SOUTHERN AFRICAN INSTITUTE *for* POLICY AND RESEARCH

Judgment Commentary Unit

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About the Judgment Commentary Unit

The JCU is a unit that operates within the legal division of the Southern African Institute for Policy and Development. Following in the footsteps of similar initiatives in other regions, the JCU provides commentaries on select judgments of terminal courts (and in exceptional cases, non-terminal courts) in the Southern African Region. The purpose of the unit is to raise the discourse around the jurisprudence of these important courts and in so doing, stimulate debate on topics of legal significance and relevance.
Each commentary aims to: (a) clarify and interpret the decision; (b) survey the development of the area of law impacted by the decision; (c) identify any uncertainties and gaps created by the decision; and (d) provide a commentary on the wider socio-political and economic implications of the judicial decision in question.

Scope

The ultimate goal of the JCU is to comment on judgments from a wide sampling of terminal courts in the region. To sustainably arrive at this objective, the JCU will expand its scope incrementally. This inaugural volume deals only with Zambian jurisprudence. In Volume II, the JCU will expand its reach to one or more other jurisdictions, and as time goes by, continue its expansion program until the majority of regional terminal courts are covered.

Frequency

The JCU will publish its commentaries twice a year: in January and in July.

Judgments Reviewed – Vol. 1 No. 2 (January 2016)

1. Attorney General vs. Chibaya and Others (Appeal No. 70/2011) [2015] ZMSC 27(10 June 2015)

2. Attorney General vs. Mutuna and Others (Appeal No. 088/2012) [2013] ZMSC 38 (9 May 2013)

3. Hans Winfred Lorenz vs. The Zambia Revenue Authority (Appeal No. 192/2010) [2015] ZMSC 21 (19 May 2015)

4. Kafue Horse Safaris Limited vs The Zambia Wildlife Society and Attorney General (Appeal No. 13/2012) [2015] ZMSC 6 (19 January 2015)

5. Michael Mabenga v. The Post Newspapers Limited (Appeal No. 069/2012) [2015] ZMSC 20 (21 May 2015).

6. Tawela Akapelwa and Others V Josiah Mubukwanu Litiya Nyumbu (Appeal NO.004/2015) [2015] ZMSC 25 (21 May 2015)

7. The Law Association of Zambia vs. The Attorney General HC [2013] ZMHC (23 October 2013)

8. The People v Austin Chisangu Liato (Appeal No. 291/2014) [2015] ZMSC 26 (2 June 2015)

Attorney General vs. Chibaya and Others (Appeal No. 70/2011) [2015] ZMSC 27(10 June 2015)

Nicholas Khan-Fogel

FACTS

Respondents were employees of the Department of National Parks and Wildlife Services, which became the Zambia Wildlife Authority (ZAWA). When the Department of National Parks and Wildlife Services became defunct, the respondents were declared redundant, but they were later engaged by ZAWA, the Appellant in this case. On December 12th, 2007, following their retrenchment, Respondents commenced an action seeking an award of terminal benefits. Pursuant to the terms of consent judgment, after the parties failed to agree on the sum to be paid, Respondents applied to the Deputy Registrar for assessment of the sums. The Deputy Registrar awarded respondents a total of K2, 501, 381, 500.98, and ZAWA appealed to the Supreme Court.

THE LEGAL ISSUES

1. Did respondents offer sufficient proof of their salaries while employed by ZAWA and the Department of National Parks and Wildlife Services to support the registrar's award?
2. Did the Deputy Registrar err in concluding that respondent 3 was entitled to retirement benefits as a classified daily employee (CDE) for the period between 1971 and 1996, and that respondent 3 was entitled to redundancy benefits following the termination of his second term of employment between 1997 and December, 1999?
3. Did the deputy registrar err by granting Respondents interests from the date of termination of employment instead of the date of commencement of the action?

THE HOLDING

1. Respondents' proof of their salaries while employed by ZAWA and its predecessor, through the use of circulars and pay slips for other employees, was insufficient to support the deputy Registrars award.
2.
   A) The Deputy Registrar erred in concluding that Respondent 3 was a classified daily employee (CDE) between 1971 and 1996 and entitled to benefits based on that classification. Instead, because Respondent 3 was an established civil servant from 1971 to 1996, he should collect a pension under the Pensions Act for that Period of employment.
   B) The Deputy Registrar also erred in concluding that Respondent 3 was entitled to Redundancy benefits following the termination of his second term of employment between 1997 and 1999.
3. The Deputy Registrar should have calculated interest from the date the action was commenced instead of the date of termination.

The Rationale of the Holding

1) Although Respondents noted that they had presented unchallenged evidence that ZAWA had taken their pay slips, and although Respondents offered to pay slips of

other employees and pay scales reflected in various circulars to establish their salaries, the court deemed this evidence inadequate. The court noted that the circulars in question established only a range of pay, with the several grades available at each designated level. The court also stated that the pay slips of other employees were irrelevant to the salaries of the Respondents. Finally, although the Appellant's witnesses disagreed about the salary of one Respondent and admitted they had no documentary evidence regarding the salaries of any Respondents, the court stated that the Deputy registrar should have credited the inside knowledge of Appellant's witnesses over the Respondents' witness.

2)
   A) Because ZAWA issued letters to Respondent 3 in 2000 and 2002 formalizing his previous employment, the Appellant's evidence showed that Respondent 3was an established civil service officer for the period between 1971 and 1996. As an established civil service officer, Respondent 3 was entitled to benefits under the Pensions Act, rather than to retirement benefits as a CDE.
   B) Because Respondent 3's second term of employment was a fixed-term contract, Respondent 3 was entitled to neither pension benefits nor redundancy pay for the termination of the contract. At most, Respondent 3 would have been entitled to damages for breach of contract. However, because respondent 3 was given three months' notice of termination, and because there was no evidence the termination was wrongful, Respondent 3 was entitled to no damages for dismissal after his second term of employment.
3) The High Court rules and the Judgment Act make clear that interest should be awarded from the date of commencement of an action by a writ of summons. Therefore, the Deputy registrar erred by awarding judgment from the date of termination.

THE SIGNIFICANCE

Uncertainty regarding the calculation of terminal benefits is of importance to all Zambian workers. Therefore, it would have been useful if the court had offered detailed guidance on the issue. Although the court aptly noted the inadequacy of various circulars adduced in evidence to establish the respondents' salaries (given that the circulars established a range of salaries rather than a precise number for each respondent), the court failed to give significant guidance on how the Deputy Registrar should calculate the award on remand. The Court's focus on the inadequacy of the respondents' evidence in the absence of their own pay slips raise troubling concerns for several reasons. First, much like these employees, many workers will have difficulty producing pay slips years after the relevant period of employment. Second, the court acknowledged unchallenged evidence that ZAWA officers had taken the Respondents Pay slips. Finally, in its conclusory dismissal of the argument that Respondents' proffered pay slips from other employees could be relevant to Respondents' claims, the court failed to address the possibility that evidence of other employees' salaries could be probative if those employees had positions and experience similar to Respondents.

