

**IN THE HIGH COURT FOR ZAMBIA**  
**HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**2015/HP/0967**

IN THE MATTER OF  
PROTECTION AGAINST DISCRIMINATION  
BY THE LAW

CONSTITUTION OF ZAMBIA  
ARTICLE 23(1) AND (3)

IN THE MATTER OF  
ENFORCEMENT OF PROTECTION  
AGAINST DISCRIMINATION  
BY THE LAW

CONSTITUTION OF ZAMBIA  
ARTICLE 28(a)

IN THE MATTER OF  
THE ELECTION DUE TO THE  
VACANCY IN THE OFFICE OF PRESIDENT

CONSTITUTION OF ZAMBIA  
ARTICLE 38(1)

IN THE MATTER OF  
ELECTIONS OF PRESIDENT

CONSTITUTION OF ZAMBIA  
ARTICLE 34

IN THE MATTER OF TENURE  
OF OFFICE OF PRESIDENT

CONSTITUTION OF ZAMBIA  
ARTICLE 35(1) AND (4)(c)

IN THE MATTER OF BY-ELECTION  
FOR NATIONAL ASSEMBLY

CONSTITUTION OF ZAMBIA  
ARTICLE 67(1)

IN THE MATTER OF  
DISSOLUTION OF PARLIAMENT FOR THE  
EXPIRY OF FIVE YEARS FROM ITS  
FIRST SITTING

CONSTITUTION OF ZAMBIA  
ARTICLE 88(6)(a)

IN THE MATTER OF THE  
ELECTORAL COMMISSION OF ZAMBIA

CONSTITUTION OF ZAMBIA  
ARTICLE 76(1)

IN THE MATTER OF THE PRESIDENTIAL  
ELECTIONS OF 20<sup>TH</sup> JANUARY 2015

ELECTORAL ACT, NO. 12 OF  
2006 ELECTORAL  
COMMISSION ACT NO. 24  
OF 1996

BETWEEN:

<b>RICHARD MUMBA</b>	<u>1st Petitioner</u>
<b>SIMEMEZA SYACHOKE</b>	<u>2nd Petitioner</u>
<b>WRIGHT MUSOMA</b>	<u>3rd Petitioner</u>
<b>KALUBA MUSENDA SIMUYEMBA</b>	<u>4th Petitioner</u>
AND	
<b>ELECTORAL COMMISSION OF ZAMBIA</b>	<u>1st Respondent</u>
<b>ATTORNEY GENERAL AND OTHERS</b>	<u>2nd Respondent</u>
<b>LAW ASSOCIATION OF ZAMBIA</b>	<u>3rd Respondent</u>
<b>GODFREY MIYANDA</b>	<u>4th Respondent</u>
<b>HAKAINDE HICHILEMA</b>	<u>5th Respondent</u>

Coram: Hon Lady Justice F. M. Lengalenga in chambers at Lusaka.

For the petitioners:	Mr. R. K. Malipenga – Messrs Malipenga and Company
For 1st respondent:	Mr. E. M. Kamwi and Mrs. Theresa Phiri – In House Counsel (ECZ)
For the 2nd respondent:	Mr. L. Kalaluka, SC – Attorney General Mr. F. K. Mwale – Acting Senior State Advocate
For the 3rd respondent:	Mr. Musa Mwenye, SC – Messrs Mwenye Mwitwa Advocates Mr. James Banda – Messrs AM Wood and Company

Mr. L. Banda – Messrs TS Chilembo and Company

For the 4th respondent: General Godfrey Miyanda – In person

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## R U L I N G

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### Cases referred to:

1. **ATTORNEY GENERAL v LAW ASSOCIATION OF ZAMBIA (2008) 1 ZR 21**
2. **PUBLIC PROSECUTOR v TAW CHENG KONG (1998) 2 SLR 410**
3. **GOURIET v UNION OF POST OFFICE WORKERS & OTHERS (1977) 3 ALL ER at page 83, paragraph (b)**
4. **WYNTER KABIMBA v ATTORNEY GENERAL & OTHERS (2011) 2 ZR 491 at page 510**
5. **WYNTER M. KABIMBA v ATTORNEY GENERAL & GEORGE KUNDA (2011) 3 ZR 492**
6. **ATTORNEY GENERAL v DOW (2001) AHRLR 99 (BwCA 1992)**
7. **KAMANAKAO & OTHERS v ATTORNEY GENERAL & ANOTHER (2002) AHRLR 35 (BwHC 2001)**
8. **GODFREY K. MIYANDA & OTHERS v ATTORNEY GENERAL (2001) ZR 126**
9. **MINISTER OF BROADCASTING SERVICE & ANOTHER v FANWELL CHEMBO & OTHERS (2007) ZR 82**
10. **MATILDAH MUTALE v EMMANUEL MUNAILE (2007) ZR 118**
11. **ZAMBIA NATIONAL HOLDINGS LTD & ANOTHER v THE ATTORNEY GENERAL (1993/94) ZR 115**
12. **OLIVER JOHN IRWIN v THE PEOPLE (1993/94) ZR 7**
13. **SOUTH DAKOTA v SOUTH CAROLINA**
14. **FAUSTIN MWENYA KABWE & ANOTHER v JUSTICES ERNEST SAKALA & PETER CHITENGI SCJ No 5 of 2012**
15. **GODFREY MIYANDA v THE HIGH COURT (1984) ZR 62**



