

(1133)

IN THE CONSTITUTIONAL COURT OF ZAMBIA **2019/CCZ/008**
HOLDEN AT LUSAKA **SELECTED JUDGMENT NO. 32 OF 2019**
(Constitutional Jurisdiction)

IN THE MATTER OF: ARTICLE 1(5) AS READ TOGETHER WITH ARTICLE 128(1), (3) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 OF THE LAWS OF ZAMBIA. THE JURISDICTION OF THE CONSTITUTIONAL COURT.

IN THE MATTER OF: ARTICLE 1(1), (2), (3) AND (4) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 OF THE LAWS OF ZAMBIA. THE SUPREMACY OF THE CONSTITUTION, ITS CONTRAVENTION IS ILLEGAL AND THAT ALL PERSONS IN ZAMBIA, STATE ORGANS AND STATE INSTITUTION ARE BOUND BY IT.

IN THE MATTER OF: ARTICLE 2 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 OF THE LAWS OF ZAMBIA. THE RIGHT AND DUTY TO DEFEND THE CONSTITUTION FROM OVERTHROWN, SUSPENDED OR ILLEGALLY ABROGATED.

IN THE MATTER OF: ARTICLES 3 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 OF THE LAWS OF ZAMBIA. THE CONSTITUTION SHALL NOT BE AFFECTED BY AN UNLAWFUL ACT TO OVERTHROW, SUSPEND OR ILLEGALLY ABROGATE ITS PROVISIONS.

IN THE MATTER OF: ARTICLE 266 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 AS READ TOGETHER WITH SECTION 2 OF THE JUDICIAL (CODE OF CONDUCT) ACT NO. 13 OF 1999 AS READ TOGETHER WITH THE JUDICIAL (CODE OF CONDUCT) (AMENDMENT) ACT NO. 13 OF 2006 OF THE LAWS OF ZAMBIA. THE DEFINITION OF "JUDICIAL OFFICER" AND "PUBLIC OFFICER."

IN THE MATTER OF: ARTICLES 122 (1), (2), (3), (4) AND 236 (2) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 OF THE LAWS OF ZAMBIA. FUNCTIONAL INDEPENDENCE OF JUDICIARY AND JUDICIAL COMPLAINTS COMMISSION RESPECTIVELY.

IN THE MATTER OF: SECTIONS 25 (1), (2); 24 (1) AND 24 (2) (d) OF THE JUDICIAL (CODE OF CONDUCT) ACT NO. 13 OF 1999 AS READ TOGETHER WITH THE JUDICIAL (CODE OF CONDUCT) (AMENDMENT) ACT NO. 13 OF 2006 OF THE LAWS OF ZAMBIA. PROCEDURE TO BE FOLLOWED ON ANY COMPLAINT AGAINST A JUDICIAL OFFICER AND APPROPRIATE AUTHORITY.

IN THE MATTER OF: SECTIONS 54 AND 55 OF THE SUBORDINATE COURT ACT, CHAPTER 28 OF THE LAWS OF ZAMBIA. ALL THE MAGISTRATES WHEN PERFORMING THEIR JUDICIAL FUNCTIONS ARE ONLY SUBJECT TO THE DIRECTIONS AND CONTROL OF THE HIGH COURT AND THEY ARE PROTECTED FROM ANY ACTION.

IN THE MATTER OF: SECTION 33 (1) OF THE JUDICIAL (CODE OF CONDUCT) ACT NO. 13 OF 1999 AS READ TOGETHER WITH THE JUDICIAL (CODE OF CONDUCT) (AMENDMENT) ACT NO. 13 OF 2006 OF THE LAWS OF ZAMBIA. THE BREACH OF CODE OF CONDUCT.

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 122 AND 236 (2) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016, SECTION 24 (1), (2) (d), SECTION 25 (2); SECTION 33 (1) (c) AND (d) OF THE JUDICIAL (CODE OF CONDUCT) ACT NO. 13 OF 1999 AS READ TOGETHER WITH THE JUDICIAL (CODE OF CONDUCT) (AMENDMENT) ACT NO. 13 OF 2006 AND SECTIONS 54 AND 55 OF THE SUBORDINATE COURT ACT, CHAPTER 28 OF THE LAWS OF ZAMBIA.

(1135)

B E T W E E N:

CHAMA MUTAMBALILO

PETITIONER

AND

ATTORNEY-GENERAL

RESPONDENT

**CORUM: Chibomba, PC, Sitali, Mulenga, Mulonda and Musaluke, JJC,
on 23rd July, 2019 and on 9th December, 2019**

**For the Petitioner: Mr. B. Phiri of
Linus E. Eyaa and Partners**

**For the Respondent: Mr. C. Mulonda, Senior State Advocate
and
Ms. J. Mazulanyika, Assistant Senior State
Advocate**

J U D G M E N T

Sitali, JC delivered the Judgment of the Court.

Cases cited:

- 1. Ellis v Allen (1914) 1 Ch.904**
- 2. Benjamin Mwelwa v the Attorney-General, Selected Judgment No. 9 of 2019.**
- 3. Milford Maambo and Others v The People, Selected Judgment No. 31 of 2017.**
- 4. Zambia National Commercial Bank PLC v Martin Musonda and 58 Others, Selected Judgment No. 24 of 2018.**

Legislation referred to:

1. **The Constitution of Zambia, Chapter 1 of the Laws of Zambia**
2. **The Judiciary Administration Act No. 23 of 2016**
3. **The Service Commissions Act No. 10 of 2016**
4. **The Judicial (Code of Conduct) Act No. 13 of 1999**
5. **The Judicial Service Commission Regulations, Statutory Instrument No. 8 Of 1998**

Other works cited:

H. M. Malek, Phipson on Evidence, 17th edition, (London, Thompson Reuters (Legal) Limited, 2010).

By petition filed into Court on 7th March, 2019, the Petitioner, Chama Mutambalilo, seeks the following reliefs:

- (a) An interim order to stay the intended sitting of the Disciplinary Committee scheduled to sit from 10th to 14th March, 2019 in Senanga or any other time thereafter constituted outside and in violation of the provisions of Article 236 of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and sections 24 and 25 of the Judicial (Code of Conduct) Act No. 13 of 1999 read with the Judicial (Code of Conduct) (Amendment) Act No. 13 of 2006;
- (b) A declaration and order that the purported procedure in the Judicial Service Commission Regulations, Statutory Instrument No. 8 of 1998 as they seem to give power to the Judicial Service Commission or the Judiciary management to discipline a Judicial Officer create an

(1137)

unclear parallel procedure and fly in the teeth of the constitutional provisions and is therefore contrary to Article 236 of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and sections 24 and 25 of the Judicial (Code of Conduct) Act No. 13 of 1999 read with the Judicial (Code of Conduct) (Amendment) Act No. 13 of 2006 and is null and void *ab initio* for being inconsistent with the Constitution;

- (c) A declaration and order that the purported charge of insubordination by public officer in line with Part II category C. 9 (b) (i) and (ii) of the Disciplinary Code and Procedures for Handling Offences in the Public Service and its purported procedure do not apply to the Petitioner who is a judicial officer and is therefore contrary to Articles 236 and 266 of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and sections 24 and 25 of the Judicial (Code of Conduct) Act No. 13 of 1999 read with the Judicial (Code of Conduct) (Amendment) Act No. 13 of 2006 and is null and void *ab initio* for being inconsistent with the Constitution;
- (d) A declaration and Order that the Chief Administrator and Judiciary Management have violated and/or contravened section 49 of the Public Finance Management Act No. 1 of 2018 and therefore sections 50, 51 and 52 of the said Public Finance Management Act No. 1 of 2018 be invoked;
- (e) A declaration and order that one magistrate cannot interfere with the judicial duties of another magistrate and therefore the activities of the Principal Resident Magistrate for Western Province Mr. Lameck Mwale

