

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

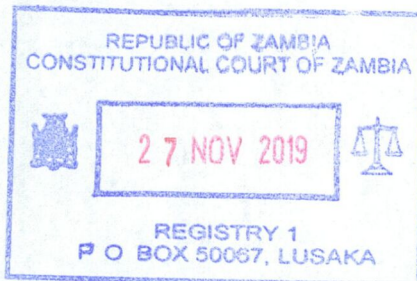
2018/CCZ/0013

**IN THE MATTER OF: ARTICLES 1 AND 165 OF THE
CONSTITUTION OF ZAMBIA**

**IN THE MATTER OF: THE CONSTITUTIONALITY OF SECTIONS 3,
4, 5, 6 AND 7 OF THE CHIEFS ACT, CAP. 287
OF THE LAWS OF ZAMBIA**

BETWEEN:

WEBBY MULUBISHA



PETITIONER

AND

THE ATTORNEY GENERAL

RESPONDENT

Coram: Mulembe, Mulonda and Munalula, JJC on 18th June, 2019 and 27th November, 2019

For The Petitioner: Mr. C.K Bwalya of D.H. Kemp & Co.

**For The Respondent: Mr A. Mwansa and Mrs D.M Shamabobo of
Attorney General's Chambers**

JUDGMENT

Mulonda, JC, delivered the Judgment of the Court

Cases Referred to:

- 1. Marbury v Madison U.S. 137 (1803)**
- 2. In Re Southern Rhodesia [1919] A.C. 211(HL) 233.**
- 3. Attorney -General v Law Association of Zambia (2008) Z.R. 21**

4. **Attorney-General v Nigel Kalonde Mutuna SCZ Judgment No. 88 of 2012**
5. **In Re Thomas Mumba(1984) Z.R.38**
6. **Zanaco v Martin Musonda and 58 others CCZ Selected Judgment No. 24 of 2018**
7. **Christine Mulundika and 7 others v Attorney -General SCZ Judgment No 25 of 1995**
8. **Public Servants Association Obo Olutunmilayi Ituna Ilbogn v Head of Department of Health and others [2017] ZACC 45**
9. **Godfrey Malembeka (suing as Executive Director of Prisons Care and Counseling Association) v The Attorney-General and Electoral Commission of Zambia CCZ Selected Judgment No. 34 of 2017**

Legislation Referred to:

1. **Constitution of Zambia (Amendment) Act No.2 of 2016**
2. **Constitutional Court Rules Statutory Instrument Number 37 of 2016**
3. **Chiefs Act, Chapter 287 of the Laws of Zambia**
4. **Constitution of Zambia, 1964**
5. **Barotse Native Authority Ordinance, 1936**
6. **Native Authority Ordinance, Cap 157 of the Laws of Zambia**

This Judgment relates to a petition filed by His Royal Highness Chief Mwene Mutondo Mulubisha of the Nkoya people of Kaoma District in the Western Province of Zambia. The petition is made pursuant to Article 128(3) of the Constitution of Zambia (Amendment) Act No. 2 of 2016. The petitioner alleges that the Chiefs Act Chapter 287 of the Laws of Zambia as amended by Act No. 13 of 1994 is inconsistent with Article 165 of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and seeks the following reliefs:

- (1) **A declaration that sections 3,4,5,6 and 7 of the Chiefs Act Chapter 287 of the Laws of Zambia are inconsistent with Article 165 of the Constitution of Zambia (Amendment) Act No.2 of 2016**
- (2) **A declaration that sections 3,4,5,6 and 7 of the Chiefs Act are unconstitutional and therefore void.**
- (3) **Any further or other relief as may be just.**

The brief background to this petition is that on 5th January, 2016 the Constitution of Zambia, 1991 was amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (hereinafter referred to as the Constitution as amended). The Constitution as amended introduced among other provisions Article 165 which provides that:

