SAIPAR Case Review

Volume 5
Issue 2 *May 2022*

Article 4

5-2022

Chapter One Foundation Limited and 2 Others v The Attorney General 2020/CCZ/0013 [2021]

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2020/CCZ/0013 [2021]
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Facts

On August 18, 2021 the Constitutional Court of Zambia (ConCourt) released a decision in the case where Chapter One Foundation, the Non-Governmental Organizations Coordinating Committee for Gender and Development Registered Trustees, and Harriet Chibuta (suing in her capacity as Executive Director of Young Women in Action) (the P etitioners) requested the interpretation of Articles 259(1)(b) and (c) and 173 (1)(j) and (k) of the Constitution as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (hereinafter "Constitution"). Specifically, the petitioners inquired whether the President of the Republic of Zambia in appointing Cabinet Ministers, Provincial Ministers and in nominating Members of Parliament during the 2016 general elections contravened Articles 259(1)(b) and (c) and 173 (1)(j) and (k) of the Constitution on the ground that he did not consider gender parity, equitable representation of youth and persons with disabilities as alleged by the Petitioners.

The Petitioners highlighted that of the 164 Members of Parliament, only 29 are female, two are youth and one is a person with disabilities. Of the 30 Cabinet positions, only nine are occupied by female Cabinet members. There are no female, youth nor persons with disabilities among the ten appointed Provincial Ministers. Finally, there were only two female Members of Parliament out of the 8 nominated Members of Parliament. The Petitioners contended that the nomination and appointment procedures made by the then President, were unconstitutional as the President's nominations of Members of Parliament and appointments of Cabinet and Provincial Ministers did not reflect gender parity or equitable representation of youth and persons with disabilities as per the Constitution of Zambia.

The Petitioners were unsuccessful in their bid. However, the ruling by the ConCourt was controversial and exposed flawed reasoning held by the majority of the ConCourt.

Significance

At first glance this case is one of statutory interpretation of Articles 259(1)(b) and (c) and 173 (1)(j) and (k) of the Constitution of Zambia. Essentially, the ConCourt was responsible for interpreting these Articles of the Constitution and for once settle how these provisions are to be interpreted when dealing with gender parity, and the equitable inclusion of youth and persons with disabilities in the political sphere. The ConCourt was required to examine the President's appointment decisions and determine whether those actions complied with the Constitution. What the decision turned out to be was one which reinforced outdated gender stereotypes and flawed reasoning pertaining to the under-representation of women, youth, and persons with disabilities in the political realm. More concerning, it exposed the ConCourt's reluctance to render decisions which may call to task incorrect decisions by a Head of State and revealed a potential lack of judicial independence within the judiciary.

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We will discuss this case in three sections. The first section will examine statutory interpretation of the impugned Articles of the Constitution. Second, we will address the gender stereotypes that the Majority employs in rendering their decision. Third, we will address the importance of judicial independence and accountability on the bench.

Statutory Interpretation

It is widely accepted within common law jurisdictions that in matters of statutory interpretation,

> There is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[3]

In addition, the Supreme Court of Zambia provided guidance on the minimum standard required in each judicial decision:

> Every judgment must reveal a review of evidence, where applicable, a summary of the arguments and submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities if any, to the facts.[4]

In this case, the ConCourt was called to interpret the texts of Articles 173 (1)(j) and (k) and 259(1)(b) and (c) of the Constitution. We have included the provisions below for ease of reference:

> 173**.** (1) The guiding values and principles of the public service include the following…
> *(j)* adequate and equal opportunities for appointments, training, and advancement of members of both gender and members of all ethnic groups; and
> *(k)* representation of persons with disabilities in the composition of the public service at all levels.
> 259**.** (1) Where a person is empowered to make a nomination or an appointment to a public office, that person shall ensure – ...
> *(b)* that fifty percent of each gender is nominated or appointed from the total available positions, unless it is not practicable to do so; and
> *(c)* equitable representation of the youth and persons with disabilities, where these qualify for nomination or appointment.