(1138)

based at Mongu Subordinate Court to withdraw cases which were rightfully before the Petitioner's court were a gross violation of Article 122 of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and were therefore null and void *ab initio*;

- (f) A declaration and order that the Judiciary management have violated and/or contravened Articles 122 (1), (2), (3) and (4) and 236 (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and sections 24 (1), (2) (d); 25 (2) and 33 (1) (c) and (d) of the Judicial (Code of Conduct) Act No. 13 of 1999 read with the Judicial (Code of Conduct) (Amendment) Act No. 13 of 2006;
- (g) A declaration and order that the Chief Administrator and Judiciary management having violated and/or contravened Articles 122 (1), (2), (3) and (4) and 236 (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016; sections 24 (1) and (2) (d), 25 (2) and 33 (1) (c) and (d) of the Judicial (Code of Conduct) Act No. 13 of 1999 read with the Judicial (Code of Conduct) (Amendment) Act No. 13 of 2006 and section 49 of the Public Finance Management Act No. 1 of 2018, their actions are a gross violation of the Constitution;
- (h) A declaration and order that the Judiciary management can only charge the Petitioner after the Judiciary has lodged a complaint with the Judicial Complaints Commission and a hearing of both parties (the complainant being the Principal Resident Magistrate for Western Province Mr. Lameck Mwale or the Judiciary management and the Petitioner who is a judicial officer) has been conducted by the Judicial Complaints Commission and a recommendation has been made to

the appropriate authority for either disciplinary action or other administrative action to be taken against the judicial officer or if the issue is criminal in nature, to the Director of Public Prosecutions for consideration of possible criminal prosecution;

- (i) A declaration and order that the Judiciary management has no role to play in disciplinary proceedings concerning a judicial officer save only as a complainant to the Judicial Complaints Commission and when the recommendation is made by the Judicial Complaints Commission against a judicial officer such as the Petitioner who is a Magistrate to the Judicial Service Commission via the Registrar;
- (j) A declaration that the disciplinary proceedings against the Petitioner by the Disciplinary Committee set by the Judiciary management is in breach of Article 236 of the Constitution of Zambia (Amendment) Act No. 2 of 2016;
- (k) Damages for the illegal harassment, torment suffered by the actions of the Judiciary Management and embarrassment which are:
 - (i) Punitive damages;
 - (ii) Ordinary damages;
 - (iii) Exemplary damages;
 - (iv) General damages;
- (l) Damages for the professional reputation damage, odium, anguish and torture caused during the period of suspension;
- (m) Costs;

(1140)

- (n) Interest on the money found due to the Petitioner; and
- (o) Any other relief the court may deem fit.

The petition is supported by an affidavit verifying facts deposed to by the Petitioner and skeleton arguments filed on 24th May, 2019. In his petition, the Petitioner stated that he was a judicial officer working as a Resident Magistrate at Senanga Subordinate Court. Whilst presiding over actions in which representatives of Senanga Secondary School had sued various persons for encroaching on land belonging to the School, he ordered the parties to the actions to contribute money towards the costs for the court to view the area of the boundary disputes. He directed the acting Clerk of Court, Mr. Mundia Muliokela, to assess the costs as the Judiciary had no funds.

On 23rd November, 2016, Mr. Muliokela brought to him K1,200.00 cash received from the parties and he instructed him to record the receipt of the money on a piece of paper. He signed for the money and directed Mr. Muliokela to photocopy the paper and file a copy of it on each of the records relating to the Senanga

(1141)

Secondary School cases as it would be required to apportion costs to the parties. He viewed the site in the presence of the parties and began hearing the matters in open court. As he began to prepare the judgment in one of the matters, he discovered that the document relating to the K1,200.00 paid to the court by the parties was missing from all the files. Mr. Muliokela who had handled the document said he did not know where it was.

On 9th November, 2018 he received a letter from the Principal Resident Magistrate for Western Province, Mr. Lameck Mwale, charging him with misconduct by a judicial officer contrary to regulation 39(2) (a) of the Judicial Service Commission Regulations, 1998 and asking him to exculpate himself. Attached to the charge letter was the document for the K1,200.00, which document was reported missing from the Senanga Secondary School case records.

He delivered his exculpatory letter to Mr. Lameck Mwale but received another letter from Mr. Lameck Mwale stating that his exculpatory letter was unsatisfactory and that the matter had been

(1142)

referred to the Chief Administrator for further action. He received a second letter from the Chief Administrator suspending him from office pursuant to Regulation 34(1)(a) of the Judicial Service Commission Regulations, 1998. Upon receipt of the suspension letter, he handed over his case load and the station to Hon. Jane Sifali.

Arising from his exculpatory letter, Mr. Mwale charged him with a second offence of insubordination by public officer in line with Part II Category 9(b)(i) and (ii) of the Disciplinary Code and Procedures for Handling Offences in the Public Service by letter dated 13th December, 2018. He responded to the charge of insubordination and Mr. Lameck Mwale informed him by letter that he had referred the case of insubordination to the Chief Administrator for further action.

By letter dated 26th February, 2019, he was invited to attend an inquiry hearing by the disciplinary committee appointed by the Chief Justice to be chaired by Mr. Justice C.F.R Mchenga from

(1143)

10th to 14th March, 2019 on his alleged misconduct to be held in Senanga. The petitioner stated that the Chief Administrator as the Judiciary's controlling officer had allowed irregular and wasteful expenditure by constituting a huge ad-hoc disciplinary committee outside the provisions of the Constitution and without citing the law under which such a committee was constituted.

The Petitioner averred that as a judicial officer, he was only subject to the disciplinary procedure provided for in the Constitution and the Judicial (Code of Conduct) Act No. 13 of 1999 which stipulates that when there is alleged misconduct by a judicial officer, a complaint should be made against the accused judicial officer to the Judicial Complaints Commission (JCC) which is mandated to receive and investigate complaints of misconduct by a judicial officer. That the JCC considers the complaint and if necessary, invites the complainant to respond to it after which it may invite the accused judicial officer and the complainant to a hearing. The JCC then recommends to the Judicial Service Commission (JSC) through the Registrar that disciplinary action

(1144)

be taken against the judicial officer if the JCC finds that the judicial officer misconducted himself. The Petitioner contended that it is only upon receipt of such a recommendation that the JSC constitutes a committee to further investigate the allegation against the accused judicial officer, if it considers it necessary to do so.

The Petitioner stated that in this case, Mr. Lameck Mwale, the Principal Resident Magistrate should have lodged his complaint against him to the JCC pursuant to section 25 (2) of the Judicial (Code of Conduct) Act No. 13 of 1999; and only after the JCC had made its recommendation to the JSC that he should be disciplined could the Chief Administrator have suspended him and the Judiciary administration taken disciplinary action against him. The Petitioner alleged that the Judiciary management has no role to play in the hearing process of alleged misconduct by a judicial officer, except as complainant.

He asserted that the law provides for the JCC which is an independent body, and is not involved in the management of the

Judiciary, to receive and hear complaints of misconduct against a judicial officer and make recommendations to the JSC in order to protect the independence and integrity of the Judiciary as a whole and individual judicial officers from victimisation. The Petitioner further argued that although the Judiciary management had charged him with insubordination by a public officer, he was a judicial officer and not a public officer. He therefore could not be charged with insubordination by a public officer under the disciplinary code for the Public Service.

The petitioner contended that Mr. Lameck Mwale had grossly interfered in the performance of his judicial duties by having audience with parties appearing before the Petitioner's court and causing them to withdraw their cases without making any application before the Petitioner's court.

The Petitioner contended that the Chief Administrator and the Judiciary management had contravened the Constitution, the Judicial (Code of Conduct) Act No. 13 of 1999 as amended by the Judicial (Code of Conduct) (Amendment) Act No. 13 of 2006 and

the Public Finance Management Act No. 1 of 2018. He therefore seeks the reliefs set out in his petition.

