Support) together with a List of Authorities and Skeleton Arguments. On the 5<sup>th</sup> March, 2025 the Respondent filed an Affidavit in Opposition to the Application sworn by one Paul Kabuswe (the Affidavit in Opposition) and a List of Authorities and Skeleton Arguments. On the 10<sup>th</sup> March, 2025 the Petitioner filed an Affidavit in Reply sworn by the Petitioner (the Affidavit In Reply) and a List of Authorities and Skeleton Arguments in Reply.

#### **The Petitioner's case**

1.4 In the Affidavit in Support in the material respects, the Petitioner for ease of reference deposed that:

....

5. That I am advised by my Advocates and verily believe that the same to be true that in order to effectively and justly determine the issues in contention before this Honourable Court, it is imperative that all relevant documentation relating to the sale and transfer of shares from the Zambia Consolidated Copper Mines Investment Holdings Limited (ZCCM-IH) to Delta Mining Limited be placed before this Honourable Court.
6. That in the light of the foregoing, I now humbly make an application before this Honourable Court for an Order to summon the following persons to produce all information and documentation related to the transaction between ZCCM-IH and Delta Mining Limited, a subsidiary of International Respuves Holdings Limited:



- i. The Honourable Minister of Mines and Mineral Development
  - ii. The Permanent Secretary Ministry of Mines and Mineral Development
  - iii. The Chief Executive Officer, Zambia Consolidated Copper Mines Investment Holdings Limited (ZCCM-IH)
- 7. That the documentation and information sought to be produced includes but is not limited to:
  - i. The complete record of the transaction between ZCCM-IH and Delta Mining Limited, including all agreements, memoranda of understanding, correspondence, and any ancillary documents related to the said transaction.
  - ii. Internal Government Reports and Feasibility Studies assessing the impact of the transaction, Minutes of Meetings & Internal Communications between the Ministry of Mines, Ministry of Finance, and ZCCM-IH regarding Mopani Copper Mines. Policy or Strategic Documents related to the Government's decision to dispose of or transfer Mopani Copper Mines shares. And any correspondence with the Ministry of Finance regarding financial implications of the transaction.
  - iii. Share Sale Agreement, Subscription Agreement, or any Transaction Documents executed between ZCCM-IH and International Resources Holdings (IRH); Board Resolutions or Minutes authorizing the transaction; Financial Statements, Evidence of Share Transfer or Change of Ownership Records at the Patents and Companies Registration Agency (PACRA); Loan or Debt Agreements related to the Mopani deal, including any financing agreements with IRH and correspondence with Regulatory Authorities, such as the Securities and Exchange Commission (SEC) and Bank of Zambia, regarding the transaction.
  - iv. All records and documentation pertaining to the alleged "subscription" of shares, including but not limited to communication exchanged, agreements executed, and all related transactional documents from inception.
- 8. That I verily believe that the production of the aforesaid documents and information is crucial for the fair and just determination of the issues in contention before this Honourable



Court, and will greatly assist this Honourable Court in arriving at an informed and just decision....

1.5 At the hearing of the Application Ms. Sipalo on behalf of the Petitioner submitted that she was relying on the Affidavit in Support, the List of Authorities and Skeleton Arguments, the *subpoena* summons, the *praecipe* for *subpoena dues tecum* and *ad testificandum*, all filed on the 25<sup>th</sup> February, 2025. And she submitted that the Petitioner was also relying on Affidavit in Reply to the Affidavit in Opposition and the List of Authorities and Skeleton Arguments filed on the 10<sup>th</sup> March, 2025.

1.6 Ms. Sipalo made brief submissions but the same mirrored the Petitioner's written submissions in support of the Application and the Petitioner's submissions in reply and therefore I shall not rehash the oral submissions.

1.7 In the written submissions it was argued that the Application was anchored on section 13 (1) and (2) of the Constitutional Court Act, No.8 of 2016 (CCA) which provides that:

**(1) The Court may, in any suit or matter in which the Court is exercising original jurisdiction-**

**(a) summon a person to give evidence or produce a document in that person's possession or power;**



(b) examine a person as a witness and require the person to produce any documents in that person's possession or power.

(2) The Court may, at any stage of a suit or matter, exercise the power in subsection (1) on its own motion or on application of a party to the suit or matter.