16. **BARCLAYS BANK (ZAMBIA) LTD v WALISKO AND COMPANY & ANOTHER (1980) ZR 9**
17. **ANDERSON MAZOKA & 2 OTHERS v LEVY P. MWANAWASA & 2 OTHERS (2005) ZR 138**

**Legislation referred to:**

1. **THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA**
2. **RULES OF THE SUPREME COURT , 1999 Edition (White Book)**
3. **THE HIGH COURT RULES, CHAPTER 27 OF THE LAWS OF ZAMBIA**

**Other works referred to:**

1. **HALSBURY'S LAWS OF ENGLAND – Fourth Edition, Re-Issue, Volume 6**
2. **HALSBURY'S LAWS OF ENGLAND – Fourth Edition, Re-Issue, Volume 41**
3. **BLACK'S LAW DICTIONARY – Eighth Edition – Page 330**

At the outset I wish to take judicial notice of the fact that there was an enactment of the Constitution of Zambia Act No 1 of 2016 and the Constitution of Zambia (Amendment) Act No 2 of 2016 on 5<sup>th</sup> January, 2016. This entails that some of the Constitutional provisions referred to herein have been revised.

In delivering this ruling and referring to the old provisions of the Constitution, I am fortified by Practice Direction No 1 of 2016.

The 3rd respondent's application for an order to dismiss the petition is made pursuant to **Article 28 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia and Order 14A of the Rules of the Supreme Court, 1999 Edition (White Book)**. The said application for an order to dismiss the matter is premised on the following grounds:

- (1) That the petitioners have not disclosed or exhibited, in their petition, how Articles 11 to 26 of the Constitution have been, are being and/or are likely to be contravened in relation to them and have therefore no *locus standi* to commence this action;**
- (2) That the purported action by the petitioners to commence a representative action on behalf of the President of the Republic of Zambia, His Excellency the President Mr. Edgar Chagwa Lungu, is not tenable at law or at all especially that the constitutionally designated legal advisor and legal representative of the office of the President, has filed an Answer opposing this application; and**
- (3) The petitioners' claims are not tenable at law or at all, in as far as they seek to have Constitutional provisions struck down because the Constitution is the supreme law of the land, which creates and binds the Courts and the Court cannot therefore strike down any Constitutional provision.**



The summons is supported by an affidavit sworn by one Kangwa Musole George Chisanga, president of the Law Association of Zambia, the 3rd respondent herein. The gist of the contents of his affidavit is that the petitioners have not exhibited how their rights have been, are being or are likely to be infringed in respect to them. It is his contention on behalf of the 3rd respondent that it is not sufficient for the petitioners to claim infringement of vague collective rights without clarifying which one of their fundamental rights has been, is being or is likely to be infringed. It is further contended that the petitioners cannot seek to commence a representative action on behalf of the President of the Republic of Zambia especially when his legal representative has filed an Answer opposing the petition.

Mr. Musa Mwenye, SC led the team of advocates in arguing the grounds on which they rely in applying for the dismissal of the petition on a point of law pursuant to Order 14A of the Rules of the Supreme Court, 1999 Edition and also Article 28 of the Constitution Chapter 1 of the Laws of Zambia.

At the outset, learned State Counsel submitted that the 3rd respondent had opted to file this application rather than an Answer to the petition in order to avoid delving into the merits of the petition as that would affect a person who is not a party to these proceedings.

Mr. James Banda argued ground one and started by acknowledging that the courts have always adopted an open door policy in dealing with fundamental rights and freedoms, with guidance so that not anyone can appear and seek to protect the said rights and freedoms. To support that position, he relied on the case of **ATTORNEY GENERAL v LAW ASSOCIATION OF ZAMBIA**<sup>1</sup> where the Supreme Court dealt with the issue of who has *locus standi* to petition the court to seek the protection and upholding of fundamental rights and freedoms. The Attorney General's contention that the petitioner did not have *locus standi* either in its own right or through public interest litigation was rejected by the Supreme Court on the basis of the petitioner's objects in section 4 of its Act which demonstrates that the petitioner has the mandate to further the development of the law, and identify itself with the citizenry and advance the rule of law and the rights and liberties of the individual.

