

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

2020/CC/005

IN THE MATTER OF: **PART I, ARTICLE 2 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016**

IN THE MATTER OF: **ARTICLE 63 (2) (d) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016**

IN THE MATTER OF: **PART XVI, OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016**

IN THE MATTER OF: **ARTICLE 177 (5) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016**

IN THE MATTER OF: **THE LOANS AND GUARANTEES (AUTHORIZATION) ACT, CHAPTER 366 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: **PUBLIC BORROWING BY THE GOVERNMENT OF THE REPUBLIC OF ZAMBIA**

BETWEEN:

DIPAK PATEL

PETITIONER

AND

THE MINISTER OF FINANCE

1ST RESPONDENT

THE ATTORNEY GENERAL

2ND RESPONDENT

Before the Honourable Mrs. Justice A.M. Sitali in Chambers.

For the Petitioner : **Mr. J. Madaika
J and M Advocates**

For the Respondents : **Mr. A. Mwansa, SC
Solicitor-General**

**Mrs. K.N. Mundia
Principal State Advocate**

R U L I N G

Cases cited:

1. **Charles Kajimanga (Honourable Judge) v Marmetus Chilemya (Appeal No. 50 of 2014) (unreported)**
2. **OTK Limited v Amanita Zambiana Limited (2011) 1 ZR 170**
3. **Law Association of Zambia and Chapter One Foundation v The Attorney-General (2019/CCZ/0013, 2019/CCZ/0014)**
4. **Chief Chanje v Zulu, Appeal No. 73 of 2008 (unreported)**
5. **Wilson v Secretary of State for Trade and Industry (2003) UKHL 40**
6. **Minister of Information and Broadcasting Services and Another v Chembo and Others, Appeal No. 76 of 2005 (unreported)**
7. **Hubert Sankombe v The People (1977) ZR 171**

Legislation referred to:

1. **The Constitutional Court Rules, S.I. No. 37 of 2016, Order VI rule 19**

Other Authorities referred to:

1. **Hodge M. Malek Q.C, editor *Phipson on Evidence*, Seventeenth Edition, 2010, Thomson Reuters (Legal) Limited, London**

By Notice of Motion to object to the production of documents filed on 3rd July, 2020, the Respondents seek an order that certain documents referred to in the Petitioner's Amended List of Documents filed on 5th May, 2020 should not be produced at trial. The Notice of Motion was filed pursuant to sections 3 (2) and 5 of the Constitutional Court Act No. 8 of 2016 read with Order VI rule 19 of the Constitutional Court Rules, S.I. No. 37 of 2016.

Prior to filing the Notice of Motion, the Respondents on 5th June, 2020 filed a Notice of Intention to object to the Production of Documents referred to in the Petitioner's Amended List of Documents with a supporting affidavit which was deposited to by Lwisha Shula-Chibowa, Acting Principal State Advocate in the Attorney-General's Chambers. In that affidavit, the deponent deposed that on 5th May, 2020 the Petitioner filed into Court an Amended List of Documents. On 13th May, 2020, the parties conducted inspection of documents in compliance with this Court's orders for directions. At the time of inspection of documents, the Respondents' Advocates advised the Petitioner's Advocates that the Respondents would object to the production of some of the documents set out in the Petitioner's Amended List of Documents.

The Respondents therefore object to the production of documents number 1 and 6 on the ground that the said documents are not relevant to the proceedings; documents number 2, 3 and 4 on the ground that the documents constitute law and need not be produced as evidence; documents number 5, 14 and 15 on the ground that they constitute opinions expressed by the Members of Parliament during their debates; documents number 12 and 13 on the ground that they are an expression of opinions held by the authors and contributors of

the papers and document number 17 on the ground that the Petitioner should provide an authenticated copy from the authoring institution.

In the affidavit in support of the Notice of Motion filed on 3rd July, 2020 also deposed to by Lwisha Shula-Chibowa, the deponent stated that she would, at the hearing of this application, rely on the application to raise objections to the production of specified documents at trial made by way of the Notice of Intention to object to the production of documents referred to in the Petitioner's Amended List of Documents, the supporting affidavit and the skeleton arguments filed on 5th June, 2020.

In opposing the notice of motion, the Petitioner filed an affidavit in opposition and skeleton arguments on 17th July, 2020. In that affidavit, the Petitioner confirmed that the parties did conduct inspection of documents and that the Respondents indicated that they intended to file an objection to the production of certain documents in his amended list of documents. He alleged that the Respondents, however, did not put their intention to object in writing.

The Petitioner averred that the Respondents waived their right to object to the production of the documents in his amended list of documents by executing a consent order directing the parties to file and

exchange bundles of documents and witness statements on 5th June, 2020; and by filing their objection after the Petitioner's advocates had duly filed his bundles of documents on 5th June, 2020. He contended that the Respondents' objection to the documents in his amended list of documents had been overtaken by events as the documents they intend to object to were produced into Court by the filing of the Petitioner's bundle of documents.

The Petitioner further averred that whereas the Respondents objected to the production of documents number 2, 3 and 4 in his list of documents on the ground that they constitute law, their entire list of documents filed on 27th May, 2020 and part of their supplementary list of documents filed on 28th June, 2020 comprise statutory instruments and motions by the National Assembly. The Petitioner deposed that the Respondents' application automatically attacks their own documents and is untenable. He contended that there is no law that prevents a party from producing copies of statutes and Parliamentary proceedings for ease of reference and as part of his evidence.

