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SAIPAR CASE REVIEW
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Editor's Note

We are very pleased to present *Volume 1: Issue 2* of the SCR. We have selected eight cases for review. In this issue we take a regional approach, analysing two ground-breaking decisions of the Kenyan and South African Apex Courts. We also survey a broad sampling of legal subject areas, ranging from Constitutional and Administrative Law, to Commercial Law and Intellectual Property.

We lead with the ground breaking decision of the Supreme Court of Zambia in *Esan v The Attorney General*, a case that dealt with the deportation of a “prohibited immigrant” under the Immigration and Deportation Act of 2010. Turning our attention to Kenya, we comment on *Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others*, a Supreme Court decision nullifying the 2017 Presidential Election of that country. Moving to South Africa, we take a closer look at *UDM v The Speaker*, a Constitutional Court decision dealing with the powers of the Speaker of the National Assembly.

Coming back to Zambia, we take a step back, and reflect on a decision that greatly impacted the trajectory of constitutionalism in the country: *The Attorney General v Mutuna and Others*, colloquially known as the case of the “Three Judges”. We then move on to examine the constitutionality of certain provisions in the Public Order Act, analysing *Law Association of Zambia v The Attorney General*.

Moving further afield to the commercial arena, we examine *Nyimba Investments Limited v Nico Insurance Zambia Limited*, a recent Supreme Court decision that develops the concept of “insurable interest” quite significantly. Next, we turn our attention to *DH Brothers Industries (PTY) Limited v Olivine Industries (PTY) Limited*, a 2012 case that expounds on the status of unregistered trademarks.

Finally, we end with a commentary on a recent case on prosecutorial discretion, *Milford Maambo and Others v The People*, decided by the Constitutional Court of Zambia.

Given the diversity in our case selection, we hope that you our reader, will find a commentary that captures both your interest and imagination.

Tinenenji Banda

Esan v.The Attorney General
(Appeal No. 96/2014) [2016] ZMSC 255
Nicholas Kahn-Fogel

The Facts

The Appellant, a British national, was the chief executive of Lafarge, South-East Africa. He obtained a two-year work permit effective from February of 2012. On December 3 2012, Zambian immigration officers detained the Appellant at Kenneth Kaunda International Airport on his return from a trip to Malawi. That evening, the Appellant was driven to Ndola. Officers denied the Appellant’s request to stop at his home to collect medicine, and they forbade him from using his telephone. On the trip to Ndola, the Appellant first learned of the purpose of his detention when officers gave him a document, signed by the Director General of Immigration, stating that his employment permit had been revoked on the grounds that he was “likely to be a danger to peace and good order in Zambia.”

The government planned to put the Appellant on a flight from Ndola to Nairobi, but when the party arrived in Ndola, they learned that the flight had been delayed. The government then decided to put the Appellant on a flight to Johannesburg the following afternoon. While officers escorted him to that flight, they handed him a “Notice of Prohibited Immigrant to leave Zambia”. The notice, which was stamped 5 December 2012, informed the Appellant that he was a prohibited immigrant because his permit to remain in the country had expired or been revoked, and because the Minister of Home Affairs had declared in writing that his presence in Zambia was inimical to the public interest. The document was signed by an immigration officer, but not by the Minister.

Procedural Posture

After the Appellant unsuccessfully appealed to the Minister of Home Affairs to return to work pending a long-term settlement, the Appellant sought relief in the High Court on the ground that the Director General’s revocation of his work permit had been procedurally improper and irrational. Specifically, the Appellant argued that the Director General had failed to comply with Section 10 of the Immigration and Deportation Act, which requires the government to give at least forty-eight hours of notice, the reasons for the decision, and an opportunity to be heard to anyone adversely affected by an immigration decision, except for decisions relating to deportation and removal. This provision required the government to give

the Appellant such notice and the opportunity to be heard before revoking his work permit. The High Court condemned the government's treatment of the Appellant and agreed that the Director General's failure to provide the Appellant with forty-eight hours of notice and an opportunity to be heard, along with the reasons for the decision, before the revocation of his work permit, violated the Appellant's rights under the Act. However, the High Court denied relief to the Appellant because it found the Minister's declaration that Appellant's presence in Zambia was inimical to the public interest superseded the violation by the Director General. Because the Act permits the Minister to make such decisions without explaining his reasons, and without requiring notice and an opportunity to be heard, the court held that the Appellant would have been subject to deportation even in the absence of the Director General's actions. The Court noted that the Appellant could seek relief for his mistreatment using other processes of law, but that he was not entitled to an order quashing the decision of the Minister ordering him to leave Zambia.

Issues on Appeal

On appeal to the Supreme Court, the Appellant argued that; 1) the trial judge erred by finding the Director General's revocation of the Appellant's work permit was void for lack of the required notice, but then holding there was no nexus between that decision and the Minister's "Notice to Prohibited Immigrant to Leave Zambia"; 2) that the trial judge had erred in holding that ordering relief against the Director General would serve no purpose, notwithstanding the breach in procedure; and 3) that the trial judge erred by abdicating his responsibility to adjudicate all issues in controversy when he opined that the Appellant could use "other processes of law" to seek redress for his mistreatment.

The Holding

The Supreme Court set aside the High Court's upholding of the Minister's decision, ruling that the removal of the Appellant from Zambia was unlawful. The crux of the Court's holding was that, although the Immigration and Deportation Act permits the Minister of Home Affairs to declare a person's presence in Zambia inimical to the public interest and to deport the person without explaining his reasons and without notice or an opportunity to be heard in advance, Section 35(2) of the Act requires the Minister to issue any such declaration in writing. Although an immigration officer had signed the "Notice of Prohibited Immigrant to Leave Zambia" that the Appellant received as he was escorted to his airplane, there was no document in evidence showing that the Minister himself had ever declared in writing that the Appellant's presence

in Zambia was inimical to the public interest. Thus, there was no lawful declaration by the Minister that could have superseded the Director General's violation of Appellant's statutory rights.

The Court's interpretation of the Act could have dispensed with the case on straightforward statutory grounds. The Court elaborated on its decision, however, by noting that the affront to the Appellant's human rights, along with the potential for arbitrariness created by the Minister's unfettered statutory discretion to declare a person's presence inimical to the public interest, without even the requirement to articulate reasons for doing so, led the court to interpret the statute strictly. The Court repeatedly went beyond mere mechanical application of the statute to suggest its willingness to protect individual rights against government excess. The Court noted, for example, that despite the seemingly absolute discretion the statute conferred on the Minister, "Courts ought to be conscious of emerging trends towards a more open and transparent government that promote the rule of law, human rights and curb arbitrariness." Therefore, a court "should go behind the orders and delve into the circumstances in which the power was exercised especially where there is prima facie evidence of arbitrariness or perverse actions, to ensure that it was exercised lawfully and within the confines of the law."

The Supreme Court went on to assert that, given the sequence of events and the inhumane treatment of the Appellant, the trial court should have "imputed bad faith and unreasonable exercise of power on the part of immigration authorities and granted the order of certiorari." This finding supported the Court's conclusion that there was, in fact, a nexus between the revocation of the Appellant's work permit in violation of the Act and the "Notice to Prohibited Immigrant to Leave Zambia", which invoked the Minister's declaration that the Appellant's presence in Zambia was inimical to the public interest. As the Court noted, the two documents were issued "more or less at the same time," and the revocation of the permit triggered the chain of events.

Given the Court's finding that the government simply had not complied with the statute with regard to either the revocation of the permit or the Minister's declaration, the Court's identification of a nexus between the two decisions may have been unnecessary to its holding. It is unnecessary to conclude that illegitimate government conduct was causally related to an ostensibly valid, subsequent government act, if the subsequent act is illegitimate on its own terms. To use the terminology of American criminal

procedure, there is no need to characterize conduct as fruit of a poisonous tree if the conduct in question is poisonous in its own right. Here, because the government failed to comply with the requirement that the Minister provide a written declaration that the Appellant's presence in Zambia was inimical to the public interest, there was no legitimate basis for deporting the Appellant that could have superseded the violation of his right to notice of the revocation of his work permit and, consequently, no need to demonstrate a nexus between the two decisions.

While the Court took issue with the manner in which the Appellant formulated his second argument, and while it noted that his third argument was inapt in that the Appellant did not seek any alternative relief in the High Court, the Supreme Court's ultimate conclusion gave the Appellant the relief he sought.

Significance

The Court's holding provides welcome evidence of judicial independence and willingness to uphold individual rights and the rule of law against executive arbitrariness and excess. The opinion is impressive as well in its at times majestic description of the importance of exercising judicial power as a check on human rights abuses. As noted, the essence of the Court's decision rested on what could have been characterized as a fairly mundane application of a clearly delineated statutory requirement; although the Minister of Home Affairs has statutory discretion to declare anyone's presence in the country inimical to the public interest without notice or articulation of the reasons for the decision, the statute requires that the Minister make such a declaration in writing, and he did not do so in this case. It has long been recognized that legal directives formulated as precisely delineated rules can insulate judges against threats to their independence, for such directives leave the decision-maker with little discretion or room for manipulation. Yet the Court declined to rely only on a dry application of the statute to the facts. Instead, it clearly and courageously asserted its important role in protecting the human rights of all people in Zambia.

**Raila Amolo Odinga and Another v Independent Electoral and
Boundaries Commission and Others Presidential Petition No. 1 of 2017**
O'Brien Kaaba

The Facts

On the 8 August 2017, the Republic of Kenya held its second general election under the 2010 Constitution. On the 11 August 2017, the Independent Electoral and Boundaries Commission (IEBC) declared the incumbent, Uhuru Kenyatta, as the outright winner. Kenyatta garnered 8,203,290 votes, beating his closest rival, Raila Odinga, who secured 6,762,224 votes. Dissatisfied with the results, Odinga and his running mate, Stephen Kalonzo Musyoka, filed a petition challenging the election of Kenyatta in the Supreme Court of Kenya.

The main issues for determination were as follows:

- a) Whether the 2017 presidential election was conducted in accordance with the principles laid down in the Constitution and the law relating to the elections;
- b) Whether there were irregularities and illegalities in the conduct of the 2017 presidential election;
- c) If there were irregularities and illegalities, what impact, if any, these had on the integrity of the election; and
- d) What consequential orders, declarations and relief the Court should grant, if any.

The Holding

By a majority of four to two judges, the Court held that:

- a) The presidential election held on 8 August 2017 was not conducted in accordance with the Constitution and applicable law, rendering the declared result invalid, null and void;
- b) The irregularities and illegalities in the presidential election were substantial and significant, and affected the integrity of the election;
- c) Uhuru Kenyatta was not validly declared as president elect and that the declaration was invalid, null and void; and
- d) The IEBC should organize and conduct fresh presidential elections in strict conformity with the Constitution and applicable electoral laws within 60 days.

