

**IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
AT THE CONSTITUTIONAL COURT REGISTRY
(CONSTITUTIONAL JURISDICTION)**

2018/CCZ/005

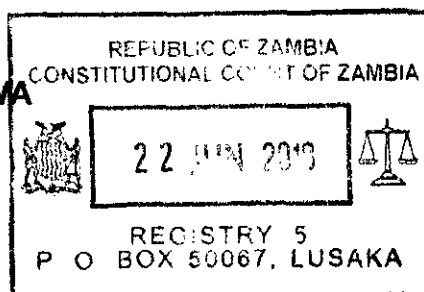
**IN THE MATTER OF: ARTICLES 1(5) AND 128(1) (a) OF THE
CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE
LAWS OF ZAMBIA**

**IN THE MATTER OF: INTERPRETATION OF ARTICLE 158 AS READ
TOGETHER WITH ARTICLE 57 OF THE
CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE
LAWS OF ZAMBIA; AND**

**IN THE MATTER OF: INTERPRETATION OF ARTICLE 70 AS READ
TOGETHER WITH SECTION 33 OF THE ELECTORAL
PROCESS ACT NUMBER 35 OF 2016 AND ARTICLE
157 OF THE CONSTITUTION OF ZAMBIA**

BETWEEN:

**CHRISTOPHER SHAKAFUSWA
ISAAC MWANZA**



**1ST APPLICANT
2ND APPLICANT**

AND

ATTORNEY GENERAL

1ST RESPONDENT

THE ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

**Coram: Sitali, Mulenga, Mulembe, Munalula and Musaluke JJC on 21st and 22nd
June 2018**

For the 1st Applicant: Ms S Kalima of Messrs J and M Advocates

For the 2nd Applicant: In person

**For the 1st Respondent: Ms N.S. Nchito, State Advocate, Attorney General's
Chambers**

For the 2nd respondent: Mr B.M. Musenga, Commission Secretary, ECZ

JUDGMENT

Munalula JC, delivered the judgment of the Court:

Cases referred to:

1. Attorney General and Movement for Multiparty Democracy v Lewanika and Others (1993-1994) Z.R.164.
2. Kapoko v The People CCZ Selected Judgment No. 43 of 2016
3. Hakainde Hichilema and Anor v Edgar Chagwa Lungu and Others 2016/CC/0031
4. Re Cuno [1889] 43 CHD 12
5. Siamondo and Others v ECZ and Anor CCZ Selected Judgment No. 24 of 2016
6. Legal Brain Trust (LBT) Limited v The Attorney General of the Republic of Uganda Appeal No.4 of 2012.
7. Zambia Democratic Congress v Attorney General SCZ Judgment No.37 of 1999.
8. Zambia National Commercial Bank PLC v Martin Musonda and 58 Others, CCZ Selected judgment No.24 of 2018

Legislation referred to:

The Constitution of Zambia (Amendment) Act No. 2 of 2016;
The Constitutional Court Act No.8 of 2016;
The Local Government Act Chapter 281 of the Laws of Zambia
The Electoral Process Act No.35 of 2016

Works referred to:

Max du Plessis, Glenn Penfold and Jason Brickhill, *Constitutional Litigation*, Juta, 2013

Alec Stone Sweet, "Constitutional Courts" in Michel Rosenfeld and Andras Sajó *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012

The Technical Committee Drafting the Zambian Constitution, Final Draft Report

On 21st May 2018, the 1st and 2nd Applicants issued Originating Summons against the Attorney General as 1st Respondent and the Electoral Commission of Zambia (ECZ) as 2nd Respondent, seeking interpretation of various specified provisions in the Constitution as

amended as well as related legislation, to determine whether a sitting ward councillor is eligible to stand as a candidate in a mayoral by-election without vacating his ward seat until and unless he wins the election and assumes office as mayor. The questions for determination as set out in the summons are:

- (i) Whereas a vacancy has been created in the office of Mayor of the City of Lusaka pursuant to Article 158 of the Constitution, whether or not the 1st Applicant who is serving as ward-based councillor can contest the resultant by election held under Article 57;**
- (ii) Whether or not a serving ward-based councillor intending to contest by-elections to office of Mayor ought to resign his or her position as councillor;**
- (iii) Whether a serving ward-based councillor who resigns his or her position would be eligible to contest the mayoral elections in view of Article 157(3) of the Constitution of Zambia; and**
- (iv) Whether or not a serving councillor who wins a mayoral election ought to vacate his or her seat as a ward-based councillor.**