He further contended that although the Respondents object to documents number 1 and 6 in his list of documents alleging that they are irrelevant, the documents are relevant as can be seen from the

witness statement of Cornelius Mweetwa filed on 5th June, 2020 and that relevance is determined by the Court at trial.

The Petitioner further deposed that although the Respondents object to the production of documents number 5, 12, 13, 14 and 15 on the ground that they comprise opinions, documents produced before Court whether or not they are opinions are not produced for their binding effect and further that it is for the Court to determine the relevance of documents at trial. The Petitioner contended that the motions of the National Assembly which the Respondents exhibited in their supplementary bundle of documents can be equated to the Parliamentary debates listed at number 5 of his amended list of documents which are alleged to be opinion evidence which cannot be produced in Court.

Lastly, the Petitioner deposed that document No. 17 in his amended list of documents which the Respondents objected to, alleging that it must be authenticated by the author institution, is a World Bank International Debt Statistics 2020 Report which is in the public domain and which can be taken judicial notice of; that since Zambia is a member of the World Bank Group from 23rd September, 1965, it need not be authenticated as it is not a foreign document.

In the affidavit in reply, Lwisha Shula-Chibowa deposed that contrary to the Petitioner's assertion that the Respondents waived their right to object by executing a consent order to vary the order for directions issued by this Court, the variation of the order for directions was necessary to allow the Respondents to file their list of documents which had not been filed at the time of inspection of the Petitioner's list and bundle of documents. That the varied order for directions only provided for the Respondents' list of documents and did not change the other dates in the initial order for directions issued by the Court.

She further deposed that the Petitioner was aware of the Respondents' intention to object to the documents having been informed of that intention at the time of inspection. That the Respondents allowed the Petitioner to file his bundle of documents so that this Court could examine the documents objected to and determine whether or not they should be removed from the Court's record.

It was deposed that the parties discussed the statutory instruments which the Respondents have filed and the Petitioner unequivocally stated that he would not object to the said statutory instruments which have a peculiar status compared to the general law which the Petitioner insists on producing.

It was averred that the process of discovery and inspection permits parties to sieve out irrelevant and objectionable documents. That the law is public in nature and shall be judicially noticed by this Court. It was further averred that the Parliamentary debates in issue are merely expressions of opinion and have been overtaken by the enactment of the requisite law.

Lastly, it was deposed that document No. 17 in the Petitioner's amended list of documents is not a local document and therefore it ought to be duly authenticated to be relied upon by the Petitioner.

At the hearing of the application, the learned Solicitor General Mr. Mwansa SC and Mrs. Mundia, Counsel for the Respondents relied on the Respondents affidavits in support of the application filed on 5th June, 2020 and 3rd July, 2020 respectively and on the arguments advanced in the Respondents' skeleton arguments filed on 5th June, 2020. They also relied on the Respondent's affidavit in reply and skeleton arguments filed on 21st July, 2020.

Similarly, Mr Madaika, Counsel for the Petitioner relied on the affidavit in opposition to the notice of motion and the skeleton arguments filed on 17th July, 2020.

In the Respondents' skeleton arguments in support of the notice of motion, it was submitted that in making this application, the

Respondents seek to invoke this Court's inherent jurisdiction to make an interlocutory order that the Court deems necessary for doing justice and rely on Order VI Rule 19 of the Constitutional Court Rules which provides that:

"An objection to the receipt of evidence by a party affected shall be made at the time the evidence is offered."

It was submitted that the purpose of conducting discovery and inspection of documents is to ensure that the parties are made aware of the documents the opposing party intends to rely on at trial and to give an opportunity to a party to raise any objection they may have. It was contended that in this case, the Respondents had raised their objection to the documents which the Petitioner intended to produce before this Court in a timely manner and had given the Petitioner sufficient notice to enable him respond to the objection raised.

The persuasive case of **Charles Kajimanga (Honourable Judge) v Marmetus Chilemya**⁽¹⁾ was cited in support wherein the Supreme Court dealt with the question of when an objection to the production of documents can be raised. It was submitted that in that case, the Supreme Court endorsed the decision in **OTK Limited v Amanita Zambiana Limited**⁽²⁾ wherein the common practice by Counsel to ignore or neglect to inspect documents, and proceed straight to filing bundles of documents was frowned upon by the Court. That it was emphasised

in that case that the fact that the parties had deliberately ignored taking certain steps set out in the order for directions, did not take away a party's right to object to certain documents that are included in the bundle of documents.

It was submitted that the Supreme Court in the Kajimanga⁽¹⁾ case further observed that:

“...in a civil matter, a party is provided with an opportunity to object to any document intended to be brought before the Court by the opposing party... an objection to a document must be made timely to allow the opposing party to respond and, if possible, to make any relevant application. (Emphasis by Counsel)

Counsel proceeded to state the basis for the Respondents' objection to specific documents in the Petitioner's amended list of documents. It was submitted that document No. 1, the Constitution of Zambia (Amendment) Bill No. 17 of 2015 (henceforth referred to as Bill No. 17 of 2015) had since been enacted into law as the Constitution of Zambia (Amendment) Act No. 2 of 2016 upon which the Petitioner herein has based his Petition. It was contended that the Bill was therefore irrelevant as the Constitution had since been amended and that the Petitioner ought to know that a Bill is merely proposed law and is unenforceable. It was argued that document No. 6 was a report relating to the Constitution as now amended.