Learned Counsel submitted further that although the court has an open door policy, its guidance is that a party, individual or entity that seeks to bring a petition on behalf of persons who seek to protect and uphold fundamental rights and freedoms, has to show a connection to the persons. He submitted that in this case, the questions to be posed are:

**"(i) Do the petitioners have sufficient interest?**

**(ii) Can it be rightly argued that a person whose rights they are alleging have been infringed cannot come to court?"**



Mr. James Banda submitted that the response to both questions is that the petitioners do not have sufficient interest or *locus standi*. His reasoning is that the petitioners have not disclosed how they have been discriminated against or are likely to be discriminated against in terms of Article 23, with reference to the incumbent President's term of office or remainder of the late President's term of office. He noted that the petitioners acknowledge that the President's term has been shortened compared to the others who were elected simultaneously with councilors, and he wondered whether that can be called discrimination. Learned Counsel further submitted that Article 23(3) deals with the definition of discrimination and he made an observation that the petitioners have not indicated under which category they fall as required. To support this he relied on the case of **PUBLIC PROSECUTOR v TAW CHENG KONG**<sup>2</sup> which brought out the point that not every distinction is discriminatory. Mr. James Banda emphatically submitted that since discrimination is defined, the petitioners should fit within that definition to demonstrate that they have *locus standi*.

He submitted that however upon perusal of the petition, he observed that the petition does not fall within the definition hence the petitioners' lack of reference to any of the grounds for discrimination.

Mr. Mwenye, State Counsel argued ground two and he emphasized that even though the Attorney General and 2nd respondent herein filed an



Answer to the petition, he indicated that he is supportive of the 3rd respondent's application.

In arguing ground two, he submitted that a perusal of paragraphs 13, 14, 15, 21, 22, 30, 33, 39, 41, 48(b)(c) and (g) of the petition leads to the inescapable conclusion that the petition concerns the rights of the Republican President. He submitted further that the petitioners' only attempt to connect themselves to the case is their allegation in the petition that the President's rights are also their collective rights. Learned State Counsel wondered whether their claim to collective rights is based on votes they casted for the President even though there is no way of checking if they voted. He contended that it is not tenable at law for the petitioners to come to court and assert that the Republican President's rights are their own rights, such as the decision to contest for public office as Republican President. Mr. Musa Mwenye, SC submitted that such election is a very personal thing that cannot be accorded public character as the petitioners have attempted to do. It is his contention that this petition is brought in a representative capacity by the petitioners on behalf of His Excellency, President Edgar Chagwa Lungu. State Counsel argued that this is not tenable at law and that Order 15 Rule 11(3) of the Rules of the Supreme Court, 1999 Edition is clear on the bringing of relator-actions.

He submitted that the Attorney General would be the best petitioner because he is the only person recognised by public law and entitled to represent public rights or interests. To support this argument, State

Counsel relied on the case of **GOURIET v UNION OF POST OFFICE WORKERS & OTHERS**<sup>3</sup> at page 83, paragraph (b) where Lord Wilberforce the Court observed as follows:

**"That it is the exclusive right of the Attorney General to represent the public interest, even where the individuals might be interested in a larger view of the matter, is not technical, not procedural, nor fictional. It is constitutional. I agree with Lord Westbury LC that it is also wise."**

Mr. Mwenye SC, contended further that even if the petitioners argued that they are trying to safeguard amorphous collective constitutional rights, the position at law is that they are unqualified to do so. He submitted that, therefore, on that point alone the court is empowered to dismiss the petition pursuant to Order 15 Rule 12 of the Rules of the Supreme Court, 1999 Edition. He submitted further that if this Court was to grant the reliefs sought, it would be the President who would be forced to stay in office against his will beyond the year 2016.

He further submitted that the situation presented has been decided upon before in the case of **WYNTER KABIMBA v ATTORNEY GENERAL & OTHERS**<sup>4</sup> where there was an attempt to proceed with the matter in the absence of the then Republican President, Mr. Rupiah Bwezani Banda who would have been directly affected by the order sought. According to State Counsel, the matter dealt with the President's qualifications to his office



and his tenure. Upon application to dismiss pursuant to Order 14A of the Rules of the Supreme Court, 1999 the matter was dismissed on the same ground as those contained in ground two of this application. State Counsel quoted the Hon Judge's comments at page 50 lines 33 to 35 where she stated as follows:

**"However, the effect of proceeding in this case would be determining the matter, without affording the subject an opportunity to be heard."**

In further comparison, Mr. Mwenye SC referred the court to the case of **WYNTER M. KABIMBA v ATTORNEY GENERAL & GEORGE KUNDA**<sup>5</sup> where the Court made a similar decision not to proceed in the absence of the vice President.

In summing up ground two, he reiterated that the totality of the law and authorities cited clearly indicate that this petition is not tenable in the manner it has been presented as a representative or relator action.