Significance

The Supreme Court's judgment is significant for at least four reasons. First, it reflects the first time that an African court has nullified a presidential election. Despite the numerous defective presidential elections that have been challenged in courts, African courts have until this decision evolved a jurisprudence that has upheld all presidential elections, regardless of the severity of anomalies proved. Judges in presidential election petitions have tended to see themselves not as handmaids of the rule of law but simply there to confirm the announced results. Perhaps this jurisprudence was best stated in the Ghanaian presidential election judgment of 2013 when the Supreme Court stated:

For starters, I would state that the judiciary in Ghana, like its counterparts in other jurisdictions, does not readily invalidate a public election but often strives in public interest, to sustain it.¹

The Kenyan Supreme Court deviates from this jurisprudence and correctly restates the role of the Court, which is fidelity to the Constitution and the law, or as the Court rhetorically asked, "For what is the need of having a Constitution, if it is not respected?" The Kenyan decision concretely incarnates the often recited but rarely respected constitutional line: The Constitution is the supreme law of any country.

The second important point about the judgment, and perhaps its greatest contribution to electoral jurisprudence in Africa, is its correct application of the "substantial effect" rule. Often election results are affected by honest mistakes, incompetence of election officials, corruption, fraud, violence, intimidation, and other irregularities. Some of these irregularities may be minor and inconsequential. However, many others are significant and bear on the fairness and legitimacy of an election.

When courts are faced with an election petition, there is therefore a need for a legal device or mechanism to determine which irregularities are minor and inconsequential, and which are significant and in need of redress. The substantial effect rule does that. For many Anglophone African countries, this is an old rule inherited from the English legal system. The main point of

¹ See the majority judgment of *Atuguba JSC in Nana Addo Dankwa-Addo and others vs. John Dramani Mahama and others No.J2/6/2013 Judgement of 29 August 2013*,.40

the rule is that elections should not be nullified for minor irregularities or infractions of rules.²

The rule is enacted in the English statute, the Representation of People Act, which has a history going back to the 1800s,³ stating that:

No parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary election rules if it appears to the tribunal having cognizance of the question that:-

- (a) The election was so conducted as to be substantially in accordance with the law as to the elections; and
- (b) The act or omission did not affect its results.⁴

The idea behind the rule is that trivial mistakes, omissions and commissions should not lead to the annulment of an election, provided that the overall fairness of the election was not vitiated. Lord Denning identified three strands to this rule:

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.
2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the results of the election.
3. If the election was conducted substantially in accordance with the law as to elections, but there was nevertheless a breach of the rules or a mistake at the polls that did affect the results, then the election is vitiated.⁵

In Africa, the substantial effect rule has worked in the most disingenuous way to uphold elections fraught with major irregularities and fraud. Two

² See *John Fitch vs. Tom Stephenson and others Case No.M324/107[2008]EWHC 501(QB) [38]*

³ See Eggers and Spirling “The Judicialisation of Electoral Dispute Resolution: Partisan Bias and Bipartisan Reform in 19th Century Britain”, 2-8

⁴ Representation of the People Act 1983, Section 23(3). See also Section 48 of the same Act.

⁵ *Morgan vs. Simpson [1975] 1QB 151*

examples can be given to illustrate the point. The first relates to the Ugandan case of *Kizza Besigye vs. Yoweri Kaguta Museveni*.⁶ This petition was brought by the main opposition losing candidate, Dr. Kizza Besigye, challenging the election of the incumbent, President Museveni, following the February 2006 election. The Presidential Elections Act states:

The election of a candidate as a president shall only be annulled on any of the following grounds, if proved to the satisfaction of the court:

- (a) ...that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the results of the election in a substantial manner.⁷

At the hearing of the petition, the issues for decision by the Supreme Court of Uganda were:

1. Whether there was non-compliance with the provisions of the Constitution, Presidential Elections Act and Electoral Commission Act, in the conduct of the 2006 presidential election;
2. Whether the election was not conducted in accordance with principles laid down in the Constitution, Presidential Elections Act and Electoral Commission Act;
3. Whether, if either of the first or second issues were answered in the affirmative, such non-compliance with the said laws and principles affected the results of the election in a substantial manner; and
4. Whether the alleged illegal practices or any electoral offences in the petition were committed by the president personally, or by his agents with his knowledge and consent or approval.⁸

With respect to the first two issues (whether there was non-compliance or failure to conduct the election in accordance with the law), the Supreme Court judges were unanimous that the election was vitiated by the disenfranchisement of voters. A number of illegalities were cited: the unlawful deletion of names

⁶ *Presidential Election Petition No.01 of 2006*

⁷ Presidential Election Act, Section 59(6)(a)

⁸ See the majority judgment of Odoki CJ in *Kizza Besigye vs. Yoweri Kaguta Museveni Presidential Election Petition No.1 of 2006*

from the voters' register; wrongful counting and tallying of results; bribery; intimidation; violence; multiple voting; and ballot stuffing.⁹

On the third issue, however (whether the election results were affected), by a majority of four to three, the Court held that the failure to comply with the provisions and principles in the statutes did not affect the election in a substantial manner.¹⁰ On the fourth issue, by a majority of five to two, the Court held that, although there were illegal practices and other offences, these were not committed by the President or his agents nor were they committed with his knowledge or approval.¹¹

The third issue (substantial effect), however, was the main issue around which the petition revolved and was mainly resolved. The majority dismissed the petition, holding that in determining if the irregularities and malpractices affected the results in a substantial manner, numbers were the sole measuring yardstick. Since in terms of votes garnered, the gap between the winner and the runner up could not be bridged even if the anomalies were taken into account, the court could not tamper with the results.

The second example is the *Zambian* case of *Anderson Kambela Mazoka and others vs. Levy Patrick Mwanawasa and others*.¹² The case was brought following the 2001 *Zambian* general elections. The Supreme Court admitted that there were many flaws in the electoral process, including the use of the national intelligence in a partisan way, the unlawful use of public resources by the incumbent party and abuse of resources from parastatal companies.¹³ These anomalies notwithstanding, the Supreme Court held that it could not grant any remedy or interfere with the result of the election because, taking into account the national character of the presidential election, "where the whole country formed a single electoral college," it could not be said that the proven "defects were such that the majority of the voters were prevented from electing the candidate whom they preferred."¹⁴ In the view of the court, the petitioners were supposed to prove that the flaws "seriously affected the result" to such an extent that it could no longer be viewed as the true

⁹ Ibid, 5.

¹⁰ Ibid, 5.

¹¹ Ibid, 5.

¹² (2005) ZR, 18.

¹³ *Anderson Kambela Mazoka and others vs. Levy Patrick Mwanawasa and others* in (2005) ZR, Ibid138.

¹⁴ Ibid, 119.

reflection of the majority of the voters.¹⁵ To demonstrate this, the petitioners should have proved “electoral malpractices and violations of the electoral laws in at least a majority of the constituencies.”¹⁶

In contrast to the Mazoka decision, the Kenyan decision demonstrates that it is not only what happens on polling day that matters, but the entire process. Elections, as the Court correctly observed, “are not events but processes”. It was the process of the 2017 Kenyan election — and in particular the use of the country’s new electoral management system — that led the Court to invalidate the result.

Prior to the 2017 Kenyan election, the Elections Act was amended to introduce the Kenya Integrated Electoral Management System (KIEMS). This system was intended to be used in the biometric voter registration and, on polling day, for voter identification. The system was also to be used to transmit election results from polling stations simultaneously to the Constituency Tallying Centre and the National Tallying Centre. The transmission of results required the use of standard forms (Forms 34A and 34B).

In practice, however, the transmission of results was not done as required by the law. No plausible explanation was given by the IEBC for this. The petitioners alleged that the system was hacked and results tampered with in favour of the incumbent. The Court appointed its own IT experts to assess the IEBC servers and report their findings to the Court. IEBC, in violation of the Court order, declined to give the Court appointed IT experts access to critical areas of the server.

The Court held that the failures by IEBC were a clear violation of the Constitution and the Elections Act, and caused serious doubt as to whether the election results could be said to be a free expression of the will of the people as required by the Constitution. The Court declined to take what has been the easy way out by many African courts, as urged by the defendants. That easy way out was to state that even if all the anomalies were taken into account, in terms of numbers, the gap between the declared winner and the runner up was too big to be bridged. It held that elections are not just about numbers, but that in order to gauge whether the result reflects the will of the people, the quality of the entire process must be taken into account. In the words of the Court:

¹⁵ Ibid, 18.

¹⁶ Ibid

“Even in numbers, we used to be told in school that to arrive at a mathematical solution, there is always a computation path one has to take, as proof that the process indeed gives rise to the stated solution.”

The third important point about the Kenyan court’s judgment in *Odinga* relates to consequences for disobeying a court order in the process of adjudicating a disputed presidential election. Courts in Africa have generally dealt with officials or incumbent candidates who disobey court orders in a timid way. In the Nigerian case of *Muhammadu Buhari and others vs. Olusegun Obasanjo and others*,¹⁷ for example, the losing candidate, Muhammadu Buhari, sought and was granted an injunction by the court restraining the then President and his running mate from presenting themselves for swearing-in into office, pending the determination of the main election petition.¹⁸ The respondents, in violation of the court order, proceeded with a purported swearing-in, and the applicants appealed to the Supreme Court to determine the validity of the swearing-in when it was done in violation of a valid court order. The Supreme Court held that the application was no longer of any relevance since the respondents were already sworn-in and, therefore, any injunction granted by the Court would simply be an academic exercise, with no *res* or status quo to protect.¹⁹ Amazingly, the acts taken by the President in violation of the court order were the same acts that insulated him from any consequences and secured his position in power.

By contrast, the Kenyan decision in *Odinga* demonstrates that disobeying a court order should have adverse consequences. The Kenyan Supreme Court in the course of the petition had appointed independent IT experts and ordered IEBC to give them access to the servers in order to independently determine whether the system had been hacked. IEBC, however, “contumaciously disobeyed the order,” leading the Court to draw an adverse inference against IEBC, and to accept the petitioners’ claim that “either IEBC’s IT system was infiltrated and compromised and the data therein interfered with or IEBC’s officials themselves interfered with the data....” The fourth and final point of significance of the *Odinga* decision relates to the Court’s statement regarding election observation. It often happens that observers trivialize some anomalies or, without observing the entire electoral process, certify an election as credible. This often gives a veneer of legitimacy to frequently

¹⁷ *133/2003 17 NWLR (2003)*

¹⁸ *Ibid*, 3.

