

The Vicissitudes of Constitutional Interpretation in Zambia

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Abstract

The Constitution of Zambia (Amendment) Act 2 of 2016, provides for, inter alia, the establishment of a Constitutional Court with original and final jurisdiction in constitutional litigation. Simply put, this means that the Court is a court of first instance and of last resort in Constitutional matters. There can be no appeal from its decisions. However, within months of the Court's creation, it was embroiled in controversy in respect of the presidential election petition of 2016, resulting in the court being severely criticised as being incompetent and corrupt and in perpetrating a monstrous miscarriage of justice. This article interrogates two of the Court's most controversial decisions and draws on the rich experience in respect of constitutional interpretation in comparable jurisdictions. The main thrust of this article is that courts should be impartial and should uphold the solemn oath of dispensing justice to all in a manner that protects and promotes the values and principles embedded in the Constitution. Given the huge disappointment with the Court's performance to date, a lot remains to be done in restoring the confidence of the citizenry in the courts as bulwarks or sentinels of individual liberties.

Keywords

accountable; constitutional democracy; constitutionalism; *nolle prosequi*; vicissitudes

1. Introduction

Zambia is a constitutional democracy with a written constitution. The Constitution is the supreme law of the country. Any other written law, customary law and customary practice inconsistent with the Constitution is invalid.¹ The Constitution also enshrines a Bill of Rights² and a set of national values and principles, namely morality and ethics; patriotism and national unity; democracy and constitutionalism; human dignity equity, social justice, equality and non-discrimination; good governance and integrity; as well as sustainable development.³ This normative value system is to be observed in

1 Article 1(1) of the Constitution of Zambia (Amendment) Act 2 of 2016.

2 The Bill of Rights is enshrined in Part III of the Constitution of Zambia, 1991, as amended. It was not affected by the 1996 and 2016 constitutional amendments.

3 The constitutional values and principles are enacted in Article 8 of the Constitution.

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interpreting the Constitution; enactment and interpretation of the law and development and implementation of state policy.⁴ Moreover, the Constitution imposes an interpretive injunction in Article 267(1) as follows:

This Constitution shall be interpreted in accordance with the Bill of Rights and in a manner that:

- (a) promotes its purposes, values and principles;
- (b) permits the development of the law; and
- (c) contributes to good governance.

This constitutional imperative was at the heart of litigation in the cases of *Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others*⁵ and *Milford Maambo and Others v The People*.⁶ In these cases, the Constitutional Court of Zambia has had opportunities to quieten doubts and make definitive pronouncements on the question of interpreting constitutional provisions involving the Bill of Rights.⁷ Regrettably, in both cases, the Court lamentably failed to live up to expectations.

Before plunging into a discussion of these two decisions, it is instructive to note that there is a long list of authorities laid down by the Supreme Court of Zambia, the highest court in the country before the establishment of the Constitutional Court in 2016, with respect to statutory interpretation. The approach of the Supreme Court has been that where words of a statute are in themselves precise and unambiguous, then no more can be necessary than to expound these words in their natural and ordinary sense. However, when a strict interpretation of a statute gives rise to an absurdity and an unjust situation, the judges can and should use their good sense to remedy it by reading words in it, if necessary, so as to do what parliament would have done had they had the situation in mind.⁸

These two well-known approaches to statutory interpretation, namely the literal and golden rules, were neatly summarised in the case of the *General Nursing Council of Zambia v Ing'utu Milambo Mbangweta* in these words: 'The primary rule of construction or interpretation of statutes is that enactments must be construed according to the plain and ordinary meaning of the words used, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to the declared or implied intention of the framers of the law, in which case the grammatical sense of the words may be extended or modified.'⁹

4 See Article 9 of the Constitution, 2016.

5 2016/CC/0031.

6 2016/CC/R001.

7 Davis D 'The role of Constitutional interpretation' in *Rights and Constitutionalism: The New South African Legal Order* (1996) edited by Van Wyk D, Dugard J, de Villiers B and Davis D. Clarendon Press, Virginia; Tribe, L 'Taking Text and Structure seriously: Reflections on free from method in constitutional interpretation' (1995) (108) *Harvard Law Review* 1223.

8 *The Minister of Information and Broadcasting Services and Attorney- General v Fanwell Chembo and Others*, Selected Judgments of Zambia, No 11 of 2007 and *Matilda Mutale v Emmanuel Munaile*, Selected Judgments of Zambia, No-14 of 2007.

9 (2008) Z R 105 (SC). Cf Scott, LJ in *Croxford and Others v Universal automobile Insurance Co and Others*, (1936)2 K b 253, 281; *Lord Watson in Salomon v Salomon & Co Ltd*, 1897 AC 22.

