

IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA

2025/CCZ/0010

(CONSTITUTIONAL JURISDICTION)

IN THE MATTER OF: ARTICLE 128 OF THE CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF 2016.

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLE
128 (2) AND 76(1) & (2) OF THE CONSTITUTION OF
ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016.

IN THE MATTER OF: SECTION 3 AND 4 OF THE NATIONAL ASSEMBLY
(POWERS AND PRIVILEGES) ACT CHAPTER 12
OF THE LAWS OF ZAMBIA

IN THE MATTER OF: THE JURISDICTION OF THE CONSTITUTIONAL
COURT TO HEAR A MATTER THAT RELATES TO
THE CONSTITUTION

IN THE MATTER OF THE DUTY TO REFER A QUESTION RELATING TO
THE CONSTITUTION TO THE CONSTITUTIONAL
COURT FOR DETERMINATION

IN THE MATTER OF THE POWER AND PRIVILEGES OF SITTING
MEMBER OF PARLIAMENT TO FREELY DEBATE
MATTERS OF PUBLIC INTEREST

IN THE MATTER OF THE DECISION OF THE CHIEF RESIDENT
MAGISTRATE DATED 2ND APRIL 2025

BETWEEN

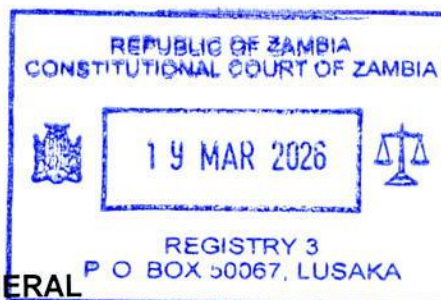
MUNIR ZULU

AND

THE ATTORNEY GENERAL

THE DIRECTOR OF PUBLIC PROSECUTIONS

DAVIES CHIBWILI (In his capacity as Presiding Magistrate)



PETITIONER

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

Coram: Shilimi – DPC, Musaluke, Mwandenga, Kawimbe and Mulife JJC on 13th
February, 2026 and 19th March, 2026

For the Petitioner: Mr. J. Chirwa and Mr. L. C. Kabwata of Joseph Chirwa & Company

For the Respondent: Mr. C. Mulonda, Deputy Chief State Advocate, Mrs. L. Chengo, Senior State Advocate and Mr. K. Sakachiva, State Advocate

JUDGMENT

Shilimi – DPC, delivered the judgment of the Court

Cases referred to:

1. Steven Katuka and Law Association of Zambia v The Attorney General and Ngosa Simbyakula and 63 Others 2016/CCZ/0010/11
2. Milford Maambo and Others v The People 2016/CC/R001
3. Law Association of Zambia and Chapter One Foundation Ltd v The Attorney General 2019/CCZ/0013/14
4. Bernard Shajilwa and 4 Others v The Attorney General 2018/CCZ/004
5. Tej Kiran Jain v N Sanjiva Reddy A.I.R. 1970 SC 1573
6. Attorney General, the Speaker of the National Assembly v Dr. Ludwig Sondashi SCZ No. 6 of 2003
7. R v Chaytor and Others [2010] UKSC 52
8. State of Kerala v Ajith (2021) 10 SCC 439
9. Hakainde Hichilema v Attorney General, SCZ, Appeal No. 4 of 2019
10. Ndyanabo v Attorney General, [2001] 2EA 485
11. Shabalala and Five Others v The Attorney General of the Transvaal and the Commissioner of South African Police, 1996(1) SA 725 (CC)
12. Bizwayo Newton Nkunika v Lawrence Nyirenda and Another 2019/CCZ/005
13. Gervas Chansa v The Attorney General 2019/CCZ/004
14. Bric Back Limited T/A Gamawe Ranches v Neil Kirk Patrick 2021/CCZ/002
15. Fredson Kango Yamba v The Principal Resident Magistrate, Anti-Corruption Commission and The Attorney General 2023/CCZ/003
16. Bradlaugh v Gossett (1884) 12 QBD 271
17. Canada (House of Commons) v Vaid [2005] 1 SCR 667

Legislation referred to:

The Constitution of Zambia Chapter 1 of the Laws of Zambia

The Penal Code Act Chapter 87 of the Laws of Zambia

The National Assembly (Powers and Privileges) Act Chapter 12 of the Laws of Zambia

