SELECTED JUDGMENT NO. 60 OF 2018

(2224)

IN THE CONSTITUTIONAL COURT OF ZAMBIA **2017/CCZ/004**

AT THE CONSTITUTIONAL COURT REGISTRY

HOLDEN AT LUSAKA

(CONSTITUTIONAL JURISDICTION)

IN THE MATTER OF: **THE INTERPRETATION OF ARTICLES 106 (1), (3), (6), 267 (3) (c) OF THE CONSTITUTION OF ZAMBIA**

AND

IN THE MATTER OF: **TENURE OF OFFICE OF MR EDGAR CHAGWA LUNGU PRESIDENT OF THE REPUBLIC OF ZAMBIA**

AND

IN THE MATTER OF: **THE ELIGIBILITY OF MR EDGAR CHAGWA LUNGU PRESIDENTIAL CANDIDATE IN THE PRESIDENTIAL ELECTION TO BE HELD IN 2021**

BETWEEN:

DR DANIEL PULE	**1ST APPLICANT**
WRIGHT MUSOMA	**2ND APPLICANT**
PASTOR PETER CHANDA	**3RD APPLICANT**
ROBERT MWANZA	**4TH APPLICANT**

AND

ATTORNEY GENERAL	**1ST RESPONDENT**
DAVIES MWILA **(In his capacity as Secretary General of the Patriotic Front)**	**2ND RESPONDENT**
THE LAW ASSOCIATION OF ZAMBIA	**1ST INTERESTED PARTY**
STEPHEN KATUKA **(In his capacity as Secretary General of the United Party for National Development)**	**2nd INTERESTED PARTY**

Coram: Chibomba, PC, Sitali, Mulenga, Mulembe, Mulonda, Munalula and Musaluke, JCC.

On 8th May, 2018 and on 7th December, 2018

For the Applicants:
Mr. B.C. Mutale, S.C, of Messrs Ellis and Co.;
Mr. S. Mr. Sikota, S.C, of Central Chambers;
Mr. R. Malipenga of Messrs. Robson Malipenga and Co.;
Mr. C.K. Bwalya of D.H Kemp and Co.;
Mr. M. Lungu of Lungu Simwanza and Co.;
Mr. D. Jere of Messrs Mvunga and Associates.

For the 1st Respondent:
Mr. L. Kalaluka, S.C, Attorney General;
Mr. A. Mwansa, S.C, Solicitor General;
Mr. J. Simachela, Chief State Advocate;
Mrs G. Tiku, Principal State Advocate;
Mrs D. Shamabobo, Senior State Advocate.

For the 2nd Respondent:
Mr. J. Zimba of Messrs Makebi Zulu Advocates.

For the 1st Interested Party:
Mr. J.P. Sangwa, S.C, of Messrs Simeza Sangwa & Associates.

Ms. N. Alikipo, of Simeza Sangwa & Associates.

For the 2nd Interested Party: Mr. K. Mweemba of Messrs Keith Mweemba Advocates.
Mr. G.A. Phiri of PNP Advocates.

JUDGMENT

Chibomba, PC delivered the judgment of the Court.

Cases referred to:

1. **S v Mhlungu 1995 (3) SA 867 (CC).**
2. **Lewanika and Others v Chiluba (1998) Z.R. 79 (SC).**
3. **Katuka and Another v Attorney General and Others CCZ Judgment No. 29 of 2016.**
4. **David Tinyefuza v The Attorney General of Uganda, Constitutional Petition No. 1 of 1996.**
5. **Crispus Karanja Njogu v Attorney General (Criminal application 39 of 2000).**
6. **Julius Ishengoma Francis Nyanabo v The Attorney General Civil Appeal No. 64 of 2001.**
7. **Omoyeni v Governor of Edo State [2004] NWLR 865.**
8. **Moobola v Muweza (1990-1992) Z.R. 38 (SC).**
9. **Zambia National Holding Limited and United Nations Independence Party v Attorney General (1993-1994) Z.R. 115.**
10. **Government of the Republic of Namibia and Another v Cultura 2000 and Another 1994 (1) SA 407.**
11. **Bangopi v Chairman of the Council of State, Ciskei 1992 (3) SA 250.**
12. **Attorney General v Unity Dow [1992] LRC (Const) 623.**
13. **Attorney General and Speaker of the National Assembly v The People (1999) Z.R. 186.**
14. **Nawa v Standard Chartered Bank of Zambia (2011) SCZ Judgment No. 4.**
15. **L'Office Cherifen des Phosphates and Another v Yamashita-Shinnon Steamship Co Ltd, The Boucraa [1993] 3All ER 686 AT 692.**
16. **Sunshine Porcelain Potteries Pty Ltd v Nash [1961] AC 927.**
17. **Lauri v Renad [1892] 3 Ch 402.**
18. **Regina v Secretary of State for Social Security Ex parte Britnell (Alan) [1991] 2 All ER 726.**
19. **Jones v Wrotham Pack Estate [1980] AC 74.**
20. **Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd [1999] 2 ALL ER 791.**

21. R (Quintavalle) v Secretary of State for Health [2003] 2 ALL ER 113.
22. The Attorney General, The Movement for Multiparty Democracy v Akashambatwa Mbikusita Lewanika and Others (1994) Z.R. 164.
23. Lubunda Ngala and Jason Chulu v Anti-Corruption Commission22 Selected Judgment No. 4 of 2018.
24. Zambia National Commercial Bank PLC v Martin Musonda and 58 Others Selected Judgment No. 24 of 2018.
25. South Dakota v North Carolina (1940) 192 USA 268: 48 ED 448.
26. Milford Maambo and Others v The People Selected Judgment No. 31 of 2017.
27. Lumina and Mwiinga v The Attorney-General (1990 – 1992) Z.R. 47.

Statutes referred to:

1. The Constitution of Zambia Act No. 1 of 2016.
2. The Constitution of Zambia (Amendment) Act No.2 of 2016.
3. The Constitution of Zambia Act 1991.
4. The Constitution of Zambia (Amendment) Act No. 18 of 1996.
5. The Constitution of Zambia 1964
6. The Constitutional Court Act No. 8 of 2016.
7. The Law Association of Zambia Act Chapter 31 of the Laws of Zambia.
8. Statutory Instrument No.156 of 1969.

Other Materials referred to:

1. A. Chayes in 'The role of the judge in public litigation' (1979) 86 Harvard Law Review 1281.
2. Craies on Legislation, A Practitioners Guide to the Nature Process, Effect and interpretation of Legislation, 8th Edition Sweet and Maxwell.
3. Francis Bennion, Statutory Interpretation, 3rd Edition, Butterworths.
4. The Twenty-second Amendment to the United States Constitution.

Before we consider this matter we wish to observe that we noted with grave concern that whilst this matter was ongoing several individuals were commenting in a manner that was calculated to either influence the proceedings or bring the individual judges of this Court into disrepute. This

Court has generally exercised maximum tolerance in a bid to protect the right to free speech because of its nature as the people's Court. However free speech does not entail destroying the very institution that the people have created. And each individual's right to free speech ends where another's begins. We therefore want to render a timely warning that those who engage in gratuitous and unwarranted attacks on the members of this Court related to matters before the Court do so at their own peril as we shall not hesitate to cite them for contempt should their comments invite that action.

By amended Originating Summons, the four Applicants named above seek the determination of the following questions:-

> **"1. Whether His Excellency President Edgar Chagwa Lungu will have served two full terms for purposes of Article 106 (3) as read with Article 106 (6) of the Constitution of Zambia at the expiry of his current term;**
>
> **2. Whether, as a matter of the Constitutional law of the Republic of Zambia, His Excellency President Edgar Chagwa Lungu is eligible for election as President for another 5 year term following his current term of office which commenced on 13th September, 2016;**
>
> **3. Further any other relief;**
>
> **4. Costs."**

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The amended Originating Summons was filed pursuant to Order 4, Rule 3 of the Constitutional Court Rules, 2016 **(CCR)** and is supported by a joint affidavit in support deposed to by the four Applicants. At the hearing of the amended Originating Summons, Counsel for the Applicants relied on the Skeleton Arguments filed which they augmented with oral submissions. The gist of the joint affidavit, which also gives the brief history of this matter, is that following the demise of President Michael Chilufya Sata on 28th October, 2014 a vacancy was created in the office of the President of the Republic of Zambia; the late President Sata had served in the office of President for three years and one month out of his five year term; consequently, a presidential by election was held on 20th January, 2015 and Mr. Edgar Chagwa Lungu was elected President of the Republic of Zambia and that he consequently served the unexpired term of Mr. Sata's tenure for one year and six months; the by-election was held pursuant to the **Constitution of Zambia, 1991** as amended by **Act No. 18 of 1996**. That on 5th January, 2016 the Constitution was amended by the **Constitution of Zambia (Amendment) Act, No. 2 of 2016** (The Constitution as amended); and that the presidential and general elections that were held on 11th August, 2016 were held pursuant to the Constitution

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as amended and that Mr. Edgar Chagwa Lungu, who stood on the Patriotic Front ticket, was elected as President of the Republic of Zambia. That, however, the question of President Lungu's eligibility to contest the 2021 presidential elections has arisen following his announcement on 5th January, 2017 that he would be eligible to contest the 2021 elections and that as a result of this announcement, a nation-wide debate ensued as to whether or not he is eligible to contest the 2021 presidential elections on ground that he has twice been elected to the office of President.

The deponents further averred that based on information from their Advocates, they believe that the unexpired tenure of office that President Lungu served from 25th January, 2015 to 13th September, 2016 cannot be deemed a term of office as it was for a period of less than three years. Hence, their belief that President Lungu is eligible to serve for a further term of five years which will constitute his second and final term of office. They therefore commenced this action seeking this Court's interpretation whether or not President Lungu is eligible to serve for a further five year period from 2021.

In the Skeleton Arguments filed, the Applicants urged us to adopt a purposive approach in interpreting the relevant provisions of the

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Constitution as amended and to take into account the national values and principles as enshrined therein. It was contended that doing so would lead to an 'irresistible' conclusion that President Lungu is eligible to contest the presidential elections in 2021. Counsel then quoted the provisions of Article 106 (1) (3) and (6) and also referred to Article 106 (5) (a) and (b) of the Constitution. He pointed out that the proceedings in this case are purely centred on the import of the above provisions and therefore, called for their interpretation.