In so far as interpreting constitutional provisions is concerned, the Constitutional Court, in the earlier case of *Noel Siamondo and Others v The Electoral Commission of Zambia and Another*,¹⁰ purporting to rely on the Supreme Court authorities cited above and those of the English Courts, appeared to conflate the approaches to interpreting ordinary Acts of Parliament with that demanded in cases of constitutional interpretation by holding that

... the provisions of the Constitution must be construed according to the plain and ordinary meaning of the words and they must be in consonance with other related provisions in the Constitution when read as a whole. It is only when the plain or literal meaning is not clear that the purposive approach should be used.¹¹

While these common law rules are well established, it is argued below that when a court is called upon to interpret the meaning of a provision in a written constitution, moreover one affecting the Bill of Rights of subjects, the court ought to proceed from the fundamental premise that the Constitution is a sacred document with a soul of its own to be read as whole and bearing in mind the purpose and the values underpinning such a constitution.¹²

It is against this background that the cases of *Hakainde Hichilema* and *Milford Milambo* will now fall to be discussed. In *Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others*,¹³ the Court was called upon to hear an election petition brought by the losing candidate in the presidential elections held on 11 August 2016.¹⁴

Under the Constitution of Zambia 2016, that petition was supposed to be heard within a period of 14 days. A divided court (3-2) decided to dismiss the petition for want of prosecution upon the expiry of the 14-day period without hearing the merits of the petition. It is argued herein that by construing the 14-day period in its ordinary meaning, the majority of the Court carried out a monstrous miscarriage of justice for, as will be shown below, a constitution is not an ordinary piece of legislation.

As a supreme law of the land, it is a sacred document or covenant which binds all people and holds the government accountable. It is *sui generis*. Its provisions cannot be read in isolation. It calls for interpretation of its own, suitable to its character, it calls for a generous, contextual interpretation in order to give to individuals the full measure of the fundamental rights protected by the Constitution and so that it plays a creative and dynamic role in the expression and the achievement of the ideas and aspirations of the nation.¹⁵

10 2016/CC/0009.

11 *Noel Siamondo and Others v Electoral Commission of Zambia and Another*, 2016/CC/0009 27.

12 *S v Makwanyane and Another*, 1995 (3) SA 391 (CC).

13 *Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others*, 2016/CC/0031.

14 *Hichilema and Another v Lungu and Others*, (2016/CC/0031).

15 Per Mahomed J, as he then was, in the Matter between the *Government of Namibia and Another v Cultura 2000 and Another*, 1994 (1) SA 407 (NMSC). See also *Mwadingi V Minister of Defence*, 1992 (2) SA 355, NMSC 361, 362

In the second case of *Milford Maambo and Others v The People*,¹⁶ the question was whether the Director of Public Prosecutions (DPP) was obliged to furnish reasons before entering a *nolle prosequi* to discontinue the criminal proceedings. As in the first case, the majority of the Court adopted the literal and ordinary meaning of the words used in the statute, and in the process, missed a golden opportunity to settle the law. It will be argued throughout this article that construing a constitution calls for a nuanced, contextual and purposive approach, for as Lord Diplock reminded us many years ago:

A Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.¹⁷

2. Presidential petition misconstrued

In the case of *Hakaïnde Hichilema and Another v Edgar Chagwa Lungu and Others* that dealt with the validity of the first defendant's election as President, the Constitutional Court was called upon to interpret the meaning of Article 101(5) read together with Article 103(2) of the Constitution. Article 101(5) is deceptively clear and straightforward:

The Constitutional Court shall hear an election petition filed in accordance with clause (4) within fourteen days of the petition.¹⁸

The facts of the case were not difficult. Hakaïnde Hichilema and his running mate sought to challenge the outcome of the presidential election aforesaid. The petition was filed on 19 August 2016, and in terms of the rules governing the computation of time, the petition should have been heard from 20 August to 2 September 2016.¹⁹ Crucially, the drafters of the Constitution omitted the words 'determine' in that Article.²⁰ Further, the Court never got a chance to 'hear' the petition on its merits. Instead, an ordinate amount of time was wasted on interlocutory applications with the result that on the penultimate day of the hearing, that is 1 September 2016, a single judge informed the parties that the hearing would commence and conclude on 2 September 2016, being the last day of the hearing. On 2 September 2016, the Court again did not hear the merits of the petition but continued to entertain motions from the petitioners' counsel until late in the evening, with only four hours left of the nine set aside for the hearing. At that juncture, each side had two hours left within which to present their cases. At that time, the petitioners' lawyers sought leave

16 2016/CC/R000 selected judgment No 31 of 2017.

17 *AG of Gambia v Jobe* [1984] A.C 689 700.

18 Article 101(5) should be read in conjunction with Article 101(6) which reads as follows: 'The Constitutional Court may, after hearing an election petition
(a) declare the election of the president elect as valid;
(b) nullify the election of the president elect and Vice President; or
(c) disqualify the presidential candidate from being a candidate in the second ballot.' See Articles 103(2) and (3).'