¹⁹ *Ibid*, 5.

spurious election results. For example, the European Union (EU) Observation Mission to Zambia's 2016 elections acknowledged that it was unable to observe the transmission and tallying of national results and further observed that:

The aggregation of results was conducted according to procedure in only 61 per cent of cases observed. In some instances, presiding officers did not stay throughout the processing of the material for their polling station, and returning officers did not always announce results, nor regularly print copies of the record of proceedings of the vote tabulation. The announcement of results form was not posted outside the totalling centre in 22 per cent of cases.²⁰

Yet, the EU went ahead and certified the election results as reflecting the will of the people. The Kenyan Supreme Court rightly frowned upon this kind of election observation. In the case of Kenya, all the major international election observers certified the election as credible, or largely reflecting the will of the people. These conclusions were entirely based on what was observable on polling day, without taking into account the transmission of results. The Court had this to say:

In passing only, we must also state that whereas the role of observers and their interim reports were heavily relied upon by the respondents as evidence that the electoral process was free and fair, the evidence before us points to the fact that hardly any of the observers interrogated the process beyond counting and tallying at the polling stations. The interim reports cannot therefore be used to authenticate the transmission and eventual declaration of results.

Ultimately, the judgment is not only ground breaking but also a breath of fresh air for African electoral jurisprudence. The decision demonstrates an unalloyed and unwavering commitment to constitutionalism and the rule of law. It is only through such principled adjudication that African courts can promote a course of development anchored on respect for human rights, accountability and the rule of law. As the court stated, the greatness of any nation lies not in the might of its armies but in "fidelity to the Constitution and strict adherence to the rule of law."

²⁰ European Union Election Observation Mission, Final Report Republic of Zambia General Elections and Referendum 11 August 2016 (2016), 6 and 33.

**United Democratic Movement v Speaker of the National Assembly and
Others (CCT89/17) [2017] ZACC 21**

Tinenenji Banda

The Facts

On 31 March 2017, South African President Jacob Zuma, in exercise of his constitutional powers, dismissed the Minister of Finance, Pravin Gordhan, and his deputy, Mcebisi Jonas. The South African market reacted sharply to these dismissals, and an economic downgrade to junk status took effect shortly thereafter. In light of the economic downgrade, three opposition political parties, the United Democratic Movement (UDM), the Democratic Alliance, and the Economic Freedom Fighters (EFF) approached the Speaker of the National Assembly Baleka Mbete, requesting her to schedule a motion of no confidence in President Zuma. Mbete obliged, and scheduled the motion for the 18 April 2017.

Twelve days before the motion was to be tabled, the UDM wrote a letter to Mbete, asking that she mandate a secret ballot for the motion. In support of this request, the UDM asserted that the motion was of obviously high importance, and that the public interest necessitated the guarantee of a truly “democratic outcome”, which could only be achieved, it was argued, through a secret ballot. An open ballot would in the UDM’s view, limit the free will of members, since some members of the House, fearing career reprisals and other adverse repercussions, might be intimidated into voting against the motion.

In responding to the request, Mbete proffered that neither the Constitution nor the Rules of the National Assembly made provision for the prescribing of a secret ballot for a motion of no confidence vote. In arriving at her decision, she relied on the 2015 High Court Decision of *Tlouamma v Speaker of the National Assembly*. In *Tloumanna*, the High Court had held that the South African Constitution did not expressly or impliedly require a secret ballot for motions of no confidence in the President. On the strength of that case, and based on her interpretation of the Constitution and the National Assembly Rules, the Speaker concluded that she lacked the legal authority to prescribe a secret ballot for the motion.

Unpersuaded by the Speaker’s reasoning, the UDM petitioned the Constitutional Court of South Africa to determine whether the Constitution of the Republic and the Rules of the National Assembly did in fact bar the

Speaker from prescribing a secret ballot for a motion of no confidence in the President. If it was to be the Court's finding that the Speaker was not so proscribed, the UDM asked the court to mandate the Speaker to prescribe a secret ballot for the no confidence motion.

The Holding

The elegant, unanimous judgment, was delivered by Chief Justice Mogoeng Mogoeng. Justice Mogoeng began his judgment by underscoring the fact that as a constitutional democracy, the South African government was a government "of the people, by the people and for the people". He added that since constitutional democracies do not self-actualize, it was the responsibility of governmental institutions and structures to turn the aspirations of the people into a reality. Noting that fifty five million people cannot collectively govern the Republic, he acknowledged that governance "by the people" was a legal fiction, noting further that the impracticalities of collective governance compelled the people to assign governance functions to "servants" and "messengers" who, in the exercise of these functions, should have the welfare of all South Africans foremost in mind.

Justice Mogoeng then went on to observe that because public officials wield so much power, these agents must have an unwavering loyalty to the constitutional values of accountability and openness, and that those values were in part superintended by Parliament, to whom the President, Deputy President, Ministers and Deputy Ministers were enjoined to report. The responsibility of supervising the performance of the President and his cabinet, the Chief Justice pronounced, fell squarely on the National Assembly. Parliament's oversight function, according to the Court, was to ensure that the power and resources entrusted to the executive were used in a justifiable way.

The Court proceeded to suggest that there might come a time when "all the regular checks and balances seem to be ineffective", and that at such a time, the best interests of the nation may require resort to the use of the "ultimate accountability ensuring mechanisms" of which there are three: (i) the removal of office through the ballot box; (ii) 'impeachment'; and (iii) a successful motion of no confidence. The threat of these mechanisms and their severe repercussions, the Court opined, were intended to serve as constant reminders to the President and his cabinet, that mishandling of public power and resources might inflict severe repercussions on those who so offend.

As to Parliament's specific oversight responsibilities, the Chief Justice focused on section 55(1) of the Constitution, which provides that:

The National Assembly must provide for mechanisms

- (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
- (b) to maintain oversight of—
 - (i) the exercise of national executive authority, including the implementation of legislation; and
 - (ii) any organ of state.

In specific reference to motions of no confidence, Mogoeng went on to cite Section 102 of the Constitution, which declares:

- (1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.
- (2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.

Reiterating the severity of a motion of no confidence, the Chief Justice emphasized that a successful no confidence vote in the President was the most severe sanction that Parliament could impose on a sitting President, and as such, was the outer limit of Parliament's supervisory function.

The Court then went on to decide the question that triggered the case, namely, whether the Speaker of the National Assembly has power to prescribe a secret ballot. The Court noted that in light of section 57 which empowers the National Assembly to determine its own procedures and arrangements, the Constitution's failure to prescribe the conduct of a no confidence vote was deliberate. The Court held further that Parliament's freedom in this regard was limited only by the requirement that whatever rules and procedures Parliament puts in place, must support, in the Chief Justice's own words, the advancing of the "constitutional project."

The Court then examined the National Assembly Rules, focusing in particular on rule 104(1), which empowers the Speaker to prescribe the

voting procedure that must be used when a manual voting system is used. The import of Rule 104, the Court held, is that the procedure that the Speaker prescribes, will determine if a vote is conducted by secret ballot or not. In other words, the question of whether voting is conducted by secret or open ballot, is a discretionary decision that the Rules of Parliament empower the Speaker to make. In making this judgment call, the Court held that the Speaker should be guided by the outcome which best ensures that “members exercise their oversight powers most effectively.” Ultimately, the Court ruled, the Speaker was labouring under a misapprehension when she determined that she lacked the power to prescribe a secret vote.

After disposing of the first question, the Court then went on to determine the second issue: namely, whether the Court could compel the Speaker to prescribe a secret ballot for the no confidence vote against the President. The Court held that compelling the Speaker to prescribe a particular voting procedure would violate the separation of powers principle, since this is a power entrusted only to the Speaker, and the Speaker alone. The Court therefore left the decision of whether the motion of no confidence vote should be held by secret or open ballot in the hands of the Speaker.

Significance

In holding that the Speaker did in fact have the power to prescribe voting procedures, the Court, in one fell swoop, exercised a decisive check on both Parliament and the Executive. For Parliament, the check came in the form of this reminder: the supervisory powers bestowed on Parliament by the Republican Constitution, are not to be hollow and unrealizable. Instead, procedures that ensure that the “ultimate accountability ensuring mechanisms” can in fact actualize, should be put in place by those responsible for doing so. In this respect, the Court reminded the Speaker that the South African Constitution and the Rules of the National Assembly empower her to prescribe procedures that best enable Parliament to realize its oversight responsibility.

For the Executive, the check came in the form of this caution: when ordinary checks and balances fail to reign them in, the most fatal of sanctions will wield a lethal sword to curtail the abuse.

Of particular significance is the fact that even while acting as a check on others, the Court acknowledged that it too was constrained, and was therefore careful not to overstep its own boundaries. While the Court

stopped short of impinging on the domain of the Speaker, the Court did offer significant guidance on how the Speaker must go about determining parliamentary voting procedure, holding in part that: “[t]here must always be a proper and rational basis for whatever choice the Speaker makes in the exercise of the constitutional power to determine the voting procedure” and further that “[d]ue regard must always be had to real possibilities of corruption as well as [whether] the prevailing circumstances...allow Members to exercise their vote in a manner that does not expose them to illegitimate hardships.” The Speaker, the Court held, must have regard to the prevailing atmosphere in Parliament, and whether the atmosphere is “peaceful”, “toxified” or “highly charged”, should all be relevant inputs in the decision-making process.

In *UDM v the Speaker*, the Court displayed in full force and with expert precision, the important oversight function that the judiciary plays in a constitutional democracy. While the primary recipient of that oversight function in this particular case was Parliament, the Executive was both cautioned and reminded, that when exercised on behalf of the people, public power must be exercised in a judicious, controlled, and justifiable manner.

Attorney General v Mutuna and Others
(Appeal No. 088/2012) [2013] ZMSC 38¹
Muna Ndulo

The Facts

On the 30 April 2012, two High Court Judges, Judges Mutuna and Kajimanga, and one Supreme Court Judge, Judge Musonda, received a letter from then-President Michael Sata, suspending them from their duties. The letter informed the three judges that he, the President, had set up a tribunal pursuant to Article 98(5) of the Constitution, to inquire into the unspecified conduct of the three. The letter directed that the judges “cease acting” as judges until the Tribunal concluded its proceedings. On the same day, the President held a press conference, stating that he had received “credible complaints” against the three judges and had therefore decided to constitute a tribunal to investigate the complaints.

Two judges, Mutuna and Kajimanga, filed an *ex parte* application for leave to apply for Judicial Review of the President’s decision. Ultimately, the applicants sought the quashing of the President’s decision, contending that the suspension had been made without recourse to Article 91 (2) of the Constitution of Zambia and the Judicial (Code of Conduct) Act. Leave was granted. Following the successful application, Judge Philip Musonda applied to be joined to the proceedings. His application was granted.

