

IN THE CONSTITUTIONAL COURT OF ZAMBIA

2023/CCZ/0016

HOLDEN AT LUSAKA

(CONSTITUTIONAL JURISDICTION)



IN THE MATTER OF:

**ARTICLES 2, 91(3)(a), 91(3)(e), 128(1)(b) AND 128(1)(c)
OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF
THE LAWS OF ZAMBIA**

IN THE MATTER OF:

**ARTICLES 173(1)(b), 173(1)(g), 198(d) OF THE
CONSTITUTION OF ZAMBIA ACT, CHAPTER 1 OF THE
LAWS OF ZAMBIA**

IN THE MATTER OF:

**ALLEGED CONTRAVENTION OF ARTICLES 173(1)(b),
173(1)(e), 198(b)(iii) AND 198(d) OF THE CONSTITUTION
OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF:

**ALLEGED ABUSE OF AUTHORITY OF OFFICE AND
WASTE OF PUBLIC RESOURCES BY PRESIDENT
HAKAINDE HICHILEMA THROUGH THE UNDERTAKING
OF NUMEROUS UNNECESSARY FOREIGN TRIPS
WHICH HAVE NOT BROUGHT ANY VISIBLE BENEFIT
TO THE NATION OTHER THAN PROVIDE A PLATFORM
FOR THE PRESIDENT TO ENGAGE ON A PERSONAL
TOUR OF THE WORLD AND WHICH HAVE BEEN A
MAJOR DRAIN ON PUBLIC COFFERS**

BETWEEN:

SEAN TEMBO

(SUING IN HIS CAPACITY AS THE PRESIDENT OF THE PATRIOTS FOR ECONOMIC PROGRESS)

PETITIONER

AND

THE ATTORNEY GENERAL



RESPONDENT

CORAM:

Shilimi DPC, Mulongoti and Mulife, JJC

On the 15th February, 2024 and 17th June, 2024

For the Petitioner:

In person

For the Respondent:

Mr. M. Muchende, SC, Solicitor General

Mr. N. Mwiya, Principal State Advocate and

Ms. A. Chisanga Principal State Advocate

of Attorney General's Chambers

JUDGMENT

Mulongoti, JC, delivered the Judgment of the Court

Cases referred to:

1. Nyathi v Member of the Executive Council for the Department of Health Gauteng and another [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC)
2. Common Cause v Union of India 23 April, 1947
3. Kasturi Lal Lakshmi Reddy v State of J. & K (1980) 4 SCC 1
4. F. v Minister of Safety and Security 2012 (1) SA 536 (CC) at paragraph 121
5. Mozambique Constitutional Council Case No. 05/CC/2019
6. Economic Freedom Fighters and another v Speaker of the National Assembly and Others, CCT 143/15 and CCT 171/15
7. Steven Katuka (suing as Secretary General of the United Party for National Development) and another v Attorney General and another CCZ Selected Judgment No. 29 of 2016
8. South Dakota v North Carolina (1904) 192 USA 268: ED 448
9. Rhesa Shipping Company SA v Edmunds (1985) 1WLR 948
10. Phiri v The People [1982] ZR 77
11. Kafwaya v Katongo and others CCZ/A/20/2021

Legislation referred to:

1. The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016
2. The Public Finance Management Act No. 1 of 2018
3. The Appropriation Act of 2022

Works referred to:

1. 'What Are Constitutional Principles?' University College of London; Constitution Unit www.ucl.ac.uk
2. Phipson On Evidence, 17th Edition, Sweet and Maxwell, page 151

[1.0] *Introduction*

[1.1] The Petitioner Sean Tembo, filed a Petition on 21st August, 2023 alleging that the Attorney General (respondent herein) has contravened Article 173 (1) (b), (e) and (g) and Article 198 (b) (iii) and (d) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution herein). The alleged contravention is as a result of the high number of foreign trips undertaken by President Hakainde Hichilema. According to the petitioner, these foreign trips are costly and amount to imprudent and irresponsible use of public resources which invariably does not promote fair, efficient and equitable use of economic resources resulting in breach of Articles 173 (1) (b) and (e) and 198 (b) (iii) and (d) of the Constitution.