19 Article 269(a) of the Constitution on the computation of time provides that the time begins to run on the day following the doing of action and in that petition, the 14 days began to run on 20 August 2016. See also Constitutional Court Rules, 2016.

20 Ndulo, M 'The judicial crisis in Zambia: And A Flawed Election' 2016 Unpublished Memo. See further M Ndulo in *SAIPAR Case Review* (2017) 1(1).

of the Court to withdraw from representing their clients, citing time constraints. Leave was granted with the result that the petitioners, now representing themselves in person, sought an adjournment to engage new counsel. Although their application was opposed by counsel for the respondents, the Court granted the application and set Monday, 5 September to Thursday, 8 September 2016 as the days for continued trial.

However, before the proceedings of that day were adjourned, the Attorney General submitted that, in terms of Article 101(5) of the Constitution, the time limited for the hearing of the petition was 14 days from the date of filing of the petition and that once the prescribed period had lapsed, the Court would not have jurisdiction to hear the petition and that any further proceedings that would be entertained by the Court would be nullity. The Court did not address that submission on that day.

The heightened sense of anticipation over the weekend of 3-5 September 2016 evoked the immortal words of Sir Winston Churchill at the height of the battle of London before the British Parliament on 20 August 1940 to wit: '[N]ever in the field of human conflict was so much owed by so many to so few.' However, the fervent hopes of millions of Zambians were dashed when the Court, acting *ex mero motu*, decided to discontinue the hearing on technicality.

When the Court reconvened on 5 September 2016 as earlier agreed by the full bench of five judges, three of the judges (Justices Sitali, Mulenga and Mulonda) decided to revert to the learned Attorney General's submissions, claiming that it was trite that whenever the jurisdiction of the Court to hear a matter was raised, that issue had to be addressed and determined before hearing the matter on its merits. The question that Justice Sitali, for the majority, raised was whether the Court had jurisdiction to hear the petition after the expiry of the 14 days prescribed by the Constitution. The Constitution is silent on that issue. Sitali J opined that Article 101(5), quoted earlier in this article was 'clear and unambiguous'. It is couched in mandatory terms thus giving the Court no discretion to enlarge the time for hearing the Petition.

In interpreting the provisions of Article 101(5) of the Constitution, the words used by the legislature should be given their ordinary meaning and only if the ordinary meaning results in an absurd meaning should the purposive interpretation be resorted to. In the present case, no absurdity results from the interpretation of the provision in its ordinary sense.²¹ The learned Judge went on to observe that where the time for hearing the petition was limited by the Constitution, the Court was bound to enforce that time limit and then went on to hold that if the petition were to be heard outside the 14-days period, the proceedings would be nullified, and that there would be no benefit to any party in breaching the constitutional provision of the 14-days period set aside for the hearing, apart from wastage of money and other resources.²²

In the premises, by upholding the literal meaning of 14 days, the majority rejected the purposive approach to the interpretation of the Constitution. The majority went on to point out that since their hands were tied, its earlier order granted on 2 September 2016 giving the parties more time to present their cases from 5-8 September 2016 was untenable.

21 See the majority opinion, 6.

22 Per Sitali J writing for the majority with Mulenga and Mulonda JJ's concurring.

As indicated in the discussion below, this judicial somersault by the three Justices without the benefit of counsel's argument is one of the most disturbing aspects of this judgment. Furthermore, it is apparent that, in computing the prescribed time within which to hear the petition, the majority ignored the provisions of Article 269 of the Constitution, 2016, and of Order XV (6) of the Constitutional Court Rules, 2016, by not excluding weekends and public holidays in the computation of time.²³ Even more serious, this literalist approach to constitutional interpretation is not supported by the weight of authority, for as Schutz JA cogently observed in the South African case of *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism*,²⁴ the literal meaning of an Act (in the sense of strict literalism) is not always the true one.²⁵ This is more so in the case of a written constitution. As Chief Justice Marshall aptly observed: '[W]e must never forget that it is a constitution we are expounding ... intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.'²⁶

In the same vein, Lord Wright has succinctly observed that,

It is true that a constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of words change, but the changing circumstances illustrate and illuminate the full import of that meaning.²⁷

Lord Wilberforce underscored this approach in the case of *Minister of Home Affairs and Another v Fisher and Another*,²⁸ to the effect that a constitutional instrument calls for principles of interpretation of its own, suitable to its character, namely that a broad and liberal spirit should inspire those whose duty it is to interpret the Constitution. Lord Wilberforce also opined that regard must be had to the historical antecedents, the traditions and usages which have given meaning to the language in question – and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.²⁹ This observation is very critical especially in a case like Hichilema's where the petitioner's right to be heard, which right is enshrined in the Bill of Rights, was directly in issue.³⁰

23 Constitutional Court Rules Act No 8 of 2016, Statutory Instrument No 37 of 2016.

24 2001(3) SAC 582.