The Zambian Constitution provides guidance on how it should be interpreted. 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-

[3] E.A. Driedger, *The Construction of Statutes* (2nd edn, Toronto: Butterworths 1983) 87.
[4] *Minister of Home Affairs and Attorney General v Lee Habasonde* (2007) ZR 207 as found in O'Brien Kaaba; Felicity Kayumba Kalunga; and Pamela Towela Sambo (2021) 'Is the Constitutional Court Fanning the Flames of Potential Unrest? A Review of Recent Political Cases,' SAIPAR Case Review: Vol. 4: Iss. 1, Article 10, 31-32.

(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 its interpretation.

It is evident early into the decision that the majority of the ConCourt is not employing the widely accepted principle to statutory interpretation. Rather, the majority takes to piecemeal interpretations of the provisions of the Constitution and does so in a way that is incongruent with the guiding principles and purposes set out within the Constitution. Furthermore, the ConCourt's decision runs counter to the intention of Parliament in drafting the Constitution as it did regarding gender parity and the inclusion of youth and persons with disabilities in the political sphere. It is also painfully evident that the manner in which the majority chooses to interpret the provisions shows bias towards the President.

First, the majority outlines the requisite standard of proof required under the Constitution. The majority reminds the parties that the Petitioners bear the onus of presenting evidence to establish that the President's appointment process ran afoul of constitutional requirements. Justice Munalula in her dissenting opinion helpfully points out that the numbers speak for themselves to show that gender parity was not achieved.[5] Fifty percent of each gender was not nominated or appointed. This is sufficient evidence that the nomination process used by the President ran afoul of Articles 173 and 259 of the Constitution. It would follow then that the Attorney General, on behalf of the President, would provide evidence explaining why it was not 'practicable' in the circumstances for the President to use a process to appoint more women to achieve gender parity and fulfil the requirements under the Constitution. However, the majority does not extend their consideration beyond the strict burden of proof.

Second, the ConCourt then examines the rationale behind Article 173 of the Constitution. The majority contends that Article 173 read together with Article 266 relates to values and principles intended to guide the appointing authority, the President, in making nominations or appointments in the public service.[6] The majority then turns to Article 259 and essentially read the Article with an emphasis on the qualifying language contained therein.[7] The majority appears to actively make arguments to support why the President's appointment process did not run afoul of the Constitution. The ConCourt selects provisions within the Constitution which support the President's authority to make certain decisions. The majority blatantly fails to extend their analysis further to outline additional duties and responsibilities of the President, which further illustrates their flawed reasoning that essentially renders their decision problematic and would lead to contradictions within the Constitution.

The majority's position can be narrowed down to this: the President as an appointing authority has unfettered discretion to make appointments under the Constitution. Simply put, the President is above the Constitution and above the law regarding the appointment process, and the ConCourt cannot interfere with his decisions. Accordingly, the President as an appointing authority does not have to ensure that gender parity and the equitable representation of youth and persons with disabilities are achieved.

[5] *Chapter One Foundation Limited and 2 Others v The Attorney General*, 2020/CCZ/0013, [1.1 of the dissenting reasons].
[6] *Chapter One Foundation Limited and 2 Others v The Attorney General*, 2020/CCZ/0013, [5.11] – [5.15].
[7] *Chapter One Foundation Limited and 2 Others v The Attorney General*, 2020/CCZ/0013, [5.16] – [5.22].

