IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 28/2017**
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

IN THE MATTER OF	**SECTION 123 (1) OF THE CRIMINAL PROCEDURE CODE CHAPTER 88 OF THE LAWS OF ZAMBIA**
IN THE MATTER OF	**ARTICLES 1, 11, 13 AND 18 OF THE CONSTITUTION OF ZAMBIA**
IN THE MATTER OF	**RULE 2 OF THE PROTECTION OF THE FUNDAMENTAL RIGHTS RULES, 1969**

BETWEEN:

HAKAINDE HICHILEMA	**FIRST APPELLANT**
HAMUSONDE HAMALEKA	**SECOND APPELLANT**
MULEYA HACHINDA	**THIRD APPELLANT**
MULILANDUBA LASTON	**FOURTH APPELLANT**
HALOBA PRETORIUS	**FIFTH APPELLANT**
CHAKAWA WALLACE	**SIXTH APPELLANT**

AND

THE GOVERNMENT OF THE REPUBLIC OF ZAMBIA **RESPONDENT**

CORAM: MAMBILIMA CJ, MALILA AND MUTUNA JJS;
On 3rd March, 2020 and 9th June, 2020

For the Appellants:	**Mr. J.P. Sangwa, SC and Mr. L. Mwamba, of Simeza Sangwa and Associates**
For the Respondent:	**Mr. L. Kalaluka, SC Attorney General and Mr. F. K. Mwale, Principal State Advocate**

JUDGMENT

MAMBILIMA CJ, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **BP ZAMBIA PLC V INTERLAND MOTORS (2001) ZR 37**

2. NARANJAN SINGH V STATE OF PUNJAB AND HARYANA HIGH COURT AND ANOTHER CWP NO. 14849 OF 2009
3. CHELASHOW V ATTORNEY GENERAL AND ANOTHER, EAST ARICAN LAW REPORTS (2005) VOL. 1 p 41
4. ZAMBIA NATIONAL HOLDINGS LIMITED AND UNITED NATIONAL INDEPENDENCE PARTY V THE ATTORNEY GENERAL (1993-1994) ZR 115 at page 119 to 120
5. MURRAY AND ROBERTS CONSTRUCTION LIMITED AND KADDOURA CONSTRUCTION LIMITED V LUSAKA PREMIER HEALTH LIMITED AND INDUSTRIAL DEVELOPMENT CORPORTION OF SOUTH AFRICA APPEAL NO. 141/2016
6. C AND S INVESTMENTS LIMITED, ACE CAR HIRE LIMITED AND SUNDAY MALUBA V THE ATTORNEY GENERAL (2004) ZR 216
7. SHILLING BOB ZINKA V THE ATTORNEY GENERAL (1990-1992) ZR 73
8. MUKUMBUTA MUKUMBUTA AND OTHERS V NKWILIMBA CHOOBANA AND OTHERS SCZ JUDGMENT NO. 8 OF 2003
9. KELVIN HANG'ANDU AND COMPANY (A FIRM) V WEBBY MULUBISHA (2008) VOL 2 ZR 88
10. HAKAINDE HICHILEMA AND GEOFFREY BWALYA MWAMBA V EDGAR CHAGWA LUNGU, INONGE WINA AND THE ATTORNEY GENERAL 2016/CCZ/0034
11. JOHN MUGALA AND KENNETH KABENGA V THE ATTORNEY GENERAL (1988-1989) ZR 171
12. PATEL V THE ATTORNEY GENERAL (1969) ZR 97
13. ATTORNEY GENERAL V LAW ASSOCIATION OF ZAMBIA (2008) VOL 1 ZR 21
14. ZAMBIA DEMOCRATIC CONGRESS V THE ATTORNEY GENERAL (2000) ZR 6
15. JYOTI BASU AND OTHERS V DEBI GHOSAL AND OTHERS (1982) AIR 983

LEGISLATION REFERRED TO:

a. PENAL CODE, CHAPTER 87 OF THE LAWS OF ZAMBIA
b. CONSTITUTION OF ZAMBIA, ARTICLES 11, 13, 28, 121, 125, 128 AND 134
c. CRIMINAL PROCEDURE CODE, CHAPTER 88 OF THE LAWS OF ZAMBIA
d. HIGH COURT RULES, CHAPTER 27 OF THE LAWS OF ZAMBIA, ORDER 3 RULE 2
e. PROTECTION OF FUNDAMENTAL RIGHTS RULES OF 1969, STATUTORY INSTRUMENT NO. 156 OF 1969
f. CONSTITUTION (AMENDMENT) ACT, NO. 2 OF 2016
g. RULES OF THE SUPREME COURT 1999 EDITION (WHITEBOOK) ORDER 59/1A
h. HIGH COURT ACT, CHAPTER 27 OF THE LAWS OF ZAMBIA, SECTION 10

i. **INTERPRETATION AND GENERAL PROVISIONS ACT, CHAPTER 2 OF THE LAWS OF ZAMBIA, SECTION 9**

WORKS REFERRED TO:

(i) **HALSBURY'S LAWS OF ENGLAND VOL 1(1) FOURTH EDITION (2001) REISSUE, PARAGRAPH 64**

1. INTRODUCTION

1.1 This is an appeal against the ruling of Majula-Mungo'mba J, (as she then was) dated 16th June, 2017 in which she dismissed the Appellants' petition for multiplicity of actions and abuse of court process, on account that a similar petition, involving the same parties and the same subject matter, and seeking more or less the same relief, was before the Constitutional Court.

2. BACKGROUND

2.1 The facts ascertained from the record show that the Appellants were arrested and detained on 10th April, 2017 on a charge of treason, contrary to Section 43(10)(d) of the **PENAL CODE**[a].

The particulars of the offence were that:–

"Hakainde Hichilema, Hamusonde Hamaleka, Pretorius Haloba, Laston Mulilanduba, Wallace Chakawa and Muleya Hachinda between the 5th day of April 2017 and the 8th day of April 2017 at Lusaka and at Mongu of the Lusaka and Western Provinces respectively, in the Republic of Zambia, jointly and whilst acting together with other persons unknown, did endeavour to carry out by force an enterprise to usurp the executive power of the State

in a matter of both public and general nature by the following overt acts:

Hakainde Hichilema and Pretorious Haloba on 5th day of April, 2017, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting together did conspire to mobilise an advance party to ensure that Hakainde Hichilema was to be accorded the status of President of the Republic of Zambia at the Kuomboka Ceremony in Mongu.
Hakainde Hichilema, Hamusonde Hamaleka, Pretorius Haloba, Laston Mulilanduba, Wallace Chakawa and Muleya Hachinda, on 8th day of April, 2017 at Limulunga in the Mongu District of the Western province of the Republic of Zambia, jointly and whilst acting together with approximately 60 other unknown persons and being in a convoy of motor vehicles on the Mongu-Limulunga Road, did obstruct the Presidential motorcade, an act that was likely to cause death or grievous harm to the President of the Republic of Zambia in order to usurp the executive power of the State."