The facts as deposed to by the Applicants in their joint supporting affidavit are briefly as follows: The 1st Applicant was re-elected as councillor of Mpulungu Ward 23 of Mandevu Constituency in the Lusaka Province on 11th August, 2016 and seeks to stand as a candidate in the forthcoming by-election for Mayor of Lusaka to replace the late Wilson Kalumba who passed away on 15th May, 2018. The 2nd Applicant is an interested party in the election of Mayor of Lusaka who supports the 1st

Applicant's bid for election as Mayor. The Applicants deposed that under the Constitution as amended a mayor is elected directly by the electorate. That the by-election must take place within 90 days of the vacancy arising. That the 1st Applicant has accordingly written to the Patriotic Front party seeking nomination as their candidate in the said by-election and the two Applicants have further moved this Court to interpret whether the 1st Applicant while serving as councillor can contest a mayoral election without resigning his seat. Additionally, whether or not a serving ward based councillor who resigns his or her seat is disqualified from contesting the elections. And whether a serving ward based councillor elected to the office of mayor ought to resign their seat.

In their separate affidavits in answer, filed on 5th June, 2018, the 1st and 2nd Respondent did not challenge the facts which they asserted were in the peculiar knowledge of the Applicants. They refrained from commenting on the questions of law raised in the affidavit of the Applicants. That the relevant provisions fall for interpretation by this Court. The 2nd Respondent however conceded that a vacancy had arisen in the office of Mayor of Lusaka which would have to be filled through a by-election to take place within 90 days of the vacancy occurring.

In his skeleton arguments in support of the originating summons, the 1st Applicant confined himself to a mayoral by-election arising from the death of a sitting mayor. He began with the question whether a serving ward based councillor qualifies to stand for the office of mayor. In order to demonstrate that he meets the requirements to stand, the 1st Applicant referred to section 33 (3) of the Electoral Process Act No. 35 of 2016 (henceforth the EPA, 2016) which states that a person qualifies to stand for the office of mayor if they possess the same qualifications as a member of Parliament but are not members of Parliament and have paid their council taxes. He also cited Article 70 of the Constitution as amended which spells out the qualifications and disqualifications of a member of Parliament.

Averring that the said provisions are clear and unambiguous, the 1st Applicant submitted that the provisions should be interpreted literally. The case of **Attorney General and the Movement for Multi-Party Democracy v Lewanika and Others**¹ was cited in support. He further averred that a literal reading shows that the 1st Applicant is eligible to contest the mayoral seat without first resigning from his ward based seat. He shored up his argument by referring to section 16 of the Local Government Act which limits those barred from contesting the mayoral seat to members of Parliament. Relying on the Latin maxim *expression*

unius est exclusion alterius (to express one thing is to exclude another), the 1st Applicant contended that if Parliament had meant to include councillors with the members of Parliament, it would have expressly said so. That nothing in the legislation precludes a councillor from contesting the mayoral seat without vacating the ward based seat. He cited Article 157 of the Constitution as amended laying down the circumstances under which a councillor vacates office to show that it excludes from its wording the prevailing circumstances before the Court. He prayed that the Court should find that he is eligible to contest the said forthcoming mayoral election.

The 1st Applicant then proceeded to submit on the question whether in the light of Articles 153 (2) (b) and 154 of the Constitution as amended a serving ward councillor who contests and wins the position of mayor would have to resign from his position as councillor. In short the 1st Applicant questioned whether a serving councillor can occupy the dual role of ward councillor and mayor or must relinquish the former by resigning. He observed that a mayor is an *ex officio* councillor who is special as he does not hold a ward based seat.

He further submitted that when Article 153 (2) (b) is read with Article 154 using the purposive approach it shows that the purpose of making a mayor an *ex officio* councillor is to facilitate his full participation

in the council. That while under the previous model the mayor was chosen from among serving ward councillors the new model restricts the mayor's responsibilities to supervising all the councillors in his city. That if the mayor serves in both ward and mayoral capacities the intention of Parliament would be defeated. Therefore, the 1st Applicant argued, a ward councillor can without resigning, contest the office of mayor in an election but should he win the election then he should resign from his position as ward councillor to prevent his holding two seats in the same council. That this would be in line with Article 157 of the Constitution. However, should he lose the election, then he should simply continue in his position as ward councillor, thereby preventing an unnecessary by-election which would be the result if all councillors had to resign in order to contest a mayoral by-election.

