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Law Association of Zambia and Chapter One Foundation Limited v Attorney General 2019/CCZ/0013/0014

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Facts

The Constitutional Court of Zambia on 29th November 2019 rendered its highly anticipated (abridged) judgment in the case of *Law Association of Zambia and Chapter One Foundation Limited v Attorney General 2019/CCZ/0013/0014*. In June 2019 the Minister of Justice introduced into the National Assembly the Constitution of Zambia (Amendment) Bill No. 10 (generally referred to as Bill 10) intended to extensively amend the Constitution. The Bill had been criticized by many stakeholders as it is seen as an attempt to enhance executive powers and undermine constitutionalism. In August 2019, the Law Association of Zambia and Chapter One Foundation Limited commenced action in the Constitutional Court challenging the constitutionality of the Bill. The petitioners argued that the manner in which the Bill sought to introduce amendments violated fundamental tenets that protect the substance and integrity of the Constitution. It is important to bear in mind that the petitioners did not challenge the power of Parliament to amend the Constitution, at least not directly. The focus of the petition was on constitutional safeguards for ensuring that arbitrary amendment of the Constitution was forestalled.

Holding

The Constitutional Court dismissed the petition. It arrived at its conclusion mainly on the basis of Article 128(3) of the Constitution, which states:

> Subject to Article 28, a person who alleges that— (a) an Act of Parliament or statutory instrument; (b) an action, measure or decision taken under law; or (c) an act, omission, measure or decision by a person or an authority; contravenes this Constitution, may petition the Constitutional Court for redress.

[1] An earlier version of this article was published as an opinion article in the *News Diggers* and *Mast* newspapers in December 2019

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Based on this provision, the Constitutional Court held that it lacked jurisdiction to review Bills as it only had jurisdiction to review Acts of Parliament. The Court reasoned that the provision only refers to Acts and not Bills. The Constitutional Court further indicated that its position was also based on the drafting history of the Constitution in the country, whereby the express provision clothing the court with jurisdiction to review Bills was deleted from the draft Constitution and never made it into law.

Significance

Albie Sachs, the celebrated retired judge of the South African Constitutional Court, while delivering a lecture, once asserted that every judgment he wrote was a lie. By this, he meant that the formality of every judgment masks the underlying considerations that birthed it; that is, the final format of the judgment belies the manner in which it has been given life. There is a manner in which his claim could also be true, in that every judgment has underlying reasons but the reasons may not be convincing or compelling. A judgment that is thinly reasoned or justified does not do justice to the plenitude of law and is difficult to appreciate. The moral force of a judgment is reason. Justice Professor Otieno-Odeke of the Kenyan Supreme Court has argued that a judgment is of value on the strength of the articulation of reasons: "reason is the soul and spirit of a good judgment."[4] We argue in this opinion that both the interpretive approach taken by the court and the determination of the merits of the case are incorrect as the reasons given by the court for the decision cannot withstand critical scrutiny. But before commenting on these two issues, we would like, in passing, to comment on the depth of the judgment.

In terms of depth, the abridged judgment generally mirrors the style of other Constitutional Court judgments. As a nascent Court, the Constitutional Court ought in its judgments, to dedicate more space to the articulation of constitutional principles, giving flesh to the bare bones of the Constitution and clearing a path for internalization of constitutional norms. The Court can only demonstrate this through the depth of the analysis of issues and articulation of the law and unabashedly demonstrating enduring commitment to constitutionalism. Sadly, this does not reflect in the judgments of the Constitutional Court. An average judgment by the Constitutional Court is largely about recounting the facts and arguments or submissions of the