It was submitted that this Court in the consolidated case of Law Association of Zambia and Chapter One Foundation v The Attorney-General⁽³⁾ held that this Court has no jurisdiction to hear a matter that alleges that a Bill contravenes the Constitution or to declare it unconstitutional. Further, that the Court refused to delve into the contents of the Constitution of Zambia (Amendment) Bill No. 10 of 2019 (Bill No. 10 of 2019) because it had no jurisdiction to do so under Article 128 of the Constitution as amended.

It was argued that if Bill No. 17 of 2015 was produced, it would require the Court to delve into its contents and to make determinations on the Constitution based on the said Bill, which situation would be contrary to the provisions of Article 128 of the Constitution and to the holding in the Law Association of Zambia and Chapter One Foundation⁽³⁾ case. The Respondents therefore argued that it would be improper and unjustifiable to allow the Petitioner to produce Bill No. 17 of 2015 at trial.

Regarding documents No. 2, 3 and 4, Counsel submitted that the three laws need not be produced as evidence by the Petitioner as doing so would merely make the bundle of documents voluminous and would serve no useful purpose in the proceedings; that the Petitioner will be able to refer to the law in their submissions before this Court.

It was further submitted that document No. 5 contains opinions expressed by the Members of Parliament in their debate of Bill No. 17 of 2015 regarding the amendment of the Constitution and cannot now be adduced as evidence before this Court. That the constitutional amendments have since become law and are binding on the Members of Parliament who participated in the debate and on the parties. It was contended that the reliefs sought by the Petitioner in this case cannot be proved by a consideration of the Parliamentary debates but may be addressed by a consideration of specific clauses of the Constitution and other relevant legislation and based on the Court's interpretation. It was submitted that the same objection applies to the Reports of the Committees of the National Assembly of Zambia contained in documents No. 14 and 15. The Respondents contended that the Petitioner would serve this Court better if he produced the resolutions following the debates, as those resolutions would be binding on all Members of Parliament who expressed their opinions during the proceedings.

It was also contended that documents No. 12 and 13 are articles containing opinions of the authors and ought not to be produced in Court. **Cross on Evidence (London Butterworths 1985: sixth edition)** was cited as stating with regard to opinion evidence that:

"A witness may not give his opinion on matters which the Court considers call for the special skill or knowledge of an expert unless he is an expert in such matters, and he may not give his opinion on other matters if the facts upon which it is based can be stated without reference to it in a manner equally conducive to the ascertainment of the truth."

(Emphasis by Counsel)

Counsel also cited the learned authors John Hatchard and Muna Ndulo who in their book entitled **the Law of Evidence in Zambia: Cases and Materials** state at page 232 that:

"When dealing with the question of 'expert' testimony, two interrelated but separate questions should be considered: first, whether the issue in question is such that the trier of fact may appropriately receive assistance in the form of expert evidence, and second, whether the witness at hand is an individual qualified to render the assistance."

Counsel submitted that it is settled law that a witness must be of fact and not of opinion. That the issue raised by the petition borders on the interpretation of a specific constitutional provision raised by the Petitioner and that the authors of documents number 12 and 13 are not qualified to give assistance to this Court in rendering its decision. It was submitted that this evidence is therefore irrelevant and ought not to be allowed to be produced at trial.

Counsel prayed that the documents objected to by the Respondents should not be produced into evidence by the Petitioner.

In the Petitioner's skeleton arguments in opposition to the notice of motion, Counsel for the Petitioner reiterated that the parties did

conduct inspection of documents on 13th May, 2020 and that the Respondents did say that they would object to the production of certain documents by the Petitioner but did not reduce their objection to writing. That the Respondents prepared and executed a consent order varying the orders for directions issued by this Court so that the Petitioner's bundle of documents and witness statements were to be filed into Court on 5th day of June, 2020.

Counsel submitted that the Respondents objections should not be upheld by this Court on the basis that the Respondents waived their right to object to the documents in the Petitioner's list of documents by their execution of a Consent Order directing that parties file and exchange bundles of documents on the 5th of June, 2020 and then waiting to file objections after the Petitioner had filed its bundle of documents. It was submitted that essentially, the Respondents' objection to documents in the amended list of documents was overtaken by the subsequent filing of a bundle of documents into Court by the Petitioner.

It was Counsel's further submission that the Respondents objections must fail on the mere fact that the Respondents own documents filed into Court fall into the category of documents that they contend should not be produced before Court. That is, documents

comprising law and documents comprising opinion. By producing statutory instruments and motions of National Assembly, this act in itself waives any right that the Respondents have to object to documents filed by the Petitioner in so far as they constitute law and opinion. Counsel therefore prayed that the Respondents objections be dismissed with costs.

In support, Counsel cited **Black's Law Dictionary** which states that a "**Waiver is the intentional or voluntary relinquishment of a known right... and further that a Waiver is essentially unilateral resulting as a legal consequence from some act or conduct of a party against whom it operates and no act of a party in whose favour it is made is necessary to complete it..."**

It further states with regard to an implied waiver that:

"A waiver is implied where one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may be entitled, or where the conduct pursued is inconsistent with any other honest intention than an intention of such waiver, provided that other party concerned has been induced by such conduct to act upon the belief that there has been a waiver and has incurred trouble or expense thereby." (Emphasis by Counsel)

Counsel submitted that the Respondents had objected to certain documents in his list of documents because they comprise law without citing any statute or decided case in support of this position. He

submitted that the Respondents had filed a list of documents on the 29th May, 2020, and a supplementary list of documents on the 18th June, 2020. That a perusal of the two documents reveals that the Respondents intended to produce statutory instruments and various motions of the National Assembly at trial.