Mr. Landilani Banda, also Counsel for the 3rd respondent addressed the Court on ground three by submitting that the petitioners' claims are not tenable at law or at all as they seek to have a provision of the Constitution expunged. He drew the court's attention to paragraph 48(d) and (e) of the petition wherein the petitioners seek respective declarations set out as follows:

- “(d) Determination that restrictions under Articles 35(1)(4)(c) and 88(6)(a) are discriminatory clauses of the law of themselves and in their effect as they limit the Presidential tenure of five (5) years under Article 35(1) of the Constitution.**
- (e) Declaration that the restrictions or limitations of Articles 35(1)(4)(c) and 88(6)(a) are illegal, null and void *ab initio* as they relate to dissolution of National Assembly when a President has been elected following the resignation or death of an incumbent President.**
- (f) An order that Articles 35(1)(4)(c) and 88(6)(a) be expunged or removed from the Constitution.”**

Learned Counsel observed that it is on the basis of those sought declarations that the petitioners seek an order to have the aforementioned articles expunged and removed from the Constitution. He submitted that on the basis of the supremacy of the Constitution as pronounced in Article 1(3) and (4), in spite of this court’s wide jurisdiction, it has no jurisdiction or power to grant the reliefs sought to expunge or remove provisions of the Constitution. His reasoning for that position is based on the fact that this court is a creature of the same Constitution and is bound by its provisions.



To buttress his argument he read Article 1(4) which is reproduced as follows:

**“(4) This Constitution shall bind all persons in the Republic of Zambia and all Legislative, Executive and Judicial organs of the State at all levels.”**

He emphasized that the phrase **“at all levels”** in that Article refers to the binding nature of the Constitution on this Court. To buttress that point he specifically referred the court to Article 91(2) which provides that the Judges, members, magistrates and justices of the Courts mentioned in clause (1) are subject only to the Constitution and the law.

Mr. Landilani Banda, therefore, submitted that this court’s jurisdiction does not extend to making declarations and orders that will have the effect of altering the Constitution by removing its provisions. He submitted further that by arguing that this Court has power to expunge and remove Constitutional provisions, it is implied that this court has power to grant reliefs outside its Constitutional jurisdiction and also to alter Constitutional provisions in contravention to Article 79 which has specifically reserved the power to alter the Constitution for Parliament in limited terms and to the Zambian people through a referendum.

Learned Counsel further submitted that the question of whether this court can make the declaration sought and subsequent order was dealt

with by the Court of Appeal of Botswana which has a common law jurisdiction with similar constitutional history as Zambia. The case referred to is that of **ATTORNEY GENERAL v DOW**<sup>6</sup> in which the question whether the court could declare provisions of the Constitution unconstitutional was raised. The Court declined to declare a provision of the Constitution unconstitutional and in its judgment made the following observation:

**"A written Constitution is the legislation or compact which establishes the state itself. It paints in broad strokes on a large canvas the institutions of that state, allocating powers, defining relationships between such institutions and between the institutions and the people within the jurisdiction of the state, and between the people themselves. A Constitution often provides for the protection of the rights and freedoms of the people, which rights and freedoms have thus to be respected in all further state action. The existence and powers of the institutions of state, therefore, depend on its terms. The rights and freedoms, where given by it, also depend on it. No institution can claim to be above the Constitution; no person can make any such claim."**

Learned Counsel further submitted on the issue of whether a court has power to expunge Constitutional provisions by relying on the case of **KAMANAKAO & OTHERS v ATTORNEY GENERAL & ANOTHER**<sup>7</sup> in



which the Court dealt with the challenge on the constitutionality of constitutional provisions that were alleged to be discriminatory on the basis of tribe. The court in its decision *inter alia* observed that to strike out one provision of the Constitution as offending another is to rewrite the Constitution which was a package. It further observed that for the High Court to be able to strike out a provision of the Constitution it would need to have express powers from the body of the Constitution itself enabling it to be the revisionary instrument for the alteration of the Constitution which is not normally the function of a court but of Parliament which is the proper institution.

In concluding his arguments on ground three, Counsel submitted that as the whole petition hinges on this Court expunging Articles 35 and 88 of the Constitution which is not within the court's jurisdiction he urged the court to dismiss the petition on the points of law.

To augment the grounds, learned State Counsel argued that apart from the petitioners' indication in the petition that the President's rights are also their collective rights because of the votes they cast for him on election day, they have not indicated how Articles 11 to 26 have been, are being or are likely to be breached with respect to them as opposed to the President.

With respect to ground three, they relied on the case of **GODFREY K. MIYANDA & OTHERS v ATTORNEY GENERAL**<sup>8</sup> where it was held *inter alia* as follows:

**“(ii) The Constitution is a supreme law from which all other laws trace their validity and no Acts of Parliament, by laws or rules of court, will be given interpretation which will conflict with the Constitution itself.”**

He submitted further that the petitioners’ request in paragraph 48(g) of the petition to prevent the 1st respondent from conducting the 2016 Presidential and General elections in accordance with the Constitution is untenable at law.

State Counsel respectively submitted that the court’s duty is to interpret the Constitution and not to change its provisions by overthrowing the Constitution. The 3rd respondent accordingly prayed that the petition be dismissed.

