

IN THE CONSTITUTIONAL COURT OF ZAMBIA  
HOLDEN AT LUSAKA  
(Constitutional Jurisdiction)

2021/CCZ/003

IN THE MATTER OF:

ARTICLE 180(8) OF THE CONSTITUTION  
OF ZAMBIA

AND

IN THE MATTER OF:

ALLEGED CONTRAVENTION OF  
ARTICLE 180(8) OF THE CONSTITUTION  
OF ZAMBIA

IN THE MATTER OF:

SECTION 90(2) OF THE CRIMINAL  
PROCEDURE CODE CHAPTER 88 OF  
THE LAWS OF ZAMBIA

IN THE MATTER OF:

EX-PARTE DECISION OF THE CHIEF  
RESIDENT MAGISTRATE OF LUSAKA  
DISTRICT IN CAUSE NO CRIMP/019/19

B E T W E E N:

WANG SHUNXUE



PETITIONER

AND

THE ATTORNEY GENERAL

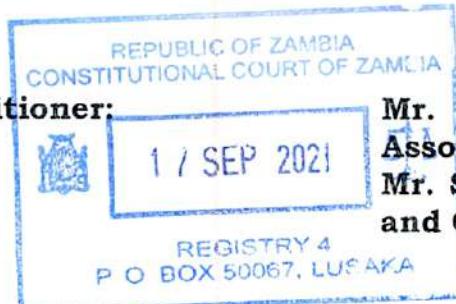
1<sup>ST</sup> RESPONDENT

WANG QINGHAI

2<sup>ND</sup> RESPONDENT



CORAM : SITALI, MULENGA, MULONDA, MUNALULA AND  
MUSALUKE JJC.  
On 22<sup>ND</sup> APRIL, 2021 and 17<sup>TH</sup> SEPTEMBER, 2021.



For the Petitioner: Mr. N. Yalenga of Yalenga and  
Associates.  
Mr. S.K. Simwanza of Lungu, Simwanza  
and Company.

For the 1<sup>st</sup> Respondent: Mr. I. Nyambe - Principal State  
Advocate.

For the 2<sup>nd</sup> Respondent: Mr. K. Mweemba of Keith Mweemba  
Advocates.  
Mr. G. Phiri and Mr. M. Phiri of PNP  
Advocates.

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## JUDGMENT

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**MUSALUKE, JC, delivered the Judgment of the Court.**

**LEGISLATION REFERRED TO:**

1. *The Constitution of Zambia (Amendment) Act No. 2 of 2016;*
2. *The Constitution of Zambia Act No. 1 of 2016;*
3. *The Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia;*
4. *The Acts of Parliament Act Chapter 3 of the Laws of Zambia;*
5. *The Criminal Procedure Code, Chapter 88 of the Laws of Zambia;*
6. *The National Prosecution Authority Act No 34 of 2010.*

### **CASES REFERRED TO:**

1. *Mazoka and Others v Mwanawasa and Others* (2005) Z.R. 138;
2. *The People v Paul Jeremiah Lungu* (1978) Z.R. 425;
3. *The People v Fred M'membe and the Post Newspaper Limited* HPR/06/2014;
4. *R (Gujra) v CPS* (2013) 1 All E.R. 612;
5. *Liyongile Muzwanolo v The People* (1986) Z.R. 46 (S.C.).

### **OTHER WORKS REFERRED TO:**

1. Maxwell, Peter Benson and P. St. J. Langan. *Maxwell on the Interpretation of Statutes*. 12th ed. Bombay: Tripathi, 1976;
2. Edmonds, Tamlyn, and David Jugnarain. *Private Prosecutions: A Potential Anticorruption Tool in English Law*. Open Society Foundations, 2016;
3. Horby A.S. *The Oxford Advanced Learners Dictionary* (2010) (8<sup>th</sup> edition) Oxford University Press;
4. Rozenberg, Joshua. *The case for the crown: the inside story of the Director of Public Prosecutions*. Equation, 1987.

### **[1] INTRODUCTION**

**[2]** This Judgment relates to the petition filed by the Petitioner on 15<sup>th</sup> February, 2021 pursuant to the provisions of Article 180 (8) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 (hereinafter referred to as the Constitution) as read with section

90 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia (hereinafter referred to as the CPC). The petition seeks to challenge the legality of the private prosecution instituted by the 2<sup>nd</sup> Respondent before the Subordinate Court at Lusaka under cause number Crimp/019/2019.

**[3] PETITIONER'S CASE**

[4] Facts leading to this petition are that on 7<sup>th</sup> May, 2019 a Chinese national by the name of Wang Qinghai (the 2<sup>nd</sup> Respondent herein) filed a complaint pursuant to section 90 of the CPC before the Subordinate Court at Lusaka alleging that the Petitioner as director of Kingphar Company Zambia Limited (the Company) in conjunction with the said company, had committed various crimes in Zambia and Hong Kong-China, respectively.

[5] Upon finding that there was a *prima facie* case against the Petitioner, the Chief Resident Magistrate at the Lusaka Subordinate Court directed the 2<sup>nd</sup> Respondent's Advocates to draw up a charge, which charge the 2<sup>nd</sup> Respondent and his

Advocates proceeded to effect by prosecuting the Petitioner and the Company before the subordinate court.