In the skeleton arguments in support of the petition, Counsel for the Petitioner submitted regarding the charge of misconduct by judicial officer, that Articles 236 and 266 of the Constitution as amended provide the disciplinary procedure for judicial officers and that Article 236 (2) (a) and (c) mandates only the JCC to enforce the Code of Conduct for Judges and judicial officers and to receive complaints against a Judge or judicial officer as prescribed. He submitted that section 25 (1) and (2) of the Judicial (Code of Conduct) Act No. 13 of 1999 provides for a member of the public including the Chief Administrator or a judicial officer such as Principal Resident Magistrate Mr. Lameck Mwale, to lodge a complaint to the JCC against a judicial officer.

Counsel argued that this procedure was not complied with when the Petitioner was charged with misconduct by judicial officer; that instead a final inquiry was imposed on him by the JSC which is a final body without the Petitioner being heard by the

JCC. That in violation of Article 236 of the Constitution as amended, the Judiciary management suspended the Petitioner from office without being heard by the JCC. Counsel contended that the Judiciary management and the Chief Administrator have no authority to commence disciplinary proceedings against a judicial officer or to recommend to the JSC through the Chief Administrator the action to be taken against such officer.

Counsel further contended that the Judiciary management contravened Article 236 of the Constitution as amended when they charged the Petitioner with misconduct by judicial officer under a parallel procedure set out in the Judicial Service Commission Regulations, Statutory Instrument No. 8 of 1998 (the Regulations); that the procedure in the Regulations is in serious conflict with the provisions of Articles 236 and 266 of the Constitution read with sections 24 and 25 of the Judicial (Code of Conduct) Act No. 13 of 1999 and is illegal because in terms of Article 1 of the Constitution as amended, the Constitution is the supreme law of Zambia and its contravention is illegal. Counsel contended that the Judiciary

(1148)

as a state organ and its employees are bound by the Constitution and must follow the stipulated constitutional procedures to the letter.

Counsel submitted that the Judiciary management's actions violated Article 1 (1), (2), (3) and (4) of the Constitution as amended. He therefore urged us to declare the said actions and the Judicial Service Commission Regulations, Statutory Instrument No. 8 of 1998 illegal and void.

Counsel went on to submit that the Respondent in its Answer to the Petition and in the supporting affidavit did not dispute the contents of paragraphs 1 to 15 and paragraphs 26 to 32 of the Petition on which the Petitioner's claims are based. That since the Respondent did not dispute the procedure contained in Article 236 of the Constitution which was stated in paragraph 32 of the Petition or that the Petitioner is a judicial officer and not a public officer, the Petitioner should be granted the reliefs he seeks in his petition as the admissions made by the Respondent in its Answer and affidavit go to the root of the petition; that judgment should be

entered on the admitted facts in line with Order 27 rule 3 of the White Book (1999) edition which provides for entry of judgment on admissions. In support of his submission, Counsel cited the case of **Ellis v Allen**⁽¹⁾ wherein it was held that judgment may be entered on clear admissions made by a party.

Counsel went on to submit that by admitting paragraph 30 of the petition, the Respondent admitted the allegation that the Chief Administrator, as controlling officer, was promoting irregular and wasteful expenditure by funding the ad-hoc disciplinary Committee constituted by the Chief Justice outside the provisions of the Constitution; that since the committee was constituted to inquire into the allegations made against the Petitioner, the expenditure was irregular and was deemed wasteful and unconstitutional and contrary to section 49 (1) of the Public Finance Management Act No. 1 of 2018 which prohibits a controlling officer from permitting unauthorised, irregular or wasteful expenditure and imposes sanctions for such expenditure.

(1150)

Counsel further submitted that the Respondent in its Answer also admitted the Petitioner's allegation that the Judiciary management had grossly interfered with the Petitioner's judicial functions; that the charges raised against the Petitioner emanated from a court order made by the Petitioner pursuant to Order III rule 2 of the Subordinate Court Rules Chapter 28 of the Laws of Zambia requiring the parties to contribute money for the Court's site visit. Counsel contended that an order made by a magistrate in court can only be reviewed by a Judge of the High Court on appeal and not by the Judiciary management.

It was submitted that by charging the Petitioner with misconduct by judicial officer based on that order and suspending him from performing his official functions as a Resident Magistrate, the Judiciary management disregarded the provisions of Article 122 of the Constitution and of section 55 of the Subordinate Court Act, Chapter 28 of the Laws of Zambia and interfered with the Petitioner's judicial function as the Petitioner should not have been held personally liable for an order made in

good faith in the performance of his judicial functions. In support of his submission, counsel cited the case of **Benjamin Mwelwa v the Attorney-General**⁽²⁾ wherein we said that independence of the Judiciary entails that in the decision making process, Judges and judicial officers should have the freedom to decide cases impartially, in accordance with their interpretation of the law and facts. That they should be able to act without any restriction or improper influence. Further, that if any party was aggrieved by the order made by the Petitioner, such party should have appealed to the High Court.

Regarding the charge of insubordination against supervisor pursuant to Part II category C. 9 (b) (i) and (ii) of the Disciplinary Code and Procedures for Handling Offences in the Public Service, Counsel submitted that the Petitioner is a resident magistrate and therefore is a judicial officer. That the definition of judicial officer in Article 266 of the Constitution as amended includes, among others, a magistrate while public officer means a person holding or acting in a public office, but does not include, inter alia, a judicial

(1152)

officer. Counsel submitted that given the two definitions, a person cannot be both a judicial officer and a public officer at the same time. He further argued that the Petitioner as a judicial officer is not amenable to the Disciplinary Code for Public Officers from which the second charge against him was drawn.

Counsel prayed that the Petitioner be granted the reliefs he seeks.

At the trial of the petition, Mr. Phiri, Counsel for the Petitioner relied on the written skeleton arguments which he augmented with oral submissions. Counsel essentially reiterated the written skeleton arguments. We therefore do not consider it necessary to restate the oral submissions.

The Respondent filed an Answer to the Petition and skeleton arguments in opposition on 3rd May, 2019 and 11th June, 2019, respectively. The Respondent did not dispute most of the contents of the petition and stated in paragraphs 12, 13 and 14 of the Answer that the Petitioner was charged pursuant to the Judicial Service Commission Regulations as read with the Disciplinary Code

for Handling Offences in the Public Service which has always been applicable to subordinate court magistrates. It was averred that the Disciplinary Committee was constituted pursuant to the Judicial Service Commission Regulations and that the Judicial Complaints Commission could not be used to stop the disciplinary process by the Judicial Service Commission.

The Respondent however denied the contents of paragraph 33-47 of the petition and stated that the procedure that the Petitioner referred to was different from that which is applicable to disciplinary cases under the Judicial Service Commission Regulations pursuant to which the Petitioner was charged as read together with the Disciplinary Code for Handling Offences in the Public Service. It was contended that the Disciplinary Code for the Public Service has always been applicable to subordinate court magistrates who are not excluded from the provisions of the Code.

The Respondent stated that the Disciplinary Committee was constituted pursuant to the (Judicial Service Commission Regulations) Statutory Instrument No. 8 of 1998 and further that

(1154)

the Respondent would show at trial that the Judicial Complaints Commission cannot be used to stop the disciplinary process by the Judicial Service Commission.

The Respondent asserted that the Petitioner is not entitled to any of the reliefs he seeks.

In the skeleton arguments in opposition to the petition, Counsel submitted that the legal issues for our determination are whether the JSC is a competent body to hear and determine disciplinary issues brought against judicial officers and whether or not disciplinary charges against a judicial officer are considered interference with judicial independence.

It was submitted that although the Petitioner questioned the jurisdiction of the JSC regarding the charge of misconduct and alleged that the proper body to discipline him was the JCC in terms of Article 236 (2) of the Constitution as amended, the JSC was created by Article 220 of the Constitution and empowered by the Constitution and section 15 (1) of the Judiciary Administration Act No. 23 of 2016 to discipline erring judicial officers.

