IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

2016/CC/0029

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF ZAMBIA (AS AMENDED BY ACT NUMBER 2 OF 2016) CHAPTER 1 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: AN APPLICATION UNDER ARTICLES 182 (3), 143 AND 144 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA

BETWEEN:

MUTEMBO NCHITO — PETITIONER

AND

ATTORNEY GENERAL — RESPONDENT

Coram: Mulenga, Mulembe, Mulonda, Munalula, and Musaluke, JJC on 23rd July, 2019 and 27th October, 2020

For the Petitioner: Mr. M. Nchito SC in person, assisted by Mr. C. Hamwela and Ms. Chibuye of Messrs. Nchito & Nchito Advocates

For the Respondent: Mr. A. Mwansa SC, Solicitor General assisted by Mrs. K. Mundia and Mr. F. Mwale of Attorney General's Chambers

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JUDGMENT

Mulonda, JC, delivered the Judgment of the Court

Cases referred to:

1. **Attorney General v Mutembo Nchito, [Selected Judgment No.1of 2016]**
2. **Mutembo Nchito v Attorney-General, 2016/CC/004**
3. **Bob Shilling Zinka v Attorney General, (1991) S.J. (S.C.)**
4. **Milford Maambo and 2 Others v the People, 2016/CC/R001**
5. **Michael Nsangu and Others v Pontiano Mwanza and Others Appeal No. 78/2002**
6. **Steven Katuka & LAZ v Attorney General and Ngosa Simbyakula and 63 Others 2016/CC/0010/2016/CC/0011**
7. **Valente v The Queen, [1985] 2 R.C.S. 673**

Legislation referred to:

1. **Constitution of Zambia Act, 1991**
2. **Constitution of Zambia Act, 1973**
3. **Constitution of Zambia (Amendment) Act, No. 18 of 1996**
4. **Constitution of Zambia Act, No. 1 of 2016**
5. **Constitution of Zambia (Amendment) Act, No. 2 of 2016**
6. **Interpretation and General Provisions Act, Cap 2**
7. **Parliamentary and Ministerial Code of Conduct Act, Cap 16**

Other Authorities referred to:

1. **Black's Law Dictionary 10th Edition**
2. **Garth Thornton Legislative Drafting 4th Edition, Butterworth, London 1996**

[1] This judgment is being delivered four years since the first petition was filed in court. The apparent long period it has taken to conclude this matter is not without cause. The parties for the most part of these proceedings were locked in interlocutories. That said, we shall give a brief account of how this matter proceeded and we do so from the time the petitioner was arrested at Chongwe in 2015, which is long before the petition was filed. This we do for the

reason that the pre-petition processes are to some reasonable extent linked to the proceedings in this matter. We now render that account.

[2] The petitioner while serving as Director of Public Prosecutions (DPP) in 2015 was arrested and detained in police custody at Chongwe. This followed a bench warrant issued by the Chongwe magistrate court. The petitioner before his arrest applied for leave to commence judicial review proceedings which leave was granted and was to act as a stay of proceedings. However, the proceedings at Chongwe did not abate until the petitioner obtained a High Court order nullifying the said proceedings at Chongwe.

[3] The petitioner was again the subject of fresh charges that were similar in nature with those at Chongwe, but this time before the Lusaka magistrate court. In the Lusaka proceedings the petitioner, as both DPP and the accused person, personally entered a *nolle prosequi* and urged the complainants to have the matter investigated if they so wished.

[4] Following this development, by letter dated 10th March, 2015 the Republican President suspended the petitioner pursuant to the now repealed Article 58(2) and (3) of the Constitution of Zambia, 1991 pending the findings of an *adhoc* Tribunal appointed to probe the petitioner. A three member *adhoc* Tribunal comprising of former Chief Justices Annel Silungwe, Mathew Ngulube and Ernest Sakala was constituted to probe the petitioner. The Tribunal was presided over by Chief Justice Annel Silungwe (Rtd).

[5]At theTribunal's third sitting on 17th April, 2015, the petitioner raised three preliminary issues, namely:

1. **that the terms of reference were incompetent,**
2. **that the hearing of the Tribunal should not be held in camera; and**
3. **that two of the members of the Tribunal, Justices Ngulube and Sakala being conflicted on the ground of bias recuse themselves from sitting on the said Tribunal.**

[6] The Tribunal considered the preliminary issues raised and in its ruling of 19th May, 2015, dismissed them for lack of merit. The petitioner thereafter applied for leave to commence judicial review proceedings before the Lusaka High Court which leave was granted on the 28th May, 2015, and acted as a stay of the Tribunal proceedings.

The respondent, being the Attorney General in this matter, filed summons to discharge the said leave on among other grounds, that investigative tribunals are not amenable to judicial review. The learned review judge in his decision ruled that no administrative tribunal in Zambia was immune to interrogation by the process of judicial review and that the Tribunal in question was amenable to judicial review. The respondent appealed against this ruling on three grounds -

1. **that the Court below erred in law and fact when it ruled that the mere act of subjecting tribunals to the process of judicial review would not result in curtailing its processes or investigative process,**

2. **that the Court below misdirected itself in law and fact when it held that judicial review proceedings against the Tribunal would not amount to interpreting Article 58 of the Constitution; and**

3. **that the Court below erred in law and in fact when it held that judicial review proceedings can lie against an investigative tribunal.**

[7] The Supreme Court in setting aside the ruling of the learned review judge in the case of **Attorney General v Mutembo Nchito**[1], held that the interlocutory ruling of the Tribunal was not subject to judicial review and the learned review judge ought not to have granted leave. Following the ruling, the Tribunal resumed its

sittings with the petitioner appearing before it under protest. The petitioner called a total of fifty (50) witnesses.

[8] Whilst the Tribunal was sitting, the petitioner commenced proceedings before the Constitutional Court under **Cause No. 2016/CC/004**[2] to continue his challenge of the Tribunal's jurisdiction.

[9] Before the matter could be heard by this Court, the Tribunal concluded its proceedings and presented its findings and recommendations to the Republican President. The Tribunal, however, did not avail the petitioner a copy of the report.