This interpretation is simply absurd. In a Constitutional Democracy where the Rule of Law is observed, nobody is above the law. As Justice Munalula stated in her dissenting reasons in *Maambo & Others v The People*, "under constitutionalism all power must be checked in some way or another."[8]

In *Maambo & Others v The People*, the ConCourt was tasked to interpret the provisions of Article 180(4)(c) and (7) of the Constitution, specifically examining the exercise of power vested in the Director of Public Prosecutions (DPP) to enter a *nolle prosequi* to discontinue criminal proceedings.[9] The majority in that case employed the primary principle of interpretation, namely that the meaning of the provisions should be derived from a plain meaning of the of the language used in the provision. [10] The majority held that the DPP has unfettered power under Article 180 and can enter a *nolle prosequi* without providing reasons.

Justice Munalula in the dissenting opinion recognises the importance of the purposive approach and the basic principle that the Constitution must be read holistically.[11] Justice Munalula emphasises that Article 267 of the Constitution serves as a key interpretation guide to the Constitution:

> In my view, Article 267 requires that the Constitution should be interpreted in a manner that broadens rather than narrows fundamental human rights; that strengthens the democratic tenets of our governance system; and that will grow our jurisprudence.[12]

In her dissenting reasons, Justice Munalula employs the purposive approach by examining the words of Article 180 of the Constitution. She makes clear that if drafters intended for the DPP to have unfettered discretion, they would have expressly used those words within the Constitution.[13] Her Honour then reviews the language in the Constitutions from other jurisdictions, as well as the draft Constitution and examines the purposes of the provisions as drafted including the recommendations. Additionally, she reviews the leading authority to interpret the impugned language within Article 180, and finally she reads the provision considering the entire Constitution. Using the purpose approach to statutory interpretation, Justice Munalula finds that the DPP does have discretion to enter a *nolle prosequi*. However, the DPP must provide reasons for entering a *nolle prosequi* to discontinue criminal proceedings. The reasons serve as a mechanism which checks the DPP's exercise of power.

The purposive approach as used by Justice Munalula is the correct approach to statutory interpretation. It allows for an extensive analysis of provisions within the Constitution and facilitates sitting Justices to provide reasoned decisions regarding the interpretation of the Constitution.

Constitutional courts in common law jurisdictions often use the purposive approach to interpret an enactment within the context of the law's purpose. In Canada, the *Persons Case* (Edwards v Canada (AG)[14] was a landmark case in two respects. The case established that Canadian women were eligible to be appointed as senators. Furthermore, it established that the Canadian Constitution should be interpreted in a way that was more consistent with the needs of society.

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[8] *Maambo & Others v The People*, 2016/CC/R001, 1136.
[9] *Maambo & Others v The People*, 2016/CC/R001, 1091.
[10] *Maambo & Others v The People*, 2016/CC/R001, 1092.
[11] *Maambo & Others v The People*, 2016/CC/R001, 1112-1113.
[12] *Maambo & Others v The People*, 2016/CC/R001, 1114-1115.
[13] *Maambo & Others v The People*, 2016/CC/R001, 1118.
[14] *Edwards v Canada (AG)*, [1930] AC 124, [1929] All ER Rep 571.

In the present case, Justice Munalula again engages in a purposive approach in the interpretation of Articles 173 and 266 of the Constitution in her dissenting reasons. In doing so, Her Honour provides a sobering voice among the cacophony of problematic reasoning in the majority decision. Her Honour reminds the Court that the President is a public official who is mandated to act in accordance with the Constitution, and his discretion is necessarily fettered by Constitutional imperatives.[15] Under Articles 90, 91(2) and (3) of the Constitution, the President has an obligation to ensure gender parity in making appointments to Ministerial offices.[16] When the words of Articles 173 and 266 are read in relation to other provisions within the Constitution, the President has an obligation under the Constitution to ensure gender parity is achieved, as well as the representation of youth and persons with disabilities in political appointments.

Gender Parity and Outdated Gender Stereotypes

The reasoning the majority relies upon to explain the failure to achieve gender parity is frankly outdated, supports gender stereotypes, reinforces cultural and society discrimination against women in the political sphere.