3. THE APPELLANTS' CASE IN THE COURT BELOW

3.1 On 5th June 2017, the Appellants petitioned the High Court pursuant to the provisions of Article 28 of the **CONSTITUTION OF ZAMBIA**[b] contending, among others, that their right to personal liberty under Article 13 of the **CONSTITUTION**[b] had been violated. They also stated that they had not sought to be released on bail pending trial, due to a proviso to Section 123 (1) of the **CRIMINAL PROCEDURE CODE**[c] (hereinafter referred to as **"the CPC"**), which bars persons facing a charge of treason or any other offence listed therein, from being granted bail. The said Section 123 (1) of the CPC provides as follows:–

"When any person is arrested or detained, or appears before or is brought before a subordinate court, the High Court or Supreme Court he may, at any time while he is in custody, or at any stage of the proceedings before such court, be admitted to bail upon providing a surety or sureties sufficient, in the opinion of the police officer concerned or court, to secure his appearance, or be released upon his own recognisance if such officer or court thinks fit:

Provided that any person charged with –

(i) murder, treason or any other offence carrying a possible or mandatory capital penalty;
(ii) misprision of treason or treason-felony;
(iii) aggravated robbery; or
(iv) theft of motor vehicle, if such a person has previously been convicted of theft of motor vehicle

shall not be granted bail by either a subordinate court, the High Court or Supreme Court or be released by any Police Officer."

3.2 The Appellants' lamentation was that the proviso had taken away the authority of the High Court and the Supreme Court, to hear an application for bail pending trial. Further, that the limitations imposed by Section 123 (1) of the CPC did not come within the ambit of Article 13 of the Bill of Rights and hence, null and void.

3.3 Their petition read, in part:–

"BREACHES OF THE CONSTITUTION

[46] By virtue of what was stated in paragraphs 1 to 45 of this Petition:

a. ...

b. Section 123(1) of the Criminal Procedure, Chapter 88 of the Laws of Zambia, to the extent it purports to deny any Police Officer, Subordinate Court, High Court or the Supreme Court the power to decide whether to grant bail or not to any person charged with murder, treason or any other offence carrying a possible or mandatory capital penalty; misprision of treason or treason felony; aggravated robbery; or theft of motor vehicle, if such person has previously been

convicted of theft of motor vehicle, is ultra vires Article 11 of the Constitution in that the limitations imposed by Section 123(1) of the Criminal Procedure Code do not come within the ambit of the Bill of Rights or Article 13 of the Constitution and hence null and void.

c. **Section 123(1) of the Criminal Procedure Code Chapter 88 of the Laws of Zambia, to the extent it purports to deny any Police Officer, Subordinate Court, High Court or the Supreme Court the power to decide whether to grant bail or not to any person charged with murder, treason or any other offence carrying a possible or mandatory capital penalty; misprision of treason or treason felony; aggravated robbery; or theft of motor vehicle, if such person has previously been convicted of theft of motor vehicle, is ultra vires or Article 13(3) (b) of the Constitution and hence null and void.**
d. **..."**

3.4 The Appellants sought a myriad of reliefs. Among the reliefs sought, insofar as is relevant to this appeal, were for –

a. **...**
b. **A declaration that Section 123 (1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia, to the extent to which it denies any police officer, Subordinate Court, High Court or Supreme Court the power to decide whether to grant bail or not to any person charged with murder, treason or any other offence carrying a possible or mandatory capital penalty; misprision of treason or treason felony; aggravated robbery; or theft of motor vehicle, if such person has previously been convicted of theft of motor vehicle, is ultra vires Articles 11 and 13 of the Constitution, and hence null and void.**
c. **An order severing the proviso to Section 123 (1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia on the premise that it is inconsistent with the provisions of Articles 11 and 13 (3) (b) of the Constitution of Zambia.**
d. **...**

4. THE RESPONDENT'S NOTICE OF MOTION

4.1 Shortly before the hearing of the petition, the Respondent, through the Attorney-General filed a Notice of Motion,

accompanied by an affidavit in support, seeking an order to stay the proceedings in the High Court, pending determination of an application to set aside proceedings in the Constitutional Court for duplicity and abuse of court process. The Notice of Motion was filed pursuant to Order 3 Rule 2 of the **HIGH COURT RULES**[d], (hereinafter sometimes referred to as **"the HCR"**). The said Order provides that:–

> **"Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."**

4.2 At the hearing of the Motion, the Respondent remonstrated that the Appellants' petition before the High Court was **"over 95 percent"** and **"exactly word for word"** similar to the petition filed in the Constitutional Court under cause number 2017/CCZ/0006. That the two petitions were filed on the same day, of 5th June, 2017, and were principally requesting the two courts, that is the High Court and the Constitutional Court, to pronounce themselves on the proviso to Section 123 (1) of the CPC.

4.3 The learned Attorney-General, submitting in support of his motion before the High Court, stated that the Appellants' petition amounted to forum shopping and an abuse of

court process, and that it could potentially cause embarrassment to the administration of justice. He urged the High Court to stay the proceedings before it until a decision was made by the Constitutional Court, as to whether there was duplicity and an abuse of court process.

4.4 To support the motion, the Respondent exhibited the Appellants' petition filed under cause number 2017/CCZ/0006 in the Constitutional Court. The said petition, as it relates to this appeal, read as follows:-

> **"BREACH OF THE CONSTITUTION**
>
> **By virtue of what is stated in paragraphs 1 to 48 –**
>
> **a. Section 123 (1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia, to the extent to which it bars the High Court from entertaining an application for bail and where necessary granting bail to any person charged with murder, treason or any other offence carrying a possible or mandatory capital penalty; misprision of treason or treason felony; aggravated robbery; or theft of motor vehicle, if such person has previously been convicted of theft of motor vehicle, is ultra vires Article 134 (a) of the Constitution and hence null and void.**
>
> **b. Section 123 (1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia to the extent to which it bars the Supreme Court from entertaining an application for bail and where necessary granting bail to any person charged with murder, treason, or any other offence carrying a possible or mandatory capital penalty; misprision of treason or treason felony; aggravated robbery; or theft of motor vehicle, if such person has previously been convicted of theft of motor vehicle, is inconsistent with Article 125 of the Constitution and hence null and void.**

SUBSTANTIVE RELIEF SOUGHT BY THE PETITIONERS

Your Petitioners, therefore, pray that they be granted the following remedies –

a. An order severing the proviso to section 123 (1) of the Criminal Procedure Code, which reads –

Provided that any person charged with -

(i) Murder, treason or any other offence carrying a possible or mandatory capital penalty;
(ii) misprision of treason or treason-felony;
(iii) aggravated robbery; or
(iv) theft of motor vehicle, if such a person has previously been convicted of theft of motor vehicle

shall not be granted bail by either a subordinate court, the High Court or Supreme Court or be released by any Police Officer.

b. An order that the Petitioners be at liberty to apply before the High Court for bail pending trial and that the High Court be at liberty to grant such bail if need be."