1.8 Relying on the above legal provisions, it was submitted that the Court was vested with the authority to summon a witness or witnesses to give evidence or produce a document or documents, whether on its own motion or upon application of a party. Hence the Application being made.

1.9 It was submitted that the interest of justice necessitated the calling of all witnesses capable of aiding the Court in resolving the contentious issues at hand. In this regard, it was submitted that the named intended witnesses possess material and relevant information and documents essential to the just determination of the issues in the Petition.

1.10 It was the Petitioner's prayer that leave to issue *subpoenas* to the named intended witnesses be granted.

#### **The Respondent's case**

1.11 At the hearing of the Application Mr. Muchende SC, the Solicitor General of the Republic of Zambia, on behalf of the Respondent



submitted, that the Application had been opposed via what he termed as a dossier in opposition comprising of the Affidavit in Opposition, List of Authorities and Skeleton Arguments all dated 5<sup>th</sup> March, 2025.

1.12 The Solicitor General and Mr. Mulonda made separate oral submissions which by and large mirrored the Respondent's written submissions. I shall therefore, not rehash the oral submissions save to say that Mr. Mulonda also argued the Application was an attempt to fish for documentary evidence from the Respondent and that that was not permissible.

1.13 In the written submissions the Respondent opposed the Application on the ground that it was irregular in form. Relying on the case of **Mutembo Nchito v Attorney General**<sup>1</sup> it was submitted that this Court guided that an application for leave to issue a *subpoena* should be by way of notice or motion when it stated:

In the circumstances of this case where the rules are that the practice and procedure should be that obtaining in the Court of Appeal of England, the rule as stated, above requires that leave must be obtained from the court by motion or notice after which the subpoenas will issue out of the court registry. We are therefore of the firm view that the application by a party to issue subpoenas referred to in Section 13(2) of the Constitutional Court Act is an application for leave to issue the same.

We note that the petitioner did, in the alternative make an oral application for leave to issue the subpoenas. We refuse to grant the application as the application is irregular in that it ought to have been by



way of motion or notice as provided for under Order 9 Rule 20(1) of the Constitutional Court Rules or Order 38 Rule 19(3) of the RSC. (Emphasis supplied by the Respondent)

1.14 It was submitted that in this case, it was not in dispute that the Application was by way of summons as opposed to the mandatory prescribed motion or notice. Therefore, it was submitted that the Application was irregular for having been wrongly commenced and ought to be dismissed.

1.15 It was further submitted that if the Court were to find that the Petitioner's Application was regular (which was denied), the Application was nonetheless flawed as the documents requested for had not been described with specificity. For this argument, inspiration was drawn from a passage in the **Mutembo Nchito**<sup>1</sup> case where the Court stated:

From the above authority, it is clear that a subpoena duces tecum ought to specify the documents that one is required to produce at a trial. The documents sought must be identified with specificity by means of a particular description and not a general description. The documents must either be individually identified by reference to a class of documents or things by which criterion the recipient can know what obligation the court places on them.

1.16 It was submitted that a perusal of paragraph 7 of the Affidavit in Support despite outlining the documents requested for does not



identify with specificity by means of particular description the documents being requested for. It was therefore, submitted that the documents requested for, fall short of the required standard, as they were described in general terms.

1.17 In response to paragraphs 6 and 7 of the Affidavit in Support which depose that the documents required from the named intended witnesses would assist in the determination of the Petition, it was reiterated that the required documents have not been specified to the prescribed standard. However, it was further submitted that in any event it was for the Petitioner to prove his case without the aid of either the Court or the Respondent.

1.18 It was submitted that in proving the Petition, the Petitioner must adduce cogent evidence as elucidated by the Court in the case of **Sean Tembo v Attorney General**<sup>2</sup>. It was submitted that the same principle was stated in the case of **Air Canada and Others, Secretary of State for Trade and Another (No.2), Pan American World Airways Inc v British Airports Authority and Another**<sup>3</sup> wherein Lord Denning MR stated that witnesses must be necessary for the due administration of



justice. In that case Lord Denning MR went on to state that due administration of justice often means that:

...as a matter of justice, the party must prove his case without any help from the other side. He must do it without discovery and without putting him into the box to answer questions.