The Subordinate Court Act Chapter 28 of the Laws of Zambia

The English Bill of Rights 1689

Other materials referred to:

1. The National Assembly of Zambia Standing Orders of 2021
2. S.L. Shadker and M.N. Kaul *Practice and Procedure of Parliament* (2016) 7th edition.
3. Thomas Erskine May in the book *Treatise upon the law, privileges and usage of parliament* (2019) 5th Edition available <https://erskinemay.parliament.uk>
4. Report of the Technical Committee on drafting of the Zambian Constitution (2021)
5. Conrad Russell, *Parliamentary History in Perspective* (Hambledon, 2001) 112
6. Justice Dr. Patrick Matibini, SC, "Parliamentary Privilege – Protecting: The Effectiveness Functioning of Democracies." A paper presented to the 23rd Conference of Speakers and Presiding Officers of the Commonwealth, (CSPDC), Kota Kinabalu, Sabah, Malaysia, 2016.

1.0 Introduction

- 1.1 This Petition relates to criminal proceedings before the Subordinate Court under cause CRMPC/009/2023 where the Petitioner, Munir Zulu, was facing three counts of criminal libel for utterances made on the grounds of the National Assembly. During the pendency of criminal proceedings before the Subordinate Court, the Petitioner sought to have two constitutional questions referred to this Court.

However, the Presiding Magistrate, the 3rd Respondent declined the application to do so.

1.2 The Petitioner has consequently brought the Petition at hand alleging contravention of Article 128(2) on the part of the Presiding Magistrate, for refusing to refer the questions to this Court. Violation of Article 76 (1) and (2) of the Constitution is also alleged on the part of the Director of Public Prosecutions (DPP), the second Respondent herein, for instituting criminal proceedings against the Petitioner despite the immunity from legal proceedings conferred on him for utterances made in the National Assembly. It is the Petitioner's further allegation that the Speaker of the National Assembly violated Article 76(1) and (2) of the Constitution when she did not employ internal processes of the National Assembly in dealing with the Petitioner's alleged breach of privileges and immunities.

1.3 The 1st Respondent has denied the alleged constitutional violations on the part of all three Respondents. Also impugned is the jurisdiction of this Court to deal with the Petition. It is the 1st Respondent's position that the right forum is the Subordinate Court.

2.0 Petitioner's Case

2.1 The Petition and affidavit evidence reveal that on 3rd March, 2023 during debates on the floor of the National Assembly, the Petitioner raised concerns on alleged corrupt activities involving the Minister of Finance and National Planning, Dr. Situmbeko Musokotwane, Minister of Infrastructure and Housing, Mr. Charles Milupi and the Board Chairman of the Road Development Agency, Mr. Mulchard Kuntawala. These remarks were repeated at a press briefing within the grounds of the National Assembly.

2.2 As a consequence, the Petitioner was arrested on 28th March, 2023 and charged with three counts of criminal libel pursuant to section 191 of the Penal Code Act, Chapter 87 of the Laws of Zambia. He started appearing before the 3rd Respondent and on 21st March, 2025, he filed an application to stay the criminal proceedings so that the matter could be referred to the Constitutional Court for the determination of the following two questions:

1. **Whether words spoken in the National Assembly or precincts of the National Assembly can constitute libel under section 191 of the Penal Code Act, chapter 87 of the Laws of Zambia in light of Article 76 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia ("Constitution") as read with sections 3 to 4 of the National Assembly (Powers and Privileges) Act, Chapter 12 of the Laws of Zambia as amended; and**
2. **Whether the Subordinate Court has jurisdiction to hear an alleged breach of parliamentary privilege, and not the National Assembly in light of Article 76 of the Constitution as read with Standing Order 202 of the National Assembly Standing Orders of 2021.**

- 2.3 The application was unsuccessful, and the Presiding Magistrate went on to hear and determine the matter.
- 2.4 Aggrieved with this, the Petitioner alleges violation of Article 128(2) of the Constitution by the Presiding Magistrate when he refused to stay the proceedings and refer the constitutional questions raised to the Constitutional Court.
- 2.5 The 2nd Respondent is alleged to have contravened Article 76(1) and (2) of the Constitution as read with sections 3 and 4 of the National Assembly (Powers and Privileges) Act Chapter 12 of the Laws of Zambia for instituting criminal proceedings over actions and words spoken within the precincts of the National Assembly in respect of which the Petitioner has immunity. Violation of Article 76(1) and (2) of the Constitution is also alleged in respect of the Speaker of the National Assembly for alleged failure to employ the internal processes of the National Assembly and acquiescing to the arrest and prosecution of the Petitioner.
- 2.6 Predicated on these factual allegations, the Petitioner sought the following remedies:

2.6.1 A declaration that a sitting Member of Parliament cannot be prosecuted under criminal or civil proceedings for words spoken on the floor and/or within the grounds of the National Assembly;

2.6.2 A declaration that the 1st Respondent through the Speaker of the National Assembly has contravened the provisions of Article 76 as read with section 3 and 4 of the National Assembly (Powers and Privileges) Act Chapter 12 of the Laws of Zambia and Standing Order No. 202 of the National Assembly Standing Orders of 2021;

2.6.3 A declaration that the decision by the 2nd Respondent to prosecute the Petitioner for an alleged offence committed within the National Assembly is in direct contravention of Article 76(1) and (2) as read with sections 3 and 4 of the National Assembly (Powers and Privileges) Act Chapter 12 of the Laws of Zambia as amended and thereby unconstitutional, illegal and null and void;

2.6.4 A declaration that the decision by the 3rd Respondent not to stay proceedings and refer the questions of law raised by the Petitioner in the proceedings under cause CRMPC/009/2023 is in direct contravention of Article 76(1) and (2) as read with sections 3 and 4 of the National Assembly (Powers and Privileges) Act Chapter 12 of the Laws of Zambia and thereby unconstitutional, illegal and null and void;

2.6.5 An order directing the 3rd Respondent to stay all further proceedings under CRMPC/009/2023 and to immediately and forthwith discharge the Petitioner from the alleged offence of criminal libel allegedly committed within the National Assembly;

2.6.6 Costs; and

2.6.7 Any other relief the court may deem fit.

2.7 The Petitioner further raised the questions in paragraph 2.2 above for our interpretation.

2.8 In skeleton arguments in support of the Petition, the Petitioner argued that this Court was the right forum to determine the alleged violation of Article 76 of the Constitution as read with sections 3 and

4 of the National Assembly (Powers and Privileges) Act. In so arguing Article 128 of the Constitution was cited in support.

2.9 The Petitioner posited that the criminal proceedings undertaken against him were illegal, null and void because of the immunity conferred on him by Article 76 of the Constitution and sections 3 and 4 of the National Assembly (Powers and Privileges) Act. In the Petitioner's view, a Member of Parliament is wholly protected against the institution of either civil and criminal proceedings for debating and imparting ideas. Having uttered the words, in respect of which he had been charged, during debate in the National Assembly and within the grounds of the National Assembly, it was the Petitioner's argument that he has immunity from both civil and criminal proceedings.

2.10 In relation to the alleged violation of Article 128(2) of the Constitution on the part of the 3rd Respondent, the Petitioner contended that the said Article is couched in mandatory terms. That, therefore, whenever a court other than the Constitutional Court determines that a constitutional question has arisen, it is mandated to refer the question to the Constitutional Court for determination. The 3rd Respondent, not having done so, was in direct contravention of Article 128(2) of the Constitution. The cases of **Steven Katuka and Law Association of Zambia v The Attorney General and Ngosa**

Simbyakula and 63 Others¹ and Milford Maambo and Others v The People² were cited, among others, on principles of constitutional interpretation.

2.11 The Petitioner went on to argue that the Speaker violated Article 76 of the Constitution as read with Standing Order number 202 of the National Assembly Standing Orders, 2021 when she permitted the arrest, charge and criminal proceedings against a sitting Member of Parliament. According to the Petitioner, Standing Order 202 requires the Speaker to discipline a Member of Parliament for breach of privileges using the internal procedures acknowledged in Article 77 of the Constitution.

2.12 The Petitioner concluded by urging us to grant the remedies sought in the Petition.

3.0 1st Respondent's Response

3.1 The 1st Respondent's Answer and Affidavit evidence denied the alleged violation of Article 76(1) and (2) of the Constitution. The 1st Respondent averred that parliamentary immunity relates to statements or reports made to the National Assembly and not the media. That, this immunity does not absolve Members of Parliament of criminal responsibility and is meant to secure freedom of speech and debate in the National Assembly. Further that parliamentary

immunity as envisaged under Article 76(1) and (2) of the Constitution as read with sections 3 and 4 of the Act did not apply to the remarks made by the Petitioner to the media.