He prayed for the following declarations:

- (i) That the 1st Applicant, as a serving ward councillor is eligible to contest the Lusaka mayoral by-elections scheduled for 26th July, 2018;
- (ii) That the 1st Applicant IS NOT required to first resign as councillor before standing for the position of Mayor in the said by-election; and
- (iii) In the event of the 1st Applicant or any other ward councillor winning the mayoral by-election, then under such circumstances, such councillor who is declared winner of the mayoral by-election must resign their position as ward councilor.

At the hearing, Ms Kalima counsel for the 1st Applicant, made oral submissions to augment the written submissions which were a repetition for the most part. However in reply to the 1st Respondent's submissions, counsel averred that the fact that no reference is made to a ward councillor in section 33 of the EPA, 2016 formed the basis of the Applicants' argument that there is an inference that it is excluded. She contended that the claim that the 1st Applicant seeks a new mandate only comes into play if he is elected as mayor and in any event it would not be a new mandate entirely as a mayor is an *ex officio* councillor who plays a supervisory role and as such would still have a mandate that transcends to benefit various wards in Lusaka. As for the submission by the 2nd Respondent claiming differences in qualifications for the mayoral and councillor positions, Counsel argued that the difference does not preclude a person from being able to qualify for both. She further submitted that seeking interpretation of Constitutional provisions cannot be said to be academic as the Constitution as per the preamble is adopted by the people hence there is need for it to be understood in its true sense. With regard to the argument that related provisions of the Constitution must be read together, she submitted that even when this Court looks at all related provisions the literal interpretation should still be met.

The 2nd Applicant also filed skeleton arguments in support of the Summons. He began by referring to Articles 1(5) and 128(1) which set out this Court's power to interpret the Constitution. He then referred to Article 158(1) (a) and (b) and Article 57 which provide the procedure for a by-election to fill a vacancy in the office of mayor among other elective offices. He conceded that the provisions bar a ward based councillor who causes a vacancy in the office by resigning, from contesting again for the remainder of the term. He averred however that the bar does not extend to contesting a mayoral seat. He referred the Court to section 33(3) of the EPA, 2016 read with Article 70 of the Constitution as amended to show that a ward based councillor is not barred from contesting the seat of mayor and is therefore not required to resign from a ward based seat in order to contest a non-ward based seat. That where the councillor wins the seat of mayor, he or she automatically ceases to be a ward based councillor as both seats cannot be held at the same time.

The 2nd Applicant analogised the quest by a ward based councillor to contest a mayoral seat to the 2015 presidential by-election when the current Republican President stood for the office of President without relinquishing his Parliamentary seat or being barred from participating in the presidential elections because he was not contesting another

Parliamentary seat. That the President's Parliamentary seat automatically fell vacant after he won the presidency.

He prayed that the Applicants should not be condemned in costs for commencing an action to resolve an issue of public interest.

At the hearing and by way of augmenting, the 2nd Applicant stated that the 1st Applicant's position as intending candidate was only used to satisfy requirements of *locus standi* in moving the Court. That the application is not speculative as it is for the Court to pronounce itself on the interpretation of the Constitution. The case of **Kapoko v The People**² was cited in support of the notion that this Court is solely entitled to interpret the Constitution. The dissenting decision in the case of **Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others**³ was also cited to take issue with the lack of clarity about the point at which the Court can be moved to interpret provisions of the Constitution; whether it should only be after an injustice has occurred. That a person should not wait until an injustice is done in order to seek constitutional interpretation.

The 2nd Applicant implored the Court to consider the decision in **Re Cuno**⁴ in which Lord Bowen LJ stated that in the construction of a statute the words must not be construed so as to take away the rights which already existed before the statute was passed unless the plain

words indicate such intention by the Legislature. That the right to contest the mayoral elections by a serving councillor existed before and has not been taken away by the statute.