Relief Sought:

[1.2] As a result of the alleged constitutional breaches, the petitioner is seeking the following:

- a) A declaration that the continued insistence by President Hakainde Hichilema to undertake foreign trips at an extremely

high rate amounts to imprudent and irresponsible use of public resources, does not promote fair and equitable use of public resources and contravenes Articles 198 (b) (iii) and 198 (d) of the Constitution of Zambia;

- b) A declaration that the continued appetite by President Hakainde Hichilema to continue undertaking foreign trips at a very high rate does not promote the efficient and effective use of economic resources and does not promptly respond to the needs of the people and contravenes Articles 173 (1) (b) and 173 (1) (e) of the Constitution of Zambia;
- c) An order for costs for this petition be borne by the respondent to this cause; and
- d) Any other reliefs that the Court may deem necessary and appropriate.

Issue for Determination:

[1.3] The cardinal issue that arises for our determination therefore, is, whether the respondent has contravened Articles 173 (1) (b) (e) and (g) and 198 (b) (iii) and (d) of the Constitution as a result of the high number of foreign trips undertaken by the President.

[2.0] *Petitioner's case*

[2.1] The facts leading to the case are as stated in the Petition and Affidavit Verifying Facts sworn by the petitioner as summarized below.

[2.2] The petitioner alleges that President Hakainde Hichilema has since taking office, undertaken a total of 49 foreign trips within a space of less than two years, giving an average frequency of 2.08 trips per month.

[2.3] The President's foreign trips have not generated any visible benefits and yet the said trips have so far cost the national treasury Two Billion Kwacha (K2,000,000,000.00), which is a waste of scarce public resources for a developing nation such as Zambia.

[2.4] In support of the Petition, the petitioner filed skeleton arguments in which he argues that the President's foreign trips do not align with the constitutional values and principles of the public service which include promotion of efficient, effective and economic use of national resources as provided in Articles 173 (1) (b) and 198 (b) (iii) of the Constitution.

[2.5] In aid of this argument, the petitioner referred to the South African case of *Nyathi v Member of the Executive Council for the Department of Health Gauteng and another*¹, in which the Constitutional Court pronounced itself on the foundational role of certain constitutional

values and principles, stating that the same should be observed scrupulously or risk a constitutional crisis of great magnitude.

[2.6] The petitioner further argued that the substantial costs associated with President Hakainde Hichilema's foreign trips divert significant resources from essential domestic programs and services such as health care, education and infrastructure development. Reference was made to the Indian cases of *Common Cause v Union of India*², and that of *Kasturi Lal Lakshmi Reddy v State of J. & K*³, in which the Supreme Court stated its duty to interfere whenever the Government acts in a manner which is unreasonable and contrary to public interest.

[2.7] It was the petitioner's submission that Two Billion Kwacha (K2,000,000,000) had been expended on unnecessary foreign trips when Zambia had missions funded by taxpayers' money who could, and should have attended to business to which the President travelled for. Thus, the Executive did not exercise prudence in the use of public resources.

[2.8] Additionally, that the President's frequent trips lack transparency and accountability which goes against Article 173 (1) (g) of the

Constitution. The South African Constitutional Court decision of *F. v Minister of Safety and Security*⁴ was referred to in support of that argument.

[2.9] In seeking the declarations above, the petitioner referred to the *Mozambique Constitutional Council case*,⁵ in which the Council nullified some government loans to companies for being unconstitutional. Also cited was the case of *Economic Freedom Fighters and another v Speaker of the National Assembly and others*,⁶ where the Constitutional Court of South Africa emphasized the need for public office bearers to observe constitutionalism, accountability and the rule of law.

[2.10] In conclusion, the petitioner submitted that much as the Minister of Finance, Secretary to the Treasury, Accountant General and various other Government officials are responsible for allocating tax payers' money, it does not entitle the President to a disproportionate share of national resources as that contravenes the provisions of the Constitution.