The court's statement that the Deputy registrar should have credited the Appellant's witnesses, who had insider knowledge of the system, over the respondents' witness, who did not, seem superficially unremarkable. Nonetheless the Appellant's own witnesses disagreed with each other about one of the Respondents salaries, and both of appellant's witnesses admitted they had no pay slips or other documentary proof to support their assertions about any of the Respondents' salaries.

Given that ZAWA had taken the respondents pay slips and that the court refused to give any weight to the pay slips of employees who may have had similar positions, it is unclear, under the circumstances, what Respondents could have done to establish with precision the terminal benefits awards to which they are entitled. This leaves considerable uncertainty for many Zambian workers in the future.

Additionally, the court's reliance on ZAWA letters to Respondent 3 in 2000 and 2002 respectively, to establish Respondent 3's employment status for the years between 1971 and 1996, raises troubling concerns for workers hoping for predictability in the formation of employment relationships. The holding suggests that a government employer has the power to establish retroactively an employee's status for work done many years in the past. The court did not address the issue of whether the expectations of respondent 3 and ZAWA's predecessor during the years between 1971 and 1996 might have been inconsistent with ZAWA's later characterization of that relationship.

Attorney General vs. Mutuna and Others (Appeal No. o88/2012) [2013] ZMSC 38 (9 May 2013)

Muna Ndulo

THE FACTS

On 30th May, 2012, the three respondents received letters from the President of the Republic suspending them from performing their duties. The first and second Respondents applied *ex parte* for leave for Judicial Review of His Excellency's decision to appoint a tribunal and suspend them. This application was granted on 16th May, 2012. Following the successful granting of the application, the 3rd Respondent took out summons and applied to the Supreme Court to join as the 3rd Applicant (now the 3rd Respondent). This was granted on 31st May 2012. The Appellant then on 17th May, 2012 took out summons to discharge the leave granted ex-parte to the Respondents. The High Court rejected the appellants' application and the appellant appealed to the Supreme Court.

THE LEGAL ISSUES

Whether the president's exercise of Article 98 powers was a contravention of Article 91 of the Constitution which establishes the Judicial Complaints Authority as the body mandated to deal with allegations of judicial misconduct.

THE HOLDING

The court held that it was the legislature's intention to make it possible for the president to "deal with" judges without recourse to the Judicial Complaints authority. It further held that article 98 was a "limited check" on the Judiciary by the president in the event that the President received credible information impugning the credibility of a judge. In so doing, the Supreme Court of Zambia adopted the doctrine of executive supremacy.

THE SIGNIFICANCE

A jurisprudence of constitutionalism is fundamentally different from a jurisprudence of executive supremacy. The former is premised on the supremacy of the constitution. The Zambian constitution states in article 1 that: "The Constitution is the Supreme Law of Zambia and if any other law is inconsistent with this constitution, that other law shall, to the extent of the inconsistency, be void." Additionally, constitutionalism is premised upon the separation of powers of the three arms of the government-namely the executive, the legislature and the Judiciary. The constitution is premised on the judiciary's exercise of its power of judicial review, which means that the judiciary must see to it that the other arms of the government act within the provisions of the constitution. It is the duty of the executive to give effect to all judgments given by the judiciary regardless of the executive's view of the correctness of the judgments. Where the executive is dissatisfied with the judgment of a lower court, its constitutional option is a right of appeal.

In order for the judiciary to perform its duties fearlessly and impartially, the constitution grants the judiciary independence from the other two arms of government. Article 91 (2) states that: "the judges of the courts mentioned in clause (1) shall be independent, impartial and subject only to this constitution and the law." Article 98 prescribes the manner in which a judge can be removed from

office. It provides that a judge of the Supreme Court may be removed from office only for an inability to perform the functions of his/her office, whether arising from infirmity of body or mind or for misbehavior, and shall not be so removed except in accordance with the provisions of this article. Article 98 provides that if the President considers that the question of removing a judge of the Supreme Court or the High Court under this Article ought to be investigated, (a) he shall appoint a tribunal which shall consist of a Chairman and not less than two other members who 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 on whether the judge ought to be removed from office under this article for inability as foresaid or for misbehavior.

Article 91 and 98 without a doubt are linked. Article 91 provides the overall context within which provisions relating to the judiciary should be interpreted. It underscores judicial independence. Article 98 cannot be interpreted in such a manner as to become the conduit of executive influence over the judiciary. **The removal of judges from the bench on spurious grounds is the greatest threat there can be to judicial independence.** How would it ever be ensured that a judge is independent if he or she can easily be removed? Where judges are subject to easy removal, it would require fearless men and women of the utmost will and moral fiber to do justice where the interest of the reigning political party is involved. To safe guard the independence of the judiciary granted in article 91, article 98 ensures that a judge can be removed on only two grounds: (1) inability to discharge the functions of his office or (2) misconduct.

International standards applicable to the preservation of the independence of the judiciary place considerable emphasis against the improper removal of judges from office. They insist that a judge who faces removal must be examined by an independent and impartial tribunal, and that the grounds of removal must be limited to the two cases mentioned above. The idea behind the procedures set up under the Judicial Complaints Act was to ensure that the President cannot, without the approval of the Chief Justice initiate the process to remove a judge from office. In this way, the judiciary overseas the removal process. The rational of this approach is for the Chief Justice to advise the President only in circumstances where it is reasonable and justifiable for an investigation to be conducted. Without this check, there would be no way to ensure that the President does not appoint a tribunal that he or she can manipulate to achieve a predetermined outcome**. The idea that article 98 provides the president with unfettered power to check the judiciary as the majority opines is to say the least, preposterous and completely offends the doctrine of the separation of powers.** Neither the constitution nor the Act could have contemplated that the position of judges would be as vulnerable as the majority would have us believe. If the constitution had wanted to vest this power in the complete discretion of the President, the constitution could easily have used words to that effect. The constitution does not say misconduct "in the opinion of the president." It says, "if the president considers the question of removing the judge." That means there have to be objective criteria on which the question is based without which the President acts arbitrarily.

It is correct to say that the determination of whether a judge is unfit for office or is guilty of misconduct stipulated in article 98 involves a value judgment. But it does not follow from this that the decision and evaluation lies within the sole and subjective preserve of the president. Value judgments are involved in virtually every decision any member of the executive might make where objective requirements are stipulated. It is also true that there may be differences of opinion in relation to whether or not objective criteria have been established or are present. This does not mean that the decision becomes one of subjective determination, immune from objective scrutiny.

The argument that the powers under article 98 are investigative and not executive is disingenuous and totally unnecessary. In equity, it is said that equity looks at substance rather than form. What remedy can there be for a judge if the Tribunal recommends dismissal? Our courts must regard themselves as courts of justice, not merely courts of law—narrowly defined, especially where human freedom and dignity are concerned.

A judge should not, and cannot afford to regard himself as a machine but must instead feel called upon to duties that are higher than the mere mechanical application of the law. In any event, in this particular case, it was unnecessary to decide whether the decision by the president constituted executive or administrative action because even in terms of the former, rationality is a requirement for the validity of executive action under the principle of legality. The Human Rights Committee has said that the principle of legality and the rule of law are inherent in the International Covenant for Civil and Political Rights (ICCPR). The Inter-American Court of Human Rights has also stressed that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law.