5 APPELLANTS' OPPOSITION TO THE NOTICE OF MOTION

5.1 The Appellants opposed the Notice of Motion in the Court below arguing in the main, that the two petitions before the High Court and the Constitutional Court respectively were different in that the Appellants were seeking remedies in relation to two separate jurisdictions. They asserted that the petition before the High Court was made pursuant to Article 28 of the Constitution for the simple reason that only the High Court has exclusive jurisdiction to enforce provisions

in the Bill of Rights. That the High Court was being invited to determine whether Articles 11 and 13 in the Bill of Rights had been violated by the proviso to Section 123 (1) of the CPC.

5.2 They contended that the petition in the Constitutional Court, on the other hand, was founded on that Court's jurisdiction in Article 128 of the Constitution, which covers all matters except those in the Bill of Rights. That in the circumstances, they argued, conflict or contradiction as suggested by the Respondent was a mere fiction.

5.3 The Appellants further argued that the Notice of Motion by the Respondent was improperly before the High Court because the Respondent did not cite any authority on which it premised its application to stay the proceedings other than Order 3 Rule 2 of the HCR which did not apply to petitions. That the only rules applicable to petitions were the **PROTECTION OF FUNDAMENTAL RIGHTS RULES OF 1969**[e] (hereinafter referred to as **"the 1969 Rules"**).

6. CONSIDERATION OF THE MOTION BY THE HIGH COURT

6.1 Majula-Mung'omba J, determined that in terms of Articles 28, 128 and 134 of the Constitution, matters concerning the

Bill of Rights in Part III of the Constitution were a preserve of the High Court; and, that the jurisdiction of the Constitutional Court covered all matters except those contained in the Bill of Rights.

6.2 The said Articles 28, 128 and 134 of the Constitution provide as follows:

> **28. (1) Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court.**
>
> **128. (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear—**
> **(a) a matter relating to the interpretation of this Constitution;**
> **(b) a matter relating to a violation or contravention of this Constitution;**
> **(c) a matter relating to the President, Vice-President or an election of a President;**
> **(d) appeals relating to election of Members of Parliament and councillors; and**
> **(e) whether or not a matter falls within the jurisdiction of the Constitutional Court.**
>
> **134. The High Court has, subject to Article 128—**
> **(a) unlimited and original jurisdiction in civil and criminal matters;**
> **(b) appellate and supervisory jurisdiction, as prescribed; and**
> **(c) jurisdiction to review decisions, as prescribed.**

6.3 The learned Judge then went on to consider whether there had been a multiplicity of actions in this case. She referred

to a portion of our judgment in the case of **BP PLC V INTERLAND MOTORS**[1] in which we stated as follows:-

> **"For our part we are satisfied that as a general rule, it will be regarded as an abuse of the process if the same parties re-litigate the same subject matter from one action to another or from judge to judge... In conformity with the Court's inherent power to prevent abuse of its process, a party in dispute with another over a particular subject should not be allowed to deploy his grievance piece meal in scattered litigation and keep on hauling the same opponent over the same matter before various Courts. The administration of justice would be brought into disrepute if a party managed to get conflicting decisions, or decisions which undermine each other from two or more judges over the same subject matter."**

From this portion, she extracted three features which would constitute a multiplicity of actions; that is:-

1. **the same parties;**
2. **the same subject matter; and**
3. **a litigant hoping from court to court.**

The Judge found that the matter before her had the same parties and was on the same subject matter as the case which was before the Constitutional Court. She then observed:-

> **"The gist of the matter is that a decision by either of the courts would have the capacity to resolve the issues brought to court for determination. It is my very firm view that it would absolutely be inappropriate to have a situation where two parallel cases are running to pronounce on the same provision in the Criminal Procedure Code. This would create disharmony in the judicial system because not only does it have the potential but also poses the real danger of having conflicting and contradictory decisions over the same matter which will have the effect of bringing the judicial system into disrepute, and contrary to public interest."**

6.4 The Judge concluded that the litigants in this case, were hopping from her court to the Constitutional Court, deploying their grievance piecemeal and scattered. She found and held that such conduct amounted to a multiplicity of actions and was undesirable.

6.5 The learned Judge then dismissed the entire petition.

In doing so, she stated:-

> **"This now brings me to the question of what is the fate of this matter before me? The learned Attorney General has urged me to stay the proceedings pending the outcome of proceedings in the Constitutional Court. I am disinclined to stay proceedings because I see no reason why I should stay them (the proceedings) as the petitioners will have their day in court in the Constitutional Court. I am of the firm view that the matter before me must be dismissed to avoid relitigating on the same issues."**

6.6 According to the Judge, she was on ***terra firma*** to make the interlocutory order dismissing the entire petition, as Order 3 Rule 2 of the High Court Rules clothed her with authority to make such orders as she:-

> **"may consider necessary for doing justice whether such order has been expressly asked by the person entitled to benefit of the order or not".**

7. THE APPEAL AND APPELLANTS' HEADS OF ARGUMENT

7.1 Dissatisfied with this determination, the Appellants have now appealed to this Court, advancing two grounds of appeal formulated as follows:-

1. **The Court below misdirected itself on facts and points of law by dismissing the petition when the application before Court was for the stay of proceedings before the High Court pending hearing and determination of the Respondent's application before the Constitutional Court.**

2. **The Court below having held that matters of enforcement of the Bill of Rights are a preserve of the High Court whilst all other constitutional matters apart from those touching on the Bill of Rights are a preserve of the Constitutional Court misdirected itself on points of law and facts by dismissing the Petitioners' petition.**

7.2 In support of the appeal, Mr. Sangwa, SC, filed written heads of argument which he augmented with oral submissions at the hearing of the appeal. He argued the two grounds of appeal consecutively.

7.3 In support of the first ground of appeal, he submitted that the Court below erred when it dismissed the entire petition when the application before it was simply to stay proceedings pending the determination of another application which was before the Constitutional Court. That contrary to the position of the law, the Court below, on its

own motion, went beyond the reliefs sought by the Respondent and granted a remedy which had not been prayed for in that the Respondent's prayer in the Notice of Motion was clearly to stay proceedings, and not to dismiss the petition.