- 1) **The institution of chieftaincy and traditional institutions are guaranteed and shall exist in accordance with the culture, customs and traditions of the people to whom they apply.**
- 2) **Parliament shall not enact legislation which-**
 - (a) **Confers on a person or authority the right to recognize or withdraw the recognition of a chief; or**
 - (b) **Derogates from the honor and dignity of the institution of chieftaincy."**

Following the enactment of the above Constitutional provision, the petitioner alleges that sections 3,4,5,6 and 7 of the Chiefs Act are inconsistent with Article 165 of the Constitution as amended. The petitioner began by giving a historical account on how legislation on chieftaincy from the colonial era has evolved and particularly

how provisions on chieftaincy from the past continue to inform the current legal order under the Chiefs Act.

It was submitted that the obtaining requirement for recognition under the Chiefs Act is traceable to the Barotse Native Authority Ordinance, 1936 and the Native Authority Ordinance, 1936 respectively. That these pieces of legislation required the recognition of a person by the territorial Governor in order for one to be a paramount chief, senior chief, chief or sub-chief with the exception of the Litunga of Barotseland, as Western Province was then known. Further that the ordinances provided for the withdrawal, revocation, suspension or varying of recognition accorded to chiefs and sub-chiefs and that the Governor had power to institute an inquiry into any succession dispute concerning a chieftaincy. It was submitted that this legal order more or less continued under the new independent Zambia, initially under the Native Authority Act Chapter 157 and the Barotse Native Authority Act Chapter 159 of the Laws of Zambia respectively. The two pieces of legislation, it was submitted, became the Chiefs Act Chapter 479 which was later repealed by the Chiefs Act Chapter 287 of the laws of Zambia. That

notable among the savings from the Barotse Native Authority Act Chapter 159 and the Native Authority Act, Chapter 157 was the provision numbered as section 15 of the Chiefs Act Chapter 479 which provided that the Litunga and other chiefs in Western Province (formerly Barotseland) recognized under the Barotse Native Authority Act, Chapter 159 and paramount chiefs, chiefs and sub-chiefs recognized under the Native Authority Act Chapter 157 would be deemed to have been accorded equivalent recognition under the Chiefs Act.

The Petitioner submitted that, the Chiefs Act Chapter 479 and the Chiefs Act Chapter 287 were similar in most respects with the exception of section 3(2) of Chapter 479 and section 3(2) of Chapter 287 respectively.

Section 3(2) of Chapter 479 read as follows:

" No Person shall be recognized under this section as the holder of an office unless the President is satisfied that such person is entitled to hold the office under African customary law."

On the other hand section 3(2) of Chapter 287 provides that:

"No person shall be recognized under this section as the holder of an office unless;

- (a) **the President is satisfied that such person is entitled to hold the office under African customary law; and**
- (b) **in the case of a Chiefly office in the Western Province, other than the office of the Litunga, the person to whom the recognition is accorded is recognized by the Litunga and traditional council to be a member of a ruling family in Western Province. "**

It was submitted that the difference in the two provisions stems from section 3(2)(b) of Chapter 287 which sets the recognition by the Litunga and traditional council of a person as being a member of the ruling family as a prerequisite or additional requirement for the recognition of that person as chief by the President in the case of Western Province. This, it was submitted, is in addition to the satisfaction by the President that such person is entitled to be chief in accordance with African customary law. That the Chiefs Act in its present form is a derivative of colonial legislation imbued with perceptions and prejudices reminiscent of the colonial era and therefore out of place.

Counsel submitted that the object of the proceedings is to list the highlighted provisions of the Chiefs Act against the current constitutional order.

In terms of the various constitutional orders that Zambia has had, it was submitted that the 1964 and 1973 Constitutions were similar in many respects except that under the 1973 Constitution, the Litunga like the rest of the chiefs was subject to recognition by the President and this was evident in Article 138 of the 1973 Constitution which defined chief. This definition continued under Article 113 of the 1991 Constitution although the 1991 Constitution did not provide for a House of Chiefs. That 1996, signaled a departure from the provision relating to chiefs with the re-emergence of the House of Chiefs and for the first time in the history of the nation's constitutional order, a specific provision dealing with the institution of chief under Article 127 was provided for. This notwithstanding, under Article 139, the definition of chief retained the requirement for recognition by the President like in all other Constitutions.