The majority opinion held that the appropriate way to interpret article 98 was through a "literal rule of interpretation." According to the majority, the literal rule requires the court to give the ordinary grammatical meaning to provisions in constitutional texts. This approach is contrary to the view of courts elsewhere in the commonwealth and it is intellectually deficient and can lead to bizarre outcomes. In any event, article 91 and article 98 are not plain in meaning. How for example do you reconcile the independence of the judiciary with an easy removal of judges from the bench? How do you reconcile the doctrine of the separation of powers and removal of judges by the executive? Further, article 98 states that a judge can be removed for "inability to discharge the functions of his office or for misconduct". To an ordinary layman these may appear to be clear terms. But far from being clear, they are in fact nebulous. All these matters require reconciliation by the Supreme Court in way that does not undermine the core purposes of the constitution. In a constitution there are some provisions, (the number of members of Parliament for example) that due to the clear and unambiguous meaning of the text, render such clear-cut provisions amenable to literal interpretation and do not therefore require the application of a sophisticated theory of constitutional interpretation to reach a sensible conclusion.

On the other hand, there are provisions of the constitution where the text itself is so abstract or ambiguous that analysis of the text and sometimes the history, the structure, purpose, and intent of the relevant provision is necessary. The purposeful approach to interpretation invites more active judicial intermediation and interpretation. In particular, it demands that judges interpreting a constitutional text not only consult the spirit of the law but also endeavor to harmonize the letter with the spirit. To do this, the judges must bring to their reasoning and decisions a clear understanding of the overarching values and philosophical foundations of a liberal democracy, and of the historical antecedents and contemporary purposes of the particular provision in dispute. The existence of an independent and impartial judiciary is at the heart of articles 91 and 98. The two articles attempt to ensure that the justice system is truly independent from other branches of the state. The principle of an independent judiciary derives from the basic principles of the rule of law, and the doctrine of the separation of powers. According to this doctrine, the executive, the legislature and the judiciary constitute three separate and independent branches of government. Different organs of the state have exclusive and specific responsibilities. By virtue of this separation, it is not permissible for any branch of power to interfere into the others' sphere. An interpretation of article 98 that holds that the determination is a matter for the president's subjective opinion and cannot be questioned by any court of law is not in keeping with the constitution. An interpretation that there should be objective jurisdictional facts that must exist

before the appointment of a Tribunal is more consistent and in keeping with the constitutional guarantee of the independence of the judiciary.

There is accordingly, a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith must be subject to constitutional control by the courts. As Udoma JSC rightly pointed out in the famous Nigerian case *Nafiu Rabiu v The State* (1980), "It is the duty of the courts to interpret the constitution liberally. The courts should not interpret any provision of the constitution so as to defeat the ends the constitution is designed to serve where another construction equally in accord and consistent with the words and spirit of such persons will serve to enforce and protect such ends." Articles 91 and 98 must be read together to determine the purpose for which the power was conferred. It is evident that the purpose of the conferral of the power was to ensure that judges are men and women of integrity while ensuring fidelity to the doctrine of separation of powers and the independence of judges.

Hans Winfred Lorenz vs. The Zambia Revenue Authority (Appeal No. 192/2010) [2015] ZMSC 21 (19 May 2015)

Chanda Chungu

THE FACTS

The appellant in the case, Hans Lorenz, (hereinafter referred to as the "Appellant") was a holder of a temporary self-employment permit. The Appellant purchased a motor vehicle in June 2004 and was granted a Customs Importation Permit (hereinafter referred to as the "customs permit") valid for a period of 3 months. The Zambia Revenue Authority (hereinafter referred to the "Respondent") confiscated the motor vehicle pending investigations that the appellant misrepresented his immigration status in the Republic of Zambia. The respondent subsequently found that the appellant did not qualify for a customs permit as he held an employment permit and the customs permit was only available to visitors. On 24th March 2005, the motor vehicle was released with the Respondent ordering that it exit Zambia within five (5) days.

The appellant instituted a claim in the High Court. He alleged that the seizure was unlawful and claimed damages, consequential damages and interest. The High court found that the appellant failed to prove that the respondent's seizure of the motor vehicle was unlawful and illegal. The appellant appealed to the Supreme Court.

i. The Appellant's claims

The appellant had three grounds of appeal. These were that the High court judge erred in law and fact when it: -

1. Took into account the Defense's assertions without evidentiary support;
2. Failed to take into consideration the validity of the customs permit; and
3. Held that the appellant's car was seized because it did not leave Zambia within the authorized period.

THE LEGAL ISSUES

The two main legal issues faced by the court were as follows:

1. Can a customs permit that was issued by mistake be valid?
2. Can a court rely on the contents of pleadings that are not directly referred to as evidence in trial proceedings?

THE HOLDING

The court held that the appellant was not truthful about his immigration status. The court held further that because the appellant held an employment permit, had he conveyed his correct status, he would not have been issued a customs permit to import the car. The fact that the appellant was granted a gate pass to ensure that the car exited Zambia within 5 days did not mean that the appellant was entitled to a customs permit, because a permit issued in error can never be valid. If a customs permit is issued by mistake, the party cannot rely on the validity of the permit.

In relation to the second legal issue, the court relied on the case of *Mundia v Senator Motor*s to hold

that parties to a case are bound to their pleadings and once an issue is settled in pleadings, the court will accept it as it has been pleaded. The court was emphatic in holding that a court of law can rely on the substance of pleaded documents that are not referred to directly as evidence in trial proceedings provided that they are contained in the bundle of documents.

THE SIGNIFICANCE

This case is significant because it confirms that parties are bound to their pleadings and a court can use and make reference to anything contained in the bundle of documents and pleadings. It does not matter whether or not the party made direct reference to the contents of the pleaded documents as evidence in trial proceedings; the court can still rely on the content of the pleadings submitted to the court.

Additionally, a permit issued in error cannot be valid and the party who received the permit cannot rely on its validity in such a case.

Kafue Horse Safaris Limited vs The Zambia Wildlife Society and Attorney General (Appeal No. 13/2012) [2015] ZMSC 6 (19 January 2015)

Tinenenji Banda

THE FACTS

The dispute concerned a memorandum of Understanding (MOU) executed between Kafue Horse Safaris limited and the Zambia Wildlife Authority (1st respondent). The subject of the MOU was the Appellant's proposed provision of horse safaris in the Kafue National park. In terms of clause 2 of the MOU, the MOU was to be in force for a period not exceeding 6 months from the date of signing. After the lapse of the 6months period, the MOU was to be replaced by a Tourism Concession Agreement (TCA). Failing the execution of the TCA, the negotiations between two parties would be discontinued. The MOU was not replaced by a TCA because the first respondent's did not sign the draft TCA. Aggrieved by the 1st respondent's failure to sign the TCA, the appellant made a complaint to the Minister of Tourism. The minister informed the appellant that the ministry would consider executing the TCA if the appellant relocated its proposed business to another site, since there had been a community objection that the proposed site was "an active animal corridor" in contravention of the Environmental Council of Zambia's direction on the matter.

