IN THE CONSTITUTIONAL COURT OF ZAMBIA **2018/CCZ/R001**
HOLDEN AT LUSAKA **SELECTED JUDGMENT NO. 16 OF 2019**
(Constitutional Jurisdiction)

IN THE MATTER OF: **THE PUBLIC PROTECTOR ACT NO. 15 OF 2016**

AND

IN THE MATTER OF: **THE COMMISSION FOR INVESTIGATIONS ACT CAP 39 OF THE LAWS OF ZAMBIA (REPEALED)**

AND

IN THE MATTER OF: **ORDER 53 OF THE RULES OF THE SUPREME COURT 1999 EDITION (WHITE BOOK)**

AND

IN THE MATTER OF: **AN APPLICATION FOR JUDICIAL REVIEW**

BETWEEN:

THE PUBLIC PROTECTOR FOR THE REPUBLIC OF ZAMBIA **APPLICANT**

AND

INDENI PETROLEUM REFINERY COMPANY LIMITED **RESPONDENT**

CORAM: **Chibomba, PC, Sitali, Mulenga, Mulembe, Munalula, JJC on 16th January, 2019 and 28th May, 2019**

For the Applicant: **Mr. E.S. Silwamba, SC,**
and Mr. J. Jalasi
Messrs. Eric. Silwamba, Jalasi and Linyama
Legal Practitioners

For the Respondent: Mr. B. Mbilima
In-House Counsel
Indeni Petroleum Refinery Company

JUDGMENT

Sitali, JC delivered the Judgment of the Court.

Cases cited:

1. Zambia National Holdings Limited and United National Independence Party (UNIP) v The Attorney-General (1993-1994) Z.R. 115
2. Kelvin Hang'andu and Company (A firm) v Webby Mulubisha (S.C.Z. Judgment No. 39 of 2008)
3. Derrick Chitala (Secretary of The Zambia Democratic Congress) v Attorney-General (1995-1997) Z.R. 91
4. Ridge v. Baldwin [1963] 2 ALL ER 66
5. The Attorney-General v The Speaker of The National Assembly and Dr. Ludwig Sondashi, MP (2003) Z.R. 42
6. Frederick Titus Jacob Chiluba v The Attorney-General (2003) ZR 153
7. ZNPF Board v Attorney-General and Others (1983) Z.R. 140
8. The People v The Registrar of the Industrial Relations Court, *Ex Parte* Zambia Revenue Authority (2007) Z.R 132
9. Edward Jack Shamwana v The Attorney-General (1988-1989) Z.R 44
10. Vacher and Sons Ltd v London Society of Compositors HL 18 Nov 1912
11. Samuel Miyanda v Raymond Handahu (S.C.Z. Judgment No.6 of 1994)
12. Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) Z.R. 138
13. Nkumbula v Attorney-General (1972) Z.R. 204
14. Hakainde Hichilema and Another v Edgar Chagwa Lungu and 4 Others 2016/CC/0034
15. Lubunda Ngala and Another v Anti-Corruption Commission 2017/CC/R002
16. South Dakota v North Carolina (1940) 192 USA 268:48 ED
17. Steven Katuka and Others v Attorney-General and Others (2016) Z.R. 226
18. Kehar Singh v State (Delhi Admin) 1988 SCR Supl (2) 24

19. **The President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA A (CC)**
20. **The Public Protector v Mail and Guardian Ltd and Others 2011 (4 (SA 420 SCA)**
21. **Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996 4(4) 744(CC)**
22. **Minister of Home Affairs v Public Protector (308/2017) 2018 ZASCA 15**
23. **Danny Pule and Others v The Attorney-General and Others Selected Judgment No. 60 of 2018.**
24. **Godfrey Miyanda v The Attorney-General SCZ Judgment No. 9 of 2009.**
25. **Milford Maambo and Others v The People Selected Judgment No. 31 of 2017**
26. **Zambia National Commercial Bank Plc v Martin Musonda and others, Selected Judgment No. 24 of 2018**
27. **Amanda Muzyamba Chaala (Administratrix of the estate of the late Florence Mwiya Siyunyi Chaala) v Attorney-General and Mukelabai Muyakwa, Supreme Court Judgment No. 6 of 2012**
28. **The South African Broadcasting Corporation and Others v Democratic Alliance and Others (393/2015) [2015] ZASCA 156**

Legislation cited:

1. **The Constitution of Zambia, Chapter 1 of The Laws of Zambia**
2. **The Public Protector Act No. 15 of 2016**
3. **The High Court Act, Chapter 27 of the Laws of Zambia**

This is a constitutional reference from the High Court of Zambia at Ndola. It was referred to us pursuant to the provisions of Article 128 (2) of the Constitution as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (henceforth referred to as the Constitution).

According to the ruling of the lower Court, the question for our determination is whether or not in terms of the provisions of Articles 243 and 244 of the Constitution, the office of the Public Protector ranks *pari passu* with the High Court and therefore its decisions are not amenable to judicial review.

The background of this reference is that on 23rd November, 2017 the Respondent herein filed an ex-parte application for leave to apply for judicial review of a decision of the Applicant at the Ndola District Registry of the High Court of Zambia. On 13th March, 2018 the Applicant herein filed in the same Ndola District Registry a notice of intention to raise issues *in limine* (preliminary issues); summons for an order to refer matter to the Constitutional Court together with an affidavit and heads of argument in support of summons for an order to refer matter to the Constitutional Court of Zambia.

