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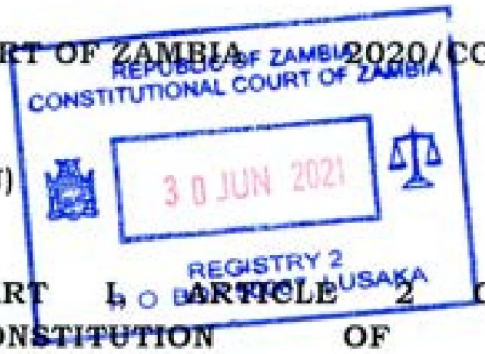
IN THE CONSTITUTIONAL COURT OF ZAMBIA 2020/CCZ/005
HOLDEN AT LUSAKA



(CONSTITUTIONAL JURISDICTION)

IN THE MATTER OF:	PART I ARTICLE 2 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016
IN THE MATTER OF:	ARTICLE 63(2)(D) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016
IN THE MATTER OF:	PART XVI OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016
IN THE MATTER OF:	ARTICLE 177(5) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016
IN THE MATTER OF:	THE LOANS AND GUARANTEES (AUTHORISATION) ACT, CHAPTER 366 OF THE LAWS OF ZAMBIA
IN THE MATTER OF:	PUBLIC BORROWING BY THE GOVERNMENT OF THE REPUBLIC OF ZAMBIA

BETWEEN:

DIPAK PATEL	PETITIONER
AND	
THE MINISTER OF FINANCE	1ST RESPONDENT
THE ATTORNEY GENERAL	2ND RESPONDENT

Coram: Chibomba, PC, Sitali, Mulenga, Mulonda and Munalula, JJC, on 9th February, 2021 and 30th June, 2021

For the Petitioner: Mr. M. H. Haimbe of Malambo and Co., with Mr. J. Madaika, Mrs. S. K. Banda and Mr. M. Mwanza of Messrs J. Advocates.

For the Respondents: Mr. A. Mwansa, S.C., Solicitor General with Mrs. K. N. Mundia, Principal State Advocate

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JUDGEMENT

Sitali JC, delivered the majority Judgment of the Court

Cases cited:

1. Zambia National Commercial Bank Plc v. Martin Musonda and 58 Others, Selected Judgment No. 24 of 2018
2. Christine Mulundika and 7 Others v. Attorney General SCZ Judgment No. 25 of 1995
3. Attorney General v Law Association of Zambia (2008) ZR 21
4. Attorney General v Nigel Kalonde Mutuna SCZ Judgment No. 88 of 2012
5. Steven Katuka and Law Association of Zambia v Attorney – General and Ngosa Simbyakula and 63 Others (2016) Z.R.226
6. Lubunda Ngala and Jason Chulu v Anti -Corruption Commission 2017/CC/R002
7. Chama Mutambalilo v Attorney General, Selected Judgment No. 32 of 2019
8. William David Carlisle Wise v. E.F. Hervey Limited 1985 ZR 179
9. Godfrey Malembeka (Suing as Executive Director of Prisons Care and Counselling Association) v. the Attorney-General and the Electoral Commission of Zambia (2017) 2ZR 108.
10. Milford Maambo and Others v. The People, (2017) 2ZR 182.
11. The Public Protector of the Republic of Zambia v. Indeni Petroleum Refinery Company Limited, Selected Judgment No. 16 of 2019
12. Faustine Mwenya Kabwe and Aaron Chungu v. Justice Ernest Sakala, Justice Peter Chitengi and The Attorney General SCZ Judgment No. 25 of 2012
13. Rafiu Rabiu v. S (1981) NCLR 293
14. South Dakota v. North Carolina (1940) 192 USA 268:48 ED 448

Legislation cited:

1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia

The matter before us was commenced by the Petitioner Dipak Patel, by way of petition against the Minister of Finance and the Attorney-General as 1st and 2nd Respondents, respectively. The petition shows that it was brought under Articles 2, 63(2)(d) and 177(5) as well as Part XVI of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (henceforth referred to as the Constitution). The reliefs sought are:

(i) A declaration that the failure of the 1st and 2nd Respondent to present all loans contracted and sought to be contracted on behalf of the Government of the Republic of Zambia, which constitutes public debt, to the National Assembly for prior approval is in breach of the Constitution of Zambia as it is an illegal abrogation of the Constitution of Zambia;

(ii) A declaration that the Loans and Guarantees (Authorization) Act, Chapter 366 of the Laws of Zambia and any other law, by-law, subsidiary legislation or gazette notice dealing with debt procurement or contraction for and on behalf of the

Government of the Republic of Zambia must be interpreted in line with the provisions of Article 63(2)(d) as requiring prior approval from the National Assembly and that any provision in any existing law that circumvents, contradicts or is inconsistent with the Constitution of Zambia is null and void to the extent of such contradiction or inconsistency and ought to be struck down accordingly;

(iii) An order compelling the 1st and 2nd Respondents to present to the National Assembly of Zambia, within 14 days of the judgment of this Court or within such other timeframe that the Court may prescribe, a full and complete statement of the state of public debt contracted from 2016 to date including the terms and conditions of the loans;

(iv) An order directing that from the date of the Judgment of this Court, all public debt, whether local or foreign, sought to be contracted on behalf of the Government of the Republic of Zambia must be

presented to the National Assembly for prior approval;

(v) Costs of and incidental to these proceedings; and

(vi) Such other declaration or order that this Court may deem fit.

The petition is supported by an affidavit verifying facts and skeleton arguments.

The facts of the case as set out in the petition and affidavit verifying facts are that the Petitioner is a Zambian national and a former Cabinet Minister and Member of Parliament for the Lusaka Central Constituency from 1991 to 2006. That the 1st Respondent is a corporation sole created under the Minister of Finance (Incorporation) Act, Chapter 349 of the Laws of Zambia and is the head of the Ministry of Finance whose mandate is set out in Part XVI of the Constitution. That the 1st Respondent is responsible for overseeing the contraction of public debt and is the main signatory to debt procurement agreements on behalf of the Government of the Republic of Zambia (henceforth referred to as the Government).

It was asserted that the 2nd Respondent is the Chief Legal Advisor to the Government whose mandate under Article 177 of the Constitution includes advising the 1st Respondent on the procurement of public debt before any loan agreement is executed; and that he was sued pursuant to section 12 of the State Proceedings Act, Chapter 71 of the Laws of Zambia.

The Petitioner based his standing to move the Court for the reliefs he seeks on his being a Zambian citizen and taxpayer who is affected by any public debt procured on behalf of the Government. He further cited Article 2 of the Constitution as conferring on him the right and duty to defend the Constitution and to resist, *inter alia*, its illegal abrogation.

The Petitioner alleged that following the amendment of the Constitution by the Constitution of Zambia (Amendment) Act No. 2 of 2016 which came into effect on 5th January 2016, it is now mandatory for the National Assembly to approve all public debt pursuant to Article 63(2)(d) of the Constitution in exercise of its oversight function over the performance of executive functions; and that the 1st Respondent must present appropriate bills for contraction of debt to the National

Assembly for its approval before any loan agreement is executed. That since 2016, the Government has contracted numerous local and foreign loans through the 1st and 2nd Respondents without obtaining the prior approval of the National Assembly according to the daily debates and proceedings of the National Assembly; that Zambia's true debt position is unknown and can only be gleaned from the 2017 and 2018 annual economic reports published by the Ministry of Finance copies of which he exhibited to his affidavit verifying facts because the correct amount of debt contracted since 2016 has not been provided to the National Assembly or to the public.

The Petitioner asserted that his effort to obtain information about Zambia's true debt position and an explanation as to why the 1st Respondent had failed to obtain the National Assembly's approval before signing loan agreements had proved futile as his letter to the 1st Respondent to that effect had received no response. The Petitioner contended that the attitude has been that the Cabinet has the authority to approve the contraction of loans as allegedly

claimed by the former Minister of Finance, Mrs Mwanakatwe, in a ministerial statement given to the National Assembly on 19th September, 2019, a copy of which statement he exhibited to his affidavit.

The Petitioner alleged that by continuing to borrow without obtaining the National Assembly's prior approval, the Respondents had knowingly and willingly abrogated the Constitution which they swore to defend and uphold through their respective oath of office. He averred that the 2nd Respondent being State Counsel and head of the Zambian Bar must be held to a higher standard as he is bound by his oath of office to ensure that the Constitution is upheld regardless of political considerations.

The Petitioner further averred that the Respondents were still relying on the provisions of the Loans and Guarantees (Authorisation) Act, Chapter 366 with no regard to the Constitutional requirements on public debt contraction. He stated that this was a deliberate error by the Respondents because the 2nd Respondent was aware that the Constitution is the supreme law of Zambia and that the Loans and Guarantees

(Authorisation) Act and subsidiary legislation relating to debt procurement by the Government should be read in conformity with the Constitution; and that any law which is not in conformity with its provisions is null and void and ought to be struck down.

The Petitioner filed three witness statements including his own. The second witness statement was purportedly given by Mr Situmbeko Musokotwane, the Member of Parliament for Liuwa Constituency while the third statement was purportedly given by Mr Cornelius Mweetwa, Member of Parliament for Choma Central Constituency. The Petitioner and his two witnesses were however not called to testify at the trial of the petition. We will therefore not set out the contents of their witness statements in this judgment.