3.2 In the skeleton arguments, the 1st Respondent argued that the Petition does not raise a constitutional question to warrant this Court to exercise its jurisdiction. According to the 1st Respondent, this Petition relates to section 191 of the Penal Code Act and sections 3 and 4 of the National Assembly (Powers and Privileges) Act in that it interrogates the issue of whether words spoken in the National Assembly constitute libel under section 191 of the Penal Code Act. In the Respondent's view, this is an issue that falls within the jurisdiction of the Subordinate Court. Our decisions in **Law Association of Zambia and Chapter One Foundation Ltd v The Attorney General**³ and **Bernard Shajilwa and 4 Others v The Attorney General**⁴ were cited in support of this argument.

3.3 Addressing the substance of the Petition, the 1st Respondent argued that freedom of speech afforded to Members of Parliament is limited to the proceedings in the House. It extends to anything said in debates on the floor or in standing or select committees and anything put in writing that forms part of the proceedings such as the text of any question or Ministers' written answer, amendment or any document published by the Order of the House. Citing the

authors of **Practice and Procedure of Parliament, 7th edition** and the Indian case of **Tej Kiran Jain v N Sanjiva Reddy**⁵, the 1st Respondent submitted that parliamentary immunity only applies to statements made in the course of business of the National Assembly. That, however, this immunity does not extend to press conferences, letters to constituents or to Ministers at ordinary public meetings. We were urged to consider the sentiments of the Supreme Court in **Attorney General, the Speaker of the National Assembly v Dr. Ludwig Sondashi**⁶.

3.4 The 1st Respondent also submitted that the Subordinate Court has the requisite jurisdiction to hear proceedings relating to the crime of criminal libel. Article 120(1) of the Constitution and section 19 of the Subordinate Court Act were cited.

3.5 We were urged to dismiss the Petition.

4.0 The Hearing

4.1 At the hearing, learned Counsel for the Petitioner, Mr. Joseph Chirwa extensively submitted on the doctrine of exclusive cognisance stating that Parliament enjoys, the immunity conferred upon Members of Parliament and the attendant privileges.

4.2 Mr. Chirwa argued that in terms of the doctrine of exclusive cognisance, that the National Assembly has power to regulate its

own procedure and that pursuant to Article 77 of the Constitution, it issues Standing Orders. Referring to Standing Orders of 2024, Mr. Chirwa pointed out that the definition of “precincts of the National Assembly” expansively includes the chamber, offices, rooms, court yards and gardens.

4.3 It was therefore argued that the Petitioner having uttered the words, in respect of which he faced prosecution and was subsequently convicted, within National Assembly grounds, amounted to a violation of his constitutional rights.

4.4 With regards to immunity conferred on Members of Parliament, Mr. Chirwa stated that Article 76 of the Constitution as read with sections 3 and 4 of the National Assembly (Powers and Privileges) Act confers Members of Parliament with immunity from civil and criminal proceedings for words uttered in the National Assembly precinct.

4.5 As regards privileges, Mr. Chirwa posited that breach of privilege by any Member of Parliament must be dealt with by the House internally as per paragraph 3, page 122 of the Standing Orders, 2024. This, it was argued, is based on the internal discipline doctrine which applies to all organs of the state by virtue of separation of powers and independence. That this practice is in accord with what obtains in other commonwealth countries. Further

that, a Member of Parliament enjoys absolute immunity from being prosecuted for words spoken within the National Assembly or its precincts to enhance their rights to debate.

4.6 In response to a question from the Court on the functional theory of the immunity afforded to Members of Parliament, Mr. Chirwa stated that it is meant for the protection of the Members of Parliament and enhances freedom of speech for them to debate freely on matters of national interest and anything within the function of a Member of Parliament. It was Mr. Chirwa's submission that when the Petitioner uttered the words at the press conference, he was holding two ministers accountable for actions taken in their official capacity.

4.7 For the Respondents, learned Deputy Chief State Advocate, Mr. Mulonda submitted that the reliefs being sought by the Petitioner and in particular 4 and 5, had been overtaken by events following the Ruling of a Single Judge of this Court and the conviction and sentence of the Petitioner.

4.8 It was Mr. Mulonda's further submission that the main issues of contention in the Petition emanate from statutory provisions, namely, the Criminal Procedure Code and the National Assembly (Powers and Privileges) Act. That therefore, since the Petition is not anchored on constitutional provisions, this Court does not have jurisdiction to entertain the Petition.