On 27th March, 2018 the High Court of Zambia sitting at Ndola delivered a ruling in which the learned Judge ordered that the matter be referred to the Constitutional Court for the determination of the question raised. The Court stayed the judicial

review proceedings before it pending the determination by the Constitutional Court of the said question.

The Applicant filed heads of argument in support of this reference on 20th September, 2018. In the heads of argument, Counsel for the Applicant began by addressing the question whether the Public Protector is amenable to judicial review by the High Court of Zambia. It was submitted in that regard that unlike the office of the Investigator-General, the Public Protector is an independent office created by Article 243 of the Constitution. That the High Court, on the other hand, was created by Article 133 of the Constitution as amended and that Article 134 spells out its jurisdiction. Counsel submitted that although Article 134 vests unlimited jurisdiction in civil and criminal matters in the High Court, that jurisdiction is not limitless as held by the Supreme Court in **Zambia National Holdings Limited and United National Independence Party (UNIP) v The Attorney-General**[1] and in **Kelvin Hang'andu and Company (A firm) v Webby Mulubisha.**[2]

Counsel proceeded to argue that judicial review lies against inferior courts and tribunals and against any persons or bodies

which perform public duties or functions. The cases of **Derrick Chitala (Secretary of the Zambia Democratic Congress) v Attorney-General**[3] and **Ridge v Baldwin**[4] in which it was held that "**as a general proposition judicial review now lies against inferior courts and tribunals and against any persons or bodies which perform public duties or functions**" were cited in support.

Counsel further cited the cases of **Attorney-General v The Speaker of the National Assembly and Dr. Ludwig Sondashi, MP**[5] in which it was held that the High Court of Zambia has constitutional jurisdiction to hear applications for judicial review in matters involving Parliament. They also cited the case of **Fredrick Titus Jacob Chiluba v Attorney-General**[6] in which the decision of the National Assembly on the issue of the removal of the former President's immunity was entertained by the Court.

Counsel proceeded to submit that in terms of Article 244 (3) (a) of the Constitution, the Public Protector can bring an action before a court and that an action can also be brought against the Public Protector but contended that the action cannot be by way of judicial review.

Regarding the question whether or not the Public Protector is an inferior court or tribunal, Counsel cited the provisions of Article 244 (4), (5) and (7) of the Constitution and argued that Article 244 (4) guarantees the professional independence of the Public Protector. Counsel drew an analogy between the office of Public Protector and that of Director of Public Prosecutions by setting out the historical constitutional provisions regarding the independence of the DPP in the performance of the functions of that office. Counsel submitted that the analogy with the office of the Director of Public Prosecutions was important for putting into context the independence of the office of the Public Protector.

Counsel submitted that of all the constitutional office holders provided for in Articles 176 to 184 of the Constitution, namely, the Attorney-General, the Solicitor-General, the Director of Public Prosecutions and the Public Protector, only the Public Protector enjoys judicial functions.

Counsel further submitted that the office of Public Protector and that of High Court Judge are created by the Constitution and that the Public Protector has the same powers as those of the High

Court of Zambia. Counsel contended that the two institutions therefore rank *pari passu*. Counsel drew our attention to the High Court case of **ZNPF Board v Attorney-General and Others**[7] in which it was held that the Industrial Relations Court, which at the time was created by Act of Parliament, was inferior to the High Court for purposes of judicial review.

Counsel further cited the case of **The People v The Registrar of Industrial Relations Court, Ex parte Zambia Revenue Authority**[8] which was decided after the enactment of Article 91 (1) by the Constitution of Zambia (Amendment) Act No. 18 of 1996 which included the Industrial Relations Court to the Judicature of the Republic of Zambia. In that case, the Supreme Court held that the High Court had no power to review the orders or judgments of the Industrial Relations Court.

Counsel further submitted that the Public Protector is not amenable to judicial review by the High Court because the legal regime which governs the appointment and removal of a Judge is the same as that of the Public Protector.

Counsel proceeded to submit on the rules of statutory interpretation and cited the case of **Edward Jack Shamwana v The Attorney-General**[9] wherein the dictum from **Vacher v London Society of Compositors**[10] was cited to the effect that:

> **"Now it is a universal rule ... that in construing statutes, as in construing all other written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid absurdity and inconsistency, but no further."**

Counsel cited, among other cases, the case of **Samuel Miyanda v Raymond Handahu**[11] wherein the Supreme Court held that the construction of a statute in statutory interpretation is to be found in the intention of the legislature which in turn is to be ascertained by taking the words in their natural, literal and usual sense.

Lastly, the case of **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others**[12] was cited wherein it was held, *inter alia*, that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning and that other principles of interpretation should only be

resorted to if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the Legislature.

In conclusion, Counsel submitted that the Public Protector is not amenable to judicial review proceedings as judicial review lies only against inferior courts and tribunals and against persons or bodies which perform public duties or functions. It was contended that the office of the Public Protector is not inferior to the High Court of Zambia because according to Counsel, Articles 243, 244, 245, 246, 247 and 248 of the Constitution of Zambia clearly demonstrate that the office of the Public Protector and the High Court of Zambia rank *pari passu*.

