

# Attorney General v Mutuna and Others (Appeal No. 088/2012) [2013] ZMSC 38

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**Attorney General v Mutuna and Others**  
**(Appeal No. 088/2012) [2013] ZMSC 38**<sup>1</sup>  
*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

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<sup>1</sup> 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.