It was argued that applying the literal or textual approach in interpreting Article 106 of the Constitution as amended would result into an absurd meaning as a simplistic reading of the said Article appears not to provide for the manner in which President Lungu initially assumed the office of President on 25th January, 2015 and that before the 11th August, 2016 elections, he served as President for a period of less than three years. Further, that it would also be against the inbuilt mechanism for interpretation contained in the Constitution which is at variance with the literal or textual approach as it supports the purposive approach.

Further, that the literal or textual approach is also inconsistent with the international culture of constitutional jurisprudence which require a

purposive and generous focus in the interpretation of the Constitution. In support of this contention, the South African case of **S v Mhlungu**[1] was cited.

It was submitted that in interpreting the Constitution, this Court should discard the literal and pedantic approach where such an approach would lead to anomalous or arbitrary results. In support of this argument, the case of **Lewanika and Others v Chiluba**[2] was cited as an example where courts in Zambia have overlooked the literal or textual approach in constitutional interpretation.

It was submitted that in the **Lewanika**[2] case, the Supreme Court construed the term: *'full bench of the Supreme Court,'* as the maximum available odd number of the judges of the Court that could be mustered to hear the case. And that this interpretation was reached notwithstanding the literal or textual position of the Constitution on the matter that provided that a full bench comprised nine judges, a number that had not been achieved at the time of the proceedings.

It was submitted that this Court's holding in **Katuka and Another v Attorney General and Others**[3] demonstrates the Court's parity of

reasoning with internationally accepted Constitutional jurisprudence. And that the decision in that case effectively means that Article 106 of the current Constitution applied to the Vice President at the material time despite the Vice President having been a presidential appointee as opposed to being a running mate. The Applicants' contention was therefore, that although the textual position of the current Constitution is that the then Vice President could not assume the office of the President in the case of a vacancy in that office, the **Katuka**[3] case, however, was a classical exhibition of a purposive and generous focus to constitutional interpretation.

The Applicants then gave a historical background on the constitutional developments as regards the limitation of presidential terms in Zambia. It was submitted that both the Constitution of Zambia, 1991, as amended by Act No. 18 of 1996, and the current Constitution have come to full circle by specifically barring a person who has twice held the office of President from being eligible for re-election as President. And that Article 106 (6) (b) of the current Constitution has gone even further by introducing the concept of 'deeming' whereby a person is deemed as not having served a full term of office as President if, at the date on which he assumed

office, there was less than three years remaining before the date of the next general election. It was contended that in the context of the provisions of the current Constitution, President Lungu should be deemed as not having served a term of office as President for the period 25th January, 2015 to 13th September, 2016 as a period of one year and six months which he served is below the constitutional threshold of 'holding office as President' for purposes of Article 106 (3) and (6) (b) of the current Constitution.

The Applicants then went on to refer to Article 267 of the Constitution. They submitted that this Article compels the Court to interpret the Constitution as a whole and not in a discordant manner. Reference was made to some of the national values and principles enumerated in Article 8 of the current Constitution and then singled out 'constitutionalism, equity, equality and non-discrimination and good governance'. It was contended that national values must be applied in the interpretation of the Constitution. Article 9 (1) (a) of the Constitution was cited and it was argued that an interpretation that has the effect of nullifying or taking away any of the national values and principles must not be applied as it would be outrageous. In support of the above proposition, the following authorities

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were cited: the Ugandan case of **David Tinyefuza v The Attorney General of Uganda**[4]; the Kenyan case of **Crispus Karanja Njogu v Attorney General**[5] and the Tanzanian case of **Ndyanabo v Attorney General**[6].

It was submitted that prior to the constitutional amendment of 2016, a vacancy in the office of the president could only be filled by way of an election. And that taken literally, the import of Article 106 (6) (b) of the current Constitution is that this provision only applies to a person who was elected to the office of President as a result of an election held in accordance with Article 106 (5)(b). And that from a casual approach, Article 106 (6) (b) appears to apply in circumstances where there is a vacancy in the Presidency after the coming into effect of the current Constitution and not before. However, that such an interpretation smacks of excessive formalism and pedantic for two reasons; first, it adopts a literal interpretation of the Constitution without regard to its purposes, objectives and values as provided under Article 8; and secondly, it relies heavily on the misconceived proposition that Article 106 (5) and (6) of the current Constitution can neither be applied retrospectively nor to the circumstances which are before this Court for determination.

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The Applicants contended that a proper reading of Article 1 of the current Constitution entails that the Constitutional amendments of 5th January, 2016 are retroactive in nature and extend before the said date. In support of this proposition, the application of legislation retroactively, reference was made to the Nigerian case of **Omoyeni v Governor of Edo State**[7].

The Applicants drew a distinction between the provisions of the repealed Article 38 (1) and the current Article 106 (5) (a). It was submitted that under Article 106 (5) (a) of the current constitution, where a vacancy occurs in the office of President, the Vice President assumes the office of President without an election as an election may only be held if the Vice President is unable to take up office; while under the repealed Article 38 (1), the Vice President exercised executive functions pending the holding of an election within 90 days from date of the vacancy. It was argued that the repealed Article 38 of the Constitution was not therefore, applicable to the matter at hand as the applicable provision is Article 106 of the current Constitution. It was further contended that the application of Article 106 to the current case would not amount to applying the law retrospectively. As authority for this proposition, the Applicants cited the cases of **Moobola v**

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Muweza[8] and **Zambia National Holdings Limited and United National Independence Party v Attorney General**[9].

It was argued that the modifications brought about by Article 106 (5) (a) and (b) are procedural as they set out the process to be followed where there is a vacancy in the office of President. And that the procedure under the repealed Article 38 of the Constitution was not satisfactory as it tended to plunge the country into unnecessary power struggles after the occurrence of a vacancy in the office of the President. Further, that in order to address this mischief, a provision in Article 106 (5) (a) and (b) was enacted to provide for the Vice President to assume the office of the President without an election whenever there was a vacancy in the office of the President except where the Vice President is unable to assume office and elections have to be held within sixty days.

It was contended that although the current constitutional provisions in question were not in operation at the time President Lungu took office, he was a president- elect at the time he assumed office as all references to a president elect applied to the incumbent when he was elected. In support of this proposition, Article 267 (3) (c) was cited.

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The Applicants further argued that the national values and the principle of non-discrimination in the current Constitution militates against an interpretation of Article 106 that would be discriminatory. Therefore, that for purposes of Article 106 (3), the proposition that a President who has served for less than three years in office should be deemed to have served a full term would be unjustified, discriminatory and unfair. And that had it been the intention of the drafters to exclude the application of Article 106 (3) to an incumbent President, that intention would clearly have been brought out. As an example, the Applicants cited the 22nd Amendment of the Constitution of the United States of America which provides as follows:

> **"No person shall be elected to the office of President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this article shall not apply to any person holding the office of President when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this article becomes operative from holding the office of President or acting as President during the remainder of such term."**

They contended that since Article 106 (6) of the current Constitution does not expressly exclude its application to the incumbent President, it means that he is not excluded. Hence, any interpretation of the Constitution that would make President Lungu, or indeed any other person that would

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have been similarly placed, ineligible for election as President in the 2021 general election on the basis of Article 106 (3) is retrogressive to the national values and principles. Further, that it would also be against the innovation of 'deeming' under Article 106 (6) which is intended to provide relief to the injustice that would result from the application of Article 106 (3) to this case.

It was submitted that Article 267 (1) (b) of the current Constitution enjoins this Court to interpret the Constitution in a manner that permits the development of the law. To press his point further, the following cases were cited:- The **Government of the Republic of Namibia and Another v Cultura 2000 and Another**[10], and **Bangopi v Chairman of the Council of State, Ciskei**[11].

It was argued that since the Constitution is not static but alive, a generous and liberal approach of interpretation must be adopted. As authority, the case of **Attorney General v Unity Dow** [12] was cited.

It was submitted that the import and legal consequence of Article 267(3) (c) of the current Constitution is that a President who is elected after a vacancy occurred under the repealed Article 38 of the Constitution of

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Zambia is the same person elected to the office of the President under Article 106 (5) (b) of the current Constitution. Hence, since President Lungu was elected after the vacancy caused by the death of President Sata, his situation is for all intents and purposes, captured by Article 106 (5) (b) of the current Constitution. In pressing this point further, it was contended that the spirit and objective of Article 106 (6) is to avail a President elect sufficient time to serve as President without suffering any prejudice brought about by fortuitous events.

It was further argued that if Article 106 (5) (a) applied to the Vice President then, *a fortiori*, Article 106(5) (b) and consequently Article 106(6) must apply to President Lungu. And that this approach is not only equitable and non-discriminatory but it promotes the national value and principle of equality.

It was the Applicants' submission that the changes introduced by the 2016 Constitutional amendments must be gauged against the previously existing state of the law as the limits to the number of terms that a president could serve were introduced by the 1991 Constitution which made the relevant provision prospective in its application. And that this enabled the then President to contest the election of that year

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notwithstanding that he had previously served more than two terms because the language used was that thereafter anyone who had served for two terms of five years each would be ineligible to contest future elections.

It was also submitted that with the enactment of the 1996 amendments, the term used was changed to 'anyone who had twice been elected' was ineligible to contest future elections. And further, that with the 2016 Constitutional amendments taking effect, the position under the current Constitution is that subject to Article 106 (6) a person is ineligible to contest the presidential election if he or she has served for two terms of five years each as reference to 'twice being elected' has now been replaced with 'two terms of five years each'. Therefore, if the 2021 general elections will be held under the current Constitution without any further amendments, then there is no need to do violence to the relevant constitutional provisions which are very clear.

In augmenting the Applicants' Skeleton Arguments, Mr. Mutale, S.C., submitted that in the Constitution as amended the unique circumstances of President Lungu were not taken care of by the transitional constitutional provisions.

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It was argued that the Legislature glossed over the fact that President Lungu's term from 25th January, 2015 to 13th September, 2016 straddled two constitutional regimes and that at the time the term in question came to an end, President Lungu had only served one year and six months. In this regard, reference was made to the report of the Technical Committee at pages 284 and 285, which, according to State Counsel Mutale, show that the Technical Committee was alive to the circumstances of the incumbent President (President Lungu). Therefore, that the current Constitution should have provided for transitional provisions to accommodate President Lungu. And that the Legislature committed a glaring error by not providing for President Lungu's circumstances in the transitional provisions.