- [6] The Petitioner states in his petition before us that the functions of the Director of Public Prosecutions (hereinafter referred to as the DPP) as provided for in Article 180 (4) of the Constitution are to conduct criminal prosecutions in the Republic of Zambia. Further, that according to Article 180 (8) of the Constitution, the functions of the DPP can only be performed by a person in authority that has been expressly or impliedly authorized by the DPP.
- [7] The Petitioner has alleged that the prosecution undertaken by the 2<sup>nd</sup> Respondent and his advocates without express or implied consent of the DPP is illegal and in breach of Article 180 (8) of the Constitution. That as a consequence of the breach, all proceedings and actions or decisions made therein by the presiding magistrate in the prosecution of the Petitioner and the Company are void *ab initio* and of no effect or at all.
- [8] The Petitioner therefore prays:

- (i) For a declaration that all prosecutions in Zambia must be with the express or implied consent of the DPP.
- (ii) That section 90(2) of the Criminal Procedure Code does not displace the requirement for a person acting through his legal practitioner to obtain the consent of the DPP to prosecute a matter in Zambia.
- (iii) That the prosecution of the Petitioner and Kingphar Company Limited under Crimp/019/19 before the Subordinate Court at Lusaka in the absence of the consent of the DPP was illegal and all proceedings and decisions made thereunder are null and void ab initio for want of authority.
- (iv) An Order that costs occasioned by the Petition and to defend the Petitioner before the Subordinate Court be borne by Wang Qinghai, the complainant.

[9] The petition is accompanied by an affidavit verifying facts. The Petitioner also filed submissions in support of the petition.

[10] In the said submissions, the Petitioner's contention is that section 90 of the CPC pursuant to which the complaint was made, has nothing to do with the power or authority to conduct a prosecution but merely outlines the various modes by which criminal proceedings can be commenced. That once the matter is commenced, only a person authorized by the DPP can prosecute such a matter. To support this position, the Petitioner relied on the provisions of Article 180 (8) of the Constitution, which provides that the functions of the DPP may be exercised in person or by a public officer or legal practitioner

authorized by the DPP, acting under the general or special instructions of the DPP.

[11] It was submitted that the plain and ordinary reading of Article 180(8) of the Constitution is to the effect that for one to exercise the functions of the DPP as outlined therein, one must be authorized by the DPP. The Petitioner also relied on various authorities on the principles of statutory construction of statutes including the case of **Mazoka and others v Mwanawasa and others**<sup>1</sup> and **P. St Lagan's rendition of Maxwell on the Interpretation of Statutes.**

[12] It was the Petitioner's further submission that the issue of whether the Magistrate at the Subordinate Court at Lusaka had jurisdiction to proceed with the prosecution was raised before him. However, the Magistrate dismissed the application to have the matter referred to this Court for constitutional interpretation, on the basis that matters commenced under section 90 of the CPC do not require the consent of the DPP to be prosecuted.

[13] It was submitted that the Subordinate Court in dismissing the Petitioner's application to have the matter referred to this Court, relied on the case of **The People v Paul Jeremiah Lungu**<sup>2</sup>. That however, the Subordinate Court miscomprehended both the holding and decision in that case. It was argued that in that case, the conviction was set aside on review, on the ground that the Magistrate had permitted a member of the public to conduct a private prosecution, contrary to section 89 of the CPC then Chapter 160 which was couched in the same terms as section 89 of the current CPC.

[14] The Petitioner stressed that the High Court in the **Paul Jeremiah Lungu**<sup>2</sup> case did not lay any principle of law that permitted an advocate to conduct a private prosecution without the consent of the DPP. Rather, that the only principle laid in that case was that only a complainant or an advocate acting on his behalf is permitted to conduct a private prosecution subject to section 89 of the CPC Cap 160 then.

[15] The Petitioner contended that upon laying the complaint on behalf of their clients, the 2<sup>nd</sup> Respondent's advocates should

have obtained the requisite consent of the DPP to conduct the prosecution, adding that it was not the legislature's intention to circumvent the office of the DPP by bringing complaints under section 90(2). Rather, that it was a way of merely reporting criminal activity without having to report to a police station. The Petitioner argued that he was fortified in his submissions by the provisions of section 89 of the CPC which provides that no person other than a public prosecutor or other officer generally or specifically authorized by the DPP shall be entitled to prosecute a matter.

- [16] In buttressing the above point, the Petitioner submitted that it would be an absurdity to say, on one hand, that all prosecutorial powers are reposed in the DPP whilst on the other hand, we have a situation where a person can arrogate to themselves the power to conduct a prosecution by making a complaint before a Magistrate. That as the Constitution entrusts the prosecutorial powers in the office of the DPP, the provisions of the CPC cannot override the provisions of the Constitution. That the provisions of section 90(2) of the CPC

cannot therefore, be read in isolation but must be read in conjunction with Article 180(8) of the Constitution as well as section 89 of the CPC which provides for the requirement for leave of the DPP to conduct a prosecution.