[10] Following the presentation of the report to the Republican President, the Republican President proceeded to relieve the petitioner of his duties as DPP on 9th August, 2016. It is this removal from office that led the petitioner to move this Court yet again on 10th August in this current cause alleging that his removal from office was unconstitutional and on the same date the petitioner proceeded to issue summons for an *exparte order* for interim relief to stay the Republican President's decision.

[11] The summons for an *exparte order* for interim relief was heard by a single judge of this Court and an *exparte order* granted on 16th August, 2016. The *exparte order* was impugned by the respondent resulting in a ruling of 29th August, discharging the said order. The petitioner subsequently applied for leave to amend the petition, which leave was granted and an amended petition filed on 7th September. The respondent filed its amended answer on 22nd September which was followed by the petitioner's reply on 26th September. At the time of replying, the petitioner also applied for discovery of documents and in particular the report of the Tribunal. The application was heard by a single judge of this Court and a ruling delivered to the effect that a single judge of the Court had no jurisdiction to consider any application which entailed interpreting the Constitution. The said application for discovery was accordingly denied. This application was never renewed before the full Court.

[12] Subsequent to the ruling by a single judge and the leave granted on 1st November to further amend the petition, the petitioner proceeded to file the same on the 9th of November. As the record will show, the respondent opted not to file an amended

answer to the amended petition of 9th November as the respondent considered the issues raised in the amended petition as already covered in its amended answer and affidavit of 22nd September.

[13] The matter was then set for hearing on 14th November, 2017. However, on the said date at the instance of the State, an application to adjourn was made which application was not opposed to by the petitioner. To that end, the matter was adjourned to 27th November. On that date, we prodded the petitioner on whether the reliefs that were being sought under paragraph 31 sub paragraph (iv)(v) and (vi) of the amended petition were properly before us. Following our proddingthe parties agreed tc file written submissions. At the same hearing before we could rise, the petitioner applied to extend the subpoenas he had issued on the 22nd of November. This prompted the respondent to indicate to the Court that they had filed an application that very day to set aside the subpoenas on a point of law. The Court could not hear the parties on both issues surrounding the subpoenas as the petitioner had not yet been served with process and in any case the likelihood of the subpoenas being over-taken by events was probable in view

of the Court's preliminary issue. We then adjourned the matter to 22nd February, 2018. On that day, the parties orally augmented their written submissions on the preliminary issue raised by ourselves.

[14] On the 30th May, 2018 we delivered our ruling on the motion raised at our own instance in which we ruled that the petition would be heard as amended by the petitioner and adjourned the matter to 30th July at the instance of the parties. On the said date the respondent applied for an adjournment which was not objected to by the petitioner considering the fact that it was beyond the respondent's control. We then adjourned the matter to the 9th August. On that date, the parties argued the application made by the respondent to set aside the subpoenas issued by the petitioner. We proceeded to rule on this motion on 7th September where we guided accordingly. Following our guidance in the ruling of 7th September, the petitioner filed fresh summons for leave to issue subpoenas as guided.

[15] Before the main matter could be heard, the respondent on the 2nd November, 2018, raised five (5) preliminary issues namely:

1. **Whether the petition discloses any cause of action;**

2. **Whether the provisions of Article 144 of the Constitution of Zambia (Amendment) Act No. 2 of 2016 apply to the petitioner and whether the decision by the President to remove the petitioner from the Office of Director of Public Prosecutions can be reviewed by this Court, and whether the petitioner can be reinstated as Director of Public Prosecutions;**

3. **Whether the amended petition herein is the correct mode of commencement of action to challenge the decisions of the Tribunal set up to probe the petitioner;**

4. **Whether the amended petition is a re-hearing of the matters heard and determined by the Tribunal set up to probe the petitioner; and**

5. **Whether this Honourable Court can grant the declaratory orders sought by the petitioner.**

[16] These preliminary issues were responded to by the petitioner on the 22nd November, 2018 and this Court by its ruling of 18th April, 2019 ruled on the preliminary issues raised resulting in a striking off of reliefs 31(i) (iii) (iv) (v) and (vi) of the amended petition. We then directed that we would proceed to hear the parties on the surviving reliefs namely 31 (ii) and (vii) of the amended petition.

[17] When the matter came up for hearing on 27th June, 2019, the petitioner raised the issue of the pending motion to subpoena witnesses filed on 28th September, 2018 and wished this time to have the subpoena issued only in relation to the then Secretary of the Tribunal, now High Court Judge, Justice Mathew Zulu. On the

other hand the respondent submitted that their understanding was that the matter on this date was coming up for trial and that if the Court was to allow the petitioner's application, the respondents would require more time. We declined the respondent's application to have the matter adjourned for the purpose of allowing the respondent to respond as, in our view, the respondent had ample time to do so before the hearing. We then guided that we would render our ruling on the application to subpoena Justice Zulu and would make it available to the parties. We then adjourned the matter to 23rd July, 2019 after the petitioner informed the Court of his unavailability on the earliest date in the Court's diary being the 4th July. When the matter came up for trial on the 23rd July both parties did not call any witnesses and agreed to file written submissions on the two surviving reliefs of the amended petition. It should be stated that the petitioner filed his final submissions on 3rd September, 2019, followed by the respondent on 17thSeptember, 2019.

[18] We now turn to the two surviving reliefs that this judgment will focus on namely:

> **(ii) that the President's action of purporting to relieve the petitioner of his position as Director of Public Prosecutions**

pursuant to Article 144 of the Constitution is unconstitutional and therefore illegal, null and void;

(vii) **that it stands to reason that a constitutional office holder such as the petitioner herein who is the subject of a Tribunal such as the one being challenged herein, which sits and hears witnesses called by a constitutional office holder and the State and considers legal arguments from either party, must be availed such a Tribunal's findings and determinations which would allow the constitutional office holder to mount a legal challenge where appropriate.**

[19] The petitioner in his opening remarks laments on what he terms unfair treatment in the prosecution of his case. In his submissions, the petitioner recounts the proceedings that preceded this matter and the hearing of the same. We shall not recount them as they already form part of our background to the judgment.

[20] That said, the petitioner submitted that the reliefs sought in the amended petition of 9th November, 2016 are informed by a troubled background which includes not being availed the report that recommended his removal from office as DPP. The petitioner submitted that he has been made to challenge a removal from office based on a report not availed to him and with the tacit approval of this Court which, in his view, could have dealt with his request for the report before dealing with the rest of the case.