Mr. Malipenga, Counsel for the petitioners in opposing the application relied on the petitioners’ affidavit in opposition filed on 27<sup>th</sup> August, 2015 and his oral submissions.

He argued that since the 3rd respondent’s application is made pursuant to Order 14A, Rule 2(3) of the Rules of the Supreme Court, 1999



Edition, the 3rd respondent was required to give notice of intention to defend which would amount to filing an Answer which was not filed. He submitted that since the 3rd respondent failed to comply with the notice of intention to defend the application to dismiss the petition should fail.

Counsel for the petitioners argued further that the issues raised by the 3rd respondent in their application and issues raised in the petition are better determined at full trial as opposed to a preliminary hearing. He submitted further that the issue of whether the 20<sup>th</sup> January, 2015 election was a Presidential election as stated by the 1st respondent or a Presidential by-election as stated in the Answer filed by the 4th respondent, General Godfrey Miyanda, was not addressed by the 3rd respondent. Mr. Malipenga argued that by dismissing the petition at this stage, the issue in paragraph 46(a) will not be interpreted.

He submitted that as the petitioners' second prayer is for the determination of the tenure of office of the President in view of the 20<sup>th</sup> January, 2015 Presidential election.

On the question of *locus standi* Counsel for the petitioners argued that the petitioners have sufficient *locus standi* as demonstrated in their affidavit in opposition.

He submitted that the petitioners raised the issue of discrimination as contained in the Constitution in as it relates to the tenure of office of the

President who follows the death of any incumbent President. He stated that the restrictions in the Constitutional provisions make them discriminatory in terms of Article 23(1). Counsel for the petitioners submitted that even Parliament has recognised the imperfection in the provisions. He argued that this court has powers constitutional powers to expunge any provision which may be in conflict with fundamental rights. He argued that they relied on Article 94(1) of the Constitution to support the argument of the court's unlimited jurisdiction to hear and determine any case. Mr. Malipenga argued that Counsel for the 3rd respondents did not refer to any clause to oust that unlimited jurisdiction. He submitted that they are fortified by Article 28 which empowers this court to make any order it considers appropriate. It is Counsel's contention that the petition should not be dismissed at this stage when all the issues have not been addressed especially since Order 14A Rule 2(3)(c) clearly states that the determination will be final. He submitted further that by dismissing the petition the entire cause will not have been determined.

In response to State Counsel's contention that the petitioners' instituted a representative or relator action, Mr. Malipenga argued that the petition is not a relator action that ought to have been brought in the Attorney General's name in what is termed as a public right. He submitted that according to Order 15, Rule 11(3) of the Rules of the Supreme Court, 1999 a relator action is described as follows:

**".... a relator action is one in which a person or body claiming**



**to be entitled to restrain interference with a public right or to abate a public nuisance or to compel the performance of a public duty is bound to bring such in the name of the Attorney General."**

Counsel for the petitioners submitted further that relator actions have three components which a person seeking has:

- (a) A person or body must be seeking to restrain interference with a public right**
- (b) One must seek to abate a public nuisance; and**
- (c) To compel the performance of a public duty.**

He argued that the petitioners do not seek any of the three components and that the petition is properly before this court and that there was no need for the petitioners to have brought this petition in the Attorney General's name.

Mr. Malipenga's reaction to Counsel for the 3rd respondent's allegation that the petitioners' action is a representative action on behalf of the President, Mr. Edgar Chagwa Lungu was that the petitioners denied it in their affidavit in opposition. He, however, submitted that the petitioners'

position is that the 3rd respondent's application is a representative action on behalf of the 1st and 2nd respondents for the following reasons:

- (i) **That the application should have been commenced by the 1st respondent since the 3rd respondent contend that the court cannot order the 1st respondent not to hold the 2016 presidential elections.**
- (ii) **That the 3rd respondent in its affidavit in support is depending on the 2nd respondent's Answer.**

With respect to the 3rd respondent's authority of **WYNTER KABIMBA v ATTORNEY GENERAL & OTHERS** Counsel for the petitioners distinguished it from the current petition as the facts and reliefs sought therein are not the same as in the current petition.

To buttress his submission that this court should not dismiss the petition, Counsel for the petitioners relied on the case of **MINISTER OF BROADCASTING SERVICE & ANOTHER v FANWELL CHEMBO & OTHERS**<sup>9</sup> in which the Supreme Court held *inter alia* as follows:

**"It is not the duty of the courts to edit or paraphrase the laws passed by Parliament. The duty of the courts is to interpret laws as found on the statute."**



Mr. Musa Mwenye, SC responded to the arguments advanced by Counsel for the petitioners. With respect to the issue that this application is incompetent because a Notice of Intention to Defend and an Answer were not filed, he submitted that since a petition is in a special class of actions, there is no requirement to file a formal Answer. For that position, he relied on the Protection of Fundamental Rights Rules, Statutory Instrument N<sup>o</sup> 156 of 1969 which disclose that there is no procedural requirement to file a formal Answer. He further relied on the case of **MATILDAH MUTALE v EMMANUEL MUNAILE**<sup>10</sup> where the Court held that a petition is not a pleading.