[3.0] *Respondent's case*

- [3.1] For its part, the respondent filed an Answer and Affidavit Verifying Answer sworn by Oliver Mubita Kalabo, in his capacity as Deputy Secretary to the Cabinet. The respondent denied the petitioner's assertions and averred that the petition was frivolous and vexatious as there were benefits that accrued from the President's foreign trips. That the President's foreign trips cannot therefore be said to be a waste of public resources.
- [3.2] As proof that the Presidential foreign trips resulted in benefits to Zambia, the respondent exhibited correspondence from various Government Ministries and several agreements revealing names of both domestic and foreign companies, indicating committed investments versus actualized, as well as committed jobs versus actualized appearing at pages 49 to 183 of the record of proceedings.
- [3.3] The respondent equally filed skeleton arguments in which it is argued that the functions of the President are as conferred by Article 92 of the Constitution. In addition, that as stipulated under Article 274 of the Constitution, a function conferred in the Constitution may be performed as occasion requires. That this was the case with the trips that the President had undertaken thus far.

[3.4] It was argued that pursuant to Article 92 (2) of the Constitution, the President appoints ambassadors, high commissioners, plenipotentiaries, diplomatic representatives, consuls and heads of international organisations, who exercise delegated functions. Accordingly, that in line with section 4 of the Statutory Functions Act, Chapter 4 of the Laws of Zambia, the President is not proscribed from exercising those delegated functions as the occasion may require.

[3.5] It was the further submission of the respondent that, there is no prescribed number of foreign trips that the President can take in any given year as the trips are determined by a number of factors which include diplomatic relationships and ties, attendance to international and regional meetings and summits such as Southern Africa Development Community (SADC), African Union (AU) and United Nations General Assembly (UNGA). Thus, the President's trips are inevitable because the functions of the President as contained in the Constitution include, among others, negotiating and signing international agreements and treaties. In this regard, the President's trips cannot be said to be a waste of public resources when the benefits to the nation could be seen as

demonstrated by the exhibits in the Respondent's Affidavit in Support of Answer.

[3.6] Referencing the definition of wasteful expenditure as defined by the Public Finance Management Act No. 1 of 2018 to mean, "*unnecessary expenditure incurred as a result of undue care and attention*", it is argued that the President's foreign trips, which have resulted in firm investments cannot be termed as wasteful expenditure as they have been necessary and have not been incurred as a result of undue care and attention.

[3.7] In further substantiating that the President's foreign trips are not wasteful but rather fall in the ambit of the functions of the President as captured under Article 92 (2) (c) of the Constitution, it was submitted that the said trips are budgeted for and adequately funded under Article 265 of the Constitution. Thus, each function and portfolio of Government is budgeted for and funds are appropriated and approved by the National Assembly, reliance was placed on the Appropriation Act No. 30 of 2022 which provided for appropriation to various Government Ministries under the Second Schedule. Specific reference was made to Head 01-3427 under

State House which provides for Presidential Affairs and Initiatives and Head 8-3418 which provides for State and Presidential Affairs.

[3.8] On the basis of the above, the respondent submitted that the petitioner's allegation that the President's foreign trips are a wasteful expenditure, was not substantiated.

[3.9] As regards the assertions at paragraph 4.1 of the Petition, alleging contravention of Article 198 (b) (iii) and (d) of the Constitution due to the president undertaking foreign trips at an extremely high rate, the respondent submitted that in Article 202, the Constitution has provided for a system of revenue and expenditure to be taken before the National Assembly for allocation and budgeting. Consequently, as the trips are properly allocated and budgeted for, they cannot be said to be undertaken in contravention of the said Articles. On the contrary, the trips are responsible, prudent and promote fair and equitable use of public resources. By way of example, the respondent submitted that Exhibit "OMK6" shows that the President's foreign trips contributed to investment worth 4.76 Billion Dollars and the actualization of 20, 528 jobs for the period of 2021 – 2023.

[3.10] In response to the assertion at paragraph 4.2 of the Petition which alleges contravention of Articles 173 (b) and 173 (i) and (e) of the Constitution due to the President's continued appetite for foreign trips, it was submitted that the foreign trips undertaken by the President have promoted the efficient, effective and economic use of national resources.

[3.11] We were invited to take interest and analyse fully, the debt restructuring agreement as contained in the Minister of Finance and National Planning's Ministerial Statement exhibited as "OMK8". In line with that, it was submitted that the President's foreign trips therefore, adhered to the values and principles as set out by Articles 173 (1) (b) and 173 (1) (e) of the Constitution.

