

IN THE CONSTITUTIONAL COURT OF ZAMBIA

2024/CCZ/0014

AT THE CONSTITUTIONAL COURT REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 56 (3), 56(5) AND 56(7) OF THE CONSTITUTION OF ZAMBIA 1996 AND ARTICLE 180(4) AND 180(7) OF THE CONSTITUTION OF ZAMBIA ACT NO. 2 OF 2016

IN THE MATTER OF: ARTICLES 1(4) OF THE CONSTITUTION OF ZAMBIA 1996 AND 1(2) AND 1(3) OF THE CONSTITUTION OF ZAMBIA ACT NO. 2 OF 2016

AND

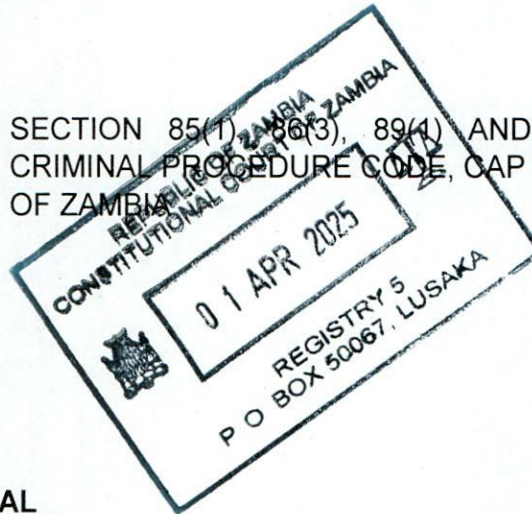
IN THE MATTER OF: SECTION 85(1), 86(3), 89(1) AND 90(5) OF THE CRIMINAL PROCEDURE CODE, CAP 88 OF THE LAWS OF ZAMBIA

BETWEEN:

RICHARD SAKALA

AND

THE ATTORNEY GENERAL



PETITIONER

RESPONDENT

CORAM: SHILIMI - DPC, CHISUNKA, MWANDENGA, KAWIMBE

AND MULIFE, JJC HELD ON 11TH FEBRUARY, 2025 AND 1ST APRIL, 2025.

FOR THE PETITIONER: Mr. L. Zulu, Ms. Pio-Makala and Mr. A. Chuni of Messrs Equitas Legal Practitioners.

Mr. J. Chirwa and Mr. C. Mwenge of Messrs Joseph Chirwa & Company.

FOR THE RESPONDENT: Mr. K. Chipulu, Senior State Advocate; Mrs. M.N.

Mulusa, Senior State Advocate and Mr. M.N. Chinyonga, State Advocate – Attorney General's Chambers.

MAJORITY RULING

Mulife JC, delivered the majority decision of the Court.

Cases referred to:

1. Road Transport and Safety Agency v First National Bank Limited & Another, Appeal No. 127 of 2016.
2. Mwila v BP Zambia PLC 9HK 85 of 2008 [2013] ZHMC 17.
3. John Atelu Omilia & Another v Attorney General & 4 Others [2017] Eklr.
4. Marwa v National Police Service Commission & 3 Others (Constitutional Petition E195 of 2022) [2024] KEEL RC 2292 (KLR).
5. James Kanyita Nderitu v A.G. and Another [2019] KECA 1006 (KLR).
6. United States v Barnes, 222 U.S. 53.
7. Monica Wangu Wamwere & 5 Others v The Attorney General, Petition No. 26 of 2019.
8. Tilokchand Motichand & Ors vs H.B. Munshi & Anr AIR 1970 Supreme Court 898.
9. Mohlomi v Minister of Defence [1996] ZACC 20.
10. A v Hoare [2008] 1AC 844

Legislation referred to

The Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016.

British Acts Extension Act, Chapter 10 of the Laws of Zambia.

Limitation Act, 1939 (UK).

Constitutional Court Rules, Statutory Instrument No. 37 of 2016.

Rules of the Supreme Court of England, 1965 (White Book), 1999 Edition.

Introduction

- [1] This is the majority Ruling on the Respondent's Notice of Motion to determine matter on a point of law (Notice of Motion). The Notice of Motion was filed on 1st November, 2024. It is anchored on Order 14A of the Rules of the Supreme Court of England, 1965 (White Book), 1999 Edition. It is accompanied by an affidavit in support and skeleton arguments.

Background

- [2] Events leading to the Notice of Motion are as follows: on 31st May, 2024, the Petitioner filed a petition in this Court, against the Respondent. The petition was instituted against the Respondent pursuant to section 12 of the State Proceedings Act, Chapter 71 of the Laws of Zambia which provides that civil proceedings by or against the State shall be instituted by or against the Attorney General.
- [3] In the petition, the Petitioner alleges that during his tenure of office, the former late President of the Republic of Zambia, Dr. Patrick Mwanawasa, SC (the late President), breached Article 1(4) and Article 56(3)(5) and (7) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 18 of 1996 (Act No. 18 of 1996).

