IN THE COURT OF APPEAL FOR ZAMBIA **CAZ APPEAL NO. 60/2019**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

JOHN SANGWA **APPELLANT**

AND

SUNDAY BWALYA NKONDE, SC **RESPONDENT**

Coram: **CHISANGA JP, MAJULA** and **NGULUBE, JJA**

This day of 21st August 2019, 19th November 2019 and 11th June 2020

For the Appellant:	*Mr. R. M Simeza, SC, Mr. L. Mwamba , Messrs Simeza Sangwa & Associates*
For the Respondent:	*N/A*

JUDGMENT

CHISANGA JP delivered the judgment of the Court

Cases Referred to:

1. ***Attorney General vs Law Association of Zambia (2008) ZR 21***
2. ***Teklemicael Mongstus and Senhah Transport and Mechanical Limited vs Ubuchunga Investments Limited Appeal No 218 of 2013***
3. ***Chelashaw vs Attorney General and Another, East Africa Law Reports (2005) Vol 1P***
4. ***Hakainde Hichilema, Geoffrey Bwalya Mwamba vs Attorney General, Appeal No. 25 of 2017***

Legislation referred to:

1. **Order 52/1/21 of the Rules of the Supreme Court 1999**
2. **Rules of the Supreme Court of England**
3. **Order 14A Rule 2 Rules of the Supreme Court**

Other Works referred to:

1. **Odgers on Civil Court Actions, Practices and Procedures**
2. **Article 18(1) of the Constitution.**

This appeal is against the decision of the High Court constituted by three judges, Musona J, Chembe J and Zulu J, whereby the appellant's petition against a High Court judge, Nkonde J, was dismissed on a preliminary issue raised by the Respondent.

The background is that Messrs Simeza Sangwa and Associates and Messrs Mulenga Mundashi and Kasonde Legal Practitioners were acting for Finsbury Investments Limited, in Cause Number 2008/HPC/366. The case was heard by Mr. Justice Sunday Bwalya Nkonde SC. The said judge appointed the 28th February 2018 for delivery of judgment. He later changed the date to 2nd May 2018. Judgment was not however delivered on that date, and on 16th May 2018, Messrs Simeza Sangwa & Associates received a Notice dated 11th May 2018, stating that judgment would be delivered on 17th May 2018 at 14:30 hours.

Two associates were detailed to attend court for receipt of the judgment. They were informed that the trial judge was finalizing the judgment, and that they had to wait. These associates waited until 17:00 hours whereupon they were informed that the judgment was still not ready but would be ready the following day on 181h May 2018. No specific time was given.

This prompted Messrs Simeza Sangwa and Associates to agree with their counterparts that they attend court at 16:00 hours to give the judge more time within which to finalise the judgment. At 16:00 hours, they were informed that the judgment was still not ready. The parties were directed to wait for it, which they did, until about 23:00 hours when the judge handed the copies to his Marshal with instructions to seal it and distribute it to the parties. The judge thereupon left his chambers.

On 19th May 2018, Messrs Simeza Sangwa & Associates, enquired, through Mrs. N. Alikipo, with the Marshal as to when it would be possible for the judge to hear an urgent application to stay the judgment pending appeal to the Court of Appeal. The response was that the judge had refused to see Mr. Sangwa on Saturday and would only see him on Monday 21st May 2018.

Efforts to attend upon judge Mweemba with a view to securing a hearing of the application for a stay proved unfruitful, as judge Mweemba was out of town attending a workshop, and that in any event, he was not in a position to hear the application or allocate it to another judge because the Respondent was in town.

On 21st May 2018, Messrs Simeza Sangwa and company filed the Notice and Memorandum of Appeal, with other documentation pertaining to the application to stay the judgment pending appeal. They were informed that the judge had been involved in an accident over the weekend, but would nonetheless report for work. After waiting for a long time, the learned advocates were informed that the learned judge would not hear the application exparte,

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and had directed that it be heard inter parties on Thursday 24[1]h May 2018 at 10:30 hours. This was despite the certificate of urgency. As the judgment of the court had been enforced, the learned advocates abandoned the application, as it had now become redundant.