[4] Justice Professor Otieno-Odek, 'Election Technology Law and The Concept of "Did the Irregularity Affectthe Result of the Election?"'< https://www.judiciary.go.ke/wp-content/uploads/2017/12/LIST-OF-AUTHORITIES-DR.EKURU-AUKOT.pdf > Accessed 19 December 2019

parties and only a small part of the judgment is dedicated to rationalization, which unfortunately also often tends to merely recast the submissions of the parties and not an independent analysis and ploughing of a path leading to a clearly justified outcome based on the articulation of constitutional norms and principles. The current abridged judgement, for example, is 17 pages long. Of the 17 pages, the first 11 pages are simply rehashing the facts and arguments of the parties. From page 11 to 16 the judgment simply recasts the positions of the parties and does not embark on an independent critical analysis of issues presented. Pages 16 and 17 simply state the final decision of the court and the denial of the remedies. There is nothing more. The judgment, therefore, lacks depth and critical analysis.

It may be argued that this is merely an abridged judgment. But the same pattern is replicated in several other decisions of the Court. For example, in a ruling in this same matter rendered by the Constitutional Court on 31 October 2019, in which the petitioners sought an injunction, the ruling dedicates the first 17 pages to restating the facts and arguments of the parties, and only the next eight pages to analysis of the issues (which predominantly is recasting rather than analysis). It is in the analysis and rationalization that the value of a judgment lies. The Bill 10 judgment is written in a manner Kenyan constitutional law scholar, Wachira Maina, aptly described as very important "but the parts that are detailed are not important and those that are important are not detailed."[5] A comparison in this respect can be drawn with some well-reasoned judgments of the Supreme Court of Zambia. In the case of *Nyimba Investments Limited v Nico Insurance Zambia Limited,*[6] the Supreme Court traverses the globe, undertaking a comparative and detailed analysis of key case law and literature in the subject matter before settling to an informed decision (in a judgment of 57 pages, 34 pages are dedicated to critical analysis). One may not agree with the conclusion the court reached, but be bound to respect it owing to the court's ingenuity of literally going to the ends of the earth to justify it.

Moving to the issue of constitutional interpretation, it is important to note that the Constitutional Court based its decision on the fact that the initial draft Constitution leading to the 2016 amendment, had an express clause that provided for review of Bills, but that this was removed in the final version of the draft Constitution on the ground that a Bill was not yet law.

[5] Wachira Maina, 'Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment Fails the Legal Test' < https://www.theeastafrican.co.ke/oped/comment/Five-reasons-Kenya-Supreme-Court-failed-poll-petition-test/434750-1753646-5dfpys/index.htm > Accessed 19 December 2019

[6] Selected Judgment No. 12 of 2017

This interpretive approach, as can be seen, simply confines the text of the Constitution to its drafting history. We argue that as a living document, the drafting history of the Constitution or its particular clauses cannot be exhaustive of its interpretation.

This is because the question of how the Constitution should be interpreted is inextricably interwoven with what it is. As Karl Klare has argued, "what a constitution means can never be entirely separated from what one hopes and aspires for it to mean."[7] The Constitution is considered to be organic, that is, it is the living representation of the people's values, hopes and aspirations. Its purpose is to transform society on the basis of collective values it articulates. It is for this reason that the Constitution is considered a living document. To this effect, the Indian Supreme Court in *Navtej Singh Johah and Others v Union of India and Others* has stated that: "…the Constitution is a living, integrated organism having a soul and consciousness of its own and its pulse beats, emanating from the spinal cord of its basic framework, can be felt all over its body, even in the extremities of its limbs."[8] This is also consistent with the classic description of a Constitution by Sidney Low, who in 1904 wrote: "we are not concerned with a solid building to which a room may be added here, or a wing there, but with a living organism in a condition of perpetual growth and change."[9] The implication of this is that the meaning of constitutional provisions cannot be confined to the drafting history. The Constitution should be interpreted in a teleological and forward-looking manner rather than backwards, as did the Constitutional Court. To tie the Constitution to the drafting history is to arrest its growth, turning it into a relic of history and a dead letter. We believe this 'living' interpretation of the Constitution is the interpretive approach provided for, in the Constitution under Article 267, which enjoins the judiciary to construe the Constitution purposively.