- [4] That this is because the late President had interfered with the decision of the Director of Public Prosecution (DPP) relating to the prosecution of criminal charges against the petitioner.
- [5] In a nutshell and relevant to the Notice of Motion, the Petitioner claimed that on 17th April, 2002, he was arraigned by the Task Force on Corruption, a body that was established under the Anti-Corruption Commission (ACC), on several counts of the criminal offence of abuse of authority pursuant to the Anti-Corruption Commission Act No. 42 of 1996.
- [6] The offences were to be prosecuted by a private prosecutor, Mr. Mutembo Nchito, before the subordinate court at Lusaka. That in due course, pursuant to the powers bestowed by Article 56 of Act No. 18 of 1996, the DPP directed Mr. Mutembo Nchito to withdraw from prosecuting the criminal charges against the petitioner. The directive was however overruled by the late President through a letter dated 16th December, 2003 addressed to the Executive Chairman of the Task Force on Corruption. The letter is marked exhibit 'RLS5', in the affidavit in support of the petition. It reads as follows:

RICHARD SAKALA'S CASE

I thank you for your letter dated 13th December, 2003. In fact I spoke to Mr. Mutembo Nchito this morning when I learnt that the Director

of Public Prosecutions had directed him to withdraw from the Sakala's case. I am glad that Mutembo accepted my request and I believe that as I dictate this letter he is cross-examining.

Yours sincerely,

Levy P. Mwanawasa, SC,

PRESIDENT OF THE REPUBLIC OF ZAMBIA.

- [7] That on the basis of exhibit 'RLS5' quoted above, Mr. Mutembo Nchito proceeded to prosecute the Petitioner on the stated and additional criminal charges which he introduced by way of amendment to the charge sheet.
- [8] At the conclusion of trial and as per the requisite judgment dated 5th March, 2004 marked exhibit 'RLS 77-154' in the affidavit in support of the petition, the Petitioner was convicted on all the counts. Consequently, he was sentenced to a cumulative sentence of eleven years imprisonment with hard labour of which he served three and half years.
- [9] The petitioner alleged that by overriding the DPP's directive for Mr. Mutembo Nchito to withdraw from prosecuting the cases, the late President violated Article 56(3)(5) and (7) of Act No. 18 of 1996 and now Article 180(4) and (7) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution). That this is because the stated provisions guarantee

the DPP, operational independence over the conduct of criminal prosecutions.

[10] That consequently, the late President further violated Article 1(4) of Act No. 18 of 1996 and now Article 1(2) and (3) of the Constitution which obligates the President to respect the Constitution.

[11] Arising from the foregoing alleged breaches, the petitioner is seeking the following remedies:

- I. **An order that the actions of the Republican President to override the decision of the Director of Public Prosecutions to direct the withdrawal of the Private Prosecutor for the Task Force on Corruption Mr. Mutembo Nchito from prosecuting the criminal case against Petitioner by reinstating the said Mr. Mutembo Nchito to the criminal case against the Petitioner is illegal for violating the express provisions of Article 56(3), 56(5) and 56(7) of the Constitution of Zambia 1996 and now Article 180(4) and 180(7) of the Constitution of Zambia Act No. 2 of 2016 which repose this power exclusively to the Director of Public Prosecutions to the exclusion of any person or authority, including the Republican President.**
- II. **An order that the Republican President, in furtherance of the principle of rule of law, despite being the Head of the Executive and State, is under an obligation to respect all Constitutional provisions, including those granting the Director of Prosecutions exclusive and unquestionable with the provisions of Articles 1(4) of the Constitution of Zambia, 1996 and 1(2) and 1(3) of the Constitution of Zambia Act No. 2 of 2016. [sic]**
- III. **An order that criminal prosecution of the Petitioner and subsequent conviction by the Subordinate Court Magistrate F.**

Hamaundu on 5th March, 2004 and any ensuing decisions on appeal based on the said proceedings was illegal and all decisions made thereunder including decisions on appeal are null and void ab initio for having being [sic]tainted by the illegalities committed by the Republican President in respect of the criminal proceedings against the Petitioner and failures by the Private Prosecutor to observe the mandatory provisions requiring him to act in line with the instructions of the Director Public Prosecutions including to withdraw from the prosecution and mandatory requirements of the Criminal Procedure Code Act, Cap 88.

IV. Consequential damages for the period of detention before and after conviction found to be void ab initio, a period of five years less remission, amounting to the sum US\$5 million.

V. Any other Relief the Court may deem fit, and costs.

[12] The respondent opposes the petition and has to this effect filed an answer, affidavit verifying the answer and skeleton arguments. Relevant to this Ruling, the respondent filed the Notice of Motion which seeks to dismiss the petition.

[13] The Notice of Motion poses the following questions for determination by this Court:

(i) whether the claim herein is not statute barred as per the Limitations Act, 1939. And;

(ii) If the said question be answered that the claim herein is statute barred, then the matter be dismissed forthwith with costs to the respondent.