As to whether a ward based councillor ought to resign his or her seat and whether a councillor who resigns is eligible to contest the mayoral elections he urged the Court to use the literal interpretation of Article 157 (3). That based on section 33 of the EPA, 2016 a Member of Parliament is barred from standing as mayor and that this was the reasoning behind the exclusion of a Member of Parliament but at the same time the inclusion of a councillor. That whether the purposive interpretation when resorted to would also exclude a councillor from the provision was another issue for determination. He submitted that if a ward councillor resigns from one position, he or she is estopped from standing for that position but may contest another position. He referred the Court to the case of **Siamondo and Others v ECZ and Another**⁵ to argue that the only mischief Parliament intended to cure under Article 157 was to stop the election of mayor by the councillors themselves and introduce a direct election by the people. He wondered whether this was also done to prevent councillors from contesting the mayoral position. After referring to section 34 of the EPA, 2016, he submitted that the 2nd Respondent had made it difficult for anyone to challenge the nomination

of any councillor as the period given for doing so is inadequate hence it would be prudent for the Court to determine the issues raised.

The 1st Respondent filed their skeleton arguments in opposition on 20th June, 2018. They referred us to Articles 153 and 156 of the Constitution as amended which they averred oblige all ward based councillors including the 1st Applicant to be accountable to the electorate. They submitted that on the basis of the two provisions, a ward based councillor gets his mandate from the electorate in the ward/district and if such a councillor desires to seek a different mandate then the principle of accountability embedded in Article 156 entails that the councillor must resign from his current position in order to be properly subjected to the electorate for a new mandate. They further submitted that the rules relating to the duties of a ward based councillor who serves on part-time differ from those relating to a mayor who is a full-time executive councillor and cannot operate concurrently. That as the law does not envisage a situation in which a councillor who is ward based and part-time is at the same time a full –time mayor, a ward based councillor who is desirous of contesting a full-time mayoral seat and qualifies under the relevant laws, must resign his position as a part-time ward based councillor. Further, that Article 157(3) automatically comes into operation upon his resignation and bars such a councillor

from being eligible for re-election as a councillor for the duration of the term of that Council. It was their conclusion that this interpretation is the means to realising the intention of the Legislature with regard to the principle of accountability to the electorate enshrined in Article 156. At the hearing, counsel for the 1st Respondent, Ms Nchito, relied entirely on the filed submissions.

The 2nd Respondent filed their skeleton arguments on 19th June 2018. On the question whether the 1st Applicant as a serving ward based councillor qualifies to stand for the office of mayor, we were referred to Articles 70, 153, 47(3) and 154 of the Constitution as amended, read with section 33 (3) of the EPA, 2016. The 2nd Respondent averred that the provisions show that the qualifications for a councillor are distinct from those of a mayor. That a mayor unlike a deputy mayor is elected directly by the electorate. That mayors work full-time as opposed to councillors who are part-time. That Article 154 (3) has deliberately prescribed that a ward based councillor can ascend, and still retain his position, only to the level of deputy mayor. That whether a councillor can stand as a mayor is best answered by Article 70 read with section 33(3).

The 2nd Respondent averred that the determination of the eligibility of a candidate to stand as mayor is governed by Article 52(2) of the

Constitution as amended, empowering the returning officer to accept or reject a nominee. That Article 52(4) provides for a mechanism for redress as the decision can be challenged before a court or tribunal. It was argued that the 1st Applicant had expressed an intention to contest the vacant mayoral seat in Lusaka in the forthcoming elections. That his personal attributes will determine his eligibility. That nominations will only be received on 26th June 2018. That the 1st Applicant had not presented any evidence that his nomination had been rejected, and that the 1st Applicant was proceeding on the assumption that his Party would adopt him. We were invited to take judicial notice of the competitive nature of the adoption process which did not guarantee the 1st Applicant's adoption. That even the question of whether the 1st Applicant would be required to resign as councillor was also speculative. The 2nd Respondent concluded that the Originating Summons was premature and intended to engage this Court in a hypothetical and speculative academic exercise. The case of **Legal Brain Trust (LBT) Limited v The Attorney General of the Republic of Uganda**⁶ was cited in support. Our attention was also drawn to the fact that the Supreme Court of Zambia also frowns upon a court engaging in academic exercises.