1.19 It was submitted that the named witnesses sought to be *subpoenaed* were government officials who strictly speaking, according to the Respondent, were the Respondent in this matter. Therefore, it was submitted that the Application should be denied as granting leave to *subpoena* them would amount to aiding the Petitioner.

1.20 It was submitted, roping in arguments in support of the Answer to the Petition, that this Court should exercise caution in the determination of the Petition to forestall the possibility of an obvious injustice that would be visited upon Mopani Copper Mines (Mopani) and International Resources Holdings (IRH) who would not be heard but who would be directly affected by a declaratory order to which they would not have been made parties.

1.21 It was submitted that the inclusion of non-specific, purported Government internal reports and studies in the request for *subpoenas*



means that the Petitioner was fishing and it poses a risk of breaching confidentiality with third parties.

- 1.22 It was the Respondent's prayer that the Application be dismissed with costs to the Respondent.

**The Petitioner's reply**

- 1.23 In his written reply the Petitioner prefaces the same by submitting that the Application is properly before the Court and that procedural objections should not be used to defeat substantive justice. It was submitted that the mode of commencement or initiation of the Application should not override the necessity and relevance of the evidence, particularly in constitutional litigation where the interest of justice must prevail over technical objections.

- 1.24 It was submitted that the summons for leave to issue the *subpoenas* was properly before the Court and that it was made pursuant to section 13 (1) and (2) of the CCA.

- 1.25 The Petitioner quoted Order IX rule 20 of the CCR and Order 38 rule 19(3) of the Rules of the Supreme Court of England (1999) Edition (RSC) before canvassing his arguments.



- 1.26 It was submitted that the significance of Order IX rule 20 of the CCR was to prescribe the procedural framework for instituting applications before the Court. An application for a *subpoena* such as the one in this matter, it was submitted was an interlocutory application contemplated under Order IX rule 20 of the CCR as it was made before a single Judge.
- 1.27 It was submitted that the appropriate procedural form for the Application was by summons as prescribed in Order IX Rule 20 of the CCR which provides for the initiation of interlocutory applications either by summons or by notice of motion. In this regard, it was submitted that the Application was properly before the Court and warranted due consideration.
- 1.28 In responding to the Respondent's reliance on Order 38 rule 19(3) of the RSC the Petitioner submitted that a proper reading of the provision makes it clear that the requirement to obtain leave by motion or notice applies specifically to cases before the Court of Appeal. It was submitted that the language of the provision was explicit and unambiguous and the procedure outlined therein pertained exclusively to appellate proceedings. According to the Petitioner, this



provision does not apply to cases before a court of first instance, such as in the present case before the Court.

1.29 It was submitted that in any event, it was well established that the RSC only applied in Zambia where there existed a procedural gap or *lacuna*. In this case, it was submitted that there was no gap or *lacuna* in the Zambian law requiring supplementation by the RSC viz the issuance of *subpoenas* in a court of first instance. It was thus submitted that the requirement to seek leave via motion or notice was inapplicable to the Application.

1.30 It was submitted that the Application was properly made under section 13 of the CCA and Order IX Rule 20(1) of the CCR which explicitly permits interlocutory applications to be made by summons or notice of motion. Therefore, it was submitted that there was no procedural irregularity in the Application and thus the Respondent's objections were entirely misplaced.

1.31 It was submitted that in the light of the constitutional imperative under Article 118(2)(e) of the Constitution and the well-established jurisprudence emphasizing the primacy of substantive justice over procedural technicalities, the Court should adopt a flexible approach



1.34 when addressing any alleged defects in form. Relying on the cases of **Simeza Sangwa & Associates v Hotelier Limited** and **Ody's Work Limited**<sup>4</sup>, **D.E Nkhuwa v Lusaka Tyre Services Limited**<sup>5</sup>, **Nahar Investments Limited v Grindlays Bank International Zambia Limited**<sup>6</sup> and **Mbazima v Tobacco Association of Zambia**<sup>7</sup> it was submitted that courts have a duty to ensure that matters with triable issues are determined on their merits rather than being dismissed on technical grounds, particularly where no prejudice had been demonstrated.

1.32 In response to the Respondent's submissions that the Petitioner had not identified the requested documents with sufficient specificity in keeping with the **Mutembo Nchito**<sup>1</sup> case, the Petitioner submitted that he had done so, as the documents requested for, were clearly identified, highly relevant and directly linked to the Mopani-IRH transaction.