It was submitted that the Constitution as amended has disrupted the status quo in that Article 165 rejects the past legal order in relation to chiefs and the institution of chieftaincy. This is so, it was submitted, because the status of chief is no longer dependent on

the act of recognition by the President or any authority, but on the people to whom the office of chief applies. It was further submitted that consistent with Article 165, the meaning of chief under Article 266 of the Constitution as amended has equally changed to suit the new position.

The petitioner stated that it was telling that the Constitution of Zambia begins with an article declaring its supremacy. In this regard Article 1 of the Constitution as amended was cited which declares the Constitution as the supreme law of the Republic and provides that any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency. To further support this position, the celebrated decision of the United States Supreme Court in the case of **Marbury v Madison**¹ was cited as being widely accepted as a standard on the practical application of the principle of the supremacy of the constitution in jurisdictions with a written constitution.

It was submitted that Article 165(2) (a) of the Constitution as amended prohibits Parliament from enacting any legislation that confers on a person or authority the right to recognize or withdraw

the recognition of a chief. That one of the salient features of the Chiefs Act, is the provision for the recognition and withdrawal of recognition of chiefs in Zambia generally. That section 3 of the Act vests the President with the power to recognize, by statutory order, any person as Litunga of Western Province or any other office of chief in that Province, paramount chief, senior chief, chief or sub-chief. Further, it was submitted that under section 4, the President has, after due inquiry, the power to withdraw recognition accorded to a person. That the power to withdraw recognition is also inconsistent with Article 165(2) (a) of the Constitution and that Parliament is prohibited from enacting legislation of a tenor such as that in sections 3 and 4 of the Chiefs Act. Furthermore, counsel submitted that section 5 which gives the President the power to institute an inquiry into any question relating to recognition or withdrawal of recognition, is a nullity as the President no longer has the power to recognize or withdraw recognition of a person as chief. That section 5 is not only unconstitutional but obsolete and therefore void.

Regarding section 6 under which the President is empowered to appoint, by statutory order, any person to the position of deputy

chief after consultations with the concerned chief, it was Counsel's submission that the section violated Article 165(1) of the Constitution as amended in so far as it guarantees the institution of chieftaincy and traditional institutions. That these institutions exist in accordance with the culture, customs and traditions of the people to whom they apply and that the power to appoint a deputy chief abrogates the prohibition from legislating the power of recognition of a person as chief by a person or authority. Further that it is doubtful that the President would have power to appoint a deputy to a chief notwithstanding the obligation to consult the chief and his traditional councilors in the purported exercise of this power. To that extent, section 6 of the Chiefs Act was said to be unconstitutional and therefore void.

Lastly, counsel submitted that section 7 was unconstitutional for two reasons in so far as it gives power to the President to prohibit a person whose recognition had been withdrawn or revoked from being within a certain area specified in a notice under his hand if that person's presence is prejudicial to the maintenance of public order in that area. That first, it is based on the assumption that

the President still has the power to withdraw recognition which it was submitted he does not have within the contemplation of Article 165(2) (a) of the Constitution as amended. Secondly, it was submitted that section 7 of the Chiefs Act is inconsistent with Article 165(2) (b) of the Constitution as amended as it tends to derogate from the honour and dignity of the institution of chieftaincy.

In concluding, the petitioner submitted that the current legislation on chiefs is a product of colonial governance in Zambia as a territory.

That coercive powers, including the powers of prohibition under section 7 of the Chiefs Act and those relating to recognition and withdrawal of recognition, are a legacy of the colonial era. To illustrate the mind set of colonial masters at the time, the dictum of Lord **Sumner in Re Southern Rhodesia**² (at pages 233 to 234) was cited where it was stated that:

"some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society. Such a gulf cannot be bridged....."