In the skeleton arguments in support of the Petition, Counsel for the Petitioner submitted that in terms of Article 1 of the Constitution, the Constitution is the supreme law in Zambia and ranks above all other laws; that all laws that are enacted are subject to the Constitution; and that any Act that contravenes the Constitution is void to the extent of its

inconsistency. Our decision in the case of **Zambia National Commercial Bank Plc v. Martin Musonda and 58 others**[1], and the Supreme Court decisions in the cases of **Christine Mulundika and 7 Others v. Attorney General**[2], **Attorney General v. Law Association of Zambia**[3] **and Attorney General v Nigel Kalonde Mutuna**[4] were cited in support of that submission that the Constitution is the supreme law and that all laws in Zambia are subject to it so that any law which is inconsistent with its provisions is void to the extent of the inconsistency.

With regard to statutory interpretation, the Petitioner submitted that the literal rule of interpretation is the primary rule which courts apply when interpreting statutes and the Constitution where the provisions are clear and unambiguous. The cases of **Steven Katuka and Law Association of Zambia v. Attorney-General and Ngosa Simbyakula and 63 Others**[5] and **Lubunda Ngala and Jason Chulu v Anti -Corruption Commission**[6] were cited in support of the submission that the starting point in interpreting provisions of the Constitution is to first consider the literal or ordinary meaning of the words and

that all articles that touch on the provision in contention must be considered together. Further, that the purposive rule of interpretation is only resorted to when 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.

It was submitted that the provisions of Article 63(2)(d) of the Constitution which is the subject of this petition are clear and unambiguous and should therefore be interpreted literally. That Article 63(2)(d) is couched in mandatory terms regarding the requirement to obtain prior approval of the National Assembly before debt contraction. Therefore, that all loans contracted on behalf of the Government since 5th January, 2016 ought to have been presented to the National Assembly for approval before contraction. That the Respondents willfully abrogated Article 63(2)(d) of the Constitution by failing to obtain the National Assembly's prior approval of all debt contracted on behalf of the Government. It was contended that this was evidenced by the statement attributed to the former Minister of Finance, Mrs. Margaret Mwanakatwe, in the National Assembly

that she did not understand the insistence that the National Assembly should oversee debt contraction because there was an able Cabinet that approved all loans before they were contracted.

Counsel further submitted that the 1st and 2nd Respondents must be held accountable for that Constitutional breach and be compelled to present to the National Assembly a full and complete statement of the state of public debt contracted from 2016 to date including the terms and conditions of those loans.

Counsel submitted that section 6 (1) of the Constitution of Zambia Act No. 1 of 2016 gives adequate direction on the effect of the amended Constitution on existing legislation. It was argued that since the Constitution is the supreme law, the Loans and Guarantees (Authorisation) Act, Chapter 366 of the Laws of Zambia (henceforth referred to as the Act) which provides for debt contraction on behalf of the Government, must be declared to be subject to it and must be read in conformity with the requirements of Article 63(2)(d) that the

National Assembly must approve all public debt before it is contracted.

Counsel contended that section 2 of the Act lists loans which are exempt from the requirements of the Act and is therefore null and void to the extent of its inconsistency with the Constitution as amended. The case of **Chama Mutambalilo v Attorney General**[7] wherein we affirmed the supremacy of the Constitution and held that any law that is inconsistent with its provisions is void to the extent of the inconsistency was cited in support.

It was submitted that this Court must declare that all public debt requires prior approval of the National Assembly before it is contracted and further, that any provision in any written law that provides a contrary position must be deemed to have been struck down by the enactment of the Constitution as amended.

Counsel went on to submit that the Respondents' contention that Article 207 (2) entails that new legislation must be enacted to bring Article 63(2)(d) into effect was flawed because there is no lacuna in the law. That the Loans and

Guarantees (Authorisation) Act, Chapter 366 was the existing law relating to the raising of loans on behalf of the Government when the Constitution was amended in 2016. That when the Act is read in conformity with the provisions of the Constitution as stipulated by section 6(1) of the Constitution of Zambia Act No. 1 of 2016, there is no requirement for new legislation to be enacted to bring Article 63(2)(d) of the Constitution into effect.

The Respondents filed an amended Answer on 31st December, 2020 with leave of the Court. It was supported by an affidavit and skeleton arguments in opposition. In their amended Answer, the Respondents began by stating that the 2nd Respondent does not authorize or sign for the contraction of any debt contrary to the Petitioner's assertion to that effect. They further stated that Article 63(2)(d) should not be read in isolation from the provisions of Articles 114(1) and 207 (1) and (2) of the Constitution. That Article 207 (1) gives the Government the discretion to raise a loan, grant or guarantee as prescribed by an Act of Parliament, which Act shall provide for the category, nature and other terms and conditions of a loan, grant or guarantee that will require approval by the

National Assembly before the loan, grant or guarantee is executed as per Article 207(2) of the Constitution.

The Respondents further contended that before the National Assembly can invoke the impugned provisions, there must be an Act of Parliament enacted in accordance with the legislative process envisaged under Articles 8, 61 and 89 of the Constitution in order to give effect to the contents of Article 63(2)(d) as read with Article 207 (2) (a) of the Constitution, which Act has not been enacted since 2016.

The Respondents further stated that section 21 of the Constitution of Zambia Act No. 1 of 2016 entails that where an Act of Parliament is required to give effect to an Article of the Constitution such as Article 63(2)(d) and Article 207 (1) and (2), the Article shall come into effect upon the publication of the enacted Act of Parliament or on another date prescribed by the Act of Parliament. The Respondents therefore denied the Petitioner's allegation that under the current law, prior approval of the National Assembly is required before local or foreign debt can be contracted by the Government.

They further denied the allegation that the 2nd Respondent ought to be signing bills for presentation to Parliament for approval before any debt is contracted by the Government. The Respondents contended that the provisions of Article 63(2)(d) have not yet come into effect and therefore the Respondents need not present any bills for loan contraction to the National Assembly for its prior approval before the debt is contracted. They stated that as a result of that position, the daily debates and proceedings of the National Assembly referred to in the petition are irrelevant to these proceedings.

The Respondents further submitted that until the provisions of Articles 63(2)(d) and 207 of the Constitution come into effect through an Act of Parliament yet to be enacted, the Loans and Guarantees (Authorisation) Act, Cap. 366 is the law which is applicable to loan contraction by the Government. They contended that sections 3 and 7 of the Act do not require them to obtain prior approval of the National Assembly before public debt is contracted.

The Respondents therefore denied that they had failed, neglected or refused to obtain prior approval of the National

Assembly. They submitted that the Petitioner is therefore not entitled to the reliefs he seeks and that the petition should be dismissed with costs.

The Respondents in their opposing affidavit sworn by, the Solicitor General, Mr. Abraham Mwansa, SC, reiterated that Article 63 of the Constitution provides for the functions of the National Assembly and that in particular, clause (2) (d) of that Article provides for the National Assembly's oversight role over the performance of executive function by approving public debt before it is contracted. He averred that Article 207(1) of the Constitution gives the Government discretion to raise or guarantee a loan, or to enter into an agreement to give a loan as prescribed by an Act of Parliament. Further, that Article 207(2) stipulates what ought to be contained in the contemplated legislation under Article 207(1).

The learned Solicitor General alleged that Parliament has not enacted any legislation to operationalize the provisions of the impugned Article 63(2)(d) and Article 207(1) of the Constitution and consequently that there had been no failure,

neglect or refusal by the 1st Respondent to obtain prior approval of the National Assembly for debt contraction.

The Respondents filed one witness statement purportedly given by Mr Mukuli Chikuba, a Permanent Secretary in the Ministry of Finance. However, this witness was not called to testify at the trial. We will therefore not set out the contents of the statement in this Judgment.

In the skeleton arguments in opposition to the petition, Counsel for the Respondents submitted that although the Petitioner alleged that the Respondents had contravened Article 63(2)(d) of the Constitution, the Article provides for the functions of the National Assembly. That the impugned function of the National Assembly to approve public debt contraction has always been performed by the National Assembly in accordance with the provisions of the Constitution and those of the Loans and Guarantees (Authorisation) Act, Cap 366.

It was submitted that Article 63(2)(d) of the Constitution should be read together with Article 207(1) and (2). That Article 207(2) requires that legislation be prescribed to provide for the

category, nature and other terms and conditions of a loan, grant or guarantee, that will require approval by the National Assembly before the loan, grant or guarantee is executed and to bring Article 207(1) into operation. Further, that the Loans and Guarantees (Authorisation) Act, Cap. 366 is the prescribed law which can be read with necessary modifications to bring it into conformity with the Article 207(1) of the Constitution. That section 3 of the Loans and Guarantees (Authorisation) Act, provides as follows:

> **3. The Minister may raise from time to time, in the Republic and elsewhere, on behalf of the Government such loans as he may deem desirable, not exceeding in the amount outstanding at any one time –**
>
> **(a) in the case of loans raised under this Act for a period of not more than one year; or**
>
> **(b) in the case of loans raised under this Act for a period in excess of one year; such amount as he shall from time to time be authorised by resolution of the National Assembly to prescribe by statutory instrument."**

That section 26 of the Loans and Guarantees (Authorisation) Act provides that:

> **26. If, during any period when the National Assembly is not sitting, the Minister considers that there is such an urgent need to raise any loan or to give any guarantee under this Act that it would not be in the public interest to delay the raising of**

such loan or the giving of such guarantee until the National Assembly next sits, the Minister may, if so authorised by the President, amend any statutory instrument promulgated in terms of section 3 or 15 by varying any sum specified in such statutory instrument to the extent necessary to permit the raising of such loan or the giving of such guarantee, as the case maybe.