1.33 In response to the Respondent's submission that the burden of proof lies on the Petitioner in keeping with the case of **Sean Tembo v Attorney General**<sup>2</sup> the Petitioner submitted that the opposing party had an obligation not to withhold evidence pertinent to the case.



1.34 According to the Petitioner, the Respondent as a government official, was bound by constitutional and statutory obligations to ensure transparency in public administration. In this regard, it was submitted that Article 210 of the Constitution, in conjunction with the Access to Information Act No. 24 of 2023 (AIA), upholds the public's right to access state records, particularly in matters involving public resources and assets. Needless however, to point out that the Petitioner did not canvass any arguments anchored on the AIA.

1.35 In response to the Respondent's submissions that producing the requested documents may affect third parties i.e., Mopani and IRH and could breach confidentiality agreements, the Petitioner submitted that confidentiality, in itself was not a valid ground to refuse disclosure in legal proceedings, particularly where public resources and state assets were at stake.

1.36 According to the Petitioner the requested documents were absolutely relevant to the case, as they pertained to:

- i. The legality and transparency of the Mopani-IRH transaction;
- ii. Government decision-making process regarding public resources;
- iii. Financial and contractual obligations tied to the transaction; and



- iv. Potential constitutional violations in the handling of state assets.

1.37 The Petitioner submitted that the requested documents were critical for determining the constitutionality, legality, economic justification of the Mopani-IRH transaction. And according to the Petitioner, without the requested documents the Court would be unable to come up with a fully informed decision on the Petition.

1.38 The Petitioner prayed that:

- i. The Respondent's objections be dismissed;
- ii. Leave to issue *subpoena duces tecum* and *subpoena testificandum* be granted; and
- iii. An order that the Respondent (through the named intended witnesses) produces the requested documents and information, as they were clearly identified, relevant, and critical for the fair and just resolution of the Petition.

1.39 At the hearing, in her oral submissions in reply Ms. Sipalo, submitted that the Application was neither incompetent nor irregular. It was submitted that the Petitioner did not rely on Order 38 Rule 19(3) of the RSC primarily because the CCA as well as the CCR were sufficient.

1.40 It was submitted that paragraph 7 of the Affidavit in Support clearly identified the documents which the Petitioner sought to be *subpoenaed* and that they were all relevant and were directly linked



to the Mopani-IRH transaction. It was submitted that the Application was not a fishing expedition or a waste of the Court's time.

- 1.41 It was submitted that the documents requested for, were necessary for the due administration of justice and disposal of the matter and for the constitutional safeguard of Article 210 of the Constitution.

#### **Determination**

- 1.42 I have carefully and painstakingly considered the summons under section 13 of the CCA, the Affidavit in Support, List of Authorities and Skeleton Arguments thereof, the Respondent's Affidavit in Opposition, List of Authorities and Skeleton Arguments, the Petitioner's Reply and List of Authorities and Skeleton Arguments as well as the oral arguments by both parties. I am grateful to Counsel for the spirited submissions that they made on behalf of their respective clients.

- 1.43 The Petitioner approached me with the Application. The Application was made pursuant to section 13 of the CCA. But for purposes of the Application it must be noted that only subsection (1) and (2) of the provision are relevant. As those provisions have been reproduced in paragraph 1.7, I shall not rehash them. However, I should hasten to mention, that subsection 3 of section 13 of the CCA which provides for



compelling of witnesses summoned under subsections 1 and 2 of section 13 of the CCA is not relevant in the Application.

1.44 A perusal of section 13 of the CCA will reveal that it deals with the discretionary power of the Court to summon witnesses, including for the production of documents in their possession or power, and to compel their attendance in matters where the Court is exercising its original jurisdiction rather than on appeal. This power can be exercised at any stage of proceedings by the Court on its own motion or on application of a party to the proceedings.

1.45 In the main matter before the Court, the Petitioner moved the Court by way of Petition, alleging, as mentioned earlier, contravention of Article 210 of the Constitution. Therefore, and without doubt when hearing and determining the Petition, the Court will be exercising its original jurisdiction.

1.46 It cannot be disputed that the Application has been made during the preliminary stages of the Petition and that it is not decisive of the Petition. It is therefore, an interlocutory application.