The majority appears to equate low numbers of candidates who are female, youth or persons with disabilities with a lack of skilled or qualified individuals within these enumerated groups.[17] Additionally, the ConCourt references the Final Report of the Technical Committee on Drafting the Zambian Constitution which states that fulfilling gender parity might be difficult in situations where one gender would not be competent for the job.[18] Such statements fail to consider the barriers in place which would preclude women from attaining the requisite competency for participation in political parties. Jo Beall in her paper 'Decentralizing government and centralizing gender in Southern Africa: Lessons from the South African experience' explains that:

> In Africa, many of the societal institutions that permeate local governance systems and procedures, notably customary law, and traditional authority, are deeply patriarchal and are based on relations of power that are difficult for women to penetrate or challenge.[19]

The patriarchal and misogynistic beliefs and attitudes hamper the ability of women to even venture into politics. This is further challenged by the fact that political parties function as gatekeepers, given the way in which they select their political candidates. Melanie L. Phillips notes that candidate selection in Zambia is a long, closed-door process which requires rounds of interviews at each level of the political structure.[20] Gatekeepers evaluate the candidates based on their expectations of family norms and hierarchy, and their family's involvement in politics.[21] Phillips notes:

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[15] *Chapter One Foundation Limited and 2 Others v The Attorney General*, 2020/CCZ/0013, [2.2] of the dissenting reasons.
[16] *Chapter One Foundation Limited and 2 Others v The Attorney General*, 2020/CCZ/0013, [2.4] of the dissenting reasons].
[17] *Chapter One Foundation Limited and 2 Others v The Attorney General*, 2020/CCZ/0013, [5.33].
[18] *Chapter One Foundation Limited and 2 Others v The Attorney General*, 2020/CCZ/0013, [5.18].
[19] Jo Beall (2005) 'Decentralizing government and centralizing gender in Southern Africa: Lessons from the South African experience,' UNRISD Occasional Paper, No. 8, United Nations Research Institute for Social Development (UNRISD), Geneva, 1.
[20] Melanie L. Phillips (2021) 'Family Matters: Gendered Candidate Selection by Party Gatekeepers' (under review), Department of Political Science, University of California, Berkeley, 13.
[21] Melanie L. Phillips (2021) 'Family Matters: Gendered Candidate Selection by Party Gatekeepers' (under review), Department of Political Science, University of California, Berkeley, 9 and 10.

> Women face an impossible double-bind: they either fulfill the cultural expectation of having a family, where domestic responsibilities and household bargaining puts stringent limitations on their resources to commit to politics, or they do not conform and face backlash from the selectorate.[22]

The majority does not address these barriers to women's participation in politics and relies on the age-old excuse of having insufficient qualified female candidates.[23] Furthermore, the majority places the responsibility of ensuring gender parity on political parties, obfuscating the fact that it is at this level where gender discrimination, misogyny and patriarchal attitudes act manifest strongly and prevent the inclusion of women as political candidates.

Finally, despite the use of the purposive approach in Constitutional courts, the provisions on how to interpret the constitution, and Justice Munalula's dissenting opinion in *Maambo & Others v The People*, the ConCourt chose to disregard these canons of interpretation and missed the mark. The court in its over-zealousness rendered an absurd decision that failed to address the needs of society by permitting the development of the law to achieve gender parity.

As a result, the decision rendered by the majority is retrogressive. The majority missed an opportunity to protect gender parity as intended by the Constitution. It is difficult to imagine that gender equity can be achieved through decisions rendered by the ConCourt. However, there are lessons to follow from Rwanda's experience if Zambia is to attain gender equity. The Constitution of the Republic of Rwanda of 2003 (revised in 2015) enshrines the principles of gender equality and women's rights and requires that a minimum of 30% of women be included in all decision-making bodies. It further commits to establishing a gender-friendly legal and policy framework. There has been resounding success, with women comprising of 62% of members in Parliament after the 2018 Parliamentary elections. Rwanda has become the world leader for women's representation in decision-making positions.