- 4.9 Submitting on the substantive issues of the Petition, Mr. Mulonda pointed out that section 4 of the National Assembly (Powers and Privileges) Act places a caveat on the freedom of speech enjoyed by Members of Parliament. The freedom of speech only arises if words are spoken in the Assembly or Committee proceedings. He pointed out that there is no reference to precinct in the said provision and that the definitions section of the National Assembly (Powers and Privileges) Act has separate definitions for “Assembly” and “precinct”.
- 4.10 In response to a question put by the Court, Mr. Mulonda stated that the Standing Orders as referenced by Petitioner’s counsel did not affect the Respondents’ position that immunity only applies during course of business of the house, either in the Assembly or Committee proceedings.
- 4.11 Mr. Sakachiva supported this position by citing the cases of **R v Chaytor and Others**⁷ and the **State of Kerala v Ajith**⁸. He went on to submit that the immunity conferred on Members of Parliament was in furtherance of the legislative duties and does not extend to shield members from criminal prosecution arising from unrelated legislative duties.
- 4.12 In reply, Mr. Chirwa emphasised that it is the duty of Members of Parliament to question acts of Ministers and the Petitioner’s

utterances fell within his legislative duties. In his view, the Petitioner was whistle blowing.

4.13 Mr. Chirwa further submitted that it has always been the practice of Members of Parliament to hold press briefings on the grounds of the National Assembly.

4.14 Responding to the Respondent's position on jurisdiction, Mr. Chirwa argued that the issue had not been raised in pleadings and therefore should not be entertained by this Court.

4.15 As regards the argument that the Petition had been overtaken by events, Mr. Chirwa cited the Supreme Court decision in **Hakainde Hichilema v Attorney General**⁹ to argue that constitutional issues cannot be overtaken by events. That this Court has wide powers to even grant relief not prayed for.

5.0 Analysis and Determination

5.1 We have carefully considered the Petition, the Answer, Affidavit evidence and arguments advanced by the Parties. We wish to state at this juncture that the questions the Petitioner seeks in the Petition for interpretation and referred to in paragraph 2.2 above are misplaced as the only issues which should be contained in the Petition are allegations of contravention of the Constitution. The Court in determining the alleged contraventions will inevitably go

through the vigorous process of interpreting the relevant constitutional provisions in dispute before arriving at a decision as to whether a provision has been contravened or not.

5.2 That said and as is our practice, we shall begin with the interpretation approach. Article 267(1) of the Constitution gives clear guidance on how the Constitution must be interpreted, that is, in accordance with the Bill of Rights and in a manner that promotes its purposes, values and principles, permits the development of the law and contributes to good governance.

5.3 This Court has, in its previous decisions, while acknowledging that the Constitution must be given a 'purposive' interpretation, has been reluctant to abandon the literal rule of interpretation. In the case of **Milford Maambo and Others v The People**², this Court stated:

We endorsed the position that the correct approach of interpreting the constitution is to apply the literal rule of interpretation, thereby giving words used in the Constitution of their plain and ordinary meaning. The literal rule of interpretation should only be vacated where the plain and ordinary meaning leads to absurdity.

5.4 Comparative constitutional case law, however, indicates that other jurisdictions have been able to more readily embrace the constitutional interpretative approach as it evolved and the purposive constitutional interpretation rule has now become firmly entrenched.

5.5 Where a Court reads a constitutional text literally, it risks missing the spirit and purpose of the provision in question. In the case of

Ndyanabo v Attorney General¹⁰, the Tanzanian Court of Appeal

stated that:

The Constitution ... is a living instrument with a soul and consciousness of its own reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law...

- 5.6 The Constitutional Court of South Africa has also adopted the purposive rule of constitutional interpretation. In the case of **Shabalala and Five Others v The Attorney General of the Transvaal and the Commissioner of South African Police¹¹**, the Court had this to say:

The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment. This approach has been consistently followed in Southern Africa. Even jurisdictions without our peculiar history, national constitutions, and Bill of Rights in particular, are interpreted purposively to avoid the 'austerity of tabulated legalism'.

- 5.7 The purposive constitutional interpretation approach is clearly in tandem with Article 267 of the Constitution, referred to in paragraph 5.2 above. In determining issues in this matter, the Court will interpret the Constitution purposively and in accordance with the provisions of Article 267(1) of the Constitution.