[21] The petitioner went on to submit that though he was removed from office pursuant to Article 144 of the Constitution of Zambia (Amendment) Act No. 2 of 2016, (the Constitution as amended) he was never a subject of the Article 144 procedure under the new constitutional order. That this is beyond debate as he never appeared before the Judicial Complaints Commission (JCC) established to consider removal of Judges and the DPP. The petitioner seeks a declaration to the effect that the President's action of removing him pursuant to Article 144 of the Constitution as amended without being subjected to the JCC is unconstitutional and therefore null and void.

[22] The petitioner submitted that while this Court in the matter of **Mutembo Nchito v Attorney-General**[2] held that the Tribunal could continue sitting pursuant to section 16 of the Constitution of Zambia Act No. 1 of 2016, the Court never determined which law the Tribunal would base its report on as Article 58 of the Constitution as amended by Act No.18 of 1996 had now been repealed. It was further hissubmission that it did not make sound reasoning for the Tribunal to exercise power now reserved for the

JCC when the Constitution as amended specifically provides for how it would be constituted and run. The petitioner in arguing his point posed a question on whether subsidiary legislation, we believe in this case to mean Act No. 1 of 2016, could be used to keep alive portions of the repealed Constitution of Zambia. He further went on to submit that if this were the case the difference in thresholds required to amend or enact the Constitution on one hand and that required for amending or enacting ordinary legislation on the other needed to be settled by this Court.

[23] Concerning the reference to Article 144 of the Constitution as amended in the letter of dismissal from office as DPP, the petitioner submitted that the respondent was never consistent in its defence. That this was so because in its amended answer of 22nd September, 2016 the respondent justified the removal of the petitioner from office pursuant to Article 144 of the Constitution as amended and the continued sitting of the Tribunal pursuant to section 10 of Act No. 1 of 2016 respectively. On the other hand, the respondent was said to have, in its motion to raise preliminary issues challenging reliefs sought by the petitioner, stated that Article 144 of the

Constitution as amended did not have retrospective application and as such did not apply to the Tribunal. That it was the repealed Article 58 of the Constitution of Zambia, 1991 that applied based on section 16 of Act No. 1 of 2016 and section 14(3) (b) and (e) of the Interpretation and General Provisions Act. That in fact the respondent considered the reference to Article 144 of the Constitution as amended in the dismissal letter as erroneous citing the **Bob Shilling Zinka v Attorney General**[3] case as authority.

[24] The petitioner considered it curious for the respondent to make a submission contrary to its answer filed 3 years earlier and without any supporting evidence. That the evidence on record in form of the President's letter of dismissal, made pursuant to Article 144 of the Constitution as amended, of 9th August, 2016 remained unrefuted.

[25] Concerning the reference to Article 144 of the Constitution as amended in the President's letter of 9th August, 2016, it was the petitioner's submission that the **Zinka**[3] case cited to justify the reference to Article 144 of the Constitution as amended is distinguishable from the case at hand. That in the **Zinka**[3] case the

issue was reference to the wrong piece of legislation when the power the President sought to exercise sat in another piece of legislation that was in operation. That the Supreme Court in that case held that the fact that the President purportedly exercised the power in question under a wrong source did not invalidate his action as he could have lawfully exercised the same power under another statutory provision.

[26] That in this case, the President referred to a power he possesses under the Constitution as amended. Further that the issue is whether the petitioner was afforded the Articles 143 and 144 process of the Constitution as amended and whether the President could exercise the power in question without the petitioner having been subjected to the Article 144 process.

[27] The petitioner submitted that it was an anomaly for the President to rely on the repealed Article 58 of the Constitution of Zambia,1991, as this was a repealed and an inapplicable law. That equally the reliance on section 14(3) (b) and(e) of the Interpretation and General Provisions Act was not helpful in that the phrase *'written law'* in the section did not include the Constitution

as the supreme law of the land and that it was illogicalto rely on ordinary legislation to keep a repealed provision of the Constitution operative.

[28] The petitioner states that this Court did not specify which law the Tribunal would apply considering that Article 58 of the Constitution of Zambia, 1991 under which it was established had been repealed. It was the petitioner's view that the repealed Article 58 of theConstitution of Zambia, 1991created a problem not only for the Tribunal in terms of which law to apply but equally the Republican President on which law to cite when relieving the petitioner of his duties. That under the difficult circumstances, the Republican President chose to act under Article 144 of the Constitution as amended. That it was the President's action under Article 144 of the Constitution as amended that gave rise to the reliefs the petitioner sought under paragraph 31 (iv) (v) and (vi) of the amended petition which this Court dismissed.

[29] The petitioner further went on to submit that he could not be removed from office pursuant to Article 144 of the Constitution as amended without being afforded the opportunity to make use of

related articles of the Constitution such as Article 216 that regulates constitutional commissions. That he was entitled to the protections related to the Article 144 procedure. He went on to cite our decision in **Milford Maambo and 2 Others v The People**[4], where we held that one principle of constitution interpretation is that-

> **All the relevant provisions bearing on the subject for interpretation should be considered together as a whole in order to effect the objective of the Constitution.**

[30] That one of the constitutional requirements of the JCC is that it must be independent and impartial as provided for under Article 216 of the Constitution as amended and that a constitutional process that is designed to remove a constitutional office holder must, by definition, meet the constitutional stipulation of propriety and due process. It was the petitioner's submission that the report pursuant to which the President acted was totally flawed as it did not meet the threshold for due process under Article 216 of the Constitution as amended.

[31] Regarding relief 31 (vii), the petitioner submitted that his attempt to be availed the Tribunal report met State opposition and

that this Court through a single judge held that it could not determine the matter as it delved into the interpretation of Article 144 of the Constitution as amended which according to the judge was a preserve of the full Court. The petitioner submitted that the removal of a constitutional office holder such as a DPP was a constitutional matter that required the due process to be followed. That the petitioner has a right under natural justice to be heard and to challenge the findings and determinations of the Tribunal. It was his submission that unfortunately the State has denied the petitioner the opportunity of having the report. In conclusion, it was the petitioner's submission that it would be absurd for this court to agree with the respondent's position that he, as a constitutional office holder, is not entitled to the Report.