[17] In sum, it was the Petitioner's submission that the failure to obtain the consent of the DPP by the 2<sup>nd</sup> Respondent's advocates to conduct a private prosecution tainted the proceedings with illegality and hence making them *void ab initio*.

[18] At the hearing of the matter, counsel for the Petitioner, Mr. Yalenga, briefly augmented the submissions by stating that the Petitioner does not deny that there is a constitutional right to undertake private prosecutions but that such prosecution must be done in conformity with the law. That Article 180(8) of the Constitution provides that the DPP is the repository of all prosecutorial powers; therefore that for a person to prosecute a matter, they must first be authorized by the DPP and the person may act generally or to specific instructions by the DPP. Counsel cited such persons acting generally as public

prosecutors and state advocates under the National Prosecutions Authority.

**[19]** It was submitted that similarly, if consent to prosecute has been granted to a person or legal practitioner, they may also act generally or subject to the DPP's special instruction. That the failure by the 2<sup>nd</sup> Respondent personally or through his advocates to obtain the authority of the DPP affected the legality of the proceedings before the subordinate court. That the Petitioner was fortified in his arguments by the provisions of section 89 of the CPC which, according to the Petitioner, emphasizes that a person other than a public officer must be authorized by the Director of Public Prosecutions to conduct a prosecution.

**[20]** The Petitioner dispelled assertions that section 89 of the CPC only applies to public prosecutions on account of the subheading under which it appears. It was the Petitioner's position that it is a settled canon of statutory interpretation that while headings, sub-headings and marginal notes can help in the interpretation of statutes, they are not strictly speaking part

of the statutes in that they are not voted upon or passed by Parliament.

[21] The Petitioner urged us to adopt the principle of statutory interpretation which states that, where there are two possible interpretations, and a narrower interpretation would lead to a failure to achieve a manifest intention of the legislature, the court must adopt the interpretation that actualizes the intention of the legislature also known as the *ut res magis vareat quam pareat* rule of interpretation. That in this case, the DPP must direct all prosecutions undertaken by his/her usual nominees in the public service. That to take away that power is likely to open floodgates to an abuse of the right to privately prosecute.

## **[22] THE 1<sup>ST</sup> RESPONDENT'S CASE**

[23] The 1<sup>st</sup> Respondent filed his answer on 19<sup>th</sup> March, 2021 in which he stated that the DPP has authority to conduct criminal prosecutions in the Republic of Zambia which may also be conducted by other people authorized under the law. Further, that section 90 of the CPC does not require the authority of the

DPP for a complaint to be lodged and ultimate prosecution thereunder commenced.

[24] The 1<sup>st</sup> Respondent further asserted that under Article 180(4) (b) of the Constitution, the DPP may take over and continue criminal proceedings instituted or undertaken by another person or authority, implying that a criminal proceeding may be instituted by another person without the authority or consent of the DPP. The 1<sup>st</sup> Respondent maintained that since the consent or authority of the DPP under section 90 of the CPC is not required, the criminal prosecution of the Petitioner before the Subordinate Court at Lusaka was legal and not in contravention of any provision of the Constitution.

[25] The 1<sup>st</sup> Respondent's answer was accompanied by an affidavit in opposition and submissions.

[26] The substratum of the 1<sup>st</sup> Respondent's submissions is that section 90 of the CPC allows any person to lay a complaint before a Subordinate Court for prosecution and does not require the consent of the DPP. That the consent of the DPP is required only in selected and defined matters or cases. That the charge

and prosecution faced by the Petitioner before the Subordinate Court did not require the consent of the DPP as it did not fall in the category of selected and defined cases. That the learned Magistrate therefore was on firm ground to allow the proceedings before him to proceed.

**[27]** It was the 1<sup>st</sup> Respondent's further contention that Article 180 of the Constitution relied upon by the Petitioner relates to the powers of the DPP in exercising his/her functions in instituting and conducting criminal matters, which functions can be expressly performed by the DPP or through another person such as state advocates under the National Prosecutions Authority. That only such persons exercising the functions of the DPP under Article 180, require the express or implied authorization of the DPP.

**[28]** That section 90 of the CPC on the other hand, gives power to any person not only to lay a criminal charge but to also conduct criminal prosecutions through a complaint without the need of the consent or authority of the DPP.

[29] It was further submitted that Article 180 of the Constitution should be read as a whole as opposed to reading selected or isolated sections and portions of the Article. In this regard, our attention was drawn to the provisions of Article 180(4) (b) and it was argued that this provision entails that the power to institute and conduct criminal proceedings or prosecution is not wholly vested in the DPP, as another person may exercise such power as provided for under the law. Such other law being the CPC which provides for another person other than the DPP to conduct criminal prosecutions.

[30] At the hearing, Mr. Nyambe, counsel for the 1<sup>st</sup> Respondent relied on the written submissions and stressed that Article 180 of the Constitution does envisage a private criminal prosecution for which the consent or authority of the DPP is not required. Further, that Article 180 of the Constitution relates only to the powers and functions of the DPP as a Chief Government Prosecutor and does not extend to private prosecutions envisaged and executed under section 90 of the CPC.