[3.12] Regarding the allegation that despite the President wielding extreme power over the Minister of Finance, Secretary to the Treasury and other officials responsible for allocating taxpayers' money, he was not entitled to a disproportionate share of national resources. The respondent submitted that since all budgetary allocation, including that of the President is subjected to the scrutiny of the National Assembly, this assertion by the petitioner was

flawed. That the scrutiny by the National Assembly was in essence upholding the rule of law.

[3.13] On the basis of the above, the respondent submitted that the petitioner is not entitled to the reliefs sought and that the Petition should be dismissed with costs.

[4.0] *Petitioner's reply*

[4.1] In his Reply, the petitioner stated that the respondent had misunderstood the Petition. That it is not the petitioner's assertion that the President cannot or should not make foreign trips but rather that he is making foreign trips in an imprudent and inefficient manner contrary to Article 198 (d) and (b) (iii) as read with Article 173 (1) (b) of the Constitution.

[4.2] Equally, that the petitioner was not asserting that the President cannot or should not exercise delegated functions but rather the imprudent and inefficient use of national resources. A case in point being that of the President refusing to use the Gulfstream Presidential jet and opting to use chartered jets.

[4.3] Furthermore, that the respondent had gone to great lengths to list alleged investment pledges but had failed to show proof that these

investment pledges arose out of the President's foreign trips or if the pledges were actualized in the form of foreign direct investment.

[5.0] *The Hearing*

[5.1] At the hearing of the matter, the petitioner relied on the Petition, Affidavits in Support and Reply and the Skeleton Arguments. To augment, he submitted that the key issue in contention is the true meaning of Articles 173(1)(b) and (e) and 198 (b) (iii) and (d) of the Constitution. The petitioner acknowledged that the President was entitled to make foreign trips but countered that there should be a reasonable number. He argued that as at 21st August, 2023, the President had made 49 trips at a cost of K2.8 billion. According to the petitioner as at the date of hearing (15th February, 2024) the President had undertaken 62 trips which cost approximately K3.5 Billion. That the 62 trips are way beyond the number of trips that the President needs to undertake for purposes of establishing relations with other nations.

[5.2] The petitioner further submitted that the question the Court has to answer is, " *at what point can we say volume and cost of trips is too much and is not efficient, effective and economical use of resources in*

line with Article 173(1)(b) of the Constitution? " That to answer this question, the Court needs to look at factors like the economy of Zambia and the many needs of citizens which government is failing to provide due to lack of financial resources and that it would be dereliction of duty if a politician like himself, did not question the number and necessity as well as costs of the President's foreign trips.

[5.3] It was the further submission of the petitioner that the respondent just filed bulky documents but failed to answer the pertinent question the Petition raises. He argued that the documents at pages 64 to 154 of the record of proceedings, exhibited by the respondent, show a list of countries which have committed to invest in Zambia as well as the actual investment realized. The point being that there were investments from countries which the President never visited like Ethiopia, Peru, Burundi, British Virgin Island, Canada, Eritrea, Lebanon, Mauritius and the Netherlands as shown on pages 65 to 67. Thus, the President does not necessarily need to visit every country to attract investment to Zambia.

[5.4] The Solicitor General, Mr. Muchende, SC, appeared on behalf of the respondent. He placed reliance on the respondent's Answer,

Affidavit in Opposition and Skeleton Arguments dated 27th September, 2023.

[5.5] In augmenting, the Solicitor General submitted that the respondent differs with the petitioner on the criteria he proposes to the Court to find breach of Articles 173 and 198 of the Constitution. This is so, especially that the determinants or evidence for assessing the excesses of the values mentioned, is based merely on comparisons of the number of trips undertaken by the current President and his predecessors.

[5.6] In acknowledging that the President does not have *carte blanche* check to undertake foreign trips, the Solicitor General submitted that the President is guided by the following:

First, budget allocation to State House which is done and approved by the National Assembly. The National Assembly allocates and approves budget for various government ministries in accordance with the Appropriation Act.