Counsel submitted that in terms of Article 7 of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016, statutory instruments form part of the laws of Zambia. Counsel argued that the Respondents cannot object to the production of laws enacted by Parliament on the basis that they are laws and yet produce statutory instruments which are also law. Counsel submitted that the Respondents' objection therefore should not be entertained by this Court.

Counsel went on to submit that while the Respondents objected to the Petitioner producing Parliamentary debates on the ground that they constitute opinion evidence, they had produced various motions of the National Assembly which can be equated to Parliamentary debates. Counsel cited Black's Law Dictionary which defines a motion at page 1164 as follows:

"The formal mode in which a member submits a proposed measure or resolve for the consideration and action of the meeting."

Counsel contended that in light of the motions produced by the Respondents their objection to the Petitioner's production of Parliamentary debates cannot be upheld.

Counsel submitted that the Respondents had not cited any law to support their position that documents containing opinion evidence cannot be produced by the Petitioner to support his case. He submitted that documents produced before Court, whether or not they constitute opinions, are not produced into Court for their binding effect. That it is for the Court to determine the relevance or irrelevance of documents produced before it. Counsel argued that the Respondents' objection to documents they consider to be opinion evidence is therefore misplaced.

In augmenting the skeleton arguments, Mr. Madaika Counsel for the Petitioner submitted that although the notice of motion states that the reasons for objecting to the production of the documents are set out in the affidavit in support of the notice of motion, the affidavit in support of the notice of motion dated 3rd July, 2020 particularly paragraph 3 does not disclose any reason for the Respondents' objection. That similarly, the affidavit in reply did not disclose any reason for objecting to the documentation.

That in paragraphs 8 and 9 of their affidavit in reply the Respondents conceded that instead of raising their objection

immediately, they allowed the Petitioner to comply with the orders for directions in full. Counsel contended that since the Respondents slept on their rights by raising a late objection, they can only raise their objections at trial and not at this stage.

Lastly, Counsel submitted that the Petitioner's amended list of documents was overtaken when the Petitioner filed his bundle of documents and that if the Respondents wanted this Court to prevent the production of the documents objected to, they should have applied to expunge the documents from the bundle of documents which they did not do.

Mr. Madaika submitted that the issue of relevance can be determined at trial and prayed that the application be dismissed with costs.

In their skeleton arguments in reply, the Respondents submitted that they did not waive their right to object to the Petitioner's amended list of documents by their conduct as the Petitioner was formally informed of their intention to object at the initial inspection meeting and that the Respondents did not take any decisive or unequivocal step that would have led the Petitioner to believe that they would not pursue their objections. In support, Counsel cited Black's Law Dictionary at page 1717 (ninth edition) which defines an implied waiver as:

"A waiver evidenced by a party's decisive, unequivocal conduct reasonably inferring to intent to waive."

The case of Kajimanga v Chilemya⁽¹⁾ was cited in aid wherein the Supreme Court stated that:

"An objection to a document must be made timely to allow the opposing party to respond and, if possible, to make any relevant application." (Emphasis by Counsel)

Counsel further cited the case of OTK Limited v Amanita Zambiana Limited and Others ⁽²⁾ and submitted that the objection was filed in a timely manner and was made within the time frame of the order for directions as permitted and envisaged by the law. Counsel argued that the purpose of the discovery and inspection process is to ensure that objectionable documents are rooted out promptly and in an orderly manner.

Counsel submitted that it was illogical for the Petitioner to argue that the filing of his bundle of documents took away the Respondents' right to object to the documents. Counsel contended that the Respondents allowed the Petitioner to file his bundle of documents so that this Court could have sight of the objectionable documents in order to make a proper ruling on the documents in issue.

Further that, section 6 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia provides that:

"Every Act, Applied Act or British Act shall be a public Act and shall be judicially noticed as such."

Counsel submitted that in terms of the provisions of section 6 of the Act cited above, Acts of Parliament are common knowledge and their production as part of the Petitioner's evidence is thus unnecessary and would be an insult to the intelligence of this Court. To that effect, the case of **Chief Chanje v Zulu** ⁽⁴⁾ was cited wherein it was said that:

"It was contended that under the law, the Court can only take judicial notice of matters of common knowledge which are so notorious that to lead evidence in order to establish their existence may be unnecessary and as Phippson put it, "would be an insult to the intelligence to require evidence."

(Emphasis by Counsel)

It was contended that this Court is aware of the law and therefore the production of the Acts of Parliament is irrelevant as the Petitioner will have an opportunity to rely on the law in making his submissions as he had done in his skeleton arguments.

Counsel conceded that both Acts of Parliament and statutory instruments constitute the Laws of Zambia but argued that in this case the Petitioner's Advocates had not objected to the production of the statutory instruments in the Respondents' list of documents. Counsel submitted that statutory instruments are distinguishable from the Acts of Parliament because they are not common knowledge and may not enjoy wide circulation. Counsel submitted that they had informed the

Petitioner's Advocates that the statutory instruments were quite difficult to find and that the Respondent were providing them for the benefit of the Court and the Petitioner.