State Counsel submitted that Order 14A Rule (1) of the Rules of the Supreme Court empowers this court to determine a point of law on its own motion. He submitted further that the totality of the issues raised and the gravity of the order or declaration sought to be made in the absence of the Republican President who is not a party to these proceedings justify the court making an order of its own motion.

With regard to the issue raised on the relevance of authorities from Botswana, State Counsel's response was that in constitutional cases, it is the accepted practice to cite cases from comparable jurisdictions as long as the authorities are good law. His reaction to Counsel for the petitioners' challenge that they should have cited provisions of the Constitution of Botswana, was that it was unnecessary as the principles in those cases are sufficient to demonstrate the point that a court cannot expunge

constitutional provisions and that for a court to do so, the Constitution itself should give a court express power.

State Counsel responded to the issue raised that this court has unlimited jurisdiction under Article 94(1) of the Constitution by relying on the case of **ZAMBIA NATIONAL HOLDINGS LTD & ANOTHER v THE ATTORNEY GENERAL**<sup>11</sup>. In that case the Supreme Court observed that the jurisdiction of the High Court under Article 94 is unlimited but not limitless since the court must exercise its jurisdiction in accordance with the law.

State Counsel responded to Counsel for the petitioners' argument that this application will not deal with all the claims by submitting that the claims at (a) (b) (c) and (h) in paragraph 46 of the petition are covered by ground 2 of this application whilst the claims at (d) (e) and (f) of the same paragraph are covered by ground 3 and the claim at (g) is covered by ground 3. He reiterated that the court's determination of the application on the points of law raised will deal with all the matters in contention in the case.

His reaction to Counsel's argument that the 3rd respondent was contending that the Constitution is perfect, is that it has never been their contention. He, however, submitted that regardless of how imperfect the Constitution may be, the court cannot expunge its provisions as the power



to alter constitutional provisions is vested in Parliament as provided in Article 79 of the Constitution.

With respect to the petitioners' argument that the petition lodged is not a representative action to enforce the Republican President's rights, Mr. Mwenye, SC submitted that the court may peruse paragraphs 12, 13, 14, 15, 20, 27, 31, 37, 39 and 46(c) of the amended petition to verify that the case concerns the President's alleged constitutional rights which the petitioners claim as their collective rights by virtue of allegedly voting for him.

On Counsel's attempt to distinguish the **WYNTER KABIMBA** case from this petition on the basis of reliefs sought, State Counsel's response is that the principles enunciated in the **KABIMBA** case apply to this petition and that therefore, this case cannot proceed on the merits because the President who is likely to be affected by any decision of this court, is not a party to these proceedings and will not be given an opportunity to be heard.

State Counsel rejected Mr. Malipenga's argument about this case being about interpretation of Constitutional provisions on the ground that the petition has been brought pursuant to Article 28 of the Constitution whose side note indicates that it is for enforcement of protective provisions which in other words, according to State Counsel are for enforcement of specific fundamental rights and freedoms.

He also reverted to the issue of Counsel for the petitioners' attempt to distinguish the **GODFREY MIYANDA** case from this case on the basis of the reliefs sought. He submitted that the following principles pronounced in that case are applicable to the present case. They are reproduced in part as follows:

- "(i) The Constitution is the supreme law of the land from which all other laws trace their validity  
.....**
- (ii) The High Court cannot make any order which will stop the Returning Officer from doing what he or she is required by the Constitution to do**
- (iii) The Court cannot overthrow the Constitution, it has to abide by the Constitutional provisions."**

State Counsel thanked Mr. Malipenga for the citation of the case of **MINISTRY OF INFORMATION AND BROADCASTING SERVICES & ATTORNEY GENERAL v FANWELL CHEMBO & OTHERS** and he adopted it to emphasize that the Court's duty is to interpret the law and not to edit the law. He submitted further that what the petitioners are seeking for in their petition to remove articles of the Constitution is worse



than editing the law. He, therefore, reiterated that this court cannot expunge Constitutional provisions.

Mr. James Banda, Counsel for the 3rd respondent in augmenting the 3rd respondent's submission on the Notice to Defend added the authority of Order 1 Rule 4 of the Rules of the Supreme Court which defines Notice of intention to Defend or Notice of Acknowledgment of Service. He quoted from the explanatory notes at Order 10 Rule 5(2) which state as following:

**"An acknowledgment of service will be required in the case of all originating summonses (other than those *parte* or the case of an originating summons under O. 113) but not in the case of originating summons or petitions."**

In view of the foregoing, Mr. Banda submitted that there is no requirement to file a Notice of Intention to Defend.

In response to Counsel for the petitioners' arguments with respect to section 4 of the Law Association of Zambia Act, Mr. James Banda submitted that what he did not address is the petitioners' standing or *locus standi* in this matter.