That such perceptions of Africans accommodated the enactment of legislation that derogated from the value of human dignity as an intrinsic worth of all humans. This Court was asked not to be seen perpetuating laws whose foundation has been swept away by the Constitution as amended.

In responding to the petition, the respondent cited the provisions of Article 165 of the Constitution as amended and the impugned sections of the Chiefs Act namely sections 3,4,5,6 and 7 and went on to state that the starting point in cases where provisions of an Act are declared to be inconsistent with the constitution and therefore null and void is with the constitution itself which provides for its supremacy. Article (1) of the Constitution as amended was cited to that effect.

Further, the cases of **Attorney-General v Law Association of Zambia**³, **Attorney-General v Nigel Kalonde Mutuna**⁴ and in **Re Thomas Mumba**⁵ were cited as reiterating and confirming the supremacy of the constitution in jurisdictions such as Zambia that have a written constitution and that therefore all laws are subject to it and any act that contravenes the constitution is null and void.

In addition our decision in the case of **Zambia National Commercial Bank PLC v Martin Musonda and 58 Others**⁶ was cited where we reiterated the position that the Constitution is the supreme law of Zambia in terms of Article 1 of the Constitution as amended. It was also submitted that in the above case we stated that the Constitution ranks above all other laws and any other law that is inconsistent with the Constitution is void to the extent of the inconsistency.

It was submitted that a consideration of sections 3,4,5,6 and 7 of the Chiefs Act does vest power in the President to recognize and withdraw the recognition of a paramount chief, senior chief, chief, sub- chief or deputy chief and that this is exercised as provided for under sections 3,4,5,6 and 7 of the Chiefs Act.

That the powers outlined in sections 3,4,5,6 and 7 of the Chiefs Act made the President the ultimate authority in giving legitimacy to any chieftaincy before the amendment of the Constitution in 2016. That this position had since changed with the enactment of Article 165 which goes a step further than the repealed Article 127 of the 1991 Constitution before amendment. It was submitted that while

both articles, Article 165 and the repealed Article 127(1) guarantee(d) the institution of chieftaincy, Article 165 goes further to completely leave to the people to whom it applies to operate it in accordance with those people's customs and traditions and that while Article 127 was silent on the issue of recognition and withdrawal of recognition, Article 165 is very explicit and directs that Parliament should not enact any legislation having the effect of giving power to a person or authority to recognize or withdraw the recognition of a chief.

It was the respondent's submission that because of the new constitutional order, the provisions of sections 3,4,5,6 and 7 of the Chiefs Act are inconsistent with Article 165 of the Constitution as amended to the extent that they grant powers to a person or authority to recognize or withdraw recognition of a chieftaincy.

It was submitted that when the provisions of an Act are inconsistent with the provisions of the constitution, the Court has power to declare those provisions of the Act unconstitutional and therefore null and void. We were referred to the case of **Christine Mulundika and 7 Others v Attorney - General**⁷ where the

provisions of sections 4 and 5 of the Public Order Act were declared unconstitutional.

In concluding, the South African case of **Public Servants Association obo Olufunmila Yi Itunu Ubogu v Head of Department of Health, Gauteng and Other**⁸ was cited to further argue the principle of constitutional supremacy within the South African jurisdiction which equally has a constitutional supremacy provision in its constitution. In this case, the South African Constitutional Court recognized the supremacy of the South African Constitution as entrenched in section 1(c) and held that foundational values of the Constitution include the supremacy of the constitution and the rule of law. This supremacy, it was submitted, connotes that law or conduct inconsistent with the Constitution is invalid and the obligation imposed by it must be fulfilled.

The respondent submitted that the petitioner may be entitled to the reliefs sought in this Judgment above.

We have considered the petition and supporting affidavit, the respondent's answer and affidavit in support as well as the

arguments advanced by both parties to this matter and see no disagreement in so far as the standing of the impugned provisions vis a vis Article 165 is concerned.