[32] In responding to the petitioner's submissions, the respondent elected to retain its answer and affidavit in support of 22nd September, 2016, in addition to its submissions in response to the two surviving reliefs namely 31 (ii) and (vii)of the amended petition.

[33] The respondent submitted that relief (ii) hinged on whether or not the petitioner was investigated pursuant to Article 144 of the

Constitution as amended. That on account of this relief the petitioner seeks a declaration on the constitutionality and legality of the Republican President's action.

[34] It was submitted that the issue of whether or not the petitioner was investigated pursuant to Article 144 of the Constitution as amended was canvassed before the Tribunal. That it was held that the Tribunal was properly constituted and its authority was anchored on Act No. 1 of 2016 and the Constitution of Zambia as amended. Further, as already pointed out in this judgment, that the petitioner sought judicial review of the Ruling of the Tribunal and that the Supreme Court held that the interlocutory ruling of the Tribunal was not subject to judicial review and the learned review judge ought not to have granted leave in the first place.

[35] The respondent submitted that the fact that there was a change in the law did not result in the termination of the mandate of the Tribunal to investigate the allegations of misconduct against the petitioner.

[36] That the Tribunal had jurisdiction to continue the proceedings against the petitioner under the repealed Article 58 of the Constitution of Zambia, 1991 as the proceedings were already underway and the new Constitution as amended aptly permitted the Tribunal to proceed as it did.

[37] The respondent cited section 14(3) (b) and (e) of the Interpretation and General Provisions Act which provides that:

> **14(3) Where a written law repeals in whole or in part any other written law, the repeal shall not**
>
> **(a)** .....
> **(b)** ..... **affect the previous operation of any written law sorepealed or anything duly done or suffered under any written law so repealed;**
> **(c)** .....
> **(d)** .....
> **(e)** **affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment aforesaid, and any such investigations, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the written law had not been made.**

[38] The respondent argued that it was not correct for the petitioner to assert that section 14 (3) (b) and (e) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia could not preserve Article 58 of the Constitution of Zambia, 1991 as it was not written law. That section 3 of the above cited

Act defines *'written law'* to mean an Act, an Applied Act, an Ordinance and a statutory instrument. That section 2 of the Constitution of Zambia Act No. 18 of 1996 defined Constitution as meaning the Constitution set out in the schedule to the Act which Act ushered in Article 58 and pursuant to which the adhoc Tribunal was constituted. That the position is made clearer by section 1 of the Constitution as amended that provides as follows:

> **This Act maybe cited as the Constitution of Zambia (Amendment) Act 2016 and shall be read as one with the Constitution of Zambia in this Act referred to as the Constitution.**

[39] Regarding the petitioner's submission that this Court in the matter of **Mutembo Nchito v Attorney General**[2] while holding that the Tribunal could continue sitting pursuant to section 16 of Act No. 1 of 2016 never determined the law under which the Tribunal would operate, the respondent submitted that the Act provided for the continuation of the proceedings under Article 58 of the Constitution of Zambia, 1991. That it followed that the procedure and the law when rendering the report would be as outlined in Article 58 of the Constitution of Zambia, 1991 as amended by Act No. 18 of 1996.

[40] Concerning the submission by the petitioner that the respondent has never been consistent with its defence or position, it was the respondent's submission that in both its defence and notice of motion to raise preliminary issues, the position is and has always been that the repealed Article 58 of the Constitution of Zambia, 1991 applied to the petitioner. That the continued sitting of the Tribunal was in line with section 10 of Act No. 1 of 2016. Further, that the reference to Article 144 of the Constitution as amended would be erroneous if it were a reference to and if it were so understood by the petitioner that the procedure which should have applied was that prescribed under Article 144 of the Constitution as amended.

[41] It was the respondent's position that although there is a reference to Article 144 of the Constitution as amended in the letter terminating the petitioner's appointment, the proceedings against the petitioner were not before the JCC and that as such relief (ii) is unsustainable. Further, that as found by the Supreme Court in the case of **Attorney-General v Mutembo Nchito**[1] the President under the repealed Article 58(4) of the Constitution of Zambia, 1991 had

no discretion with regard to the recommendation of the Tribunal, but to relieve the petitioner of his position as DPP.

[42] It was submitted that in the event this Court finds that the reference to Article 144 of the Constitution as amended in the termination letter was wrong, the respondent would rely on the **Zinka**[3] case where it was held that:

> **The reference to the Emergency Powers Act by the President had been wrong. However, the President could lawfully have exercised the same power under another statutory provision. In the circumstances, as the power he had exercised had been traceable to a legitimate source, the fact that he purportedly exercised that power under a wrong source did not invalidate his action.**

[43] In concluding on this relief, it was the respondent's submission that the reference to Article 144 of the Constitution as amended didnot invalidate the President's action of relieving the petitioner of his position as DPP as the power exercised would be traced to a legitimate source being the repealed Article 58 of the Constitution, 1991, section 16 of Act No. 1 of 2016 and section 14 of the Interpretation and General Provisions Act.

[44] In respect of relief (vii) of paragraph 31 of the amended petition, the respondent submitted that there was no legal basis for

the petitioner to be shown the findings of the Tribunal or any legal basis that placed a duty on the President to furnish a copy of the Report to the petitioner. The repealed Article 58 of the Constitution of Zambia, 1991 was reproduced in its entirety but of emphasis was Article 58(3) (b) which provided that:

(b) **the Tribunal shall inquire into the matter and report on the facts thereof to the President and advise the President whether the person holding the office of Director of Public Prosecutions ought to be removed from office under this Article for incompetence or inability or for misbehavior.**

[45] That the above article does not place a duty on the President to furnish the petitioner with the report or a corresponding right to the petitioner entitling him to a copy of the report. That the above cited provision mandated the Tribunal to report on the facts of the inquiry to no person other than the President.

[46] The position under the repealed Article 58 of the Constitution of Zambia 1991, was contrasted with that of section 13 of the Parliamentary and Ministerial Code of Conduct Act which in section 13(4) provides that:

> **(4) the Tribunal shall, within forty-five days after it's being appointed, submit a report on its findings to the President and to the Speaker and shall furnish a copy to the member concerned.**

[47] It was submitted that by way of analogy, the above provision particularly subsection (4) directs the Tribunal in mandatory terms to furnish the report on its findings not only to the President and the Speaker but also to the member concerned. That this was not the case under the repealed Article 58(3) (b) of the Constitution of Zambia, 1991.