He submitted further on the issue of *locus standi* that Mr. Malipenga's argument that this application should have been made by the Electoral Commission of Zambia, or the Attorney General is not supported by any

authority. He, submitted that, however, the 3rd respondent's position with regard to section 4 is that upon the court's perusal of that provision it will easily conclude that the said provision gives the 3rd respondent power or the mandate to raise issues such as the ones raised.

Mr. Landilani Banda amplified the 3rd respondent's submissions on two points.

The first point he addressed is the issue of jurisdiction of the court by citing the case of **OLIVER JOHN IRWIN v THE PEOPLE**<sup>12</sup> where the Supreme Court made the following observation:

**"Although Article 94 of the Constitution gives the High Court unlimited jurisdiction that Court is bound by all the laws which govern the exercise of such jurisdiction."**

Counsel's second point relates to Mr. Malipenga's contention that this court is only being called upon to interpret the Constitutional provisions. Mr. Landilani Banda disagreed with that view and he submitted that this court cannot be invited to interpret Constitutional provisions in a manner that contradicts them as was observed by the Supreme Court in the case of **SOUTH DAKOTA v SOUTH CAROLINA**<sup>13</sup> when it stated as follows:

**"I take it to be an elementary rule of constitutional construction that no one word of the Constitution is to be segregated from all others and to be considered alone."**



In relation to this case, Counsel submitted that this elementary principle was adopted by the Supreme Court of Zambia in the case of **FAUSTIN MWENYA KABWE & ANOTHER v JUSTICES ERNEST SAKALA & PETER CHITENGI**<sup>14</sup>. He accordingly invited this court to consider the said judgment.

The 4th respondent herein also filed an application for an order to dismiss the petition pursuant to Order 14A of the Rules of the Supreme Court, 1999 Edition (White Book). I decided to consider it together with the 3rd respondent's application as it deals with similar issues and the 4th respondent seeks the same order to dismiss the petition on points of law.

The said application is premised on the following grounds:

- "1. That the commencement of this petition in the High court is *ultra vires* Article 41(2) of the Constitution of Zambia.**
  
- 2. That in bringing up in the High Court for Zambia questions, complaints, challenges and/or claims arising from the Presidential election conducted by the Electoral Commission of Zambia on 20<sup>th</sup> January, 2015, the petitioners have not complied with the law laid down in the Constitution and the electoral law and**

**regulations, which they are obliged to comply with and consequently the petitioners are estopped from continuing with this matter in the High Court for Zambia.**

- 3. That the commencement of this petition in the High Court to determine questions that have arisen from the election of President Edgar Chagwa Lungu who is the winner of the Presidential election conducted by the Electoral Commission of Zambia on 20<sup>th</sup> January, 2015 is an abuse of court process."**

The application for an order to dismiss the petition is supported by an affidavit and supplementary affidavit which were sworn by one Godfrey Miyanda, the 4th respondent herein.

The gist of the contents of his affidavit is that he and President Edgar Chagwa Lungu were Presidential candidates in the 20<sup>th</sup> January, 2015 Presidential elections in which the latter emerged the winner and sworn in on 25<sup>th</sup> January, 2015 as the Republican President. He deposed that he was not aware of any petition that was filed challenging the presidency.

According to the 4th respondent's averment, the presidential candidates for the 20<sup>th</sup> January, 2015 election including the current President, Mr. Edgar Chagwa Lungu knew or ought to have known that the



said election was for the residue of the late President Sata's tenure of office. The said Godfrey Miyanda's reasoning is based on part of the campaign message by President Edgar Chagwa Lungu which was to the effect that opposition candidates did not qualify to contest the remainder of late President Sata's tenure of office because they were not conversant with the Patriotic Front manifesto. The 4th respondent averred that in the light of that campaign message, he publicly campaigned that he was better placed to continue serving the remainder of the late President's term because the programmes that the Patriotic Front were carrying out of opening and linking the country were in the manifesto of the Heritage Party and other campaign publications in 2001 before the Patriotic Front published them. According to the deponent there were no allegations of discrimination by President Edgar Lungu or his supporters or any other candidates or their supporters in a timely fashion during or after the 20<sup>th</sup> January, 2015 Presidential elections.

In addition to the affidavits and exhibits the 4th respondent filed into court skeleton arguments on which he relied. He dealt with the issue of the petitioners' *locus standi* alleged discrimination with respect to the Republican President's tenure of office and this court's jurisdiction.

On the issue of the petitioners' *locus standi*, it is the 4th respondent's contention that the petitioners' status as supporters and voters for President Edgar Lungu does not give them standing in this matter to move this court under Article 28 of the Constitution. He submitted that they are

strangers to the petition and that they cannot make allegations of discrimination against the President on his behalf as they have no interest in the matter.