At the hearing of the matter, State Counsel Silwamba augmented the Applicant's written heads of argument and submitted that the Applicant seeks this Court's interpretation of the question whether judicial review can lie against the Public Protector when judicial review can only lie against inferior tribunals. State Counsel submitted that the comparison made by the Respondent between the office of the Public Protector and that

of the Auditor-General was misplaced because while the Auditor-General enjoys security of tenure like a High Court Judge, only the Public Protector can exercise powers akin to those of a High Court Judge including the power to proceed against a person for contempt of Court under Article 244 (5) of the Constitution.

State Counsel argued that as the powers of the Public Protector and those of a High Court Judge rank *pari passu*, judicial review is not available against the Public Protector. State Counsel further submitted that since under Article 244 (5) of the Constitution, the Public Protector can exercise the same powers as those of the High Court, it is the Applicant's position that the High Court cannot sit to issue the prerogative writs of mandamus, certiorari and prohibition against the Public Protector. When asked by the Court if he had any other authority to support the Applicant's assertion that the Public Protector ranks at par with the High Court apart from Article 244 (5) of the Constitution, State Counsel Silwamba stated that he did not. He stated that the provisions of Article 244 (5) are not couched in very cheerful terms but argued that that is a reality we have to deal with.

State Counsel Silwamba further submitted that the South African cases cited by the Respondent are distinguishable from this case because one cannot litigate on a draft bill or proposed legislation in this jurisdiction as held in the case of **Nkumbula v Attorney-General.**[13] That on the other hand, under the 1993 interim Constitution of South Africa, there was a schedule which contained constitutional principles under which a draft bill could be taken to Court to examine whether it complied with the interim Constitution.

State Counsel conceded in conclusion that he had not seen any specific provision in the Constitution which ranks the Public Protector the same as the High Court or whether judicial review can be issued against that office.

The Respondent filed heads of argument on 13th December, 2018 in which Counsel for the Respondent submitted that this application turns upon a referral from the High Court seeking a determination of whether or not in terms of Articles 243 and 244 of the Constitution, the office of the Public Protector ranks *pari passu*

with the High Court and hence its decisions are not amenable to judicial review.

Counsel submitted first, that this Court should adopt both the literal and the purposive approach when interpreting the provisions of the Constitution which are before us, because adopting a literal interpretation alone would lead to absurdity. Secondly, that the correct interpretation of the constitutional provisions based on the purposive approach is that the Public Protector is not a court of law and therefore does not rank *pari passu* with the High Court in terms of Articles 243 to 248 of the Constitution. Counsel submitted that the Public Protector does not exercise judicial power nor is the Public Protector's function adjudicative. He argued that the Public Protector's jurisdiction is different from that of the High Court as the Public Protector is merely an independent office that carries out investigations of decisions taken or omitted to be taken by a state institution in the performance of an administrative function. He further submitted that although the office of the Public Protector is new in Zambia, this Court has established principles on how to interpret

provisions of the Constitution in a manner that gives effect to the intention of the Legislature. Counsel cited the case of **Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others**[14] wherein according to Counsel, it was held that when construing statutory provisions, the words used in the statute must be given their ordinary meaning and that the literal rule of interpretation must be applied unless doing so would result in absurdity.

Counsel also cited the case of **Lubunda Ngala and Another v Anti-Corruption Commission**[15] in which we referred to the case of **South Dakota v North Carolina**[16] and held that in interpreting constitutional provisions, the Constitution must be read as a whole and that no single provision must be isolated from the other provisions bearing on the subject matter. That all provisions bearing on the subject matter must be considered and taken into account in order to give effect to the greater purpose of the instrument.

Counsel submitted that in **Steven Katuka (Suing as Secretary General of UPND) and Law Association of Zambia v Attorney General and Others**[17] this Court held that the

purposive approach entails adopting a construction or interpretation that promotes the general legislative purpose and that requires the court to ascertain the meaning and purpose of the provision having regard to the context and historical origins, where necessary. Submitting on what constitutes ascertaining the provisions of a statute, Counsel cited the Indian case of **Kehar Singh v State (Dehli Admin)**[18] quoted in the **Lubunda Ngala**[15] case wherein the Court in India stated that:

> **"If the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as a paramount duty to put upon the language of the legislature a rational meaning. We then examine the Act as a whole. We examine the necessity which gave rise to the Act. We look at the mischief which the legislature intended to redress. We look at the whole situation and not just one-to-one relation. We will not consider any provision out of the framework of the statute."**

Counsel urged us to adopt both the literal and purposive approach in interpreting Articles 243 and 244 of the Constitution and submitted that to interpret the two constitutional provisions literally by equating the Public Protector with the High Court would lead to absurdity and would not give a rational meaning to the intention of the Legislature.