Thus, the petitioner bears the burden to prove that the President exceeded the budget allocation; which he has failed to discharge as he glossed over the issue of budget allocation as the

fundamental criteria in assessment of prudent and economical use of public resources.

[5.7] On the burden of proof, the learned Solicitor General quoted the learned author of *Phipson On Evidence, 17th edition at page 151, paragraph 6-06* that "so far as the burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue. " In *casu*, it is the petitioner who has failed to prove that the President exceeded his budget.

[5.8] Secondly, that the petitioner should have demonstrated that the mode of travel used by the President is uneconomical. Thirdly, the size of the entourage of the current President compared to that of his predecessors. The other factors to consider is the purpose of travel. Thus, the petitioner should have demonstrated that the purpose of travel is luxurious holidays, in order to prove wasteful expenditure of resources. It is therefore not just the number of trips that prove wasteful expenditure.

[5.9] Regarding the petitioner's assertion that investors came from countries which the President did not visit, the Solicitor General submitted that the assertion is actually self-defeating in that it

demonstrates prudence and is supported by the fact that the President would dispense with certain destinations.

[5.10] In reply, the petitioner argued that the respondent's argument on budget allocation entails that as long as the expenditure is budgeted for it cannot be wasteful is contrary to the Public Finance Management Act No. 1 of 2018. That section 2 of the Act differentiates between unauthorized and wasteful expenditure. Accordingly, that wasteful expenditure is one which does not meet the three principles of efficiency, effectiveness and economy. Thus, the expenditure of foreign trips does not necessarily need to exceed the budget. Therefore, in as much as the K2.8 billion was budgeted for, the petitioner has demonstrated that the trips were wasteful. That the basis for K2.8 billion on the budget is the green book for 2023 which provides an estimate for each trip. In response to a question from the Court, the petitioner conceded that he should have exhibited this information but urged the Court to take judicial notice that the information is readily available.

[5.11] Regarding the issue of the size of the entourage, he submitted that President Hichilema's entourage is kept secret and since no private

media houses accompany the President there is no information due to lack of transparency.

[5.12] With regard to the fact that investments came from countries which the President did not visit, he reiterated that this proves that the expenditure incurred on foreign trips is wasteful expenditure. That more investments came from countries the President never visited as exhibits at pages 64 to 66 reveal. There was therefore, no correlation between the visits and investments of the country, it follows that the President's foreign trips are wasteful and contravene Articles 173 and 198 of the Constitution.

[6.0] *Determination*

[6.1] We have considered the Petition and Answer, the parties' respective affidavit evidence, as well as their competing arguments. The central issue that falls for determination is, whether due to the high number of foreign trips undertaken by the President, the respondent has contravened Articles 173 (1) (b), (e) and (g) and 198 (b) (iii) and (d) of the Constitution. Key to this issue is the question whether these trips result in wasteful expenditure for being

imprudent and undertaken at the expense of other needy sectors such as education.

[6.2] In the main the petitioner is asking us to declare that the President's numerous or high number of trips are unconstitutional for contravening the above articles, pursuant to Article 128 (1) (b) and (c) of the Constitution which gives this Court jurisdiction to hear a matter relating to a violation or contravention of the Constitution and a matter relating to the President. We are alive to the fact that order IV rule 2 of the Constitutional Court Rules requires that a matter relating to the President (other than that involving his nomination or election) be commenced by an originating notice of motion. Be that as it may, we are of the considered view that this matter is properly before us by way of Petition as the petitioner has alleged contravention of the Constitution which is in line with Article 128(3) which provides that a matter alleging contravention be commenced by Petition.

[6.3] We bear in mind our holding in the case of *Steven Katuka (suing as Secretary General of the United Party for National Development) and another v Attorney General and another*⁷ in which we referred to the case of *South Dakota v North Carolina*⁸ 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 give effect to the greater purpose of the instrument.

[6.4] The Petition alleges breach of constitutional values and principles. Before we delve into whether the respondent has contravened the above articles as alleged, we find it imperative to consider what the constitutional values and principles are. The Constitution does not define the constitutional values and principles. In a publication entitled 'What Are Constitutional Principles?' The University College London; Constitution Unit observed that:

Constitutional principles are the values which underlie constitutional democracy. These principles provide a framework within which politics is properly conducted. There exists no definitive list of constitutional principles, but their fundamental content is widely agreed. These can be grouped as follows: institutional checks and balances; representative government; the rule of law; protection of fundamental rights and integrity and standards in public life.