The 2nd Respondent agreed with the Applicants that the new position of mayor referred to in common parlance as "executive mayor" is specifically intended to divorce the mayor from ward roles and to assign him to a supervisory role. That it was not the intention of the Legislature for a mayor to be a ward councillor at the same time. On the manner in which to interpret the Constitution, we were referred to Article 267. That it would be contrary to the spirit of good governance for one person to hold the offices of mayor and councillor at the same time. That the provisions governing mayor and councillor are unclear and cannot be interpreted literally. That instead the Court ought to consider all related provisions. We were reminded that this Court took the said position in the case of **Zambia National Commercial Bank PLC v Martin Musonda and 58 Others**⁷ that the Constitution should be read as a whole in order to give effect to the objective of the Constitution. That such a reading will lead to the inescapable conclusion that one individual cannot hold both the positions of councillor and mayor at the same time. The 2nd Respondent prayed that the action should be dismissed. At the hearing, counsel for the 2nd Respondent, Mr Musenge, relied entirely on the filed submissions.

We are grateful to counsel and the parties for the arguments and authorities cited and for prosecuting this matter in a timely manner. After

meticulously sifting through the record of proceedings and in particular the parties' arguments it is our considered view that the fundamental questions before us can be conveniently separated into two and considered accordingly. The first part will address the first question which asks whether the 1st Applicant as a serving councillor is eligible to contest the forthcoming City of Lusaka mayoral election. The second part will address questions two, three and four seeking interpretation of the provisions governing the question whether a serving councillor can contest a mayoral by-election without resigning from a ward based seat and without being banned for the duration of the council's term.

In addressing the question about the 1st Applicant's eligibility to contest the forthcoming Lusaka mayoral election, we wish to begin with the 2nd Respondent's arguments. The 2nd Respondent seeks dismissal of this entire matter on the ground that it is not ripe for adjudication and cannot therefore be considered without the Court engaging in speculation or an academic exercise. To make their point, the 2nd Respondent pointed to the fact that the 1st Applicant has not been nominated or rejected as a candidate in the forthcoming election. That nominations are in fact scheduled to take place on 26th June 2018. That there is a procedure under Article 52 which deals with challenges to nominations which includes remedial measures. They cited in their aid,

the case of **Legal Brain Trust (LBT) Limited v The Attorney General of Uganda**⁶ wherein it is stated that:

In this regard, it is a cardinal doctrine of our jurisprudence that a court of law will not adjudicate hypothetical questions – namely, those concerning which no real, live dispute exists. A court will not hear a case in the abstract, or one which is purely academic or speculative in nature – about which there exist no underlying facts in contention. The reason for this doctrine is to avoid the hollow and futile scenario of a court engaging its efforts in applying a specific law to a set of mere speculative facts. There must be pre-existing facts arising from a real live situation that gives rise to, for instance, a breach of contract, a tortious wrong, or other such grievance on the part of one party against another. Absent such a dispute, the resulting exercise would be but an abuse of the court's process.

In view of the fact that the Applicants have submitted giving the same time line and status of the 1st Applicant, we find merit in the arguments raised by the 2nd Respondent. We agree that some aspects of the application are based on assumptions that certain events will take place which will place the 1st Applicant in a position to approach this Court to make a declaration as to his eligibility to contest the forthcoming mayoral election. It is trite that courts should not entertain matters which are premature. The principle is well founded and necessary to ensure that a court's resources are applied to issues that are ripe for the hearing. The learned authors, **Max du Plessis, Glenn Penfold and**

Jason Brickhill in their book **Constitutional Litigation**, state at page 38 that:

In terms of the doctrine of ripeness, a court will not entertain a matter if it is premature in the sense that rights (or interests) have not been infringed or threatened.

It follows that we will not consider the questions or declarations sought on whether the 1st Applicant is eligible to contest the forthcoming mayoral elections and whether he is obliged to resign his ward based seat in order to so contest. The issues, which relate to the 1st Applicant personally, are dismissed for the reason that they have come before this Court prematurely.

Having thus stated, it is evident from the Originating Summons that the second to fourth questions raised by the Applicants are of a general nature regarding interpretation, and founded upon the constitutional provisions that we now intend to consider. This underscores the fundamental principle laid down in Article 128 which provides that (subject to Article 28) this Court has sole jurisdiction to hear a matter relating to the interpretation of the Constitution.