In contending that the Public Protector is not at par with the High Court, Counsel cited the South African case of **The President of the Republic of South Africa and Others v South African Rugby Football Union and Others**[19] wherein the Constitutional Court of South Africa stated that the office of the Public Protector is one mechanism of constitutional control aimed at establishing and maintaining efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. Counsel further cited another South African case of **The Public Protector v Mail and Guardian Limited and Others**[20] to press the point regarding the importance of the institution of the Public Protector wherein the Supreme Court of Appeal of South Africa held that:

> **"The office of the Public Protector is an important institution. It provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that are capable of insidiously destroying the nation. If that institution falters or finds itself undermined, the nation loses an indispensable constitutional guarantee."**

Counsel went on to submit that in analyzing the reason why the Constitution has conferred the Public Protector with the same powers as the High Court in certain instances under Article 244

(5), we should consider the history, rationale and context of the provision. Counsel submitted that before the office of the Public Protector was created, its predecessor office, the Commission for Investigations was accountable to the executive and depended on the executive to enforce its decisions. The Commission for Investigations also had to seek permission from the executive to commence certain high profile investigations in terms of section 8 and 21 of the repealed Commission for Investigations Act. Counsel contended that one of the major weaknesses of the office of the Investigator General was the lack of a proper enforcement mechanism of the recommendations which the office made.

Counsel argued that the Investigator General relied upon other agencies to enforce their recommendations and that in most cases its recommendations were not followed through. Counsel submitted that the Legislature extended the powers of the High Court to the Public Protector in summoning witnesses, and enforcing decisions to ensure efficiency and effective investigation and implementation of the orders of the Public Protector. That given that legislative history, the mischief which the Legislature

intended to cure in giving the Public Protector some of the powers of the High Court was first the ineffectiveness of the Public Protector in enforcing its decisions and secondly, to delink it from interference from the executive over which the core function of the Public Protector might touch. Counsel submitted that no mischief would arise from subordinating the Public Protector to the jurisdiction of the High Court.

Counsel further submitted that Article 244 (5) was enacted in order to foster the independence and boost the efficiency of the Public Protector and also to provide for an effective mechanism of investigating and enforcement of orders. Counsel urged this Court to contextualize the provisions of Articles 243 and 244 of the Constitution bearing in mind the history and rationale of those particular provisions.

While agreeing with the Applicant's submission that the High Court's unlimited jurisdiction is not limitless as held in the **Zambia National Holdings Limited**[1] case and the **Kelvin Hang'andu**[2] case, Counsel disagreed with the Applicant's submission that the Public Protector is not amenable to judicial

review on the ground that the Public Protector is independent and exercises the same powers as the High Court and therefore ranks *pari passu* with the High Court.

Counsel submitted that the office of Public Protector is inferior to the High Court and is therefore amenable to judicial review notwithstanding that it is an independent office which is vested with limited powers of the High Court.

Counsel submitted that the office of Public Protector was created in order to ensure good governance and integrity and to promote constitutional democracy as the Constitution specifically provides for the independence and powers of the Public Protector as the guard of guards. Counsel submitted that both the office of the Public Protector and the High Court are creatures of the Constitution and that Article 119 of the Constitution vests judicial authority in the Courts, which authority shall be exercised by the Courts in accordance with the Constitution and other laws.

Counsel further submitted that the jurisdiction of the High Court provided for under Article 134 of the Constitution is not limited to exclude matters that are before the Public Protector or

which have been settled by that office and that the Public Protector is not exempted from the jurisdiction of the High Court. He contended that to argue otherwise would be to read words into the Constitution.

Counsel went on to submit that the High Court's functions are adjudicative while those of the Public Protector are investigatory in nature and that Article 245 (a) of the Constitution limits the power of the Public Protector to investigate a matter which is before a court or which relates to an officer in the Judicial Service. Counsel submitted that there is no corresponding limitation on the powers of the High Court regarding the jurisdiction of the Public Protector. Counsel submitted that Article 244 (4) regarding the independence of the Public Protector which the Applicant had relied upon should be read in the light of Article 267 (4) which provides that:

> **"A provision of the Constitution to the effect that a person, authority or institution is not subject to the direction or control of a person or an authority in the performance of a function does not preclude a court from exercising jurisdiction in relation to a question as to whether that person, authority or institution has performed the function in accordance with this Constitution or other laws."**

Counsel submitted that the issue before the Court below, was not whether or not the Public Protector had the powers to render an order in the manner envisaged by the Constitution, or whether or not the office was independent, but whether the Public Protector's powers were exercised legally and rationally. Counsel contended that the provision providing for the independence of the Public Protector does not preclude it from being amenable to review by the High Court. Counsel argued that the independence envisaged by the Constitution must be contextualised in order to give purpose to the constitutional provisions.

Counsel further contended that according to Article 244 (1), the core duty of the Public Protector is to investigate an action or decision taken or omitted to be taken by a State institution in the performance of an administrative function. He cited the definition of State institution as stated in Article 266 of the Constitution. He argued that courts are out of the ambit of the functions of the Public Protector and that there was therefore no apprehended mischief which would cause the Legislature to oust the jurisdiction of the High Court over the Public Protector.

Counsel submitted by way of comparison that the Public Protector in South Africa is provided for under section 118 of that country's Constitution as a chapter 9 institution with the sole purpose of ensuring that there is an effective public service which maintains a high standard of professional ethics. He cited the South African case of ***Ex Parte* Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa**[21] in support. Counsel submitted that the Public Protector in South Africa is granted wide powers to investigate the grievances of members of the public into any conduct of state affairs and to report on such conduct and take remedial action in order to strengthen constitutional democracy in the Republic in terms of section 181 of the Constitution of South Africa.