In this regard, State Counsel Mutale urged us to envisage the intention and purpose of Parliament and the Technical Committee as regards the intention behind Article 106 (6) which was that an inherited term does not count in reckoning whether a President has served two full terms.

It was further contended that applying the new constitutional regime to President Lungu's inherited term would not amount to retrospective

application of the law as President Lungu was still serving his inherited term when the current Constitution came into force. And that this is so because the rule against retrospective application of the law only applies in instances where accrued rights are being impaired which is not the case at hand. To press this point, the **Moobola v Muweza**[8] case was again cited.

Mr. Mutale, S.C urged us to answer the first question raised in the Originating Summons in the negative and the second question in the affirmative subject to Article 100 of the Constitution, respectively.

In conclusion, State Counsel Mutale took issue with the first part of the 1st Interested Party's submissions which raised the question whether the Applicants have *locus standi* and sought to impugn these proceedings. State Counsel Mutale pointed out that the 1st Interested Party had raised the same issues before a single Judge of this Court who dismissed them and that the ruling of the single Judge on this aspect was not appealed against. Therefore, that this Court has no jurisdiction to entertain the first part of the 1st Interested Party's submissions as it relates to issues already determined by a single Judge.

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In view of the position we have taken on this issue, which we will discuss below, we shall not further outline the extensive arguments by all the parties on this aspect.

On the other hand, the Attorney General, who is the 1st Respondent in this matter also relied on the Affidavit in response and Skeleton Arguments filed. In the Affidavit in response, it was deposed that during his first segment as President, President Lungu had only served for a period of one year when the current Constitution came into force; during the second segment and under the current Constitution, President Lungu served a further period of six (6) months from 5th January, 2016 to 11th August, 2016. And that the current Constitution provides that a term of less than three (3) years does not amount to a full term of office.

In the skeleton arguments, it was argued that the question before this Court is whether or not President Edgar Lungu has twice held office as President of the Republic of Zambia. It was contended that on the face of it, it would appear that President Lungu has twice held office as President. However, that Article 106 (6) of the current Constitution provides guidance on this matter and clarifies Article 106 (3) as Article 106 (6) makes it clear that serving as President for a period not exceeding three years is not

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deemed to be a full term. Therefore, that when considering the eligibility of President Lungu for election as President in the 2021 election under Article 106 (3), regard must be had to Article 106 (6) which specifically provides for what constitutes a full term. Hence, having served as President for a period of less than 3 years from 20th January, 2015 to 13th September, 2016 President Lungu is currently serving his first term in office as President and as such, he is eligible to contest the Presidential elections in 2021.

It was submitted that the 2015 presidential elections substantially fall within Article 106 (5) (b) of the Constitution as amended and that to hold otherwise would amount to having undue regard to procedural technicalities prohibited by Article 118 (2) (e) of the current Constitution.

It was argued that the dictates of justice require a broad and purposive interpretation of Article 106 (5) (b) of the current Constitution that gives effect to the objectives of the Constitution as a whole. In support of this proposition, the 1st Respondent cited the case of the **Attorney General v Unity Dow**[12]. Further, that a literal reading of Article 106 (5) (b) of the current Constitution presents challenges in relation to other constitutional provisions such as Articles 106 (3) and 118 (2) (e). Therefore, that a

purposive interpretation must be employed to determine the intention of the Legislature.

In pressing this point, Mr. Kalaluka, S.C., cited the case of **Steven Katuka and Law Association of Zambia v Attorney General and Others**[3] where we guided that regard to the context and historical origins of the relevant constitutional provisions in a case should be interrogated so as to ascertain the meaning and purpose of the particular constitutional provisions. He submitted that history leading to the enactment of Article 106 (3), 106 (5) (b) and 106 (6) of the current Constitution shows that there was in force Article 35 (2) in the Constitution prior to the 2016 amendment which had the same effect as the current Article 106 (3) of the Constitution, which bars a person who has twice held office as President from contesting a Presidential election. And that the purpose of the 2016 amendments was to clarify the position of a vice president or a new president who served an unexpired term of office and also to give effect to the position of a presidential running mate. Hence, it was never the intention of Article 106 (5) (a) and (b) of the current Constitution to exclude any prior elections from the objectives of Article 106 (6) of the Constitution.

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To press this point further, reference was made to the constitutional provisions relating to the Vice President and Councillors to underscore the point that under the current Constitution, a full term is only reckoned as such if it is for a duration of more than three years before the date of the next election.

In supplementing the arguments by the Attorney General, the learned Solicitor General submitted that Article 106 (5) of the current Constitution was akin to the repealed Article 35(2) of the Constitution which existed prior to the 2016 Constitutional amendments. He submitted that Article 106 is a build up to what amounts to a presidential tenure of office and it therefore cannot be read in isolation. And that the above mentioned provision remedies the problem that the repealed Article 35 caused as it did not define what amounted to a full term. Therefore, that Article 106 (5) of the current Constitution also remedies the mischief of what should happen to a president who serves an unexpired term of another president.

It was argued that while President Lungu may have served twice as President, he has not served a full term as envisaged by Article 106 (6) of the current Constitution. And that he is eligible to present himself as a candidate for the 2021 presidential elections.

The 2nd Respondent did not file any Skeleton Arguments. However, Counsel for the 2nd Respondent, Mr. Zimba, adopted the submissions made on behalf of the Applicants and the 1st Respondent.

In opposing the Applicants' Originating Summons, Counsel for the 1st Interested Party, Mr. Sangwa, S.C., relied on the 1st Interested Party's Skeleton Arguments filed which were divided in two parts. Under the first limb, the 1st Interested Party raised four arguments relating to *locus standi* and others which, as earlier stated, we shall not delve into.

The second limb of the 1st Interest Party's written submissions are in response to the two questions raised in the Originating Summons. It was submitted that the first question raised in the Originating Summons ought to be answered in the affirmative, that is to say, that President Lungu has twice been elected to the office of President of Zambia. Therefore, that under the Constitution, he is not eligible to contest the 2021 presidential election. And that the second question raised in the Originating Summons must be answered in the negative, that is to say, that under the current Constitution, President Lungu is not eligible for election as President for another five year term after his current term of office ends.

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In specific response to the first question raised in the amended Originating Summons, it was submitted that the Applicants had misconstrued Article 106 (3) and Article 106 (6) of the Constitution as these provisions deal with the tenure of office of the President. That Article 106 (3) provides a limit to the number of times that a person who has been elected President can contest in an election to hold that office. It was submitted that the import of Article 106 (3) is that if a person has been elected as President, the period of holding office during either the first or second term is inconsequential as the fact that he was elected to the office of President on two occasions renders him ineligible to re-contest the elections for the third time. And that this has been the position since 1991. In support of this argument, the Repealed Article 35 of the Constitution was cited.

The 1st Interested Party also drew a comparison between Article 35 of the 1991 Constitution and Article 35 of Act No. 18 of 1996. It was submitted that under the former, the tenure of office was limited to two five year terms while under the latter, it was limited to the number of times one was elected as President. It was contended that the latter position is what has been retained under Article 106 (3) and since President Lungu has been elected

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twice to the office of President, in January, 2015 and September, 2016, he is ineligible to contest the 2021 general elections. To press this point further, it was argued that the question is not whether President Lungu has served two full terms or not. Rather, it is whether he has been elected twice to the office of President to which the answer is in the affirmative.

It was also submitted that Article 106 (6) of the current Constitution must not be read in isolation but together with Article 106 (5) which prescribes what should happen in case of a vacancy created other than as provided under Article 81. And that the import of Article 106 (6) is that, if the vice president assumes the office of President according to Article 106(5) (a) or if a person contests and wins the election as President under Article 106(5) (b), the limit of tenure provided for in Article 106(3) will apply if the person occupies the office of President for a minimum period of three years before the next election. Hence, if he serves for a period of less than three years, that period will not count.

It was argued that the situations prescribed in Article 106 (5) and (6) do not cover President Lungu as they became effective from January, 2016 when the Constitution was amended. And that at that time, President Lungu had already been elected to the office of President once. It was

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contended that had Parliament intended for the above cited provisions to operate retroactively, it would have expressly provided so in the Constitution. That Article 106 (6) covers a person who is the Vice President and takes over the office of president, without being elected to that office, by virtue of having been the running mate of the elected President who vacates the office of president. Hence, the 1st Interested Party's contention was that since at the time President Lungu was first elected to the office of president in January, 2015 he was a Minister and not the Vice-President, he does not come within the ambit of Article 106 (6). It was submitted that the Applicants' action would have been sound if Parliament had made Article 106 (6) effective from 1st January, 2015.

In response to the Applicants' Arguments in Support of the 2nd question raised in the Originating Summons, the 1st Interested Party submitted that by virtue of the provision in Article 106 (3) of the Constitution, President Lungu is not eligible to contest the 2021 elections as his election to the office of president in January, 2015 counts as his first election while his subsequent election in September, 2016 counts as his second election. And further, that Article 106 (6) does not operate

retroactively and therefore cannot operate to cover the period from January 2015 when President Lungu was first elected.

In augmenting the 1st Interested Party's written submissions, Mr. Sangwa, S.C., submitted that it was not in dispute that Article 106 (6) does not cover President Lungu. Therefore, his contention was that there is nothing for this Court to interpret in this matter.

In response to the argument that this Court should adopt the purposive approach and also take into account the national values in interpreting the relevant constitutional provisions in this case, it was submitted that the provisions on the national values are not a license to make the Constitution malleable or to urge this Court to begin to rewrite the Constitution. Therefore, that any interpretation that makes Article 106 (6) applicable to President Lungu is untenable at law.

It was submitted further that the application by the Applicants seeks to undo the fundamental principle of constitutionalism which is at the heart of a written constitution and which basically means limited government.

In response to the argument that Article 106 is discriminatory, it was submitted that this is a moral argument and that there is a mechanism in place under Article 23 of the Constitution that protects persons against

discrimination which the Applicants can activate. Further, that the Applicants must go before the High Court and not this Court to demonstrate how Article 106 (6) is discriminatory. And that it is not the responsibility of this Court, under the 'guise' of purposive interpretation, to rewrite the Constitution. As authority, the case of **Attorney General and Speaker of the National Assembly v. The People**[13] was cited.