(1155)

It was contended that it was therefore a fallacy for the Petitioner to insist that only the JCC is authorised to discipline erring judicial officers.

In addition, Counsel cited section 20 of the Commonwealth Model Law on Judicial Service Commissions to press the point that the JSC is competent to discipline the Petitioner. It was submitted that Regulation 34 of the Regulations empowers the Chief Administrator to suspend a judicial officer and notify such judicial officer in writing of the reasons for the suspension. It was submitted that under regulation 39 of the Regulations, disciplinary proceedings may be instituted against a judicial officer by the JSC and that the Chief Administrator may assume and exercise the functions of the JSC.

Counsel submitted that the Respondent followed the correct procedure when instituting disciplinary action against the Petitioner and rightly charged him under Regulation 39 for the offence of misconduct. Further, that the Petitioner was charged with the offence of misconduct and insubordination in compliance

(1156)

with the Regulations and the Disciplinary Code to which the Petitioner is amenable. It was submitted that although the Respondent in its Answer had admitted the contents of paragraphs 30, 31 and 32 of the Petition, the admitted paragraphs did not go to the root of the cause of action herein and that the Petitioner was misguided to conclude that the Respondent had admitted his claim.

Counsel further submitted that the Public Finance Management Act No. 1 of 2018 does provide that when the expenditure is unauthorised, it may amount to financial misconduct. However, in this case, the disciplinary committee was constituted pursuant to the Regulations and the Chief Administrator who performed her duties according to the Regulations cannot be sanctioned under section 39 of the Act.

Regarding the submissions on judicial independence, Counsel submitted that he was alive to the provisions of section 55 of the Subordinate Court Act, and argued that independence speaks to a Magistrate's ability to render decisions based solely on

(1157)

his or her own findings and beliefs. That in the instant case, the Petitioner demanded money from one of the parties before his Court so that he could be moved to conduct a site visit as a Court, which action was gross misconduct on his part warranting his suspension.

Counsel reiterated that the disciplinary procedure that was set in motion regarding the offences of misconduct and insubordination was legal and constitutional and did not amount to interference with the Petitioner's judicial independence. He therefore, prayed that the petition be dismissed with costs.

To augment the written submission, Mr. Mulonda, Senior State Advocate supported by Ms. Mazulanyika, Assistant Senior State Advocate reiterated the written arguments which we shall not restate here.

The Petitioner filed an affidavit in reply to the Respondent's Answer in which he reiterated that by not disputing the contents of paragraphs 30 to 32 of the petition, the Respondent essentially admitted the core issues raised in the petition and therefore

(1158)

admitted the whole matter as those were the paragraphs on which the reliefs sought were premised. He reiterated that the Petitioner is a judicial officer whose disciplinary procedure is provided for in the Constitution and is not a public officer.

The Petitioner contended that the Judicial Service Commission Regulations Statutory Instrument No. 8 of 1998 regulate how an accused judicial officer must be tried when he has breached the code of conduct and do not define what misconduct is, which definition is in section 33 of the Judicial (Code of Conduct) Act No. 13 of 1999; that a judicial officer who is alleged to have breached the Code of Conduct must be charged under section 33 of the Act. He contended that that a judicial officer cannot be charged under the Regulations.

That in this case, since the Respondent purportedly charged the Petitioner under the Regulations instead of under section 33 of the Judicial (Code of Conduct) Act, the Petitioner was never charged with any offence under the law.

(1159)

Regarding the charge of insubordination, Counsel reiterated that the Petitioner was a judicial officer and not a public officer that he should be charged under the Disciplinary Code for the public service; that when the Petitioner made a judicial decision as a court, he could not be charged for misconduct as doing so would be interfering with his judicial functions contrary to Article 122 of the Constitution which guarantees judicial independence to a judicial officer.

Counsel went on to submit that it was never the Petitioner's position that the JSC is not a competent body to hear and determine disciplinary issues brought against a judicial officer but that the JSC has no jurisdiction to hear any disciplinary issues brought to it by anybody other than the JCC as envisaged by Article 236 (2) of the Constitution and section 25 of the Judicial (Code of Conduct) Act No. 13 of 1999 as amended. That the Petitioner disagreed with the assertion that the JSC could initiate disciplinary action against a judicial officer without a recommendation being made to it by the JCC and maintained that

only the JCC has constitutional power to enforce the Judicial Code of Conduct, to investigate and receive complaints from individuals and judicial officers according to Article 236 (2) of the Constitution as amended read with section 24 (1) and 25 of the Judicial (Code of Conduct) Act. The JSC disciplinary functions only as a final body. It receives already investigated matters from the JCC through the office of Chief Registrar in accordance with Article 236 (2) of the Constitution as read together with section 24 (1) of the Judicial (Code of Conduct) Act No. 13 of 1999 as amended.

Counsel contended that although the Respondent asserted that part of the JSC's prescribed functions include the discipline of erring judicial officers in accordance with regulations made by the Commission as stipulated in section 15 (1) of the Judiciary Administration Act No. 23 of 2016 the Judicial Service Commissions Regulations are rules of procedure which do not define misconduct but make available the procedure for handling a judicial officer facing a charge under another law. Further, Counsel submitted that the said Regulations provide a parallel

procedure to that provided for in Article 236 (2) of the Constitution as amended. It was contended that the said Regulations are therefore illegal in terms of Article 1 (1) of the Constitution which provides that the Constitution is the supreme law of Zambia and that any other written law which is inconsistent with its provisions is void to the extent of the inconsistency and that any act or omission that contravenes the Constitution is illegal as per Article 1 (2) of the Constitution as amended.

With regard to the Respondent's reference to the Commonwealth model law on Judicial Service Commissions: Judicial Service Commission Act 20, counsel submitted that Zambia has its own Constitution and that the Service Commissions Act No. 10 of 2016 has no provision permitting the JSC to receive complaints from members of the public but that the JSC receives recommendations from the JCC in accordance with Article 236 (2).

The Petitioner further submitted that Regulation 34 gives power to the Chief Administrator to suspend an accused judicial

officer before he is even charged with a substantive charge and not even being heard with his witnesses. That the procedure in the regulation provides a parallel procedure to the mandatory procedure in Article 236 (2) of the Constitution as read together with section 24 of the Judicial Code of Conduct Act No. 13 of 1999 as amended. That the Constitution clearly states that, any written laws that are inconsistent with the Constitution as per Article 1 (1) and (2) are illegal. It was contended the Petitioner therefore was suspended using an illegal procedure.

Counsel contended that the Petitioner was never charged with a substantive charge because the charging officer Mr. Lameck Mwale used regulations 39 (2) to charge him when he should have been charged under the Judicial (Code of Conduct) Act No. 13 of 1999. Counsel submitted that the Petitioner was a judicial officer regulated by the Judicial (Code of Conduct) Act No. 13 of 1999 which provides for misconduct. Further, that the charge of insubordination based on the Public Service Disciplinary Code is applicable to public officers and does not apply to the Petitioner

(1163)

who is a judicial officer and is therefore not amenable to that Disciplinary Code.

Counsel further submitted that although the Respondent asserted in their skeleton arguments that the disciplinary procedure that was set in motion when the Petitioner was charged with the offences of misconduct and insubordination was legal and constitutional and did not amount to interference with the Petitioner's independence, the Petitioner as a Resident Magistrate was subject to the Judicial Code of Conduct and any misconduct on his part should have been charged in accordance with the Judicial Code of Conduct. That in this case, the Petitioner was never charged in accordance with the Judicial Code of Conduct and never appeared before the JCC for him to be arraigned before the JSC for further sanctions. Counsel, therefore, prayed that the Petition be upheld and that the reliefs sought be awarded in favour of the Petitioner with costs.