7.4 To support this submission, Counsel cited a number of Indian authorities, among them, the case of **NARANJAN SINGH V STATE OF PUNJAB AND HARYANA HIGH COURT AND ANOTHER**[2] in which the Supreme Court of India stated:-

> **"It is quite settled that Courts cannot give relief beyond the prayer made in the writ petitions. The Honourable Supreme Court in KRISHNA PRIYA GANGULY V UNIVERSITY OF LUCKNOW (1984) VOL 1 SCC 307 held that where the petitioner had merely prayed for a writ directing the medical college to consider his case for admission, the High Court was not justified in going a step further and issuing a writ of mandamus directing the medical college to admit him to the post graduate course, as that amounted to granting a relief, which the petitioner himself never prayed for."**

7.5 Counsel argued that in dismissing the petition, the Court below violated the fundamental principle of natural justice that no man should be condemned without being heard, because the Appellants were not given an opportunity to be heard on the dismissal of their petition. To buttress this point, Counsel relied on the learned authors of

HALSBURY'S LAWS OF ENGLAND[i] who state that rules of natural justice must be observed by courts, tribunals, arbitrators and all persons having the duty to act judicially.

7.6 Counsel further submitted that it was wrong for the Court below to have invoked Order 3 Rule 2 of the HCR, to defeat a petition brought pursuant to Article 28 of the Constitution. He argued that High Court Rules governing civil procedure in the High Court generally do not apply to petitions seeking the enforcement of the Bill of Rights. To fortify his argument, Counsel cited a portion of a judgment in the case of **JYOTI BASU AND OTHERS V DEBI GHOSAL**[15] which states, inter alia that:-

> **"A petition is not an action at Common Law, nor in equity. It is a statutory proceeding in which neither the Common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it..."**

7.7 State Counsel contended that in this case, the High Court was **'put in a straight jacket'** and could not resort to the normal rules of civil procedure to dismiss the petition. That the procedure adopted by the High Court to determine a petition was governed, strictly, by Article 28 (1) (a) of the Constitution as read with the 1969 Rules. He posited that

there was no provision for cross referencing between the said 1969 Rules and the HCR; that the HCR govern ordinary civil proceedings in the High Court. In addition, that the HCR, which are a creature of statute are subordinate to the 1969 Rules which were made under the authority of the Constitution. To support this submission, Counsel referred us to the East African case of **CHELASHAW V ATTORNEY GENERAL AND ANOTHER**[3] in which it was stated that:-

> **"rules made under constitutional powers are superior and stand above those made under statute. They thus should be given more regard and force in comparison to those made under a statute."**

7.8 Counsel submitted that this Court has, on numerous occasions, pronounced itself that the jurisdiction of the High Court, though unlimited, is not limitless. He referred us to one such decision, which is the case of **ZAMBIA NATIONAL HOLDINGS LIMITED AND UNITED NATIONAL INDEPENDENCE PARTY V THE ATTORNEY GENERAL**[4], in which we stated that:-

> **"In order to place the word 'unlimited' in Article 94(1) in its proper perspective, the jurisdiction of the High Court should be contrasted with that of lesser tribunals and courts whose jurisdiction in a cumulative sense is limited in variety of ways. For example, the Industrial Relations Court is limited to cases under a single enactment over which the High Court has been denied any original jurisdiction. The local courts and Subordinate Courts are limited as to**

geographical area of operation, types and sizes of awards and penalties, nature of causes they can entertain, and so on. The jurisdiction of the High Court on the other hand is not so limited; it is unlimited but not limitless, since the court must exercise its jurisdiction in accordance with the law. It is inadmissible to construe the word 'unlimited' in a vacuo in and then to proceed to find that a law allegedly limiting the powers of the court is unconstitutional."

7.9 Coming to the second ground of appeal, Counsel submitted that it is a constitutional right for anyone who alleges that any of the provisions in Articles 11 to 26 of the Constitution has been, is being or is likely to be contravened in relation to him, to move the High Court. He argued that petitioning the High Court for redress under Article 28 (1) of the Constitution was not a bar to commencing another cause of action before any another court on the same facts and neither would there be a conflict between the two actions. He contended that since Article 28 was entrenched, the drafters of the **CONSTITUTION OF ZAMBIA (AMENDMENT) ACT**[f] were mindful to ensure that the jurisdiction of the Constitutional Court did not violate Article 28 or the Bill of Rights.

7.10 Counsel further submitted that while the lower Court properly directed itself, when it found that the two jurisdictions of the High Court and the Constitutional Court

are separate and distinct, in that while matters relating to the Bill of Rights were a preserve of the High Court, anything outside it, was a preserve of the Constitutional Court; the Court misdirected itself when it went on to hold, contrary to its earlier direction, that it would be inappropriate to have two parallel cases to pronounce on the same provision of the CPC. That by so holding, the Court below erroneously raised the jurisdiction of the Constitutional Court above that of the High Court. He argued further that by holding that the petition amounted to a multiplicity of actions, the High Court deliberately ignored and went against Article 128(1) of the constitution which clearly provides that a petition is not a bar to any other case which a petitioner may cause to be issued.

7.11 In his oral submissions, Mr. Sangwa, SC submitted that at the heart of this appeal, was the need for this Court to categorically state the extent of the jurisdiction of this Court vis a vis that of the Constitutional Court. He invited us to declare that there can be no multiplicity of actions in constitutional law matters, particularly when the Court is moved pursuant to Article 28 of the Constitution. In this

regard, Counsel invited us to take judicial notice of the Ruling of the Constitutional Court in cause number 2017/CC2/0006 in which the Constitutional Court dismissed the Appellants' petition on the ground that there was a potential of conflicting judgments. He pointed out that the High Court petition was also dismissed on account of a potential conflict with the decision of the Constitutional Court; leaving the petitioners without relief or a decision on merit. According to Counsel, this should never happen because Article 28(1) of the Constitution clearly states that:-

> **"...if any person alleges that any provisions of Article 11 to 26 inclusive, has been, is being contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court..."**

7.12 Counsel argued that Article 28 of the Constitution itself states that moving the court pursuant to that Article is no bar for one to move another court on the same facts. In his view, there was a lack of appreciation by the lower court of the distinction in jurisdiction between the two Courts. He stated that under the current constitutional order, only the High Court and the Supreme Court on appeal, have jurisdiction in matters involving the Bill of Rights, while the Constitutional Court has jurisdiction over the rest of the

matters outside the Bill of Rights; and, as such, a conflict can never arise. He posited that although both the High Court and the Constitutional Court dismissed the Appellants' petitions on account of potential conflict, such potential for conflict in his view must be real, and not imagined. According to Counsel, in the case in **casu**, the conflict was a mere fiction.