It was contended that there was therefore no breach of Article 63(2)(d) of the Constitution as the category, nature and other terms and conditions of a loan, grant or guarantee, that require approval by the National Assembly before the loan, grant or guarantee is executed, and any monies received in respect of a loan or grant approved by the National Assembly to be paid into the Consolidated Fund, or other public fund or public account already exists in subsidiary legislation.

It was submitted that the function of Parliament to enact legislation to conform to the Constitution is not mandatory, particularly where existing legislation may equally serve the desired purpose. After citing Article 272 of the Constitution, it was submitted that the current legislation on contraction of debt by the Government satisfies the demands of the

Constitution as amended and allows the National Assembly to fulfill its function as envisaged under Article 63(2)(d).

It was argued that this function has been satisfied at two levels first, by Cabinet approval pursuant to Article 114 and secondly, by authorisation by the National Assembly. That in the event that the National Assembly is not sitting, the authorisation is granted by the President in terms of Section 26 of the Loans and Guarantees (Authorisation) Act.

Counsel went on to submit that there is no legal basis for the Court to grant the Petitioner an order to compel the Respondents to present to the National Assembly a comprehensive statement on public debt contracted from 2016 to date, including the terms and condition of the said loans. That the current legislation does not require the Respondent to submit such a statement but only provides for prior approval of debt by the National Assembly before the debt is contracted.

It was further submitted that should this Court be of the view that existing legislation does not provide for the category, nature or other terms and condition of a loan, grant or guarantee, that require prior approval by the National Assembly

before the loan, grant or guarantee is executed, the Court should hold that the provisions of the Loans and Guarantees (Authorisation) Act have been applied with necessary modifications or adaptations to conform to the Constitution as amended.

After citing the provisions of sections 6 and 21 of the Constitution of Zambia Act No. 1 of 2016, Counsel submitted that in order to determine whether the Respondents had breached the provisions of Article 63(2)(d) as alleged, recourse should be had to the transitional provisions set out in those sections. That the import of section 6 is that the Loans and Guarantees (Authorisation) Act, being a law in force immediately before 5th January 2016, continues to be in force to the extent of its consistency with the Constitution as amended until Parliament enacts a law amending it.

The Respondents further submitted that the National Assembly sets the limits for debt contraction based on the presentation made by the Minister of Finance who then issues a statutory instrument setting out the limits set by the National Assembly for both domestic and external debt. It was the

Respondents' position that the Minister had been contracting debt in line with the limits set by the National Assembly in the statutory instruments issued to that effect as evidenced by the Respondents' bundle of documents. It was submitted that it is clear from the provisions of sections 3 and 26 of the Loans and Guarantees (Authorisation) Act that there is always prior authorization of the contraction of debt by the National Assembly. The Respondents therefore urged that the Petition be dismissed.

The Petitioner filed a Reply in which he averred that the implementation of Article 63(2)(d) is not dependent on the enactment of fresh legislation as the Loans and Guarantees (Authorization) Act already exists which by virtue of section 6 of the Constitution of Zambia Act No. 1 of 2016 meets the requirements of Article 207 (2) of the Constitution.

That Article 63(2)(d) bestows supervisory power on the National Assembly with regard to the contraction of public debt, which power does not require any Act of Parliament to be exercised; that the provision is couched in mandatory terms and is not subject to any other provision of the law and cannot

be altered by an Act of Parliament. It was argued that if the framers of the Constitution had intended to subject the Article to any other provision of the Constitution, they would have done so in clear terms.

The Petitioner reiterated that Article 63(2)(d) is not ambiguous and must therefore be given a literal meaning. That Articles 8, 61 and 89 do not dilute Article 63(2)(d).

The Petitioner further averred that Article 207 provides first for the raising of loans and grants by the Government and secondly for the issuance of loans and grants out of public funds by the Government. That the two aspects are not so entwined that Article 207 can be said to strictly apply to Article 63(2)(d). That the reference to legislation in Article 207 relates to the issuance of loans by Government since legislation on borrowing already exists and further that the Petition relates to public borrowing and not lending.

It was contended that section 21 of the Constitution of Zambia Act No. 1 of 2016 applies to novel situations and not where legislation already exists as such matters are governed by sections 4 and 6 of the Act. That existing laws continue to

apply to the extent to which they are not inconsistent with the Constitution as amended and are treated as if made pursuant to the Constitution and construed with necessary modifications to bring them into conformity with the Constitution.

It was averred that the Loans and Guarantees (Authorisation) Act which regulated public debt contraction prior to 2016 continued in force with such modifications adaptations, qualifications and exceptions as are necessary to bring it into conformity with the Constitution. That any provision of the Loans and Guarantees (Authorization) Act or any other subsidiary law which provides for the contraction of public debt by the Government without the prior approval of the National Assembly is null and void to the extent of its inconsistence with Article 63(2)(d). That this entails that from January 2016, all local and foreign loans contracted by Government should have been presented to the National Assembly for approval.

It was further averred that the Respondents conceded in paragraphs 17, 18, 19 and 20 of their Answer that they had continued to use the Loans and Guarantees (Authorization) Act

since 2016 to contract new debt without the approval of the National Assembly and offered no explanation for ignoring the provisions of Article 63(2)(d). The Petitioner averred that if new legislation was required as alleged by the Respondents, borrowing should have been suspended until such legislation was enacted. He contended that the Respondents had the means to enact legislation to activate the provisions of Article 63 (2)(d) and 207(1) and (2) as deemed necessary and that they cannot rely on their failure or refusal to enact the legislation as an excuse for not upholding the requirements of the Constitution. That their failure to do so therefore constitutes a willful refusal to uphold the supreme law of the land.

In his affidavit in reply, the Petitioner stated that the issue for our determination is restricted to the failure by the Respondents to obtain prior approval of the National Assembly in contracting public debt. He reiterated that there is no requirement for the enactment of new legislation to operationalize Articles 63 and 207 in relation to public borrowing as the existing Loans and Guarantees (Authorization) Act applies. That the Respondents willfully failed, neglected and

refused to obtain prior approval of the National Assembly before contracting public debt as required by the Constitution since 2016.

In his skeleton arguments in reply, the Petitioner stated that although the Respondents claimed that there has been no failure by the Respondents to obtain prior approval of the National Assembly before contracting public debt, they did not state a single instance since 2016 when prior approval of the National Assembly was obtained before contracting the billions of dollars' worth of debt that have been contracted by the Government from 2016 to date. The Petitioner further submitted that the Respondents claimed that he had not pleaded any particular provision of the subsidiary legislation that is not in conformity with the Constitution as amended that ought to be struck down by this Court and further that there is no provision of the law upon which the prayers in paragraph (iii) and (iv) in the Petition may be anchored. The petitioner asserted that this submission is totally misguided because the settled position of the law as provided by section 6 of the Constitution of Zambia Act No. 1 of 2016 is that all legislation

must be read in conformity with the Constitution as amended. That there is therefore no requirement to plead any particular section of any Act or subsidiary legislation because section 6 says that all laws must be read in conformity with the Constitution as amended.

The Petitioner contended that in so far as any section of any Act or Subsidiary Legislation is not in conformity with the Constitution, this Court has the jurisdiction to make a blanket order striking down all such provisions and ordering that the laws relating to debt contraction must be read as requiring prior approval of the National Assembly without exception.

The Supreme Court case of **William David Carlisle Wise v. E.F. Hervey Limited**[8] was cited as stating that there is no requirement to plead a statute. It was submitted that based on the **William David Carlisle Wise** case, the petition sufficiently discloses a cause of action rooted in both the Constitution as amended and in Act No. 1 of 2016 whereby there is sufficient ground for this Court to grant the reliefs sought and to make a blanket order striking down any and all provisions of any Act or statutory instrument which do not conform to the

Constitutional requirement for the National Assembly to approve all public debts before it is contracted. That the Respondents arguments that there was need for the Petitioner to mention every section in every Act or statutory instrument that did not conform with Article 63 (2) (d) of the Constitution as amended in order for this Court to be able to strike it down and further that there is no law upon which prayers (iii) and (iv) in the Petition are anchored is misguided and erroneous.

It was submitted that although the Respondents submitted that the National Assembly has always exercised the function granted to it under Article 63 (2) (d), they had not produced any evidence in their bundle of documents to prove that the loans obtained by the Government from 2016 to date were tabled before the National Assembly for approval before they were contracted. That the issue before this Court is not whether the National Assembly had some peripheral oversight on debt contraction, but whether or not the Respondents have been obtaining prior approval of the National Assembly before contracting the loans. The petition asserted that this question can only be answered by the Respondents providing proof that

they have been tabling all debt agreements before the National Assembly before signing them.

Counsel argued that the petition states in very clear terms that the oversight function of the National Assembly granted by Article 63 (2) (d) has been made absolute and unqualified so that the piece-meal authority which existed prior to the 2016 constitutional amendment is no longer sound law and that the Respondents are be-labouring a moot point in trying to demonstrate that the National Assembly has always had some form of oversight and that this Court should therefore leave things as they are. That it was because the previous marginal and nominal oversight the National Assembly had over debt contraction by the Government was inadequate that the Constitution was amended to give the National Assembly absolute and unqualified oversight over debt contraction by the Government.

We have duly considered the contents of the petition, the amended answer, the reply and the affidavits in support of and in opposition to the petition and in reply. We have also considered the submissions and the authorities cited by the

respective parties. The Petition relates to the subject of public debt contraction and the oversight role given to the National Assembly by Article 63 (2) (d) of the Constitution with regard to the performance of executive functions in the contraction of public debt on behalf of the Government.