[48] In order to further stress the point of non-compellability of the President to avail the Tribunal report to the petitioner, we were referred to the case of **Michael Nsangu and Others v Pontiano Mwanza and Others**[5] where the Supreme Court had occasion to address the issue of whether the High Court could order the President to appoint a Commission of Inquiry into matters of Chieftaincy. That the Supreme Court stated in relation to section 4(2) of the Chiefs Act that the Court could not compel the President to appoint a commission of inquiry. It was the submission of the respondent that equally under the repealed Article 58 of the Constitution of Zambia, 1991, the President cannot be compelled to avail the report to the petitioner and that if this Court were to compel the President to avail the report to the petitioner, it would

run afoul of the provisions of the Constitution. It was the respondent's prayer that the matter be dismissed with costs.

[49] We have considered the arguments and submissions by both parties in this matter. What we consider as falling for our determination are mainly two issues namely:-

(i) **Whether the changes made to the Constitution of Zambia, 1991 by the Constitution of Zambia Act No. 1 of 2016 and the Constitution of Zambia as amended affected the standing of the adhoc Tribunal appointed under the repealed Article 58 of the Constitution of Zambia, 1991 to probe the petitioner as DPP.**

(ii) **Whether the petitioner having been a constitutional officer holder and subjected to a constitutional removal process is entitled to the report of the adhoc Tribunal upon which the Republican President based his decision to relieve the petitioner of his duties as DPP.**

We hasten to state that the first issue as we see itis not entirely new before this Court as we had occasion to address our minds to it in the matters of **Stephen Katuka and LAZ v The Attorney-General and Others**[6] and **Mutembo Nchito v Attorney General**[2]. As for the second issue, the Supreme Court of Zambia in the case of **Attorney-General v Mutembo Nchito**[1] did guide the parties in the matter and so did a single judge of this Court in a Ruling following

an application for discovery of the report. We shall get back to these issues later in this judgment.

[50] Any alteration of the Zambian constitutional order is informed by the Constitution itself and particularly Article 79 which is an entrenched provision. Article 79 under clause (1) provides that subject only to the Article itself Parliament may alter the Constitution or the Constitution of Zambia Act. It further goes on to provide under clause (2), which is only subject to clause (3) that provides for the alteration of Part III or Article 79 of the Constitution, that a Bill for the alteration of the Constitution or the Constitution Zambia Act shall not be passed unless:

> **(a) Not less than 30 days before the first reading of the Bill in the National Assembly the text of the Bill is published in the gazette; and**
>
> **(b) The Bill is supported on second and third readings by the votes of not less than two thirds of all the members of the Assembly.**

[51] As outlined by the provisions above, the thresholds for the enactment or amendment of the Constitution as amended (Act No. 2 of 2016) and the Constitution of Zambia Act (Act No.1 of 2016) are similar, implying that they are both of a constitutional nature. Act No. 1 of 2016 is the enabling or effecting Act of the constitutional

amendments and in it are all the relevant provisions for ensuring a seamless transition from one constitutional order to another. Historically, since Zambia attained her Independence in 1964, the Constitution has always been a schedule to an enabling Act initially the Zambia Independence Order, 1964 as schedule 2 to that Order, the Constitution of Zambia Act, 1973 as a schedule therein, the Constitution of Zambia Act, 1991 as a schedule therein, and the Constitution of Zambia (Amendment) Act No. 18 of 1996 as a schedule therein. However, the style under the 2016 amendments is a departure in drafting style only and not at law. As we stated in the **Mutembo Nchito**[2] case, this is so because though the two Acts stand separately in numbering, the two are conjoined by Section 4 of the Constitution of Zambia Act No. 1 of 2016 which provides that:

> **Subject to this Act, the Constitution as amended in Act No. 2 of 2016 shall come into operation on the commencement of this Act."**

[52] The import of section 4 underscores the fact that the Constitution of Zambia Act as in other past constitutional changes is not only the operationalizing Act of the Constitution, but also through its other provisions provides for the transition as stated

above. Of particular interest to the matter at hand are sections 10(1) and 16(1) of Act No. 1 of 2016 respectively.

Section 10(1) provides that:

> **Where a provision of the Constitution as amended has altered the name of an office or institution existing immediately before the effective date, the office or institution as known by the new name shall be the legal successor of the first named office or institution**

The above provision as a transitional provision takes care of institutions and offices that may change in name or character following constitutional amendments. In the case at hand, the repealed Article 58 provided for an adhoc Tribunal for purposes of probing and investigating a person occupying the office of DPP and making the relevant recommendations to the Republican President. On the other hand, Act No. 2 of 2016 provides under Article 144 the procedure for removal of a Judge including the DPP using a permanent standing body in the name of the JCC. This Commission is in essence the legal successor institution of the adhoc Tribunal under the repealed Article 58 of the Constitution of Zambia, 1991.

[53] Further, section 16(1) provides that:

> **(1) Unless otherwise provided under the Constitution as amended, proceedings pending before court or tribunal shall continue to be heard and determined by the same court or**

tribunal or may be transferred to a corresponding court or tribunal established under the Constitution as amended.

The above provision acts as a saving provision or a transfer provision for pending proceedings depending on the circumstances of the case. In the case of proceedings commenced before the effective date, the proceedings continue to be heard and determined under the old constitutional order unless expressly transferred to the corresponding court or tribunal envisaged under section 10 (1) of Act No. 1 of 2016 above.