7.13 Mr. Mwamba, in augmenting State Counsel Sangwa's oral arguments, submitted that the Court below volunteered a ruling without hearing the Appellants on the dismissal of their petition. He opined, that this was contrary to our decision in the case of **MURRAY AND ROBERTS CONSTRUCTION LIMITED AND KADDOURA CONSTRUCTION LIMITED V LUSAKA PREMIER HEALTH LIMITED AND INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA**[5]. According to Counsel, we guided in that case, that a court should not volunteer a ruling without affording the parties an opportunity to be heard. He echoed the Appellants' written submissions that it was wrong for the lower Court to have invoked Order 3 Rule 2 of the HCR to dismiss the petition

stating that this Rule only applied to interlocutory and not final orders. He submitted that the High Court ruling in this case was a final order which brought the petition to an end. As to what constitutes a final order, Mr. Mwamba referred us to Order 59/1A of the **RULES OF THE SUPREME COURT**[g] (hereinafter referred to the White Book) which states that:

> **"A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issues before it."**

7.14 In sum, learned Counsel for the Appellants prayed that the ruling of the Court below should be set aside, and, that the matter should be remitted back to the High Court to be determined on the merit.

8. **THE RESPONDENT'S HEADS OF ARGUMENT**

8.1 On behalf of the Respondent, the learned Attorney General Mr. Kalaluka, SC, filed written heads of argument which he also augmented with oral submissions.

8.2 Responding to the Appellants' submissions on the first ground of appeal, that the Court below erred in dismissing the petition when the application before it was for stay of proceedings, Mr. Kalaluka, SC, submitted that the lower

Court was on firm ground when it terminated the petition to avoid relitigating the same issues.

8.3 He argued that by virtue of Order 3 Rule 2 of the HCR, the Court or a judge, in any cause or matter before it, is clothed with jurisdiction to make any order necessary for doing justice, whether such order had been expressly sought or not. That in this case the Judge found it necessary to dismiss the entire petition in order to do justice in the case and as such, she could not be faulted for exercising a power which was bestowed on her by statute.

8.4 The Attorney General noted that in buttressing their argument that courts cannot grant reliefs which have not been prayed for; the Appellants had relied on Indian cases. He submitted that in the case of **C AND S INVESTMENTS LIMITED, ACE CAR HIRE LIMITED AND SUNDAY MALUBA V THE ATTORNEY GENERAL**[6], this Court stated that cases cannot be decided on the basis of foreign law. He thus urged us not to pay attention to the Appellants' submissions and authorities on this point, as our High Court Rules provide adequate guidance on the matter.

8.5 As regards the Appellants' assertion that the rules of natural justice had been breached because they had not been heard on their substantive claim, the Attorney General submitted that the Appellants would not be condemned unheard as they would still have had their day in the Constitutional Court.

8.6 While conceding on the need for judicial and quasi judicial bodies to observe the rules of natural justice, the Attorney General referred us to the following passage in the case of

SHILLING BOB ZINKA V THE ATTORNEY GENERAL[7]

> **"The principles of natural justice must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially except where their application is excluded expressly or by necessary implication (See Halsbury's Laws of England, 4th ed. Para 64' and S.A. de Smith's Judicial Review of Administrative Action, 3rd ed.). In order to establish that a duty to act judicially applies to the performance of a particular function, it is now unnecessary to show that the function is analytically of a judicial character or that it involves the determination of a lis inter parties; however, a presumption that natural justice must be observed will arise more readily where there is an express duty to decide only after conducting a hearing or inquiry or where a decision entails the determination of disputed questions of law and fact. Prima facie, moreover, a duty to act judicially will arise in the exercise of power to deprive a person of his livelihood; or of his legal status where the status is not merely terminable at pleasure; or to deprive a person of liberty and property rights or any other legitimate interests or expectations or to impose a penalty. However, the conferment of a wide discretionary power exercisable in the public interest may be indicative of the absence of an obligation to act judicially."** (underlining by the Attorney General)

8.7 Arising from this passage, the Attorney General submitted that in all cases or matters, a High Court Judge is conferred with wide discretionary power to make any order which he or she considers necessary for doing justice in the case, and in his view, the conferment of this discretionary power suggests that there is no obligation to act judicially when exercising the power.

8.8 Coming to the second ground of appeal, Mr. Kalaluka, SC, submitted that the dismissal of the petition by the High Court paved the way for the Constitutional Court to determine the constitutionality of the provisions in the CPC, in so far as they touched on other provisions of the Constitution and not the Bill of Rights. In his view, the High Court did not misdirect itself by dismissing the petition before it even after noting that matters of enforcement of the Bill of Rights are a preserve of the High Court whilst all other constitutional matters are a preserve of the Constitutional Court. He supported the lower Court's observation that continuing to hear the petition would have led to a situation where two parallel cases would have been running to pronounce on the same provision of the CPC and

that such a situation would create disharmony in the judicial system as it posed a danger of having conflicting or contradictory decisions.

8.9 In his oral submissions, the Attorney-General submitted that in their petitions before the High Court and Constitutional Court, the Appellants were seeking to server the proviso to Section 123(1) of the CPC. He submitted that the High Court of Zambia had jurisdiction, under Article 28 of the Constitution, to strike down any provisions of the CPC which were found to offend the Bill of Rights, and as such, there was absolutely no need for the Appellants to have commenced parallel proceedings before the Constitutional Court, seeking the same relief in relation to the same facts. He maintained that the Court below had inherent jurisdiction, upon hearing the parties, to grant a relief not specifically prayed for if it was necessary to do justice in the case. To fortify his argument, he cited the case of **MUKUMBUTA MUKUMBUTA AND OTHERS V NKWILIMBA CHOOBANA AND OTHERS**[8] in which, according to him, this Court condemned the Respondent's Advocates to costs for deliberately and consciously forum

shopping in the absence of a prayer to condemn the lawyers to costs. He argued that courts in Zambia do have inherent jurisdiction, upon hearing the parties on an issue, to grant an order which will do justice in a case, even if it is not prayed for.

8.10 On the case of **MURRAY AND ROBERTS CONSTRUCTION LIMITED**[5] which was referred to us by Mr. Mwamba, Mr. Kalaluka SC submitted that that case was distinguishable from the case in casu in that the Appellants in this case, were heard on the question as to whether there was multiplicity of actions although the relief granted was not what the Respondents had prayed for. In his view, when the Appellants' petition was dismissed by the High Court, they ought to have taken issue with the Constitutional Court, instead of asking this Court to clarify the provisions of Articles 128 and 134 of the Constitution, when these Articles are clearly the preserve of the Constitutional Court.

8.11 According to the Attorney-General, the Appellants should have first sought redress in the High Court and, depending on the outcome of their case, they could then have had recourse to the Constitutional Court. He opined that the

Appellants were architects of their own fate in that they opted to proceed with two different matters, in two different courts, seeking the same relief simultaneously resulting in not having their day in court because of forum shopping.