The law regarding the supremacy of the Zambian Constitution in relation to ordinary legislation is in our view well settled. Article 1(1) and (2) of the Constitution as amended provides that:

- "(1) **This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.**
- (2) **An act or omission that contravenes this Constitution is illegal."**

As a court we have had occasion to consider statutory provisions alleged to have contravened the Constitution as the supreme law of the land. In the case of **Zambia National Commercial Bank PLC v Martin Musonda & 58 Others**⁶, we stated at page J13 that the Constitution is the supreme law in Zambia in terms of Article 1 of the Constitution as amended and therefore ranks above all other laws and that any law that is inconsistent with the Constitution is void to the extent of the inconsistency. This is the position we took in the **Godfrey Malembeka (suing as Executive Director of**

Prisons Care and Counseling Association) v The Attorney-General and Electoral Commission of Zambia⁹, when we declared that sections 9(1) (e) and 47 of the Electoral Process Act, 2016 contravened Article 46 of the Constitution as amended and were therefore void and required expunging from the statute book.

Article 165 of the Constitution as amended provides that;

- " (1) **The institution of chieftaincy and traditional institutions are guaranteed and shall exist in accordance with the culture, customs and traditions of the people to whom they apply.**
- (2) **Parliament shall not enact legislation which-**
- (a) **confers on a person or authority the right to recognize or withdraw the recognition of chief; or**
 - (b) **derogates from the honor and dignity of the institution of chieftaincy."**

Further Article 266 of the Constitution as amended defines Chief namely;

".....[A] person bestowed as chief and who derives allegiance from the fact of birth or descent, in accordance with the customs, traditions, usage or consent of the people in a chiefdom."

On the other hand the Chiefs Act Chapter 287 of the laws of Zambia provides in sections 3,4,5,6 and 7 as follows:

- "3. (1) Subject to the provisions of the section, the President may by, statutory order, recognise any person as being, within the area in Zambia specified in the order, the holder of - [Emphasis ours]**

- (a) the office of Litunga of the Western Province or of any other chiefly office in the Western Province specified in the order;
 - (b) the office of Paramount Chief, Senior Chief, Chief Or Sub - Chief
- (2) No person shall be recognised under this section as the holder of an office unless-
- (a) the President is satisfied that such person is entitled to hold the office under African customary law; and
 - (b) in the case of chiefly office in the Western Province, other than the office of Litunga, the person to whom recognition is accorded is recognized by the Litunga and traditional council to be a member of a ruling family in the Western Province. [Emphasis Ours]
4. (1) The President may by statutory order, withdraw the recognition accorded to any person under this Act if, after due inquiry, he is satisfied that-
- (a) the person has ceased to be entitled under African customary law to hold the office in respect of which recognition was accorded; or
 - (b) the withdrawal of the recognition accorded to the person is necessary in the interests of peace, order and good government. [Emphasis Ours]
- (2) Where the President deems it expedient to inquire or cause inquiry to be made into the question of the withdrawal of the recognition accorded to a person under this Act, he may, by statutory order, suspend the recognition so accorded until such time as the inquiry has been completed and the President has made a decision on the question.
5. The President may appoint a person or persons to inquire into any question relating to the recognition of any person under this Act or the withdrawal of the recognition accorded to any such person and on the completion of the inquiry, to report and make recommendations thereon to the President. [Emphasis Ours]

6. **After consultation with a chief and his traditional councilors, the President may, by statutory order-**
- (a) **appoint any person as the deputy to that chief; and**
 - (b) **subject to the provisions of subsection (2) transfer to the person so appointed for such period as the order remains in force, all or any of the functions of the office of that Chief.**
7. (1) **Where the recognition accorded to a person as a chief or the appointment of a person as a deputy chief has been withdrawn or revoked under this Act, and the President is satisfied that the presence of such person in any area would be prejudicial to the maintenance of public order in that area, the President may, by notice under his hand, prohibit such person from being within the area specified in the notice on and after a date specified in the notice except in such circumstances and on such conditions if any, as may be specified in the notice.** [Emphasis Ours]