The learned advocates' next option was to apply for an injunction to the Court of Appeal. They realized they had to justify why they had applied for an injunction before the Court of Appeal instead of the High Court. Mr. Sangwa's belief was that given what had occurred regarding the application for stay of execution of the judgment pending appeal, the application for an injunction would meet the same fate. Thus, Mr. Sangwa deposed, in the affidavit in support as follows:

> ***"I have no doubt in my mind that the Judge's absence from his chambers on Monday 21s' May 2018 was deliberate and was intended to frustrate the application to stay his Judgment pending appeal and undermine the appeal which is before this court. My position is further strengthened by the fact that the Judge decided to schedule the application for inter-parties hearing on Thursday 24th May 2018 at 10:30 hours."***

On 1st June 2018, the learned judge issued a *'summons to an accused'* under the inherent jurisdiction of the Court, and under **Order 52/1/21 of the Rules of the Supreme Court 1999,** directed to Mr. John Sangwa SC. Mr. Sangwa was commanded in the name of the President to appear before the learned judge at 10:30 hours on the 1 Ith June 2018 and on every adjournment of the court until the matter was disposed of, to show cause why he should not be cited and committed or punished for contempt on one count which read:

"Count 1:

Statement of Offence:

Contempt of Court contrary to Order 52/1/21 of the Supreme Court Rules (1999) and under the inherent Jurisdiction of the court

Particulars of offence:

You John Sangwa SC on 22nd day of May 2018, in Lusaka District of the Republic of Zambia, deponed or said in an affidavit in support of the application for an injunction pending appeal in cause No. 201 8/CAZ/1 26 in the matter between Finsbury Investments Limited and Antonio Ventriglia and Manuela Ventriglia in paragraph 23 as follows:

> *"I have no doubt in mind that Judge's absence from his chambers on Monday 2st May 2018 was deliberate and was intended to frustrate the application to stay his Judgment pending appeal and undermine the appeal which is before his (sic) court. My intention (sic) is further strengthened by the fact that the Judge decided to schedule this application for inter-parties hearing on Thursday 24th May 2018 at 10:30 hours" thereby accusing the Judge (the court) of bias and want of integrity.*

Upon being served with this summons Mr. John Sangwa the *'accused'* person to whom the summons were directed, petitioned the High Court for what he regarded as breaches of the constitution, particularly **Article 18(1) of the Constitution.** A verbatim reproduction of his petition in this regard is as follows:

"BREACHES OF THE CONTITUTION

[501 By virtue of what is stated from paragraphs 6 to 49, the Petitioner's right:

(a) where he is charged with a criminal offence, to have his case afforded "a fair hearing within a reasonable time by an independent Court established by law", guaranteed under Article 18(1) of the Constitution has been, is being or is likely to be violated in relation to him in that:

(i) the said summons has not been Issued by a Court (High Court established by law;

(ii) further, the Petitioner will not be afforded a fair hearing before an independent and Impartial Court (High Court) established by law In that:

1. *the Respondent is a complainant who has made the allegations contained In the said summons against the Petitioner;*
2. *The Respondent will also prosecute the said allegations against the Petitioner; and*
3. *The Respondent will also determine whether the said allegations have been proven against the Petitioner or not.*

(b) guaranteed under Article 18(2) (b) of the Constitution to be presumed innocent until he Is proved or has pleaded guilty has been, Is being or Is likely to be violated In relation to him In that when the Petitioner appears before the Respondent on 1 1th May 2018, he has the burden to prove his innocence that Is "to show cause why he should not be cited and committed or punished for contempt of Court on one count..."

(c) guaranteed under Article 18(7) of the Constitution not to be compelled to give evidence at the trial has been is being and Is likely to be violated In relation to him in that when the Petitioner appears before the Respondent on 11th June 2018, the Petitioner has no choice but "to show cause why he should not be cited and committed or punished for contempt of Court on one count..."

(d) guaranteed under Article 18(8) of the Constitution not to be tried or convicted of a criminal offence unless that offence Is defined and the penalty prescribed in a written law has been, Is being and is likely to be violated in relation to him In that:

(i) The criminal offence the Petitioner Is alleged to have committed Is not defined and the penalty is not prescribed by law in that:

1. *Order 52/1/21 of the Supreme Court Rules (1999) Is not law;*
2. *There is no offence In Zambia known as "Contempt of Court contrary to Order 5211121 of the Supreme Court Rules (1999)."*

3. There is no offence in Zambia known as Contempt of Court contrary to "and under the inherent jurisdiction of the Court."