Counsel further submitted that the functions and powers of the Public Protector of South Africa are far wider than those of the Public Protector of Zambia in that the Public Protector of South Africa can investigate any conduct of state affairs, including conduct of the President while the Public Protector of Zambia is

precluded from investigating actions of state organs including those of the President. Further, that the Public Protector of South Africa is empowered to take remedial action as an important component of the institution.

Counsel submitted that with all its sweeping powers and wide mandate, the Public Protector of South Africa is not regarded as a Court or to be at the same level as a Court. That the Supreme Court of Appeal of South Africa pronounced itself on whether or not the action of the Public Protector in that country can be reviewed in the case of **The Minister of Home Affairs v The Public Protector**[22] wherein that Court essentially stated that the Public Protector is not a court and does not exercise judicial power and therefore cannot be equated with a court.

Counsel further submitted that the Court accepted in that case that the Public Protector is amenable to judicial review. Counsel contended that the Public Protector of South Africa with wide reaching powers is subordinated to the High Court, a position which is within the spirit of that Constitution.

That in the same light, the provisions of the Zambian Constitution resonate well with that position and that this Court should hold that the Legislature did not intend to create the office of the Public Protector as being equivalent to that of the High Court. Counsel submitted that the Constitution instead intended to create an independent office performing functions totally different from the High Court but which enjoys the same power as the High Court in specific areas. Counsel contended that the office of the Public Protector is thus amenable to the jurisdiction of the High Court to review its decisions.

Counsel further submitted that the ouster of the jurisdiction of the High Court must be clearly stated and should not be implied and the ouster should be consistent with the objective of the Constitution. Counsel contended that Articles 243, 244, 245, 246, 247 and 248 do not in any way place the Public Protector at the same level as the High Court to oust the High Court's jurisdiction over the Public Protector. He submitted that the only way in which the findings of the Public Protector may be validly set aside is through the mechanism of the Courts, with the High Court at the

centre of it. Counsel reiterated in conclusion that the office of the Public Protector is not at the same level as the High Court.

In augmenting the Respondent's written heads of argument, Mr. Mbilima submitted that as the Applicant had conceded, the couching of Article 244 (5) is what had brought this matter before this Court. And that a literal interpretation would lead to absurdity. Counsel submitted that it was for that reason that the Respondent has urged this Court to adopt a purposive interpretation of Article 244 (5) in line with this Court's decision in **Danny Pule and Others v the Attorney-General and Others,**[23] in which this Court guided that the starting point in statutory interpretation is the literal interpretation and that only when doing so results in absurdity should a court resort to the purposive interpretation.

Mr. Mbilima submitted that whereas State Counsel Silwamba contended that the Respondent had, in its submissions, compared the Public Protector with the Auditor General, the Respondent merely mentioned the Auditor General as an independent body created under the Constitution and did not submit further on the

matter except to mention that the two offices were created as independent offices.

As regards the contention that judicial review does not lie against the Public Protector, Counsel submitted that the High Court is vested with power to answer that question and that this Court should rather direct its mind to the effect of Article 244 (5) on the powers of the Public Protector. Counsel contended that if this Court looked at the legislative history of the office of the Public Protector, it would come to the firm conclusion that the reason why the Constitution has given the Public Protector the powers contained in Article 244 (5) is to enhance its effectiveness. Counsel further submitted that the Respondent cited the two South African cases to aid this Court on how it should interpret Articles 244 and 245. That of particular interest to this Court should be the far reaching powers which the South African Public Protector has as stipulated in section 118 of the South African Constitution, which include the power to investigate the affairs of the President. Counsel submitted that notwithstanding those wide powers, the

Public Protector in South Africa has been subjected to judicial intervention and review.

Counsel went on to submit that although the Applicant, in its submissions, had extensively compared the office of the Director of Public Prosecutions to that of the Public Protector, the two offices are not comparable as they operate in different constitutional spaces. He urged us to disregard the comparison.

In conclusion, Counsel submitted that the Public Protector is not at the same level as the High Court and that that office is amenable to judicial review by the High Court. Counsel, therefore, urged us to dismiss this application.

In reply, State Counsel Silwamba submitted that this reference was very specific and was inspired by the order of the High Court for leave to apply for judicial review directed at the Public Protector. State Counsel argued that judicial review is a very special procedure which lies against an inferior body. State Counsel argued that the Applicant's argument was not that the Public Protector could not be sued. He cited the Supreme Court case of **Godfrey Miyanda v The Attorney General**[24] wherein it

was held that although the President of the Republic of Zambia enjoys immunity under the Constitution, the President can still be sued and submitted that the Applicant was under no illusion that the Public Protector cannot be sued. State Counsel submitted that rather the Applicant's contention is that the mode of commencement is not by way of judicial review.

State Counsel submitted in conclusion that the issue in the present case is that the High Court does not enjoy the power to issue writs under judicial review against a body exercising powers similar to it, and that this Court should rule that it cannot do so.

We have considered the written arguments and oral submissions made by counsel on both sides as well as the authorities cited. The issue we have to determine as framed by the learned Judge of the High Court is whether the office of the Public Protector ranks equivalently with the High Court and therefore is not amenable to judicial review by the High Court.