With regard to the argument that the literal approach to constitutional interpretation has been done away with, it was submitted that there is no law to support that proposition as the law on constitutional interpretation was clearly set out by this Court that the starting point is the literal interpretation. And that it is only if the literal meaning is problematic that the court can adopt the purposive approach. As authority, the **Stephen Katuka**[3] case was cited. It was argued that Article 106 is clear and it does not lead to any absurdity. And further, that this provision must be read in its entirety and not selectively.

In response to the Applicants' reliance on the report of the Technical Committee on Drafting the Constitution, it was submitted that the Applicants had selectively read the report and that its perusal shows that what is captured in the Constitution is what the Technical Committee

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intended. And that there was no mistake or misunderstanding or absurdity as pages 283 and 284 of the report show that the Technical Committee addressed its mind to the issue of limiting the tenure of the president and resolved to retain the provision in the Constitution that a person who has twice held the office of president cannot go for another term of office. Thus, that Article 106 (6) which applies to a specific office holder cannot be applied to another office holder. Therefore, Mr. Sangwa's contention was that the question whether President Lungu's first term of office should or should not count does not arise as there is no basis for such a proposition as the situation before this Court is not covered by law.

In response to the argument that there is deficiency in the transitional arrangements contained in the transitional provisions of the Constitution, it was submitted that the **Constitution (Amendment) Act No. 1 of 2016** sufficiently dealt with the transitional arrangements. Further, that Article 106 (1) to (3) dealt with the incumbent President. And that if the limitation on the presidential terms was not intended to apply to the incumbent, provision would have been made to the effect that the counting of the number of times one has held office would start with the 2016 constitutional amendments. And that such a provision was included under the Repealed

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Article 35 when a limit on the presidential term was introduced. To press this point further, it was argued that as a general rule, the president is supposed to hold office for five years unless the tenure is prematurely terminated on account of the grounds provided for under Article 106 (4) (a), (b) and (c). And that sub-article (5) provides for what should happen in such a situation.

Further, that the only reason for the use, by the drafters of the Constitution of the words "twice held office" in Article 106 (3) as opposed to "twice elected" as before the amendment, is that in the Constitution as amended, one can ascend to the office of president by either being elected by the people or by virtue of the fact that they are vice president, a running mate. That before the amendment, no one could ascend to the office of president without being elected.

In conclusion, State Counsel Sangwa urged us to dismiss the Originating Summons for lack of merit as the issues raised therein are not justiciable before this Court.

The 2nd Interested Party also filed an Affidavit in opposition and Skeleton Arguments which Co-Counsel, Mr. Mweemba and Mr. Phiri,

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augmented with oral submissions. In the affidavit in opposition, it was deposed that the Applicants were under a total misapprehension over the eligibility of President Lungu in the 2021 Presidential elections as the President has served two presidential terms and is therefore, not eligible for election as President for another five year term.

In the Skeleton Arguments, the 2nd Interested Party began by responding to the Applicants' argument that President Lungu's first term of less than three years in office must not count, it was contented that this argument finds no resonance with Article 106 (3) of the Constitution as President Lungu has twice held office as President. Therefore, that he is not eligible for re-election in 2021 when his second term of office ends.

In response to the argument that President Lungu will not have held office twice in 2021 as he has not previously held office for a full term of five years, the 2nd Interested Party referred us to Article 106 (2) and argued that it does not provide for a president to only be deemed to have held office where the president holds office for a certain period or for a period of five years. Therefore, the proposition that President Lungu must not be deemed to have held office for the period before 5th January, 2016 when

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the Constitution as amended came into effect, is not sustainable as it is nothing more than logical fallacy.

Reference was then made to Article 106 (3) which provides that a person who has twice held office as president is not eligible for election as president, it was submitted that there is no ambiguity in that provision and neither is there any reference to a term of office.

It was contended that Article 106 (6) applies to a vice president who had been a running mate and is in the office of president for a period less than three years. Therefore, that had it been the intention of the drafters that Article 106 (6) should apply to President Lungu's circumstances, such intention would have been clearly articulated in Article 106 (6).

Reference was also made to Article 106 (2), which, according to the 2nd Interested Party, further clarifies what is meant by the term "holding office" under Article 106 (3). It was contended that the length of time served is not a consideration in determining whether a president has held office provided that it is within the legal parameters.

It was submitted that Article 106 (6) (b) does not have retrospective effect. Hence, it cannot be relied upon to support the Applicants' argument

in favour of President Lungu's eligibility to contest the 2021 elections. Reference was made to Section 7 (1) of the **Constitution Act No. 1 of 2016** which, according to the 2nd Interested Party, recognises the presidential term of office under the pre-amended Constitution. It was submitted that Section 7 (1) is couched in very clear terms and without any ambiguity.

It was submitted that in January, 2015 when President Lungu took up and served the unexpired term of the late President Sata, that was the first time he held office as president. And that his second term of holding office started running from 13th September, 2016.

Further, that the provisions of Article 106 (6) (b) of the Constitution, vis-a-vis the term of office of less than three years not counting as a full presidential term of office apply to a sitting Vice President who assumes office under the provisions of Article 106 (5) (a) after the effective date of the January, 2016 Constitutional amendments or a person elected to the office of president in accordance with Article 106 (5) (b) where the Vice President is unable to take up the office of president for some reason. Therefore, that the scenario presented by the current case has not yet arisen in Zambia and is yet to arise prospectively. Therefore, that the

length of President Lungu's first term of office which he served from January 2015 to August 2016 does not come within the purview of Article 106 vis-a-vis whether such a term should be deemed to have been a full term of office.

As authority for the argument that the law does not apply retrospectively unless expressly so stated, the case of **Nawa v standard Chartered Bank of Zambia**[14] was cited. Therefore, that the argument that the provision relating to the length of the unexpired term of a president who vacates office should apply to President Lungu is not tenable at law because the said provision did not exist in January, 2015 when President Lungu took office.

In pressing this point further, the 2nd Interested Party contended that for a person to qualify under Article 106 (6) (b), that person has to have been elected to the office of President as a result of a presidential by-election held in accordance with Article 106 (5) (b). That, however, that is not the case in the current case as the January, 2015 presidential by-election was held under the provisions of the Constitution (Amendment) Act No. 18 of 1996. Hence, the Applicants' argument that President Lungu is eligible to contest the 2021 election on the basis of Article 106 (6) (b)

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cannot be sustained as the 'three years exemption' scenario does not apply to the current case.

In response to the Applicants' submission as to what constitutes a presidential term of office, it was submitted that it was vital to first give a definition of the word "term", which, according to the 2nd Interested Party, means to be sworn into office and serve as president until the next person is sworn into that office. As authority, Article 106 (2) was cited. Further, that although it is correct that the presidential "term of office" is five years, however, that a "term of office" was not necessarily the same thing as a period that the president is deemed to "hold office" as a person can hold office for a period of less than five years.

It was contended that the provision in Article 106 (3) which restricts the number of times a person can hold the office of President does not use the word "term" but rather, it uses the term "held office". And that had the Constitution in Article 106 (3) used the words "term of office" in place of the words "held office", then President Lungu could presumably contest the election.

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It was submitted that the restriction on holding office is contained in Article 106 (2) of the Constitution. Therefore, the restriction under Article 106 (3) has nothing to do with the question whether or not a president has served a 'term of office'. Rather, it is about whether a president has 'held office'.

In pressing this point further, it was argued that if the President resigned from his office today, he would have held office notwithstanding that he would not have served a period of five years in office.

In conclusion, it was submitted that the first question raised in the Originating Summons must be answered in the affirmative because not only has President Lungu twice held office but also the provisions of Article 106 (6) do not apply to him. And that the second question raised in the Originating Summons must be answered in the negative as President Lungu is not eligible for re-election as president for another term of five years after 2021.

In augmenting the 2nd Interested Party's written submissions, Counsel for the 2nd Interested Party, Mr. Mweemba, argued that since President Lungu has neither been Vice President nor was he elected as President in

lieu of the Vice President failing to assume the office of president, the provisions of Article 106 (5) (a) (b) and 106 (6) do not apply to him. That the situation envisaged therein has not yet arisen in this country and hence, any argument that is based on the said situation is speculative as conjecture and is superfluous.

In response to the argument that the literal rule of interpretation has been ousted by Articles 8, 9 and 267 of the Constitution, Counsel disagreed with this proposition. He cited the case of **Katuka and Another v Attorney General and Others**[3] in which, according to him, this Court guided on how to interpret the Constitution. Counsel submitted that the literal rule is the primary rule of the canons of interpretation. And that the purposive approach in statutory interpretation should only be resorted to when there is ambiguity and absurdity in the provision of a statute.

In response to the argument that the legislature glossed over President Lungu's situation and disadvantaged him, it was submitted that this argument was not tenable as the Constitution is the supreme law which is a creature of the people and it is superior to the Legislature. And that the Applicants' argument relating to discrimination should be rejected because the Applicants have not demonstrated how President Lungu was being

discriminated against by the constitutional provisions. Further, that even if that was the case, the High Court would be the right forum before which to raise these issues, under Article 28 as read together with Rule 2 of **Statutory Instrument No. 156 of 1969**, and not this Court.

In response to the argument that the 'inherited' term should not count in the case of President Lungu, Mr. Mweemba submitted that there is a clear distinction between Article 35 (2) of the Constitution (Amendment) **Act No. 18 of 1996** and Article 106 (3), of the current Constitution. He elaborated that whereas Article 35 (2) talked about being 'twice elected' as president, Article 106 talks about 'holding office'. Therefore his contention was that under Article 106 (3), once a person holds office twice as president that was the end, regardless of the duration that person has held the office. In pressing this point, Counsel cited Articles 81 and 107 of the current Constitution.

In response to the argument that it is unjust that only one person (President Lungu) should be excluded from the provisions of the Constitution, it was submitted that this argument is not tenable as the issue is not about an individual. Rather, it is about the office of President.

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In conclusion, it was submitted that the first question raised in the Originating Summons must be answered in the affirmative as going by the provisions of Article 106 (3), President Lungu has twice held office and the provisions of that Article do not apply to him. Further, that there is nothing ambiguous or absurd or discriminatory about Article 106 (3) as that is simply the law. And that this Court cannot be invited to amend the Constitution as it enjoys no such powers.

In supplementing Mr. Mweemba's oral submissions, Mr. Phiri, added that no compelling argument has been advanced by the Applicants to warrant the use of the purposive rule of interpretation in this case as there was no absurdity to be addressed in the provisions of Article 106 (5) and (6) which refer to a Vice President. And therefore, that the literal rule of interpretation suffices.