- [14] Particulars verifying the Notice of Motion are outlined in the affidavit in support sworn by Friday Tembo (the deponent), in his capacity as Assistant Director in the ACC.
- [15] The deponent avers that in as far as the petitioner is seeking consequential damages for the alleged breach of provisions of the Constitution, the petition is a species of an action founded on a tort.
- [16] That according to section 2 of the Limitation Act, 1939 of the United Kingdom (Limitation Act, 1939), actions founded on a tort must be commenced within a period of six years from the date the cause of action accrued. That in the present case, the cause of action accrued in the year 2009 when the Petitioner was released from prison after serving the sentence. Thus, having been filed on 4th September, 2024, the petition is outside the six years' time frame and accordingly statute barred.
- [17] In his skeleton arguments, the Respondent submitted that Order 14A/1/2 of the White Book empowers this Court to entertain the Notice of Motion. Further, that it is legally permissible for a party who has suffered injury as a result of breach of a statutory duty by another person, to institute an action in tort. In support of this proposition, we were referred to a statement by Neil Foster in his book entitled 'The Sydney Law Review'. The statement was quoted

with approval by the Supreme Court in the case of **Road Transport and Safety Agency v First National Bank Limited & Another**¹

thus:

The tort action, for Breach of Statutory Duty provides an intersection between the goals of private law and 'public' goals as determined by legislature...But what is meant when we say that someone has a 'right' to enforce a statutory duty against another person? Clearly not every statute imposes obligations that are intended to be enforced by private individuals. Given the vast expansion of legislation emanating from parliaments in recent years, there clearly needs to be some guiding principles to determine when it is appropriate to allow a personal civil action based on breach of a statutory right. These principles have been set out for many years in the elements of the specific tort breach of statutory duty. Chapter 50 of the Second Statute of West Minister in 1285 sets out an early basis for a civil action based on statutory breach. But perhaps the modern history of the action can be traced to Action upon Statute (F)' in Cornyn's Digest, an 18th century source for the availability of an action by an individual who suffers damages caused by the breach of a statute:

That in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantages or for the recompense of a wrong done to him contrary to the said law.

[18] That however, the right to commence the action is subject to the time-limit imposed by the Limitation Act, 1939 particularly section 2 which states as follows:

(1) the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say – (a) actions founded ...on tort...

[19] That applied to the present case, the Petitioner's right to commence the subject action accrued in 2009 after he served his prison sentence but expired in the year 2015. Citing the High Court case of **Mwila v BP Zambia PLC**², the respondent submitted that the petitioner sat on his rights by omitting to commence the action within the stated timeframe stipulated by the Limitation Act, 1939.

[20] Based on the foregoing, the Respondent urged us to dismiss the petition with costs.

The Petitioner's Response

[21] The Petitioner opposes the Notice of Motion. In doing so, he filed an affidavit in opposition accompanied by a list of authorities and skeleton arguments, on 16th September, 2024.

[22] In his affidavit in opposition, the petitioner avers that contrary to the Respondent's assertion, the petition is not founded on a tort of breach of a statutory duty but on a violation of constitutional provisions. That the Constitution being a supreme law, actions founded on it cannot be constrained by restrictions imposed by inferior pieces of legislation such as the Limitation Act, 1939. That this is especially so considering that the Constitution is silent on the

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timeframe within which a constitutional action should be commenced. Further, the Limitation Act, 1939 does not indicate that it extends to constitutional actions.

[23] That to use time-limits as a basis of justifying an authority's violation of his or her duty to respect the Constitution, is a violation of national values and principles enshrined in the very Constitution.

[24] In his list of authorities and skeleton arguments, the Petitioner essentially repeated his averments above. For this reason, they shall not be recited except to state that we were urged to dismiss the Notice of Motion with costs.

The Respondent's Reply

[25] On 15th November, 2024, the Respondent filed an affidavit in reply to the affidavit in opposition to the Notice of Motion. The affidavit was accompanied by a list of authorities and skeleton arguments which are fundamentally a repetition of the averments and arguments in support of the Notice of Motion except to add that having arisen from alleged constitutional breaches, the tort in issue is referred to as a constitutional tort. That a constitutional tort is within the scope of breach of a statutory duty and the time-limits governing tortious actions. Further, that the Petitioner has not demonstrated how the Limitation Act, 1939 contradicts the

Constitution or exempts the Constitution from its applicability. That to the contrary, Article 7(e) of the Constitution extends the Limitation Act, 1939 to Zambia.