8.12 Echoing the submissions by the Attorney General, Mr. Mwale stated that there was no need for the Appellants to move the two courts at the same time seeking the same relief. He cited the case of **KELVIN HANG'ANDU AND COMPANY (A FIRM) V WEBBY MULUBISHA**[9] in which we disapproved the commencement of a multiplicity of actions over the same facts. He also referred to the Constitutional Court case of **HAKAINDE HICHILEMA AND GEOFFREY BWALYA MWAMBA V EDGAR CHAGWA LUNGU, INONGE WINA AND THE ATTORNEY GENERAL**[10] which, according to him, though not binding on this Court, has given insight on dismissal of a petition for abuse of court process. He concluded by urging us to dismiss this appeal with costs.

8.13 In his response, to the submissions on behalf of the Respondent, Mr. Sangwa, SC, spiritedly argued that the notion of multiplicity of actions needed to be dispelled on account of the changes to the constitutional order in 2016.

He submitted that in a normal situation, the reliefs would have been endorsed in one petition but that this was no longer possible because of the way the current Constitution is structured. That for this reason, even the authorities cited by the Respondent should be revisited in the light of these changes.

8.14 Mr. Mwamba, on his part, added that the learned Attorney General's submission that there were many orders which the Court could invoke to meet the ends of justice, cannot hold, because the Court below specifically invoked Order 3 Rule 2 of the HCR to dismiss the petition.

9. CONSIDERATION OF THE APPEAL BY THIS COURT

9.1 We have considered the Ruling of the court below, the submissions of Counsel and the issues raised in this appeal. The issue for our determination in the first ground of appeal is whether the learned Judge in the Court below erred, to dismiss the Appellants' entire petition when the application before her was for a stay of proceedings.

9.2 The Appellants assail the decision of the Court below to dismiss the entire petition when the application before it was simply to stay proceedings. They have argued that in

dismissing the petition, the lower Court invoked an inapplicable provision of the law and went beyond the reliefs prayed for. The learned Attorney General, on the other hand, anchored his support for the decision of the Court below on three grounds:- firstly, that the Court had inherent jurisdiction to dismiss the entire petition to avoid relitigating the same issues; secondly, that allowing the two petitions to run side by side had the potential to result in conflicting decisions; and lastly, that the dismissal was necessary in order to do justice in the case.

9.3 It is not in dispute that the Respondent's application in the Court below was for an order to stay the proceedings before that Court, pending the determination of another application which was before the Constitutional Court. This is evident from Mr. Kalaluka's submission at the hearing of the application. He stated that he was making an:-

> **"..application to stay proceedings pending the application to set aside the Constitutional Court proceedings for duplicity and abuse of court process..."**

From this submission, it is apparent that between the two petitions, the Attorney General had intended to concentrate on the Petition filed in the High Court and hence the application to pend the High Court proceedings while an

application was going to be made in the Constitutional Court to set aside the proceedings before it for duplicity and abuse of the court process. But something went terribly wrong. The High Court instead, dismissed the petition which was before it while the application in the Constitutional Court to set aside also succeeded leaving the Appellants in limbo. What is baffling however, is that the Constitutional Court made its decision on 28th March, 2018 well after the High Court had dismissed the petition before it on 16th June 2017. As at 28th March, 2018 when the Constitutional Court made its decision, there was nothing pending in the High Court, thereby negating any possibility of conflicting decisions.

9.4 In her Ruling, the learned High Court Judge stated:-

> **"The learned Attorney General has urged me to stay the proceedings pending the outcome of proceedings in the Constitutional Court. I am disinclined to stay proceedings because I see no reason why I should stay them [the proceedings] as the petitioners will have their day in court in the Constitutional Court. I am of the firm view that the matter before me must be dismissed to avoid relitigating on the same issues."** (underlining ours)

That day never came.

9.5 In the case of **JOHN MUGALA AND KENNETH KABENGA V THE ATTORNEY GENERAL**[11] we guided that:-

"It is most undesirable for a trial Judge to volunteer a ruling especially without affording the parties advance notice of what the judge has in mind and giving them an opportunity to address him."

We affirmed this decision in the later case of **MURRAY AND ROBERTS CONSTRUCTION LIMITED AND KADDOURA CONSTRUCTION LIMITED V LUSAKA PREMIER HEALTH LIMITED AND INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED**[5]. In that case, the trial Court was seized with an ex parte application for leave to issue a writ of possession. The Judge instead set aside a default Judgment granted by the Deputy Registrar for irregularity and dismissed the Appellant's entire action for abuse of process. We observed that **"instead of confining himself to this specific application, the trial judge went beyond his jurisdiction by making decisions on matters that had not been canvassed by the parties..."**

9.6 In arguing that a court should not award a relief which has not been prayed for, State Counsel referred us to several Indian authorities, one of which was the case of **NARANJAN SINGH V STATE OF PUNJAB AND HARYANA HIGH COURT AND ANOTHER**[2]. The learned Attorney General,

sought to dissuade us from considering any of these foreign authorities, relying on the case of **C AND S INVESTMENTS LIMITED, ACE CAR HIRE LIMITED AND SUNDAY MALUBA V THE ATTORNEY GENERAL**[6] stating that in that case, we said that cases cannot be decided on the basis of foreign law. We have visited our decision in the **C AND S INVESTMENT**[6] case and we find that the submission by the Attorney General is out of context. What we said was that:-

> **"While cases cannot be decided on the basis of foreign law, the legal situation prevailing in other jurisdictions is helpful to enable a Court to look at issues objectively, from a wider base."**

This is still our guidance to the lower courts with regard to foreign law and cases.

9.7 The Court, in the Indian case of **NARANJAN SINGH V STATE OF PUNJAB AND HARYANA HIGH COURT AND ANOTHER**[2] stated as follows:

> **"It is quite settled that Courts cannot give relief beyond the prayer made in the writ petitions. The Honourable Supreme Court in KRISHNA PRIYA GANGULY V UNIVERSITY OF LUCKNOW (1984) VOL 1 SCC 307 held that where the petitioner had merely prayed for a writ directing the medical college to consider his case for admission, the High Court was not justified in going a step further and issuing a writ of mandamus directing the medical college to admit him to the post graduate course, as that amounted to granting a relief, which the petitioner himself never prayed for."**

This decision, though not binding on us, affirms our legal position in this jurisdiction as outlined in the cases of **JOHN MUGALA AND KENNETH KABENGA**[11] and **MURRAY AND ROBERTS CONSTRUCTION LIMITED AND KADDOURA**[4]. We can safely conclude, from these authorities, that both Zambian and Indian Supreme Courts will not allow trial courts to grant reliefs beyond what has been prayed for. A trial court, therefore, has no jurisdiction to volunteer a relief which an Applicant or a Plaintiff has not prayed for. Consequently, we agree with the Appellant that the Court below misdirected itself when it dismissed the Appellants' petition when the application before it was for stay of proceedings pending determination of the Respondent's application before the Constitutional Court.