The appellant filed an application before the High Court for judicial review of the respondent's decision. The trial judge dismissed the application but granted manadamus to the appellant and instructed the first respondent to notify the appellant, in writing, of the reasons for the refusal to execute the TCA. The appellant appealed to the Supreme Court.

THE LEGAL ISSUES

The legal issues before the court were both procedural and substantive.
Procedurally, the issue was whether the appellant followed proper procedure in commencing the action, and if not, whether this improper commencement deprived the court of the requisite jurisdiction to hear the matter.

Substantively, the issues to be determined were as follows:

1. Whether the party with the requisite authority to execute a TCA was the Director General of the 1st respondent or the Minister of Tourism.
2. Whether the actions of the Director General (in refusing to execute the TCA) were irrational and unreasonable.
3. Whether the appellant had a legitimate expectation that the first respondent would execute the TCA based on the fact that a draft TCA had been prepared.
4. Whether the MOU had in fact granted the appellant a right to conduct horse safari's for a period of six months
5. Whether the failure to give reasons for the refusal to grant the first appellant a tour operator's license was a breach of statutory duty and malfeasance of public office entitling the appellant to damages.
6. Whether the grounds of judicial review are cumulative.

THE HOLDING

The court dealt with this substantive issues first. On issue 1, namely, the question of who has the power to execute the TCA, the court stated that this issue was common cause. Since the party to the TCA was the Director General (DG), it was clearly the DG that had the authority to execute the agreement. The court chided the trial judge for engaging this issue stating that the duty of the court was to decide issues in dispute and not issues that are common cause. On the second issue the court found that there was no irrationality or unreasonableness on the part of the director. Regarding issue 3, the court found that since the issue of legitimate expectation had not been raised in the trial court, it could not be raised on appeal. On issue 4, the court held that whatever rights accrued to the appellant under the MOU had expired after the lapse of the 6 months period, and therefore provisions in the expired MOU could not form the basis of any relief sought. On issue 5, the court found that the appellant was not entitled to damages because it had not proved loss. Finally regarding issue 6, the court held that there was not a single authority supporting the contention that the success of one ground of appeal cumulatively entailed the success of the others.

The court dealt with the procedural point last holding that the appellant had improperly commenced the action.

THE SIGNIFICANCE

The Supreme Court's disposal of the substantive issues was sound and in accordance with long established principals of judicial review. The court should be commended on its clear articulation of the legal principals applicable to the 6 grounds of review.

However the court's treatment of the procedural question necessitates some comment. The court held that the applicant commenced their application in disregard of section 57 of the Zambia Wildlife Act which reads as follows:[1]

57. (1) where the Director-General refuses to issues a license, the applicant may, not later than one month after the receipt by the applicant of the notice given under subsection (2) of section fifty-six, appeal in writing to the authority against such refusal.
(2) In determining any appeal, the Authority my uphold the decision of the Director-General or may instruct the Director General to issue the license as applied for.
(3) The decision of the Authority on any appeal under this section shall be subject to appeal to the High Court.

The court noted that the applicant had contravened section 57 by seeking judicial review before appealing to the first respondent as mandated by s 57. The court further noted that due to the improper commencement of the action, the trial court had no jurisdiction to hear the matter. It held additionally that even if the appellant's grounds of appeal had merit, the Supreme Court would still have dismissed the appeal on the grounds of improper commencement.

[1] Following the abolition of the Zambia wildlife authority in March 2015, section 57 has now been superseded by section 145(1) of the Zambia Wildlife Act [No. 14 of 2015] (an Act that provides for the winding up of the affairs of the Zambia Wildlife Authority) which reads "A person who is aggrieved with the decision of the director or committee under this act may appeal to the Minister within thirty days of the receipt of the decision of the director or committee. (2) The decision of the minister on an appeal under this section shall be subject to appeal to the high court within thirty days of the receipt of the decision of the minister."

In light of the court's observations, and given that the court has inherent jurisdiction to dismiss an improperly commenced application, it appears that the court's engagement with the substantive issues was a waste of the court's time. The Supreme Court in *Chikuta vs Chipata Rural Society* held that "where a party commences an action by a wrong mode, the court lacks the jurisdiction to grant the relief sought". Based on this ruling, the present case was an excellent opportunity for the court to use its inherent jurisdiction and dismiss the appeal without engaging the merits. Actions that are improperly commenced and are therefore outside the court's jurisdiction are a waste of valuable judicial time and delay the hearing of cases that are deserving of review. A stricter approach by the Supreme Court would encourage counsel to give greater heed to the proper commencement of cases and alert trial courts to their lack of jurisdiction to hear cases that are improperly commenced.

Michael Mabenga v. The Post Newspapers Limited (Appeal No. 069/2012) [2015] ZMSC 20 (21 May 2015)

Dunia Zongwe

THE FACTS

The appellant, Mr. C.L. Mundia, an advocate in Zambia, had represented a client at a disciplinary hearing against a legal practitioner. The Legal Practitioners' Disciplinary Committee of the Law Association of Zambia absolved the legal practitioner of any wrongdoing. The appellant's client, Ms. Beatrice Mulako Mukinga, appealed the decision of the Disciplinary Committee.

Sometime after the Disciplinary Committee's decision in the initial disciplinary hearing, the legal practitioner in question was appointed judge of the High Court in Zambia. Later on, in a matter unrelated to the disciplinary hearing against the judge, the appellant appeared before the judge in the High Court. The appellant made an application for the matter to be transferred to another judge. The appellant motivated his application on the basis that he was representing Ms. Mukinga in the pending appeal against the High Court judge before the Disciplinary Committee.

The High Court judge dismissed the application with costs on the grounds that the application was an attempt at forum shopping. The court stated that a party is not entitled to choose which forum his or her action will be heard before.[2] She further held that, even if it was an application asking her to recuse herself in the matter, it could not succeed because the appellant had not asked the judge to recuse herself but had instead asked for the reallocation of the matter to another judge. The appellant appealed the judge's decision to the Supreme Court of Zambia.

(i) Arguments by the Parties

The appeal was heard in the Supreme Court by three judges, including the Acting Deputy Chief Justice.[3] The respondent in the main case, The Post Newspapers Limited, did not make any argument regarding the partiality or otherwise of the High Court judge at any stage of the proceedings. Similarly, the respondent did not object to the appellant's application for reallocation of the case to another judge.

In his appeal, the appellant contended that the judge erred when, in dismissing his application, she relied on the provisions of the Judicial (Code of Conduct) Act, No. 13 of 1999 (hereinafter 'Judicial Act'), when the appellant never accused her of any impropriety; that the judge was wrong to hold that the appellant's request for reallocation amounted to forum shopping; and that the judge should not have awarded costs against him because the respondent neither objected to the appellant's application nor applied for costs.