[26] On the definition and nature of a constitutional tort, the Respondent referred us to the Kenyan case of **John Atelu Omilia & Another v Attorney General & 4 Others**³ where it was held as follows:

A “constitutional tort” refers to a private civil suit brought to redress a constitutional violation. Constitutional torts are violation of one’s constitutional rights by a government servant. “Constitutional tort” actions are an avenue through which individuals can directly appeal to the Constitution as a source of right to remedy government-inflicted injury. This tort of access is a recent phenomenon. Before the twentieth century, the Constitution primarily served a structural function, with litigation focused on the limits of government power. Suits seeking to hold government liable for individual injuries were brought in state courts pursuant to the common law. It was not until the U.S Supreme Court decisions in *Monroe vs. Pape* and *Bivens vs. Six Unknown Named Agents of Federal Bureau of Narcotics* that individuals began arguing that the Constitution entitled them to damages for wrongful injury.

“Constitutional tort” actions compensate and deter constitutional rights violations. That is, remedying an individual’s injury with a damage award which enforces the Constitution and sets adequate monetary disincentives to unconstitutional action. “Constitutional tort” actions are not only about rights protecting individuals from certain forms of injuries but also about norms that regulate government action; a court determines both that the plaintiff has a right rooted in the law and that a defendant has a correlative duty

to the plaintiff to avoid violating that right. Thus, a protective right in a sense imposes a correlative duty on the government.

[27] Further citing the Kenyan cases of **Marwa v National Police Service Commission & 3 Others**⁴ and **James Kanyita Nderitu v A.G. and Another**⁵, the Respondent maintained that constitutional actions are amenable to time-limits.

[28] In the case of **Marwa v National Police Service Commission & 3 Others**⁴, we were referred to the following passage at paragraph 30 of page 5:

I find it imperative to state where constitutional litigation is initiated long after the cause of action arose, the Court is faced with the task of interrogating the controversy, may strike out the petition, on the ground that the delay in initiating the matter was inexplicably and inordinately long, and that the justice and circumstances of the case demand the striking out.

[29] In the case of **James Kanyita Nderitu v A.G. and Another**⁵, we were referred to the following holding at paragraph 45 of page 9:

the court in considering whether or not to grant relief under section 84 of the constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time.

[30] The Respondent reiterated that the petition is statute barred and should, on that basis, be dismissed with costs.

The Hearing

[31] At the hearing on 12th February, 2025, counsel for both parties informed the Court that they would rely on their respective documents on record. They also made oral submissions which were essentially a recital of the same.

[32] Of relevance to the ruling, Mr. Chirwa, on behalf of the Petitioner, additionally submitted that matters such as the subject petition, alleging violation of the Constitution, should not be disposed off on a point of law as envisaged by the Notice of Motion. And, that having not been expressly mentioned, the legislature intended to exclude constitutional actions from the ambit of the Limitation Act, 1939. That this is in line with the maxim *expressio unius est exclusion alterius*. In support of this, counsel cited the case of **United States v Barnes**⁶.

[33] Further on behalf of the Petitioner, Mr. Zulu highlighted that Article 128 of the Constitution does not place time-limits within which a person alleging a constitutional breach should approach this Court.

[34] In reply and on behalf of the Respondent, Mr. Chipulu submitted that Article 128 of the Constitution does not apply to the subject petition

because it was enacted after events that triggered the petition. On the other hand, Mr. Chinyonga, submitted that delay by the Petitioner in commencing the petition has an inherent negative effect on the Respondent. That therefore, timeframe is a relevant consideration in this matter.

Determination.

[35] We have considered the Notice of Motion, the parties' respective affidavits, skeleton arguments and oral submissions. The Notice of Motion is beseeching us to dispose off the petition pursuant to Order 14A of the White Book to which our jurisdiction is endeared by Order 1, rule 1 of the Constitutional Court Rules, 2016, Statutory Instrument No. 37 of 2016.

[36] Suffice it to state at the outset, that the Notice of Motion is properly before us. This is because Order 14A of the White Book empowers us to dispose of a matter on a question of law, without the necessity of a full trial.

[37] Quoting only relevant portions, Order 14A of the White Book provides as follows:

1.(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –

(a) Such question is suitable for determination without a full trial of the action, and

(b) Such determination, will finally determine (subject only to any possible appeal) the entire cause or matter on any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just...

2. An application under rule 1 may be made by summons or motion or ... may be made orally in the course of any interlocutory application to the Court.

[38] We accordingly dismiss Mr. Chirwa's suggestion that constitutional matters cannot be dismissed on a point of law.

[39] As outlined above, the petition is anchored on an alleged violation of constitutional provisions by the late President. In light of this, the crux of the question presented by the Notice of Motion is whether or not an action alleging violation of the Constitution, is amenable to the Limitation Act, 1939. It suffices to state that the Limitation Act, 1939 applies to Zambia by virtue of Article 7(e) of the Constitution read together with section 2 of the British Acts Extension Act, Chapter 10 of the Laws of Zambia.

[40] In answering the question, we have first combed through the Constitution with regards to time-limits within which constitutional actions should be commenced before this Court pursuant to its jurisdiction bestowed by Article 128 of the Constitution. Our finding

is that there are no express time-limits that apply to matters such as the subject petition.