1.47 It can also not be disputed that the Petitioner initiated the Application via summons. The parties are however, at odds over the propriety or



otherwise of the Petitioner resorting to a summons to invoke the Court's power under section 13 of the CCA.

1.48 The Respondent by the Affidavit in Opposition calls in aid paragraph 4 thereof where the affiant deposes:

4. That I have been advised by the Attorney General, the Respondent, which advice I believe to be true that the application for leave to issue Subpoena Duces Tecum and Ad Testificandum to witnesses ought to be by way of Notice or Motion.

1.49 The Respondent in his arguments then canvasses the point that it was irregular for the Petitioner to make the Application by summons.

1.50 On the other hand, the Petitioner in the Affidavit in Reply in his paragraph 6 thereof deposes:

6. In response to paragraph 4 of the Respondent's affidavit, I am reliably advised by my advocates, and verily believe the same to be true, that the application herein is properly instituted by way of summons, the same being consistent with established practice when a matter is brought before a single Judge and not in the context of an appeal. As such, the contention that the application ought to have been commenced by Notice of Motion is misconceived.

1.51 The Petitioner in his arguments then canvasses the point that the Application was properly initiated by summons as the same was brought before a single Judge as an interlocutory matter and is not made in an appeal.



1.52 Before I delve further in this Ruling, I think it is imperative that I resolve a jurisdictional issue that has arisen because of the position that the Respondent has taken over the mode of initiating the Application. If the position taken by the Respondent be a proper one, then it would mean that I do not have the jurisdiction to hear and determine the Application on account of a wrong mode of initiation of the Application. The Petitioner has of course, opposed the Respondent's position.

1.53 The Respondent has relied on decision of the Court in the case of **Mutembo Nchito v Attorney General**<sup>1</sup> for the proposition that an application for leave to issue a *subpoena* should be by way of notice or motion and called in aid particularly the portion that, for ease of reference, reads:

In the circumstances of this case where the rules are that practice and procedure should be that obtaining in the Court of Appeal in England, the rule as stated, above requires that leave be obtained from the court by motion or notice after which the subpoenas will issue out of the court registry. We are therefore of the firm view that the application by the party to issue subpoenas referred to section 13(2) of the Constitutional Court Act is an application for leave to issue the same.

We note that the petitioner did, in the alternative, make an oral, application for leave to issue the subpoenas. We refuse to grant the same as the application is irregular in that it ought to have been by way of motion or notice as provided for under Order 9 Rule 20(1) of the



**Constitutional Court Rules or Order 38 Rule 19(3) of the RSC. (Emphasis supplied by the Court)**

1.54 The Petitioner has on the other hand, relied *inter alia* on Order IX rule 20(1) of the CCR as prescribing the procedural framework for instituting interlocutory applications before the Court and therefore, according to the Petitioner there was no default in the procedure to warrant the invocation of Order 38 rule 19(3) of the RSC.

1.55 In my view the starting point should be section 13 of the CCA. A perusal of the provision will show that it does not provide for the procedure to be followed when a party wants the Court to invoke its power of summoning and compelling attendance of witnesses. However, the practice and procedure to be followed in matters before the Court is provided for in the CCR and in case of default, in the RSC. See Order 1 of the CCR.

1.56 The Petitioner relied on Order IX rule 20(1) of the CCR which provides that:

**An interlocutory application under the Act shall be by summons or notice of motion, as the case may be. (Emphasis supplied by the Petitioner)**



1.57 The Petitioner then posited that an application for a *subpoena* falls within the scope of interlocutory applications contemplated under Order IX rule 20(1) of the CCR.

1.58 I am of the considered view that the Petitioner is on firm ground. The Application relates to an interlocutory application as mentioned in paragraph 1.46. In my considered view an application for the Court to invoke its power under section 13 of the CCA should, in keeping with Order IX rule 20(1) of the CCR, be by summons or notice of motion. This is against the backdrop that the application is an interlocutory one.

1.59 The Application, as has already been noted, was made by summons and therefore I find and hold that it was properly made.