9.8 We also agree that by dismissing the entire petition, the Court violated rules of natural justice in that the Appellants were not heard on the substantive issues. The Attorney General argued that the Appellants could still have had their day in court as their grievance would have been heard by the Constitutional Court. This argument cannot hold. The High Court had the Appellants' petition pending before

it and in order to decide its fate, the rules of natural justice dictated that the Court should hear both parties before rendering a decision. It is trite that rules of natural justice promote fair decision making.

In the words of Silungwe CJ, as he then was, in the case of **SHILLING BOB ZINKA V THE ATTORNEY GENERAL**[7]:

> **"The principles of natural justice - an English law legacy - are implicit in the concept of fair adjudication. These principles are substantive principles and are two-fold, namely that no man shall be judge in his own cause...and that no man shall be condemned unheard, that is, parties shall be given adequate notice and opportunity to be heard (audi alteram partem). As was quaintly stated by an eighteenth-century judge, Foretescue, J., in R. v Chancellor of the University of Cambridge [8] at page 567:**
> **'Even God himself did not pass sentence on Adam before he was called upon to make his defence.'**
> **We are, of course, here concerned with the second principle. The principles of natural justice must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, except where their application is excluded expressly or by necessary implication. (See Halsbury's Laws of England, 4th ed., para. 64..."** (emphasis ours)

However, the learned Attorney General in his submissions, referred us to a passage from the same case of **SHILLING BOB ZINKA**[7] in which the Chief Justice observed that **"...the conferment of a wide discretionary power exercisable in the public interest may be indicative of the absence of an obligation to act judicially..."** This statement, in our view, should be understood in its proper

context. When he said those words, the Chief Justice was ascertaining when a duty to act judicially would arise. He observed that principles of natural justice must be observed by **"courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, except where their application is excluded expressly by necessary implication."** He then observed:-

> **"...however, a presumption that natural justice must be observed will arise more readily where there is an express duty to decide only after conducting a hearing or inquiry or where a decision entails the determination of disputed questions of law and fact. Prima facie, moreover, a duty to act judicially will arise in the exercise of a power to deprive a person of his livelihood; or of his legal status where that status is not merely terminable at pleasure; or to impose a penalty. <u>However, the conferment of wide discretionary power exercisable in the public interest may be indicative of an obligation to act judicially...</u>"** (emphasis added)

Clearly, reference to **'wide discretionary power exercisable in the public interest'** can only refer to persons or bodies conferred with such discretionary powers by statute and not a court of law. A court has a duty, at all times, to act judicially and observe the rules of natural justice.

9.9 We find that by not asking the parties to address it on the petition before dismissing it, the Court below deprived the Appellants in this case of a chance to be heard and in so doing, offended the ***audi alteram partem*** principle of

natural justice adumbrated in the **SHILLING BOB ZINKA**[7] case.

9.10 The Appellants have further argued that the court below was wrong to have invoked Order 3, Rule 2 of the HCR to dismiss the entire petition as that Order only provides for the grant of interlocutory and not a final orders. In rebuttal, the Attorney General has spiritedly argued that a trial Judge enjoys wide discretion under Order 3 Rule 2 to make any order even those not expressly asked for by a party, in order to do justice in a case.

Order 3 Rule 2 of the HCR provides as follows:-

> **"Subject to any particular rules, the court or a judge may, in all causes and matters, make any interlocutory order, which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."** (underlining ours)

9.11 From its wording, Order 3 Rule 2 gives wide discretionary power to a Court to make interlocutory orders even if the said orders are not expressly asked for in order to meet the ends of justice. The question is; does this discretion extend to making final orders in a case? In the case of **ZAMBIA NATIONAL HOLDINGS LIMITED AND UNITED NATIONAL INDEPENDENCE PARTY V ATTORNEY GENERAL**[4] we held that although the Constitution conferred unlimited

jurisdiction on the High Court, the Court must exercise its jurisdiction within the confines of the law. In short, such jurisdiction is not limitless.

9.12 Looking at the provisions of Order 3 Rule 2 of the HCR, it is clear that the Order only applies to interlocutory orders and not final orders. According to Order 59/1A of the RSC, a judgment or order of a court **'shall be treated as final'** if the entire cause or matter would have been finally determined. This is what happened in this case. The Court granted what it termed as an 'interlocutory Order of dismissal' on the ground that it was clothed with jurisdiction to make any order under Order 3 Rule 2 of the HCR without any regard as to whether such order was interlocutory or final.

9.13 Be that as it may, there is still the question raised by Mr. Mr. Sangwa, SC; as to whether Order 3 Rule 2 of the HCR applies to petitions brought pursuant to Article 28(1) of the Constitution. It is trite that any application made to the High Court pursuant to Article 28(1) of the Constitution is by way of a petition under the 1969 Rules. Skinner CJ, as

he then was, underscored this point in the case of **PATEL V ATTORNEY GENERAL**[12] when he said:-

> **"I am satisfied that the true construction of rule 2 of the Protection of the Fundamental Rights Rules is that an application under Section 28(1) of the Constitution has to be made by way of petition to the High Court."**

The 1969 Rules in their current state provide for procedure on commencement of a petition; service and hearing of a petition; and how to deal with evidence. There is no express provision providing for cross referencing with the HCR. Section 10(1) of the **HIGH COURT ACT**[h] provides as follows:-

> **10. (1)** The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the **manner provided by this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or any other written law**, or by such rules, orders or directions of the Court as may be made under this Act, **the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or such written law, and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of England and subject to subsection (2), the law and practice applicable in England in the High Court of Justice up to 31st December, 1999.** (underlined for emphasis)

9.14 The **'any other written law'** in this case should be the enabling legislation found in Article 28(1) of the Constitution and the 1969 Rules. Article 28(1) is very clear that when moved, the High Court ***'...may make such order, issue such writs and give such directions as it may consider***

appropriate for the purpose of enforcing or servicing the enforcement of, any such provisions of Articles 11 to 26 inclusive." These are very wide powers bestowed on the High Court to enable it enforce the Bill of Rights. Order 3 Rule 2 should not be imported to supplement the 1969 Rules which were made pursuant to an article of the Constitution.