In the main, the Petitioner seeks a declaration that the 1st and 2nd Respondents' failure to present all loans contracted and sought to be contracted as public debt, on behalf of the Government, to the National Assembly for prior approval is a breach and an illegal abrogation of the Constitution. In support of that contention, the Petitioner alleged that Article 63 (2) (d) of the Constitution places a mandatory duty on the National Assembly to approve all public debt, without exception, before it is contracted on behalf of the Government. He argued that the Respondents have not submitted any bills for debt contraction to the National Assembly for its prior approval before public debt is contracted since January 2016. That as a result of that failure, Zambia's true public debt position is unknown.

The Respondents in rebuttal of the claim asserted that the 1st Respondent has complied with the existing laws on public debt procurement and has obtained the National Assembly's prior approval of the debt limits and thus has not breached or illegally abrogated the Constitution. Further, that Article 63 (2) (d) should be read together with the provisions of Article 207 (1) and (2) which require that legislation be enacted to state what loans should be submitted to the National Assembly for its prior approval before they are contracted. The Respondents further contend that no such legislation has been enacted to date and that in the absence of such legislation the provisions of Article 63 (2) (d) have not yet come into effect.

We have considered the opposing arguments. The issue we have to determine in relation to this claim is whether there is a mandatory requirement in Article 63 (2) (d) or elsewhere in the Constitution, for the executive to submit all public debt, without exception, to the National Assembly for its approval before the debt is contracted.

Before we consider the issue before us, it is necessary for us to briefly restate the general principles which are applicable

to the interpretation of a Constitution as laid down by our courts and courts in other jurisdictions in light of the arguments advanced by respective counsel in this matter.

The first principle which is settled by the Constitution itself in Article 1 (1) of the Constitution, is that the Constitution is the supreme law of this Country and therefore ranks above all other laws. Every other written law derives its authority from the Constitution and is therefore subject to the Constitution. Any law which is inconsistent with the provisions of the Constitution is void to the extent of its inconsistency. We affirmed the supremacy of the Constitution over other laws in the case of **Godfrey Malembeka (Suing as Executive Director of Prisons Care and Counselling Association) v. the Attorney-General and the Electoral Commission of Zambia**[9], when we held that sections 9 (1) (e) and 47 of the Electoral Process Act, No. 35 of 2016, which disqualified persons in lawful custody from voting in an election, were void as they contravened Article 46 of the Constitution which entitles a citizen aged eighteen years and above to vote in an election.

Further, it is settled law that another primary principle in interpreting the Constitution is that where the words used in a provision of the Constitution are clear and unambiguous, they must be given their plain or natural meaning. In other words, the provisions of the Constitution should be construed in such a way that they are given their literal meaning, unless a literal meaning results in absurdity or causes conflict with other provisions of the Constitution on the subject for interpretation.

This principle was affirmed in our decisions in the cases of **Milford Maambo and Others v. The People**[10] and **the Public Protector of the Republic of Zambia v. Indeni Petroleum Refinery Company Limited**[11].

The Supreme Court in **Faustine Mwenya Kabwe and Aaron Chungu v. Justice Ernest Sakala, Justice Peter Chitengi and the Attorney General** [12] similarly stated that:

> **"Whenever there is no ambiguity in the meaning of a statute or indeed the Constitution itself, the primary principle of interpretation is that the meaning of the text should be derived from the plain meaning of the language used. In other words, the natural and ordinary meaning of the words used should convey the true intent of the originators of the text. Other principles of interpretation**

should only be called in aid where there is ambiguity or where such literal interpretation will lead to absurdity."

In the case of **Rafiu Rabiu v. S** [13] the Nigerian Supreme Court reiterated this position when it observed that:

"...where the words of any section are clear and unambiguous, they must be given their ordinary meaning unless this would lead to absurdity or be in conflict with other provisions of the Constitution."

A further principle of interpretation which we applied in the case of **Zambia National Commercial Bank Plc v. Martin Musonda and Others**[1] is that when interpreting the Constitution, all the relevant provisions bearing on the subject for interpretation should be considered together as a whole in order to effect the objective of the Constitution. This means that the Constitution must be read as a whole so that no one provision of the Constitution should be segregated from the other provisions touching on the matter which is the subject of interpretation.

The US Supreme Court in the case of **South Dakota v. North Carolina**[14] similarly settled that principle by stating that:

"no single provision of the Constitution is to be segregated from the others and considered alone but all other provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effect the greater purpose of the instrument."

These are the principles we have applied in determining the issues raised in the petition.

In determining whether there is a mandatory requirement in Article 63 (2) (d) of the Constitution for the executive to submit all public debt, without exception, to the National Assembly for its approval before the debt is contracted on behalf of the Government as alleged by the petitioner, we have examined all the provisions of the Constitution which touch on the subject of public debt contraction on behalf of the Government by the executive, namely Articles 63 (2) (d), 114 (1) (e) and 207 (1) and (2). In order to place the matter in context, we will set out each of the three Articles below.

Article 63 (2) (d) of the Constitution reads as follows:

"(2) The National Assembly shall oversee the performance of executive functions by:

(d) approving public debt before it is contracted."

Article 114 (1) (e) relating to the functions of the Cabinet reads as follows:

(1) The functions of Cabinet are as follows:

(e) recommend, for approval of the National Assembly-

(i) loans to be contracted by the State;

(ii) guarantees on loans contracted by State institutions or other institutions.

While Article 207 (1) and (2) of the Constitution provides for borrowing and lending by the Government in the following terms:

"(1) The Government may, as prescribed –

(a) raise a loan or grant on behalf of itself, a State organ, State institution or other institution;

(b) guarantee a loan on behalf of a State organ, State institution or other institution; or

(c) enter into an agreement to give a loan or a grant out of the Consolidated Fund, other public fund or public account.

(2) Legislation enacted under clause (1) shall provide –

(a) for the category, nature and other terms and conditions of a loan, grant or guarantee, that will require the approval by the National Assembly before the loan, grant or guarantee is executed; and

(b) that any monies received in respect of a loan or grant approved by the National Assembly shall be paid into the Consolidated fund or other public fund or public account."

The provisions of Article 63(2)(d) of the Constitution, on which the Petitioner based his petition, are clear and unambiguous. A literal interpretation of the Article reveals that it confers power on the National Assembly to oversee the performance of executive functions by approving the contraction of public debt on behalf of the Government before the debt is contracted. The Article does not contain any details on how the National Assembly will exercise that specific oversight function nor does it state whether it is all or only certain loans which will require the approval of the National Assembly before they are contracted. This is correctly so because the purpose of Article 63(2)(d) is merely to assign to the National Assembly the function of approving public debt before it is contracted. The substantive provisions on borrowing and lending by the Government are set out in Article 207 of the Constitution. We will examine Article 207 more closely later in this judgment.

Article 114 (1) (e) of the Constitution gives the Cabinet the power to recommend to the National Assembly for its approval,

the loans to be contracted by the State as well as guarantees or loans contracted by State institutions or other institutions.

When the provisions of Article 63(2)(d) and 114(1)(e) are read together, it is evident to us that the Cabinet and the National Assembly have distinct roles which they play in the matter of public debt contraction. The role which the Cabinet plays is restricted to recommending to the National Assembly for its approval the loans to be contracted by the State. The Constitution has not conferred any power on the Cabinet to approve the contraction of loans by the State as can be seen on a plain reading of Article 114 (1) (e). Thus, any assertion that the Cabinet has the power to approve the contraction of debt by the State is not supported by the Constitution. As we already stated, that power is vested in the National Assembly as clearly stated by Article 63(2)(d) of the Constitution.

That said, we observe that Article 207 (1) (a) of the Constitution gives the Government the power to raise a loan or grant on its own behalf or on behalf of a State organ, State institution or other institution as prescribed. Article 266 of the

Constitution defines the word prescribed to mean "provided for in an Act of Parliament."

Thus, Article 207 (1) of the Constitution clearly stipulates that the details of how the Government will raise loans or grants on its own behalf or that of other State organs, State institutions or other institutions will be provided for in an Act of Parliament. Article 207 (2) further provides that the category, nature and other terms and conditions of a loan, grant or guarantee which will require the approval of the National Assembly before the loan agreement is executed will be set out in that Act of Parliament.

Again it is evident on a literal interpretation of the provisions of Article 207 (1) and (2) that the framers of the Constitution in their wisdom set out in broad terms the power of the Government to raise a loan or grant on behalf of itself, a State organ, State institution or other institution in Article 207 but did not stipulate the details of the category, nature and the terms and conditions of a loan, grant or guarantee, which would require approval by the National Assembly before the loan, grant or guarantee is executed.

The rationale for this is clear. The provisions of the Constitution by their nature are fairly static and not easy to change or amend as evidenced by the process for the alteration of the Constitution stipulated by Article 79 of the Constitution. Therefore, it was prudent for the framers of the Constitution to leave the details of the category, nature and the terms and conditions of a loan, grant or guarantee that would require approval by the National Assembly before the loan agreement is executed to an Act of Parliament. This is because laws enacted by Parliament are dynamic and easier to change based on the current needs of the Zambian society.

It will be seen from the foregoing that in order to get a correct understanding of the intention of the framers of the Constitution regarding the oversight function given to the National Assembly to oversee the procurement of public debt on behalf of the Government by the executive, the provisions of Article 63 (2) (d) and Article 207 (1) and (2) must be read together. To read the provisions of the two Articles in isolation from each other would result in an erroneous interpretation of

the objective of the framers of the Constitution on public debt contraction.