1.60 In coming to the finding and holding in paragraph 1.59, I am not oblivious of the position espoused by the Respondent that Order 38 rule 19(3) of the RSC applies by reasons given in the **Mutembo Nchito**<sup>1</sup> case. My quick and brief response is that the Respondent in so proceeding, appears to have elected to cherry-pick the aspect in that case that, understandably so, is favourable to him. Had the Respondent properly read the excerpt which he quoted from the



**Mutembo Nchito**<sup>1</sup> case he would come to the realisation that, in fact the Court in another breath also said that it refused to grant the oral application in that case as “...[t]he application is irregular in that it ought to have been by way of motion or notice as provided for under Order 9 Rule 20(1) of the Constitutional Court Rules or Order 38 Rule(3) of the RSC”.

- 1.61 From the excerpt in paragraph 1.60 it is palpably clear that proceeding under Order IX rule 20(1) of the CCR was and is recognised as an alternative route for making an application under section 13 of the CCA. For ease of reference Order XI rule 20(1) of the CCR has been reproduced, in paragraph 1.56 above.
- 1.62 With the foregoing matters in mind, I come, to the ineluctable conclusion, that the Application being an interlocutory one was indeed properly initiated by summons. Therefore, the Respondent’s objection viz the initiation of the Application has no merit.
- 1.63 I shall now proceed to deal with the “*main application*” i.e., the application characterised as being for leave to issue *subpoenas* to the named intended witnesses.



1.64 Despite the fact that the Application was characterized as an application for leave to issue *subpoenas* directed at named intended witnesses I am of the considered view, that in fact the Application was made according paragraph 6 of the Affidavit in Support “...for an Order to summon” named intended witnesses to bring to Court “all information and documentation related to the transaction between ZCCM-IH and Delta Mining Limited...” Paragraph 7 of the Affidavit in Support also purportedly specifies the documentation and information that was or is sought to be produced in the Court. In my view therefore, the Application is made pursuant to section 13 of the CCA for an order to summon the named intended witnesses to bring the purported information and documentation. Its mischaracterisation as an application for leave to issue *subpoenas* is neither here nor there and is therefore not fatal.

1.65 A perusal of section 13 of the CCA will show that it does not elaborate on the factors to be taken into consideration by the Court when dealing with an application for an order summoning and/or compelling attendance of a witness or the witnesses under that provision.



1.66 In my considered view section 13 of the CCA should only be resorted to, if and only if a would-be witness or would-be witnesses is or are reluctant or do not want to attend court voluntarily (for whatever reason(s)) to testify or to produce documents on behalf of a party to proceedings. This provision is available to parties to proceedings before the Court and the Court itself. It therefore provides a method though which the Court can summon and/or compel attendance of a witness or witnesses in a matter or suit before the Court. In the event that a party is desirous of taking advantage of this provision at the bare minimum the applicant under section 13 of the CCA must demonstrate, but not limited to the following:

- i. That the intended witness or witnesses has or have been approached on the need for him or her or them to attend Court and testify and/or produce certain documents and has or have refused or is not or are not willing to do so voluntarily;
- ii. That the evidence sought to be brought by the would-be witness or witnesses is relevant to the facts in issue or a collateral issue in the underlying action;
- iii. That the application is necessary as the evidence cannot be obtained other than through a summons or order of the court;
- iv. That the scope of the information or documents is not too vague or overly broad and/or must be specific;
- v. That the summons does not amount to a fishing expedition; and/or



- vi. That the information or documents required are not confidential or private.

1.67 The Petitioner sought to justify, why he applied for the order under section 13 of the CCA on the ground that the documents and information were crucial for the fair and just determination of the issues in contention before the Court in the Petition and that they would greatly assist the Court in arriving at an informed and just position. See paragraph 8 of the Affidavit in Support.

1.68 The Respondent in opposing the Application *inter alia* was of the view that the Petitioner did not specify by means of particular description the documents requested for and that before commencing the Petition, the Petitioner ought to have had the necessary evidence and the Petitioner should not be aided by either the Court or the Respondent in proving his case. See paragraphs 5,6 and 7 of the Affidavit in Opposition.

1.69 In my view the crux of the matter, lies in what the purpose is for the Petitioner coming to Court to seek an order for the summons under section 13 of the CCA. From the Affidavit in Support, it is clear that the Petitioner wants the Court to assist him garner some more evidence



in support of his case. I say so because on Court's record, I note that on the 4<sup>th</sup> March, 2025, the Petitioner in keeping with the orders for directions issued by the Court filed the Record of Proceedings. The Record of Proceedings does not have a lot of evidence, as will be seen from the paragraphs following below.