Before we consider the issue before us, we reiterate what we stated in the case of **Steven Katuka and Others v Attorney-General and Others**[17] and in **Milford Maambo and Others v The**

People[25] that when interpreting the Constitution, the primary principle of interpretation is that the meaning of the text should be derived from the plain meaning of the language used. In other words, where the words of any provision are clear and unambiguous, they must be given their ordinary meaning unless this would lead to absurdity or be in conflict with other provisions of the Constitution. Further, that other principles of interpretation should only be resorted to where there is ambiguity in the text or where a literal interpretation would lead to absurdity or conflict with other provisions of the Constitution.

A further principle of constitutional interpretation which we applied in the case of **Zambia National Commercial Bank Plc v Martin Musonda and Others**[26] is that when interpreting the Constitution, all the relevant provisions bearing on the subject for interpretation should be considered together as a whole in order to give effect to the objective of the Constitution. In other words, no one provision of the Constitution should be segregated from the other provisions and considered alone.

It is with these principles in mind that we shall consider the issue before us. The reference raises two issues which are inter-related. The first issue is whether the office of Public Protector ranks equivalently with the High Court and the second is whether the Public Protector is amenable to judicial review by the High Court. We shall consider the two issues in that order.

Regarding the question whether or not the office of Public Protector is at par with the High Court, we have considered the relevant provisions of the Constitution and the Public Protector Act No. 15 of 2016 (henceforth the Public Protector Act) on the establishment, functions and powers of the Public Protector. We have also considered the constitutional provisions and the provisions of the High Court Act, Chapter 27 of the Laws of Zambia relating to the establishment, jurisdiction and powers of the High Court as well as its practice and procedure.

Article 243 of the Constitution establishes the office of Public Protector. It reads as follows:

> **(1) There shall be a Public Protector who shall be appointed by the President, on the recommendation of the Judicial Service Commission, subject to ratification by the National Assembly.**

(2) A person qualifies for appointment as Public Protector if that person –

(a) is qualified to be appointed as a Judge; and
(b) does not hold a State office or constitutional office

(3) The office of Public Protector shall be decentralised to the provinces and progressively to districts, as prescribed.

(4) The procedures, staff, finances, financial management, administration and operations of the office of the Public Protector shall be prescribed.

Articles 244 (1), (2) and (3) provide for the functions of the Public Protector in the following terms:

(1) The Public Protector may investigate an action or decision taken or omitted to be taken by a State Institution in the performance of an administrative function.

(2) For purposes of clause (1), an action or decision taken or omitted to be taken is an action or decision which is –

(a) unfair, unreasonable or illegal; or
(b) not compliant with the rules of natural justice.

(3) For purposes of clauses (1) and (2), the Public Protector may –

(a) bring an action before a court;
(b) hear an appeal by a person relating to an action or decision taken or omitted to be taken in respect of that person; and
(c) make a decision on an action to be taken against a public officer or constitutional office holder, which decision shall be implemented by an appropriate authority.

Articles 244 (4) and (5) provide for the independence and powers of the Public Protector in the following terms:

(4) The Public Protector shall not be subject to the direction or control of a person or an authority in the performance of the functions of office.

(5) The Public Protector has the same powers as those of the High Court in –

(a) enforcing the attendance of witnesses and examining them on oath;
(b) examining witnesses outside Zambia;
(c) compelling the production of documents;
(d) enforcing decisions issued by the Public Protector; and
(e) citing a person or an authority for contempt for failure to carry out a decision.

Article 245 of the Constitution limits the powers of the Public Protector as follows:

245. The Public Protector shall not investigate a matter which-
(a) is before a court, court martial or a quasi-judicial body;
(b) relates to an officer in the Parliamentary Service or Judicial Service;
(c) involves the relations or dealings between the government and foreign government or an international organisation;
(d) relates to the exercise of the prerogative of mercy or
(e) is criminal in nature.

As regards how the hearings by the Public Protector should be conducted, section 22 of the Public Protector Act reads:

(1) When conducting a hearing the Public Protector is not bound by the rules of practice or evidence.
(2) The Public Protector shall conduct hearings with as little formality and technicality as is possible.
(3) The Public Protector may conduct hearings with as little emphasis on an adversarial approach as is possible and wherever possible, written submissions may be presented.

Regarding the High Court, the first provision we have considered is Article 120 (1) of the Constitution which establishes the Judiciary of Zambia of which the High Court is a part. Article 120 (1) reads:

> **120. (1) The Judiciary shall consist of the superior courts and the following courts:**
> **(a) subordinate courts;**
> **(b) small claims courts;**
> **(c) local courts; and**
> **(d) courts, as prescribed.**

Article 266 of the Constitution defines the superior courts as comprising the Supreme Court, Constitutional Court, Court of Appeal and High Court established in accordance with the Constitution. In terms of Article 120 (2), the courts established under Article 120 (1) are courts of record except local courts which are required to progressively become courts of record. Article 120 (3) (a) provides that the processes and procedures of the courts shall be prescribed.