Judicial Accountability

Muna Ndulo describes judicial accountability as "a fundamental democratic requirement" which requires judges to be accountable to the public in their role of applying the law in a fair and impartial manner.[24]

> It involves two tenets: (a) judicial power must exist as a power separate from and independent of, executive and legislative power and (b) judicial power must repose in the judiciary as a separate organ of government, composed of persons different from and independent of those who compose the executive and legislature.

An independent judiciary must be so both in fact and in perception. They must exercise their powers without influence from any external party, and their decisions must not be influenced by other branches of government.[25] The Right Honourable Beverley McLachlin, former Chief Justice of the Supreme Court of Canada in her address on Judicial Accountability provides examples of how judges can be held to account: 1) the sanction of removal; 2) the built-in

[22] Melanie L. Phillips (2021) 'Family Matters: Gendered Candidate Selection by Party Gatekeepers' (under review), Department of Political Science, University of California, Berkeley, 18.
[23] *Chapter One Foundation Limited and 2 Others v The Attorney General*, 2020/CCZ/0013, [5.3].
[24] Muna Ndulo (2013) 'Judicial Reform, Constitutionalism, and the Rule of Law in Zambia: From a Justice to a Just System,' Zambia Social Science Journal: Vol. 2: No, 1, Article 3, 2.
[25] Muna Ndulo (2013) 'Judicial Reform, Constitutionalism, and the Rule of Law in Zambia: From a Justice to a Just System,' Zambia Social Science Journal: Vol. 2: No, 1, Article 3, 7.

accountability of the open court processes; 3) public and peer review; and 4) the principle of defence developed as a protection against uncontrolled judicial power.[26]

We will focus on two aspects that are mentioned above. The third talks about, the use of public and peer review to hold judges in account. The Right Honourable Beverley McLachlin explained the importance of peer review:

> … Peer review comes in a number of forms. Appellate review is the most obvious. All judicial decisions, with the exception of the decisions of the court at the apex of the judicial system, are open to appeal. When judges make mistakes, their decisions can be overturned on appeal. At the highest court level, the Supreme Court of Canada, the rationale is that the buck has to stop somewhere, and the likelihood of error is greatly decreased if more minds are brought to bear on the problem at hand. Moreover, the Court has the power to overrule statements of law made in its own earlier decisions.[27] (emphasis added)

The ConCourt was established pursuant to Article 127 of the Constitution. The ConCourt is at the same level as the Supreme Court of Canada. Therefore, there are no avenues to appeal any decision made by the ConCourt. This is problematic because there is no peer review available for other judges to examine the decisions made by the ConCourt. Even where judges make mistakes or decisions which are not sound, there are no other avenues to correct these wrongs. For example, the ConCourt employed a literal interpretation of the Constitution in a matter which gave the DPP unfettered decision-making in *Maambo & Others v The People*. In the present case, the ConCourt again decided in a manner which led to absurd results which do not adhere to the principles of interpretation within the Constitution. This was done despite Justice Munalula's helpful explanation of how the Constitution should be interpreted in both *Maambo & Others v The People* and the present case.

While peer review from other judges is not available at the ConCourt, peer review can be achieved through lawyers and legal academics who review the cases and provide commentaries on judicial decisions.[28] It is unclear the weight such public review bears on how decisions are made, or whether judges on the ConCourt will amend the way in which they render their decisions. However, lawyers and legal scholars as a community can provide a voice to challenge the way the ConCourt renders their decisions.