1.70 In the Record of Proceedings, I note that at pages 5-17 thereof, is the Petitioner's Affidavit in Support. The Affidavit in Support only has one exhibit marked "MBS1" which is the Ministerial Statement of the Minister of Mines and Minerals Development as recorded in the Hansard dated 22<sup>nd</sup> November, 2024. The Affidavit in Support has no other exhibit and there is no indication in it, that the Petitioner is likely to rely on other documentation and/or information at the hearing of the Petition.

1.71 A perusal of the Record of Proceedings will also show that the Petitioner's Affidavit in Reply to the opposing Affidavit appears at pages 47-57 thereof. The Affidavit in Reply also only has one exhibit marked "MBS1" which is a printout from the Patents and Companies Registration Agency (PACRA) which outlines the shareholding structure of ZCCM-IH shares. The Affidavit in Reply has no other



exhibit and there is no indication in it, that the Petitioner is likely to rely on other documentation and/or information at the hearing of the Petition.

1.72 A perusal of the Record of Proceedings will also show that the Petitioner's Witness Statement appears at pages 58-61 thereof. It therefore, seems to me that before the Application was made, the Petitioner intended to be the sole witness on his part in the Petition. Needless to point out that in the Witness Statement there is no express indication or otherwise that the Petitioner was intent on relying on other documents and/or information other than the Ministerial Statement dated 22<sup>nd</sup> November, 2024.

1.73 A perusal of the Record of Proceedings will also show that the Petitioner's Bundle of Documents appears at pages 62-77 thereof. The Bundle of Documents contains only two documents namely:- the Ministerial Statement dated 22<sup>nd</sup> November, 2024 referred to in paragraph 1.72 above, at pages 63-70 of the Record of Proceedings and an extract article by IRH – Mopani Copper Mines: Key Highlights of IRH'S Transformational operations at pages 71-77 of the Record of Proceedings.



1.74 From the matters I have dealt with in paragraphs 1.70 to 1.73 above, it is palpably clear to me that at the time of commencing the Petition, the mentioned pieces of evidence were the only ones that the Petitioner was intent on adducing before the Court. But perhaps as an afterthought, the Petitioner has now deemed it fit and proper that he should make the Application under section 13 of the CCA. Thus, it seems to me, that the Petitioner has embarked on a fishing expedition for more evidence to bolster his case. (In so saying, as a single Judge I by no means do not voice any opinion on the weight or otherwise of the Petitioner's evidence thus far. That assessment lies within the preserve of the full Court during and/or after the hearing of the Petition.) And in this regard, the Petitioner by the Application has therefore, invited the Court to aid him on this fishing expedition. I decline the invitation for the reasons I articulate hereunder.

1.75 I have read the Affidavit in Support as well as the Affidavit in Reply however, I have not seen any paragraph that shows efforts (if any) that the Petitioner deployed to contact the named intended witnesses with a view of asking them to come to court and testify on his behalf and/or to bring documents to Court. In the least the Petitioner ought to have



attempted (as part of marshalling evidence for the Petition or in the preparation for the hearing of the Petition) to contact the witnesses and to ask them to come to Court to testify and/or bring documents voluntarily and upon their refusal to do so, then and only then should he have come to Court under section 13 of the CCA. The Petitioner's failure in this regard was and is fatal to the Application as the Application was premature.

- 1.76 I have read paragraph 6 of the Affidavit in Support and I note that the named intended witnesses have been targeted so that they can *"...produce all information and documentation related to the transaction between ZCCM-IH and Delta Mining Limited..."* In my view this is too broad and is not specific as what information and documentation is required of each of the named intended witnesses. The named intended witnesses are supposed to be specifically assigned the information and documentation that they are required to come and produce in Court. This would enable them to know exactly what information and documentation they will be required to produce in Court. On this score, failure to specifically assign the



required information and documentation to the individual named intended witnesses is fatal to the Application.

1.77 I am alive to the fact that in paragraph 7 of the Affidavit in Support the affiant thereof purportedly specifies the documentation and information to be produced as including but "*not limited to*" the documents listed in sub-paragraphs (i), (ii), (iii), and (iv) thereof. In my considered view the use of the phrase "*not limited to*" in paragraph 7 of the Affidavit in Support is problematic in the sense that it connotes vagueness. Vagueness is fatal to an application under section 13 of the CCA. Documentation and Information sought to be produced in terms of section 13 of the CCA should be specifically and properly identified.