**[31] THE 2<sup>ND</sup> RESPONDENT'S CASE**

[32] The 2<sup>nd</sup> Respondent filed his answer on 19<sup>th</sup> March, 2021 in which he stated that the conduct of criminal proceedings in the Republic of Zambia is not the exclusive preserve of the DPP and that this is anchored on Article 180 (4) (b) of the Constitution where it is recognized that criminal proceedings may be instituted or undertaken by another person or authority other than the DPP.

[33] The 2<sup>nd</sup> Respondent stated that the consent of the DPP was not required in the prosecution of the Petitioner before the Subordinate Court as the criminal complaint was initiated pursuant to section 90 of the CPC where there is an express provision for any person to make a complaint to a magistrate having jurisdiction, if there is reasonable belief that an offence has been committed by any person. It was averred further that only in selected and defined matters or cases is the consent of the DPP required and the same is expressly provided by statute.

[34] The 2<sup>nd</sup> Respondent denied the Petitioner's allegations and prayed that the petition be dismissed with costs for lack of merit.

[35] The 2<sup>nd</sup> Respondent's answer was accompanied by an affidavit in opposition and submissions filed into court on 16<sup>th</sup> April, 2021.

[36] The gist of the 2<sup>nd</sup> Respondent's submissions is that the right of a private person or citizen to institute a private prosecution is constitutionally recognized under Article 180(4) (b) and (c) of the Constitution. Further, that the procedure for exercising the said right is set out under section 90 of the CPC. In support of this proposition, reliance was placed on the case of **The People v Fred M'membe and the Post Newspaper Limited**<sup>3</sup> in which the question of the right of a private person to institute a private prosecution was considered in the light of the then Article 56(3) (b) and (c) of the Constitution, now Article 180(4) (b) and (c) of the Constitution as amended. Counsel recited what was held in that case at pages R13 and R14 as follows:

*"In Zambia, the right of a citizen to institute a private prosecution is set out in section 90 of the Criminal Procedure Code.....Though the right is set out in the Criminal Procedure Code, the Constitution recognizes its existence*

*through sub-Articles 3(b) and (c) of Article 56. The provisions indicate that the Director of Public Prosecutions can take over or discontinue “criminal prosecutions that have been instituted by another person or institution.” Consequently, it is my finding that there is a constitutional right to institute a private prosecution and the extent of the Director of Public Prosecutions’ powers under Article 56 of the Constitution must be considered and determined in the light of that right.”*

[37] On the strength of the above authority, it was the 2<sup>nd</sup> Respondent’s submission that a person or citizen who intends to institute a private prosecution under section 90 of the CPC, does not need the consent of the DPP.

[38] It was further submitted that although certain offences require the consent of the DPP before a prosecution can be instituted, the fact that such authority is required does not, however, prevent the arrest of, or the issuance of a warrant of arrest for the person accused. The 2<sup>nd</sup> Respondent submitted that he was fortified in his submission by the provisions of sections 84 and

85 of the CPC as well as section 46 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia.

[39] In relation to the provisions of section 89 of the CPC relied upon by the Petitioner, it was the 2<sup>nd</sup> Respondent's submission that section 89 has nothing to do with the requirement of the DPP's consent in a private prosecution as evidenced by the sub-heading under which the section falls, titled "*Appointment of Public Prosecutors and Conduct of Prosecutions*". It was submitted that statutory provisions must be read as a whole and not in isolation and that if the Petitioner had given attention to the statutory provision, he would have realized that section 89 in issue, allows a magistrate inquiring into or trying any case to permit a complainant to conduct the prosecution while also giving power to the DPP to grant permission to an officer, either generally or specifically in that regard. That a person permitted by the DPP usually becomes a gazetted public prosecutor.

[40] It was argued that section 89(3) of the CPC makes it clear that any person conducting a prosecution may do so personally or by an advocate.

**[41]** In addition, that a perusal of Article 180(3) (b) and (8) of the Constitution as read with section 89(3) and 90(4)(b) of the CPC, reveals that all those provisions use the term “or”, entailing that the law recognizes both the legal authority for private prosecution without the DPP’s consent, while at the same time recognizing the legal authority for public prosecution under the umbrella of the DPP. The 2<sup>nd</sup> Respondent stressed that the DPP directs public prosecutions as opposed to private prosecutions but that this does not take away the DPP’s right to take over and continue or indeed discontinue private criminal proceedings under private prosecution, at any given time where public interest so demands.

**[42]** The 2<sup>nd</sup> Respondent went on to give a historical perspective of the right to private prosecution and its rationale. It was submitted that the historical right to private prosecution by way of complaint has been a valuable constitutional safeguard aimed at protecting both public and private interests. In addition, that it safeguards against capricious, corrupt or

biased failure or refusal of the responsible public authority to prosecute offenders against the criminal law.

[43] Reliance was placed on the English case of **R (Gujra) v CPS**<sup>4</sup> in which the relationship between the DPP and a Private Prosecutor was considered.