(1164)

We have considered the contents of the Petition, the Answer, the Reply and the affidavits in support of and in opposition to the Petition. We have also duly considered the respective parties' written and oral submissions and the authorities cited. The Petitioner seeks several declarations and orders as he challenges the decision of the Judiciary Management to charge him with the offence of misconduct by judicial officer under the Judicial Service Commission Regulations, Statutory Instrument No. 8 of 1998 and with the offence of insubordination by a public officer under the Disciplinary Code and Procedures for Handling Offences in the Public Service without a complaint first being made to the JCC.

The principles applicable to the interpretation of the Constitution are well settled. Thus in determining this matter, we reiterate as a starting point that the Constitution is the supreme law in Zambia and ranks above all other laws in terms of Article 1 of the Constitution as amended. Therefore, any law that is inconsistent with the Constitution is void to the extent of the inconsistency. In addition, as we stated in **Milford Maambo and**

Others v The People⁽³⁾ and in **Zambia National Commercial Bank PLC v Martin Musonda and 58 Others**⁽⁴⁾ 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.

Another principle of constitutional interpretation is that all the relevant provisions bearing on the subject for interpretation should be considered together as a whole in order to give effect to the objective of the constitution. This means no one provision of the Constitution should be segregated from the others and considered alone. These are the principles which have guided us in determining the issues in this matter.

We shall first consider the Petitioner's claim for a declaration and order that the Judiciary management can only charge the Petitioner after a complaint is lodged before the JCC and based on a recommendation made by the JCC to the JSC that disciplinary

action be taken against the concerned judicial officer. We shall simultaneously consider the related claim for a declaration that the Judiciary management has no role to play in the disciplinary process of a judicial officer, save as complainant both before the JCC and before the JSC through the Registrar.

In support of these two claims, the Petitioner in his petition and skeleton arguments contended that Article 236 (2) (a) and (c) of the Constitution mandates only the JCC to enforce the Code of Conduct for Judges and judicial officers and to receive complaints as prescribed in the Judicial (Code of Conduct) Act. He further argued that in terms of section 25 (1) and (2) of the Judicial (Code of Conduct) Act as amended a member of the public, including the Chief Administrator, or a judicial officer may lodge a complaint against a judicial officer to the JCC. He further contended that Article 236 (2) (e) of the Constitution requires the JCC to make recommendations to the JSC as the appropriate authority after hearing the parties concerned. That Articles 236 and 266 of the Constitution provide the mandatory procedure on how disciplinary

(1167)

action should be instituted against a judicial officer such as the petitioner, and that any other parallel procedure is illegal and void as it is inconsistent with that procedure. The Petitioner alleged that this procedure was not complied with in his case and that, instead, a final inquiry was imposed on him by the JSC without his being heard by the JCC.

The Respondent on the other hand argued that the procedure in Article 236 (2) of the Constitution which the Petitioner referred to was different from the procedure which is applicable to disciplinary cases under the Judicial Service Commission Regulations, S. I. No. 8 of 1998 pursuant to which the Petitioner was charged as read with the Disciplinary Code for Handling Offences in the Public Service. The Respondent contended that the Disciplinary Code for the Public Service has always applied to subordinate court magistrates like the Petitioner.

We have considered the opposing arguments. The issue we have to determine regarding the two claims is whether the Petitioner as a judicial officer can be disciplined by the JSC

without a complaint first being made to the JCC and thereafter a recommendation for disciplinary action to be taken against the judicial officer being made to the JSC by the JCC. In determining this issue, we have considered the relevant provisions of the Constitution, the Judiciary Administration Act No. 23 of 2016 and the Service Commissions Act No. 10 of 2016 relating to the establishment, functions and powers of the Judicial Service Commission alongside the provisions of the Judicial Service Commission Regulations, Statutory Instrument No. 8 of 1998. We have also considered the constitutional provisions and the provisions of the Judicial (Code of Conduct) Act No. 13 of 1999 relating to the establishment and functions of the Judicial Complaints Commission.

As a starting point, we note that Article 145 (1) of the Constitution vests the power to appoint judicial officers in the JSC as follows:

- (1) The Judicial Service Commission shall appoint judicial officers, as prescribed.**

The term judicial officer as defined by Article 266 of the Constitution includes a magistrate, local court magistrate, registrar and such officers as prescribed.

Further, Article 220 (1) of the Constitution as amended establishes the Judicial Service Commission while its functions are stipulated in Article 220 (2) as follows:

- (1) There is established the Judicial Service Commission.**
- (2) The Judicial Service Commission shall -**
 - a) constitute offices in the Judicial Service;**
 - b) make recommendations to the President on the appointment of judges;**
 - c) appoint, confirm, promote and hear appeals from judicial officers; and**
 - d) carry out a function provided for in this Constitution, or as prescribed.**

In addition, Article 241 of the Constitution provides for general powers of commissions, including the JSC, as follows:

241. A commission -

- (a) shall appoint its staff;**
- (b) may refer matters within its mandate to appropriate state organs or state institutions for action;**
- (c) may initiate its own investigations and receive complaints from a person on matters within its mandate;**
- (d) shall take measures to ensure that state institutions and other persons comply with its decisions; and**

(1170)

(e) shall submit annual reports to the National Assembly on its accounts and activities as prescribed.(Emphasis added)

Article 242 of the Constitution goes on to provide for the enactment of legislation on commissions in the following terms:

242. The functions, composition, appointment of members, tenure of office of members, processes and procedures, operations, administration, structures, finances and financial management of a commission shall be prescribed.

Pursuant to Article 242 of the Constitution as amended, the Service Commissions Act No. 10 of 2016 was enacted. Section 6 of the Act provides generally for the functions of the JSC while section 6 (b) of the Act, which is relevant to this case, vests power to discipline employees of the Judicial Service, including judicial officers, in the JSC in the following terms:

6. The functions of the Judicial Service Commission are as provided in the Constitution and to –

(b) appoint, confirm, promote, second, re-grade, transfer, discipline and separate the employees of the Judicial Service; (Emphasis added).

Further, the Judiciary Administration Act No. 23 of 2016 provides for the administration of the Judiciary. Specifically, section 7 of the Act vests the power to appoint judicial officers including subordinate court magistrates in the JSC. Section 15 of

the same Act provides for the exercise of disciplinary powers by the JSC as follows:

- 15. The Commission shall exercise its powers with respect to the dismissal, disciplinary action or termination of appointment of a person appointed under the Act in accordance with regulations made under the Act. (Emphasis added)**

On the other hand, Article 236 (1) and (2) of the Constitution as amended establish the JCC and stipulate its functions as follows:

- (1) There is established the Judicial Complaints Commission.**
- (2) The Judicial Complaints Commission shall -**
 - a) enforce the Code of Conduct for judges and judicial officers;**
 - b) ensure that judges and judicial officers are accountable to the people for the performance of their functions;**
 - c) receive complaints lodged against a judge or judicial officer, as prescribed;**
 - d) hear a complaint against a judge or judicial officer, as prescribed;**
 - e) make recommendations to the appropriate institution or authority for action; and**
 - f) perform such other functions as prescribed.**

The Judicial (Code of Conduct) Act No. 13 of 1999 provides for the Code of Conduct for judges and judicial officers. Section 24 (1)

of the Act as amended further sets out the functions of the JCC as follows:

24. (1) The functions of the Authority shall be to –

- a) receive any complaint or allegation of misconduct and investigate any complaint or allegation made against a judicial officer:**

Provided that where, in the opinion of the Authority a complaint or allegation made against a judicial officer does not disclose a prima facie case, the Authority may dismiss such a complaint or allegation without investigating the complaint or allegation.

- b) submit its findings and recommendations to –**
 - (i) the appropriate authority for disciplinary action or other administrative action; and**
 - (ii) the Director of Public Prosecutions for consideration of possible criminal prosecution.**

Section 25 (1) and (2) of the Act provides for the lodging of complaints against a judicial officer as follows:

25. (1) Any member of the public who has a complaint against a judicial officer or who alleges or has reasonable grounds to believe that a judicial officer has contravened this Act shall inform the Authority.