In our considered view, our *raison d'être* as a constitutional court is to interpret the various provisions of the Constitution whenever questions about the provisions arise. This Court is different from

ordinary courts handling mostly disputes between individuals. The issues before the Constitutional Court generally relate to constitutional questions with serious policy implications. Our adherence to the principle of ripeness is therefore subject to drawing a distinction between a matter which must be prefaced by the occurrence or threatened occurrence of particular events and an examination of constitutional provisions intended to provide clarity on the meaning of such provisions, thereby serving to guide the efficient and legitimate enforcement of the said provisions. The learned author **Alec Stone Sweet** in his chapter entitled **“Constitutional Courts”** in **Michel Rosenfeld and Andras Sajó** **The Oxford Handbook of Comparative Constitutional Law** is helpful in summing up generally, the interpretation mandate and jurisdiction of constitutional courts even in the absence of a concrete allegation that a violation has or will occur.

According to **Sweet**, at pages 820 to 824, constitutions are contracts which are negotiated by multiple parties. They are a product of what is termed relational contracting, because they seek to broadly frame the relationships between the parties who then agree on a set of basic goals and objectives. Such goals and objectives cannot cover specific details or all eventualities. Constitutions are incomplete because meaningful uncertainty will inevitably exist. The constitutional

court's role in all this is to interpret the "problems" arising out of the incompleteness or imperfections of the constitutional contract. The court's existence "gives the drafters of the constitution confidence to strike constitutional bargains *ex ante*" and guarantees "the credibility of commitments made *ex post*."

It follows that the constitutional court's jurisdiction comes in different forms the most basic of which are identified by **Sweet** as a) the abstract or pre-enforcement review of statutes; b) concrete review in the form of a constitutional reference; and c) the constitutional complaint which permits individuals to approach the court directly on the basis of both questions and violations. Thus under the Constitutions of some countries, "everyone possesses the right to petition" the constitutional court directly through an "*actio popularis* or popular action" thereby initiating "abstract review of statutes" as "the petitioner need not show that the law referred to has actually harmed her[him] personally."

Our Article 128 has been formulated to take care of such eventualities. It is evident that there will be a tension between interpretation of the Constitution in order to pre-empt difficulties in the application of constitutional provisions and the principle of ripeness. However it is also clear from Article 128 that this Court has a duty to answer questions about the Constitution that have been brought to its

attention. We therefore, agree with the 2nd Applicant's plea that the heart of this matter or the call for interpretation of various provisions is not speculative and should be resolved.

That said, we now turn to the remaining questions which for convenience and brevity, will be addressed together. Before we go into the merits of the questions we wish to comment on the issue of the interpretation approach which repeatedly came up in the submissions of the parties. The Applicants propose the literal approach. The 2nd Respondent argued instead that the literal approach is unsuitable given the ambiguity in the provisions governing a mayoral by-election. Our brief comment is that we have had occasion to pronounce ourselves on the matter of constitutional interpretation on numerous occasions. As we said recently, in **Zambia National Commercial Bank PLC v Martin Musonda and 58 Others.**⁷

...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 shall proceed accordingly. For the sake of brevity, we will not repeat the arguments of the parties. The gist however is that whilst the Applicants have argued that the law as framed does not prevent a

servicing councillor from contesting a mayoral election, or require him to resign from his councillorship before he is elected mayor, the Respondents have in essence argued that it does. That while the issue is not explicitly provided for, a more complete reading of related provisions shows that it could not have been the intention of the framers of the Constitution that a serving councillor should be able to contest the by-election of a mayor.

We have carefully studied the most pertinent provisions namely, Articles 47, 48, 70, 153, 154, 156, 157, 158 and 267 of the Constitution as amended as well as section 33 of the EPA, 2016. We will begin with section 33 of the EPA, 2016 which provides for the nomination of candidates in districts or wards and is read in conjunction with Article 70 of the Constitution as amended. This is the basis of the Applicants' argument that a literal interpretation of the provisions shows that a person who is serving in his/her capacity as a ward councillor is not explicitly disqualified from contesting for election to the mayoral seat, assuming they meet the qualifications set out in Article 70 (1) of the Constitution as amended as read with section 33 (3) of the EPA, 2016. The Applicants' argument is anchored on the fact that the provisions appear to exclude members of Parliament from seeking the office of mayor without providing a similar restriction for councillors. They further

argue that a councillor's resignation from a ward based seat prior to winning a mayoral seat is not required as a matter of law so that should the candidate lose the election, they will maintain their existing ward seat thereby avoiding a by-election and its consequences. Should the councillor win however, that they will not be affected by the restriction in Article 157(3) which bars any councillor who causes a by-election from assuming another council seat for that council's term because they would be holding a different position at that point. For the sake of clarity we have set out section 33 and Article 70. Section 33 is as follows:

33(1) Subject to subsection (2), a candidate for election in a district or ward of a council shall be nominated by means of a nomination paper in such form as may be prescribed and such nomination paper shall be subscribed, in the presence of the returning officer for that council, by a proposer and a seconder and not less than seven other persons, each of whom shall be a voter registered in a polling district in such ward.