(i) At the time the alleged criminal offence is alleged to have been committed by the Petitioner on 22nd May 2018, when the Petitioner deponed the affidavit in support of the application for an ***injunction*** *pending appeal; or on 1st June 2018, when the Respondent issued the "Summons to an Accused" the Respondent did not constitute High Court as required by Article 135 and the proviso to Article 18(8) of the Constitution.*

[51] By virtue of what is stated in paragraphs 6 to 49, the Petitioner's freedom, except with his own consent, not to be hindered in the enjoyment of his freedom of expression, that is the freedom to hold opinions without interference, freedom to receive ideas and information without hindrance, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of person, guaranteed by Article 20 of the Constitution has been, is being and is likely to be violated in relation to the Petitioner in that:

(a) What is contained in paragraph 23 of the affidavit of 22" May 2018, which forms the basis of the alleged contempt of Court, constitute the opinion or belief of the Petitioner, which belief or opinion the Petitioner formed based on the information acquired over a period of time in his capacity as Counsel for the defendant, Finsbury Investments Limited and in his interactions with the Respondent, the Respondent having constituted himself as a High Court to adjudicate Cause No 2008/HPC/366, and the Respondent's Marshall and which belief or opinion the Petitioner communicated to the single Judge of the Court of Appeal in support of the application for an injunction pending appeal;

(b) Order 52/1/21 of the Rules of the Supreme Court (1999) relied upon by the Respondent does not constitute law necessary to curtail freedom of expression as required by Article 20(3) of the Constitution; and

(c) The alleged inherent jurisdiction relied upon by the Respondent does not constitute law necessary to curtail freedom of expression as required by Article 20(3) of the Constitution.

INTERIM RELIEF

[52] The Petitioner, therefore, prays that he be granted an injunction restraining the Respondent by himself, his servants or agents or howsoever otherwise from commencing or causing to be commenced and from continuing or prosecuting or causing to be continued or prosecuted the contempt proceedings against the Petitioner based on the Summons to an accused person dated 1st June 2018 arising out of the Petitioner's affidavit in support of the application for an injunction pending appeal deponed on 22'' May 2018.

SUBSTANTIVE RELIEF

[53] the Petitioner, therefore, prays that he be granted the substantive remedies below:

(a) A declaration that the "Summons to an Accused" issued by the Respondent against the Petitioner dated 1st June 2018, is ultra vires Article 18 of the Constitution, void and of no effect.

(b) A declaration that the "summons to an Accused" Issued by the Respondent against the Petitioner and dated 1st June 2018, is ultra vires Article 20 of the Constitution, void and of no effect.

(c) An order of certiorari to remove Into the High Court for the purpose quashing the "Summons to an Accused" issued by the Respondent against the Petitioner and dated 1st June 2018.

(d) A declaration that the Respondent's authority to constitute himself as a High Court established by law as required by Article 18 of the Constitution for purposes of Cause No 2008/HPC/366, expired on 18th May 2018, when the Respondent delivered his judgment.

AND the Petitioner claims that the costs of and occasioned to the Petitioner by these proceedings be paid by the Respondent personally to the Petitioner.

AND the humble Petitioner shall forever pray

Dated the 11th day of June 2018

Upon being served with the petition, the Respondent, Mr. Justice Sunday Bwalya Nkonde SC raised preliminary issues on the petition as to whether:

- The matter was properly before the court when the Petition had not been signed by the Petitioner;
- The Petitioner could bring an action against the Respondent in the manner he had done;
- The Petitioner could sue the Respondent as he was not the correct party in an action of that nature;
- The affidavit verifying facts in a Petition was properly before court, considering that it did not speak to the facts, and was not in the first person;
- A high court judge could review, injunct or set aside the decision of another high court judge.

On being served with the Notice to Raise Preliminary Issues, Mr. Sangwa made an objection to the manner in which the Respondent had raised the issues, arguing that the Protection of Fundamental Rights Rules of 1969 do not provide for the raising of preliminary issues, and that the Rules of the Supreme Court of England do not apply.