[6.5] We adopt this definition as it is in line with the Constitution particularly Article 8 which provides for the national values,

principles and economic policies. In addition, the Petition in paragraph 1.1 reads as follows:

1.1 Your Petitioner is a representative of a political party duly registered as an association of persons under the Societies Act, Chapter 119 of the Republic of Zambia and established under Article 60 of the Constitution to, among other things, promote the values and principles specified in the Constitution and provide checks and balances that ensure Government's prudent use of national resources, and by virtue of Article 2 of the Constitution under duty to defend the Constitution

[6.6] With that in mind, the question that arises then is, does the Petition as pleaded prove breach or contravention of the constitutional values and principles for us to exercise our jurisdiction as provided under Article 128(1)(b)?

[6.7] We are alive that the Petition has alleged contravention of Articles 173(1)(b) and (e) and 198(b) (iii) and (d). The entire Article 173 (1) which falls under Part XIII of the Constitution entitled 'Public Service: Values and Principles' is couched thus:

173 (1)The guiding values and principles of the public service include the following –

(a) Maintenance and promotion of the highest standards of professional ethics and integrity;

(b) promotion of efficient, effective and economic use of national resources;

(c) effective, impartial fair and equitable provision of public services;

(d) encouragement of people to participate in the process of policy making;

(e) prompt, efficient and timely response to people's needs;

(f) commitment to the implementation of public policy and programmes;

(g) accountability for administrative acts;

(h) proactively providing the public with timely, accessible and accurate information;

(i) merit as the basis of appointment and promotion;

(j) adequate and equal opportunities for appointments, training and advancement of members of all ethnic groups; and

(k) representation of persons with disabilities in the composition of the public service at all levels

[6.8] Article 198 which falls under Part XVI of the Constitution entitled Public Finance and Budget is couched thus:

198 The guiding principles of public finance include the following:

- (a) transparency and accountability in the development of macro-economic frameworks, socio-economic plans and the budget;*
- (b) promotion of a public finance system that ensures that –*
 - (i) the burden of taxation is shared equally;*
 - (ii) revenue raised nationally is shared equitably among the different levels of government; and*
 - (iii) expenditure promotes the equitable development of the country;*
- (c) sustainable public borrowing to ensure inter-generational equity; and*
- (d) prudent and responsible use of public resources.*

[6.9] Article 173 provides for the guiding principles of the public service, which entails guiding the people in charge of the public service as a whole. This includes politicians, judges and civil servants etc. As observed by the University College London; Constitution Unit, there are five constitutional principles (1) institutional checks and balances, (2) representative government (3) rule of law (4) respect

for fundamental rights and (5) observance of integrity and standard in public life. In conclusion, it is observed that:

the five constitutional principles set out here are indispensable to a constitutional democracy in which citizens agree to be governed, and the state agrees to constraints on its power. Crucially, politicians should view themselves as the stewards of the political system, respecting the spirit as well as the letter of these principles. People working in all parts of the system, including politicians, judges and civil servants, have a duty to uphold such principles.

[6.10] Thus, Article 173 applies to all persons in public service. Article 173 (3) even accords protection from victimization or discrimination to a public officer who performs their function in good faith in accordance with the Constitution.

[6.11] Article 198 provides for the guiding principles of public finance and budget. This is targeted at those in charge of public finance and budget. We considered all the provisions under Part XVI entitled public finance and budget. It runs from Article 198 to Article 212. Apart from the guidelines under Article 198, Part XVI also provides for the consolidated fund, budget and planning, legislation and the financial report of the Republic. Besides, the officers responsible are mentioned such as the Minister of Finance, the National

Assembly and the Auditor General. To us, this entails separation of powers between the three arms of government as it is clear that the National Assembly which embodies the legislature is heavily involved in the process of public finance and budget to all government ministries and organs including State House. As the judiciary, to check the other branches we come in where there has been breach or violation of the law and to ensure the Constitution or law is complied with.