25 *Poswa v MEC for Economic Affairs Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA) para 10.

26 *McCulloch v The State of Maryland et al* 1819 [4 Wheaton 316] 314, 323.

27 Lord Wright in *James v Commonwealth of Australia*, 1936 A.C 357 b614.

28 *Minister of Home Affairs and Another v Fisher and another*, 1980 AC 319.

29 *Minister of Home Affairs v Fisher* 1980 A.C 319, 328.

30 Article 18(9) of the Bill of Rights states that any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be independent and impartial, and where proceedings for such determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

This point brings us to the dissenting opinion of Justice Munalula. In her very well-reasoned judgment, Munalula J proceeded from the cardinal principle that the Constitution must be read as a whole. In her view, '[n]o one word or phrase in a provision, no one clause or certainly no one provision should be read in a manner that alienates it from the rest of the provisions or the rest of the Constitution. The common and ordinary meaning of words is the starting point to bringing life to a clause, provision and indeed the Constitution as a whole.'³¹

She went on to observe that an unrelieved focus on the words 'within fourteen days of the filing of the petition' could not give the Court the correct and sensible meaning of the Article in question.³² She went on to opine that a constitution should be interpreted in accordance with the Bill of Rights and in a manner that promoted the purposes, values and principles of the Constitution and in a manner that contributed to good governance.³³

On the question of inordinate delays in hearing petitions in the past, a mischief alluded to by the majority, Munalula J was of the view that the need for speedy resolution had to be tempered with the need for actually hearing the petition in line with the purports of the Constitution. She reasoned that the primary purpose of Article 101(5) was for the Court to hear the petition and to make a decision as laid down in the Constitution based on a solid finding of both fact and law, noting that if the process of the hearing had not been conducted, the stated purpose had not been achieved and complying to a deadline without the intended event having taken place was an absurdity.³⁴

She went on to conclude that a purposive approach to interpreting the Article in question was the most appropriate approach, pointing out that the parties to the case working with the Court would have helped the country by allowing a hearing to take place rather than make a pronouncement based on technicality and that the issue of the presidential petition was too heavy for a mechanical response by the Court and a well-reasoned decision would have helped to heal the nation.³⁵ As discussed below, Munalula J's point about the perceived bias and lack of independence of the Constitutional Court in particular, are some of the core points thrown into sharper relief by the decision of the majority.

In the common law tradition, if a provision in an Act of Parliament when interpreted in its ordinary, literally or grammatical sense leads to a manifest absurdity, the so-called Golden Rule of interpretation allows judges to construe such a provision in such a way that such an absurd meaning or effect is avoided.³⁶ Thus, in the old English case of *Becken v Smith* (1836), it was said that it is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature to be collected from the

31 Munalula, 5 of the dissenting judgment.

32 Munalula 2016/CC/0031, dated 5 September 2016.

33 Munalula, 6.

34 *ibid* 7.

35 *Ibid* 7-8.

36 See Heydon's case 1584, 16 E R 637. See also *Adler V George*, 1964 2 Q B 7

statute itself or leads to any manifest absurdity or repugnance in which case the language may be varied or modified so as to avoid such inconvenience, but no further.³⁷

With reference to the proper approach for interpreting the constitutional provisions, the approach from comparable jurisdictions indicate that interpreting a written constitution calls for an approach of its own, suitable to its character. A few examples here will suffice. In the Indian case of *Jugal Kishore Dhoot and others v The State and others*,³⁸ the court made this very instructive observation:

The Constitution of India is a paramount law which represents the will of the people and is a mechanism under which laws are framed. In interpreting the Constitution, the Court has to see that it is a documentation of the founding face of a nation and the fundamental directions for its fulfillment, whereas in interpreting a statute, its pith and substance has to be looked into and the duty of the Court is to find the legislative intent. The general principle of interpretation and construction of statutes is that a Court presumes its constitutionality and prefers an interpretation in favour of competency of the legislature. It is only when two meanings are inferred, whereby one results into the view of the legislature in effective result and the other results into manifest absurdity or futility or palpable injustice or anomaly, the Court should adopt the second view.³⁹

This *dictum* is quoted *extensu* to show what should be done when a literal reading of an enactment leads to a 'palpable injustice' as in the *Hichilema* case. In the Commonwealth of Australia, the approach is that the Constitution must be read as a whole, and the whole Constitution has to be examined without giving undue weight to any part. Thus, in *Tasmania v Commonwealth*, on the question as to the meaning of the Constitution of the Australian Commonwealth, O'Conner J said:

I do not think that it can be too strongly stated that our duty in interpreting a statute is to declare and administer the law according to the intention expressed in the statute itself. In this respect the Constitution differs in no way from any Act of the Commonwealth or a statute. The Constitution has to be looked at as a whole to see the scope of provisions. It is necessary to consider the extent in which a particular provision appears and why it was framed.⁴⁰

The learned judge emphasised the importance of a contextual, purposive approach especially in cases impacting on basic human rights and fundamental freedoms protected by the Constitution. This approach is supported by almost all jurisdictions in the common

37 *Becken v Smith* 1836 2 M.8W.191, 195. In the South African case of *Bhyatt v Commissioner of Immigration* 1932 AD 125 129, Stratford JA opined that 'in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the legislature could not have intended'.

38 CW case NO 4733 of 2004 (2007) INRJHC 5718.

39 See n 14 above.

40 1904 1 CCR 329.

law world. For example, Chief Justice Dickson in the famous Canadian case of *R v Big M Drug Mart Ltd*⁴¹ was of the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one, pointing out the Charter was not enacted in a vacuum. It had to be placed in its proper linguistic, philosophic and historic context and that the interpretation should be generous, rather than legalistic one, aimed at fulfilling the purpose of the guarantee securing for the individuals the full benefit of the Charter's protection.

Finally, much closer to home, the South African Constitutional Court has emphasised and re-emphasised the purposive approach to constitutional construction in a number of landmark decisions.⁴² In the specific circumstances of South Africa with its painful history, the Court admonished as follows:

Our Constitution embodies the basic and fundamental objectives of our Constitutional democracy. Like the German Constitution it has "an inner unity and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate". Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole.⁴³

These foreign case laws show that, in a case such as that of Hichilema where a fundamental right to be heard by an impartial court was implicated, it was monumentally wrong for the majority of the Court to dismiss the petition in any case after sitting for only ten court days, if weekends are excluded.⁴⁴ The material conditions referred to by Munalula J made it clear that such an important case could not have been set down and argued in 14 days. The importance of these historical antecedents referred to earlier by Lord Wilberforce and of the context implicated cannot be over-emphasised.

In that context, the South African Constitutional Court could not have been more apt when it intoned that

... the Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises

41 1985 1 SCR 295.

42 *S v Mkwanyane and Another* 1995 (3) SA 39 para 266; *Investigative Directorate; Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 para 2.

43 *Matatiele Municipality v President of the Republic of South Africa* 2007 (6) SA 477 para 36.

44 The computation of time under Article 269 of the Constitution and Order XV of the Rules of the Constitutional Court 2016 exclude public holidays and weekends.

the constitutional enterprise as a whole. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of the Act and to read the provisions of the legislation, so far as possible, in conformity with the Constitution.⁴⁵

The process of constitutional interpretation must therefore be context-sensitive instead of focussing on the so-called intention of the legislature. In construing the provisions of a constitution, it is not sufficient to focus only on the ordinary or contextual meaning of a phrase. The proper approach to constitutional interpretation involves a combination of textual approach and structural approach. Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution. This provides the context within which a provision in a constitution must be construed.⁴⁶ In similar vein, in the matter between the *Government of the Republic of Namibia and Another v Cultura 2000 and another*,⁴⁷ the Court of Appeal for Namibia quite correctly opined that a court called upon to interpret a constitutional instrument should avoid giving a narrow, mechanistic, rigid and artificial interpretation to such an instrument. Mahomed J, in his characteristic grandiloquent style, emphasised this:

A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must be broadly, liberally and purposively be interpreted so as to avoid the austerity of tabulated legalism and so to enable it to contribute to play a creative and dynamic role in the expression and the achievement of the ideas and aspirations of the nation, in the articulation of the values bonding its people and disciplining its government.⁴⁸

As pointed out in the introductory section, the decision of the majority of the Court in upholding the literal meaning of 14 days and rejecting the purposive approach to constitutional interpretation has been severely criticised by academic commentators and laypersons alike. One of the most acerbic criticisms has been penned down by Prof. Muna Ndulo, the doyen of Zambian law. In an article titled 'The Judicial Crisis in Zambia: And a flawed Election',⁴⁹ the learned scholar opined that 'there is no denying that Zambia's judicial system, especially the Constitutional Court, is in a crisis. It has failed its constitutional role', and he went on to say that the Court has displayed 'unbelievable mediocrity and is an embarrassment to Africa and the rest of the world'.⁵⁰ He submitted that the September 5

45 In *Investigating Directorate: Serious Economic Offences and Others V Hyundai Motor Distributors (Pty) Ltd and Others in Re Hyundai Motor Distributors (Pty) and others v Smit NO and Others* 2001 (1) SA 545 (CC) 21-22. See also quoted in *Juleiga Daniels v Robin Grieve Campbell No and Others*, 2003 case CCT40/03 21-22.