The High Court considered these issues and held as follows:

1. *While the Protection of Fundamental rights Rules are silent on the raising of preliminary issues, there was no express prohibition. It had become customary to recourse the Rules of the Supreme Court 1999 Edition. In such*

instances, a litigant had an inherent right to raise a preliminary issue in any matter. ***Attorney General vs Law Association of Zambia****' was a case in point.*

2. *To hold that a preliminary issue cannot be raised at all in proceedings commenced under Article 28 of the Constitution would result in absurdity as a party would have no recourse even where there is an obvious irregularity such as wrong form of commencement until the substantive matter is heard. There was nothing irregular in raising preliminary issues by the Respondent*
3. *While agreeing with the requirement for a preliminary issue to be raised under Order 14A RSC, the filing of an answer would suffice as a defence as envisaged under that Order. The court was at large to assume that the requirement to file a notice of intention to defend or an answer is only necessary if reliance on Order 14A will lead to final determination of the matter.*
4. *Even the court on its own motion can decide to determine a question of law or construction under Order 14A. In any event, the application of Order 14A is with great flexibility and celerity.*
5. *The Respondent was entitled to raise a preliminary issue under Order 33 rule 7 RSC 1999 Edition.*

The court's holding on the Respondent's preliminary objections were as follows:

- *From the Protection of Fundamental Rights Rules of 1969, there is no requirement that a petition brought under Article 28 of the Constitution should be signed by the Petitioner.*

- *While fundamental rights and freedoms are acknowledged, their enforcement is subject to rules of procedure and law.*
- *The petitioner did not give any justification or cite law or authority supporting the contention that judicial immunity does not extend to applications under Article 28 of the Constitution.*
- *The Protection of Fundamental Rights Rules speak to the mode of commencement and parties, and do not expressly prohibit the application of other rules.*
- *The petitioner cannot bring the action against the Respondent for anything done while performing his judicial functions within his jurisdiction.*
- *Section 4(5) of the State Proceedings Act is restricted to matters of tort.*
- *There is only one High Court as created by the Constitution. Article 28 of the Constitution does not clothe the High Court with higher jurisdiction when it hears matters under the Bill of Rights. The High Court cannot make an order of certiorari or issue an injunction against itself. The Respondent sitting as High court judge cannot be deemed to be an inferior court to the one that was considering this matter.*
- *Preliminary issues number two, three and five succeeded. The Respondent was wrongly cited as a party, and his name struck out. The preliminary issues that had succeeded did not go to the root of the petition. The petitioner was thus granted leave to apply to amend the petition.*

Aggrieved at this decision the Petitioner appealed on the following grounds:

1. That the lower court erred in Law when it held that since the Protection of Fundamental Rights Rules of 1969 do not have a specific provision for raising preliminary issues, one could have recourse to the Rules of the Supreme Court of England ("RSC") in matters commenced under Article 28 of the Constitution;
2. That the lower court erred in Law when it held that it is an inherent right of a litigant to raise a preliminary issue in any matter before the court;
3. The lower court erred in law when it held that the court was at large to assume that the requirement to file a notice of intention to defend or to file an answer is only necessary if the reliance on Order 14A of the RSC will lead to the final determination of the matter;
4. That the lower court erred in Law when it held that an application for determination of questions of law or construction under Order 14A could be brought by a notice of intention to raise preliminary issues because applications under order 14A are with great flexibility and celerity;

S. That the lower court erred in Law when it held that the Respondent was entitled to raise a preliminary issue under Oder 33 rule 7 of RSC together with order 14A;

6. That the lower court erred in law when it held that there is no distinction between civil actions and petitions brought under Article 28 of the Constitution as the underlying principles are the same regardless of the nature of the matter before court;

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7. That the lower court erred in law when it held that judicial immunity of judges of the High Court extends to petitions brought under Article 28 of the Constitution
8. That the lower court erred in law when it held that the Appellant cannot bring an action against the Respondent for anything done while the Respondent was performing his judicial functions within his jurisdiction;
9. That the lower court erred in law when it held that the correct party to sue for wrongs committed by the Respondent was the Attorney General;
10. That the lower court erred in law when it held that a high Court judge cannot make an order of certiorari or grant an injunction because to do so would be to issue an injunction against itself or order certiorari against itself.