On 17 May 2012, the Attorney General took out summons to discharge the leave obtained by the Applicants, arguing that the President had acted within his constitutional powers, without procedural impropriety, and without unreasonableness. The Attorney General argued further that the Judicial (Code of Conduct) Act was subordinate to Article 98 of the Constitution on which the President relied, and could therefore not “be used to fetter the Republican President’s power under the Constitution.”

The Trial Court did not discharge the leave, ruling that there were matters ripe for further investigation, including the question of whether Article 98 should be read and understood in tandem with Article 91 and the Judicial

¹ This case was decided before the Constitutional Amendment of 2016. The provisions cited in this commentary are the pre-amendment Constitutional provisions.

(Code of Conduct) Act. The Attorney General appealed to the Supreme Court.

The Holding

Adopting the doctrine of Executive Supremacy, the Court held that in enacting Article 98, Parliament intended to make it “possible for the President as Head of State to deal with that exclusive class of adjudicators without recourse to the Judicial Complaints Authority.”

Holding that Article 98 was “very clear” and “unambiguous”, the Court adopted a literal interpretative method, arguing that adopting any other approach would be to “amend” Article 98 through interpretation. Using a literal approach, the Court went on to hold that there was no constitutional provision to support an “interplay” between Article 98 on the one hand, and Article 91 and the Judicial (Code of Conduct) Act on the other. In the Court’s view, these were “stand alone” provisions. The framers of the Constitution, so the Court argued, “never intended for the powers vested in the President to be diluted through the route of the Judicial (Code of Conduct) Act or through the Chief Justice.”

Deciding on whether the President’s conduct was unreasonable, the Court uttered these words:

Bearing in mind the authoritative position of His Excellency, it would be illogical and unreasonable to hold that he did not receive credible information as President for him to act as he did. ***He [the President] is the overall authority on everything. His sources are exclusive to the public domain and must be impeccable.*** [Emphasis ours].

Finally, on the question of natural justice for the three judges, the Court held that since the suspended judges would have the opportunity to be heard before the tribunal, the setting up of the tribunal did not violate “open justice principles”.

Significance

This commentary argues that the doctrine of “executive supremacy”, which the Zambian Supreme Court adopted in this case, has no place in a constitutional democracy. A jurisprudence of constitutionalism differs in fundamental respects from a jurisprudence of “executive supremacy”. The former is premised on the supremacy of the Constitution. Additionally,

constitutionalism is premised upon the separation of powers of the three arms of the government. The stability of the nation hinges on respect for the rule of law which is the cornerstone of the separation of powers principle. Fundamental to the separation of powers principle, is the unassailable independence of the judiciary. There must therefore be entrenched safeguards to ensure judicial independence, chief among which are proper standards that prevent the arbitrary and baseless removal of judicial officers.

To allow 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, magistrates and justices of the courts mentioned in clause (1) shall be independent, impartial and subject only to this Constitution and the law and shall conduct themselves in accordance with a code of conduct promulgated by Parliament.” Article 98 provides for ways to remove a judge from office. It provides that a judge may be removed from office only for inability to perform the functions of his or her office, whether arising from infirmity of body or mind or for misconduct, and shall not be so removed except in accordance with the provisions of that Article. The Article further provides that if the President considers that the question of removing a judge of the Supreme Court or the High Court under Article 98 ought to be investigated, (a) he shall appoint a tribunal which shall consist of a Chairman and not less two other members who have held high judicial office; and (b) the Tribunal shall inquire into the matter and report on the facts thereof to the President and advise the President whether the judge ought to be removed from office under the Article.

Articles 91 and 98 are without a doubt, interconnected. Article 91 provides the overall context within which provisions relating to the judiciary should be interpreted. It underscores judicial independence. Article 98 is not a conduit of executive influence over the judiciary and no interpretation that supports this is valid. The removal of judges from the bench on spurious grounds is the greatest threat to judicial independence. There is no assurance of a judge’s independence if he or she can easily be removed from office. Where judges can easily be removed, it would require fearless men and women of the strongest will and moral fibre to do justice where the interests of the reigning political party are at stake. To safeguard the independence of the judiciary granted in Article 91, Article 98 provides that a judge can be removed on only two grounds: (1) inability to discharge the functions of office or (2) misconduct.

International standards applicable to the preservation of the independence of the judiciary amply warn 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; inability to perform one's functions, and misconduct. The Judicial (Code of Conduct) Act of 1999 states in the clearest of terms that it was enacted to provide for the code of conduct for officers of the judiciary pursuant to Article 91 of the Constitution. The trial judge was correct when she suggested that there is an interplay between articles 91(2) and the Judicial Code of Conduct on one hand, and articles 98(2) (3) and (5) on the other. The procedures set up under the Judicial (Code of Conduct) Act were put in place to ensure that the process of removing judges established under Article 98 does not compromise judicial independence, and undermine the right to due process. The interplay ensures 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 oversees the removal process. The rationale of this approach is that the Chief Justice will advise the President only in those circumstances where it is reasonable and justifiable for an investigation to be conducted. Without this check, it is impossible to ensure that the President does not appoint a tribunal that he or she can manipulate to achieve a predetermined outcome. Additionally, the complaints procedures established under the Judicial (Code of Conduct) Act protect a judge's due process rights by enabling the judge to defend himself or herself before a complaints hearing before a Tribunal is appointed.

The argument that Article 98 provides the President unfettered power to check the judiciary as the majority opines is to say the least, unbelievable. That thinking completely undermines and offends the doctrine of the separation of powers. Further, by construing Article 98 as a stand-alone provision, the court ignores the fact that there is a context to Article 98. Neither the Constitution nor the procedures prescribe in the Judicial (Code of Conduct) Act could have contemplated that the position of a judge be as vulnerable as the majority would want us to 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 rather, "If the President considers the question of removing a judge of the Supreme Court or of the High Court under this Article ought to be investigated." That means there has to be an objective criteria on which the question is based

otherwise the President is acting 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 that this 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. Equity looks at substance rather than form. What remedy can there be for a judge if the Tribunal recommends dismissal? Should the judge wait until the Tribunal has concluded its work to institute judicial review of the President's action to appoint a Tribunal? It is a betrayal of the sacred duty of doing justice entrusted to judges if the judges take such an obviously naive view of the law and declare executive action to be exempt from scrutiny by the courts. Our courts must regard themselves as courts of justice, not merely courts of law narrowly defined, especially where human freedom and dignity are concerned. In the words of former US President Andrew Jackson, "[a]ll the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary."

A judge should not, and cannot afford to subject himself or herself to a mere mechanical application of the law but must feel called upon to higher duties. In any event, in this particular case, it was unnecessary to decide whether the decision by the President constituted investigative 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 United Nations 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 the method of the "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 held by other courts elsewhere in the Commonwealth. It is also intellectually deficient and can lead to bizarre outcomes. Does the majority suggest that our Constitution does not subscribe to any values that it seeks to reflect and advance? In any event, Article 91 and Article 98 need interpretation. How for example, do you reconcile the independence of the judiciary with an easy process of removal of judges from the bench? How do you reconcile the doctrine of the separation of powers and removal of judges by a system initiated and controlled by the executive without any opportunity for scrutiny? 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 ways that do not undermine the core purposes of the Constitution. In a Constitution there are some unambiguous provisions, for example, the number of members of Parliament that because of the clear and unambiguous meaning of the text, render these clear-cut provisions amenable to a 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 absolutely 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 endeavour 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; of the social, economic, and political evaluation of their country; and of the historical antecedents and contemporary purposes of the particular provision in dispute. The values of democracy, transparency, accountability and good governance are particularly relevant in the interpretation of Article 91 and 98.

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. 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

with the sphere of the other. An interpretation of Article 98 that holds that the decision to institute a tribunal is a matter for the President's subjective opinion alone and cannot be questioned by any court of law is not in keeping with the Constitution. An interpretation that requires the existence of objective jurisdictional facts before the appointment of a Tribunal is more consistent and in keeping with the constitutional guarantee of the independence of the judiciary.

The Supreme Court in its judgment exhibited excessive deference to the Executive. As a result, alarming statements were made by the majority, *to wit*, the President "is the overall authority on everything" and "his sources are exclusive to the public domain and must be impeccable." The level of grovelling exhibited by the Court in this case is shocking. How can a Court possibly determine, without scrutiny, that a President's sources of information are impeccable? Is the Court telling us that it has a secret method of finding this out? If it has, is that method legal and transparent? As Lord Denning warned, when the state defends its actions by pleading national interest and privileged information, it is the end of liberty, and in this case, the end of constitutionalism.

Law Association of Zambia v. the Attorney General
(Appeal No. 8/2014) [2016] ZMSC 243.
Muna Ndulo and Samuel Ndungu

The Facts

This appeal concerned the constitutionality of Sections 5 and 6 of the Public Order Act. The Law Association of Zambia had unsuccessfully argued in the High Court that these Sections violated Articles 20 and 21 of the Constitution of Zambia, which provide for the protection of freedom of expression and the protection of freedom of assembly and association. The appeal sought to overturn the decision of the High Court.

The Holding

The Supreme Court agreed with the High Court that the Public Order Act, as amended by Act No. 36 of 1996 is constitutional. The Court opined that the amendment had addressed the concerns expressed in the *Mulundika* judgment – namely, that the police cannot deny permits to people who apply to hold a public demonstration. The Court however found that Section 5 (6) of the Act fell short of the constitutional threshold, as it does not give the police an obligation to suggest a “reasonable alternative date in the very near future”, and that the police had used this loophole to constructively deny people their right to protest.

Significance

In this commentary, we argue that this judgment does not effectively protect the rights of peaceful assembly and expression. First, it suffers from the same weaknesses as the *Mulundika* judgment, in that it does not fully appreciate the nature of the right of assembly and the freedom of expression. Secondly, it does not adequately capture all aspects of constructive denial of freedom of expression that are brought about by the 1996 amendment to the Public Order Act, specifically by Section 5(6), and its lack of guidelines for the police. This makes Section 5(6) fundamentally unconstitutional. The Court fails to realize that Section 5 (6) fundamentally operates as a limitation on the constitutional rights to peaceful assembly and expression.