Regarding the Parliamentary debates in the Petitioner's list of documents, it was submitted that the debates were an expression of opinion by the Members of Parliament, and that the opinions were irrelevant as Bill No. 17 of 2015 to which they related had become law.

Counsel called in aid the case of Wilson v Secretary of State for Trade and Industry⁽⁵⁾ wherein it was stated *inter alia* that:

"Beyond the use of the Hansard as a source of background information, the content of Parliamentary debates has no direct relevance to the issues the Court is called upon to decide in compatibility cases and, hence, these debates are not a proper matter for investigation or consideration by the Courts. In particular, it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis. The Courts are to have due regard to the legislation as an expression of the will of Parliament."

They further cited the case of Minister of Information and Broadcasting Services and Another v Chembo and Others⁽⁶⁾, wherein the Supreme Court stated that:

We propose to deal with the second ground of appeal first which is that the Court below misdirected itself in referring to the Hansards or relying on debates of a few Members of Parliament in construing the intent of the two pieces of legislation, namely, the Independence Broadcasting Authority Act No. 17 of 2002 and the Zambia National Broadcasting

Corporation (Amendment) Act No. 20 of 2002. Of the authorities cited on the jurisprudence on the construction of statutes, the case of Attorney-General v Lewanika and Others⁽¹⁾ sums up what all the other cases have to say, that the fundamental rule of interpretation of Acts of Parliament is that they ought to be construed according to the words expressed in the Acts themselves. The word “construe” in our considered opinion means reading the statute in whole and not piecemeal.”

Counsel submitted that in view of the foregoing authority, Parliamentary debates should not be included in the Petitioner's list and bundle of documents because the will of Parliament is expressed in the language used by it in its enactments.

Counsel submitted that on the other hand, the motions filed by the Respondents are directly relevant to the questions raised by the Petitioner regarding the debt contraction by the Government because they clearly show the binding resolutions made by the Members of Parliament substantiating the debt contraction procedure; and that the resolutions in the motion culminated into the statutory instruments, which are relevant to the determination of this cause.

In conclusion Counsel prayed that the Respondents' objections be upheld by this Court and that the costs of this application be borne by the Petitioner.

In augmenting the skeleton arguments in reply, Mrs. Mundia submitted that contrary to Mr. Madaika's contention that the

Respondents' affidavit in support of the notice of motion filed on 3rd July, 2020 did not disclose the reasons for the objection, paragraph 3 of that affidavit clearly stated that the Respondents would rely on the documents filed on 5th June, 2020.

Regarding the Petitioner's allegation that the Respondents' objection was raised late and that they allowed the orders for directions to be complied with, Mrs. Mundia submitted that the Petitioner's Advocates were made aware of the Respondents' intention to object to the documents at the initial meeting for inspection of documents and that the objection was filed within the time frame of the orders for directions.

In further augmentation, Mr. Mwansa, SC submitted that although Mr. Madaika argued that the Respondents had not given reasons why the documents objected to should not be produced, paragraphs 4 to 8 of the affidavit in support of the Respondent's application filed on 5th June, 2020 clearly stated which documents ought not to be produced in the bundle of documents. That document No. 2 - the Constitution of Zambia Act No. 1 of 2016; document No. 3 - the Constitution of Zambia (Amendment) Act No. 2 of 2016 and document No. 4 - the Loans and Guarantees (Authorisation) Act, Chapter 366 of the Laws of Zambia are law and are not documents

capable of being produced in a bundle of documents. That at best, these documents may be produced in a bundle of authorities if the Petitioner so desires.

The learned Solicitor-General further submitted that documents such as Parliamentary debates and proceedings cannot be produced because what follows the debates is enactment of a law after which the debates and proceedings are history. Regarding Mr. Madaika's argument that the Respondents took fresh steps after the filing of the amended list of documents and long after the Petitioner had filed his bundle of documents, the learned Solicitor-General submitted that the Respondents' short reply was, how else would this Court have appreciated the nature of the documents objected to if they had not been filed before the Court?

He stated that as Mrs. Mundia had submitted, it was made known to the Petitioner's Advocates during inspection of documents that the Respondents would object to the production of the documents now objected to but the Petitioner decided to file those documents, hence this objection. Mr. Mwansa, SC submitted that this application is therefore properly before this Court as it had come immediately after the Petitioner filed his bundle of documents.

He prayed that the documents objected to should not be relied upon or produced at trial as they are objectionable.

I have considered the application and the affidavits filed on both sides as well as the written and oral arguments and the authorities cited which I have reviewed. The Respondents object to the production of documents number 1, 2, 3, 4, 5, 6, 12, 13, 14, 15 and 17 listed as such in the Petitioner's Amended List of documents. Before considering the Respondents' objection to the specific documents, I will first address the Petitioner's contention that the Respondents waived their right to object to the production of the impugned documents at this stage when they executed the consent order which varied the order for directions issued by this Court and by only filing the notice of motion to object to the documents after the Petitioner had filed his bundle of documents.

I should state at the outset that there is nothing in the law which barred the Respondents from filing their notice of motion to object to the production of the documents after the Petitioner had filed his bundle of documents into Court. In civil matters, rules of procedure commonly provide for parties to have access to all documents in the possession of their opponent and to raise any objection that they may have to such documents. This is done through the process of discovery and inspection of documents. In the case of **Charles Kajimanga (Hon.**

Judge) v. Marmetus Chilemya⁽¹⁾ and the case of OTK Limited v. Amanita Zambiana Limited⁽²⁾ which were cited by Counsel for the Respondents, the respective Courts emphasized the necessity for parties to conduct discovery and inspection of documents in order to give either party an opportunity to object to the production of a document by the other party at the earliest opportunity. Further, Order VI rule 19 of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 clearly provides that:

“An objection to the reception of evidence by a party affected shall be made at the time the evidence is offered.”