[6.12] Regarding institutional checks and balances, the University College of London; Constitution Unit, observes that power should be distributed between different institutions including the executive, legislative and judiciary. So that no one body can act with unchecked power. The Courts ensure that the executive or legislature does not exceed its legal authority. Has the Petitioner proved the allegations in the Petition for the Court to act as a check and grant the relief sought?

[6.13] As matters stand, we are of the firm view, first that the Petition as pleaded, does not raise constitutional issues (in light of the articles alleged to have been contravened), is speculative and based on conjecture. Second, to prove contravention of the two articles, it

was incumbent upon the petitioner to adduce cogent evidence that the guidelines in Article 198(b)(iii) and (d) and values and principles in Article 173 were violated by the National Assembly and others involved in the public finance and budget process as they allocated funds to State House. It is not enough to simply allege contravention of the Constitution without adducing any cogent evidence. As argued by the Solicitor General, it is a settled principle of the law that he who alleges must prove.

[6.14] The Petition simply alleges that the President has undertaken 49 trips since he took office without providing the source of this information apart from stating various local media reports which is insufficient to prove the veracity of the allegations and information. Yet still in one breath the petitioner acknowledged the President's need to undertake foreign trips.

[6.15] In addition, there was no evidence adduced or details about these alleged unnecessary foreign trips. Crucially, there is no evidence of the needy areas which were neglected at the expense of the foreign trips. On top of that the Petitioner requested the Court to take judicial notice of the green book which allegedly has information of

the foreign trips and to study the economy as proof that other needy areas are neglected.

[6.16] We hasten to state that it is not the duty of the Court to go scouting for information like that. Zambia as a common law jurisdiction follows the adversarial system of justice which requires parties to adduce all the evidence they wish to rely on at trial before the Court. It is trite law that it is not the duty of the Court to fill the gaps in the evidence and thereby assist one party. The case of *Rhesa Shipping Company SA v Edmunds*⁹ per Lord Brandon guides that:

Judges should not fill gaps in the evidence with their own findings or inferences. Inferences must be based on the facts presented and must not go against the evidence.

[6.17] Also in *Phiri v The People*,¹⁰ the Supreme Court illuminated that Courts are required to act on the evidence placed before them. If there are gaps, courts are not permitted to fill them. This Court has also elucidated on this principle of the law in a plethora of its decisions for instance in the case of *Kafwaya v Katongo and others*.¹¹

[6.18] Equally, it is not for the Court to take judicial notice of contentious issues between the parties as submitted by the petitioner. The onus

was on him to present the evidence before the Court to prove the allegations, which he failed to do.

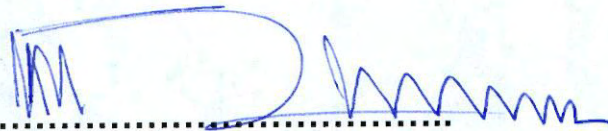
[6.19] We are alive to the arguments on wasteful expenditure by both parties based on the Public Finance Management Act. Our brief perusal of the Act reveals that wasteful expenditure is an offence against a controlling officer. Like all offences evidence must be adduced to prove it to the requisite standard, in a Court of competent jurisdiction.

[6.20] All in all we are of the firm view that the petitioner has failed to prove that the respondent contravened Article 173(1)(b) (e) and (g) and Article 198 (b) (iii) and (d) due to the number of foreign trips undertaken by the President.

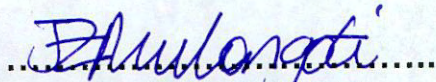
[6.21] Furthermore, perusal of the declarations sought also show that the Petition is frivolous and vexatious. It must fail of its own inanity.

[6.22] We note the foreign authorities cited by the petitioner in support of his case, we find that they were cited out of context and do not aid his case.

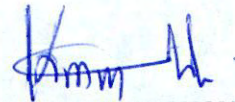
[6.23] The upshot of the preceding paragraphs is that the Petition fails. It is accordingly dismissed. We order each party to bear own costs as the Petition raises issues of public interest.



A. M. SHILIMI
Deputy President Constitutional Court



J. Z. MULONGOTI
Constitutional Court Judge



K. MULIFE
Constitutional Court Judge