Weakness of the Mulundika Judgment Replicated

The 1996 amendment to the Public Order Act did much to enhance the protection of the freedom of peaceful assembly and expression. The previous language in the Public Order Act empowered the police to control

who can talk at an assembly, the duration of the assembly, and the content that can be discussed at the assembly.¹ These requirements were replaced under the 1996 amendment with new ones: all that is required is a notification to the police of the date, duration and location of the assembly, whether it be a static one or a demonstration/protest that follows a path.² However, there remained an undertone that the rights of peaceful assembly must be policed – that they are subject to the police’s ability to police them and that the police can deny or cancel a permit on the grounds that the police cannot police the assembly.³ This detracts from the fundamental nature of the right.

The right of peaceful assembly is recognized as a fundamental right worldwide. Article 21 of the International Covenant on Civil and Political Rights (ICCPR) specifies that no restrictions may be placed on the right, except those that are “necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”⁴

Similarly, Article 11 of the African Charter on Human and People’s Rights provides that:

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.⁵

As we demonstrate, there is consensus worldwide that the right to peaceful assembly and expression are fundamental to political speech. This is why they are viewed as fundamental in a democratic society, where views that may only be held by a minority may not find expression in other fora, leading to the necessity of peaceful assembly and expression within the

¹ Previous Section 5 (5) of the Public Order Act.

² Section 5 (5) as amended.

³ This is the import of Section 5 (6) of the Public Order Act, which allows police to prohibit a public meeting because they are unable to police it.

⁴ Article 21, International Covenant on Civil and Political Rights.

⁵ African Charter on Human and People’s Rights, 1979.

assembly. Legal restrictions or ‘clawbacks’⁶ are allowed in the interests of keeping the peace, protecting private property, or respecting the rights, and not merely the sensibilities, of other people.

It is immediately noticeable that Section 5 of the Public Order Act, as amended, does not meet this threshold set out by the ICCPR. The language of Section 5 does not limit the restrictions to the freedom of assembly to only those “necessary” for national security or public safety, public order, health or morality. It is even more telling that the right of assembly in Article 21 (2) of the Constitution conforms to the ICCPR:

- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision –
 - (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
 - (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;

Section 5 (6) of the Act simply states: “Where it is not possible for the Police to adequately police any particular public meeting,” the police may inform the conveners of their inability and suggest an alternative date. What is conspicuously missing from this Act is a provision that ensures that any restrictions to the freedom of assembly satisfy the conditions set out in Article 21 of the Constitution. The inability to police a public meeting is not one such restriction, in and of itself. It should be shown that should the meeting go on without police presence, there is a probability, more than a mere possibility, that there would be a breach of the peace as a result. The test is not subjective, nor one entirely for the police. It must be based on objective criteria. This is the tenor of the United Kingdom’s Public Order Act, which despite being similar to the Zambian Act in the requirement of notices to the police for public processions and assemblies, takes a more

⁶ R. Goodrick, *The Right of Peaceful Protest in International Law and Australian Obligations under the International Covenant on Civil and Political Rights*, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiqjcSUrMbNAhWHKsAKHVieC-cQFggcMAA&url=https%3A%2F%2Fwww.humanrights.gov.au%2Fsites%2Fdefault%2Ffiles%2FHRC_assembly_Goodrick.doc&usg=AFQjCNHysp6f_ekqmHyT_qAUNMEcwqLQ8g&sig2=9YmMhf91FqIvpQZLkC4Kw&bvm=bv.125596728,d.ZGg

serious view of the power of the police to stop a procession. Consider section 12 which provides:

- (1) If the senior police officer, having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, reasonably believes that –
 - (a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or
 - (b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do, he may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions.⁷

This provision is grounded in the understanding that the right to peaceful assembly is indeed a fundamental right; and one that does not need the midwifery of the police. The police are allowed to step in where the assembly is, for serious reasons, suspected of not being peaceful. The police cannot prohibit an assembly solely on the ground that no permit was issued for the assembly. The assumption of the automatic need for a permit for assembly in the Public Order Act is therefore unwarranted and unconstitutionally abrogates the right to peaceful assembly.

The mistake here is not just one for the legislature, though. The Supreme Court, both in the *Mulundika* case and in this case, has shown a somewhat short-sighted view of the fundamental nature of the right to peaceful assembly. In *Mulundika*, the provisions being subjected to constitutional scrutiny were egregious, and the Court was largely cognizant of this. However, it failed to recognize that the power to issue directions must be constrained by the conditions in the Constitution, namely, public peace, morality and the protection of the property and rights of other people. The Court proceeded on the assumption that police oversight into the exercise of this right was necessary.

⁷ Public Order Act (UK), 1986, S. 12.

Although not guided by concern for the administrative consequences, we readily accept and acknowledge that there are many regulatory features in the Public Order Act which are perfectly constitutional and very necessary for the sake of public peace and order. This is common cause. For instance, there are subsections authorizing the issuing of directions and conditions for the purpose of regulating the route of a procession; the date, place and time of an assembly or a procession; their duration and any other matter designed to preserve public peace and order.

However it appears that in the Court's mind, peaceful assembly cannot be peaceful without police presence. The Court rightly upheld the requirement to give notice to the police of a public meeting, but wrongly attributed it to the need for the police to exercise a "regulatory function" over assemblies, stating that: "In this regard, we hold the view that the requirement for notice is necessary, as this is the only way that the police can perform their regulatory function and maintain law and order in our society".⁸ The flaw in the conception of the fundamental nature of the right is revealed; the Court does not place the evidentiary burden on the police to show that they *must* regulate a public assembly. Regulation is seen as a foregone conclusion, a necessity for the enjoyment of the fundamental right. This therefore explains why the power granted to the police to cancel a public meeting and suggest a date in the near future because they (the police) cannot "regulate" it adequately, without necessarily showing that the inability to regulate would result in a breach of the peace, has gone unchecked.

This question of whether the police should regulate at all in the interests of peace is seen in the EU case of *Éva Molnár v Hungary*.⁹ In interpreting Article 21 of the Convention for the Protection of Human Rights and Freedoms, which is identical to Article 21 of the Zambian Constitution, the Court held that there was no assumption that the policing of a peaceful assembly was required by the Constitution. Thus, the breaking up of a spontaneous peaceful assembly, for which notice could not be given, would be an unnecessary abrogation of the right to peaceful assembly: the Court stated:

⁸ *Law Society of Zambia v the Attorney General*, Appeal No. SCZ/8/333/2013.

⁹ *Law Society of Zambia v the Attorney General*, Appeal No. SCZ/8/333/2013.

[I]n special circumstances when an immediate response might be justified, for example in relation to a political event, in the form of a spontaneous demonstration, to disperse the ensuing demonstration solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, may amount to a disproportionate restriction on freedom of peaceful assembly...It is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance.¹⁰

The failure of the Supreme Court to appreciate the fundamental nature of the right to peaceful assembly further blinds it to another flaw in Section 5 (5) (e) of the Public Order Act. This section outlines one of the conditions that the conveners of the public meeting have to meet, and which the police may rely upon to justify the cancellation of a planned public meeting. That section states 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 the inhabitants of that neighbourhood** [emphasis added].” The emphasized portion of the provision in effect gives the police the power to regulate the content of the opinions to be expressed at a public meeting. Had the Court appreciated the fundamental nature of the freedom of expression, it would have made it clear that such power is incompatible with the inalienable stature of a fundamental right. While a Constitution can limit the kinds of expression that are not protected – for example, libel and defamation¹¹ – no such restrictions can be given for unpopular views. The freedom to air unpopular views is the very essence of the freedom of speech and assembly. Two American cases illustrate this. In *Edwards v South Carolina*,¹² the US Supreme Court held that a State could not criminalize “the peaceful expression of unpopular views.” In *National Socialist Party v Village of Skokie*,¹³ the Supreme Court upheld an Illinois Supreme Court decision that would not ban the Nazi Party from organising a peaceful protest because of the content of their message. Closer to home, the Kenyan High Court, in a recent case, underscored the important part that the freedom of assembly plays in the ventilation of unpopular views:

¹⁰ Application no. 10346/05, ECHR (7 January 2009).

¹¹ Article 21 (3) (b), Constitution of Zambia.

¹² 372 US 229 (1963).

¹³ 473 US 43 (1977).

It may very well be that the opinion or view is an unpopular one with others but yet again, freedom of assembly merely provides an alternative form of participating in democracy to those who may be disenchanted and uninspired in one way or another. A minority may, for example, feel disappointed by their own failure to convince the majority. The alternative avenue for expressing their view would simply then be through demonstrations and picketing, even though the minority may still not have their way.¹⁴

As has been argued elsewhere:

Often a demonstration has significant publicity advantages over more conventional media of expression since it can attract extensive news coverage and widespread public interest; and for persons unpopular or unknown to the general public, or without financial resources, a demonstration may be the only effective means to publicize a message or reach a desired audience.¹⁵

These views are in sharp contrast with the position in the Act and the position of the *Zambian Supreme Court's* judgment in that the "disaffection" of locals in the locale of a planned protest is not grounds enough for the abrogation of a right, no matter how odious the opinion that causes the disaffection. The thrust of the *Skokie* decision is that freedom of expression and assembly are cornerstones of democracy, as they ensure that minority, unpopular views are not drowned by the hum of the majority. The police have an obligation to protect people expressing unpopular views.

Unfettered Discretion of Police

Section 5 of the Public Order Act outlines numerous conditions for the holding of an assembly, for instance, the applicants have to wait for police authorization before they can proceed to hold an assembly. Section 5 gives the police the absolute power of determining whether or not an assembly, meeting or procession should take place. The Supreme Court rightly stated that the right to assembly cannot be denied. However, the Court fails to identify that the right can still be abrogated if the police are allowed to cancel a public assembly without proper guidelines. The Court seems to

¹⁴ *Hon. Ferdinand Ndung'u Waititu & 4 others v The Attorney General & 9 Others*, Petition No. 169 of 2016, as per Onguto J.

¹⁵ 1967 HLR 1773.

think that it is clear from the Act that the reasons to be given for the cancellation of a peaceful assembly must comply with the Constitution. However, as already illustrated, the language of Section 5 of the Public Order Act expands the reasons for cancelling an assembly to beyond those given in the Constitution, namely, maintaining public peace and protecting the rights and properties of other people. In fact, the language of the Act does not even limit the reasons why the police can cancel a planned assembly – it only states that they can cancel an assembly out of an inability to police it. Apart from the foundational arguments already made, this scenario is clearly not envisaged by the Constitution – that an individual, whoever that might be, should be made the sole and unquestionable determinant of what is reasonably justifiable for the entire citizenry of Zambia. The Constitution does not in any way intend that the enjoyment of 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.