[41] We have also examined the Limitation Act, 1939 whereupon we find that it does not expressly mention constitutional actions as falling within its ambit. Relevant to the Respondent's argument, the Limitation Act, 1939 embraces actions founded on tort.

[42] Citing the Kenyan case of **John Atelu Omilia & Another v Attorney General & 4 Others**³, the Respondent suggests that the subject petition is a constitutional tort. That this is because it incorporates a claim for consequential damages. Further, that a constitutional tort is a species of a tort and accordingly amenable to the Limitation Act, 1939.

[43] Our response is that a claim for consequential damages in a matter alleging breach of the Constitution, does not render the matter amenable to the Limitation Act, 1939. This is because extending the Limitation Act, 1939 to such a matter would be inconsistent with the Constitution since the Act would be imposing time limits in cases where the Constitution does not. To this extent, the measure would violate Article 1 (1) of the Constitution which not only elevates the Constitution above all laws of the Republic but also voids any law which is inconsistent with it. The provision thus states:

The Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.

[44] In the result, we opine that Article 1 (1) read with Article 128 of the Constitution, have impliedly excluded the Limitation Act, 1939 from constitutional actions and consequently, the Notice of Motion fails.

[45] Notwithstanding the inapplicability of the Limitation Act, 1939 to the matter before us, the fundamental question, in our discernment, is whether the period within which to commence a constitutional action like the subject petition, is open-ended. The question is fundamental because in our assessment, a delay of over twenty years in instituting the subject petition is manifestly inordinate.

[46] In resolving this question, we have holistically examined constitutional provisions that guide the administration of justice. Of utmost importance, is Article 118(2)(b) of the Constitution, which we understand to signify that delayed justice amounts to injustice. Also, that courts as dedicated mechanisms for the delivery of justice, should not permit injustice through delays.

[47] For completeness, Article 118(2)(b) of the Constitution is thus reproduced: ***“in exercising judicial authority, the courts shall be***

guided by the following principles...justice shall not be delayed”.

[48] To operationalize Article 118 (2)(b) of the Constitution, we deduce concurrent duties imposed on the parties and courts. Thus, in cases where there are prescribed time-limits for performing required acts, parties and courts must adhere to the time-limits. In cases like the subject petition, filed pursuant to Article 128 of the Constitution, where there are no express time-limits, time for performance is not open-ended as parties and courts are required to act promptly. Accordingly, a petitioner must institute the petition promptly from the date the cause of action accrued. In this regard, there is no lower or upper time-limit as each case would be determined on its facts.

[49] Once instituted, parties and the court must ensure a steady progression of the matter.

[50] This is similarly the practice in identical jurisdictions we have examined namely, Kenya, India, South Africa and England.

[51] As regards Kenya, it embraces the Limitation of Actions Act, Chapter 22 of the Laws of Kenya. Further, apart from enjoying a superior status, the Constitution of Kenya is similarly silent on time-limits within which actions such as the subject petition, should be commenced.

[52] In terms of case law, courts in Kenya have declined to extend the Limitation of Actions Act, Chapter 22, to constitutional actions. However, there is a requirement, for actions to be commenced promptly from the date the cause of action accrued. Further, where there is delay, a claimant must tender a satisfactory explanation lest the matter be dismissed.

[53] In that regard, the Supreme Court of Kenya held the following persuasive view in the case of **Monica Wangu Wamwere & 5 Others v The Attorney General**⁷, at 16:

In point of fact, the two superior courts affirmed the position that the Limitations of Actions Act, Cap 22 [of the] Laws of Kenya does not apply to causes founded on violation of rights and freedoms. We concur and hold that there is no limitation of time in matters relating to violation of rights under the Constitution which are evaluated and decided on a case by case basis.

Nonetheless, it is well settled that a court is entitled to consider whether there has been inordinate delay in lodging a claim of violation of rights...Where there is delay, a petitioner ought to explain the reasons for the delay to the satisfaction of the court.

[54] Turning to India, it has the Limitation Act, 1963. Its Constitution which also enjoys superior status is silent on time-limits for commencement of constitutional actions such as the present petition. Similarly, courts in that jurisdiction have declined to extend the Limitation Act, 1963 to constitutional matters. However, matters should be commenced promptly.

[55] The following holding by Hidayatullah CJ (as he then was), in the Indian Supreme Court case of **Tilokchand Motichand & Ors vs H.B. Munshi & Anr⁸**, at page 11, is appropriate:

If then there is no period prescribed, what is the standard for this Court to follow? I should say that utmost expedition is the sine qua non for such claims. The party aggrieved must move the Court at the earliest possible time and explain satisfactorily all semblance of delay. I am not indicating any period which may be regarded as the ultimate limit of action for that would be taking upon myself legislative functions...in India I will only say that each case will have to be considered on its own facts. Where there is appearance of avoidable delay and this delay affects the merits of the claim, this Court will consider it and in a proper case hold the party disentitled to invoke the extraordinary jurisdiction.