[44] In view of the foregoing, it was submitted that the provisions of Article 180(8) of the Constitution have nothing to do with the right of a private individual or citizen to institute private prosecution as set out in section 90 of the CPC and recognized under Article 180(4) (b) and (c) of the Constitution.

[45] That a clear reading of Article 180(8) of the Constitution reveals that the provision does not *stricto sensu* relate to a private prosecution instituted by a person or citizen unless the same has been taken over by the DPP at which point, the legal practitioner intending to prosecute the case would require the consent of the DPP. Otherwise, that clause 8 of Article 180 of the Constitution concerns criminal proceedings out-rightly and generally commenced by the DPP.

[46] It was therefore the 2<sup>nd</sup> Respondent's submission that no consent of the DPP was required to commence the private prosecution under cause No. Crimp/019/2019. That the said prosecution was therefore not contrary to Article 180 (8) of the Constitution

[47] The 2<sup>nd</sup> Respondent urged us to take judicial notice of the fact that criminal proceedings can be commenced in two ways, firstly by complaint under section 90 of the CPC or secondly by arrest without a warrant. That in the case at hand, the private prosecution commenced by way of complaint before a magistrate having jurisdiction was lawful, legally sound and constitutional.

[48] The 2<sup>nd</sup> Respondent prayed that this matter be dismissed with costs.

[49] At the hearing of the matter, counsel for the 2<sup>nd</sup> Respondent Mr. Mweemba augmented the written submissions. As regards the provisions of section 89 of the CPC, it was argued that whilst headings, subheadings and marginal notes are not a product of Parliament but of draftspersons, they are extremely important

for guidance and that in this case, section 89 of the CPC falls under a provision dealing with public prosecutions. In this regard, we were urged to take judicial notice of section 3(2) of the Acts of Parliament Act, Chapter 3 of the Laws of Zambia which states that the words of enactment shall be taken to extend to all sections of the Act and to any schedules, tables and other provisions.

[50] Further, it was argued that there is nothing in Article 180 (8) of the Constitution that suggests the requirement for consent of the DPP in a private prosecution and that the office of the DPP deals with public prosecutions but that does not mean that the DPP cannot take over a private prosecution as he/she has constitutional discretion to do so.

[51] Mr. Phiri co-counsel for the 2<sup>nd</sup> Respondent, referred to correspondence from the National Prosecutions Authority appearing at pages 46 and 47 of the Record of Proceedings where the DPP indicated that a person can institute a private prosecution without the involvement of the DPP. He went on to argue that the use of the phrase “take over” in Article 180(4) of

the Constitution presupposes that there was a present action, thereby validating the fact that private prosecution can be commenced and perpetuated or continued without the involvement of the DPP.

[52] It was argued that the aspect of taking over is simply a safeguard against abuse. That this country's constitutional order from independence has always given leeway to private prosecutions and that the Petitioner is attempting to change the constitutional order by suggesting that there should be no private prosecution unless the consent of the DPP is sought and granted.

### **[53] PETITIONER'S REPLY**

[54] Mr. Yalenga submitted regarding the letter from the office of the DPP, that the law will be that which this Court will pronounce on and not the letter from the DPP.

[55] In response to the argument that the DPP is only responsible for public prosecutions and has nothing to do with private prosecutions, it was the Petitioner's argument that all prosecutions in this country are carried out in the name of the

People and not in the name of the concerned complainant, which fact makes all prosecutions public prosecutions. Further, that criminal law by its very nature is public law.

[56] It was argued further that although as a general rule all prosecutions are undertaken by public officers, in certain instances private persons may be authorized to prosecute, but that that does not take them outside the realm of the control of the DPP. Counsel emphasized that the Petitioner's arguments are not founded on the consent of the DPP to prosecute matters but simply that a person to whom the DPP has not granted general prosecutorial powers must seek the DPP's authority to exercise one of the functions or powers of the DPP which is to conduct prosecutions.

[57] That whilst it has been permissible throughout many constitutional regimes to conduct private prosecutions, that exercise is subject to authority granted by the DPP. That once a magistrate has determined that there are sufficient grounds for prosecution, the authority of the DPP at that point to commence a private prosecution is required.

[58] In addition, Mr. Simwanza co-counsel for the Petitioner, argued that what this Court is being called upon to determine is not whether a person can lay a complaint before a magistrate but whether or not any person can exercise prosecutorial powers without the consent of the DPP.

[59] The Petitioner prayed that the Court finds merit in the petition and grants the reliefs sought.

#### **[60] ANALYSIS AND DECISION**

[61] We have considered the petition and the affidavit in support and the answers and affidavits in opposition filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, respectively. We have also considered the submissions both written and oral by counsel representing the respective parties herein.