Having considered the provisions of Articles 63 (2)(d) and 207(1) and (2) of the Constitution together, we find that there is no mandatory requirement in Article 63(2)(d) of the Constitution for the executive to submit all loans, without exception, to the National Assembly for its approval before the loan is contracted.

As we already observed earlier in this judgment, it is evident that the framers of the Constitution did not intend that every loan to be contracted on behalf of the Government would have to be submitted to the National Assembly for its approval before the loan agreement is executed. Rather, as revealed by the provisions of Article 207 (1) and (2), the framers of the Constitution intended that only loans of a certain nature or category and their terms and conditions would be required to be submitted to the National Assembly for prior approval before the debt is contracted. The details of the nature, category, terms and conditions of loans to be so submitted to the National Assembly for prior approval were left to be worked out

by Parliament in an Act of Parliament to be enacted after the Constitution as amended had come into force.

Given the clear provisions of Article 207 (1) and (2) of the Constitution, the Petitioner's contention that following the enactment of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and its coming into force on 5th January, 2016 there is a mandatory constitutional requirement in Article 63 (2) (d) of the Constitution that the executive, through the 1st Respondent, should submit all public debt to the National Assembly for its approval before the debt is contracted, is not supported by the Constitution.

In the circumstances, there is no basis on which we can grant a declaration that the 1st and 2nd Respondents' have failed to present all loans contracted and sought to be contracted as public debt, on behalf of the Government of the Republic of Zambia, to the National Assembly for prior approval and have thus breached and illegally abrogated the provisions of the Constitution. The claim therefore fails and is dismissed.

Before leaving this matter, we consider it important to address some of the arguments advanced by the Respondents

in opposing the petition. The Respondents alleged that the provisions of Article 63(2)(d) are not yet in operation because, according to them, new legislation is required to bring that Article into operation. That contention is untenable because at the time the Constitution of Zambia (Amendment) Act No.2 of 2016 came into effect, there was in force existing law in the form of the Loans and Guarantees (Authorisation) Act, Cap 366 which provides for borrowing and lending by the Government.

In terms of section 6 of Constitution of Zambia Act No.1 of 2016, to the extent that the Loans and Guarantees (Authorisation) Act was not inconsistent with the provisions of the Constitution on debt contraction, the Act continued in force and ought to be construed with necessary modifications, adaptations, qualifications and exceptions to bring its provisions into conformity with the Constitution as amended.

An examination of the provisions of the Act however reveals that although its provisions on debt contraction could be modified in the short term to allow for the continuation of the performance by the executive of its function of contracting public debt on behalf of the Government, the Act must be

amended or repealed and replaced, as the case may be, to bring it in line with the requirements of Article 207 (1) and (2) to provide for the category, nature and other terms and conditions of a loan, grant or guarantee, which will require the National Assembly's approval before the loan, grant or guarantee is executed.

Regarding the timeframe within which the Loans and Guarantees (Authorisation) Act ought to have been amended or repealed and replaced to bring it into conformity with the Constitution as amended, section 6 (2) of the Constitution of Zambia Act No. 1 of 2016 is instructive. It reads:

> **(2) Parliament shall, within such period as it shall determine, make amendments to any existing law to bring that law into conformity with, or to give effect to, this Act and the Constitution as amended.**

Section 6 of the Constitution of Zambia Act No.1 of 2016 vests the power to determine the timeframe within which to amend existing legislation to bring it into conformity with the Constitution as amended in Parliament. Clearly, the power given to Parliament to determine the timeframe within which to amend existing laws to make them compliant with the

Constitution must be exercised in collaboration with the Attorney-General whose mandate under Article 177 (5) (b) of the Constitution is to sign Government Bills to be presented to the National Assembly.

The assertion by the Respondents that the process of amending and enacting laws is expensive has no support of the law as it is imperative that existing laws providing for such important matters as loan contraction by the Government be prioritized on the legislative agenda of Parliament working in conjunction with the Attorney-General.

The rationale given by the Technical Committee for including an article on borrowing and lending by Government at page 751 of the report dated 30th December 2015 was as follows:

> **The rationale for the Article was to provide guidelines on the contraction of loans by the State and the procedure to be followed in the provision of loans or grants from the consolidated fund. The Committee, therefore, resolved to include a provision on borrowing and lending by Government in order to address the problem of high indebtedness which had been previously experienced by the country, as a result of unregulated loan contraction by the Executive.**

The urgency and importance of amending the law on borrowing and lending by the Government to bring it into conformity with the provisions of Article 63 (2) (d) read with Article 207 (1) and (2) of the Constitution cannot be over emphasized. The Loans and Guarantees (Authorisation) Act Cap 366 does not stipulate the category, nature and terms and conditions of loans, grants or guarantees which require the prior approval of the National Assembly before the loan, grant or guarantee is executed. In the spirit of the guiding principles of public finance that there should be sustainable public borrowing to ensure inter-generational equity as stated in Article 198 (c) of the Constitution, it is imperative that priority be given to amending the Loans and Guarantees (Authorisation) Act Cap 366 to bring it into conformity with the Constitution.

This will enable the National Assembly to effectively exercise its oversight role on public borrowing as required by the Constitution. We therefore enjoin Parliament to exercise its mandate to ensure that appropriate legislation on government borrowing and lending is enacted as a priority in accordance with section 6 (2) of the Constitution of Zambia Act No. 1 of

2016. We further enjoin the Attorney General, at the earliest opportunity, to take to National Assembly an appropriate bill relating to the amendment or the repeal and replacement of the Loans and Guarantees (Authorisation) Act, Cap. 366 to bring it into conformity with the requirements of the Constitution. This is in line with his duty to sign Government Bills to be presented to the National Assembly under Article 177 (5) (b) of the Constitution.

With that said, we shall consider the remaining claims sought by the Petitioner.

The Petitioner further seeks a declaration that the Loans and Guarantees (Authorization) Act, Chapter 366 of the Laws of Zambia and any other law dealing with debt procurement or contraction for and on behalf of the Government must be interpreted in line with the provisions of Article 63(2)(d) as requiring prior approval from the National Assembly and that any provision in any existing law that is inconsistent with the Constitution of Zambia is null and void to the extent of such inconsistency and ought to be struck down accordingly. It is settled law that the Constitution is the supreme law in Zambia

and ranks above all other laws in terms of Article 1 of the Constitution. It follows therefore, that any law that is inconsistent with the Constitution is void to the extent of the inconsistency.

However, in this case, the Petitioner based his assertion that section 2 of the Loans and Guarantees (Authorisation) Act, and other provisions of the Act which he did not specify, contravene the provisions of Article 63(2)(d) of the Constitution, on his argument that Article 63 (2)(d) of the Constitution places a mandatory requirement on the 1st and 2nd Respondents to submit every debt to be contracted on behalf of the Government to the National Assembly for approval before the loan is contracted.

With regard to the general allegation of contravention, we wish to state that for us to exercise our mandate under Article 128 (3) (a) of the Constitution relating to whether or not an Act of Parliament contravenes the Constitution, the party who seeks redress must make clear and specific allegations as to which specific provision of the Act contravenes the Constitution

and not stop at making a blanket or general allegation. This is what the Petitioner failed to do in this case.

As regards section 2, the Petitioner's argument was that Article 63 (2)(d) of the Constitution places a mandatory requirement on the 1st and 2nd Respondents to submit every loan to be contracted on behalf of the Government to the National Assembly for approval before the loan is contracted. We have found that that is not the correct interpretation of Article 63(2)(d) when it is read with Article 207 (1) and (2) of the Constitution. This claim therefore has no merit and is dismissed.

The Petitioner also seeks an order that the 1st and 2nd Respondents be compelled to present to the National Assembly of Zambia, a full and complete statement of the state of public debt contracted from 2016 to date including the terms and conditions of the loans, within a timeframe to be specified by the Court. He also seeks an order directing that from the date of the Judgment of this Court, all public debt, whether local or foreign, sought to be contracted on behalf of the Government of the Republic of Zambia must be presented to the National

Assembly for prior approval. These two claims were based on the Petitioner's first claim which we have dismissed. Consequently, we cannot grant the orders sought and they are dismissed.

The petition therefore fails in its entirety and is dismissed. As the petition raised an important constitutional question, each party will bear their costs.

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H. Chibomba
PRESIDENT, CONSTITUTIONAL COURT

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A. M. Sitali
CONSTITUTIONAL COURT JUDGE

.....

M. S. Mulenga
CONSTITUTIONAL COURT JUDGE

.....