Heads of argument were filed on behalf of the appellant.

It was argued that the lower court erred in holding that a party can have recourse to the **Rules of the Supreme Court of England** as a matter of custom in a petition for the Protection of Fundamental Rights And Freedoms. The premise of this contention was an Indian case in which it was reportedly held that:

> ***"a petition is not an action at common law or in equity. It is a statutory proceeding to 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, has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and Equity must remain strangers to election Law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters, as those***

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relating to the trial of Election Petitions is what the statute lays down. In the trial of election disputes the court is put in a straightjacket."

Reliance was also placed on **Odgers on Civil Court Actions, Practices and Procedures** where this statement is reportedly found:

"a petition is a rare form of bringing proceedings and is used in cases where it is required by a particular statute or rule."

It was contended that the jurisdiction exercised by the High Court when determining a petition for protection of fundamental rights and freedoms is a special jurisdiction, exercised only in accordance with the statute governing the Petition. Therefore, the court is not at liberty to recourse any other rules of procedure when determining such a petition. In the premises, only rules made pursuant to **Article 28(1)** of the Constitution govern determination of petitions brought under that Article, being *sui generis.* The court cannot thus co-mingle the protection of Fundamental Human Rights Rules with the usual rules of procedure, like the Rules of the Supreme Court, regardless of whether or not the rules are silent on a particular issue.

According to learned counsel, the silence of the rules on the raising of preliminary issues is deliberate. This is because, as revealed by **Article 28(1),** the framer's intention was to render the process for protection of fundamental rights very simple and free from procedural technicalities unlike the procedures under ordinary civil proceedings in the High Court Rules. This, in learned counsel's view, is why the Protection of Fundamental Rights Rules of 1969 were deliberately simplified, Rule 5 stipulating that the Petition is to be set down for

hearing as soon as possible as may be convenient after filing. There was no provision for interlocutory applications in a matter began by petition. To buttress the simplicity of the procedure in such matters, learned counsel referred to an Indian case where a mere letter alleging violation of a person's fundamental rights was treated as a petition. It was argued that a litigant does not have an inherent right to raise preliminary issues in a matter begun by a petition as there was no provision or authority under the applicable Rules.

Learned counsel's further arguments were that the prerequisites for employing Order 14A are mutually exclusive, requiring a party to meet all the requirements. Failure to meet any of the requisites is fatal. A party needed to give notice of intention to defend, and also show that determination of the question of law or construction will determine the entire action or claim with finality.

In this case, the argument proceeded, the Respondent did not file a notice of intention to defend or an answer to the petition, and in addition to his, the issues raised did not go to the root of the petition itself. Although the lower court accepted the argument that the case was not a proper one in which to raise objections under **Order 14A RSC,** it misdirected itself by holding that the requirement to file a notice of intention to defend or an answer is only necessary if the reliance on Order 14A will lead to final determination of the matter.

Learned counsel submitted that they had objected to the manner in which the preliminary issue had been raised, but the court below refused to uphold the

objection. Our attention in this regard was drawn to ***Teklemicael Mongstus and Senhah Transport and Mechanical Limited vs Ubuchunga Investments Limited***[2], where the Supreme Court held that an application for dismissal of a case on a point of law under **Order 14A Rule 2 RSC** should be brought by summons or motion, and may be made orally, but not by notice. This, it was contended, is the procedure the Respondent should have employed. Thus, the application was improperly before the lower court, and it was an error to entertain it.

On the applicability of Order 33 RSC, learned counsel contended that under this order, it is the court that directs or states the questions or issues to be determined. The parties cannot just agree between themselves without first obtaining the order of the court to state the questions of law in the form of a special case. The rule was not applicable in this case because the questions of law were settled by counsel for the Respondent, and not by order of the court. It was therefore erroneous for the court to hold that the Respondent was entitled to raise the issues in the manner he did.