[62] The question that falls for our determination is:

**Whether or not the 2<sup>nd</sup> Respondent and his Advocates breached Article 180 (8) of the Constitution when they conducted a private criminal prosecution of the**

**Petitioner at the Subordinate Court at Lusaka without  
the authority or permission of the DPP.**

[63] As a starting point, we note that the parties in this matter have loosely used the term '**consent of the DPP**'. It is our considered view that the appropriate term should be '**authorization or permission of the DPP to conduct a private prosecution**' as opposed to '**consent of the DPP**'. Consent of the DPP otherwise known as a fiat or sanction of the DPP relates to the power of the DPP to issue a written consent for the commencement or continuance of prosecution for certain selected offences, without which the trial is rendered a nullity, as was held in the Supreme Court decision in the case of **LIYONGILE MUZWANOLO v THE PEOPLE<sup>5</sup>**. These offences are usually statutorily prescribed and require the consent/fiat of the DPP before a prosecution can be executed, but this is not a bar to the arrest and detention of the accused person but merely to the commencement of a trial. In those instances, if the DPP has signed the charge sheet or information, no written consent is required from him or her because the fact that the DPP has

signed the charge sheet means that the DPP has looked at the case, applied his or her mind to it and has consented to the prosecution. Section 84 and 85 of the CPC speak to this.

[64] On the other hand, the consent of the DPP being referred to in the instant case is authorization or permission by the DPP to allow a private person to undertake a private criminal prosecution of the offences which do not require a fiat. The two in our view are distinct and must not be taken to mean one and the same thing.

[65] For us to answer the question we posed at paragraph 62 herein, we have to examine the constitutional provisions that deal with the office of the DPP.

[66] Article 180 (1) of the Constitution establishes the office of the DPP by enacting as follows:

**There shall be a Director of Public Prosecutions who shall be appointed by the President, subject to ratification by the National Assembly.**

[67] Article 180(4) of the Constitution provides for the functions of the DPP as follows:

**The Director of Public Prosecutions may—**

- (a) institute and undertake criminal proceedings against a person before a court, other than a court-martial, for an offence alleged to have been committed by that person;
- (b) take over and continue criminal proceedings instituted or undertaken by another person or authority; and
- (c) discontinue, at any stage before judgment is delivered, criminal proceedings instituted or undertaken by the Director of Public Prosecutions or another person or authority.

[68] The functions of the DPP are replicated in section 8 (1) and (2) of the National Prosecution Authority Act No. 34 of 2010 which provides as follows:

(1) Subject to the Constitution, the Director of Public Prosecutions shall have authority over the exercising of all the powers and the performance of all the duties and functions conferred upon, imposed on or assigned to, prosecutors by this Act or under any other law.

(2) Notwithstanding the generality of subsection (1), the functions of the Director of Public Prosecutions are to -

(a) institute and undertake criminal proceedings against any person before any court, other than a court martial, in respect of any offence alleged to have been committed by that person;

- (b) take over and continue criminal proceedings as may have been instituted or undertaken by any other person or authority; and
- (c) discontinue, at any stage before judgment is delivered, criminal proceedings instituted or undertaken by the Director of Public Prosecutions or any other person or authority;
- (d) set the qualification for the appointment of prosecutors;
- (e) advise prosecutors on all matters relating to criminal offences;
- (f) review a decision to prosecute, or not to prosecute, any criminal matter;
- (g) advise the Minister on all matters relating to the administration of criminal justice;
- (h) liaise with the Chief State Advocate, the Deputy Chief State Advocate, the prosecutors, the legal profession and legal institutions in order to foster common practices and to promote co-operation in the handling of complaints in respect of the Authority;
- (i) assist the Deputy Chief State Advocate and prosecutors in achieving the effective and fair administration of criminal justice;

(j) liaise with and assist the Attorney-General in matters of extradition and mutual legal assistance in criminal matters; and

(k) appoint such experts as are necessary to assist the Director of Public Prosecutions carry out any functions under this Act.

[69] Under the current constitutional regime, the right to institute private prosecution is therefore, recognized under Article 180 (4) (b) and (c) of the Constitution which empowers the DPP to take over and continue criminal proceedings instituted or undertaken by another person or authority or to discontinue at any stage before judgment is delivered, criminal proceedings instituted or undertaken by the DPP or another person or authority.

[70] The power conferred on the DPP under Article 180 (4) (b) and (c) presupposes that criminal prosecutions cannot always be undertaken by the DPP but maybe undertaken by another person or authority.

[71] Under what circumstances then can criminal prosecutions be undertaken by another person or authority other than the DPP

who according to Article 180 (3) of the Constitution is the Chief Prosecutor of the Government?

[72] It is clear that the DPP has sole prosecuting powers to undertake all criminal prosecutions in this country. This notwithstanding, Article 180 (8) of the Constitution provides for the delegation of the functions of the DPP. Article 180 (8) of the Constitution enacts as follows:

**The functions of the Director of Public Prosecutions may be exercised in person or by a public officer or legal practitioner, authorized by the Director of Public Prosecutions, acting under the general or special instructions of the Director of Public Prosecutions.**

[73] In order to realize the dictates of Article 180 (8) of the Constitution, the DPP appoints and gazettes prosecutors from statutory bodies or institutions to undertake criminal prosecutions on behalf of the office of the DPP for offences under their respective governing legislation. Suffice to state that although the DPP appoints these prosecutors, the office of the DPP still retains control over any such prosecution undertaken

by them as provided for under Article 180 (4) of the Constitution.