[54] The **Black's Law Dictionary, 10th Edition** defines a saving clause:

> **As a statutory provision exempting from coverage something that would otherwise be included. A saving clause is generally used in a repealing Act to preserve rights and claims that would otherwise be lost.**

[55] Further, the learned author **Garth Thornton** in his work **Legislative Drafting, 4th Edition, Butterworth, London, 1996** at page 383 has this to say on saving and transitional clauses:

> **A function of a savings provision in legislation is to preserve or "save" a law, a right, a privilege or an obligation which would otherwise be repealed or cease to have effect..... A function of a transitional provision is to make special provision for the application of legislation to the circumstances which exist at the time when the legislation comes into effect.**

[56] The petitioner contends that his dismissal from office was unconstitutional and therefore illegal, null and void. That this was so because though dismissed pursuant to Article 144 of the Constitution as amended, he was never subjected to the Article 144 process under the JCC. Further, that as a consequence he was not afforded an opportunity to make use of related articles in the Constitution as amended that govern constitutional commissions such as Article 216. The respondent argues that the change in the law did not result in the termination of the adhoc Tribunal's mandate to investigate the allegations of misconduct against the petitioner. That the adhoc Tribunal's continued mandate and jurisdiction is anchored on the provisions of the two constitutional Acts namely, Acts No. 1 and No. 2 of 2016 respectively. The respondent submitted that the Tribunal had sufficient authority to proceed under the repealed Article 58 of the Constitution of Zambia, 1991 and did not need to proceed under Article 144 of the Constitution as amended. That although there is a reference to Article 144 in the letter terminating the petitioner's appointment, the proceedings against the petitioner were not before the JCC.

[57] The adhoc Tribunal appointed to investigate the petitioner was constituted under Article 58 of the Constitution of Zambia, 1991. While undertaking its mandate, a new Constitutional Order was ushered in following the passing of Acts No. 1 and No. 2 of 2016. Under the new constitutional order the adhoc arrangement for investigating the DPP has been done away with and in its place a permanent mechanism under the JCC instituted. The contention by the petitioner is that his matter ought to have been investigated in line with the new mechanism under Article 144 considering that the letter terminating his appointment as DPP was made pursuant to Article 144 of the Constitution as amended.

[58] We wish to state that it is trite that whenever changes occur in any legal order the changes are not abrupt but orderly and structured to ensure smooth transition. In the case at hand, Act No.1 of 2016 performs that function and this Court had occasion to pronounce itself on the import of Act No. 1 of 2016 in the case of **Steven Katuka & LAZ v Attorney General and Ngosa Simbyakula and 63 Others**[6] where we stated at J74 that:

> **As can be seen from the above provisions, Act No. 1 of 2016 provides for savings and transitional provisions between the 1991 Constitution and the Constitution as amended. Therefore, Act No. 1**

should be read together with the 1991 Constitution and the Constitution as amended. To that extent, we do not agree with the suggestion that Act No. 1 of 2016 is a stand-alone Act because it is an instrument that provides for smooth transition from the 1991 Constitutional regime to the current Constitutional Order.

That said, we wish to further restate what we said in the case of **Mutembo Nchito v Attorney General**[2] that:

It was clearly not the intention of the Legislature to have an automatic and abrupt abolition of the Tribunal while matters were still pending before it. The Legislature was apparently aware of the provisions in Articles 182(3), 143 and 144 which had changed the mode of investigating the DPP from the adhoc Tribunal to the Judicial Complaints Commission.

[59] Section 16 of Act No. 1 of 2016 cited above clearly preserves all proceedings commenced before a court ortribunal unless such proceedings are transferred to a corresponding court or tribunal established under the Constitution as amended pursuant to section 16(1) of Act No. 1 of 2016. It is therefore our firm view that the proceedings commenced under the repealed Article 58 of the Constitution of Zambia, 1991 were constitutionally preserved and that the Article 144 procedure could not have been the one under which the Republican President relieved the petitioner of his duties despite referring to Article 144. Further, despite referring to the Article in his letter of termination, the petitioner cannot claim the provisions of Article 216 of the Constitution as amended within the

context of the Article 144 procedure, save to state that the Article 216 provisions are generic to all constitutional procedures including the repealed Article 58 procedure.

[60] The petitioner submits that while we ruled in the case of **Mutembo Nchito v Attorney-General**[2] that the adhoc Tribunal could continue sitting pursuant to section 16 of Act No. 1 of 2016, we never determined which law the adhoc Tribunal would use when rendering the report as Article 58 stood repealed. The respondent maintained its position that proceedings under the repealed Article 58 continued under section 16 of Act No. 1 of 2016 and that it followed that the procedure and the law applicable when rendering the report would be as outlined under the repealed Article 58.

[61] As we quoted **Black's Law Dictionary** on the definition of a saving clause, a saving clause is generally used in a repealing Act to preserve rights and claims that would otherwise be lost and in this matter the saving clause section 16(1) of Act No. 1 of 2016 preserved the provisions of Article 58. Similarly the learned author **Garth Thornton** in his work **Legislative Drafting** reiterates this point of law that a savings provision in legislation is there to

preserve or save a law, in this case Article 58 which would otherwise be repealed or cease to have effect. It follows therefore that the continued existence of the adhoc Tribunal secures the application of the repealed Article 58 to all its proceedings.

[62] Further, the implication of this preservation is that despite a new mechanism being in place under the new constitutional order, the repealed Article 58 applied to the adhoc Tribunal as though the Article 144 procedure were non-existent.

[63] The petitioner argued that subsidiary legislation, in this case Act No. 1 of 2016 could not be used to keep alive the repealed Article 58 of the Constitution of Zambia, 1991 in view of the fact that the two laws have different enactment thresholds. We wish to state that Article 79 of the Constitution of Zambia, 1991 is the provision that informs all constitutional enactments including amendments. Article 79 provides the same threshold for the alteration of the Constitution and the Constitution of Zambia Act under clause (2) (a) and (b). It follows therefore, that Acts No. 1 and No. 2 of 2016 are cut from the same constitutional fabric and are two sides of the same coin, Act No. 1 of 2016 being the effecting Act.

It is therefore a misapprehension of Article 79 of the Constitution of Zambia, 1991 to relegate Act No. 1 of 2016 to ordinary legislation status.

[64] The petitioner submitted that the respondent was inconsistent in its answer and position as it initially canvassed that the dismissal of the petitioner was in line with Article 144 of the Constitution as amended and that the Tribunal's continued sitting was pursuant to section 10 of Act No. 1 of 2016. That in its notice of motion to raise preliminary issues the respondent stated that Article 144 of the Constitution as amended did not act retrospectively and that the Tribunal continued to sit pursuant to the repealed Article 58 of the Constitutionof Zambia, 1991, section 16 of Act No. 1 of 2016 and section 14(3) (b) and (e) of the Interpretation and General Provisions Act.