P. Mulonda
CONSTITUTIONAL COURT JUDGE

OPINION

Munalula, JC, dissenting:

Cases referred to:

1. Hilton Chironga and Another v Minister of Justice, Legal and Parliamentary Affairs and 3 Others[6] CCZ 14/20 (Civil Appeal No. CCZ 42/15)
2. Government of NCT of Delhi v Union of India and Another Civil Appeal No. 2357 of 2017
3. Davis v Burke US SC Case No. 286/1900
4. Mutembo Nchito v Attorney General 2016/CCZ/0029
5. Webby Mulubisha v Attorney General 2018/CCZ/0013
6. Law Association of Zambia and Chapter One Foundation Limited v The Attorney General 2019/CCZ/0013 and 2019/CCZ/0014
7. R (On the Application of Miller) v The Prime Minister, Cherry and Others v The Advocate General for Scotland [2019] UKSC 41

Legislation referred to:

Constitution of Zambia, 1991 as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016
Constitution of Zambia Act No. 1 of 2016
Loans and Guarantees (Authorisation) Act, Chapter 366 of the Laws of Zambia

Works referred to:

Bryan Garner, Black's Law Dictionary, 8th Edition
Campbell's Black's Law Dictionary, 1968, revised 4th edition
First Draft Report of the Technical Committee Drafting the Zambian Constitution, 2012
Hector Fix-Fierro and Pedro Salazar-Ugarte, "Presidentialism" in Michel Rosenfeld and Andras Sajo eds., he Oxford Handbook of Comparative Constitutional Law, Oxford, 2013

I have dissented in this matter because I do not believe that there has been no wrong doing or that no one should be held accountable. The Petitioner approached this Court, not seeking an interpretation of the relevant provisions of the **Constitution**, but alleging specific wrongdoing

to be resolved by specific remedial action. Admittedly the Petitioner did not come under Article 128 (3) but I take comfort from Article 118 (1) (e) decrying undue focus on technicalities and the words of the Constitutional Court of Zimbabwe in the case of **Chironga and Another v The Minister of Justice and Others**[1] that:

> ...[B]because the application raises the issue of legality, the court would want to be slow in dismissing such an application offhand even in the face of these glaringly gross technical glitches, notwithstanding the invidious position which the few remaining valid threadbare averments place the court in. The application seeks to enforce the constitutional obligations as set out in s 210 of the Constitution, and this Court as the apex court on constitutional matters is equally obligated to see to it that constitutional obligations are fulfilled.*(emphasis added)*

The facts *per se* of the alleged contravention are not denied, rather what is challenged is whether there was any obligation to comply with Article 63 (2) (d) of the **Constitution** in the circumstances. In my considered view, this Court needed to clearly address that allegation not only because all concerned, including the Court itself, are bound by the Constitution but also because it is necessary to settle the issue and make appropriate orders which will not only vindicate the **Constitution** but ensure that appropriate action in compliance with the **Constitution** is taken in future. Let me begin at the beginning and explain my views in full.

This Opinion is in a matter in which the Constitutional Court was moved in its original jurisdiction to determine questions of law relating to the contracting of public debt. Based on the affidavit evidence, the facts as I

see them are that from 2016 to date, the Government of the Republic of Zambia contracted, both local and foreign, public debt. The said debt was contracted after the Constitution of Zambia was amended by the **Constitution (Amendment) Act No. 2 of 2016** (henceforth the **Constitution**) which introduced Article 63 (2) (d) providing for the National Assembly to oversee the performance of executive functions by *inter alia* approving public debt before it is contracted. Article 63 (2) (d) was not applied in the contracting of the impugned debt, instead the Respondents relied on the **Loans and Guarantees (Authorisation) Act Chapter 366 of the Laws of Zambia**. Thus what is in issue, is whether the debt which was contracted, is constitutional and therefore legal.

I have considered the question by firstly, interpreting the **Constitution** as a whole so as to bring to bear all related provisions. Secondly, by applying the plain, natural and grammatical meaning of the words in the impugned provisions. I did so because I observed no ambiguity nor injustice arising therefrom as to obscure the ultimate purpose of the framers of the **Constitution** as expressed in the text of the **Constitution**. I have therefore stayed true to Article 118 (1) providing that judicial authority derives from the People of Zambia and shall be exercised in a just manner and such exercise shall promote accountability. By the same token I have

heeded Article 119 which provides that judicial authority shall be exercised in accordance with the **Constitution** and the law.

I now turn specifically to the issues for consideration, beginning with the provisions in the **Constitution** relating to Public debt. In doing so I have closely followed the Respondents' arguments. For convenience I will begin with the role of the Respondents in the process of contracting debt and the question whether they are the rightful functionaries to be cited in this case. I do so because the 2nd Respondent is on record in paragraph 2 of the Amended Answer saying that he does not authorise or sign for the contraction of any debt. I believe this response belittles the central role assigned to the office of Attorney General of the Republic of Zambia in the process of debt contraction.

The position of the two Respondents as constitutional functionaries is better understood by reference to Article 207 which clearly shows that the power to borrow and the ownership of that borrowing is for the Government of the Republic of Zambia as a whole. Government is both distinct from and inclusive of the three organs of Government. The word 'Government' as used in the Article is not defined in the **Constitution** but whatever meaning it carries is not synonymous with the Executive branch as is evident from the words that the Government "may borrow on its own behalf on behalf of a State organ or State institution". State organs are

defined in Article 266 as the Executive, the Legislature and the Judiciary. The term is therefore used broadly and collectively over and above Government as the Executive. Further **Garner's Black's Law Dictionary**, 8th edition, at page 715 is helpful as it defines government as follows:

> The sovereign power in a nation or state. An organisation through which a body of people exercises political authority; the machinery by which sovereign power is expressed...In this sense, the term refers collectively to the political organs of a country regardless of their function or level, and regardless of the subject matter they deal with.

The Respondents represent in the circumstances, Government as a whole and not just, the Executive organ. I say so because of their status as constitutional functionaries. The functions of the office of Attorney General are set out in Article 177 of the **Constitution**. Under Article 177 (4) the Attorney General is not subject to the direction or control of a person or authority in the performance of his (or her) functions. And in Article 177 (5) he (or she) is chief legal adviser to the Government. He (or she) among other things, represents the Government in litigation, signs Government Bills to be presented to the National Assembly and gives advice on agreements to which the Government intends to become a party or in respect of which the Government has an interest before they are concluded except where the National Assembly directs otherwise, subject to conditions prescribed.

The Minister of Finance on the other hand is the constitutional functionary identified in Part XVI of the **Constitution**, relating to Pubic Finance and Budget. He (or she) is the gate keeper of the guiding principles of public finance which include sustainable public borrowing to ensure inter-generational equity. He (or she) is the main mover of money bills under Article 65 (2) including bills to raise or guarantee the raising of loans. He (or she) has primary power in relation to loans under section 3 of the **Loans and Guarantees (Authorisation) Act**.

Article 113 creates the Cabinet consisting of the President, the Vice-President and Ministers (including the Minister of Finance), with the Attorney General as *ex officio* member. Among the functions of Cabinet set out in Article 114 (1) is to recommend for the approval by the National Assembly of loans to be contracted by the State and guarantees on loans contracted by State or other institutions. Under Article 114 (2) Cabinet is enjoined to take collective responsibility for its decisions. It follows that the Attorney General's office together with that of the Minister of Finance are the face of Government as a whole in the loan contraction process. That said I now turn to the substantive issue.

The first substantive argument by the Respondent relates to whether the impugned provisions beginning with Article 63 (2) (d) which sets out the functions of Parliament and the National Assembly were enforceable in

the circumstances. In view of the Respondents' stance, I feel compelled to explain, in pedantic detail, my understanding of the relevant law. Article 63 (2) (d) provides that the National Assembly shall oversee the performance of executive functions by approving public debt before it is contracted. It reads:

> 63(2) The National Assembly shall oversee the performance of executive functions by—
>
> .....
>
> (d) approving public debt before it is contracted; *(emphasis added)*

Two words are significant. The first is "shall" and the second is "functions". The drafters of the **Constitution** opted to use the word "shall." Henry Campbell's Black's Law Dictionary, 1968, revised 4th edition at page 1541 indicates that this word is generally imperative or mandatory. It further provides that:

> In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favour of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears.

In my considered view, the word is used in its mandatory sense in Article 63 (2) (d) for good reason.

The word 'function' is defined in Article 266 as including powers and duties. Power is defined in the same Article as including privilege, authority and discretion. The import of Article 63 (2) (d) is therefore that the National Assembly is empowered and duty bound to approve the contraction of public debt before it is contracted.

That said, I agree with the Respondents to the extent that Article 63 (2) (d) should not be read in isolation from Article 114 (1) (e) and Article 207. The two Articles are closely related to Article 63 (2) (d) and they serve to clarify the meaning of Article 63 (2) (d).

Article 114 (1) (e) sets out Cabinet's functions in relation to the contraction of public debt and establishes a link to the content of Article 63 (2) (d). It reads:

> The functions of Cabinet are as follows:
> (e) to recommend, for approval of the National Assembly-
> (i) loans to be contracted by the State; and
> (ii) guarantees on loans contracted by State institutions or other institutions *(emphasis added)*

The use of the word 'are' in relation to the functions of Cabinet in Article 114 (1) (e) (i) and (ii) is a reference to the existing function of that part of Government as it is a present tense plural noun. When read together with the functions of the National Assembly under Article 63 (2) (d) which as earlier stated are peremptory, the provision is indicative of a present act and one without discretion. Cabinet is with effect from 5th January 2016

denied the power to approve loans as the same is reposed in the National Assembly. This means that any conduct of the Executive in contracting of loans or guarantees must be in line with this provision. It is the position reflected in Article 207 which falls under Part XVI of the **Constitution** relating to public finance and budget. Article 207 reads:

> 207 (1) The Government may as prescribed-
> (a) Raise a loan or grant on behalf of itself, a State organ, State institution or other institution;
> (b) Guarantee a loan on behalf of a State organ, State institution or other institution; or
> (c) Enter into an agreement to give a loan or grant out of the Consolidated Fund, and other public fund or public account.
> (2) Legislation enacted under clause (1) shall provide-
> (a) for the category, nature and other terms and conditions of a loan, grant or guarantee that will require the approval by the National Assembly before the loan, grant or guarantee is executed; and
> (b) that any monies received in respect of a loan or grant approved by the National Assembly shall be paid into the Consolidated Fund, or other public fund or public account) .*(emphasis added)*

To appreciate Article 207 it is necessary, once again, to understand the meaning of the key words used and then to read the provision in tandem with Article 63 (2) (d) so that the two Articles are interpreted harmoniously. The Article empowers Government to borrow under the authority of an Act of Parliament. The term 'as prescribed' is defined in Article 266 as 'provided for in an Act of Parliament'. That being the case, there is no alternative meaning to Article 207 purporting to give power to the Executive to pursue a different mode of contracting loans contrary to the mandate given to the National Assembly in Article 63 (2) (d). The power

to borrow is given to Government as a whole with each arm of Government performing its own constitutional function in the collaborative process of legitimate public loan contraction. The National Assembly is given authoritative powers. Article 207 (2) (a) stipulates what must go into the legislation to be enacted by the National Assembly. Thus the National Assembly, approves public debt and by enacting legislation determines the category, nature and conditions of the loans that must be presented to it for direct approval. The National Assembly must approve all loans because no other organ on the part of Government could do so with effect from 5th January, 2016.