9.15 On the whole, we find merit in the first ground of appeal and it therefore succeeds.

9.16 Coming to the second ground of appeal, Mr. Sangwa, SC. argued that the Court below misdirected itself when, after properly determining that the Bill of Rights was a preserve of the High Court, it dismissed the petition to avoid two parallel processes which sought to pronounce on the legality of the proviso to Section 123 (1) of the CPC. According to Counsel, Article 28 of the Constitution does not bar the filing of an action before another court over the same facts. He drew strength for this proposition from the words in Article 28, which provide that:-

> **"...if any person alleges that any of the provisions of Article 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is**

lawfully available, that person may apply for redress to the High Court..." (Underlined for emphasis)

9.17 In his oral submissions, Mr. Sangwa SC submitted that the Appellants' petitions were dismissed by both the High Court and Constitutional Court because of perceived multiplicity of actions and conflict, leaving the Appellants without any relief and without a decision on merit. He invited us to make a pronouncement on the jurisdiction of the High Court, the Supreme Court and the Constitutional Court vis-à-vis constitutional matters and further, to make a declaration that there can never be a multiplicity of actions under the current constitutional order.

9.18 The Attorney General in response, submitted that the Appellants were architects of their own fate. That the Appellants insisted on proceeding with two matters at once instead of commencing one action in the High Court and in the event of failure, resorting to the Constitutional Court. That although the Appellants were seeking the same relief under two different provisions of the Constitution, the sum effect of the actions was to sever the proviso to Section 123 of the CPC.

9.19 We have considered the submissions and authorities cited to us by Counsel on this ground of appeal. We have taken judicial notice that the Constitutional Court delivered its ruling on 28th March, 2018 in Cause No. 2017/CCZ/0006 on the Respondent's application to set aside proceedings before it for duplicity and abuse of court process. As we have pointed out, in paragraph 9.3 above, as at that date, there was no petition pending in the High Court because the High Court had earlier dismissed the Appellants' petition on 16th June 2017 in order **'to avoid relegating on the same issues.'** So far as is relevant to the second ground of appeal, the Constitutional Court stated as follows:-

> **"We have compared the above reliefs with those in the petition before this Court. Clearly, the Petitioners' ultimate objective, based on the reliefs they are seeking, is to have the proviso to section 123(1) of the CPC obliterated by way of orders or declarations either from this Court or the High Court....clearly, this is the main reliefs the petitioners seek from both the High Court and this Court. Therefore, there can be no doubt that what the Petitioners have done is to use alternative routes to reach the same destination, namely, severance of the impugned proviso to section 123(1) of the CPC. As such, there is merit in the Respondent's apprehension that if the two courts reach different or conflicting decisions regarding the issue whether or not the proviso to section 123(1) of the CPC should be severed for being contrary to the Constitution, such a development could cause the Judiciary and the administration of justice embarrassment and ridicule. We therefore, agree that to file two identical petitions in two different courts, on the same day by the same parties, seeking essentially the same remedies, is inimical to constitutional orderliness...the potential for two conflicting**

decisions being handed down by the two courts is high. We therefore find merit in regard to this limb of the motion... On the whole, we find merit in the Respondent's Motion and set aside the petition under 2017/CCZ/0006."

9.20 We get an impression that at the time of rendering of this Ruling, the Constitutional Court believed that there was a subsisting action before the High Court. The Appellants seem to have been aggrieved with the determination of the Constitutional Court because they are now, in essence, asking us to make a pronouncement or declaration against it. We say so because in his oral arguments before us, Mr. Sangwa stated inter alia:-

"...at the heart of this case, there is need for this Court to categorically state the extent of the jurisdiction of this Court in constitutional matters that is the Supreme Court vis a vis the Constitutional Court...I would invite the court to be able to declare that at the end of the day..." there can be no multiplicity of actions in constitutional law matters when the court is moved pursuant to Article 28."

What Counsel is asking us to do is not tenable under the current constitutional order. This is because Article 121 of the **CONSTITUTION OF ZAMBIA** ranks the Supreme Court and the Constitutional Court equivalently. Further, the Constitution makes it abundantly clear in Article 128 (4) that decisions of the Constitutional Court are not appealable to this Court. They are final.

9.21 From the portion of the ruling delivered by the Constitutional Court, which we have reproduced above, it is clear that that Court pronounced itself and accepted the argument by the Attorney General that there is a potential of having two conflicting decisions between the High Court and the Constitutional Court. The Court opined that having 'two identical petitions in two different courts', filed on the same day by the same parties, and seeking essentially the same remedy, is inimical to constitutional orderliness. The Court, in essence, accepted that there can be a multiplicity of actions under the current constitutional order, even when the High Court is moved pursuant to Article 28 of the Constitution. Accordingly, that decision by the Constitutional Court carries the day. We, therefore, decline the invitation to pronounce ourselves on this point. We will stick to our lane, as defined in the Constitution, and resist the attempt to thrust us into an appellate court over issues already pronounced upon by the Constitutional Court. The second ground of appeal, in the way it has been formulated, therefore fails.

9.22 Having succeeded on the first ground of appeal, the prayer by the Appellants is that the matter should be remitted back to the High Court for it to hear the petition.

9.23 From the contents of the petition, the Appellants had been arrested and incarcerated on charges of treason, disobedience to lawful orders and using insulting language contrary to Section 43, 127 and 179 of the Penal Code. They did not apply for bail because the proviso to Section 123(1) of the CPC makes the offence of treason and others named therein not bailable. They thus filed a petition in the High Court seeking several reliefs, including a declaration that the proviso to Section 123(1) of the CPC, to the extent that it denies the grant of bail to anyone accused of treason and the other named offences; contravenes Articles 11 and 13 of the Constitution and is therefore null and void. The Petitioners also sought an order to sever the said proviso for being inconsistent with the provisions of Articles 11 and 13(3)(b) of the Constitution.

9.24 We take judicial notice that the Appellants are no longer in detention and that the criminal charges they were facing were withdrawn. In view of these changed circumstances, it

is our view that the issues which informed the commencement of this action have been overtaken by events and have become otiose. Thus remitting the matter back to the High Court for retrial would be an academic exercise. In the case of **ATTORNEY GENERAL V LAW ASSOCIATION OF ZAMBIA**[12], this Court declined to grant an interim order restraining the President from announcing the election date because it was a notorious fact that the elections were long gone. Sakala CJ, as he was then, stated:-

> **"we find it undesirable to make an academic pronouncement on an interlocutory relief overtaken by events"**

Similarly, in the case of **ZAMBIA DEMOCRATIC CONGRESS V ATTORNEY GENERAL**[13], where the Applicant was no longer in existence and the Secretary General who sponsored the suit had since re-joined the ruling party, we stated that:-

> **"As a matter of practice, this court disapproves of being engaged in academic exercises."**

9.25 From the foregoing, we decline the request by Mr. Sangwa, SC, that we should send this matter back to the High Court for retrial.

9.26 Each party will bear their own costs.

I.C.Mambilima
CHIEF JUSTICE

M. Malila
SUPREME COURT JUDGE

N.K. Mutuna
SUPREME COURT JUDGE