[74] Article 180(8) of the Constitution states that the functions of the DPP may be exercised in person or by a public officer or legal practitioner, authorized by the DPP, acting under the general or specific instructions of the DPP. The **Oxford Advanced Learner's Dictionary** defines the term '**authorized**' to mean: "*Having official permission or approval*" whereas the term '**authorization**' has been defined as: "*Official permission or power to do something; the act of giving permission*".

[75] From the wording of Article 180 (8) of the Constitution, it is our view that as all prosecutions are undertaken by the DPP or on behalf of the DPP. A person undertaking any prosecution must first obtain authorization or permission from the DPP.

[76] Section 6 of the Constitution of Zambia Act No. 1 of 2016 provides that existing legislation at the time of the 2016 constitutional amendments, such as the CPC, were to continue in force and must be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution as

amended. However, in case of section 89 of the CPC, it is in line with the provisions of Article 180 (8) of the Constitution and similarly recognizes the right of a private person or citizen to conduct private prosecution, save that the same should be done with the permission of the DPP. Section 89(1) of the CPC provides that:

**Any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person, but no person, other than a Public Prosecutor or other officer generally or specially authorised by the Director of Public Prosecutions in this behalf, shall be entitled to do so without permission.**

(Emphasis added).

[77] There was an argument by the Respondents that section 89 of the CPC has nothing to do with the requirement of the authorization of the DPP in private prosecution and that the said section falls under a sub-heading dealing with appointment of public prosecutors and conduct of prosecutions. That therefore, the section only refers to public prosecutions under the umbrella of the DPP. That this was clarified by the DPP herself in a letter wherein she explained

that the authorization or permission of the DPP is not required in private prosecutions. According to the Respondents, the DPP directs public prosecutions as opposed to private prosecutions as suggested by the name.

[78] It was further argued that the use of the word “or” under Article 180 (4) (b) and (8) of the Constitution, section 89(3) and section 90(4) (b) of the CPC means that the law recognizes both the legal authority for private prosecution without the DPP’s consent or authority and also the legal authority for public prosecution under the umbrella of the DPP.

[79] Our understanding of section 89 (1) of the CPC is that it grants two fold permission; firstly, the permission by a magistrate inquiring into the matter and secondly, authorization to conduct a prosecution by the DPP. In other words, although a magistrate inquiring into or trying any case may permit a prosecution to be conducted by any person, such a person shall not be allowed to do so without permission of the DPP. In our view, this provision relates to private prosecutions in so far as it relates to prosecutions undertaken by such persons other than public prosecutors generally or persons specifically

authorized by the DPP as expressly stated in section 89 (1) of the CPC.

**[80]** In line with Article 180(8) of the Constitution, section 89(1) of the CPC in fact complements the constitutional provision that any private criminal prosecution instituted by either a complainant personally or by his legal practitioner, requires the permission of the DPP.

**[81]** We therefore, find that the argument by the 2<sup>nd</sup> Respondent that section 89 of the CPC only deals with public prosecutors because it falls under the umbrella of a sub-heading titled ‘appointment of public prosecutors and conduct of prosecution’ is a serious misapprehension of the law. It is clear from the marginal note against section 89 that the provision also deals with permission to conduct prosecutions in general. If indeed it was the intention of the Legislature that the provision relate only to public prosecutions, the same would have been expressly stated. There is in no doubt that the prosecution referred in section 89 of the CPC includes that which is instituted under section 90 of the CPC.

[82] It was the Respondents argument that section 90 of the CPC does not require the authority of the DPP for a complaint to be lodged and ultimate prosecution thereunder commenced. In dealing with this argument, we need to clarify that the right of a citizen to institute criminal proceedings is set out under section 90 of the CPC. Section 90 (1) of the CPC, specifically provides for two modes through which criminal proceedings may be instituted by either making a complaint or by bringing before a magistrate a person who has been arrested without warrant.

[83] As regards commencement of criminal proceedings by way of a complaint, section 90 (2) of the CPC enacts that any person who has a reasonable and probable cause to believe that an offence has been committed by any person, may make a complaint of the alleged offence to a magistrate having jurisdiction to try and inquire into the alleged offence.

[84] Under section 90(3) of the CPC, every such complaint may be made orally or in writing but if made orally it shall be reduced to writing and when so reduced, shall be signed by the

complainant. The magistrate, upon receiving such complaint, shall (a) personally draw up and sign; or (b) direct that a public prosecutor or legal practitioner representing the complainant shall draw up and sign; or (c) permit the complainant to draw up and sign; a formal charge containing a statement of the offence with which the accused is charged and until such charge has been drawn up and signed no summons or warrant shall issue and no further step shall be taken in the proceedings.

**[85]** The other mode of commencement is by arrest without a warrant. Section 90(5) of the CPC provides that when an accused person who has been arrested without a warrant is brought before a Magistrate, a formal charge containing a statement of the offence with which the accused is charged shall be signed and presented to the Magistrate by the police officer preferring the charge.