The import of the above provision is that a party must make his or her objection known to the other party when the evidence is availed to that party.

In the present case, the directions issued to the parties by the Court required the parties to conduct discovery and inspection of documents, which directions the parties duly complied with. The consent order for directions which was subsequently executed by the parties did not reverse the order for discovery and inspection of documents. The undisputed evidence on record is that the Respondents' advocates informed the Petitioner's advocates of their intention to object to certain documents in the Petitioner's possession, which documents were listed in the Petitioner's Amended List of Documents when they

first inspected each party's documents. There's no evidence on record that the Respondents gave any indication to the Petitioner that they would not proceed to raise their objection.

In the circumstances, the Petitioner's assertion that the Respondents waived their right to object to the production of the documents by executing the consent order varying the directions issued by this Court and by filing their objection after he had filed his bundle of documents is untenable and without merit. The Petitioner's filing of his bundle of documents into Court did not take away the Respondents' right to object to the documents in issue. The Respondents are entitled to raise the objection at this interlocutory stage. The application is therefore properly before me for determination.

Having said that, I shall proceed to consider the objection raised to specific documents.

The Respondents object to the production of Bill No. 17 of 2015, document number 1 in the Petitioner's amended list of documents, and the National Assembly Committee report on Bill No. 17 of 2015, document No. 6. They contend that Bill No. 17 of 2015 culminated in the enactment of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and is therefore not relevant to the determination of the issues raised in the petition. The Respondents further submitted that the

Petitioner has in fact brought his petition pursuant to the provisions of the Constitution as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016.

The Respondents added that a bill being proposed law is unenforceable and that this Court has no jurisdiction to delve into the contents of the said Bill as was held in the case of **Law Association of Zambia and Chapter One Foundation v The Attorney-General**⁽³⁾. That this Court cannot make determinations on the Constitution based on Bill No. 17 of 2015 as there is no power to do so under Article 128 of the Constitution as amended.

In opposing this objection, the Petitioner insisted in paragraph 14 of his affidavit in opposition that documents number 1 and 6 are relevant to these proceedings as evidenced by Mr Cornelius Mweetwa's witness statement filed on 5th June, 2020. He contended that the relevance of the documents would be determined at trial. The Petitioner did not respond to the Respondents' contention that this Court cannot determine the petition based on the contents of a Bill.

I have considered the arguments on this aspect. While the Respondents' objection to the production of Bill No. 17 of 2015 and the related National Assembly committee report on the said Bill challenged the relevance of the two documents to the determination of the

Petitioner's petition, the Petitioner in opposing the objection to the production of the said documents did not state the purpose for which he seeks to produce Bill No. 17 of 2015 and the related National Assembly Committee report on the said Bill. He merely referred to the witness statement given by Mr Cornelius Mweetwa, which statement he said demonstrates the relevance of the Bill and the report on the Bill to these proceedings. I note that that witness statement has 20 paragraphs. The Petitioner did not specify which of the 20 paragraphs he relies on to explain the relevance of the Bill and the committee report to the determination of the petition so that I can examine them in light of the Respondents' objection.

Further, the Petitioner did not respond to the Respondents' assertion that Bill No. 17 of 2015 and the related committee report had been overtaken by the enactment of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

In view of the Respondents' objection to the production of the two documents on the basis of relevance to the proceedings, it was incumbent upon the Petitioner to clearly state their relevance to the determination of the issues he has raised in his petition. This is particularly so in light of the Respondents' assertion that the Bill being

proposed law is not enforceable and cannot be taken into consideration in determining the petition in this case.

The Petitioner's contention that the relevance of the impugned documents can only be determined at trial and not at this stage does not assist the Petitioner's case. As the Respondents have raised the objection at this stage, the relevance of the documents must be determined at this stage and not at trial.

Further as Counsel for the Respondents submitted, and I agree with them, a Bill is proposed law. It is a settled principle that the will of Parliament is expressed in the language of the law which it enacts regardless of what the proposals in a bill may have been. In this case, the will of Parliament with regard to the proposals for constitutional amendments put before it by way of Bill No. 17 of 2015 was expressed in the provisions contained in the Constitution of Zambia (Amendment) Act No. 2 of 2016 which it enacted. Thus, in determining the Petitioner's petition in this matter, the Court will interpret the provisions of the Constitution as amended and not any proposals which were contained in Bill No. 17 of 2015.

In the absence of an explanation by the Petitioner regarding the relevance of Bill No. 17 of 2015 and the related committee report on the said Bill to the determination of the petition herein, I uphold the

Respondents' objection to the production of the two documents by the Petitioner at trial for lack of relevance.

The Respondents also object to the production of the Constitution of Zambia Act No. 1 of 2016 (document number 2), the Constitution of Zambia (Amendment) Act No. 2 of 2016 (document number 3) and the Loans and Guarantees (Authorisation) Act, Chapter 366 of the Laws of Zambia (document number 4) on the ground that these are laws which can be judicially noticed and need not be produced as evidence by the Petitioner. That instead, the Petitioner can cite the laws in issue in his submissions.