[56] At page 13 of the same judgment, the Learned Chief Justice went on to state that:

If a claim is barred under the Limitation Act...prima facie it is a stale claim and should not be entertained by this Court. But even if it is not barred under the Indian Limitation Act, it may not be entertained by this Court if on the facts of the case there is unreasonable delay

[57] The rationale for limiting the time during which litigation may be commenced was explained by the Constitutional Court of South Africa in the case of **Mohlomi v Minister of Defence⁹** as follows:

rules that limit the time which litigation may be launched are common in our legal system as well as others. Inordinate delays in litigating, damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor

in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.

[58] In the English case of **A v Hoare**¹⁰, the House of Lords similarly held that:

Then the injustices to a claimant who may be deprived of his claim, perhaps as a result of the very injuries which gave rise to it, can be balanced against the injustice to a defendant who may be called upon to defend himself a long time after the event when important evidence may no longer be obtainable...The reasons for the delay are highly relevant ...as of course are the prospects of a fair trial.

[59] We cannot agree more with the afore-cited authorities that delay is inherently prejudicial to a respondent's right to a fair trial. Further, where it has occurred, it must be justified by the petitioner.

[60] Against this backdrop, we have, with great circumspection, examined the petition, affidavit in support thereof and affidavit in opposition to the Notice of Motion and supporting oral submissions by counsel whereupon we have not found any justification for the delay. We underscore the requirement for the Petitioner to justify the delay considering that he had opportunities to commence the petition promptly.

[61] In as much as the Petitioner is entitled to seek redress in this Court, we do not believe that the framers of our Constitution had intended that this Court should sit to consider a petition at the instance of a person who had without reasonable explanation, slept on his rights for over twenty years. This is in light of Article 118(2)(b) of the Constitution which requires him to have instituted the petition promptly. By the same provision, the Respondent must have a reasonable expectation that the petition would be prosecuted within a reasonable time.

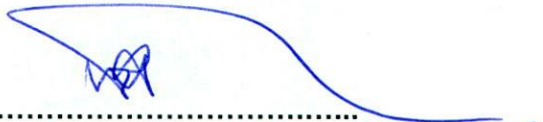
Conclusion

[62] For the foregoing reasons, the petition is dismissed.

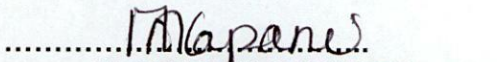
[63] Parties shall bear own costs.




A.M SHILIMI
DEPUTY PRESIDENT OF THE
CONSTITUTIONAL COURT



M.K CHISUNKA
CONSTITUTIONAL COURT JUDGE



M. MAPANI-KAWIMBE
CONSTITUTIONAL COURT JUDGE



K. MULIFE
CONSTITUTIONAL COURT JUDGE

DISSENTING RULING

Mwandenga, JC delivered the dissenting ruling of the Court.

Cases referred to:

1. Doctor J.W. Billingsley v J.A Mundi (1982) Z.R.12
2. Steven Katuka and Law Association of Zambia v The Attorney General and Ngosa Simbyakula & Others CCZ Judgment No. 29 of 2016
3. Milford Maambo and Others v the People Selected Judgment No. 31 of 2017

Legislation referred to:

1. The Constitution of Zambia, Chapter 1 of the laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 18 of 1996
2. The Constitution of Zambia, Chapter 1 of the laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 1 of 2016
3. Limitation Act, 1939 (UK)
4. Constitutional Court Act, No.8 of 2016
5. Constitutional Court Rules, No.35 of 2016
6. The Rules of the Supreme Court of England, 1965 (White Book) 1999 Edition

[64] From the outset I must state that I agree with the majority ruling on the holding that the Limitation Act, 1939 does not apply to constitutional actions such as the underlying case before the Constitutional Court (the Court) and that the Notice of Motion (motion) fails, but with deference I do not agree with the final outcome hence this dissenting ruling.

[65] The motion, the facts and arguments underpinning the motion have been properly and adequately captured in the majority ruling. In order not to unnecessarily overload this dissenting ruling I shall not rehash them.

[66] As noted in the majority ruling, the motion which is anchored on Order 14A of the Rules of the Supreme Court, 1965 (White Book) 1999 Edition, has posed two specific questions for determination by the Court. The questions are couched as follows:

1. ...whether the claim herein is not statute barred as per the Limitations [sic] Act, 1939; and
2. That if the said question be answered that the claim herein is statute barred, the matter be dismissed forthwith with costs to the Respondent.