**[86]** We need to mention here that section 90 of the CPC specifically provides for an individual to institute criminal proceedings and not the conduct of a private criminal prosecution. If a

complainant or his advocate subsequently desires to conduct a private criminal prosecution, they ought to obtain necessary authority of the DPP in line with the dictates of Article 180 (8) of the Constitution.

[87] The provisions of section 90 (2) of the CPC are therefore not inconsistent with the provisions of Article 180 of the Constitution.

[88] It follows that the arguments by counsel for the Respondents that section 90 (2) of the CPC confers the right on an individual to undertake private criminal prosecution in the Republic of Zambia without the authority or permission of the DPP are misconceived. We reiterate that section 90 (2) of the CPC only provides for institution of criminal proceedings by private citizens and not the conduct of private criminal prosecutions without authority of the DPP.

[89] The learned author of ***The Case for the Crown: The inside story of the Director of Public Prosecutions*** at page 169, gave a justification for authorization provisions. That the aim was “***to stop busybodies blundering in and prosecuting people in circumstances which would not be seen as appropriate***”.

[90] As regards the argument that the DPP only directs public prosecutions as opposed to private prosecutions, we wish to reiterate what we earlier stated that the DPP is the Chief Prosecutor for the Government and is therefore in charge of all prosecutions in Zambia whose functions are either conducted by the DPP himself or herself or on his or her behalf by such persons as are authorized. This is evidenced by the fact that the DPP may take over or continue criminal proceedings instituted by another person or authority whom he or she had earlier given permission to prosecute. The DPP may also discontinue at any stage before judgment criminal proceedings instituted either by himself or herself or another person or authority whom he or she had earlier given permission to prosecute.

[91] It is clear that the DPP retains control over all prosecutions and therefore a right to a private criminal prosecution must be read in line with the relevant constitutional provisions. Not only is it subject to the constraint, in regard to specific offences, which require the consent or fiat of the DPP, but also that private prosecutions may be terminated by the DPP who has the power to take over or discontinue proceedings instituted by private

persons under Article 180 (4) of the Constitution as read with section 8 of the National Prosecution Authority Act. Needless to mention that private criminal prosecutions, though instituted by private persons, are carried out in the name of the People, namely; the State. It is therefore, imperative that the DPP is aware of and authorises all criminal prosecutions by private persons beforehand. The argument that the DPP only directs public prosecutions is therefore not sustainable.

**[92]** A study of the pieces of legislation of other countries on this subject, indeed, reveals that the laws governing private prosecutions are more or less similar to the ones in our jurisdiction. In Kenya for instance, section 88 of the Kenyan CPC which is a mirror of section 89 of the Zambian CPC provides that:

**(1) Any magistrate trying a case may permit the prosecution to be conducted by any person, but no person, other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecutions in this behalf, shall be entitled to do so without permission.**

**(2) Any such person or officer shall have the same power of withdrawing from the prosecution as is provided by section 87,**

**and the provisions of that section shall apply to withdrawal by that person or officer.**

**(3) Any person conducting the prosecution may do so personally or by an advocate**

**[93]** In the United Kingdom, private prosecution is provided for under section 6(1) of the Prosecution of Offences Act 1985. The said Act sets out control mechanisms in section 6(2) wherein the Director of Public Prosecutions has power to take over or continue private prosecutions, or to discontinue a private prosecution in some cases. A private prosecutor must seek the authorization of the DPP before the commencement of a private prosecution.

**[94]** In our jurisdiction like other jurisdictions, the DPP retains control over all prosecutions to secure consistency in prosecutions so as to prevent abuse and bringing the law into disrepute by instituting proceedings which might otherwise result into vexatious private prosecutions. This also provides a safety mechanism for avoidance of abuse of criminal law to intrude into private citizens' rights without proper mechanisms for checks.

[95] We find that Article 180 (8) of the Constitution confers the right to undertake private prosecutions but only with authorization of the DPP.

[96] We further find that the provisions of section 90(2) of the CPC, only empower private citizens to institute criminal proceedings by making a complaint to a magistrate having jurisdiction. Section 90(2) of the CPC does not confer any power on an individual to conduct a private criminal prosecution without the permission of the DPP but merely outlines the various modes by which criminal proceedings may be commenced.

**[97] CONCLUSION**

[98] In view of what we have stated above, we hold that whilst the right of a private citizen to institute private criminal prosecution is constitutionally guaranteed, no such prosecution can be undertaken without the authorization of the DPP.

[99] Consequently, we hold that the private criminal prosecution of the Petitioner and Kingphar Company Limited under cause number Crimp/019/2019 before the Subordinate Court at Lusaka in the absence of authorization of the DPP was

unconstitutional and illegal and all proceedings and decisions made thereunder are null and void.

[100] In view of the facts of this case, each party will bear own costs.



**A.M. SITALI**

CONSTITUTIONAL COURT JUDGE



**P. MULONDA**

CONSTITUTIONAL COURT JUDGE

**M.S. MULENGA**

CONSTITUTIONAL COURT JUDGE

**M.M. MUNALULA (JSD)**

CONSTITUTIONAL COURT JUDGE

**M. MUSALUKE**

CONSTITUTIONAL COURT JUDGE