[65] We wish to state that section 10 (1) of Act No. 1 of 2016 is concerned with the legal succession of institutions and offices that existed immediately prior to the new constitutional order. In this particular case it informs which institution takes over the legal persona of the adhoc Tribunal; in this case being the JCC.

However, it is a misapprehension of the law by the respondent to assign section 10 (1) to be the saving provision for the Tribunal's continued operation.

The question of Article 144 of the Constitution as amended not acting retrospectively has already been addressed in this judgment and so is the import of section 16(1) of Act No. 1 of 2016.

[66] The petitioner further argues that the **Bob Zinka**[3] case cited by the respondent as being authority for the wrong citing of Article 144 of the Constitution as amended is distinguishable from the case at hand. That the **Zinka**[3] case involved the exercise of a power based on a wrong provision of the law, which power reposed in another Act. That in the current case the provision cited is the correct one save that the petitioner was not subjected to the Article 144 procedure under this correct source. The respondent's position is that the current case is on all fours with the **Zinka**[3] case as the power exercised was traceable to the repealed Article 58 of the Constitution of Zambia, 1991.

[67] Our firm view is that, while Article 144 of the Constitution as amended, is the correct provision under the new constitutional

order to exercise powers of dismissal against an officer falling under its coverage, in this case the DPP included, the case at hand does not fall under its coverage. This is so because the repealed Article 58 is what applied in the case at hand as shown above. That being the case, Article 144 of the Constitution as amended within the context of this case is a wrong provision to anchor the decision of dismissal in this case. It follows therefore, that the reference to Article 144 of the Constitution as amended was misplaced though the power exercised was covered by the repealed Article 58 of the Constitution of Zambia, 1991. The President's action thus cannot be said to be unconstitutional, illegal or null and void as alleged by the petitioner.

[68] The petitioner submitted that the reliance on section 14(3)(b) and (e) of the Interpretation and General Provisions Act by the respondent for purposes of preserving the provisions of the repealed Article 58 of the Constitution of Zambia, 1991 is not helpful to the respondent's case. It was submitted that this was so because it does not apply to the Constitution within the meaning of 'written law' as defined under section 14 cited above as the Constitution is defined separately and differently. The respondent to the contrary

submitted that the Constitution fell within the meaning of 'written law' as defined in the Interpretation and General Provisions Act. That section 1 of Act No. 2 of 2016, provides that it should be read as one with the Constitution of Zambia. The respondent argues that it follows that the Constitution of Zambia falls within the definition of 'written law' which includes Acts of Parliament.

[69] We wish to begin by stating that the Constitution of Zambia is birthed through a legislative process and in that context it is an Act of Parliament. However, Article 79 of the Constitution of Zambia, 1991 is what provides both for transitional and preservation aspects of constitutional amendments. The Constitution has its own mechanism of preserving repealed provisions for transitional purposes as is the case in this matter where Act No. 1 of 2016 performs that function. Therefore, section 14(3)(b) and (e) of the Interpretation and General Provisions Act cannot be used for that purpose and is inapplicable in that regard. Having said so, we agree with the petitioner that section 14 cited above is not helpful for purposes of keeping the repealed Article 58 provisions alive. However, section 16(1) of Act No. 1 of 2016 equally cited does

preserve the repealed Article 58 of the Constitution of Zambia, 1991 as already stated above. On the whole the issues raised in this relief fail and we dismiss it.

[70] The second and last issue invites us to consider whether the petitioner having been a constitutional office holder and subjected to a constitutional removal process is entitled to the report of the *adhoc* Tribunal upon which the Republican President based his decision to relieve the petitioner of his duties as DPP.

[71] We wish to begin by addressing the petitioner's assertion that the Court tacitly approved of the non-furnishing of the report to the petitioner before this Court dealt with the whole matter. It is on record that in the Ruling of 19th October, 2016 a single judge gave reasons why discovery could not be ordered following an interlocutory application by the petitioner. In fact, the single judge in the ruling properly guided the petitioner. As the record will show the petitioner did not renew the application before the full Court as guided. In short, we can safely state that he abandoned the application for discovery for reasons we are not privy to. It is therefore misleading and inaccurate for the petitioner to state that

this Court tacitly approved the situation the petitioner found himself in when in actual fact we were never moved as a full Court to address the issue of discovery of the Tribunal report.

[72] The repealed Article 58 of the Constitution of Zambia, 1991 upon which the removal proceedings against the petitioner are anchored is key. Article 58 clauses (2) (3) and (4) provide that:

> (2) **A person holding the office of Director of Public Prosecutions may be removed from office only for incompetence or inability to perform the functions of his office whether arising from infirmity of body or mind or misbehavior and shall not be so removed except in accordance with the provisions of this Article.**
>
> (3) **If the President considers that the question of removing a person holding the office of Director of Public Prosecution from office ought to be investigated then:**
>
> > (a) **he shall appoint a tribunal which shall consist of a Chairman and not less than two other members who hold or have held high judicial office;**
> >
> > (b) **the tribunal shall inquire into the matter and report on the facts thereof to the President and advise the President whether the person holding the office of Director of Public Prosecutions ought to be removed from office under this Article for incompetence or inability or for misbehavior.**
>
> (4) **where a tribunal appointed under clause (3) advises the President that a person holding the office of Director of Public Prosecutions ought to be removed from office for incompetence or inability or for misbehavior, the President shall remove such person from office;**

Clause (2) above insulates the holder of the office of Director of Public Prosecutions from being disappointed by the appointing authority except under well defined grounds which in this case are incompetence, inability to perform the functions of the office or misconduct. It will be noted that this is the only constitutional office outside that of judge which is protected in such a manner. This position is not without cause.

In the Canadian case of **Valente v The Queen**[7] the Canadian Supreme Court had occasion to state what it considered to be secured tenure within the context of judicial independence. It was stated at page J675 that:

> **Security of tenure, because of the importance traditionally attached to it, is the first of the essential conditions of judicial independence..... The essentials of such security are that a Judge be removable only for cause, and that cause, be subject to independent review and determination by a process at which the Judge affected is afforded a full opportunity to be heard. The essence of security of tenure ..... is a tenure ..... that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.**

[73] The above authority is in our view reflective of clauses (2) and (3) of the repealed Article 58 of the Constitution of Zambia, 1991 which provided for an independent *adhoc* tribunal meant to review and determine the issue of removing a DPP from office by the

President as appointing authority. It is under this first safeguard that the DPP is afforded a hearing with procedural due process rights.