In Reply, Mr. Bwalya, relied on the Applicants' written submissions in Reply which he augmented with oral submissions. It was submitted that in order to establish whether President Lungu has served two full terms, the Court has to consider whether his first term of office was a full term in accordance with Article 106 of the Constitution.

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In response to the 1st Interested Party's contention that President Lungu has twice been elected to the office of President, it was submitted that the continued reference to the phrase "*twice elected*" under the repealed Article 35 (2) of the Constitution by the 1st Interested Party was misconceived as Article 106 (3) of the Constitution as amended uses the term *"twice held office*". And that the point of departure in the current legal regime is that a person is not deemed to have twice held office if he has not served two full terms as defined by the Constitution.

With regard to the 1st Interested Party's argument that Article 106(6) had no retrospective or retroactive effect to cover the period when President Lungu was first elected from January, 2015 it was submitted that the 1st Interested Party did not proffer any authoritative definition of the terms "retrospective" or "retroactive" nor did they show how these terms were applied in this particular case. Reference was then made to the definition of the term "retrospectivity" by the learned authors of **Craies on Legislation, paragraph 10.3.1** where it is stated as follows:-

"Legislation is retrospective if it has the effect in relation to a matter arising before it was enacted or made."

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The Applicants also cited a number of English cases which give meaning of retrospective operation of legislation. These include:-

1. **L'Office Cherifen des Phosphate and Another v Yamashita – Shinnon Steamship Co. Ltd, The Boucraa**[15] where it was stated that:-

> **"A statute is deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."**

2. **Sunshine Porcelain Potteries Pty Ltd v Nash**[16] where it was put thus:-

> **"Generally, there is a strong presumption that a legislature does not intend to impose a new liability in respect of something that has already happened, because generally it would not be reasonable for a legislature to do that ....But this presumption may be overcome not only by express words in the Act but also by circumstances sufficiently strong to displace it."**

In pressing this point further, it was submitted that retrospectivity is a presumption that may be rebutted. As authority, the case of **Lauri v Renad**[17] was cited where it was stated that:-

> **"It is a fundamental rule of English law that no statute shall be construed so as to have retrospective operation, unless its language is such as plainly as to require such construction. And the same rule involves another subordinate rule, to the effect that a statute is not to be construed**

so as to have greater retrospective operation than its language renders necessary."

It was submitted that a statute is not retrospective which has effect only for the future but which relies in part on events that occurred prior to the passing of the statute. In support of this proposition, we were urged to adopt the test suggested in **L'Office Cherifen des Phosphates and Another v Yamashita-Shinnon Steamship Co Ltd, the Boucraa**[15] in which Lord Mustill stated as follows:

"What degree of unfairness (if any) might be thought to be suffered if the provision were applied with retrospective effect, and that the greater the unfairness the stronger the presumption that Parliament would not have intended it, and therefore the greater the clarity of language required to rebut it."

It was submitted that the above approach accords with the general trend of the courts of having regard to all relevant circumstances as opposed to the rigid application of formulaic presumptions and the application of common sense in the search for legislative intention in each context. It was argued that in the present case, the presumption against retrospective application of the law does not arise for three reasons:-

(i) Firstly, that the determination as to eligibility is as to the future only although it draws partly on facts that are antecedent to the passing of the Constitutional amendments in question;

(ii) Secondly, that the term of office in relation to which interpretation is sought was not served or completed by President Lungu on the date that the Constitutional provisions sought to be relied upon in this case came into force, and that

(iii) Thirdly, that the presumption against retrospectivity only applies in cases where accrued rights are being impaired.

In response to the argument that the circumstances in which President Lungu assumed office are not covered by Article 106 (5), it was submitted that the imprecise drafting or the lack of adequate transitional provisions to deal with the peculiar circumstances of the incumbent President have led to the uncertainty in the interpretation of the current Constitution. Further, that while the powers, privileges, duties and functions of the President are taken care of by Section 7 of the **Constitution of Zambia Act No.1 of 2016**, provisions dealing with tenure and vacancy are not provided for. And that it is for this reason that this Court, in stating the legislative intent of Parliament in the **Stephen Katuka**[3] case, was prepared to hold that a Vice President who was a presidential appointee could automatically assume the presidency in the event that a vacancy arose in the office of the president before the 2016 election. And that the absence of

express transitional provisions, calls upon this Court to discern whether the one year six months period that President Lungu served in his first term is considered a full term for purposes of his eligibility in the elections to be held in 2021.

As to the definition of a transitional provision and what its purpose is, the following authorities were cited:-

1. **Regina v Secretary of State for Social Security Ex parte Britnell (Alan)**[18] where Lord Keith observed as follows:-

> **"As Staughton LJ observed in the Court of Appeal, it is not possible to give a definitive description of what constitutes a transitional provision. In Thornton on Legislative Drafting it is said:**
>
> > **"The function of a transitional provision is that its operation is expected to be temporary, in that it becomes spent when all past circumstances with which it is designed to deal have been dealt with, while the primary legislation continues to deal indefinitely with the new circumstances which arise after its passage."**

2. The learned authors of **Bennion on Statutory Interpretation at section 96** where they state that:-

> **"Where an Act contained substantive amending or repealing enactment, it commonly also includes transitional provisions which regulate the coming into operation of those enactments and modify their effect during the period of transition. Where the Act failed to include such provisions expressly, the court is required to draw such inference as to the intended transitional arrangements as, in**

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the light of the interpretative criteria, it considers Parliament to have intended."

3. The learned authors of **Craies on Legislation, Paragraphs 10.1.26 and 10.1.27**, respectively, where they state that:-

10.1.26
"It is necessary when one legislative system ends and another begins to enact special rules in relation to factual cases that straddle the transition. Sometimes the old law is continued for transitional cases, and sometimes the new law is applied; in either event modifications may be necessary..."

10.1.27
"In the absence of express transitional provisions the courts will have to attempt to discern what Parliament must have intended in respect of matters arising partly before and partly after the commencement of a provision, or which arose before commencement but fall to be addressed after commencement. This is not always easy."

It was submitted that in the circumstances of this case, the literal interpretation method which the 1st and 2nd Interested Parties have chosen is of little help as it does not address the factual circumstances that the first term that President Lungu served was for a period of less than three years. And that the law was altered half way through his first term. Therefore, that this Court should adopt the purposive approach to resolve the issues raised in this case. In support of this proposition, Counsel quoted extensively from the case of **Jones v Wrotham Pack Estate[19], Oliver Ashworth**

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(Holdings) Ltd v Ballard (Kent) Ltd [20] and **R (Quintaville v Secretary of State for Health**[21].

It was also submitted that considerable effort and resource is being spent on the interpretation of Article 106(6) of the Constitution because the provision is of doubtful application to the peculiar case which has now arisen. And that the task of this Court is to give effect to the purpose and intention of Parliament for enacting this provision, which is that, a duly elected President who has served the unexpired term of his predecessor is entitled to re-contest the presidency after being elected twice as long as the unexpired term of the predecessor was for a period of less than three years.

In conclusion, it was submitted that the purposive approach has been in use by our courts and is part of the jurisprudence of this jurisdiction. As authority, the case of **The Attorney General and The Movement for Multiparty Democracy v Mbikusita Lewanika and Others**[22] was cited where the Supreme Court observed that:-

> **"However, it is clear from the Shartz and Northman cases that the present trend is to move away from the rule of literal interpretation to 'purposive approach' in order to promote the general legislative purpose underlying the provision. Had the learned trial judge adopted the purposive approach she would undoubtedly have come to a different conclusion. It follows, therefore that whenever the strict interpretation of a statute gives rise to**

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unreasonable and an unjust situation, it is our view that judges can and should use their good common sense to remedy it – that is by reading words in if necessary – so as to do what parliament would have done had they had the situation in mind."

Therefore, that using the purposive interpretation of Article 106 (5) and Article 106 (6) as read together with Article 106 (3), President Lungu is eligible to contest the 2021 presidential election subject to Article 100.

In augmenting the Applicants' written submissions in Reply, Mr. Bwalya reiterated what was submitted in the Applicants' skeleton arguments, the oral submissions by Counsel for the Applicants and the written submissions in Reply. Counsel however, added that although Article 106 (6) refers to a Vice President who was the running mate to a president and a person elected after the expiration of the period within which the Speaker exercises the functions of the president, this provision does not state how a person like President Lungu who served an inherited term of less than three years is to be treated in relation to Article 106 (3). And that more so that a presidential term of office is five years.

Mr. Bwalya submitted that the Applicants are not trying to enforce any right under the Bill of Rights. Rather, the Applicants are simply urging this

Court to apply the principle of non-discrimination in its interpretation of the Constitution and in accordance with the Bill of Rights.

In supplementing Mr. Bwalya's oral submissions, Mr. Jere, submitted that Article 106 of the Constitution applies to President Lungu because had it been the intention of the drafters to exclude him from its application, there would have been a specific provision in the Constitution to exclude him from benefitting from the 2016 constitutional amendment.

We have seriously considered the Applicants' Amended Originating Summons together with the Affidavit in Support, the 1st Respondent's Affidavit in Response, the 1st and 2nd Interested Parties' Affidavits in Opposition, the respective parties' Skeleton Arguments and the oral submissions and the authorities cited by the learned Counsel for the respective parties. The Applicants have posed two questions and we shall address them in the order in which they are presented. We begin with the first question. Going by the parties' respective submissions, the main question/issue is whether President Edgar Chagwa Lungu will have served two full terms for purposes of Article 106 (3) as read with Article 106 (6) of the Constitution of Zambia at the expiry of his current term.

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Before we proceed to consider the question posed above, we note that although the Applicants argued in their submissions that this matter has been brought pursuant to Article 128 (1) (a), which gives this Court jurisdiction to interpret constitutional provisions, the manner the above question has been couched personalizes the issue in that it targets the incumbent President as an individual. We do not encourage this trend because the framing of the questions for this Court's interpretation of constitutional provisions should not target any individual as it is meant for general application as the interpretation is binding on every person in the Republic. What we are dealing with in the present case is the office of President. We of course understand what the question is or what it ought to have been and what it aims at, namely, the office of President.