This same view obtains in the Ghanaian Supreme Court. It held in *New Patriotic Party vs. Attorney-General* 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.”¹⁶ The Ghana Supreme Court nullified section 12 (a) of the Public Order Decree¹⁷ which gave police officers unfettered discretion to stop and cause to be dispensed with, any meetings or processions in any public place in contravention of Sections 7 and 8. It also nullified Section 13(a) which made it an offence to hold such processions, meetings and public celebrations without permission. Similarly, the Court of Appeal in Nigeria, in *Inspector-General of Police v. All Nigerian Peoples Party and Others*, after holding the permit system under the Nigerian Public Order Act unconstitutional stated: “constitutions should be interpreted in such a manner as to satisfy the yearnings of the Nigerian Society.” The court observed:

[The] Public Order Act should be promulgated to compliment section 39 and 40 of the Constitution in context and not to stifle or cripple it.
A rally or placard-carrying demonstration has become a form of

¹⁶ 1992-93 GBR 585-(2000) 2HBLRA, 1.

¹⁷ Public Order Decree, 1972(NRCD)

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.¹⁸

In re *Munhumeso*,¹⁹ the Zimbabwe Supreme Court held that powers placed in the hands of the police are arbitrary where (a) there is no criterion 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. This approach is supported by case law elsewhere in the world. In the US case of *Shuttleworth v. Birmingham*,²⁰ the City Commission had been granted power by legislation, to refuse permission for a procession on such vague criteria as “public welfare, safety, health, decency and public morals.” The Court held that such power created an avenue for arbitrariness. It struck down the legislation. Similarly, in *Gregory v. Florida*²¹, a statute which gave the police almost unlimited discretion to decide whether or not demonstrators had committed a “diversion tending to a breach of peace” was declared an unconstitutional interference with the freedom of assembly. In *Shuttleworth*²², the Court 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 lack of a precise standard which the police must abide by when considering whether to abridge the right to peaceful assembly is therefore particularly damning. It makes Section 5 (6) of the Public Order Act open to arbitrary enforcement, as the police are not required explicitly by the Act to justify that their “inability to police” a planned public meeting or demonstration will lead to a breach of peace, should the planned meeting go

¹⁸ (2) 18 NWLR 457 C.A.

¹⁹ 1994(1) ZLR 49(s).

²⁰ (1969) 394 US 147.

²¹ (1969) 394 US 111.

²² Supra note 17.

on without police supervision. This is contrary to Article 21 of the Constitution, and is not justifiable in an open and democratic country.

The Supreme Court erred in finding that the only way Section 5 (6) of the Act offended the Constitution is by not providing a strict timeline for the police's postponement of a planned meeting. In doing so, the Court validated the untenable situation where the police, in conforming to the Act, do not have to prove that a lack of police supervision of an event would probably lead to a breach of the peace. In addition, the police are empowered to cancel a planned meeting because of the potential that the planned protests may offend the sensibilities of the local residents – which in essence empowers the police to license the content of the message of the protest. The gravest error, however, lies in the Court's misapprehension of the inalienable and fundamental nature of a fundamental human right. In the Court's view, the midwifery of the right to peaceful assembly by the police is a foregone conclusion.

Nyimba Investments Limited vs Nico Insurance Zambia Limited
(Appeal No. 130/2016) [2017] ZMSC 32
Edward Sampa

The Facts

On 15 October 2010, the Appellant company, Nyimba Investments, obtained an insurance policy from Nico Insurance. The policy insured against risk on all real and personal property, and against business interruptions and the loss of profit of the Appellant and its group companies trading in Zambia. On 12 September 2011, a fire gutted the property of the Appellant. At the time of the fire, the titleholders of the property were Gulam Ahmed Adam Patel and Ayyub Adam Patel who traded under the name: “Nyimba Filling Station and Supermarket”. The two were also shareholders in the Appellant company.

The Appellant claimed on the policy for material damage, and the claim was settled by the Respondent, Nico Insurance. However, the claim for business interruption and loss of profit was later rejected by the Respondent when it was discovered that the destroyed property was not registered in the name of the Appellant Company, but instead in the names of two of its shareholders. The Respondent repudiated the policy for lack of insurable interest, refused to honour the claim for business interruption and loss of profit, and sought to recover the money it had already paid for material damage.

The Appellant took the matter to the High Court. The High Court held that the Appellant made a representation that it owned the property that was the subject of the claim, when it did not in fact do so, and further that the Appellant's misrepresentation was fraudulent. This rendered the insurance policy void, and the claim on the policy untenable. It is against this judgment that the Appellant appealed.

The legal issues to be determined could be summarized as follows:

1. What constitutes an insurable interest? Is an insurable interest co-extensive with legal or equitable ownership of the subject matter of insurance?
2. Is it misrepresentation, and therefore a breach of the duty of utmost good faith, for the insurer to insure the property as its own, when that property is in fact owned by the shareholders of the insured?
3. Is an insurer who accepts and continues to accept premiums from the insured, while knowing that it is entitled to decline to insure the risk, or to repudiate a claim on account of breach of warranty or misrepresentation, estopped from pleading breach of warranty or misrepresentation?

The Holding

On Issue 1 above, the Supreme Court held that;

- (a) The insurable interest requirement does not necessarily require an insured to own the insured property outright. A less direct interest is enough. It may be enough that the insured is in possession of the property, or simply that it would suffer loss if the property were to be damaged.
- (b) The determination of insurable interest should depend on a careful reading of the contract of insurance in each case.
- (c) While authorities of apex courts in England will remain persuasive on courts in Zambia, authorities will not be applied without consideration of the circumstances in which they were decided.

On Issue 2, the Court held that;

- (a) Insurance contracts are contracts of utmost good faith. Each party to the contract should not only disclose all the relevant information truthfully, but should also refrain from misleading the other party to the contract.
- (b) Misrepresentation must be material and must lead to inducement.
- (c) A misrepresentation is material if, first, it influences the prudent insurer's decision to take up the risk, and second, if it influences the premium to be fixed for such risk. The test for materiality is an objective one made by reference to the attitude of a hypothetical prudent insurer.
- (d) A representation is influential if it weighs on the critical decision to insure or not to insure, and if to insure, on what terms. The insurer will only be entitled to avoid a policy if they can show that they were induced by the non-disclosure or misrepresentation by the insured, to enter into the contract.

On Issue 3, the Court held that the issue of estoppel did not arise, given the Court's finding that the Respondent was bound to honour the claim.

Significance

General

The Court is to be commended for deviating from the narrow interpretation of insurable interest under English law as espoused in *Macaura v. Northern*

*Assurance*¹ and *Luceana v. Craufurd*.² Instead the Court leaned in favour of authorities that follow the reasonable expectancy theory and broad interpretation of insurable interest. The Court's holding that the insured had an insurable interest, despite the fact that it had no legal title registered in its name, is sound.³

Since insurance companies and underwriters do, in some cases, seek to evade their legal obligations on the grounds of a lack of an insurable interest, it is the duty of the Court to lean in favour of an insurable interest, where possible. After insurance companies have accepted premiums, the objection that there was no insurable interest is often a technical objection and one which has no real merit.⁴

The above notwithstanding, the Court in its analysis of the *Feasey v. Sun Life Assurance Company* case, should have considered adopting Waller L.J.'s⁵ three-step test for the validity of a policy under the rules of insurable interest, which was laid down as:

- (a) What is the subject-matter of the policy?
- (b) What is the interest of the insured in the insured subject-matter?
- (c) Does the policy cover the assured's interest?

The adoption of the above test would have made future determination of matters dealing with insurable interest easier.

¹ (1925) A.C. 619

² (1802) 3 Bos & Pul. 75

³ An insurable interest can be said to exist if: the assured has legal or equitable title to the subject matter; or if the assured is in possession of the subject matter; or if the assured is not in possession of the subject matter but may be either responsible for, or suffer loss in the event of, any damage to the subject matter. *Glengate-KG Properties Limited v Norwich Union Fire Insurance Society Limited* (1999) 2 All E.R. 487 *Feasey v Sun Life Assurance Corporation of Canada* (2003) Lloyds Rep. I.R 637. Though in *Sharp v Sphere Drake Insurance* (1992) 2 Lloyd's Rep. 501, the court rejected the view that insurable interest had to be based upon the assured being the equitable or legal owner of the property in question, and held that an insurable interest in property might arise merely because the assured owed a duty to exercise reasonable care in respect of the property.

⁴ Brett M.R in *Stock v Inglis* (1884) 12 Q.B.D. 564, affirmed (1885) L.R. 10 App. Cas 263; *Feasey v Sun Life Assurance Co of Canada* (2003) Lloyd's Rep. I.R. 637

⁵ Lloyd's Rep. I.R. 637

The Time When an Insurable Interest Must Exist

The Court at pages J44 to J46, reviewed the policy document and arrived at the conclusion that the Appellant was within the contemplation of insurable interest under the definition of “property insured” in the policy document. The Court did not address in detail nor provide guidance on the time when an insurable interest must exist. However, inference from the decision shows that it must exist at the time of contract.

Different jurisdictions have taken different views on the timing question. The opinions from the majority of the American courts hold that insurance on property is valid when an insurable interest in the property exists at the time of the loss.⁶ The basis of this position is that if the loss only occurs to the insured with an insurable interest in the damaged property, then no loss can exist when the property lacks the prerequisite insurable interest at the time of the loss.⁷ Common law courts however, appear to have never reached consensus on whether the insurable interest must exist at the time of contract formation. In *Sadlers Co. v. Badcock*⁸ the court held that the insured must have an insurable interest in the property both at the time of contract formation and at the time of loss.⁹

In addition, the premium is recognized as an insurer’s consideration for assuming the insured’s risk in exchange for the insurer’s obligation to pay proceeds.¹⁰ The consideration may fail, however, if the insurer assumes no risk at the time the premiums are paid because, even though the insurer promises to insure against the risk of loss, the insured risk does not exist until the insured actually obtains insurable interest.¹¹ Given that the insurable interest is an essential element for the valuable consideration of an insured’s payment of premium, requiring its existence only at the time of

⁶ *Washington University Global Studies Law Review* Vol. 10 Issue 4 - 749

⁷ E.g., *Dairyland Ins. Co v. Hawkwin*, 292 F. Supp. 947, 951 (S.D. Iowa 1968) as cited in the *Washington University Global Studies Law Review* Vol. 10 749 (finding insurers could not deny coverage on grounds that insured, who was listed as owner, had no insurable interest because, even though the insured’s son-in-law possessed the car and the insured intended to transfer ownership to the son-in-law when insured received payment, a bona fide sale had not occurred at the time of loss).

⁸ 2 Atk. 544, 26 ER 733 (1743).