The High Court is established by Article 133 (1) of the Constitution and its jurisdiction is set out in Article 134 of the Constitution in the following terms:

(134) The High Court has, subject to Article 128 –

(a) unlimited and original jurisdiction in civil and criminal matters;
(b) appellate and supervisory jurisdiction, as prescribed; and
(c) jurisdiction to review decisions, as prescribed.

Further, section 9 (1) of the High Court Act restates the jurisdiction of the High Court as follows:

(1) The Court shall be a Superior Court of Record, and, in addition to any other jurisdiction conferred by the Constitution and by this or any other written law, shall, within the limits and subject as in this Act mentioned, possess and exercise all the jurisdiction, powers and authorities vested in the High Court of Justice in England.

Section 9 (2) of the High Court Act provides that the jurisdiction vested in the High Court includes the judicial hearing and determination of matters in dispute.

Section 10 of the High Court Act further provides for the practice and procedure of the High Court in the following terms:

(1) The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or any other written law, or by such rules, orders or directions of the Court as may be made under this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or such written law, and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of England and subject to subsection (2), the law and practice applicable in England in the High Court of Justice up to 31st December, 1999.

An examination of the provisions of Article 243 (1) and (2) of the Constitution reveals that although the office of Public Protector is created by the Constitution and although the qualifications for appointment as Public Protector are the same as those required for appointment as Judge, the Public Protector is not a court and does not perform adjudicative functions as a Judge of the High Court does. The Public Protector's role is completely different from that of the High Court as shown by the functions of that office which in terms of Article 244 (1) and (2) are to investigate an action and decision taken or omitted to be taken by a State Institution in the performance of an administrative function, which action is unfair, unreasonable, illegal or is not compliant with the rules of natural justice. Further, in terms of sections 6 and 13 of the Public Protector Act, the Public Protector's mandate is to investigate allegations of maladministration by a State institution.

It is therefore evident from the provisions of Article 244 (1), (2) and (3) read with sections 6 and 13 of the Public Protector Act that the jurisdiction of the Public Protector is specific and is restricted to investigation of allegations of maladministration by a

State Institution. As we have already observed, it is different from the jurisdiction of the High Court which has unlimited and original jurisdiction in civil and criminal matters, appellate and supervisory jurisdiction and jurisdiction to review decisions, in accordance with the law, subject only to Article 128 of the Constitution.

In the South African case of **The Minister of Home Affairs v The Public Protector,**[22] which was cited by the Respondent, the Supreme Court of Appeal of South Africa stated regarding the Public Protector of South Africa as follows:

> **"The Public Protector is not a court, does not exercise judicial power and cannot be equated with a court. Her role is completely different to that of a court and the jurisdictional arrangements of the courts are entirely irrelevant to a determination of the Public Protector's jurisdiction. It is necessary to look to section 182 of the Constitution and the Public Protector Act to ascertain the bounds of the Public Protector's jurisdiction."**

Similarly, in the case of Zambia, it is evident that the Public Protector is not a court as Article 120 of the Constitution clearly states the composition of the Judiciary and does not include the office of the Public Protector.

Further, the Constitution does not contain any express provision which equates the Public Protector to the High Court. The main reason for the Applicant's contention that the Public Protector ranks the same as the High Court is that Article 244 (5) of the Constitution has conferred on the Public Protector some of the powers of the High Court in the areas specified in that Article.

The plain language of Article 244 (5) reveals that the Public Protector has the same powers as the High Court to enforce the attendance of witnesses before her and to examine them on oath, to examine witnesses outside Zambia, to compel the production of documents, to enforce decisions made by the Public Protector and to cite a person or an authority for contempt for failure to carry out a decision issued by the Public Protector. Article 244 (5) does not provide that the Public Protector shall possess and exercise all the powers vested in the High Court.

Further, while according to Article 134 (a) of the Constitution, the High Court is a superior court of record with unlimited and original jurisdiction in civil and criminal matters, the Public Protector's investigative powers are limited. The Public Protector is

expressly prohibited by Article 245 of the Constitution from investigating a matter which is before a court, including a subordinate court, or which is criminal in nature. Further, according to section 23 of the Public Protector Act, the Public Protector cannot commence or continue an investigation where the subject matter of a complaint or investigation is the subject matter of judicial proceedings. Section 23 provides that:

> **"Where the subject matter of a complaint or investigation is the subject matter of judicial proceedings, the Public Protector shall not commence or continue an investigation pending the final outcome of those proceedings."**

With regard to procedure, the High Court is bound by rules of procedure and evidence in civil and criminal matters. This is clearly stated in section 10 (1) of the High Court Act which we cited earlier on.

The Public Protector, on the other hand, is not bound by rules of evidence or procedure and is required by law to conduct hearings with minimal formality and technicality. Further, the Public Protector should conduct hearings with as little emphasis on an adversarial approach as is possible. Section 22 of the Public Protector Act is categorical to that effect.

While we agree with the Applicant's submission on the well settled position of the law that the High Court's jurisdiction in civil and criminal matters though unlimited is not limitless, there is no provision in the Constitution or in the Public Protector Act which limits the High Court's jurisdiction to review a decision of the Public Protector. Rather, the opposite position is that the Public Protector is precluded by Article 245 of the Constitution from investigating a matter that is before a court.