(2) A person appearing before a returning officer for the purpose of subscribing a nomination paper under subsection (1) shall produce a voter's card and a national registration card to the returning officer for inspection as proof of identity.

(3) A person qualifies to be a mayor or council chairperson if that person— (a) possesses the same qualifications as those specified for a Member of Parliament in Article 70 of the Constitution;
(b) is not a Member of Parliament; and
(c) has a certificate of clearance showing the payment of council taxes, where applicable. (emphasis added).

Article 70 provides for qualifications and disqualifications of Members of Parliament. On the face of it, section 33 (3) (a) speaks to one of the qualifications to be a mayor or council chairperson and it stipulates that they must possess the same qualifications as those specified for a Member of Parliament under Article 70. Section 33 also seems to restrict itself to 'qualifications' under Article 70 and does not extend to disqualifications which appear under Article 70 (2) which Article provides that:-

70 (2) A person is disqualified from being elected as a Member of Parliament if that person—

- (a) is validly nominated as a candidate in a presidential election;**
- (b) is a public officer or Constitutional office holder;**
- (c) is a judge or judicial officer;**
- (d) has a mental or physical disability that would make the person incapable of performing the legislative function;**
- (e) is an undischarged bankrupt;**
- (f) is serving a sentence of imprisonment for an offence under a written law;**
- (g) has, in the immediate preceding five years, served a term of imprisonment of at least three years;**
- (h) has, in the immediate preceding five years, been removed from public office on grounds of gross misconduct; or**
- (i) holds or is acting in an office, as prescribed, the functions of which involve or are connected with the conduct of elections.**

We have considered the two provisions and find that they cannot explain the distinction drawn between "ward based councillor" and "mayor or council chairperson". To understand the distinction and its

implications for the question whether a ward based councillor can ascend to the office of mayor or council chairperson and whether resigning from the ward based seat is a factor, requires a consideration of all the provisions governing the mayoral/council chairperson election.

We begin with the meaning of the word "councillor" as defined in the Constitution. Article 266 says that **"councillor" means a member of a council elected in accordance with Article 153.** Article 153 provides for several classes of councillor; we shall confine ourselves only to the two in issue, namely, the ward based councillor provided for in Article 153(2)(a) and the mayor or council chairperson provided for in Article 153 (2) (b). Article 153 reads in part:

(1) A councillor shall be elected in accordance with Article 47(3) by registered voters resident within the district.

(2) A council shall consist of the following councillors-

(a) Persons elected in accordance with clause (1)

(b) A mayor or council chairperson elected in accordance with Article 154; and

(c)

(4) A person qualifies to be elected as councillor, excluding councillors specified under clause (2) (b), if that person—

(a) is not a Member of Parliament;

(b) is not less than nineteen years of age;

(c) has obtained a minimum qualification, grade twelve certificate or its equivalent;

(d) is a citizen or a holder of a resident permit, resident in the district; and

(e) has a certificate of clearance showing the payment of council taxes, where applicable.

.....

Thus while on the one hand a ward based councillor and a mayor or council chairperson are both councillors on the other hand a distinction is drawn between them in terms of how a person ascends to one office or the other. Election to the office of mayor or council chairperson is provided for in Article 154.

Article 154 provides that:

154(1) There shall be a mayor and deputy mayor or council chairperson and deputy council chairperson for every council, as prescribed.

(2) A mayor and council chairperson shall be elected—

(a) directly, in accordance with Article 47 (3) during elections for councillors, as prescribed; and

(b) for a term of five years and may be re-elected for one further term of five years.