⁹ Robert Jerry II, *Understanding Insurance Law*; 43 (2nd ed. 1996)

¹⁰ *The Washington University Global Studies Law Review* Vol. 10 749

¹¹ *Ibid.*

loss materially therefore conflicts with the general principle of contract law.¹² In Germany for instance, the legislators there have endorsed the principle that the insurable interest must exist through the entire duration of the insurance contract. Article 80 of the German Insurance Contract Act for example provides that “the policyholder shall not be obligated to pay insurance premium if no insured interest exists when the insurance cover [age] commences.” The Zambian Insurance Act is silent on this issue, and the Court did not clearly address this in its judgment.

An insurable interest can be said to exist if: the assured has legal or equitable title to the subject matter; or if the insured is in possession of the subject matter; or if the insured is not in possession of the subject matter but may be either responsible for, or suffer loss in the event of, any damage to the subject matter. *Glengate-KG Properties Limited v Norwich Union Fire Insurance Society Limited* (1999) 2 All E.R. 487 *Feasey v Sun Life Assurance Corporation of Canada* (2003) Lloyds Rep. I.R 637. Though in *Sharp v Sphere Drake Insurance* (1992) 2 Lloyd’s Rep. 501, the Court rejected the view that insurable interest had to be based upon the insured being the equitable or legal owner of the property in question, and held that an insurable interest in property might arise merely because the assured owed a duty to exercise reasonable care in respect of the property.

Overall, the Court’s disposal of the issues was sound, and in accordance with long established principals of law. In developing their analysis, the Court provided a useful historical analysis of the concept of insurable interest, and undertook a cross jurisdictional comparison of how apex courts in other jurisdictions have, in recent times, dealt with the subject of insurable interest. The ambiguity on timing notwithstanding, the broader construction of the concept of insurable interest is a welcome development.

¹² Malcom Clarke, *Policies and Perceptions of Insurance Law in the Twenty-First Century* 36 (2007).

**DH Brothers Industries (PTY) Limited vs. Olivine Industries (PTY)
Limited (Appeal No. 74/2010) [2012] ZMSC 17**
Chanda N. Tembo

The Facts

The Respondent, Olivine Industries, applied to the Registrar of Trade Marks (The “Registrar”) for the registration of the mark ‘Daily’ under Class 3 of the Trade Marks Act.¹ The registration was with respect to “*its bleaching preparations and other substances for laundry use such as cleaning, polishing and abrasive preparations, soaps, perfumery, essential oils, cosmetics, hair lotion and dentifrices.*”² The Appellant, DH Brothers, opposed the Respondent’s application on the grounds that the Appellant was the true proprietor of the mark “Daily”. The Appellant also advanced the “prior use” argument, noting that it had been using the unregistered mark since 2003. Deciding in favour of the Respondent, the Registrar allowed the registration of the mark on the ground that the Appellant’s mark was not registered under the Act, and was therefore not entitled to protection under the Act. This was notwithstanding the fact that the Appellant demonstrated prior use of the mark ‘Daily’ for a similar class of goods.

Aggrieved by this decision, The Appellant appealed to the High Court. The High Court upheld the Registrar’s decision. The Appellant then appealed to the Supreme Court.

The Holding

The crux of the Registrar’s decision, as upheld by the High Court and by the Supreme Court, was that the Act does not offer protection to unregistered marks, and that consequently, the proprietor of an unregistered mark cannot prevent the registration of a similar or identical mark under the Trade Mark Act. An aggrieved proprietor of an unregistered mark can therefore not invoke Sections 16 and 17 of the Act.³ Section 16 pertains to the prohibition

¹ Cap 401 of the Laws of Zambia (The “Act”).

² Class 3, Classification of Goods, The Fourth Schedule to the Act

³ In this case the Supreme Court refused to accept the argument made by the Appellant that relied on an English case, *The Trade Marks Act, 1938 and Koyo Seiko Kabushiki Kaisha’s* in the Reports of Patent, Design and Trade Mark Cases, vol. LXXI No.19, London, 1954. In that case, it was held that a corresponding Section 11 of the United Kingdom Trade Marks Act (which was transplanted into the Zambia Trade Mark Act unchanged as Section 16) was available to proprietors of an unregistered mark, while section 12 under the 1938

of the registration of marks that are likely to deceive or confuse consumers or the general public in the course of trade,⁴ while Section 17 provides for the prohibition of the registration of marks with respect to any goods or the description of goods that are identical or closely resemble a mark already registered under the Act.⁵

Of central concern in this commentary is Section 7 of the Act, the section on which the courts based their decision. Section 7 provides that “no person shall be entitled to institute any proceedings to prevent or to recover damages for the infringement of an unregistered trade mark, but nothing in this Act shall be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof.”⁶

Significance: Key Unresolved Questions

Marks Capable of Registration

In considering the question of which marks are eligible for registration under the Act, the Supreme Court should have drawn its mind to the question of whether the mark “Daily”, a common English word of keen use, was registrable under the Act. Before delving into a more detailed consideration of this issue, it is important to consider what a mark is.⁷ The

Act (which corresponds with Section 17 of the Zambian Act) was only available to proprietors of registered marks. The Supreme Court in the case in *casu* on the contrary held the view that the whole Act was not available or applicable, unless as expressly provided, to unregistered marks. It must be noted that the Trade Mark Act of the United Kingdom of 1938 (available at http://www.legislation.gov.uk/ukpga/1938/22/pdfs/ukpga_19380022_en.pdf) was repealed and replaced in 1994 by the British Trade Marks Act of 1994 (available at http://www.wipo.int/wipolex/en/text.jsp?file_id=127270).

⁴ Section 16, of the Act; this is because trade marks as economic tools are conveyors of economic information regarding the quality or other attributes of goods or services being sold so as to facilitate purchase decisions in the course of trade. See B. G. Ramello, (2006) ‘What is in a Sign? Trademark Law and Economic Theory?’ *Journal of Economic Surveys* 20, 4, 547-565, 549; Deceiving or confusing consumers in the course of trade are therefore likely to prejudice the economic interests of the proprietor of the legitimate and registered mark.

⁵ *Ibid*, Section 17

⁶ Section 7, of the Act; See also Section 2(1) of the UK Trade Mark Act of 1994 and Section 27(1) and (2) of the Indian Trade Mark Act of 1999

⁷ A trade mark is defined as a mark, “*except in relation to certification marks, which is used or proposed to be used in relation to goods for purposes of*

Act establishes a Register of trade marks which is divided into four parts: Part A, Part B, Part C and Part D.⁸ A mark is capable of registration under any of these parts if it has some element of distinctiveness. In the context of trade mark law, ‘distinctiveness’ is the ability to distinguish and differentiate the goods and services of one business from competing businesses.⁹

The degrees of distinctiveness varies between the four parts, particularly between Part A and Part B. Section 15 of the Act requires that marks registerable under Part B of the Trademark Register:

must be capable, in relation to the goods in respect of which it is registered or proposed to be registered, of distinguishing goods with which the proprietor of the trade mark is or may be connected in the course of trade, from goods in the case of which no such connection subsists, either generally or, where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within the extent of the registration.¹⁰

This means that a mark’s ability to distinguish can increase with use over time. However, for trademarks registerable under Part A of the Act, the ability to distinguish is higher, because the Act requires that these marks must be inherently distinct or inherently capable of distinguishing goods of competing businesses. This means that the mark ‘Daily’, unless modified through fancy representation for instance, would not qualify for registration under Part A of the Register. It follows however that the mark ‘Daily,’

indicating for, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as a registered user to use the mark, whether with or without any indication of the identity of the person.” (Section 2 of the Act); marks which are defined as including a “*device, brand, heading, label, ticket, name, signature, word, letter, numerical or a combination thereof.*” (Section 2 of the Act)

⁸ Ibid, Section 6(2)

⁹ A. Taubman, *et al.*, (2012) *A Handbook on the WTO TRIPS Agreement*. Cambridge University Press, 57; Section 14(2) of the Act states that a trade mark is said to be distinctive if it is “*adapted in relation to goods in respect of which a trademark is registered or proposed to be registered, to distinguish goods with which the proprietor of the trademark is or may be connected in the course of trade ...*”

¹⁰ Ibid, Section, 15

being less distinctive, would most likely be eligible for registration under Part B of the Register.

The Availability for Registration of Common Words under the Trademarks Act

One of the key functions of a trademark is to minimise the cost of information in the course of trade.¹¹ By branding goods and services, trademarks act as communication tools. Common nouns and adjectives are generally said to be ‘inappropriable’ through trademark and therefore available for all businesses to use in the course of trade. If common words were permitted to be monopolised through appropriation in the course of trade, this would increase the cost of information for other businesses, who must in turn find alternative expressions through words or signs to identify goods and services. In the course of its decision, the Court should have applied its mind to the question of whether “Daily” was a common word, and if so, whether it was capable of registration.

Common words in trademark law are also known as generic words or marks. Something is said to be generic or common if it is “shared by, including or typical of a group of people.”¹² Common words are therefore unavailable for monopolisation since the words are available for all to use. From a legal standpoint, no one person or business has the right to appropriate a common or generic word and stop others from using that word in the course and scope of their business. The law however, does provide an exception. If a party wishes to register a common or generic mark, the Registrar will require the proprietor of the mark to enter a disclaimer notifying the public that the proprietor is aware that the proprietor has no exclusive right or monopoly over the common word, and thus has no right to restrict or prevent others in Zambia from utilising the generic word.¹³ In Zambia a good example of disclaimers applied to common words would relate to the common word ‘Manzi’ in the trade mark ‘ManziValley’ owned by Natural Valley Limited. ‘Manzi’ in some local Zambian languages literally means water. ‘Water’ or ‘Manzi’ are both common words that, unless adapted for instance through fanciful writing, are not available for absolute appropriation or monopolisation through trademarks.

¹¹ Ramello B.G. (2006) ‘What is in a Sign? Trademark Law and Economic Theory.’ *Journal of Economic Surveys* 20, 4, 547-565; 552

¹² *Oxford Advanced Learner’s Dictionary*. (2006) 620

¹³ See Sections 19, 36, and 39(1)(e) of the Act

Should Passing Off be Pleaded Specifically in an Opposition Action?

This case raised both substantive and procedural issues. Substantively, while the proper court of first instance was indeed the High Court, the action brought by the Appellant was defective because as stated above, Section 7 of the Act bars any action brought under the Act that relates to an unregistered mark. From a procedural perspective, the initial action was defective because the action was improperly brought before the courts. This is because passing off has to be pleaded as a common law tort and not under the Trade Marks Act.

In addition, there is unanimous precedent that states that where commencement of a civil matter is prescribed by law, commencement of proceedings must conform to the prescribing law.¹⁴ Thus, where a litigant departs from the prescription of law with regard to the mode of commencing an action, such commencement must be treated as defective. This means that passing off has to be specifically pleaded as a common law tort under a separate action against the infringing party in accordance with the High Court Rules. The court should have guided the Appellant to this effect.