[67] The fact that the motion has posed two specific questions for determination means that the remit of what is required of the Court has been clearly defined. In the case of **Doctor J.W. Billingsley v J.A. Mundi**¹ when an application for an interlocutory injunction came up before the High Court Commissioner, the advocates concerned contrived to argue not only the application properly before the Court, but every aspect of the respondent's case as disclosed in the writ. The Commissioner in his judgment granted a perpetual injunction, an order for vacant possession, and awarded damages. In essence the judgment purported to be a final

determination of the entire action. On appeal Ngulube (D.C.J as he then was) said:

...unless the parties have specifically and clearly applied for a consent judgment, which they are at liberty to apply for at any stage of an action, the court should only deal with the particular application before it.... In this case I would hold that the purported final determination of all the issues at that stage was premature and incompetent, and accordingly a complete nullity. (Emphasis supplied)

In my view this position holds good even in the proceedings before the Court.

[68] With the matters set out in paragraph 67 in mind, I opine that the Court is only supposed to deal with the two specific questions as framed by the respondent in the motion. Consequently, with respect to the majority ruling I am by and large in substantial agreement with it, up to the point when it reads at page R18:

[44] In the result, we opine that Article 1(1) read with Article 128 of the Constitution, have impliedly excluded the Limitation Act, 1939 from constitutional actions and consequently, the Notice of Motion fails. (Emphasis supplied)

[69] From that point, with deference, I must disagree with the remainder of the majority ruling. In my considered view, the majority ruling should have then proceeded to answer the first question on the motion by stating categorically and in no uncertain terms "*that the claim herein is not statute barred as per the Limitation Act, 1939*" or words to that effect. And as of necessity the second question would have become otiose. This would invariably have meant the motion

being dismissed and the matter being allowed to proceed to trial on the merits. In other words, the ruling should not have substantively gone beyond paragraph 44 but it should nonetheless have made the necessary orders befitting the relative finding by the Court quoted in paragraph 68 hereof.

[70] Needless to point out, that in fact matters dealt with after paragraph 44 are dealing with a question or questions or an issue or issues which have not been raised in the motion but have been raised by the majority ruling and upon which the parties have not been heard. In this regard, sight should not be lost at the fact that the motion is anchored on Order 14A of the RSC. One of the hallmarks of an application under Order 14A of the RSC is that the Court should not determine any question under the Order unless the parties have been heard on the question or have consented to an order or judgment being made. For ease of reference Order 14A rule 1(3) of the RSC provides that:

The Court shall not determine any question under this Order unless the parties have either-

- (a) had an opportunity of being heard on the question, or**
- (b) consented to an order or judgment on such determination.**

[71] That said, in my considered view therefore, the majority ruling has, with deference gone beyond the remit of the Court as set out in the motion by engaging in the discourse that leads to the conclusion at page R23 that:

[61] In as much as the Petitioner is entitled to seek redress in this Court we do not believe that the framers of our Constitution had intended that this Court should sit to consider a petition at the instance of a person who had without reasonable explanation, slept on his rights for over twenty years. This is in light of Article 128 of the Constitution which requires him to have instituted the petition promptly. By the same provision, the Respondent must have a reasonable expectation that the petition would be prosecuted within a reasonable time. (Emphasis supplied)

[72] The excerpt quoted in paragraph 71 above is in my view problematic, when Article 128(3) of the Constitution is interpreted using the literal rule of interpretation. The literal rule of interpretation is apt in this case because its use will not result in ambiguity or absurdity. This in my view would be in keeping with our decisions referred to below.

[73] In the case **Steven Katuka and Law Association of Zambia v The Attorney General and Ngosa Simbyakula & Others**² at page J63 we said that:

In terms of the general or guiding principles of interpretation, the starting point in interpretation of words or provision of the Constitution or indeed any statute, is to first consider the literal or ordinary meaning of the words and articles that touch on the issue or provision in contention.

[74] In the case of **Milford Maambo and Others v the People**³ we said that:

The primary principle in interpreting the Constitution is that the meaning of the text should be derived from the plain meaning of the language used. Only when there is ambiguity or where a literal interpretation will lead to absurdity should other principles of interpretation be resorted to.

[75] The fact of the matter, according to the literal interpretation, is that Article 128(3) of the Constitution is open ended as to when petitions

alleging Constitutional contraventions are supposed to be filed. Article 128(3) of the Constitution provides that:

- (1) **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.** (Emphasis supplied)

[76] Needless to point out, that Article 128(3) of the Constitution is in fact replicated in section 8(3) of the Constitutional Court Act, No.8 of 2016 (CCA).

[77] A perusal of Article 128(3) of the Constitution and/or section 8(3) of the CCA will show, that no time frame is provided for as to when a petition can be filed. In fact, a perusal of the entire Constitution also shows that no time frame has been provided for filing a petition alleging the contravention of the Constitution. However, it is noteworthy that the Constitution is replete with provisions that provide time frames for the commencement of certain other petitions or legal matters. I outline those provisions in the paragraph below.