It was submitted that the lower court erred in equating a petition for protection and enforcement of Fundamental Human Rights and Freedoms to an ordinary civil suit. A petition, according to learned counsel, is not an ordinary civil suit, such as a suit for libel or damages. It was argued that concepts and practices familiar to common law and equity must remain strangers to petitions for enforcement of fundamental rights and freedoms unless statutorily embodied

in the protection of Fundamental Human Rights Rules or in Article 28 of the Constitution.

Counsel argued that the court erred in holding that no distinction exists between an ordinary civil suit and a petition for protection of Fundamental Human Rights and Freedoms. It was learned counsel's contention that where a person alleges that his rights are being infringed or likely to be infringed by a judicial officer, the officer cannot plead immunity as he normally would in ordinary civil suits. To hold to the contrary would negate the bill of rights which is enshrined in the Constitution. This is because, it was contended, a judge like any other person is bound by the Constitution of Zambia, per **Article 1(3) of the Constitution.** It is a slur on Article 1 (3) to suggest that an action cannot be brought against the Respondent on the mere premise of being a judge. Where an allegation of breach of the Constitution is brought against a judge, he cannot plead immunity. Moreover, **Article 122 (1)** establishes that in the exercise of judicial authority, the judiciary or a judge is subject to the Constitution and the law. **Article 122(1)** accords with **Article 1(3)** which provides that the Constitution shall bind all persons in Zambia, and this includes judges of the Superior Courts.

Another argument advanced by the appellant is that the case of *Miyanda & Chaila* referred to in the court below is distinguishable from the instant one. That case did not allege violation of rights by the judge against the petitioners. Moreover, the English cases were founded on the English Common Law

positions and not statute. Therefore the *Miyanda* case is not good law because judges are bound by the Constitution in Zambia.

Our attention was drawn to **Article 267 (4) of the Constitution.** It was then argued that the functional independence enjoyed by the judge does not preclude the court from exercising jurisdiction in relation to the question whether the judge has no immunity when it comes to the question as to whether or not the judge performed his functions in accordance with the Constitution.

It was argued that the judge violated Articles 18 and 20 when he issued the summons to the petitioner in a matter after he had become *firnctus officio.* He could not constitute himself as high court established by law as required by Article 18 when his authority in relation to Cause No. 2008/HPC/366 had long expired after he had handed down his final judgment.

Learned counsel also submitted that Rule 4 of the Protection of Fundamental Rights Rules indicated that an officer acting in an official capacity could be petitioned under Article 28. The only requirement was that the petition be additionally served on the Attorney General. Similarly, a judge of the High Court can be sued where it is alleged that he has violated any of the provisions of Article 11-26 of the Constitution. The Respondent's claim of immunity has no legal basis as a result.

The appellant's further submission was that a judge sitting to hear a petition for protection of Fundamental Rights and Freedoms can order an injunction

against another judge for protection of Fundamental Rights and Freedoms. Doing so would not amount to the High Court enjoining itself as held by the lower court. Article 28(1) confides exclusive jurisdiction to hear petitions under Articles 11 to 26 in the high court. That court has power to make any orders it may deem appropriate to secure enforcement of the provisions of Articles 11 to 26.

It was contended that the jurisdiction confided by Article 28(1) of the Constitution is a special one, separate and distinct from the jurisdiction it exercises in ordinary civil and criminal actions under the Criminal Procedure Code and the High Court Act. Thus, a high court judge exercising the special jurisdiction under Article 28 is not exercising his ordinary jurisdiction under **Section 4 of the High Court Act.** Once Article 28 is invoked, the High Court judge is conferred with a special jurisdiction different and superior to the ordinary jurisdiction under the High Court Act. In this regard, reference was *made to* ***Chelashaw vs Attorney General and Another***[3], where it was reportedly held that:

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

Premised on this decision, it was contended that a high court judge exercising jurisdiction under **Article 28(1) of the Constitution and the Protection of Fundamental Rights Rules** cannot be placed at par with a high court judge who is or was exercising jurisdiction in an ordinary civil suit. The Constitution

being the supreme law of the land stands above the provisions of the High Court Act. Thus, the principle that High Court judges have equal jurisdiction as a result of Section 4 of the High Court Act only applies when the judges are exercising their jurisdiction under the High Court Act in ordinary civil suit. Therefore, the principle of equal jurisdiction does not apply. In other words the jurisdiction under Article 28 is higher than the ordinary jurisdiction in civil duty under the High Court Act. It follows that a high Court judge exercising that special jurisdiction under Article 28 can enjoin another High Court judge.