- (2) Where a judicial officer alleges or, has reasonable grounds to believe that any other judicial officer has contravened this Act, the judicial officer shall inform the Authority.**

The Judicial (Code of Conduct) Act No. 13 of 1999 was enacted pursuant to the repealed Article 91 of the Constitution. Following the repeal of the former Article 91 of the Constitution, the Act has continued in force to the extent that it is not inconsistent with the Constitution as amended. The Act must be construed with necessary modifications to bring its provisions into conformity with the Constitution as amended pursuant to the provisions of section 6 of the Constitution of Zambia Act No. 1 of 2016. Section 6 of the Act provides with regard to existing laws as follows:

6. (1) **Subject to the other provisions of this Act, and so far as they are not inconsistent with the Constitution as amended, existing laws shall continue in force after the commencement of this Act as if they had been made in pursuance of the Constitution as amended, but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution as amended.**

An examination of the provisions of Article 236 (2) (a), (c), (d) and (e) of the Constitution as amended reveals that the Constitution in that article vests the power to enforce the Code of Conduct for Judges and judicial officers; to receive and hear complaints lodged

against a Judge or judicial officer and to make recommendations to the JSC for action as prescribed, in the JCC.

Further, section 24 (1) (a) and (b) of the Judicial (Code of Conduct) Act, read with necessary modifications, in line with the provisions of Article 236 (2) (c), (d) and (e) of the Constitution provide for the JCC to receive complaints or allegations of misconduct against a judicial officer and to submit its findings and recommendations to the appropriate authority, which is the JSC in the case of judicial officers, for disciplinary action or other administrative action. Section 25 (1) and (2) of the Act provides for a member of the public or a judicial officer who has a complaint against a judicial officer or believes that the judicial officer has contravened the Act to inform the JCC.

In terms of Article 236 (2) (a), (c), (d) and (e) of the Constitution as amended read with sections 24 (1) (a) and (b) and 25 (1) and (2) of the Act, where misconduct is alleged against a judicial officer, the complaint regarding the alleged misconduct should be made in the first instance to the JCC which will hear the complaint, if

necessary, and thereafter make a recommendation to the JSC for action to be taken. This implies that once the JSC has received a recommendation from the JCC for appropriate action to be taken against the judicial officer, the JSC may then proceed to discipline the judicial officer or to take administrative action as appropriate.

However, in interpreting the provisions of Article 236 (2) (a), (c), (d) and (e) of the Constitution as amended, we are mindful of the provisions of Article 241 of the Constitution as amended which provides for general powers of commissions. Article 241(c) of the Constitution gives power to a commission to initiate its own investigations and receive complaints from a person on matters within its mandate. Article 241 of the Constitution as amended applies to all commissions established by the Constitution. The JSC is not excluded from its provisions. Therefore, the power to initiate its own investigations and to receive complaints from a person on matters within its mandate as stipulated in Article 241 (c) of the Constitution as amended applies to the JSC. In the case of the JSC, matters within its mandate include power to exercise disciplinary

control over judicial officers as the appointing authority. We are fortified in our interpretation of Article 241 (c) of the Constitution as Article 220 (2) (d) of the Constitution as amended empowers the JSC to carry out a function provided for in the Constitution, or as prescribed. This is a function other than those set out in Article 220 (2) (a), (b) and (c) of the Constitution as amended.

What that means is that, in essence, the Constitution provides two avenues by which a complaint against a judicial officer may be dealt with by the JSC. The first is that the JSC can receive a recommendation from the JCC for action to be taken against a judicial officer under Article 236 (2) (e) and act upon that recommendation. The second is that the JSC may in exercise of the power vested in it under Article 241 (c) of the Constitution as amended initiate its own investigations and receive complaints from a person on matters within its mandate including a complaint against a judicial officer.

Having carefully examined the constitutional and statutory provisions which we have set out in this judgment, we hold that in

order to give effect to the intention of the framers of the Constitution, the provisions of Article 236 (2) (a), (c), (d) and (e) of the Constitution as amended should be read with the provisions of Article 220 (2) (d) and Article 241(c) of the Constitution as amended and should not be read in isolation from each other.

That being the case, the provisions of section 25(1) and (2) of the Judicial (Code of Conduct) Act No. 13 of 1999 to the extent that they are couched in imperative terms and require a member of the public who has a complaint against a judicial officer or a judicial officer who believes another judicial officer has contravened the Act to inform the JCC, and do not include the power of the JSC to initiate its own investigations and to receive complaints against judicial officers, are at variance with the clear provisions of Article 241(c) of the Constitution as amended.

Given the clear provisions of section 6 of the Constitution of Zambia Act No.1 of 2016 that an existing law continues in force after the coming into force of the Constitution as amended as long as it is not inconsistent with the Constitution as amended, it is

evident to us that sections 24 and 25 of the Judicial (Code of Conduct) Act No.13 of 1999 must be construed with necessary modification to bring them into conformity with the Constitution as amended until such a time as Parliament amends the Act to bring it into conformity with the provisions of Article 220 (2) (d) and Article 236(2) read with Article 241(c) of the Constitution as amended.

Having said that, we note that in the present case, the Principal Resident Magistrate, Mr. Mwale, charged the Petitioner with judicial misconduct under regulation 39 (2) (a) of the Judicial Service Commission Regulations, Statutory Instrument No. 8 of 1998. Regulation 39 (2) (a) of the Regulations permits a disciplinary authority to commence disciplinary proceedings against a judicial officer, while regulation 2 of the Regulations defines disciplinary authority, in relation to disciplinary proceedings, to mean the head of department or the supervising officer in the Judiciary. This procedure when read in the light of Article 241 (c) of the Constitution cannot be impugned.

Having examined all the relevant constitutional and statutory provisions touching on the powers of the JSC and the JCC with regard to the discipline of judicial officers, since Article 241 (c) of the Constitution gives the JSC power to initiate its own investigations and receive complaints from a person on matters within its mandate, it follows that the Petitioner's claim that the Judiciary management could only charge him after the management had lodged a complaint to the JCC and that the JSC could only discipline him pursuant to a recommendation made to it by the JCC is untenable.

We accordingly refuse to grant the declaration that the Petitioner could only be charged by the disciplinary authority under the Judicial Service Regulations, S. I. No. 8 of 1998 after a complaint was lodged with the JCC and a recommendation for action made by the JCC to the JSC.

We urge the Attorney-General, pursuant to section 6 (2) of the Constitution of Zambia Act No. 1 of 2016, to facilitate the enactment of legislation to bring the Judicial (Code of Conduct) Act into conformity with Articles 220 (2) (d), 241 (c) and 236 (2) of the Constitution as amended relating to the disciplining of judicial officers.

Regarding the claim that the Judiciary management has no role to play in the disciplinary process of a judicial officer, we find that the assertion is not supported by the law in that the role of the JCC in the disciplinary process for judicial officers ends at making a recommendation for appropriate action to be taken by the JSC in accordance with Article 236 (2) (e) of the Constitution. After the recommendation is received, the JSC performs its disciplinary powers over a judicial officer in accordance with the Judicial Service Commission Regulations as provided by section 15 of the Judiciary Administration Act No. 23 of 2016. The Regulations clearly spell out the function of the Judiciary management in the ensuing disciplinary process. Further, as we have already pointed out, the

JSC has power to initiate its own investigations against a judicial officer pursuant to Article 241 (c) of the Constitution as amended. Those investigations may inevitably require the involvement of the Judiciary management. It is therefore incorrect to state that the Judiciary management has no role to play in the disciplinary process regarding a judicial officer except as complainant before the JCC and the JSC in view of the clear provisions of the law to the contrary. That being the case, we decline to grant a declaration to that effect as prayed.