[78] The following time frames, for instance are constitutionally provided:

- (a) Article 52(4) of the Constitution provides that a person may challenge, before a court or tribunal the nomination of a candidate within seven days of the close of nomination;
- (b) Article 53(2) of the Constitution provides that a person may challenge the declaration of an unopposed candidate as being duly elected within seven days of the declaration;

- (c) Article 67(3) of the Constitution provides that a person may challenge a statutory instrument, for its constitutionality, within fourteen days of its publication in the gazette;
- (d) Article 81(5) of the Constitution provides that if the President wishes to dissolve the Parliament due to its failure to objectively and reasonably carry out its legislative functions he shall *inter alia* refer the matter to the Court within seven days of informing the public of his intention to do so;
- (e) Article 94(4) of the Constitution provides that where a Presidential appointment or measure (that requires approval of the National Assembly) is not given approval within 21 days of the commencement of the sitting and the National Assembly unreasonably refuses to give an approval as requested, the President shall refer the matter to the Court for *inter alia* a hearing;
- (f) Article 101(4) of the Constitution provides that any person within seven days of the declaration as President-elect may petition the Court to nullify the election of that candidate;
- (g) Article 103(1) of the Constitution provides in respect of Presidential run-off election, that any person may within seven days of the declaration of a President- elect, petition the Court to nullify the election of the President-elect; and
- (h) Article 105(5) of the Constitution provides that in the event a President-elect is unable to assume office a political party whose presidential candidate was declared President-elect or another person shall within three days from the date on which the President-elect should have been sworn in office, petition

the Court to determine whether the inability of the President-elect to assume office is permanent.

[79] With the foregoing matters in mind, I am of the considered view that the framers of the Constitution deliberately and rightly so, did not provide for the time frame for commencement of petitions under Article 128(3) of the Constitution. Further the framers did not in fact attach any conditions for filing petitions challenging alleged contravention or contraventions of the Constitution other than the condition that the alleged contravention or contraventions should relate to the Constitution as described in Article 128 of the Constitution.

[80] At this juncture it is opportune for me to point out that the Constitutional Court Rules, Statutory Instrument No.37 of 2016 (CCR) which provide for the practice and procedure for how matters under the Constitution and the CCA are supposed to be dealt with, do not also provide for the time frame for the commencement of a petition seeking redress for the alleged contravention of the Constitution.

[81] With the above matters in mind, therefore, all what the Constitution and CCA provide for, is that where a person alleges contravention of the Constitution in the circumstances

set out in Article 128(3) of the Constitution and/or section 8(3) of the CCA he or she may seek redress from the Court by filing a petition. As there is no time frame in this regard, I am of the considered view that a petition can, therefore, be filed at any time as long as the petitioner wishes to challenge any alleged contravention of "*this Constitution*" in the language of Article 128(3) of the Constitution and/or section 8(3) of the CCA. "*This Constitution*" in Article 128(3) of the Constitution and section 8(3) of the CCA means the Constitution of Zambia (Amendment) Act, No.2 of 2016.

[82] In proceeding as I have done, in this dissenting ruling I am not oblivious to the fact that the majority ruling has introduced in Article 128(3) of the Constitution or this matter the elements of the need to justify delay and to commence a petition promptly as well as a respondent's reasonable expectation that the petition would be prosecuted within a reasonable time. Before I give my quick and brief response to the introduction of these three elements I believe it is opportune for me to refer to paragraph 43 of the majority ruling which provides the reasoning why the Limitation Act, 1939 does not apply to a matter that alleges breach of the Constitution. Paragraph 43 in the majority ruling in part reads:

Our response is that a claim for consequential damages in a matter alleging breach of the Constitution, does not render the matter amenable to the Limitation Act, 1939. This is because extending the Limitation Act,1939 would be imposing time limits in cases where the Constitution does not... (Emphasis supplied)

[84] Taking a leaf from the excerpt in paragraph 83, my brief and quick response to the introduction of the three elements into Article 128(3) of the Constitution and/or in this matter would be that that it is tantamount to imposing conditions "*where the Constitution does not.*"

[85] Further in my view introducing the three elements is akin to the majority ruling amending Article 128(3) of the Constitution. With deference to the majority ruling proceeding in that fashion, is not in line with the Court's interpretative jurisdiction but is tantamount and wrongly so, to stepping into the legislative mandate of Parliament as provided for in Article 62 of the Constitution. Article 62 of the Constitution provides that:


- (1) **There is established the Parliament of Zambia which consists of the President and the National Assembly.**
- (2) **The legislative authority of the Republic is vested in and exercised by Parliament.**
- (3) **A person or body, other than Parliament, shall not have power to enact legislation, except as conferred by this Constitution.** (Emphasis supplied)

[86] A perusal of the Constitution will reveal, the fact that the Court

does not have power to legislate and therefore I opine that the Court cannot and should not introduce those three elements into Article 128(3) of the Constitution and/or in this matter.

Conclusion

[87] To the extent that I have indicated in this dissenting ruling, it is my considered view that the motion has no merit and it must fail. I would dismiss it with no order as to costs since it has raised some novel and important issues. I would therefore, allow the petition to be heard on the merits.


M.Z. MWANDENGA
CONSTITUTIONAL COURT JUDGE