46 *Matatiele*, para 37.

47 1994 (1) SA 407 (NMSC).

48 Mahomed J, as he then was; paras 20-21.

49 Ndulo, *op cit* note 20 1.

50 *Ibid.*

decision to dismiss the petition was illegal, irregular and unprofessional and has no legal effect. 'It must pass as the worst spectacle of judicial rascality anywhere in the world.'⁵¹

In condemning the Constitutional Court, in particular the majority decision, Ndulo asks a number of telling questions: 'When did the Judges' conference to arrive at a new decision take place? Who called this meeting and in what context? How do three judges overrule a full bench properly constituted at what is a clearly irregular meeting? Who re-opened the issue? When was the application for reopening made and to whom and where? When was the application heard?'⁵²

Ndulo concludes his series of questions by positing that the only logical conclusion was that the three judges (Mulonda J, Mulenga J and Sitali J) caucused on their own over the weekend and decided to overrule the subsisting ruling of the full bench.⁵³ Ndulo's strong condemnation must be understood in the context of immense implications of the presidential election petition to the country's nascent constitutionalism, particularly as the petition implicated the petitioners' fundamental right to have the petition heard and adjudicated upon by a fair and impartial tribunal.⁵⁴ That is what the constitution of Zambia itself demanded with respect to the Court's power to enforce the provisions of the Constitution underlying the constitutional guarantees of basic human rights and fundamental freedoms.⁵⁵

In this respect, Ndulo raises further concerns with huge repercussions to Zambia's constitutional project as follows: the lack of integrity or even active corruption within institutions mandated to enforce and safeguard the rule of law as particularly alarming and destructive to society; that the majority decision completely undermined the integrity of the Court and exposed some of its judges as either incompetent or partial or both; the court made contradictory decisions at least on three occasions culminating in the abrupt termination of the hearing contradictions the earlier commitments that it would not do so because only ten working days lapsed instead of 14 and, lastly, that judicial powers ought to be exercised judiciously. Essentially it must be exercised in the interest of substantial justice and not to defeat the common will of the people on a narrow, mechanistic, rigid, and artificial interpretation of constitutional principles.⁵⁶

Ndulo's criticism of the Court's approach to interpretation is reminiscent of Lord Atkin's famous observation in the wartime case of *Liversidge v Anderson*⁵⁷ to wit:

I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the

51 *Ibid.* In similar vein, another learned commentator, Monyonzwe Hamalengwa has opined that what happened in Zambia will be difficult to live down for decades. 'Was justice served or was this monumental injustice personified?' See 'Gigantic judicial reforms are needed for presidential election petitions' *Zambian Eye* (2016) 2.

52 Ndulo, *op cit*, note 20 2.

53 *Ibid.*

54 Article 18 of the Bill of Rights, 1991 Constitution of Zambia.

55 Constitution of Zambia (Amendment) Act 2 of 2016 in particular Article 118(1) which demands that judicial authority should be exercised in a just manner in order to promote accountability and Article 118(2) on dispensing justice to all without discrimination.

56 Ndulo, *op cit* n 20 4.

57 [1942] A.C 206 (H.L.); see also [1941] 3 ALLER 338.

liberty of the subject show themselves more executive minded than the executive ...⁵⁸

Of course, Lord Atkin was protesting against what he perceived to be an abdication of responsibility by the majority of the Law Lords to investigate and control the executive by a strained construction put on words with the effect of giving uncontrolled power of imprisonment to the to the Minister, Sir Anderson. This point is examined in the next section of the article.

3. Are there unreviewable discretionary powers?

in the case of *Milford Maambo and Others v The People*,⁵⁹ which came before the Constitutional Court by way of a referral from a Subordinate Court, the question before the Court was whether the DPP had unfettered powers to discontinue criminal proceedings by way of *nolle prosequi*. A related question was whether the DPP was required to give reasons to the court in entering a *nolle prosequi*? At the heart of the dilemma was the proper interpretation of Article 180(4)(c) and (7) of the Constitution as amended which reads as follows:

- (4) The Director of Public Prosecutions may:
 - (a) discontinue, at any stage before judgment is delivered criminal proceedings instituted or undertaken by the Director of Public Prosecutions or another person or authority.
- (7) The Director of Public Prosecutions shall not be subject to the direction or control of a person or an authority in the performance of the functions of that office, except that the Director of Public Prosecutions shall have regard to the public interest, administration of justice, the integrity of the judicial system and the need to prevent and avoid abuse of the legal process.