When the matter was called for hearing, it was established, to the satisfaction of the court, that the respondent had been served with the cause list. We allowed the appellant to argue the appeal as a result. The respondent had not filed heads of argument to oppose the appeal. Be that as it may, it behoves the court to consider the record, and the reasoning of the court below in dealing with this appeal.

Our considered opinion is that this court has no jurisdiction to deal with this matter. We asked Mr. Simeza, S.C, when the matter was first called for hearing, whether the appeal had been properly brought beforeis court. His response was that the Supreme Court had rendered a decision to the effect that interlocutory appeals in matters brought under the Bill of Rights in the High Court lie to the Court of Appeal, and not the Supreme Court. We were availed with an Order of the Supreme Court to that effect, in ***Hakainde Hichilema, Geoffrey Bwalya Mwamba vs Attorney General***[4]. In that order, the Supreme Court stated as follows:

By virtue of the creation of the Court of Appeal, all appeals against decisions made by the High Court lie to the Court of Appeal, save for substantive decisions made on questions regarding the rights of individuals under Articles 13 to 28 of the Constitution.

- ***The appellants had commenced a petition in the High Curt pursuant to Article 18 and 28 of the Constitution, and the Petition was pending in the High Court.***

  The appellants had appealed to the Supreme Court against an interlocutory decision of the High Court, which did not involve final determination of their Petition.

It was concluded that the Supreme Court lacked the jurisdiction to entertain the appeal as it ought to have been filed in the Court of Appeal.

The present appeal was lodged in this court as a result of the guidance in the cited case. It will be noticed that one of the issues the respondent raised in the court below implicated the immunity of a judge to suits that may be instigated by the exercise of authority by the judge in the course of their duties. In deciding this issue, the court below referred to several decisions in which the independence of judges, and the consequent insulation of these officers from harassment by vexatious litigants has been discussed, reiterated, and endorsed by the Supreme Court in this jurisdiction.

Ground eight of the Appeal attacks the holding of the court below that the respondent is immune from being petitioned in the manner done by the

appellants. In our considered view, disposal of this ground will necessitate a discussion of the question whether or not the respondent, as a judicial officer, is within the contemplation of Article 28, as a person against whom a petition can be brought under Part III of the Constitution.

Articles, such as Article 136(d) and others that relate to the independence of the judiciary and judges will inevitably be considered in this discussion. The end result of such a discussion will be construction of relevant Articles on the independence of judges, and final resolution of the question whether or not the respondent can be petitioned as done. Our considered opinion is that this court does not possess jurisdiction to embark on the proposed exercise. This is because the issue on the independence of judges is likely to be put to rest, and determined with finality. In so doing, this court will delve into matters the constitution has not consigned to its determination.

While this is but one among a number of issues arising in the appeal, we find it improper for this court to determine some issues, and thereafter refer this particular issue to the Supreme Court.

To begin with, there is no provision for referral of matters to the Supreme Court by this court, as is the case with the Constitutional Court. Secondly, it would be against good order to decide an appeal piece-meal, when appeals from this court on deserving interlocutory matters lie to the Supreme Court.

Moreover, Article 128 (1) of the constitution as amended provides as follows:

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.

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As we see it, only the Supreme Court possesses power to interpret constitutional provisions that relate to Part III of the Constitution.

Although the appeal before us is interlocutory, it calls for interpretation of Article 28, vis-à-vis Articles relating to independence of judges. This court cannot assume such jurisdiction. The *Hichilema* decision does not, in our consideration, confer jurisdiction on this court to discuss such matters. Our understanding of that decision is that the jurisdiction of this court relates to those matters that are peripheral and do not revolve around construction of Articles whose interpretation has been reserved to the Supreme Court.

On the foregoing discussion, the appeal is dismissed for want of jurisdiction. We make no order as to costs.

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F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

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B. M. MJULA
COURT OF APPEAL JUDGE

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P. C. M. NGULUBE
COURT OF APPEAL JUDGE