The question therefore is or ought to have been framed as follows: - **Whether in terms of Article 106 (3) and (6), a presidential term of office that ran from 25th January, 2015 to 13th September, 2016 and straddled two constitutional regimes can or should be considered as a full term?**

However before we proceed to consider the above reframed question, there are also two other peripheral questions that have been

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raised that go to the jurisdiction of this Court and as such must first be considered. These are:-

1. Whether or not the Applicants have *locus standi* to bring this matter; and
2. Whether or not the two questions posed in the Amended Originating Summons have been prematurely brought on the ground that they are not ripe for determination.

As can be seen from the Applicants' submissions in response to the two peripheral issues of *locus standi* and ripeness of the matter raised by the 1st Interested Party in its written submissions, they are challenging the appropriateness or the competence of the 1st Interested Party's submissions which raised the two issues. The main contention by the Applicants is that it is not competent for the 1st Interested Party to raise the two issues as these are the same issues that the 1st Interested Party had raised in their application before a single Judge of this Court and which application the single Judge dismissed. And that although the 1st Interested Party had appealed to the full Court against the Ruling of the single Judge, the 1st Interested Party discontinued the same before it was heard. Hence,

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there is no appeal pending against the said Ruling. As such, it is incompetent for the 1st Interested Party to raise the same issues before the full Court through their Skeleton arguments.

The response by Counsel for the 1st Interested Party was that the above issues are competently before this Court because the single Judge did not address the issues on the merit as the preliminary application which raised the two issues was dismissed without being heard or determined on its merits. Further, that the issues of *locus standi* and ripeness of a matter are questions of law which any court can raise and address even where the parties have not raised them.

We have considered the above submissions. The question is whether in the circumstances of this case, it is competent for the 1st Interested Party to raise the issues of *locus standi* and ripeness of the matter in this case which were dismissed by a single Judge and the Ruling has not been reversed.

Perusal of the record has shown that after the Applicants filed this action against the 1st Respondent, the 1st and 2nd Interested Parties applied before a single Judge of this Court for joinder and they were joined to this

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action. Thereafter, the 1st Interested Party filed a summons to dismiss the action on, among other grounds, that the Applicants did not have *locus standi* to bring this action and that the claim in the Amended Originating Summons was not ripe for determination.

The record also shows that subsequently, the single Judge issued Orders for Directions by which, among others, the 1st Interested Party was directed to serve its summons, affidavit in support and arguments in support of its application by 23rd March, 2017. However, the 1st Interested Party did not comply with the directions of the single Judge. Because of the 1st Interested Party's failure to comply with the said directions, the Applicants applied to dismiss the 1st Interested Party's application. In the affidavit in opposition to the Applicants' application to dismiss that application, the learned Counsel for the 1st Interested Party deposed, *inter alia*, that the failure to comply with the directions of the single Judge was not deliberate but because at the time of settling the directions, Counsel had underestimated his case load. In particular, that he was involved in a matter before the Commercial Division of the High Court which had not been tried for nearly ten years and which involved several long witness statements and documents which he had to review. That as a result of this,

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his efforts to comply with the directions of the single Judge of this Court were derailed.

The learned single Judge heard the application to dismiss the 1st Interested Party's application and, in the Ruling dated 31st May, 2017 the single Judge dismissed the 1st Interested Party's application to dismiss the Applicants' action.

On 11th August, 2017 the learned Counsel for the 1st Interested Party then filed before the full Court, the 1st Interested Party's Summons on Appeal against the Ruling of the single Judge which dismissed its application. However, the 1st Interested Party later filed a Notice of Motion to Discontinue the Summons on Appeal. When the matter came up for hearing on subsequent dates, the 1st Interested Party did not make any comments as regards its application but raised the two issues in their Skeleton Argument in opposition of the main matter.

The question therefore is whether in the circumstances of this case as outlined above, it is competent for the 1st Interested Party to now raise the two issues before us on the ground that the two issues were not interrogated by the single Judge as the application was dismissed for want

of prosecution. And on ground that the Court can raise these issues on its own motion even where the parties did not raise them.

We must point out that we are rather perplexed by the *modus operandi* or method of procedure applied by the 1st Interested Party because following the dismissal of its application by the single Judge, they did follow the correct procedure for challenging the decision of the single Judge which dismissed their application. For unexplained reason(s), the 1st Interested Party and by its own motion, saw it fit to discontinue their appeal before it was determined by filing a Notice to discontinue their appeal. Therefore, it was highly irregular for the 1st Interested Party to turn around and re-introduce the same issues that they discontinued and ask the Court to consider and determine them. It is a practice that this Court cannot and would not want to see or encourage litigants and lawyers to adopt as strictly speaking, this amounts to sneaking in issues that were and stand dismissed through the back door and which they voluntarily discontinued. This could amount to abuse of the court process.

Ordinarily, we would have dismissed the two issues. However, since the issues of *locus standi* and ripeness of a matter go to the jurisdiction of the Court in this matter, we will address them. We also wish to observe that

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the parties made lengthy submissions and cited authorities for our consideration which we do not intend to reflect here. Suffice to say that we have read these and we shall take them into account in arriving at our decision on the two issues.

As regards *locus standi*, the modern approach to constitutional matters supports the extended as opposed to the narrow "own interest" standing favoured by the common law. As such Article 43 (2) (a) of the Constitution as amended, includes among the tabulated responsibilities of citizens, the following: "A citizen shall endeavour to acquire basic understanding of this Constitution and promote its ideals and objectives". In our considered view, one of the ways in which citizens can acquire this understanding and be able to promote its ideals and objectives is by seeking authoritative interpretation of the provisions in the Constitution.

Nevertheless, access to the Court is circumscribed by section 11 of the Constitutional Court Act No. 8 of 2016 in order to protect the Court from busy bodies. Section 11 provides that:

> **"11(1) The parties to a matter before the Court may appear in person or be represented and appear by a practitioner.**
>
> **(2) Subject to subsection (1), court proceedings may be instituted by –**

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(a) a person acting on behalf of another person who cannot act in their own name;
(b) a person acting as a member of, or in the interest of, a group or class of persons;
(c) a person acting in the public interest; or
(d) an association acting in the interest of one or more of its members"

It follows that whether the litigants in any particular case have sufficient standing is a matter of both fact and law that must be determined on a case by case basis. In the present case, the issue raised being the interpretation of Article 106 brought under Article 128 (3) of the Constitution as amended is one of public interest. We therefore find that by virtue of Article 43 (2) (a) of the Constitution as amended read with Section 11 (2) (c) of the Constitutional Court Act, the Applicants do have sufficient standing to bring this matter for interpretation of the Constitutional provisions in question.

As regards the issue whether or not this matter is ripe for determination, our firm view is that a matter of interpretation of Article 106 in relation to the presidential term that straddled two constitutional regimes from 25th January, 2015 to 13th September, 2016 is not premature but ripe for consideration. This is because the issue of eligibility is not only triggered by the nomination process as provided for by the Constitution. Therefore, a

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person need not wait until the nomination period commences before seeking an interpretation of Article 106.

Coming now to the main matter and the questions that have been posed for our interpretation in the amended Originating Summons, we have found it imperative to first begin by considering the parties' contentions as regards the cannons of interpretation that the Court should apply in interpreting Article 106 (3) and (6) and other provisions of the Constitution related to the subject matter set for our determination. This is so because we have two conflicting positions by the parties as to the canon of interpretation that we should apply in this matter.

On one hand, the Applicants and the 1st Respondent have taken a common position that this Court should adopt a purposive or teleological approach in interpreting Article 106 (3) and (6) of the Constitution. That this is so because in interpreting any provision of the Constitution, this Court is enjoined by Articles 9 and 267 to take into account the national values and principles enshrined in Article 8 of the Constitution and in accordance with the Bill of Rights.

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To support their position that the purposive approach should be applied, the sum total of the Applicants' and the 1st Respondent's submission was that adopting a literal or textual approach of interpretation would lead to an absurd and unjust outcome. In this regard, they cited the case of **Lewanika and Others v Chiluba**[2] as an example of where courts in this jurisdiction have overlooked the literal or textual approach in constitutional interpretation.

The reasons given for the above proposition can be summed up as follows- first, that a simplistic reading would result in this Court not taking into account how the incumbent President initially assumed office before the Constitution as amended was enacted; second, that the literal rule of interpreting the Constitution has been ousted by the Constitution itself as can be seen from the net effect of Articles 8, 9 and 267 of the Constitution as amended. They argued that applying the literal rule of interpretation would be at variance with the inbuilt mechanism contained in the Constitution for its interpretation. Third, that the standard that is applicable in the international culture of constitutional jurisprudence is the purposive and generous approach and not the restrictive/ordinary canon of interpretation.

In support of the above contentions, the Applicants and the 1st Respondent cited a number of authorities including the case of **S v Mhlungu**[1] and the case of **Katuka and Another v Attorney General and Others**[3].

Fourth, that a literal interpretation would lead to absurdity as only a broad and inclusive approach to interpretation will give effect to the objectives of the Constitution as a whole. And, that a purposive approach would allow the Court to take into account the context and historical origin of the relevant constitutional provisions in order for the Court to ascertain the intention of the Legislature in enacting them. Counsel cited the case of **Attorney General v Unity Dow**[12] and the case of **Steven Katuka and Law Association of Zambia v Attorney General and Others**[3] in support of this argument.

The 1st and 2nd Interested Parties on the other hand, have taken the position that this Court should apply the literal rule of interpretation as the purposive approach is only resorted to where applying the ordinary meaning of the words used in any provision/legislation results in an absurd meaning or where they are ambiguous.

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The sum total of the 1st and 2nd Interested Parties' position that this Court should apply the literal approach in interpreting Article 106 (3) and (6) is first, that the starting point of interpretation for all constitutional provisions is the literal rule as the purposive approach is only resorted to where the literal rule results in an absurd meaning being given to the constitutional provision. As such, the position taken by the Applicants and the 1st Respondent that the literal rule has been discarded is not supported; secondly, that taking into account the national values and principles cannot be and is not a license for taking the purposive approach as this would result in making the Constitution malleable and would also result in re-writing the Constitution instead of merely interpreting it; thirdly, that the literal rule of construing constitutional provisions is the primary rule of interpretation and that the purposive approach is only resorted to where an ambiguity or absurdity arises. That in the current case, no ambiguity or absurdity has arisen.