As will be elucidated below, the same trio of judges – Sitali, Mulenga and Mulonda – now joined by Mulembe J adopted the same literal rule of statutory construction in deciding whether the DPP was obliged to give reasons in deciding to discontinue criminal proceedings by way of *nolle prosequi*.⁶⁰

The material facts in that case were not complicated. The three applicants were charged before a magistrate’s court with 25 counts relating to corrupt practices by public officers, corrupt acquisition of public property and revenue and abuse of authority. Before the commencement of the trial, the state prosecutor tendered a *nolle prosequi* to discontinue the proceedings under the authority of the DPP. However, defence counsel objected to the entry of the *nolle prosequi*, averring that the *nolle prosequi* did not meet

58 [1941] 3 ALLER 338, 361-362.

59 2016/CC/R0001, No 31 of 2017.

60 See pages 35-37 where the Court referred to the plain language or clear provisions of Article 180 (4)(c) of the Constitution.

the conditions set out in Article 180(4)(c) and (7) quoted above, as no reasons were given to the court for entering such a *nolle prosequi*. He therefore requested for a constitutional reference to the Constitutional Court, stating that the law governing the tendering of the *nolle prosequi* needed to be interpreted authoritatively by the Constitutional Court so as to quieten doubts and settle the law.

Before the Constitutional Court, counsel for the applicants argued, inter alia, that the usage of the word ‘may’ in Article 180(4)(c) of the Constitution in place of the word ‘shall’, as used in the Constitution before the 2016 amendment, should be understood to mean that the DPP had to seek leave of the court before he or she could discontinue criminal proceedings by entering a *nolle prosequi*. Counsel sought to fortify his submissions by relying, inter alia, on the mischief rule as enunciated in the old English case of *Heydon*,⁶¹ namely that the mischief which the legislature sought to prevent was abuse of process on the part of the DPP by entering indiscriminate *nolle prosequis*. One way of curing that defect in the law was by requiring the DPP to furnish reasons for entering a *nolle prosequi* acceptable to the court.

In reply, learned counsel for the state submitted that relying on ordinary rules of statutory interpretation, the word ‘may’ was not mandatory but permissive, thus the legislature clearly implied that the DPP had discretion in the use of the *nolle prosequi* and further that Article 180(7) made it clear that in exercising his or her powers, the DPP was not subject to the control of any person or authority including the courts. He referred to other jurisdictions where the word ‘may’ had been interpreted as conferring discriminatory powers. He concluded his submissions by arguing that, if the legislature had intended that the DPP should give reasons for entering a *nolle prosequi*, the Constitution would expressly have stated that in view of the critical position of the DPP in the criminal justice system.

A divided court (4-1) came down in favour of the literal construction of Article 180(4)(c). Writing for the majority, Sitali J started off by observing that the Constitution was the supreme law of the land and thus ranked above all other laws and that the starting point in interpreting the Constitution was to use the literal rule of interpretation where the words in the text were clear and unambiguous. She went on to opine that ‘[i]n interpreting the Constitution, the primary principle of interpretation was that the meaning of the text should be derived from the plain meaning of the language used and that other principles of interpretation should only be resorted to where there was ambiguity or where the literal meaning would lead to an absurdity.’⁶² In her considered opinion, the provisions of Article 180(4)(c) were clear and unambiguous in conferring discretionary powers on the DPP to discontinue criminal proceedings at any state before judgment was delivered.

61 *Heydon’s case* (1584) 76 E.R. 637.

62 *Milford Mambo case*, supra, 21-22 relying on the cases of *Faustine Mwenya Kabwe and Aaron Chungu v Justice Ernest Sakala, Justice Peter Chitengi and the Attorney General*. Selected judgments of Zambia, No 25 of 2012 and *The Attorney General and Another v Akashambatwa Mbikusita Lewanika and Others* (1993/94) ZR 164.

After referring to a few authorities on statutory interpretation and to the legislative history of the Article in question, she held that there was no basis for the Court to hold that Parliament had intended that the DPP should obtain leave of the Court before discontinuing criminal proceedings. Further, that the factors set out in clause 7 of Article 180, quoted above, which the DPP had to consider, were meant to guide the DPP in the performance of the functions of his or her office and not in any way intended to place a fetter on the discretion of the DPP.⁶³ Thus, with a few strokes of the pen, the majority clothed the DPP with unreviewable discretionary powers.

It is trite that the principle of constitutional supremacy enshrined in Article 1 of the Constitution demands that the powers of governmental functionaries are circumscribed by the Constitution as the supreme law of the land. What is more, the Constitution controls the manner in which repositories of state power should exercise their powers and discharge their functions. In the present case, Article 180(7) has a very important caveat to wit: ‘... except that the DPP shall have regard to the public interest, administration of justice, the integrity of the judicial system and the need to prevent and avoid abuse of the legal process.’

This entails that the DPP is enjoined to have regard to these four stipulations, namely public interest, administration of justice, the integrity of the judicial process and the need to prevent and avoid abuse of the legal process in deciding whether or not to discontinue criminal proceedings. This point is alluded to later in the concluding section of this article. For now, turn to the dissenting opinion of Munalula J.