The Petitioner also seeks a declaration that the procedure contained in the Judicial Service Commission Regulations, S. I. No. 8 of 1998 by giving power to the Judicial Service Commission or the Judiciary management to discipline a judicial officer creates an unclear parallel procedure contrary to Article 236 of the Constitution as amended read with sections 24 and 25 of the Judicial (Code of Conduct) Act, and is inconsistent with the Constitution as amended and is therefore null and void *ab initio*. He further seeks a declaration that the disciplinary proceedings

against the Petitioner by the disciplinary committee appointed by the Judiciary management is in breach of Article 236 of the Constitution as amended. We shall consider these two claims together as they are inter-related.

The issue we have to determine related to these claims is whether the provisions of the Judicial Service Commission Regulations, S. I. No. 8 of 1998 to the extent that they give power to the Judicial Service Commission to discipline a judicial officer contravene Article 236 (2) of the Constitution as amended. We should say at the outset that our examination of the provisions of Article 236 (2) against the provisions of Article 220 (2) reveals that the Constitution as amended provides for a two-tier disciplinary process for judicial officers where a complaint is first made to the JCC under Article 236 (2) (c) of the Constitution. Our interpretation of Article 236 (2) (a), (c), (d) and (e) of the Constitution is that the role of the JCC in that process is limited to enforcing the Code of Conduct against judicial officer by receiving and hearing complaints

against judicial officers and recommending action to be taken against a judicial officer to the JSC.

The power to discipline the judicial officer is vested in the appointing authority of the judicial officer which is the JSC. As we stated earlier on in this judgment, Article 145 (1) of the Constitution vests the power to appoint judicial officers in the JSC. Again as we said earlier on, the Constitution as amended provides in Article 270 that the power to appoint includes the power to exercise disciplinary control over the person so appointed and to remove such person from office. To that effect, Article 270 of the Constitution provides as follows:

"In this Constitution, unless a contrary intention is expressed, power to appoint a person to hold or act in an office includes the power to confirm appointments, to exercise disciplinary control over the person holding or acting in the office and to remove that person from office."

After receiving a recommendation for action against a judicial officer from the JCC under Article 236 (2) (e) of the Constitution as amended, the JSC exercises its disciplinary control over such judicial officer in accordance with its own regulations as provided

by section 15 of the Judiciary Administration Act No. 23 of 2016. In this case, the regulations currently in force are the Judicial Service Commission Regulations, S. I. No. 8 of 1998.

The Regulations were made under the authority of the Judicature Administration Act, Chapter 24 of the Laws of Zambia which was repealed and replaced by the Judiciary Administration Act No. 23 of 2016. Section 15 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia, provides a guide with respect to written laws and provides as follows:

“Where any Act, Applied Act or Ordinance or part thereof is repealed, any statutory instrument issued under or made in virtue thereof shall remain in force, so far as it is not inconsistent with the repealing written law, until it has been repealed by a statutory instrument issued or made under the provisions of such repealing written law, and shall be deemed for all purposes to have been made thereunder.”

The Regulations therefore continue to be in force under the Judiciary Administration Act No. 23 of 2016 and are applicable insofar as they are not inconsistent with the said Act. The disciplinary procedures and processes contained in the Regulations are still valid in view of the provisions of section 15 of the Judiciary

Administration Act No. 23 of 2016 which empowers the JSC to exercise its powers regarding disciplinary action over a judicial officer in accordance with regulations made under the Act.

We have considered the provisions of these Regulations and our view is that when read with necessary modifications, the Regulations do not contravene Article 236 (2) of the Constitution. This is because the power to charge a judicial officer by the JSC under the current constitutional set up is intended to be exercised by the JSC either after receipt of a recommendation for disciplinary action by the JCC or the JSC may initiate its own investigations and receive complaints from a person on the discipline of a judicial officer which is within its mandate as we have already stated in this judgment.

When the provisions of Article 236 (2) and 220 (2) (d) and 241 (c) of the Constitution as amended are read in their proper context, we find that the procedure set out in the Judicial Service Commission Regulations, S. I. No. 8 of 1998 for the discipline of judicial officers does not contravene the provisions of Article 236 of

the Constitution. We, therefore, decline to grant the declaration that the Judicial Service Commission Regulations, S. I. No. 8 of 1998 are illegal and null and void *ab initio*. Further, in view of our interpretation of the provisions of Articles 236 (2) and 220 (2) (d) read with Article 241 (c) of the Constitution, we also decline to grant a declaration that the disciplinary proceedings against the Petitioner by the Disciplinary Committee appointed by the Judiciary management is in breach of Article 236 of the Constitution as amended.

We further decline to grant the interim order to stay the sitting of the Disciplinary Committee constituted to investigate the alleged misconduct of the Petitioner in light of the provisions of Article 241 (c) of the Constitution as amended. We have already explained the import of Article 241 (c) in this judgment.

The Petitioner further seeks a declaration and an order that one magistrate cannot interfere with the judicial duties of another magistrate and that Mr. Mwale's activities of withdrawing cases that were before the Petitioner's court violated Article 122 of the

Constitution and were therefore null and void. He seeks a further declaration and order that the Judiciary management violated and contravened Articles 122 and 236 (2) of the Constitution as amended read together with the Judicial (Code of Conduct) Act. We shall consider these two claims together as they are related.

From the outset, we wish to state that although the Petitioner alleged that the Principal Resident Magistrate for Western Province interfered with his independence as a judicial officer by causing parties to withdraw cases which were before him, the Petitioner stated in paragraph 24 of his Petition that he handed over his case load and the station to Honourable Jane Sifali upon receipt of the suspension letter written to him by the Chief Administrator.

The suspension letter which the Petitioner exhibited to his affidavit verifying facts and which is set out at page 58 of the record of proceedings shows that the Petitioner was suspended from exercising the powers and functions of his office as a magistrate with immediate effect. From his own evidence, it is clear to us that having been suspended from office, the Petitioner

could not continue to perform his judicial functions as a magistrate. Further, the Petitioner did not adduce any evidence to support the allegation that Mr. Lameck Mwale interfered with the performance of his judicial functions by causing the parties to withdraw matters before him. He did not call any witness to testify before this Court that such witness was influenced by the Principal Resident Magistrate to withdraw his or her case before the Petitioner. In any case, it is clear to us from the affidavit evidence that Mr. Lameck Mwale was exercising his authority over the Petitioner as supervisor in the Western province, and not as the Petitioner's fellow magistrate.

As regards the allegation that the Judiciary management interfered with his independence as a judicial officer and therefore contravened Article 122 of the Constitution, we have examined the charge letter relating to the offence of misconduct by judicial officer which letter is exhibited at page 82 of the record of proceedings. The relevant part of the letter reads:

"It has been brought to my attention that on 23rd November, 2016, you received the sum of K1,200.00 from the plaintiff in the matter of Mutuna Sumbwanyambe (suing as Headmaster of Senanga

(1189)

Secondary School) plus 2 others v Kahilu Kahilu, Cause No. 2016/IZO/24, receipt of which you acknowledged by signing on a document attached hereto for ease of reference.

The said signed document shows that the money in question was meant for viewing of Senanga Secondary School plots. This same money was never receipted nor banked but was put to personal use by yourself.

You are fully aware that the Judiciary does not charge litigants for land viewing and your conduct amounts to misconduct by a Judicial Officer contrary to Regulation 39 (2) (a) of S.I. No. 8 The Judicial Service Commission Regulations, 1998.(Sic)

In this regard, you have up to 13th November, 2018 to show cause why disciplinary proceedings should not be instituted against you."

Having read the above letter, we note that the charge against the Petitioner was based on his having required parties in a matter before him to pay for a site visit when the Judiciary does not require parties to pay for site visits; and for his failure to receipt and bank the money which was paid for that purpose but instead putting it to his personal use. The letter does not disclose any interference by Mr. Mwale or the Judiciary management in the performance of the Petitioner's judicial functions contrary to Article 122 (2) of the Constitution as he alleged. In the case of **Benjamin Mwelwa v The Attorney-General**⁽²⁾ we stated that:

"Independence of the Judiciary entails that in the decision-making process, judges and judicial officers should have the freedom to

(1190)

decide cases impartially, in accordance with their interpretation of the law and the facts. They should be able to act without any restriction or improper influence. They should also act without fear of reprisals for decisions and orders they make in the course of performing judicial functions."