5.8 The Petitioner in this case in essence questions the legality of criminal proceedings brought against him for utterances alleged to be covered by freedom of speech afforded to all Members of Parliament by Article 76(1) of the Constitution. It is the Petitioner's argument that being covered by this freedom of speech, his utterances ought to have been internally dealt with by the Speaker using internal procedures. That the criminal proceedings against him are therefore unconstitutional and that at the point that he made an application for the Presiding Magistrate to refer the constitutional questions to this Court, the Magistrate was obligated to refer the matter to this Court in accordance with the provisions of Article 128(2) of the Constitution.

5.9 The 1st Respondent on the other hand has argued that the Petition interrogates provisions of the Penal Code Act and the National Assembly (Powers and Privileges Act) which fall outside the jurisdiction of this Court. In response to the substance of the matter, the 1st Respondent has argued that the freedom of speech is restricted to debates in the National Assembly and not statements made to the media.

5.10 From the above contentions, the main issues for determination as we see them are:

- (i) **Whether this Court has jurisdiction to determine the Petition. If answered in the affirmative;**

- (ii) **Whether Article 128(2) of the Constitution obligates a Court to refer a constitutional question that arises in the course of proceedings before it to this Court;**
- (iii) **Whether the freedom of speech afforded to Members of Parliament by Article 76 of the Constitution extends to utterances made outside the National Assembly debates or proceedings namely utterances made to the media within the National Assembly grounds and; and**
- (iv) **Whether the criminal proceedings against the Petitioner violated Article 76(1) of the Constitution?**

5.11 For convenience, we shall deal with issues (i) and (ii) first and issues (iii) and (iv) shall be dealt with secondly and simultaneously as they relate to the same issue, namely freedom of speech and debate in the National Assembly which shall not be questioned or ousted in a Court.

Whether this Court has jurisdiction to determine this Petition?

5.12 This Court's jurisdiction is elaborately set out in Article 128 of the Constitution. Article 128(1) of the Constitution provides as follows:

Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear:

- (a) **a matter relating to the interpretation of this Constitution;**
- (b) **a matter relating to a violation or contravention of this Constitution;**
- (c) **a matter relating to the President, Vice President or an election of the President;**
- (d) **appeals relating to election of Members of Parliament and Councillors;**
- (e) **Whether or not a matter falls within the jurisdiction of the Constitutional Court.**

Article 128(3) further provides as follows:

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 any 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.

5.13 We have previously interpreted these provisions in a number of cases. In the case of **Bizwayo Newton Nkunika v Lawrence Nyirenda and Another**¹², we stated that Article 128 of the Constitution mandates us to hear and determine any Petition that alleges a violation or contravention of the Constitution. Further, and in the case of **Gervas Chansa v The Attorney General**¹³, we stated that this Court's jurisdiction is only rightly invoked if a matter raises a constitutional question. We defined a constitutional question as a legal issue that can only be resolved by interpretation of the Constitution other than an ordinary statute.

5.14 The Petition at hand quite clearly alleges contravention of Articles 76 and 128(2) of the Constitution. In as much as it implicates the Penal Code Act, the National Assembly (Powers and Privileges) Act, and the Subordinate Court Act, the gravamen of the Petition is the freedom of speech afforded by Article 76 of the Constitution within the proceedings of the National Assembly, and the referral of

constitutional questions to this Court from other Courts as provided for in Article 128(2) of the Constitution.

- 5.15 The Petition is therefore rightly before us and we are mandated to hear and determine the same. The 1st Respondent's claim that the Court lacks jurisdiction to hear this Petition and as a result, that the Petition ought to be dismissed, lacks merit and is dismissed.

Whether Article 128(2) of the Constitution obligates a Court to refer any question framed as a Constitutional issue, in the course of proceedings, to this Court.

- 5.16 Article 128(2) of the Constitution provides that:

Subject to Article 28(2), where a question relating to this Constitution arises in a Court, the person presiding in that Court shall refer the question to the Constitutional Court.

- 5.17 This provision sets out what should happen when a constitutional issue or question arises in a Court. That the constitutional question or issue should be referred to this Court. From the use of the word "shall", there is no question as to whether the provision is mandatory or not. However, it is clear that the mandatory reference to this Court only arises where a Court acknowledges that a constitutional issue or question has arisen. Where the Court is of a contrary view, it will not be obligated to make such a reference as quite clearly there will be no issue to be referred to us. This explains our position in the case of **Bric Back Limited T/A Gamawe Ranches v Neil Kirk Patrick**¹⁴,

where we stated that should a presiding Court be of the view that no constitutional question has arisen, a party is at liberty to initiate a fresh action before us. We reiterated this position in the case of **Fredson Kango Yamba v The Principal Resident Magistrate, Anti-Corruption Commission and the Attorney General**¹⁵.