The dissenting judgment of Munalula J is very illuminating and is in stark contrast to the arid decision of the majority. Munalula J started off by reiterating that a constitution ought to be interpreted purposively in such a manner that the constitutional text is read as a whole with its provisions understood in their historical context and not in isolation. The central thesis underpinning her judgment is that the DPP’s action in entering a *nolle prosequi* was subject to judicial review and that he or she had to give reasons for the decision. She arrived at this conclusion after an erudite and exhaustive review of the authorities, both in Zambia and comparable jurisdictions such as Kenya, South Africa, United Kingdom and Zimbabwe.

In all these countries, the decision to enter a *nolle prosequi* is subject to judicial review in appropriate cases, *albeit* that the power of judicial review is exercised sparingly in such cases. With respect to Zambia’s constitutional history since independence in 1964 to the present, Munalula J first referred to Article 267 of the Constitution, 2016 which requires that the Constitution should be interpreted in a manner that broadens rather than narrows fundamental human rights and that which strengthens the democratic tenets of the country’s governance system; promotes the purposes, values and principles laid down in the Constitution and permits the development of the law.

Secondly, Munalula J referred to Article 267(4) of the Constitution, 2016 which provides, *inter alia*, that when the Constitution said a person or authority or institution was not subject to the discretion or control of a person or an authority in the performance of a function, that did not preclude a court from exercising jurisdiction in reaction to a

63 Sitali, J 36.

question as to whether that person, authority or institution had performed the function in accordance with the Constitution. If the powers of the DPP were exempted from the purview of judicial review, the Article would have expressly said so.

Thirdly, the learned judge emphasised the profound effect of a *nolle prosequi* of an accused person's enjoyment of the rights and freedoms and added these seminal observations:

Prosecution of an individual in our democratic dispensation entails an open and transparent process, throughout which reasons for decisions are apparent. The act of suspending a prosecution, only to have the threat of its reinstatement hanging over a "suspect" indefinitely perhaps for the rest of their life does not fit the ideal in our Bill of Rights that every person is "innocent until proven guilty". It diminishes the right to be heard. To minimize such eventuality, the DPP must exercise the discretion to enter a *nolle prosequi* in accordance with Article 180 and be seen to have so acted.⁶⁴

She concluded by emphasising that the DPP must not only give reasons for entering a *nolle prosequi* but those reasons must satisfy the exception in Article 180(7), namely the public interest, administration of justice, the integrity of the judicial system and the need to prevent and avoid abuse of the legal process and that in appropriate cases judicial review can be invoked to ensure compliance. In her view, clothing the DPP with absolute powers was incongruous with the provisions of the Constitution as a whole and was contrary to the fundamental tenets of checking and balancing power, aspired by the Constitution and constitutionalism.⁶⁵

For the purposes of this article, it is submitted that the minority judgment of Munalula J correctly reflects the position of the law. In country with a written constitution which is supreme, all branches of government including the courts and the DPP are bound by it. Article 118(1) of the Constitution makes it very clear that judicial authority of the Republic derives from the people and should be exercised in a just manner and in such a way as to promote accountability.⁶⁶ It goes without saying that the giving of reasons for the DPP's decision to discontinue criminal proceedings is at the heart of an accountable government. In ending this part of the article, it is instructive to recall these seminal words from the Tanzanian Court of Appeal: "The Constitution is a living document with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of. A timorous and unimaginable exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document."⁶⁷

64 Munalula, 65.

65 Munalual, 66.

66 See further *Kapoko v The People* No 43 of 2016; *Katuka and Another v Attorney General and others* No-29 of 2016.

67 *Ndyambo v Attorney General* 2011 (2) E A 485 493.

4. Conclusion

This article has been concerned with constitutional interpretation in Zambia. It has been argued that the Constitutional Court as the apex Court in the country has the ultimate authority to say what the law is on any given point. However, in two cases used in this article, the Court has not covered itself in glory, leading to accusations of gross incompetence and grand corruption. Yet, the Constitution is the supreme law of the country, binding all persons, state organs and state institutions. Any law, act or omission inconsistent with the Constitution is invalid. The Constitution further embodies a set of normative values and principles including constitutionalism, good governance and integrity. This normative value system should animate and inform the exercise of state power including decision-making by the courts.⁶⁸

In the case of interpreting a constitutional provision implicating the human rights of the subject, the balance of authority is in the favour of a purposive and generous approach as opposed to a narrow, legalistic interpretation. It is the hope that this article will excite some further thoughts on this very important aspect of Zambia's constitutional trajectory.

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68 Constitution of Zambia (Amendment) Act 2 of 2016, Articles 1 and 8.