In response to this, the Petitioner submitted that the Respondents had not given any legal basis or cited any statute or case authority to support their objection to the production of the law by the Petitioner. Further, the Petitioner argued that the Respondents' objection should be dismissed because the Respondents in support of their case had also filed into Court statutory instruments which are also law. It was the Petitioner's position that by filing statutory instruments, the Respondents had waived their right to object to the documents filed by the Petitioner which are law. I have examined the arguments on both sides regarding whether or not the Acts of Parliament in issue can be produced as evidence by the Petitioner.

In determining the issue I have considered the provisions of section 6 (1) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia which provides as follows:

“(1) Every Act, Applied Act or British Act shall be a public Act and shall be judicially noticed as such.”

The above provision was construed by the Supreme Court in the case of **Hubert Sankombe v The People**⁽⁷⁾ wherein it was held at page 174 that:

“... as a matter of statutory law, section 6 (1) and (2) of the Interpretation and General Provisions Act, Chapter 2 of the Laws provides that every Act, Ordinance, or British Act (i.e. an Act of the Parliament of the United Kingdom extended or applied to the Republic, see section 3 *ibid*) shall be judicially noticed as such.”

In **Phipson on Evidence**, 16th edition, in paragraph 1-18 at page 7, the learned author states that:

“Judicial notice is the cognisance taken by the Court itself of certain matters which are so notorious, or clearly established, that evidence of their existence is deemed unnecessary.”

Regarding the scope of the rule, the learned author further states at paragraph 3-03 at page 62 of the same book that:

“Judicial notice covers the provisions of the law which are not a matter of evidence at all, and the acceptance of facts without admission or proof. The latter may be prescribed by statute in cases where otherwise the Courts would not dispense with proof. The doctrine of judicial notice extends to all departments of law, and is not confined to that of evidence ... Generally, matters directed by statute to be

judicially noticed, or which have been so noticed by the well-established practice or precedents of the Courts, must be recognised by the Judges.” (Emphasis added)

Given the clear provisions of section 6 (1) of the Interpretation and General Provisions Act, Chapter 2, it follows that this Court as a mandatory statutory requirement must take judicial notice of all Acts of Parliament which are in force. Those laws include the Constitution of Zambia Act No. 1 of 2016; the Constitution of Zambia (Amendment) Act No. 2 of 2016; and the Loans and Guarantees (Authorisation) Act, Chapter 366 which the Petitioner wishes to produce. The objection to the production of the three Acts of Parliament is therefore upheld.

As I conclude on this point, I wish to state that although the Petitioner asserted that the Respondents had waived their right to object to the production of the laws by filing statutory instruments in support of their case, the Petitioner did not raise a specific objection to the production of the statutory instruments by the Respondents. This fact lends credence to the Respondents' assertion that when their Advocates advised the Petitioner's Advocates about their intention to produce the statutory instruments as part of their evidence, the Petitioner's Advocates stated that they would not raise any objection to their production. There is therefore no objection by the Petitioner to the

production of the statutory instruments by the Respondents for me to rule on.

The Respondents also object to the production of the Parliamentary debates and proceedings relating to Bill No. 17 of 2015. The Respondents argued that the debates are merely an expression of opinions by individual parliamentarians and that, notwithstanding those opinions, the Members of Parliament who debated are bound by the enacted Constitution of Zambia (Amendment)Act No. 2 of 2016.

The Respondents similarly object to the production of the report of the Committee on the National Economy, Trade and Labour Matters for the Third Session of the Twelfth National Assembly and also the Report of the Parliamentary Select Committee Appointed to Scrutinise the Constitution of Zambia (Amendment) Bill, N.A.B No. 10 of 2019.

They stress that the reliefs sought by the Petitioner in his petition cannot be determined by considering the debates of parliamentarians. That the petition will be determined in light of specific provisions of the Constitution.

In opposing the objection to those documents, the Petitioner does not deny that the documents contain expressions of opinion by various Members of Parliament. Instead, the Petitioner argued that the Respondents waived their right to object to those documents by filing

various motions of the National Assembly which can be equated to Parliamentary debates.

The Petitioner further contends that whether or not the impugned documents contain opinions, it is for the Court to determine their relevance when considering the evidence before it.

I have examined the objection to the production of the Parliamentary debates and the committee reports in light of the issues raised in the petition and the reliefs sought. It is clear to me that in determining those issues, this Court will be required to interpret the relevant provisions of the Constitution as amended with regard to the subject of public debt contraction by the Government which is at the core of the petition.

A scrutiny of documents No. 5, 14 and 15 which the Petitioner seeks to produce reveals that the Parliamentary debates are indeed expressions of opinions of the individual Members of Parliament who debated while the committee reports in issue contain proposals made by the respective committees to the National Assembly. In the absence of an explanation by the Petitioner regarding the purpose for which he seeks to produce the debates and committee reports, I uphold the Respondents' objection to the production of the documents.

I similarly uphold the objection to the production of documents number 12 and 13 which are the Cuts International Paper relating to the effect of Constitutional Amendment on Public Financial Management and Debt Management and the Southern African Institute for Policy and Research Occasional Paper Series-A Barometer for the Perfect Storm: The causes of the Zambian Debt Crisis and Indicators for tracking the Public Debt Management Progress, respectively.

This is because not only has the Petitioner not denied the Respondents' contention that the two documents comprise the opinions of the respective authors of the papers but he has also not advanced any explanation regarding the relevance of the said documents to the determination of the petition.