5.18 We have perused the Ruling of the 3rd Respondent exhibited by the Petitioner to his Affidavit. While it makes reference to an earlier Ruling made in open Court, a Ruling we have not had the benefit to look at, it is clear that the Court did not agree that a constitutional question had arisen. The exhibited Ruling does not allude to any analysis of whether the issues raised were constitutional in nature. What is clear is that the Presiding Magistrate refused to entertain the application for being brought so late in the day. Not having determined that a constitutional issue had arisen, it cannot be said that the Presiding Magistrate was obligated to refer the constitutional question to this Court. It follows therefore that the claim by the Petitioner that the Presiding Magistrate violated Article 128(2) of the Constitution fails for lack of merit.

Whether the freedom of speech afforded to Members of Parliament by Article 76 of the Constitution extends to utterances made outside the National Assembly debates or proceedings, namely utterances made to the Media within the National Assembly grounds?

5.19 By way of historical context, the historical roots of parliamentary privilege lie in the medieval conflicts between the Crown and Parliament in England. Members frequently petitioned the monarch for protections such as freedom from arrest and immunity for words spoken in Parliament. According to Conrad Russel in his book, *Parliamentary History in Perspective* at page 112:

The arrest of Members in 1629 for speeches delivered in Parliament exposed the vulnerability of legislative independence.

These conflicts laid the ground work for the codification of parliamentary privilege.

5.20 The Bill of Rights 1689 is the fundamental document for modern parliamentary privilege. Article 9 of the Bill states that:

The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

5.21 This provision established two principles, namely:

- (i) **Freedom of speech in parliamentary proceedings; and**
- (ii) **Exclusive cognisance, the doctrine that Parliament alone may regulate internal proceedings.**

5.22 Article 9 of the Bill of Rights 1689 thus remains central to privilege jurisdiction across the Commonwealth, having been transplanted into colonial legal systems, including Zambia. Judicial elaboration played a critical role in clarifying the scope of Article 9. Thus, in the case of

Bradlaugh v Gossett¹⁶, the Court held that internal parliamentary procedures, lie within Parliament's exclusive cognisance and are not justiciable. The judgment affirmed:

- (i) **Parliament's autonomy over internal matters,**
- (ii) **The non-justiciability of procedural decisions, and**
- (iii) **The limited jurisdiction of the Courts regarding internal parliamentary affairs.**

5.23 The Court further stated that the freedom of speech accorded to Members of Parliament is meant to afford freedom for Parliament to conduct its legislative and deliberative business without interference from the other arms of Government.

5.24 The landmark decision of the United Kingdom Supreme Court in **R v Chaytor**⁷, however, fundamentally reshaped modern privilege.

The decision established the following key principles:

- (i) **Privilege protects only "core" parliamentary activities including debates, votes, committee work and formal proceedings.**
- (ii) **Activities collateral to parliamentary work, even if connected to Members of Parliament roles, are not protected.**
- (iii) **The Court adopted a functional test namely that privilege applies only where necessary to safeguard Parliament's ability to perform its constitutional functions.**

5.25 Further, and in case of **Canada (House of Commons) v Vaid**¹⁷, the Supreme Court adopted the functional necessity test, holding that privilege applies only where it is necessary for the legislature to fulfil

its constitutional functions. The Court rejected claims of privilege that lacked functional justification.

5.26 In Zambia, Article 76(1) of the Constitution provides that:

A Member of Parliament has freedom of speech and debate in the National Assembly and that freedom shall not be ousted or questioned.

5.27 This provision gives parliamentarians the freedom to speak and debate in the National Assembly. It goes on to confer immunity on them by providing that the content of their speech or debate is not to be questioned or impugned in any court or tribunal. The rationale for Article 76(1) of the Constitution can be gleaned from the sentiments of the Technical Committee on drafting the Zambian Constitution in its report dated 30th April, 2012. Part of the content on page 142 states that:

...The committee, therefore, resolves to explicitly provide for the National Assembly's freedom of speech and debate in the first draft Constitution so that the Members of Parliament will debate without fear of being impeached or questioned in any court or tribunal.