THE HOLDING

The Supreme Court considered the matter as one concerning the perception or probability of bias against the appellant. In a unanimous opinion, the Supreme Court held that the judge in the court

[2] *Michael Mabenga v. The Post Newspapers Limited,* Supreme Court of Zambia, Appeal No. 069/2012 [hereinafter referred to as '*Mabenga'*] at p.3. For quotation purposes, this comment directly cites to the original judgment.
[3] Malila (Judge), Wood (Judge) and Mwanamwambwa (Acting Deputy Chief Justice).

below should have recused herself because there was a likelihood that she would be biased against the appellant. The Court stated:[4] "[T]he learned Judge should not have handled a matter in which the lawyer appearing before her was prosecuting the Judge in a different matter." Furthermore, the Supreme Court agreed with all the three submissions made by the appellant and ordered that the matter be sent back to the High Court for hearing before a different judge.

(i) The Rationale for the Holding

The main reason for the Supreme Court's rulings in *Mabenga* was that, by adjudicating on a matter in which the lawyer appearing before her was prosecuting the judge in a different matter, the High Court judge created the impression that she is, or was likely to be, prejudiced against the appellant. The Supreme Court reasoned that: "[C]ounsel cannot prosecute a judge in one case and at the same time appear before that judge in another proceeding." It held that "any party to an action is entitled to transfer a matter from one judge to another judge where a judge's impartiality may be reasonably questioned."[5] Finally, the Court held that an order for costs against the appellant could not be made where the respondent did not apply for it.

THE SIGNIFICANCE

The court reaffirmed the principle that judges should not place themselves in a position where their impartiality may reasonably be questioned. The court in so deciding echoed the principle articulated in the English case of *R v Sussex Justices, Ex Parte McCarthy* on judges' impartiality: "Not only must justice be done; it must also *be seen* to be done".[6]

On the question of costs, the Supreme Court held that, although the award of costs is at the discretion of trial judges, such discretion must be exercised judicially.[7] Lastly, the court endorsed the rule that prohibits a party from bringing up on appeal issues and documents that were not raised and produced in the court below.

For all its strengths mentioned above, the *Mabenga* judgment suffers from a number of shortcomings. The Supreme Court does not clarify whether there is a difference between the grounds for a request for a transfer of a case from one judge to another and the grounds for a request for a judge to recuse himself or herself from a case. The appellant applied for a transfer of the case from the judge to another judge and did not ask the judge to recuse herself on the grounds of bias. The Supreme Court took the view that Mundia really intended the High Court judge to recuse herself on grounds of bias. Wood JS noted that:[8]

> Although State Counsel Mundia has avoided using the words bias, prejudice or impropriety in the heads of arguments, this appeal was about these very words. In fact, the application by [the counsel for Mr. Mundia] was, in essence, rooted in Section 9(2)(a) of the Judicial (Conduct of Conduct) Act.

[4] *Id.* at p.14.
[5] *Id.* at pp.8-9. See also Section 6(2) of the Judicial (Code of Conduct) Act, No. 13 of 1999.
[6] *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233). Emphasis added.
[7] *Mabenga* at p.15.
[8] *Id.* at p.9.

Even though the appellant made it clear that the propriety and integrity of the High Court judge were not in question,[9] the Supreme Court nonetheless stated that the question to be determined was whether or not it was proper for the judge to adjudicate in the matter.[10] The Supreme Court formulation of the question before the court did not reflect the issues expressly raised by the appellant.

(i) Recusal versus transfer

Another aspect of the case affected by the Supreme Court's formulation of the issues is the distinction between transfer and recusal. The two notions are different and rest on two different legal bases. In *JCN Holdings vs. Development Bank of Zambia* (hereinafter 'JCN Holdings'), the Supreme Court of Zambia drew a distinction between the two: The law relating to transfer of a matter from one High Court Judge to another is contained in section 23(1) of the High Court Act whereas the law relating to recusal by a High Court Judge is found in sections 6 and 7 of the Judicial Act.[11]

The appellant's first ground of appeal was that the High Court judge erred in invoking the provisions of the Judicial Act when, in reality, his transfer application did not impugn her integrity. The Supreme Court disagreed with the appellant. It ruled that the judge in the court below was entitled to consider the provisions of the Judicial Act as "this was the only way she could determine whether or not she was disqualified from adjudicating in the matter".[12]

The Supreme Court held that transfer could be used to address concerns about a judge's "personal bias or prejudice concerning a party or a party's legal practitioner".[13] The view of the court was informed by the fact that "once a Judge recuses himself or herself from handling a matter, that matter would inevitably have to be transferred to another Judge".[14] Thus, the justices of the Supreme Court did not make a clear distinction between an application for the reallocation of a case and an application for a judge to recuse himself or herself.

However, that position was not entirely correct because it is evident from the High Court Act that the reallocation of a case does not require that a judge's impartiality be questionable. The High Court Act presupposes that there must be reasons necessitating a transfer. [15] Because the Supreme Court defined the appellant's transfer application as a challenge of the judge's impartiality, the Court connected the application to the provisions of the Judicial Act. Yet the appellant's grounds of appeal assumed a distinction between transfer and recusal in terms of court procedure. This may explain why the appellant challenged the relevance of invoking the provisions of the Judicial Act – and of investigating the propriety of judge's conduct – to his transfer application. The appellant referred to the decision of the disciplinary hearing against the judge, not as evidence of her bias or lack of integrity, but as a reason for transferring the action in "fairness to both the Judge and the [appellant]".[16]

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[9] *Id.* at pp.4 and 5.
[10] *Id.* at p.10.
[11] *JCN Holdings vs. Development Bank of Zambia,* Supreme Court of Zambia, Appeal No. 87/2012, at 494.
[12] *Mabenga,* at p.9.
[13] *Id.* at pp.8-9.
[14] *JCN Holdings* at 502.
[15] *Id.* at 502.
[16] *Id.* at p.5.

(ii) The Court's fundamental contradiction

The Supreme Court recast the basic issues in *Mabenga,* and this led to a fundamental contradiction. On the one hand, the Court disagreed with the appellant's first ground of appeal and ruled that the High Court judge was entitled to consider the provisions of the Judicial Act. On the other hand, the Court declared that, "from what we have stated above", the first ground of appeal must succeed.[17] Again, this contradiction may be explained away by the Court's reframing of the issues. In disagreeing with the appellant, the Court was basing its ruling on the appellant's submission; in agreeing with the appellant, the Court was proceeding from its own understanding of how the appellant should have framed his submission.

This contradiction in the Court's judgment is obvious. After holding that "grounds one and two of the appeal must succeed",[18] the Court concluded its judgment by stating that "the net result is that this appeal must succeed".[19] If the appellant's argument succeeds, this means that the appellant was right to say that the trial judge should not have used the Judicial Act; but if the Court's argument succeeds, this means that the appellant was wrong. The Court cannot have it both ways. Either the appeal succeeds, which would imply that the appellant can transfer the matter to another judge without having to question the High Court judge's integrity; or, the appeal fails, which would imply that the trial judge was right to dismiss the appellant's transfer application.

(iii) A pragmatic way out?

The Supreme Court could have steered clear of this quandary by taking the appellant's claim as it was expressly framed, instead of redefining the appellant's claims. The Court should have resisted the temptation to compensate for the uncertain strategic calculations of Mr. Mundia. It is possible that the Supreme Court sensed that the High Court Judge was reacting emotionally to the appellant's transfer application in the manner in which she brushed it aside, awarded costs against the appellant, and imposed an adverse presumption if he did not attend trial in the main case. In any event, the Court should have confined itself to the record of appeal. What is more, it could have reached the desired outcome (i.e. the reallocation of the case to another judge) without sacrificing the purity and rigor of analysis simply by pronouncing itself solely on the transfer application.