This, for example, was the approach the Malawian Constitutional Court took in the 2020 judgment that nullified the presidential election, stating:

> The Court bears in mind that the Constitution is a living document. It does not look at the context as a snapshot of history frozen in time. It envisages that the values that

[7] Karl Klare, 'Legal Culture and Constitutionalism' (1998) 14 *South African Journal on Human Rights*, 146-188
[8] Writ Petition (Criminal) No. 76 of 2016 (2019)
[9] Cited in Geoffrey Marshall and Graeme c Moodie, *Some Problems of the Constitution* (Hutchinson and Co Limited 1968) 18

> underlie our society as an open and democratic one reflect an ongoing societal process, a moving picture which continues into and beyond the present.[10]

Perhaps an excellent example of that approach is the decision of the South African Constitutional Court in the case of *State v Makwanyane and Mchunu.*[11] The drafters of the South African Constitution failed to reach consensus on the death penalty and, therefore, the Constitution included no express provision proscribing the death penalty, although the death penalty was still reflected in subordinate legislation. The Constitutional Court in this case declared the death penalty unconstitutional, largely on the basis of the value of human dignity enshrined in the constitution, notwithstanding the views of the drafters of the Constitution.

Similarly, the Bill 10 petition called the Court to make a determination, on the basis of the values and principles enshrined in the Constitution. The Constitutional Court, however, opted to take the easy way out by simply reverting to the drafting history and settling there. It goes without saying that such an approach compares unfavourably with jurisprudence from progressive constitutional courts across the globe. If American Courts, for example, had taken this approach to constitutional interpretation, slavery may not have been outlawed as some of the drafters of the American Constitution actually owned slaves.

In terms of substance, the Constitutional Court dismissed the petition on account that it lacked jurisdiction. The Court came to this conclusion on the basis of Article 128(3) of the Constitution, which states: "Subject to Article 28, a person who alleges that— (a) an Act of Parliament or statutory instrument; (b) an action, measure or decision taken under law; or (c) an act, omission, measure or decision by a person or an authority; contravenes this Constitution, may petition the Constitutional Court for redress." The Constitutional Court, on the basis of this provision, held that it is only clothed with jurisdiction to review Acts of Parliament and not Bills as the provision does not expressly mention Bills. The Court felt buttressed by the drafting history of the Constitution whereby the express provision clothing the court with jurisdiction to review Bills was deleted in the draft Constitution and never made it into law.

[10] Saulos Chilima and Lazarus Chakwera v Arthur Mutharika and Others Constitutional Reference No.1 of 2019
[11] Case No. CCT/3/94

It is not clear why the Constitutional Court chose to resolve the petition under this limb of Article 128, considering that the article has multiple limbs. Article 128(1), for example, clothes the Court with original and final jurisdiction to interpret the Constitution. It is important to acknowledge that the petitioners did not argue that Parliament had no power to amend the Constitution. The contention was that the manner it was being done was in violation of several express and implied constitutional values and principles that bind both the executive and the legislature. The Constitutional Court did not address this in the judgment. Comparative literature and case law indicate that when the Constitution imposes obligations on organs of the state and the concerned organs do not perform their role in line with the stated obligations, the Courts have a duty to intervene to enforce the constitutional obligations. The South African Constitutional Court in the case of *Doctors for Life International v The Speaker of the National Assembly and Others,*[12] for example, held that once a question is raised about the manner in which the legislature exercises its power, that triggers the Court's interpretive role as it is vested with power to interpret the Constitution. We submit that there is nothing in the Constitution prohibiting the Court to have entertained the petition under Article 128(1), triggering into effect its role as interpreter of the Constitution. This is a general and more extensive power than that contained under article 128(3) under which the Court chose to dispose of the matter.