1.78 Of course, in paragraph 7 of the Affidavit in Support, the affiant has purportedly set out the documentation and information sought to be produced by the named intended witnesses but I am of the opinion (with matters dealt with in paragraph 1.77 in mind) that the same have been merely too broadly set out. In my view the documentation and information sought under section 13 of the CCA must be specifically set out so that the intended witness or witnesses should be able to know exactly what he or she is expected to produce. As drafted



paragraph 7 of the Affidavit in Support lacks specificity as to the required documentation and information. Paragraph 7 of the Affidavit in Support has deliberately been reproduced in full at paragraph 1.4 above so that its vagueness and lack of specificity can be appreciated and noted by all and sundry. The extent of the specificity of the required documentation and/or information was spelt out by the Court in the **Mutembo Nchito**<sup>1</sup> case when it stated:

....The documents sought must be identified with specificity by means of a particular description and not a general description. The documents must either be individually identified by reference to a class of documents or things by which criterion the recipient can know what obligation the court places on them.

In my view on the material before me, the Application does not meet the specificity test. The lack of specificity of the required documentation and information is fatal to the Application.

1.79 Lastly but not the least I need to consider whether the documents and information to be produced by the named intended witnesses are relevant to the issues in controversy between the parties to the Petition. As already noted the Petitioner approached the Court alleging contravention of Article 210 of the Constitution. Without delving into the merits or otherwise of the Petition (which I cannot at



this stage of the proceedings delve into as a single Judge) Article 210 of the Constitution provides that:

- (1) A state organ, State Institution and other public office shall procure goods or services, in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, as prescribed.
- (2) A major State asset shall be sold, transferred or otherwise disposed of , as prescribed, subject to the approval of the National Assembly signified by a vote of at least two-thirds of the Members of Parliament.
- (3) For the purposes of this Article, "major State asset" includes a parastatal and equity held by the Government, as prescribed.  
(Emphasis supplied)

1.80 Taking into consideration the reliefs sought in the Petition as reproduced in paragraph 1.1 above, it seems to me, that the crux of the matter in the Petition, is whether the requisite approval under Article 210 of the Constitution had been obtained for the Mopani-IRH transaction. It also seems to me, that the issue in the Petition is essentially a narrow one and therefore the Petitioner ought to have provided justification as to how and why the multifarious documentation and information set in paragraph 7 of the Affidavit in Support are relevant to the crux of the Petition. On the material before me the Petitioner has however, not done so. Paragraph 7 of the Affidavit in Support is merely but an indication of an assemblage of documentation and information targeted by the Petitioner in the



Application with no hint as to the relevance or their nexus to the crux of the Petition. In this regard it is opportune that I take a leaf from a South African Supreme Court of Appeal case of **Deltamune (PTY) Limited and 13 Others v Tiger Brands Limited and 2 Others**<sup>8</sup> where it was aptly stated that:

...[t]hird parties may be subpoenaed to attend court and produce documents. Third parties ought not be required to do so unless its absolutely necessary and there is some certainty that such documents are relevant to the issues in the underlying action. (Emphasis supplied)

I am alive to the fact that the case I have referred to is merely but persuasive, however I am of the opinion that the principles enunciated in the excerpt represent good law even in this jurisdiction. I adopt the same accordingly and I summon the same in aid of my position on the issue of relevance or otherwise of the documentation and information sought in the Application.

1.81 On the material before me, I am not satisfied that the documentation and information sought to be produced by the named intended witnesses are relevant to the crux of the Petition. In this regard therefore, the Application does not meet the relevance test.


1.82 Further I am alive to the fact that the Respondent brought arguments concerning or touching on the confidentiality or third-party interests



which of course, were opposed by the Petitioner. I resist the temptation to delve into those issues because at this stage of the proceedings I have not had an opportunity to look at the documentation and information in question to see how the confidentiality and third-party interests come into play in the Application and/or how they will come into play in the Petition.

## 2.0 Conclusion

All I all I am of the considered view that the Application for a summons under section 13 of the CCA has no merit and is therefore dismissed. No order for costs is made.

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