[17] *Id.* at p.14.
[18] *Ibid*.
[19] *Id.* at p.16.

Tawela Akapelwa and Others V Josiah Mubukwanu Litiya Nyumbu (Appeal NO.004/2015) [2015] ZMSC 25 (21 May 2015)

Mapange Nsapato

FACTS

The appeal arose from a ruling of the high court after it granted an interim injunction in favour of the respondent in this appeal.

In 2008, the respondent was gazetted as chief of the Mbundu people and established as His Royal Highness Chief Chiyengele of the Mushuwa area in the western province of the Republic of Zambia. On or about October 2014, the appellants together with other persons unknown called a meeting of the Kuta to discuss the dethronement of the respondent on account of alleged misrule of his subjects. The deliberations of the Kuta proceeded without the respondent who, despite the invitation, did not attend on account of what he attributed to ill-health. At the meeting, a decision to dethrone the respondent was arrived at.

Aggrieved by the decision to dethrone him, the respondent commenced this action in the High court challenging the decision as being contrary to section 4 of the Chiefs Act, Chapter 287 of the laws of Zambia. He sought various orders including an injunction which he obtained pending the determination of the main matter. The appellants appealed against the interim order of injunction.

THE LEGAL ISSUES

The main issue to be resolved was whether this was a proper case in which to grant the interim relief of injunction. To determine the main issue, the Supreme Court had to resolve the following issues:

1. What is a "serious question to be tried' for purposes of granting an injunction;
2. What accounts for an injury which cannot be atoned for in damages; and
3. Whether the adequacy of damages is a mandatory consideration when granting an interim injunction

THE HOLDING

The Supreme Court dismissed the appeal and upheld the interim injunction. It held:

1. There is a serious question to be tried if upon looking at the pleadings and conflicting affidavit evidence a *prima facie* arguable case is revealed[1]. It is not for the court at this point to try to resolve the conflicting pleadings and affidavit evidence.
2. An injury which cannot be atoned in damages is one which is irreparable and substantial, not a mere inconvenience.[2]

[1] See the following cases for further guidance on an arguable case: Preston v Luck (1884) 27 Ch.D,; Zambia State Insuarance Corporation limited v Dennis Mulikelela (1990-1992) ZR 18,; Harton Ndove v. National Educational Company Of Zambia Limited (1980) ZR. 184.

[2] See Shell BP Zambia Limited v Conidaris and others (1975) ZR 174 and Communications Authority v. Vodacom Zambia limited (2009) ZR. 196.

3. The consideration of damages as an adequate remedy before granting an interim injunction is mandatory. This is irrespective of the uniqueness of the case or where the ultimate remedy is one that is one that is unrelated to damages.

THE SIGNIFICANCE

This decision departs from the Supreme Court's previous decisions on the applicability of the principles established in the American Cyanamid[3] case. The Supreme Court in its previous decisions on interim injunctions seems to suggest that the principals in American Cyanamid are mere guidelines and not binding on the court[4]. In the present case, the Supreme Court after itemizing the Principles of the American Cyanamid case , held that '*these considerations be foremost in the mind of any judge considering whether or not to grant an injunction'.*[5] In this case the Supreme Court makes the application of principles of American Cyanamid mandatory[6].

Furthermore, the Supreme Court had the opportunity to rule on whether the consideration for damages as an adequate remedy was mandatory in all cases. There is overwhelming dicta post the American Cyanamid case, to support the view that in certain cases, damages must not be a factor in the determination of whether or not to grant an interim injunction[7]. The Supreme Court recognized this rising school of thought, but rejected the same as being an evolving law which has not yet crystalized into a mandatory norm. This is in line with the historical foundations of an injunction being an equitable remedy as developed by the court of chancery.[8] It follows therefore, that where the common law remedy of damages is adequate no injunction should be granted.
The present case sets out the principles a court must consider when hearing an application for an interim injunction. The case has further confirmed that consideration of the adequacy of damages is mandatory when granting an interim injunction.

[3] American Cyanamid Co. v Ethicon Limited (1975) 1 ALL ER 504.
[4] See Tommy Mwandalema v. Zambia Railways Board (1987) ZR. 65; Shell BP Zambia Limited v Conidaris and other (1975) ZR 174 and Communications Authority v. Vodacom Zambia (2009) ZR. 196.
[5] At page 21 of the judgment under commentary.
[6] The Supreme Court itemized these principals as follows: whether there is a serious question to be tried, whether damages would be adequate to compensate the plaintiff, whether the balance of convenience tilts in favour of granting the injunction to the plaintiff, and whether the plaintiff has come to court with clean hands.
[7] Evans Marshall& Co. v Bertola SA (NO.1)(1993) 1 WLR 349, Moonda Jane Mungaila Mapiko and Another v. victor Mukuba Chaanda(2010)ZR. Volume 2, 416.
[8] See J. Parks, A History of the Court of Chancery.

The Law Association of Zambia vs. The Attorney General HC [2013] ZMHC (23 October 2013)

Muna Ndulo

THE FACTS

The petitioners sought a declaration that sections 5, 6 and 7 amended by Statutory Instrument No. 1 of 1996, of the Public Order Act, Chapter 113 of the Laws of Zambia were unconstitutional. Section 5 provides in part (4) that any person intending to assemble or convene a public meeting procession or demonstration shall notify the police in writing of such intent fourteen days before the meeting.[1] Section (6) provides that where it is not possible for the police to adequately police any particular public meeting, procession or demonstration, the regulating office of the area shall, at least five days before the date of the public meeting, procession or demonstration, inform the conveners of the public meeting, procession or demonstration in writing the reasons for inability of the police to police the public meeting procession or demonstration and shall propose an alternative date and time for the holding of such public meeting, procession or demonstration and (7) provides that whenever the police notify the conveners of a public meeting, procession or demonstration that it is not possible for the police to adequately police any proposed public meeting, procession or demonstration, such public meeting procession or demonstration shall not be held.

THE LEGAL ISSUE

Whether sections 5, 6, and 7 (as amended by Statutory Instrument No. 1 of 1996) of the Public Order Act are unconstitutional.

THE HOLDING

Judge Hamaundu held that the amended section (5) removed the requirement that the convener of a meeting should apply for a permit and replaced it with the requirement that the convener notify the police of the intended meeting. He further held that the amendment has introduced an administrative grievance procedure in subsections (8) and (9) of section 5. A person aggrieved by the regulating officers decision has a right to appeal to the Minister and therefore to the High Court. In so holding, he came to the conclusion that the relevant sections were not unconstitutional.