(3) A deputy mayor and a deputy council chairperson shall be elected by the councillors from amongst themselves. (Emphasis added)

This shows a clear shift in the law regulating the two classes of councillor. Whereas before the 2016 amendments, a mayor/council chairperson was elected internally this is no longer the case. By virtue of Article 154, a mayor or a council chairperson is elected directly as opposed to a deputy mayor or deputy council chairperson who are elected by other councillors from amongst themselves. This means that a mayor is a councillor who is required to have different qualifications, and to be elected directly by the voters as opposed to being drawn from

other councillors. He or she is to perform a supervisory role as opposed to being tied to any particular ward. Consequently he or she enjoys separate conditions of service.

We therefore agree with the Respondents that the positions of ward councillor and mayor are not interchangeable nor can they be held by the same person at the same time since the qualifications for ascending to the higher office are different and they have different accountabilities and conditions of service. We find that it could not have been the intention of the framers of the Constitution to make the two offices interchangeable. A person must either be elected a mayor /council chairperson or a ward councillor. A ward councillor cannot transit to the position of mayor or council chairperson for the duration of their council.

We are fortified in coming to this conclusion by Article 157 which governs the vacation of office by a councillor. It provides in part that:

(1).....

(2) The office of councillor becomes vacant if-

.....

(b) the councillor resigns by one month's notice, in writing, to the mayor or council chairperson;

(c) the councillor becomes disqualified for election under Article 153;

(d) the result of an election for that councillor is nullified by a local government elections tribunal established in accordance with Article 159;

(e) the councillor acts contrary to the code of ethics provided for in Article 155;

(3) Where a councillor resigns in accordance with clause (2) (b), (c), (d) and (e) the councillor shall not be eligible for re-election as councillor for the duration of the term of that council. (emphasis added)

Article 157(3) says that any councillor who resigns is barred from contesting any election for a seat in the council until the life of the council comes to an end because the effect of resigning is to intentionally cause a vacancy. The question is can a ward based councillor avoid triggering Article 157 by contesting a mayoral election without resigning from his ward seat. Allowing a ward based councillor to contest an election without resigning when the effect of their subsequently winning the election is to cause a by-election in the ward they have vacated is absurd. This cannot have been the intention of the framers of the Constitution.

The intention of the framers of the Constitution was to curb unnecessary and costly by-elections by introducing a different order barring a councillor from contesting any further elections during the remainder of the term of that council following a vacation of office of councillor. This is clearly stated in the Final Draft Report of the Technical Committee Drafting the Zambian Constitution wherein at pages 556 to 557 it states that the Technical Committee resolved to

amend the relevant Article by adding a provision to bar a councillor who resigns from his or her position from re-contesting the position during the life of that council.

The Applicants have argued quite forcefully that a serving councillor should not be called upon to resign before the mayoral/council chairperson by-election and that thereafter resignation is overtaken by the fact that the person occupies a fresh office which is not tied to the vacated seat which has become subject to a by-election. An analogy to the Presidential candidate, who was a serving Member of Parliament and did not resign from the said position prior to the 2015 election was offered in support. This argument is misplaced because the 2015 election took place under a different election regimen and the candidate was not seeking office within Parliament.

In fact we observe that under the current constitutional regimen the President is elected together with the Vice-President as running mate. Where a vacancy in the office of President occurs before the expiry of the President's term of office, Article 106 (5) provides for the Vice-President to assume the office of President. It is only when the Vice-President is unable to assume the office of President that a presidential election is held.

Further, when the office of the Vice-President becomes vacant, the President appoints another person as Vice-President subject to ratification by Parliament under Article 111 (5). These provisions were intended to avoid by-elections.

Based on a reading of all the related provisions, it is our firm view that a ward-based serving councillor is at liberty to resign from office. However, once they resign they are barred from contesting the position of mayor/ council chairperson or ward based councillor. Having established that a ban under Article 157 (3) is inevitable where a serving councillor aspires to the office of mayor/ council chairperson, it follows that the question whether a councillor should resign his position either before or after the election process becomes moot as it effectively means that a serving councillor cannot contest a mayoral/ council chairperson seat regardless of whether they resign from their ward based seat or not.

As this matter raised pertinent constitutional issues each party shall bear their own costs.



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A.M. Sitali

CONSTITUTIONAL COURT JUDGE



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M.S. Mulenga
CONSTITUTIONAL COURT JUDGE



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E. Mulembe
CONSTITUTIONAL COURT JUDGE



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M. M. Munalula
CONSTITUTIONAL COURT JUDGE



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M. Musaluke
CONSTITUTIONAL COURT JUDGE