A reading of Article 165 of the Constitution as amended clearly shows a departure from the practice of recognition of a chief by the President as Article 165(2) (a), prohibits enacting legislation which confers on a person or authority the right to recognize or withdraw the recognition of a chief. As earlier highlighted in our Judgment, the supremacy of constitutional provisions is beyond question. That being the case, any provision on our statute book which runs afoul of a provision of the Constitution such as Article 165(2) (a) is void to the extent of the inconsistency in question. Both parties to this matter are in agreement on the issue of constitutional supremacy. We too agree with the parties on this point. The

question that calls for our consideration is whether sections 3,4,5,6 and 7 of the Chiefs Act, run afoul of Article 165 of the Constitution as amended.

Section 3 in its entirety focuses on recognition of chiefs within Zambia. This provision under the current constitutional order is, in our firm view, inconsistent with Article 165(2) (a) as the President no longer has the right to recognise chiefs and therefore the section is void. It is for each particular chieftom to follow their established customary system of selecting and removing a chief. In like manner, section 4 of the Chiefs Act, in our firm view becomes otiose as the right to recognise, in section 3 of the Chiefs Act, upon which it is anchored is void for inconsistency with the constitution as amended.

Regarding section 5 of the Chiefs Act empowering the President to appoint a person or persons to inquire into any question relating to the recognition of any person under the Act or the withdrawal of recognition accorded to any person, our view is that this section is equally, like in the case of section 4, premised on the right to recognise under section 3 which as we have already stated above is

void for being inconsistent with Article 165(2) (a) of the Constitution as amended. It follows therefore that section 5 of the Chiefs Act is void on account of being inconsistent with the Constitution as amended, particularly Article 165(2) (a).

Counsel for the petitioner argued that the institution of chieftaincy and traditional institutions exist in accordance with culture, customs and traditions of the people to whom they apply and that to empower the President to appoint by statutory order, any person to the position of deputy chief as section 6 does, is a violation of Article 165(1) of the Constitution as amended. On the same section, Counsel for the respondent submitted that the powers outlined in sections 3,4,5,6 and 7 of the Chiefs Act made the President the ultimate authority in giving legitimacy to any chieftaincy before the amendment of the Constitution in 2016. That under the new constitutional order, Article 165 completely leaves the institution of chieftaincy to the people to whom it applies.

We note both submissions by the parties on section 6 are in agreement with the position that the institution of chieftaincy exists

in accordance with the culture, customs and traditions of the people to whom they apply.

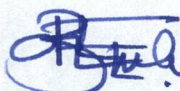
We are of the firm view that to allow the President to appoint a deputy chief who for all intents and purposes would likely assume the role of a chief goes against the principle of non involvement of the Presidency in the selection of chiefs. We agree with the parties that section 6 runs afoul of Article 165(1) of the Constitution as amended and is therefore void.

Lastly section 7 of the Chiefs Act concerns the exclusion of a former chief or deputy chief from a specified area. The section is premised on the power of the President to withdraw recognition under section 4 of the Chiefs Act or revoke appointment of a deputy chief under section 6. As stated above sections 4 and 6 of the Chiefs Act are void for their inconsistency with Article 165 of the Constitution as amended . That being the case, section 7 being premised on sections 4 and 6 equally becomes void.

In summing up we declare sections 3,4,5,6 and 7 of the Chiefs Acts to be inconsistent with Article 165 of the Constitution as amended

and are therefore unconstitutional and void. We order that they be expunged from the statute book.

Each party shall bear their own costs.



E. Mulembe

CONSTITUTIONAL COURT JUDGE



P. Mulonda

CONSTITUTIONAL COURT JUDGE



M.M. Munalula

CONSTITUTIONAL COURT JUDGE