[1] Part (5) states that the notice required under subsection (4) shall contain an undertaking by the persons intending to assemble or convene a public meeting, procession or demonstration that order and peace shall be maintained through the observance of the following conditions: (a) that they have been informed by the police that the site for the meeting has not already been granted to another convener for the holding of a public meeting, procession or demonstration; (b) that the route and the width of the route is suitable for the holding of processions in accordance with the width and route specifications for such purposes as specified by the Minister by statutory order;(c) that marshals of a number sufficient to monitor the public meeting, procession or demonstration are available and shall co-operate with the police to ensure peace and stability; (d) that the commencement, duration and destination of the public meeting, procession or demonstration shall be notified to the police; (e) that the public meeting, procession or demonstration shall not create a risk to security or public safety, a breach of the peace or disaffection amongst inhabitants of that neighborhood; and (f) that the conveners of the meeting, procession or demonstration have been assured by the police that at the time of the proposed activity shall be held it will be possible for it to be adequately policed.

THE SIGNIFICANCE

In his judgment Judge Hamaundu fails to address the fact that although section 5 has changed from requiring a permit to requiring notification, the conditions attached to the notification are such that in substance, section 5 requires a permit and is therefore unconstitutional. The Oxford English dictionary defines "permit" as "an official document granting authorization." In contrast it defines notification as "make known." The amended section 5 outlines numerous conditions for the holding of an assembly and moreover the applicants have to wait for police authorization before they can proceed to hold the assembly. Section 5 gives the police absolute power to determine whether or not an assembly, meeting or procession should take place. This scenario is clearly not envisaged by the constitution. The constitution does not in any way intend that the enjoyment of a rights and freedoms enshrined by it in articles 20, 21, and 28 be conditioned or contingent on the opinion of an official of the executive arm of government. A law which confers discretion on a public official without indicating with sufficient precision the limits of that discretion does not satisfy the quality of the "law" contemplated in article 21 by the requirements of prescribed law.

In *New Patriotic Party vs. Attorney-General*[2] the Ghanaian Supreme Court held that "restrictions as are provided by article 21(4) of the 1992 constitution may be necessary from time to time and upon proper occasion. But the right to assemble, protest or demonstrate cannot be denied." The Ghana Supreme Court nullified section 12 (a) of the Public Oder Decree which gave a police officer an unfettered discretion to stop and cause to be dispensed any meetings or processions in any public place in contravention of sections 7 and 8; and section 13(a) which made it an offence to hold such procession, meetings and public celebration without permission. The Court of Appeal in Nigeria, in *Inspector-General of Police v. All Nigerian Peoples Party and Others*[3], after holding that the permit system under the Nigerian Public Order Act was unconstitutional stated: "constitutions should be interpreted in such a manner as to satisfy the yearnings of the Nigerian Society. The court observed "A rally or placard-carrying demonstration has become a form of expression of views on current issues affecting government and the governed in a sovereign state. It is a trend recognized and deeply entrenched in the system of governance in civilized countries. It will not only be primitive but also retrogressive if Nigeria continues to require a pass to hold a rally. We must borrow a leaf from those who have trekked the rugged path of democracy and are now reaping the dividend of their experience." In In re *Munhumeso*[4], the Zimbabwe Supreme Court held that powers placed in the hands of the police are arbitrary where (a) there is no criteria to be used to regulate the authority in the exercise of its discretion, (b) the regulating authority is not obliged to take into account whether the likelihood of a breach of peace could be averted by attaching conditions such as time, duration and route, and (c) it allows refusal of a permit even on the slightest possibility of breach of peace.

The approach adopted by the African courts as explained above is also supported by case law elsewhere in the world. In the US case of *Shuttleworth v. Birmingham*[5], the court found that the city commission had power to refuse permission for a procession on such vague criteria as "public welfare, safety, health, decency and public morals" and concluded that that this created an avenue for arbitrariness. It struck down the legislation. Similarly, in *Gregory v. Florida*[6] a statute which gave the police almost unlimited discretion to decide whether or not demonstrators had committed

[2] 1992-93 GBR 585-(2000) 2HBLRA, 1.
[3] (2) 18 NWLR 457 C.A.
[4] 1994(1) ZLR 49(s).
[5] (1969) 394 US 147.
[6] (1969) 394 US 111.

a "diversion tending to a breach of peace" was declared an unconstitutional interference with Freedom of Assembly. *Shuttleworth*[7] stated that the test required for the restricting law is an objective one and should not depend on the subjective view or opinion of a police officer. The Zambian statutes prescribe criminal penalties in the event of breach of the restrictions imposed on Freedom of Assembly. It is one thing for the court to uphold the restrictions and quite another for it to enforce the criminal penalties accompanying any breach of the restrictions. The penalty itself may be declared unconstitutional as an infringement of the Freedom of Assembly if it is deemed disproportionate. In *Ezelin v. France*[8], the applicant participated in a demonstration against the courts and judges. The demonstration degenerated into violence, and the applicant, who was a lawyer, refused to answer police questions and did not disassociate himself from the demonstration. He was reprimanded by the Court of Appeal in its exercise of disciplinary functions over lawyers. The European Court of Human Rights held such a penalty to be disproportionate to the interest of the prevention of disorder. Clearly, therefore, a court may accept certain restrictions as legitimate but still outlaw a disproportionate penalty accompanying breach of the restrictions. Interestingly the facts in the *Law Association of Zambia v. Attorney- General* are strikingly similar to the facts in *Ghana case of New Patriotic Party vs. Attorney General*[9] and the *Nigerian case of Inspector-General of Police v. All Nigerian Peoples Party and Others*[10]. In the Ghanaian case the petitioners had been granted a permit however the police later withdrew the permit. In the Nigerian case respondents being a registered political party requested the defendants to issue to their members permits to hold unity rallies throughout Nigeria to protest the rigging of the 2003 elections. The request was refused. In the Zambian case the UNDP on numerous occasions notified the police of their intention to hold rallies or protests. The Police offered a variety of reasons including, on 29 May 2012, that (i) the police would be unable to police the protest and (ii) the police had information that a certain group of people intended to disrupt the procession—effectively given an unnamed group the right to prevent others from having an assembly and (iii) that the subject matter of the procession was already in the courts. In the notification of August 1, 2012, the police initially had no objection to the intended August 2012 rally being held, subsequently, however, the police withdrew their support on the ground that manpower to police the rally had been diverted to the Copper belt where a football march between Zambia and Uganda needed to be policed. The UNDP obtained a court order staying the decision by the police. The Police disobeyed the court order and sealed off the venue and maintained police presence to prevent people gathering at the site. On September 10, 2012 the UNDP again notified the police of its intention to hold a public rally on 16th September, 2012 at the same venue. The police informed the UNDP that the rally would not be allowed because the venue was the subject of litigation. The UNDP then notified the police of its intention to hold a public rally on the 16th of September 2012 this time in Chawama. The police did not allow the rally on the grounds that the situation in Lusaka at that time rendered densely populated areas unsuitable as venues for political rallies. In of January 2013, the UNDP notified the police of its intention to hold a public rally in Kabwata. The police again refused to grant permission on the grounds that the security of both the police and members of the public could not be guaranteed. In this case the Minister of Home Affairs did however subsequently allow the public rally to be held.