We now turn to the fourth, regarding the means of holding judges to account: the principle of deference developed as a protection against uncontrolled judicial power. This principle of deference does not exist in the ConCourt, at least not in a substantive manner. Decisions made in the ConCourt are not reviewable as they are a final court. The ConCourt does not defer even to the Supreme Court of Zambia. The ConCourt may defer to their own prior decisions, but if those decisions were incorrectly decided, then the errors will continue into subsequent decisions. In such a reality and with some questionable decisions from the ConCourt, it is highly likely that the ConCourt could render a decision with principles which run counter to those developed by the Supreme Court. This would lead to incoherent decisions and conflicts between the two highest courts in Zambia. It is evident that more robust means of holding judges in the ConCourt is required. As Ndulo notes:

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[26] The Right Honourable Beverley McLachlin, PC, CC, CStJ, 'Remarks of the Right Honourable Beverley McLachlin, P.C.,' Conference on Law and Parliament (Ottawa, 2 November 2006).
[27] The Right Honourable Beverley McLachlin, PC, CC, CStJ, 'Remarks of the Right Honourable Beverley McLachlin, P.C.,' Conference on Law and Parliament (Ottawa, 2 November 2006).
[28] The Right Honourable Beverley McLachlin, PC, CC, CStJ, 'Remarks of the Right Honourable Beverley McLachlin, P.C.,' Conference on Law and Parliament (Ottawa, 2 November 2006).

> Constitutional democracy is founded upon the notion of checks and balances, namely the judiciary and the executive, while operating independently of one another, act to check each other's operations and balance each other's power [...] It requires independent, functional, and credible courts in order to translate constitutional provisions and principles into practice and into meaningful checks on government.[29]

Given that the ConCourt lacks the requisite checks and balances, it is imperative that individual judges remain independent. Ndulo proposes a means to ensure individual independence of the judges:

> …First, judges must be protected from the threat of reprisals, so that fear does not direct their decision-making. Second, the method by which judges are selected, and the ethical principles imposed upon them, must be constructed so as to minimize the risk of corruption from outside threats.[30]

He notes that the second point is to ensure that judicial authority is not abused, and it is the core concern of judicial accountability. Simply stated, judges must be hired knowing that they are protected from any external reprisals by relying on the very Constitution they are tasked to interpret. If judges on the ConCourt rely on the principles and purposes of the Constitution as set out therein, they should be able to render decisions which are viewed as just and fair in accordance with the Constitution. We posit that this will increase public trust in the system and foster support from the public, lawyers, and legal scholars in matters where there may be attempted political interference. Essentially, the very systems judges may be disabusing, are the ones which will protect them from external influence if they adhere to them strictly.

Unfortunately, the present decision does not ensure coherency of the Constitution. If anything, the Constitution has been used as a tool to provide unfettered decision-making responsibility which privileges individuals or exempts others from accountability under the Constitution. Absent an intentional and structured approach to statutory interpretation, the ConCourt will cause further confusion rather than provide an illuminating analysis of the Constitution.

Conclusion

It is evident that gender equity cannot be fully achieved through decisions rendered exclusively by the ConCourt. However, the 'Courts of justice can be powerful agents for social change when they work without gender bias and support gender equality, as their pronouncements carry the backing of the state and may thus be enforced or become a norm across a broad range of citizens through established channels of state-citizen engagement' [31] In conclusion, if Zambia is to achieve gender parity and the representation of youth and persons with disabilities in politics, the ConCourt must be committed to, a) interpreting the Constitution in a manner which aligns with the principles and values set out in the Constitution, and b) ConCourt needs to offer extensive well-reasoned analysis of the Constitution within context of the laws' purpose.

[29] Muna Ndulo (2013) 'Judicial Reform, Constitutionalism, and the Rule of Law in Zambia: From a Justice to a Just System,' Zambia Social Science Journal: Vol. 2: No, 1, Article 3, 16.
[30] Muna Ndulo (2013) 'Judicial Reform, Constitutionalism, and the Rule of Law in Zambia: From a Justice to a Just System,' Zambia Social Science Journal: Vol. 2: No, 1, Article 3, 7.
[31] Rea Abada Chiongson, Deval Desai, Teresa Marchiori and Michael Woolcock, The Role of Law, and Justice in Achieving Gender Equality. World Development Report 2012.