The case of *Doctors for Life International v The Speaker of the National Assembly and Others,*[13] is also instructive on how the Constitutional Court could have adjudicated the matter. In this matter, the Court had to determine if it had power to nullify a Bill which had not yet become law and also, assuming the Court had no such power, if it could provide declaratory relief where the legislature disregarded constitutional obligations in drafting a Bill, although not yet law. With regard to the first issue, the Court held that it is more appropriate to review an Act of Parliament and not a Bill in order to respect the principle of separation of powers and to avoid prescribing to Parliament how it should perform its role. However, with regard to how Parliament exercised that power in the legislative process, the Court took the view that the Constitution binds all entities and organs of the state. Therefore, if the legislature or executive, in the legislative process, violated constitutional norms, the Court could intervene to enforce constitutional obligations. The Court categorically held:

[12] Case CCT 12/05 (2006)
[13] Ibid

> But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament must act in accordance with, and within the limits of, the Constitution, and the supremacy of the Constitution requires that the obligations imposed by it must be fulfilled. Courts are required by the Constitution to ensure that all branches of government act within the law and fulfil their constitutional obligations. This Court has been given the responsibility of being the ultimate guardian of the Constitution and its values.[14]

However, in the Zambian context, there are provisions of the Constitution that suggest that the Court can intervene with the legislative process if what is intended could lead to the violation of basic norms of the Constitution. Article 2 of the Constitution, for example, empowers every citizen to prevent violation of the Constitution. It states: "Every person has the right and duty to— (a) defend this Constitution; and (b) resist or prevent a person from overthrowing, suspending or illegally abrogating this Constitution." The use of the word "prevent" under Article 2(b) suggests that one does not have to wait until the action is completed (in this case the enactment of a Bill into law). Otherwise what would a citizen be preventing if the impugned act has been accomplished? Surely the duty to prevent the abrogation of the Constitution includes the possibility of approaching the Constitutional Court for redress before the Constitution is abrogated as to prevent implies action taken before the impugned act is accomplished. The decision by the Constitutional Court means that an opportunity to articulate and cloth such provisions with flesh and give them meaning in a concrete situation, was completely squandered.

Finally, we believe that the judgment of the Constitutional Court has ruinous consequences for constitutionalism and rule of law. The decision mirrors old executive-minded jurisprudence such as the case of *Nkumbula v Attorney General*[15] where the judiciary abdicated its mandate to defend constitutionalism, effectively handing unchecked power to the state to rewrite the Constitution capriciously, resulting into the one-party state. The *Nkumbula* case, of which the Constitutional Court seems to approve, assuming in the unlikely event that it was correctly decided, could still be distinguishable from the present one on many fronts. Chiefly, the

[14] Ibid
[15] (1972) ZR 204

Constitutional norms were different at the time and there was no specialised Constitutional Court to competently and robustly interpret the provisions of the Constitution. In a book published in 2020, Supreme Court judge, Mumba Malila, laments about such jurisprudence and expresses hope that "in present times similar cases would be decided with completely different considerations in mind."[16] That hope has been dashed in this case.

The decision to let government proceed with the process of amending the Constitution, disregarding binding constitutional obligations has a deleterious effect on the rule of law and constitutionalism as it sends a clear message to the ruling elite that they may get away with anything. As Justice Albie Sachs stated: "once you open the door to diminishing respect for the rule of law, you close the door to the rule of law."[17] The same view is graphically and eloquently stated by Justice Brandeis of the US Supreme Court in *Olmstead et al v United States:* '[i]n a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously…Government is the potent, omnipotent teacher. For good or for ill, it teaches the whole people by its example…If the Government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.' [18]

[16] Mumba Malila, *The Contours of a Developing Jurisprudence of the Zambian Supreme Court: Reflections On My First Five Years as Judge 2014-2019* (Mumba Malila 2019) 87
[17] Albie Sachs, The Strange Alchemy of Life and Law (Oxford University Press 2009) 80
[18] 277 US 438 (1928)