Section 5 of the Public Order Act is nothing more than a permit system, the police administer it in that way and use it to interfere with the Freedom of Assembly. The fact that the decisions of the Police can be appealed to the Minister and eventually to the courts does not in any way make

[7] *Ibid.*
[8] A202(1991).
[9] *Ibid.*
[10] *Ibid*.

section 5 constitutional. In fact, the facts before the court clearly demonstrate the hollowness of that approach. The court failed to realize that Freedom of Assembly is the foundation to the life of a democracy. It helps create space for collective politics and secondly it is essential in democratic politics because only through meeting and talking with fellow citizens can we critically explore the various beliefs and values which animate political decisions. The more discussions that take place the better and more legitimate political decisions are likely to be. The Public Order Act in its present form is undemocratic and unconstitutional. It was conceptualized in a colonial setting in which Zambians were subjects and not citizens. A democratic society involves the exchange of ideas formulated in a culture of free interaction and association. It is unfortunate that the court missed out on an important opportunity to throw out this antithesis to a democratic society.

The People v Austin Chisangu Liato (Appeal No. 291/2014) [2015] ZMSC 26 (2 June 2015)

Edward Sampa

THE FACTS

The respondent was charged, tried and convicted by the Subordinate Court of the first class on one count of possession of property suspected to be proceeds of crime contrary to section 71(1) of the forfeiture of proceeds of crime ActNo.19 of 2010 of the Laws of Zambia (**"FPC ACT").** Briefly, the particulars of the offense where that the respondent, on the 24th of November, 2011 in the Lusaka Province of the Republic of Zambia, possessed and concealed money at his farm (L/Mpamba/44, Mwembeshi) amounting to K2,100, 000. These sums were suspected to be proceeds of crime. The money was concealed in two steel trunks buried under a concrete slab.

The respondent appealed to the High Court against the conviction in the Subordinate Court. Three puisne Judges sat for this Appeal[1]. The High court acquitted the respondent and the state appealed to the Supreme Court.

THE LEGAL ISSUES

The following were the key legal issues:

1. Whether a predicate offence had to first be established in order to secure a conviction of possession of property suspected of being proceeds of crime contrary to section 71(1);
2. What '*reasonable suspicion'* entails for purposes of proving the ingredients of the offence under section 71(1) of the FPC;
3. What the requisite standard of proof is to prove the reasonable suspicion under section 71(1)of the FPC in order to secure a conviction; and
4. Whether section 71(2) of the FPC shifts the burden to prove the offence under section 71(1) from the prosecution to the accused person.

THE HOLDING

1. To secure a conviction under section 71(1) of the FPC no predicate offence needs to be proved.
2. *'Reasonable Suspicion'* under section 71(1) of the FPC means a state of conjecture or surmise, where proof is lacking.
3. Proof beyond reasonable doubt or reasonable suspicion was not contemplated or intended when section 71(1) of the FPC was formulated. The standard of proof is on a balance of probability.
4. Section 71 (2) does not impose any obligation on the accused person to prove any ingredient of the offence under section 71 (1), but it does afford the accused an opportunity to explain the absence of reasonable grounds for the suspicion that the property he was found in possession of under section 71 (1) were proceeds of crime.

[1] Ordinarily only one judge of the high court is appointed to sit for an appeal from subordinate courts.

THE SIGNIFICANCE

The primary significance of this case is that this was the first time the Supreme Court has been called upon to provide a definition for the meaning of *'reasonable suspicion'* as used in section 71(1) of the FPC Act. In arriving at this definition, the Supreme Court adopted the definition of 'reasonable suspicion' espoused in the Australian case of George v. Rockett[2] in which the High Court of Australia said reasonable suspicion means a state of conjecture or surmise, where proof is lacking. We agree with the Supreme Court's position that the reasonable suspicion under section 71(1) entails that the suspicion ought to be based on some factual basis (which must be shown to exist at the time the suspicion is formed) which removes the subjectivity implicit in ordinary suspicion.[3]

Upon establishing the definition of 'reasonable suspicion', the court proceeded to set a standard of proof for such reasonable suspicion as it was not contemplated or intended when section 71(1) of the FPC was formulated: the terminology of the section uses the word '**may',** namely, 'may reasonably be suspected'. We are inclined to agree with the interpretation of the Supreme Court on this point. Had the section used the word 'is' rather than 'may' that would have resulted in the section requiring the suspicion to be conclusive, but it does not. Further as rightly pointed out by the Supreme court, section 78 of the FPC Act that states '*save as otherwise provided in this act, any question of fact to be decided by the court proceedings under this Act is to be decided on the balance of probabilities'*, lowers the standard of proof in the establishment of the cases envisioned by section 71of the FPC act and is a deviation from the long standing principle of standard of proof in criminal matters established by Woomington since 1935.[4]

The Supreme Court further held that to secure a conviction of being in possession of property suspected of being proceeds of a crime, no predicate offense needs to be established. This is in line with section 72(3) of the FPC Act. Section 71 (3) provides that '*the offence under subsection (1) is not predicted on proof of the commission of a serious offence or foreign serious offence'.*

With respect to whether section 71(2) of the FPC Act shifts the burden to prove the offense under section 71 (1) from the prosecution to the accused, we agree with the Supreme Court's holding that it does not impose any duty on the accused person to prove any ingredient of the offence under section 71(1). It does however, afford the accused an opportunity to explain the absence of reasonable grounds on his part of suspecting that the property he was found in possession of under section 71(1) was proceeds of crime if so desirous of defending himself.

The clarity given by the Supreme Court on the interpretation of section 71 of the FPC Act has the potential to encourage the state to investigate and prosecute a number of individuals who they may reasonably suspect to be in receipt of, possess, conceal or dispose of any money or other property in Zambia reasonably suspected to be proceeds of a crime. This can be an important tool in the fight against corruption.

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[2] (1990) 170 CLR 104. This decision adopts the meaning of reasonable suspicion of Lord Devlin in Hussein v. Chong Fook Kan (1970) AC 942 at 948.

[3] This decision seems to be in line with the following authorities; Shauban Bin hassien and others v. Chong Fook Kan and another (1903) 3 ALL ER 1629; Queensland bacon v. Rees (1966) 115 CLR 266 , Streat v. Bauer & Blanco BC 9892 155.

[4] (1935) AC 462, 481.

Editorial Board

Editorial Board Biographies

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Tinenenji Banda is a Senior Research Associate at the Avon Center for Global Justice and a finalizing Doctoral candidate at Cornell Law School. Over the course of her legal career, she has held several research and advocacy positions in the Middle-East, the United States and Zambia. Prior to pursuing her doctoral studies, she taught commercial law at the University of Zambia where she also served as Acting Assistant Dean for Postgraduate Studies. During her time at Cornell, she has co-supervised clinical projects on Juvenile Justice and Domestic Violence in two of the law school's clinics. More recently, she acted as a research assistant for former Chief Justice of South Africa Sandile Ngcobo. A dual qualified attorney (New York and Zambia), she holds law degrees from the University of Cape Town and Cornell Law School.

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addition to my research and writing, she has been involved in a number of efforts for the documentation, preservation, curation, and digitisation of materials in Zambia, including the creation and development of the Economic Policy Resource Centre based at SAIPAR, as well as working with the National Archives of Zambia and several other organisations.