[74] The Article 58 procedure was a 'peer review procedure' overseen by an *adhoc* tribunal consisting of persons who hold or have held high judicial office. This was meant to accord the affected officer all the procedural due process rights and to competently adjudicate the issue of whether to retain or not the affected officer in a secured office.

[75] Clause (3) (b) of the repealed Article 58 provided for the process on how the Tribunal would proceed after adjudicating a matter put to it by the appointing authority; in this case the President. An interpretation of clause (3) (b) of the repealed Article 58 in its literal or ordinary sense brings out the fact that the Tribunal was under no express obligation to avail its findings to any other person than the President as appointing authority. In our decision in the case of **Steven Katuka and Another v the Attorney General**[6] we stated that:

> **"In terms of the general or guiding principles of interpretation, the starting point in interpreting words or provisions of the**

Constitution or indeed any statute is to first consider the literal or ordinary meaning of the words and articles that touch on the issue or provision in contention. This is premised on the principle that words or provisions in the Constitution or statute must not be read in isolation. It is only when the ordinary meaning leads to an absurdity that the purposive approach should be resorted to (emphasis ours)."

[76] Our position as stated in the **Katuka**[6] case above has not changed. The question which begs an answer is whether clause (3)(b) should be given a literal interpretation or not. A literal interpretation of clause (3) (b) does not in any way place an obligation on the *adhoc* tribunal to share their report with the affected party. The clause only requires that the *adhoc* tribunal renders a report to the President. Considering the issue before us and taking a literal interpretation of clause (3) (b) of the repealed Article 58, the question then is whether a literal interpretation does really result in an absurdity. In this regard we turn to what is legally available in form of remedies should an affected party to tribunal proceedings be dissatisfied with the outcome.

[77] In the case of **Attorney-General v Mutembo Nchito,**[1] the Supreme Court had this to say at page J30.

Although Article 58(4) of the Constitution leaves the President with no discretion with regard to the recommendation of the Tribunal, we do not agree with the Respondent that the said

Article closes the door to judicial checks on the recommendation itself. The recommendation of the Tribunal, being its final decision is subject to judicial review.

Accordingly, the Respondent retains the liberty to ask the Court to review the procedure used by the Tribunal to arrive at the recommendation and could even apply for a stay of the said decision.

[78] The above authority brings out a further safeguard for offices that have secured tenure in the form of judicial review. It is clear that the tribunal process leading to the decision is subject to judicial review to ensure that its decision remains untainted. As rightly stated by the Supreme Court in the **Mutembo Nchito**[1] case above, the recommendation of the tribunal being its final decision is subject to judicial review and that in this particular matter the petitioner retained the liberty to seek for the review of the process or procedure used by the tribunal to arrive at the recommendation. The Court further went on to state that the petitioner could even apply for a stay of the said decision.

[79] That said, the question to be answered is whether a literal interpretation of the repealed Article 58(3) (b) of the Constitution of Zambia, 1991 would result in absurdity and therefore paving way for a purposive interpretation.

[80] The respondent, on the issue of the Tribunal report not being made available to the petitioner submits that there is no legal basis for the petitioner to be shown the findings of the Tribunal or any legal basis that places a duty on the President to furnish a copy of the report to the petitioner. The repealed Article 58(3) (b) was cited as authority for this position. The respondent went on to contrast the provisions of section 13 of the Parliamentary and Ministerial Code of Conduct Act, Chapter 16 of the Laws of Zambia, particularly sub-section 4 which specifically provides that the tribunal shall furnish a copy of the report to the member concerned.

[81] Concerning the respondent's response that there is no legal basis to furnish the petitioner with the Tribunal report, within the contemplation of the repealed Article 58(3) (b), we wish to state that the President as a recipient of the Tribunal report is under no obligation to avail a copy of the report to the affected secured officer, in this case the petitioner. That notwithstanding, an affected party having exercised their procedural due process rights before a tribunal is entitled to be availed a reasoned decision of the

adjudicative body regardless of the form the decision takes, following such proceedings.

[82] This is in the interest of retaining confidence in the adjudicative mechanism by affected secured officers. This is in addition to making subsequent judicial review proceedings meaningful should the affected officer elect to commence such proceedings. If the framers of the Constitution had in mind the situation before us, they would have provided that the outcome of the investigation should also be provided or availed to the concerned office holder. This would enable the office holder to know the basis upon which the recommendation is made and to take appropriate action. This is what natural justice demands. This is the purposive interpretation we have given to the repealed Article 58(3) (b) of the Constitution of Zambia, 1991 as the literal interpretation results in absurdity.

[83] The issue raised in this relief succeeds and we accordingly grant the declaration that the petitioner was entitled to be availed the findings or report by the *adhoc* Tribunal.

[84] In conclusion we wish to state that the President acted constitutionally when he relieved the petitioner of his duties as DPP despite the fact that the letter of dismissal erroneously referred to Article 144 of Act No. 2 of 2016 and not the repealed Article 58 of the Constitution of Zambia, 1991. We further state that an affected party in a constitutionally ordained removal process who has appeared before the relevant adjudicative body, in this case the *adhoc* Tribunal constituted pursuant to the repealed Article 58 was entitled to a copy of the reasoned decision of such proceedings. This in our view is in conformity with the principle underlying the mechanism for removal of constitutionally secured officers, who through such mechanism must be given justification for their disappointment.

[85] Relief (ii) fails while relief (vii) succeeds. The petition having succeeded in part and due to the

important constitutional issues raised in this matter, each party will bear their own costs.

M.S. Mulenga
Judge
CONSTITUTIONAL COURT

E. Mulembe
Judge
CONSTITUTIONAL COURT

P. Mulonda
Judge
CONSTITUTIONAL COURT

M.M. Munalula
Judge
CONSTITUTIONAL COURT

M. Musaluke
Judge
CONSTITUTIONAL COURT