Counsel for the Petitioner argued that the Petitioner made the order requiring the parties to pay for the site visit pursuant to Order III rule 2 of the Subordinate Court Rules, Chapter 28 of the Laws of Zambia and that the order was made for the benefit of the parties. However, we do not agree that an order made by a judicial officer that a party in an action should bear the costs of a site visit, which costs are to be borne by the Judiciary was for the benefit of the parties.

It is settled law that in order to succeed in his or her claim in a civil matter, a party must prove his or her allegations to the required standard. To that effect, the learned authors of **Phipson on Evidence**, 17th edition in paragraph 6-06 at page 151 state, regarding the burden of proof in civil cases as follows:

"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him."

In the absence of evidence to prove that Mr. Mwale and the Judiciary management contravened Article 122 of the Constitution by interfering with the Petitioner's judicial functions, we decline to grant the orders as prayed and accordingly dismiss the two claims.

The Petitioner also seeks damages for illegal harassment and torture suffered due to the actions of the Judiciary management being punitive, ordinary and exemplary and general damages. He further seeks damages for the professional reputation damage, odium and anguish and torture caused during the period of suspension with interest.

We have examined the affidavit evidence placed before us by the Petitioner and have found no evidence of illegal harassment, torture or embarrassment of the Petitioner by the Judiciary management as alleged by the Petitioner to warrant the award of damages in any form. It was incumbent upon the Petitioner to adduce clear evidence that the Judiciary management by its actions caused him injury for which he ought to be awarded

damages. In the absence of such evidence, the Petitioner's claim for damages under the respective heads fails and is dismissed.

The other issue we have to determine is whether the Petitioner as a judicial officer can be charged with an offence under the Disciplinary Code and Procedures for Handling Offences in the Public Service. The Petitioner contended that as a judicial officer he cannot be charged with the offence of insubordination under the Disciplinary Code for the Public Service as he is not a public officer. The Respondent on the other hand contended that the Petitioner was rightly charged with the offence of insubordination under the Disciplinary Code and Procedures for Handling Offences in the Public Service because the said disciplinary code has always been applicable to subordinate court magistrates.

In determining this issue, we note that Article 219 (1) of the Constitution as amended establishes the Judicial Service and the office of judicial officer is stated as being an office in the Judicial Service under Article 219 (2) which reads:

- (2) **The office of judge, judicial officer, the members of staff of the Judicial Service Commission and such other officers as prescribed, are offices in the Judicial Service.**

The office of public officer on the other hand is an office in the Civil Service in terms of Article 221 (2) of the Constitution. Further, in terms of the definitions in Article 266, judicial officer includes a magistrate. Public officer on the other hand means -

"A person holding or acting in a public office, but does not include a State officer, councilor, a Constitutional office holder, a judge and a judicial officer." (Emphasis added)

Public service is defined as follows:

"public service" means service in the Civil Service, the Teaching Service, Defence Force and National Security Service, the Zambia Correctional Service, the Zambia Police Service, Emoluments Commission, State Audit Commission, Lands Commission, Electoral Commission, Human Rights Commission, Gender Equity and Equality Commission, the Anti-Corruption Commission, Drug Enforcement Commission, the Anti-Financial and Economic Crimes Commission, the Police and Public Complaints Commission, and service as a constitutional office holder, service in other offices, as prescribed."

Having said that, however, we note that the Disciplinary Code and Procedures for Handling Offences in the Public Service (the Disciplinary Code) was issued by the Service Commissions pursuant to section 21 of the Service Commissions Act, chapter 259 of the Laws of Zambia. Section 2 of the Disciplinary Code

defines “service commission” to mean, in relation to any particular service, the Public Service Commission, the Teaching Service Commission, the Police and Prisons Service Commission or any other service commission duly established under Article 123 of the Constitution of Zambia or section 7 of the Service Commissions Act.

The Judicial Service Commission was established by the repealed Article 123 (1) of the Constitution prior to the enactment of the Constitution of Zambia (Amendment) Act No. 2 of 2016. The Disciplinary Code therefore applies to all offices for which the various service commissions (including the Judicial Service Commission) are responsible except those offices specified in section 3 of the Disciplinary Code. Section 3 lists the offices to which the Code does not apply and it does not exclude judicial officers from the provisions of the Disciplinary Code.

That being the case, the Disciplinary Code applies to judicial officers as Counsel for the Respondent rightly submitted. Following the enactment of the Constitution of Zambia

(Amendment) Act No. 2 of 2016 and the Service Commissions Act No. 10 of 2016 which repealed and replaced the Service Commissions Act of 1991, the Disciplinary Code has to be read with necessary modification as stipulated by section 6 of the Constitution of Zambia Act No. 1 of 2016, which was cited earlier. The Disciplinary Code provides for ordinary offences which are not provided for in the Judicial (Code of Conduct) Act No. 13 of 1999 as amended in relation to judicial officers.

For us to accept the Petitioner's argument that the Disciplinary Code does not apply to judicial officers in light of the clear provisions of the law to the contrary would leave a gap as there would be no basis upon which a judicial officer would be disciplined for an ordinary offence such as insubordination in the interim period.

We therefore decline to grant the Petitioner a declaration that the charge of insubordination by public officer under the Disciplinary Code and Procedures for Handling Offences in the

(1196)

Public Service and its procedures do not apply to the Petitioner as a judicial officer.

We further decline to declare that the said Disciplinary Code contravenes Article 236 and 266 of the Constitution and is therefore null and void as that is not the case. These two claims fail and are dismissed.

The last issue we shall consider relates to the Petitioner's assertion that the Chief Administrator as controlling officer for the Judiciary has contravened the provisions of section 49 of the Public Finance Management Act No. 1 of 2018 and that sections 50, 51 and 52 of the said Act should therefore be invoked. The Petitioner claimed in his affidavit verifying facts that the Chief Administrator as the Judiciary's controlling officer by constituting an *ad-hoc* disciplinary committee without citing the law under which the committee was constituted and outside the provisions of the Constitution as amended had allowed irregular and wasteful expenditure contrary to the stipulation of the Public Finance Management Act No. 1 of 2018.

(1197)

The question that arises from this allegation is whether this Court is competent to determine allegations of contravention of the Public Finance Management Act No. 1 of 2018. Our brief reaction to this claim is that the jurisdiction of this Court as stated in Article 128 of the Constitution as amended does not extend to the determination of allegations of violations of Acts of Parliament as these are matters reserved to the jurisdiction of the High Court. That being the case, the claim is improperly before us and we accordingly dismiss it.

In sum, the petition fails in its entirety. For reasons we have already stated, we reiterate that the disciplinary proceedings relating to the charges of misconduct by judicial officer and insubordination respectively, were properly commenced against the Petitioner. The disciplinary proceedings are therefore valid.

(1198)

As the Petition has provided us an opportunity to interpret the constitutional provisions relating to the JCC and the JSC as they relate to the discipline of judicial officers, each party will bear their own costs.



.....
H. Chibomba
PRESIDENT, CONSTITUTIONAL COURT



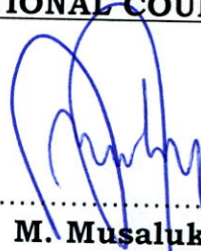
.....
A.M. Sitali
CONSTITUTIONAL COURT JUDGE



.....
P. Mulonda
CONSTITUTIONAL COURT JUDGE



.....
M.S. Mulenga
CONSTITUTIONAL COURT JUDGE



.....
M. Musaluke
CONSTITUTIONAL COURT JUDGE