Conclusion

All in all, the Court's decision might have been a more effective development of intellectual property law if it had considered the unresolved issues above.

¹⁴ *Newplast Industries V the Commissioner of Lands and the Attorney General.*

Milford Maambo and Others v The People
2016/CC/R001 [2017]
O'Brien Kaaba

The Facts

Three Applicants stood charged before the Livingstone Subordinate Court with twenty-five counts relating to corrupt practices under the *Zambian Anti-Corruption Act No. 3 of 2012*. When the matter came up for trial, the prosecutor presented a *nolle prosequi* to discontinue the criminal proceedings. The defence objected to the discontinuance of the proceedings in such a manner, arguing that the entry of the *nolle prosequi* did not meet the conditions set out in Article 180(4)(c) and (7) of the Constitution as amended, since no reasons were given to the Court for the discontinuation of proceedings. Consequently, the defence requested an interpretation of the impugned provisions by the Constitutional Court.

The issue for determination was whether the Director of Public Prosecutions (DPP) still has unfettered powers to discontinue criminal proceedings pursuant to Articles 180(4)(c) and (7) of the Constitution, since the amendment of the Constitution by the Constitution of Zambia (Amendment) Act No. 2 of 2016.

The Holding

By a majority of four to one (Munalula JC dissenting), the Constitutional Court held that once the DPP informs the Court of his intention to discontinue proceedings pursuant to Article 180(4)(c), the Court cannot object to that exercise of power nor can it ask the DPP to furnish it with reasons for the discontinuation. Therefore, the DPP has unfettered discretion to discontinue criminal proceedings.

Significance

The judgment is significant in that it is the first application of Article 128 (2): “where a question relating to this Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court.” That notwithstanding, the Constitutional Court’s decision is unsatisfactory for its defiance of the basic approaches in constitutional adjudication, and for its dearth in legal analysis, leaving one with the sense that a critical opportunity to expand constitutional law was lost.

In determining how to interpret the Constitution, the Constitutional Court claimed to be restating the principles applicable in constitutional

interpretation in Zambia as well as in other jurisdictions. According to the Court, the correct approach is the literal rule of interpretation, which literal interpretation should only be vacated when it leads to an absurdity. This approach is, however, problematic. Judges are required to justify their decisions. As constitutional scholar Robert Post argues, “judges must be able to explain why they have decided to interpret the Constitution through one set of inquiries rather than another.”¹ The reasons advanced by the Constitutional Court for choosing the literal rule have no merit and in fact, it is respectfully submitted, the use of the literal approach in constitutional adjudication is unconstitutional.

The Constitution was, save for the Bill of Rights, overhauled in the 2016 amendment. Article 1 of the Constitution declares the Constitution supreme. Therefore, any law or practice contradicting it is, to the extent of the inconsistency, invalid. Article 267(1) of the Constitution provides in mandatory terms how the Constitution shall be interpreted, stating that: This Constitution shall be interpreted in accordance with the Bill of Rights and in a manner that:-

- (a) Promotes its purpose, values and principles;
- (b) Permits the development of the law; and
- (c) Contributes to good governance.

Further, Article 8 of the Constitution provides for national values, which include democracy and constitutionalism, social justice, good governance and integrity. Article 9 makes it mandatory for a court to apply these values in interpreting the Constitution and other laws. It must be noted that these provisions were borrowed from the 2010 Kenyan Constitution, word for word. The significance of these provisions, as the then Kenyan Chief Justice Willy Mutunga stated, is that “the Constitution is complete with its mode of its interpretation.”² The Constitution being self-contained with tools for its interpretation, and these provisions being mandatory, there was no legal basis for the Constitutional Court’s reversion to the common law in order to circumvent the theory of interpretation required by the very Constitution. Surprisingly, the Constitutional Court seemed to be unaware of these

¹ Robert Post, (1990) “Theories of Constitutional Interpretation.” Yale Law Faculty Scholarship Series Paper 209.

² In the Matter of the Principles of Gender Representation in the National Assembly and Senate Advisory Opinion No. 2 of 2012.

provisions as nowhere in the majority judgment does the Court make reference to them. South African Constitutional Court Judge, Kentridge J, rightly stated that when a court ignores the language of the law giver, what results “is not interpretation but divination.”³

Articles 8, 9 and 267 of the Constitution, which provide for its construction are value laden, entailing that constitutional interpretation is teleological and not mechanical. It should be geared towards realization of those constitutional values, standards and collective aspirations of the people. Invariably, only a purposive interpretation is consistent with this standard the Constitution has set for its interpretation. Contrary to the assertion of the Constitutional Court that the literal rule is the approach to interpretation taken in many jurisdictions, the purposive approach is actually the standard in countries with written constitutions.⁴ Former Judge of the South African Constitutional Court Mahomed J, considers a purposive and generous interpretation of the Constitution as an “international culture of constitutional jurisprudence.”⁵ This, as stated in a Namibian case, is the standard way of interpreting the constitution:

A constitution is an organic document. Although it is enacted in the form of a statute it is *sui generis*. It must be broadly, liberally and purposively interpreted so as to avoid the austerity of tabulated legislation and so as to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and disciplining its government.⁶

³ Zuma and Two Others v The State, Case No. CCT/5/94.

⁴ See the following case examples: Affordable Medicines Trust and Others v The Minister of Health of the Republic of South Africa and Another, Case No. CCT/27/03; In the Matter of the Principle of Gender Representation in the National Assembly and Senate Advisory Opinion No. 2 of 2012; Democratic Alliance v Speaker of the National Assembly and Others (2016) ZACC 8; Economic Freedom Fighters v Speakers of the National Assembly and Others (2016) ZACC 11; State v Makwanyane and Mchunu, Case No. CCT/3/94; Mhlungu and Four Others v State, Case No. CCT/25/94; Republic of Namibia and Another v Cultura 2000 and Another 1994 (1) SA 407; Zuma and two others v The State, Case No. CCT/5/94.

⁵ Mhlungu and Four Others v State, Case No. CCT/25/94.

⁶ Government of the Republic of Namibia and Another v Cultura 2000 and Another 1994(1) SA 407.

In holding that the DPP enjoys absolute discretion in discontinuing criminal proceedings, the Court also relied on the legislative history of the provision. It noted that the first draft Constitution of 2012 had provisions that trammelled the discretion of the DPP, but that these provisions were removed in the final draft, and therefore, the framers of the Constitution never intended the DPP's discretion to be constrained. Again, this approach is by itself, an impoverished approach to the determination of a constitutional matter. While understanding the decisions and choice of words used by framers of the Constitution is important in order to understand the larger context and meaning of specific words, that in itself should not be determinative of a constitutional issue. This is because, logically, the Constitution is not the product of the few individuals who framed it, but is, in the words of Mahomed AJ, "a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people."⁷ A constitution, therefore, should not be interpreted simply to reflect its drafting history but to reflect the collective values and ideals of the people. Interpretation should be forward and not backwards looking. Chaskalson P, the former President of the South African Constitutional Court, once stated that a constitution should be interpreted as the product of a "multiplicity of persons" and therefore "caution is called for in respect of the comments of individual actors in the process, no matter how prominent a role they might have played."⁸ The views of the Technical Committee that drafted the 2016 Constitution should, therefore, not have been determinative of the outcome of the Court's decision.

Taking a literal approach, the Court considered Article 180(4) (c) as giving the DPP unfettered discretion to discontinue criminal proceedings at any stage before judgment is delivered. In light of this approach, the Court has no oversight role to play in the manner in which the DPP exercises his/her discretion. In the view of the majority, this position is consistent with Article 180(7) which states that the DPP shall not be subject to the direction or control of a person or an authority in the discharge of his/her office.

However, a careful reading of the Constitution shows no merit in this position. First, Article 180(7) has a qualification to the effect that in the discharge of his/her duty, the DPP "shall have regard to the public interest, administration of justice, the integrity of the judicial system and the need to avoid abuse of the legal process." It is obvious that this qualification is a fetter

⁷ The State v Achesou 1991(2) SA 805 (NM).

⁸ The State v Makwanyane and Mchunu, Case No. CCT/3/94, para 18.

on the manner in which the DPP exercises discretion. If he/she contravenes these standards, he/she would be acting unconstitutionally. But not so for the Constitutional Court. The Constitutional Court simply considered this qualification as a mere guide to the Director of Public Prosecutions “in the performance of the functions of that office.” The Court, however, gave no reasons for making that conclusion. The decision of the Constitutional Court is further contradicted by Article 267(4) which clearly states:

A provision of this Constitution to the effect that a person, an authority or institution is not subject to the direction or control of a person or authority in the performance of a function, does not preclude a Court from exercising jurisdiction in relation to a question as to whether that person, authority or institution has performed the function in accordance with this Constitution or other laws.

The net effect of Article 267(4) is that as long as the DPP derives his/her authority from the Constitution, the manner in which he/she exercises that power cannot escape the scrutiny of the Court as the guardian of the Constitution and the rule of law. The exercise of any power that issues under the Constitution is subject to constitutional control and judicial oversight. This is the standard approach in a constitutional democracy. Power is never arbitrary. As the South African Constitutional Court stated, where power derives from the constitution, its exercise must be “rationally related to the purpose for which power was given.”⁹

Recent jurisprudence from the South African Supreme Court of Appeal is squarely in line with this view. On the powers of the DPP, the South African Constitution has comparable provisions to the Zambian Constitution. The South African National Prosecution Authority had, in 2009, dropped charges against President Zuma, and it was argued by the prosecution that this was within its discretion. The court rejected this argument.

Finally, back to basics. The majority of the Constitutional Court held that the DPP has unfettered discretion to discontinue proceedings at any stage before judgment is delivered. But is “unfettered discretion” tenable in law? What exactly is discretion? Ronald Dworkin, addressed the concept of

⁹ *Affordable Medicines Trust and Others v The Minister of Health of the Republic of South Africa and Another*, Case CCT/27/04.

discretion in his theory of adjudication.¹⁰ The word discretion is appropriately used in one context only, that is, when a person is in general charged with making decisions which are subject to standards set by a particular authority. As Dworkin states, “discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.” Discretion therefore, at least in law, is always relative to the power under which it is given. Otherwise it does not exist. According to Dworkin, it is always legitimate to ask: “discretion under which standards?” or, “discretion as to which authority?” If, therefore, someone can do as they please, that is not discretion. It is simply lawlessness.

¹⁰ Ronald Dworkin, *Taking Rights Seriously* (London: Gerald Duckworth and Co, 1986) 14-34.