We have seriously considered the above submissions and the authorities cited. We wish to observe at this stage that this is not the first case in which we have been asked and indeed have pronounced ourselves on the canon on interpretation of the Constitution as amended. We did so

in our judgment in **Steven Katuka and Law Association of Zambia v The Attorney General and Ngosa Simbyakula and 63 Others**[3] which we note, the parties also cited in their respective submissions. In that case, we stated that:-

> **"As a starting point, we wish to observe that Article 267 (1) enjoins us to interpret the Constitution in accordance with the Bill of Rights and in a manner that promotes its purposes, values and principles. This entails that this Court must have in mind the broad objects and values that underlie any particular subject matter."**

We went on to state that:-

> **"In terms of the general or guiding principles of interpretation, the starting point in interpreting words or provisions of the Constitution, or indeed any statute, is to first consider the literal or ordinary meaning of the words and articles that touch on the issue or provision in contention."**

We explained that this is premised on the principle that words or provisions in the constitution or statute must not be read in isolation. We then went on to state that it is only when the ordinary meaning leads to absurdity that the purposive approach should be resorted to. We further explained that the purposive approach entails adopting a construction or interpretation that promotes the general legislative purpose which requires the court to ascertain the meaning and purpose of the provision having regard to the context and historical origins, where necessary and that this

exercise would sometimes require reading into the provision what the Legislature had intended.

We have reiterated the above position in our later decisions including in the following cases:

i. **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission**[23];

ii. **Zambia National Commercial Bank PLC v Martin Musonda and 58 Others**[24].

The sum total of what we stated in the above two cited cases is that the purposive rule of interpretation is resorted to where the literal rule of interpretation results in absurdity or where it is not possible to decipher what the Legislature intended from the words used in the statute itself.

We also referred to a decision of the Supreme Court of the United States of America in the **South Dakota v North Carolina**[25] case in which that Court stated that no single provision of the constitution should be segregated from the others and that all provisions bearing on a particular subject must be considered and taken into account in interpreting a provision of the constitution so as to give effect to the greater purpose of the instrument.

(2288)

In **Milford Maambo and Others v The People**[26], we stated that the primary principle in interpreting the constitution is that the meaning of the text should be derived from the plain meaning of the language used. Only when there is ambiguity or where a literal interpretation will lead to absurdity should other principles of interpretation be resorted to.

We also stated that a further principle of constitutional interpretation is that 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. This means that no one provision of the Constitution should be segregated from the others and considered alone.

The sum total of our conclusions in the above cited cases was that we would be guided and apply the above principles in determining the issues that were before us.

Therefore, having reviewed our earlier decisions and other authorities cited by the parties, we reiterate our position that the starting point in interpreting the constitutional provisions in question in this matter is the literal rule of interpretation. And that only where this results in an absurd or ambiguous meaning shall we resort to the purposive approach.

It follows that the Applicants' and 1st Respondent's position that we should apply the purposive approach without first having recourse to the literal canon of interpretation is not tenable. The correct position as clearly shown by the authorities cited above is that when interpreting the Constitution or other Statutes, the starting point is to consider the plain language in the provision itself unless it results in an absurdity or is ambiguous.

As regards the argument that we would be departing from the Constitution's inbuilt mechanism for its interpretation provided under Articles 8, 9 and 267 if we apply the literal rule as opposed to the purposive rule of interpretation, our brief response is that a proper reading of these Articles does not in any way exclude the literal rule of interpretation. What Articles 8, 9 and 267 do is to enjoin us to interpret the Constitution as amended in accordance with the Bill of Rights and in a manner that promotes its purpose, values and principles and permits the development of the law and contributes to good governance.

In arriving at the above position, we did take into account the decision of the Supreme Court relied upon by the Applicants to support their position in the case of **Lewanika and Others v Chiluba[2].** They argued that that

(2290)

decision is an example of instances where the Courts in this jurisdiction have overlooked the literal rule of constitutional interpretation. However, a proper reading of that judgment shows clearly that the Supreme Court did state that the trial Judge's application of the literal rule of interpretation was sound and correct but guided that where strict interpretation gives rise to an unreasonable and unjust situation, the purposive approach should be adopted and if necessary, words read in so as to achieve what Parliament would have done had they had the situation in mind. It is therefore not correct to say that the Supreme Court overlooked the literal rule of interpretation as it only adopted the purposive approach upon arriving at the conclusion that the literal rule resulted in an unreasonable and unjust situation.

Having pronounced ourselves on the canon of interpretation to be applied in interpreting Article 106 (3) and (6) of the Constitution as amended, we now come to the first question which we have reframed above.

The question is thus; whether in terms of Article 106 (3) and (6), a presidential term of office that ran from 25th January, 2015 to 13th

(2291)

September, 2016 and straddled two constitutional regimes can or should be considered as a full term?

To ably answer this question, we have found it imperative at this stage to in brief, give a historical background in terms of our country's constitutional development and in this regard, we shall pay particular attention to the presidential tenure of office and vacancy in the office of president. We shall start with the 1964 Constitution, the Independence Constitution as it is commonly referred to.

Section 34 as read together with Section 83(3) and Section 37 of the 1964 Constitution provided for tenure of office and what should happen if there was a vacancy in the office of the president. Section 34 provided as follows:-

Section 34-

> **"A person assuming the office of President in accordance with the provisions of this Constitution shall, unless he ceases to hold office by virtue of the provisions of section 35 or 36 of this Constitution or resigns, continue in office until the person elected at the next election of President following a dissolution of Parliament assumes office."**

Section 83 (3)-

"Subject to the provisions of subsection (4) of this section, Parliament, unless sooner dissolved, shall continue for five years from the date of its first sitting after any dissolution and shall then stand dissolved."

Section 37 of the 1964 Constitution provided for what would happen if there was a vacancy in the office of president. This never arose while this Constitutional regime was in place.

However, it is interesting to note that the 1964 Constitution went as far as to provide who the first President would be by name. It also went on to deem him to have assumed office at the coming into operation of that Constitution. Therefore, the concept of 'deeming' in the 2016 Constitution is not at all a novel situation in our constitutional set ups.

In 1973, Zambia enacted another Constitution which made a radical change from a multiparty democracy into a one party State. The five (5) year tenure for office of the President was however, retained. Zambia continued as a one party State until 1991 when there was another radical change to our Constitution as multiparty democracy was reintroduced. Of particular interest to the current case is the provision on tenure of office of president which was provided for under Article 35.

Article 35 of the 1991 Constitution provided as follows:-

(2293)

"(1) Subject to clauses (2) and (4) every President shall hold office for a period of five years.

(2) After the commencement of this Constitution no person who holds or has held office as President for two terms of five years each, shall be eligible for re-election to that office.

(3) For the purposes of clause (2) the period of two terms of five years each shall be computed from the commencement of this Constitution.

(4) The President may, at any time by writing under his hand addressed to the Speaker of the National Assembly resign his office.

(5) A person assuming the office of the President in accordance with the Constitution shall unless –

(a) he resigns his office; or

(b) he ceases to hold office by virtue of Articles 36 or 37;

(c) the National Assembly is dissolved;

Continue in office until the person elected at the next election to the office of President assumes office."

It must be noted that the import of Article 35 (3) is that it provided for how the term, of the then incumbent President who had held office for more than two terms, of five years each was to be treated after the commencement of the 1991 Constitution. It clearly provided that the two terms of five years each shall be computed from the commencement of the 1991 Constitution.

Article 38 of the 1991 Constitution made provision for what would happen if there was a vacancy in the office of president.

(2294)

In 1996, Zambia amended the 1991 Constitution through Act No. 18 of 1996. The 'tenure of office of president' was provided for in Article 35. Article 35 provided as follows:-

"Article 35-

(1) Subject to clauses (2) and (4) every President shall hold office for a period of five years.

(2) Notwithstanding anything to the contrary contained in this Constitution or any other law a person who has twice been elected as President shall not be eligible for re-election to that office.

(4) A person assuming the office of the President in accordance with this Constitution shall, unless –

(a) he resigns his office;

(b) he ceases to hold office by virtue of Article 36 or 37; or

(c) the National Assembly is dissolved;

continue in office until the person elected at the next election to the office of President assumes office."

Article 38 of the Constitution as amended in 1996 provided for what would happen if there was a vacancy in the office of President.

What is common in all the previous constitutional regimes is that whenever there would be a vacancy in the office of President, the Vice-President or any other person chosen to discharge the functions of the office of President where the Vice-President was not in a position to do so, was that such a person would act in the office of president pending the holding of a by-election. No vacancy in the office of President occurred until

in 2008 and 2014 when the then incumbent Presidents passed on in mid-term of their second and first term of office, respectively. The country as per constitutional regime in place held by-elections.

However, in 2016, further amendments were made to the Constitution by the Constitution of Zambia (Amendment) Act No. 2 of 2016 by, *inter alia,* the introduction of Article 106 on the tenure of office. We find it prudent at this stage to cast Article 106 in its totality. It provides as follows:-

"106(1) The term of office for a President is five years which shall run concurrently with the term of Parliament, except that the term of office of President shall expire when the President-elect assumes office in accordance with Article 105.

(2) A President shall hold office from the date the President elect is sworn into office and ending on the date the next President elect is sworn into office.

(3) A person who has twice held office as President is not eligible for election as President.

(4) The office of President becomes vacant if the President—

(a) dies;

(b) resigns by notice in writing to the Speaker of the National Assembly; or

(c) otherwise ceases to hold office under Article 81,107 or 108.

(5) When a vacancy occurs in the office of President, except under Article 81—

(a) the Vice-President shall immediately assume the office of President; or

(b) if the Vice-President is unable for a reason to assume the office of President, the Speaker shall perform the executive functions, except the power to—

(i) make an appointment; or
(ii) dissolve the National Assembly;
and a presidential election shall be held within sixty days after the occurrence of the vacancy.

(6) If the Vice-President assumes the office of President, in accordance with clause (5) (a), or a person is elected to the office of President as a result of an election held in accordance with clause 5 (b), the Vice-President or the President-elect shall serve for the unexpired term of office and be deemed, for the purposes of clause (3)—

(a) to have served a full term as President if, at the date on which the President assumed office, at least three years remain before the date of the next general election; or
(b) not to have served a term of office as President if, at the date on which the President assumed office, less than three years remain before the date of the next general election."

Thus, this amendment introduced fundamental changes in our constitutional regime in so far as it relates to the office of President. Of relevance to the case at hand, is the introduction of a Vice President as a running mate to the President and the deeming of a President who has served less than 3 years of his predecessor's term as not having served a term of office. Also notable is that under the previous constitutional regimes, two separate articles provided for the tenure of office of President and vacancy in the office of President, respectively, while under the 2016 amendments, provisions relating to tenure and vacancy are combined under a single article which is Article 106.