In view of the foregoing observations, the Applicant's assertion that the office of the Public Protector ranks equally with the High Court has no backing of the Constitution or any other law. As we stated earlier on in this judgment, although the Public Protector is vested with some of the powers which are exercised by the High Court, the Public Protector does not possess or exercise all the powers of the High Court. Article 244 (5) is specific to that effect.

It is our considered view that the matter of the Public Protector being equivalent to the High Court is a substantive matter which the legislature could not have left to be inferred from

the provisions of the Constitution relating to the matter. Our firm view is that were it the intention of the framers of the Constitution to equate the office of Public Protector to the High Court, they would have made express provision to that effect as they did in the case of the Constitutional Court and the Supreme Court in Article 121 of the Constitution which clearly provides that the Supreme Court and the Constitutional Court rank equivalently. Based on the constitutional provisions which we have examined, we determine that the Public Protector does not rank equivalently with the High Court.

Turning to the question whether or not the Public Protector is amenable to judicial review by the High Court, we note that the Applicant argued that the Public Protector is not subject to judicial review by the High Court because the Public Protector exercises the same powers as a High Court Judge and is independent and not subject to the direction or control of any person or an authority in the performance of the functions of the office.

It is settled law that judicial review lies against an inferior court or tribunal, and against any persons or bodies which

perform public duties or functions as was held in **Ridge v Baldwin.**[4] The office of Public Protector is a public office in terms of Article 266 which defines a public office "**as an office whose emoluments and expenses are a charge on the Consolidated Fund or other prescribed public fund and includes a State office, constitutional office and an office in the public service, including that of a member of a commission.**" Section 31 (1) (a) of the Public Protector Act provides that:

> **(1) The funds of the office of the Public Protector shall consist of such monies as may-**
> **(a) be paid to the office of the Public Protector by Parliament for the purposes of the Public Protector.**

Further, it is undisputed that the Public Protector performs public functions. Therefore, since we have determined that the Public Protector is not at par with the High Court, it follows that the office of the Public Protector being a public office which performs a public function is amenable to judicial review by the High Court.

While the Applicant argued that the Public Protector is not amenable to judicial review because the office is independent in terms of Article 244 (4) of the Constitution, Article 267 (4) is

instructive with regard to the independence of the Public Protector. The Article gives a court power to examine whether the independent person, institution or office has performed its powers in line with the Constitution or others laws. The jurisdiction to review the performance of a function in line with the law is generally vested in the High Court in terms of Article 134 (c) of the Constitution.

In view of the clear provisions of Article 267 (4) of the Constitution as amended, the Applicant's contention that the Public Protector is not amenable to judicial review by the High Court on the basis of the provisions of Article 244 (4) regarding the independence of the Public Protector in the performance of the functions of the office, is untenable.

The basis of the power of the High Court to review decisions of inferior courts, public bodies and tribunals is that it can make such bodies do their duty and stop them from doing things which they have no power to do. The function of the High Court in judicial review proceedings is to ensure that the discretion entrusted to public authorities has been properly exercised. In the persuasive

case of **Amanda Muzyamba Chaala (Administratrix in the Estate of the late Florence Mwiya Siyuni Chaala) v The Attorney General**[27] the Supreme Court observed that:

> **"Judicial review is a public law remedy by which a citizen can challenge the lawfulness of decisions made by public bodies or authorities before courts of law. The remedy is necessary for accountability of public bodies for it ensures that both the governed and the government adhere to the rule of law. It helps to protect citizens against bureaucratic excesses. As far as a citizen is concerned, a public authority must act in a fair and predictable manner. Public law requires that those who are entrusted with the exercise of public power should not do so arbitrarily or subject to their own whims and caprices; they must give effect to the true intent of the law while upholding the fundamental tenets of individual human rights."**

In determining this matter, we have found South African case authorities regarding the status of the Public Protector in that country helpful in that they clearly state that the Public Protector is subject to judicial review. In the case of **The South African Broadcasting Corporation and Others v Democratic Alliance and Others,**[28] the Supreme Court of Appeal of South Africa made the following remarks:

> **"Our constitutional compact demands that remedial action taken by the Public Protector should not be ignored. State institutions are obliged to heed the principles of co-operative governance as prescribed by s 41 of the Constitution. Any affected person or institution aggrieved by a finding, decision or action taken by the Public Protector might, in appropriate circumstances, challenge that by way of a review application. Absent a review application,**

however, such person is not entitled to simply ignore the findings, decision or remedial action taken by the Public Protector." (Emphasis added).

The Constitution and the Public Protector Act do not provide for any appeal procedure for a person who is dissatisfied with a decision of the Public Protector. Therefore, an aggrieved person or State institution may challenge that decision by way of judicial review proceedings.

We reiterate in conclusion that the office of the Public Protector does not rank *pari passu* with the High Court as the Constitution does not contain any provision to that effect. The Public Protector being a public body is therefore amenable to judicial review by the High Court.

Each party will bear their costs.

.....
H. Chibomba
CONSTITUTIONAL COURT PRESIDENT

.....
A.M. Sitali
CONSTITUTIONAL COURT JUDGE

.....
M.S. Mulenga
CONSTITUTIONAL COURT JUDGE

.....
E. Mulembe
CONSTITUTIONAL COURT JUDGE

.....
Prof. M.M. Munalula
CONSTITUTIONAL COURT JUDGE