Before I consider the Respondents' last objection, I should state that while the Petitioner asserted that the Respondents cannot object to the production of Parliamentary debates and committee reports because they too had filed motions tabled in the National Assembly, the Petitioner did not object to the production of the motions in the Respondents' bundle of documents and the supplementary bundle of documents. There is therefore no objection to the production of the said motions by the Respondents for my determination.

Lastly, the Respondents also object to the production of document No. 17 in the Petitioner's Amended List of Documents, namely, the World Bank International Debt Statistics 2000 Country Tables for Zambia on the ground that it was not authenticated by the authoring institution. I note that the Respondents did not list document No. 17 among the documents objected to in both the Notice of Intention to object to the production of documents filed on 5th June, 2020 or in the Notice of Motion to the production of the said documents filed on 3rd July, 2020.

However, in paragraph 11 of the Respondents' affidavit in support of the Notice of Intention to object to the production of the documents, the deponent deposed as follows:

"11. That the Respondents shall also object to the production of document No. 17 in the Petitioner's list of documents on the basis that the Petitioner ought to provide an authenticated copy from the authoring institution."

In response to the above averment, the Petitioner in paragraphs 17 to 19 of his affidavit in opposition to the Notice of Motion deposed as follows:

"17. That the Respondents also object to the production of document No. 17 in my list of documents alleging that there is need for the same to be authenticated from the authoring institution.

18. The said document is the World Bank International Debt Statistics 2020 Report which document is in the public

domain and can easily be taken judicial notice of by this Honourable Court. It is not a secret document.

- 19. That further, I am advised by my Advocates and verily believe the same, that Zambia, being a member of the World Bank Group from 23rd September, 1965 makes it such that there would be no need to authenticate the same as if it were a foreign document.”**

Since the objection to document No. 17 of the Petitioner's amended list of documents was clearly made by the Respondents in their affidavit in support of the application filed into court on 5th June, 2020 and the Petitioner clearly responded to the objection to the document in his affidavit in opposition filed on 17th July, 2020, I must address the objection as it is properly laid before me.

I should point out at the outset that the Respondents' advocates did not submit on their assertion that the World Bank document needed to be authenticated by the authoring institution in their skeleton arguments. As a result, the Petitioner's advocates similarly did not advance any arguments as to whether or not document No. 17 ought to be authenticated before it can be received in evidence.

That being the case, I have considered the objection in light of the provisions of the Authentication of Documents Act, Chapter 75 of the Laws of Zambia which provides for the authentication of documents. The word “authentication” is defined in section 2 of the Act as follows:

"Authentication" when applied to a document, means the verification of any signature thereon." (Emphasis added).

The word document is defined in the same section of the Act to mean "any deed, contract, power of attorney, affidavit, or other writing, but does not include an affidavit sworn before a Commissioner of the High Court."

Section 3 of the Act goes on to provide as follows:

3. Any document executed outside Zambia shall be deemed to be sufficiently authenticated for the purpose of use in Zambia if-
 - (a) in the case of a document executed in Great Britain or Ireland it be duly authenticated by a notary public under his signature and seal of office;
 - (b) in the case of a document executed in any part of Her Britannic Majesty's dominions outside the United Kingdom it be duly authenticated by the signature and seal of office of the mayor of any town or of a notary public or of the permanent head of any Government Department in any such part of Her Britannic Majesty's dominions;
 - (c) in the case of a document executed in any of Her Britannic Majesty's territories or protectorates in Africa it be duly authenticated by the signature and seal of office of any notary, magistrate, permanent head of a Government Department, Resident Commissioner or Assistant Commissioner in or of any such territory of protectorate;
 - (d) in the case of a document executed in any place outside Her Britannic Majesty's dominions (hereinafter referred to as a "foreign place") it be

duly authenticated by the signature and seal of office-

- (i) of a British Consul-General, Consul or Vice-Consul in such foreign place; or**
- (ii) of any Secretary of State, Under-Secretary of State, Governor, Colonial Secretary, or of any other person in such foreign place who shall be shown by the certificate of a Consul or Vice-Consul of such foreign place in Zambia to be duly authorised under the law of such foreign place to authenticate such document.**

(Emphasis added).

The above provisions clearly stipulate that documents which must be authenticated as a mandatory requirement before they can be used in Zambia are those which are executed outside Zambia and which fall within the category of documents specified by section 2 of the Act, namely any deed, contract, power of attorney, affidavit or other written document.

In the present case, the Respondents' advocates have not shown that the World Bank document was a document which was executed outside Zambia nor have they given any explanation as to why they consider that the document must be authenticated before it can be used in this matter. In the absence of such an explanation, the objection to the production of the document has not been substantiated. The objection is therefore not upheld.

Having upheld the objection to the production of documents No. 1, 2, 3, 4, 5, 6, 12, 13, 14 and 15 in the Petitioner's Amended List of Documents, I hold that the said documents cannot be produced in evidence at trial by the Petitioner. As the said documents have been filed before Court by the Petitioner, I accordingly order that the said documents be expunged from the Petitioner's bundles of documents filed into court on 5th June, 2020. The costs of the application shall be in the cause.

The matter shall come up for a further scheduling conference on 23rd October, 2020 at 09.00 hours.

Dated this 16th day of October, 2020.



.....
A.M. SITALI
JUDGE OF THE CONSTITUTIONAL COURT