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Coming back to the matter at hand, the Applicants' contention in this case is that the term served by the incumbent President did not constitute a full term in terms of Article 106 (3) as read together with Article 106 (6) because he only served a period of one year and six months which is below the threshold set in Article 106 (6) of the Constitution and that the spirit of this Article is to avail a President-elect sufficient time to serve in office.

In opposing the above contention, the sum total of the 1st and 2nd Interested Parties' response was that in determining the question whether a President has held office under Article 106 (3), the length of time served does not count as Article 106 (2) states what is meant by "holding office". It was contended that to hold office does not necessarily mean a term of office as a president can hold office for a lesser period than the five years. As such, the restriction of the number of times a President can hold office under Article 106 (3) is distinct and does not refer to the term of office. Further, that Article 106 (3) clearly states that a President who has 'twice been elected' is not eligible to stand for election regardless of the period served. Therefore, that the circumstances under which the incumbent first

assumed office are not covered by 106 (5) so that Article 106 (6) could be extended to apply to him.

We have considered the submissions by the parties and we have also reviewed the authorities cited. To ably answer the question whether the presidential term of office that straddled two constitutional regimes can or should be considered a full term in terms of Article 106 (3) and (6) of the Constitution, it is imperative to first determine what would be considered as 'holding office' under Article 106. In particular, Article 106 (2), which we have already quoted above, states that a President shall hold office from the date the President-elect is sworn into office and ending on the date the next president-elect is sworn into office.

From the above, it is clear that once a President takes up office, he/she shall hold office until the next president-elect takes up office.

The question therefore, is: For how long can a president hold office?

In order to answer the above question, we have to consider the tenure of office of the office of president. In this regard, Article 106 (1) which we have quoted above, provides that the term of office for a President is five years which shall run concurrently with the term of

Parliament, except that the term of office of President shall expire when the President-elect assumes office in accordance with Article 105.

We must state here that from the historical constitutional developments that we have given above, it is clear that in the pre-2016 constitutional arrangements, there was no provision for a Vice President to come into office as a running mate to the President. There was thus no express provision made for the Vice President to automatically assume office to fill up the vacancy in the office of President and to complete the unexpired term of office of the predecessor.

However, following the enactment of the Constitution of Zambia (Amendment) Act No. 2 of 2016, a new set of provisions relating to the term of office of President and to how a vacancy in the office of President should be filled were ushered in. In this regard, Article 106 covers this aspect. Although we have already quoted Article 106 above, for convenience and emphasis, we find it prudent to re-quote Article 106 (6) here. It provides as follows: -

> **"106 (6) If the Vice-President assumes the office of President, in accordance with clause (5)(a), or a person is elected to the office of President as a result of an election held in accordance with clause 5(b), the Vice-President or the**

(2300)

President-elect shall serve for the unexpired term of office and be deemed, for the purposes of clause (3)—

(a) to have served a full term as President if, at the date on which the President assumed office, at least three years remain before the date of the next general election; or

(b) not to have served a term of office as President if, at the date on which the President assumed office, less than three years remain before the date of the next general election."

Article 111 (5) and (6) contains similar provisions for the office of Vice President.

Previously the limitation in eligibility for election to the office of President, as provided in the repealed Article 35 (2), was premised on the fact that a person had been elected twice as President regardless of the period the person served as President, even when the person was required only to serve the remainder of the term of office of his or her predecessor.

Under the current Constitutional regime, however, the holding of office as President is attached to the term of office as defined in Article 106 (1) and (6) read together. While Article 106 (1) provides that the Presidential term of office is 5 years, Article 106 (6) defines what constitutes a full term. Any period of 3 years and above is a full term. A period less than 3 years is not a full term.

(2301)

Article 106 (6) thus presents a novel situation, providing that a person will be deemed not to have served a full term of office as President if at the time he or she assumes office, less than 3 years remain before the date of the next general elections. The intention of the Legislature as shown from the import of Article 106 is that a person can serve only two five year terms amounting to 10 years. However, with the enactment of Article 106 (6) two other scenarios now obtain. Under Article 106 (6) (a), it is possible that a person can serve for a period of less than 10 years, being one term of at least 3 years and another term of 5 years and these will count as two full terms. The converse is also true under Article 106 (6) (b) where it is now possible for one to occupy the office of President for a period which is less than a full term in addition to two full terms of office. Meaning that a President can be in the office for a total of almost 13 years. We have decided to add this for clarity.

Therefore, it is clear from the above provisions that when the Constitution is read holistically, we believe, the intention of the Legislature was that when a person takes over the unexpired term of a previous president, that person should be able to serve a substantial part of the unexpired term in order for such a term to be considered as a full term.

(2302)

In view of the above position, the question is: Did the framers of the Constitution in the transitional provisions under the 2016 Constitutional amendments, make provision for what was to happen to the incumbent President's term of office which straddled two constitutional regimes as to how it should be treated?

Perusal of both the Constitution of Zambia (Amendment) Act No. 1 of 2016 as well as the Constitution of Zambia (Amendment) Act No. 2 of 2016 has shown that these contain very limited provision(s) as to what or how the remaining term of office of the immediate predecessor's tenure should be treated. Section 7 (1) of the Constitution of Zambia (Amendment) Act No. 1 of 2016 provides as follows: -

> **"7. (1) The President shall continue to serve as President for the unexpired term of that office as specified by the Constitution in accordance with the Constitution."**

The above provision clearly shows that although the Constitution of Zambia (Amendment) Act No. 1 of 2016 provided for the continuation of the President in the office of President, it made no provisions for how the period served from January, 2015 to September, 2016 which straddled two constitutional regimes was to be treated in view of the change in the constitutional provisions from the limitation based on being 'twice elected'

to 'holding office' for two terms. In this regard, we agree with Counsel for the Applicants that the Legislature did not address that aspect in the transitional provisions. The question, therefore, is: Was it the intention of the framers of the Constitution to not provide for transitional provisions relating to this term?

Counsel for the Applicants referred us to the learned authors of **Bennion on Statutory Interpretation at section 96** where they state that:-

> **"Where an Act contains substantive, amending or repealing enactments, it commonly also includes transitional provisions which regulate the coming into operation of those enactments and modify their effect during the period of transition. Where the Act fails to include such provisions expressly, the court is required to draw such inferences as to the intended transitional arrangements as, in the light of the interpretative criteria, it considers Parliament to have intended."** (emphasis added)

We were also referred to **Craies on Legislation, paragraph 10.1.26** where it is stated that:-

> **"It is commonly necessary when one legislative system ends and another begins to enact special rules in relation to factual cases that straddle the transition. Sometimes the old law is continued for transitional cases, and sometimes the new law is applied; in either event, modifications may be necessary."**

And at paragraph 10.1.27 of the same publication, where it is stated that:-

> **"In the absence of express transitional provision the courts will have to attempt to discern what Parliament must have intended in respect of matters arising partly before and partly after the commencement of a**

provision, or which arose before commencement but fall to be addressed after commencement. This is not always easy." (emphasis added)

The foregoing shows that where it is determined that an Act failed to include express transitional provisions, it is for the Court to draw an inference or to attempt to discern what the Legislature must have intended. The Supreme Court applied this approach in the cases of **Lumina and Mwiinga v The Attorney-General**[27] and **Attorney-General and the Movement for Multi-Party Democracy v Lewanika and 4 Others**[22] where the respective transitional provisions did not expressly provide for the Members of Parliament who crossed the floor. In the **Lewanika**[22] case, the Supreme Court put it as follows:-

> **"It follows, therefore, that whenever the strict interpretation of a statute gives rise to unreasonable and an unjust situation, it is our view that judges can and should use their good common sense to remedy it - that is by reading words in if necessary - so as to do what parliament would have done had they had the situation in mind."**

Therefore, the question is: What could have been the intention of the Legislature on this aspect in relation to the transitional arrangements for a presidential term straddling two constitutional regimes?

Our firm view is that it could not have been the intention of the Legislature to not provide for the period that was served and that straddled

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two constitutional regimes as to how it should be treated. This is so because, as stated above, a holistic consideration of the relevant provisions in this case will clearly show that the intention was/is to allow or enable a person who assumes the office of president to complete the unexpired period of the term of another president to serve a substantial part of the five year term of office in order for that term to count as a full term pursuant to Article 106 (6) of the Constitution as amended.

It follows that the sub-articles in Article 106 cannot be isolated from each other in interpreting the article. As we have already stated above, an interpretation of a constitutional provision that isolates the provisions touching on the same subject is faulty. Therefore, to state that Article 106 (3) applies to the term that straddled two constitutional regimes but that Article 106 (6) does not, is to isolate Article 106 (3) from the rest of the provisions in Article 106 which is untenable at law, and is at variance with the tenets of constitutional interpretation, as all the provisions on the tenure of office of the President must be read together. We are of the considered view that the provision regarding the full term must be applied to defining

what is meant by twice held office under Article 106 (3) in interpreting the provisions of that Article.

It therefore, follows that in the current case, the term served which sits astride the pre and post 2016 constitutional amendments and having looked at the intention of the Legislature as we have done, and the holistic approach we have taken in interpreting Article 106 of the Constitution in its entirety, our answer to the question that we have rephrased is that the Presidential term of office that ran from 25th January, 2015 to 13th September, 2016 and straddled two constitutional regimes cannot be considered as a full term.

As regards the second question posed in the amended Originating Summons, which is whether the incumbent President is eligible for election as president in the 2021 presidential election, our view is that, in light of the position that we have taken as regards the first question posed in the amended Originating Summons, the second question has become otiose and we shall not consider it.

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Since this matter raised serious constitutional issues, it is only fair that each party shall bear its own costs.

H. Chibomba
PRESIDENT
CONSTITUTIONAL COURT

A. M. Sitali
JUDGE
CONSTITUTIONAL COURT

M. S. Mulenga
JUDGE
CONSTITUTIONAL COURT

E. Mulembe
JUDGE
CONSTITUTIONAL COURT

P. Mulonda
JUDGE
CONSTITUTIONAL COURT

M. M. Munalula
JUDGE
CONSTITUTIONAL COURT

M. Musaluke
JUDGE
CONSTITUTIONAL COURT