Article 207(2) when read literally mandates any legislation, existing or in future providing for the borrowing or lending by Government to meet the conditions set out in Article 207(2) (a) and (b). It sets the standard or yardstick for such legislation. It does not in any way act as a proviso to Article 63(2) (d). Such an interpretation would create ambiguity as well as divert from the intention of the framers of the **Constitution**.

My position is supported by the origins of Article 207. The original formulation of Article 207, found in draft Article 282 is helpful to understanding its meaning. Draft Article 282 of the **First Draft Constitution** found at pages 256-257 of the **First Draft Report** of the

Technical Committee on Drafting the Zambian Constitution (henceforth the TCDZC) reads in part:

> 282 (1): The Government may subject to this Article borrow money from any source.
>
> (2) The Government shall not borrow, guarantee or raise a loan on behalf of itself or any State organ, State institution, authority or any person except as authorised by or under an Act of Parliament.
> (3) Notwithstanding clause (2) the Government shall-
> (a) lay before the National Assembly the terms and conditions of the loan which shall not come into operation unless approved by a simple majority of the National Assembly; and
> (b) pay any money received in respect of the loan paid into the Consolidated Fund or into some other public fund which exists or is created for the purpose of the loan.
> (4) The terms and conditions required to be laid before the National Assembly under clause (3) shall include the following:
> (a) the source of the loan;
> (b) the extent of the total indebtedness by way of principal and accumulated interest;
> I the provision made for servicing or repayment of the loan; and
> (d) the utilisation and performance of the loan.

Draft Article 282 was endorsed unanimously by the District Consultative *fora*, the Provincial, Sector Group and National Conventions consulted by the TCDZC. When it was re-drafted as Article 207, the aim was in the TCDZC's own words, to ensure simplicity and clarity. Article 207 therefore ought not to take anything away from Article 63 (2) (d). To say so would in my view mean that the TCDZC had betrayed the People's trust by veering away from the given direction.

The betrayal would not end there. If, as was argued by the Respondents, Article 207 represents a different intention on the part of the **Constitution**, one which allows the Executive in the absence of required legislation to borrow without National Assembly approval, then the legitimacy of the Article would be questionable together with whatever legislation it spawned and activities it supported. This is because the **Constitution** in Article 63 (2) (d) embodies the People's desires and expectations. And those who bring it to life enjoy a position of trust. I am fortified in this regard by the Indian case of **Government of NCT of Delhi v Union of India and Another**[2] in which the Court at page 57, said:

> The decisions taken by the constitutional functionaries in the discharge of their duties, must be based on normative acceptability. Such decisions, thus, have to be in accord with the principles of constitutional objectivity, which, as a lighthouse, will guide the authorities to take constitutionally right decisions.

This brings me to the third argument of the Respondents. It was argued that Article 207 (2) required the enactment of legislation in order for Article 63 (2) (d) to apply. The argument belies the nature of constitutional provisions once passed into law. In the case of **Davis v Burke**[3] the United States Supreme Court stated that:

> ... [W]e are also of opinion that for the purposes of this case the provision of the Idaho constitution must be deemed self-executing. The rule is thus stated by Judge Which Cooley in his work upon Constitutional Limitations (p. 99): "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely

> indicates principles, without laying down rules by means of which those principles may be given the force of law *(emphasis added)*.

Article 63 (2) (d) when read with Article 114 (1) (e) and other related Articles constitutes a hard constitutional rule which came into force on 5th January, 2016. Its enforcement is also provided for. Under Article 114 (1) (e) Cabinet recommends through a money Bill as laid out in Article 65 (2) a loan to the National Assembly for approval by virtue of Article 63 (2) (d). The process that the National Assembly follows in passing a Bill is generic and well laid out in the **Constitution** and the National Assembly's procedures. Furthermore Article 207 (2) (b) provides for legislation to be enacted to support the minute details that go into the procurement of the loans.

The net effect of the above is that all loans must be approved by the National Assembly and no loans which are not approved by the National Assembly as provided for in Articles 63 (2) (d) read with Article 114 (1) (e) and 207 (2) (a) are envisaged by the **Constitution** other than where the National Assembly itself enacts legislation categorically spelling out which loans need not be presented to it for approval. There is no gap in relation to the fulfilment of Article 63 (2) (d) directly or through legislation envisaged by Article 207, which would translate into giving the Executive organ a power to act as the final authority in the approval of public debt.

Such a position also belies the existence of the **Loans and Guarantees (Authorisation) Act** and the need to read it in accordance with the **Constitution** in the absence of fresh legislation flowing from Article 207 (2). The Respondents have argued, quite alarmingly in my view, that they contracted debt under the authority of, and in accordance with, the **Loans and Guarantees (Authorisation) Act** because no law had been enacted to give effect to Articles 63 (2) (d), 114 (2) (e) and 207. Central to the Respondents' "defence" is the claim that Articles 207 and 63 (2) (d) had to be given effect by enacting the relevant law. That section 21 of the **Constitution of Zambia Act No. 1 of 2016** (henceforth **Act No. 1 of 2016**) provides for legislation to be enacted in order to give effect to a provision of the **Constitution** in the event of a new constitutional mandate. That they were therefore obliged to apply the **Loans and Guarantees (Authorisation) Act** as is. I must admit this argument left me perplexed.

The Petitioner in response to the Respondents' claim contended that the **Loans and Guarantees (Authorisation) Act** is the proper legislation for contracting public debt. He maintained that as the said Act preceded the 2016 constitutional amendments, it ought to have been applied by the Respondents in conformity with Article 63 (2) (d) as guided by section 6 of **Act No. 1 of 2016**.

I have considered the Respondents' argument in light of sections 21 and 6 of **Act No. 1 of 2016** in order to determine whether the law envisaged in Article 207 is yet to be enacted despite the existence of the **Loans and Guarantees (Authorisation) Act**. The relationship between **Act No.1 of 2016**, the **Constitution of Zambia, 1991** and the **Constitution of Zambia (Amendment) Act No. 2 of 2016,** which this Court has already had occasion to consider, is clear. We said at pages J28-29 in the case of **Mutembo Nchito v Attorney General**[4] that:

> Act No.1 of 2016 is the enabling or effectuating Act of the Constitutional amendments and in it are all the relevant provisions for ensuring a seamless transition from one constitutional order to another.

Section 21 of **Act No. 1 of 2016** provides as follows:

> 21. Subject to section six, where an Act of Parliament is required to give effect to an Article of the Constitution as amended, that Article shall come into effect upon the publication of the Act of Parliament or such other date as may be prescribed by, or under, the Act of Parliament.*(emphasis added)*

I take cognisance that section 21 is subjected to section 6 which provides:

> 6 (1) Subject to the other provisions of this Act, and so far as they are not inconsistent with the Constitution as amended, existing laws shall continue in force after the commencement of this Act as if they had been made in pursuance of the Constitution as amended, but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution as amended.
>
> (2) Parliament shall within such period as it shall determine, make amendments to any existing law to bring that law into conformity with, or to give effect to, this Act and the Constitution as amended.

In my considered view, the line of argument preferred by the Respondents does not help them. I say so because if an Act of Parliament was required

to effectuate the provisions of Articles 63 (2) (d), 114 (1) (e) and 207, it would mean that no legislation was in existence to regulate public borrowing during the impugned period. And yet the fact remains that borrowing took place at unprecedented levels. To argue as stated is untenable as it wipes out any legal basis upon which the impugned debt could have been contracted. I have to agree with the Petitioner that the fact that the Respondents did continue to borrow, relying on the **Loans and Guarantees (Authorisation) Act** is an admission on their part that there was an Act of Parliament in place. It is the **Loans and Guarantees (Authorisation) Act.** This Act constitutes the law on public borrowing as envisaged by Article 207 subject to such modifications, adaptations, qualifications and exceptions as may necessary to bring it into conformity with the Constitution as amended. In order to apply **the Loans and Guarantees (Authorisation) Act** after the **Constitution** was amended in 2016, it was necessary to either amend it or read it in such a way as to ensure that the power to authorise borrowing is exercised by the National Assembly. In accordance with section 6 of **Act No. 1 of 2016**, the **Loans and Guarantees (Authorisation) Act** should have been read with such modifications, adaptations, qualifications and exceptions as to bring it into conformity with Articles 63 (2) (d); 114 (1) (e) and 207. Conforming to the **Constitution** is the only way in which existing legislation may be legally and legitimately applied given the changes wrought in the **Constitution**

by the 2016 Constitutional amendments. This is because, as is the case with all other laws, the **Loans and Guarantees (Authorisation) Act** derives its legality from the **Constitution**.