5.28 Further, sections 3 and 4 of the National Assembly (Powers and Privileges) Act goes on to provide that:

3. **There shall be freedom of speech and debate in the Assembly. Such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Assembly.**
4. **No civil or criminal proceedings may be instituted against any member for words spoken before or written in a report to, the Assembly or to a committee thereof or by reason of any matter or**

thing brought by him therein by petition, Bill, resolution, motion or otherwise (emphasis ours).

5.29 Sentiments of an eminent authority on parliament practice, Thomas Erskine May in his book **Treatise upon the law, privileges and usage of parliament** equally point to this. He observed in paragraph 13.2 that:

Not everything said within parliament is covered by the privilege of freedom of speech. Particular words said or acts committed within the precincts may be entirely unrelated to any business being transacted or ordered to come before either House in due course. In the view of the Select Committee on the Official Secrets Act.

'a casual conversation in the House cannot be said to be a proceeding in Parliament, and a Member who discloses information in the course of such a conversation would not be protected by privilege, though it might be a question whether the evidence necessary to secure his conviction could be given without the permission of the House.'

As far as formal proceedings are concerned, subject to the rules of order in debate, a member may state whatever they think fit in debate, however offensive it may be to the feelings, or injurious to the character, or individuals; and the member is protected by parliamentary privilege from any action for defamation, as well as from any other question or molestation. (emphasis ours)

5.30 In a paper by Justice Dr. Patrick Matibini, former Speaker of the National Assembly of Zambia presented to the 23rd Conference of Speakers and Presiding Officers of the Commonwealth, Malaysia in 2016, he stated that:

Freedom of speech entails that a Member may state whatever he or she thinks fit in the debate, without fear of being sued or

prosecuted in the course of the proceedings of the House or indeed in any of the Committees. (emphasis ours)

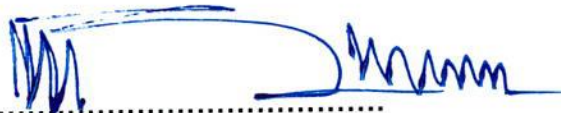
5.31 From the above, it is clear that the purpose of freedom of speech accorded to parliamentarians is to shield them from reprisals as they fearlessly debate and scrutinise the Executive as well as go about with robust law making. Both the constitutional and statutory provisions show that the freedom of speech is in respect of statements made in furtherance of business of the house and these are statements issued in formal proceedings of the House. This privilege is limited to only 'core' parliamentary activities such as debates, votes, committee work and formal proceedings.

5.32 In the case at hand, the Petitioner avers that he made the utterances during debates in the National Assembly and later repeated the utterances outside the House but within the National Assembly grounds. There is no question that the utterances made in the House are covered by the absolute freedom of speech conferred by Article 76(1). The issue is with the utterances made outside the House. The Respondent's evidence on this was that the Petitioner was charged for utterances made outside the National Assembly and the utterances were made to the media. The Petitioner did not dispute this assertion.

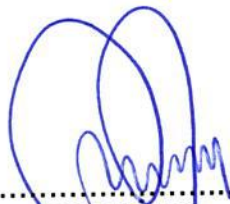
5.33 We find that the utterances having been made outside the House to the media and not in formal proceedings, are not covered by Article 76(1) of the Constitution. Freedom of speech only applies to statements made during the conduct of formal proceedings of the National Assembly or indeed in any of the committees. Press briefings are not formal proceedings of the House and do not form a “core function” of the National Assembly. They are not covered by Article 76(1) of the Constitution irrespective of whether they are made within the precinct of the National Assembly or not. The claim by the Petitioner that the 1st and 2nd Respondents violated Article 76(1) and (2) of the Constitution therefore fails for lack of merit.

5.34 That said, this Petition fails for lack of merit.

5.35 In light of the significant constitutional issues raised in this matter, we order the parties to bear their own costs.



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A. M. SHILIMI
DEPUTY PRESIDENT – CONSTITUTIONAL COURT



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M. MUSALUKE
CONSTITUTIONAL COURT JUDGE



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M. Z. MWANDENGA
CONSTITUTIONAL COURT JUDGE

M. M. Kawimbe
.....
M. M. KAWIMBE
CONSTITUTIONAL COURT JUDGE

K. Mulife
.....
K. MULIFE
CONSTITUTIONAL COURT JUDGE