As this Court has already shown, where the existing law is inconsistent with the Constitution, it will be struck down. This is what happened in the case of **Webby Mulubisha v Attorney General**[5] when this Court said as follows at page J19:

> ...the supremacy of constitutional provisions is beyond question. That being the case, any provision on our statute book which runs afoul of a provision of the Constitution such as Article 165 (2) (a) is void to the extent of the inconsistency...

Thus **Act No. 1 of 2016** provides for the manner in which existing laws are to operate in relation to the new constitutional provisions. Existing laws which contravene the **Constitution** cannot be applied wholesale in the face of obvious contradictions with the **Constitution**. They must be read in a manner that makes them constitutional.

I have perused the **Loans and Guarantees (Authorisation) Act** in order to establish the adequacy of its provisions in relation to Article 207. The **Loans and Guarantees (Authorisation) Act** was passed in 1969 and was last amended in 1994. It precedes the democratic dispensation of the post 2016 era and yet it has continued to be the main piece of legislation governing public borrowing.

In its Preamble, it states that it is an Act to provide for the raising of loans, the establishment of sinking funds, the giving of guarantees and indemnities and the granting of loans by or on behalf of the Government, and to provide for matters incidental thereto and connected therewith. The Act regulates all public borrowing with the exception of loans from the Bretton Woods institutions, which loans are governed by specific Acts. This provision specifically responds to the requirement for categorisation of loans in Article 207 (2).

The remaining provisions, cover other elements. Section 3 of the Act gives the Minister the power to raise loans as he or she may deem necessary within the limits set in the Act and as prescribed by statutory instrument as authorised by resolution of the National Assembly. Section 4 specifies that loans running for less than a year are payable into special deposit accounts whereas loans running for longer than that are to be paid into general revenues. Section 5 defines and regulates debt charges. Section 6 which is subjected to the provisions of the Act, states that a loan may be raised by the issue of stocks and bonds, by the issue of treasury bills or by agreement in writing. According to section 7 a loan shall be raised in accordance with the conditions and terms directed by the Minister. Under section 8 the Bank of Zambia acts as the agent of the Minister in the raising of loans by the issue of bonds, stocks or treasury bills.

amendments took effect. In defending the failure to do so, the Respondents have cited Articles 8, 61 and 89(1). This argument is misplaced for more than one reason. As we said in **The Law Association of Zambia and Chapter One Foundation v The Attorney General,**[6] at page 7 of the Abridged Judgment:

> ...we are alive to and in agreement with, the fact that Article 8 outlines the national values and principles...Further the principles guiding the exercise of legislative authority by Parliament are outlined in Article 61 as being the protection of the Constitution and the promotion of the democratic governance of the country. This requirement is settled, as this Court has said in several of its decisions that it is enjoined to apply these national values and principles in interpreting the Constitution and the law.

I can only assume that the argument that the Respondents were making is that the process of enacting new legislation or making the necessary amendments would have been harmful to the separation of powers, complex and costly. The claim is easily disposed of. Firstly the formulation under which 'separation of powers' and 'checks and balances' are effected, is entirely the preserve of the framers of the **Constitution**, the People of Zambia.

Secondly, I take judicial notice that 25 Acts of Parliament were passed in 2020; 18 were passed in 2019; 23 in 2018; 22 in 2017 and 46 in 2016. Surely an Act on such an important subject could have been treated as a priority and enacted in place of some other less pressing Act. I say so because the intention of the framers of the **Constitution** was to make

public borrowing a democratic process in which the People speak through their representatives, loan by loan. So while the Respondents referred to Articles 8, 61 and 89 (1) to demonstrate the difficulties of making the enactments to effectuate Article 63 (2) (d) and related Articles, I see the provisions as important, not for excusing Government intransigence, but for actualising the democratic ideals of the People. The cited Articles affirm the desire on the part of the People of Zambia to provide a solution to the past mischief of excessive public debt accumulation and the Legislative arm of Government was seen as the one rightfully placed, to conduct the requisite check on the Executive.

A look at the **First Draft Report** of the TCDZC supports this conclusion. The rationale behind the Article providing guidance on the contraction of loans by the Government, is at page 257 of the Report, and it reads:

> The Committee, therefore, resolves to include a provision on borrowing and lending by Government in the Constitution, in order to address the problem of high indebtedness which had been previously experienced by the country as a result of unregulated loan contraction by the Executive.

My short answer to the Respondents on this point therefore is that reference to Articles 8, 61 and 89 (1) as a defence to not enacting required legislation does not help them. To the contrary, it raises questions about their commitment to promoting the values and principles in the **Constitution**. This is a concern that the Zimbabwean Constitutional Court

voiced in the case of **Chironga and Another v Minister of Justice and Others**[1] by stating as follows:

> Mechanisms to oversee how public power and state authority is exercised by those so entrusted must be tightened and strengthened. More importantly, if such mechanisms are by command of the supreme law of the land, "the constitution", they must be put in place within a reasonable time to actualise the constitution as a living document. To this end, the State, its organs and functionaries cannot, without consequence, be allowed to adopt a lackadaisical attitude, at the expense of the public interest, in bringing into operation institutions and mechanisms commanded by the supreme law.

It is not only the Executive arm of Government that failed the People, the National Assembly did too. The question as to why the national Assembly did not move to introduce a Bill in response to Article 207 as it is empowered to do under Article 64 begs an answer. That answer may lie in Article 65 which provides that the definition of a money bill includes a bill to raise a loan. The definition further extends to include matters incidental thereto. As the money bill can only be presented by a Minister, there is plausible reason for the National Assembly's failure. That nevertheless does not make their failure excusable. They have tools for compelling a minister to move such as Article 87 (5) on censuring ministers. They did not invoke the said powers.

Nevertheless, I am constrained to take cognisance that the application of the **Loans and Guarantees (Authorisation) Act** without complying with the need for prior approval by the National Assembly undermined the latter's ability to perform its oversight function. Although the Legislature

and the Executive are both arms of Government, they each enjoy their own separate legitimacy because of the election process which, according to the learned authors **Hector Fix-Fierro and Pedro Salazar-Ugarte** in their chapter "**Presidentialism**" at page 629 of the **Oxford Handbook of Comparative Constitutional Law**, makes them institutionally and organically independent of each other. In seeking to find a solution to public debt, the People chose to place their trust in the Legislature and it was for the Executive to cooperate in ensuring that the former fulfilled its Constitutional mandate. In addressing the question of accountability amongst the arms of government and its enforcement before the courts of law, in the case of **R (On the Application of Miller) v The Prime Minister, Cherry and Others v The Advocate General for Scotland**[7] the Supreme Court in the United Kingdom expressed its displeasure with the Executive for preventing Parliament, as another arm of Government from conducting its proper checks upon the Executive as part of the democratic process. The court went further to point out in paragraph 33 to 34 in summary that the court (the third arm of Government) has a duty to give effect to the law.

This is why I took a different view. An egregious wrong has been done to the People of this country by their own Government. It is a wrong that will

be felt for generations to come. And yet it could have been prevented through due diligence on the part of those in Government.

The People of Zambia tried to pre-empt wrong-doing by electing into office individuals that they entrusted with their very future and provided them with the necessary legal instrument in the form of Article 63 (2) (d) and related provisions. The provisions were ignored resulting in the very mischief which the People sought to prevent taking place unimpeded.

That the constitutional functionaries who ought to have been at the forefront of upholding the Constitution not only failed on their watch but continue to deny any wrongdoing is of grave concern. It would therefore be wrong for me not to point this out in no uncertain terms.

I would find that the Respondents breached Article 63 (2) (d), Article 114 (1) (e) and Article 207 by enabling the Government to borrow without prior National Assembly approval. That the contravention renders the post 2016 public debt unconstitutional and therefore, illegal. This is because under Article 1 (2) any act or omission that contravenes the **Constitution** is illegal.

I am obliged to make the finding based on my duty to protect the **Constitution** as the supreme law of the land. As already stated, the **Constitution** in Article 1 (3) binds all persons as well as State organs and

State institutions including this Court. I wish to again echo the Constitutional Court of Zimbabwe which said in the **Chironga**[1] case, that:

> One of the crucial elements of the new constitutional dimension ushered in by the 2013 Constitution is to make a decisive break from turning a blind eye to constitutional obligations. To achieve this goal, the drafters of the Zimbabwean Constitution Amendment (No. 20) Act, 2013 ("the Constitution") adopted the rule of law and supremacy of the Constitution as some of the core founding values and principles of our constitutional democracy. For this reason, public office bearers ignore their constitutional obligations at their own peril. Left unchecked those clothes*(sic)* with state authority or public power may quite often find the temptation to abuse such powers irresistible.

That notwithstanding however, I am alive to the ramifications of finding that the impugned debt is unconstitutional, on both Zambia's economy and its international standing in relation to the outside world, particularly its creditors. I would therefore go further and suspend the declaration of unconstitutionality in order for the Government to within 90 days of the new National Assembly assuming office, bring all the debt acquired during the impugned period under the **Loans and Guarantees (Authorisation) Act** before Parliament for endorsement. I would also order that going forward, the necessary measures, legislative and otherwise, be taken to ensure that Government borrowing is done in accordance with Article 63 (2) (d) read with Articles 114 (1) (e) and 207. I would make no order as to costs.

Prof Justice M M Munalula (JSD)

Constitutional Court Judge