It is further the 4th respondent's contention that although the petitioners brought this petition under Article 28 for alleged cited breaches of Part III, he perceives it as an election petition disguised as a complaint under Part III of the Constitution. He submitted that Article 28 is not applicable to the petitioners because there is no link between the petitioners to any breach of the Constitution. He referred the court to Article 28(1) which provides as follows:

**"28(1) Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may for redress to the High Court which shall –**

- (a) hear and determine any such application**
- (b) determine any question arising in the case of any person which is referred to it in pursuance of clause (2);"**

He submitted that based on the documents filed by the petitioners there is nothing to indicate how Articles 11 to 26 have been breached with



regard to the petitioners. He submitted further that his observation on the lack of information is important in relation to Article 28 which restricts the persons who may apply to the High Court. The 4th respondent further submitted that according to the petition they allege that President Edgar Chagwa Lungu has been or is likely to be discriminated against by the curtailing of his tenure of office. He, however, argued that it is not the petitioners but the winner of the 20<sup>th</sup> January, 2015 election, His Excellency President Edgar Chagwa Lungu who is entitled to bring the action.

In his first ground for an order to dismiss the matter, the 4th respondent's contention is that the petitioners' commencement of this petition in the High Court is *ultra vires* Article 41(2) of the Constitution. This provision states as follows:

**"41(1) The Chief Justice shall be the Returning Officer for the purpose of the elections to the office of President.**

**(2) Any question which may arise as to whether –**

**(a) any provision of this Constitution or any law relating to election of a President has been complied with;**

**(b) any person has been validly elected as President under Article 34; shall be referred to and determined by the full bench of the Supreme Court."**

He submitted that the questions and issues in the petition arise from the 20<sup>th</sup> January, 2015 presidential elections and that the said Article is clear and unambiguous and mandatory on the jurisdiction of the court that must determine the matter. He relied on his own case of **GODFREY MIYANDA v THE HIGH COURT**<sup>15</sup> which dealt with the issue of jurisdiction. The 4th respondent stated that he instituted proceedings before a single judge of the Supreme Court and Honourable Justice Matthew Ngulube, Deputy Chief Justice as he then was, held that the Supreme Court of Zambia is basically an appellate Court and that it has no original jurisdiction to entertain a complaint as a court of first instance.

In consideration of the decision in the cited case, the 4th respondent submitted that even in the current case, the full bench of the Supreme Court is the court of first instance in matters relating to presidential petitions or elections. He therefore urged this court to decline to assume jurisdiction in a petition relating to presidential elections that is disguised as a petition under Article 28 of the Constitution. To support his submission that the principle is that litigants have to follow laid down procedures in commencing actions, he relied on the High Court case of **BARCLAYS BANK (ZAMBIA) LTD v WALISKO AND COMPANY & ANOTHER**<sup>16</sup> where the court held as follows:

**"Where an Act of Parliament has specifically laid down the**



**method by which proceedings must be begun, there is no option as to which procedure to adopt. The plaintiff is bound to commence his action by the procedure laid down by the Act."**

The 4th respondent submitted that the procedures for presidential petitions are contained in Article 41(2) of the Constitution and they are also covered in the Electoral Act, No 12 of 2006 and its subsidiary legislation. It is his contention that since the petitioners have not complied with the provisions of Article 41(2) of the Constitution that this court should dismiss the petition.

He reverted to the issue of the petitioners' lack of *locus standi* in this matter. He submitted that in section 94 of the Electoral Act the petitioners have *locus standi* to present their petition in the High Court. Section 94(a) provides as follows:

**"94. An election petition may be presented to the High Court by one or more of the following persons –**

- (a) a person who lawfully voted or had a right to vote at the election to which the election petition relates."**

In concluding his submissions, the 4th respondent reiterated his reliance on Order 14A of the Rules of the Supreme Court, 1999 edition

which empowers this court to dispose of the case on a point of law. He therefore, urged this court to allow his application to have this petition dismissed.

Mr. Malipenga, Counsel for the petitioners replied and submitted that they still rely on Article 41(2) of the Constitution in relation to the election law being complied with and with the validity of the person who has been elected.

He submitted further that it is not any question such as that contained in the current petition that has to be decided in the Supreme Court. To support that submission he relied on the case of **ANDERSON MAZOKA AND 2 OTHERS v LEVY P. MWANAWASA AND 2 OTHERS**<sup>17</sup> wherein the Supreme Court held *inter alia* as follows:

**"3. Article 41(2) of the Constitution confers the Supreme Court jurisdiction to decide whether a person has been validly elected as President**

.....

**5. Under Article 41(2) of the Constitution, the election of a President can be challenged on any question, either of law relating to the election of a President or the validity of the election itself. Thus, any question relating to the legitimacy of a Presidential election including corruption, bribery and non-compliance with the**



relevant law can be considered under Article 41(2) of the Constitution.

6. **In trying the question alleged, the Supreme Court is at large to examine the conduct of the Presidential election itself or indeed the compliance to the provisions of the applicable law. Should the court be satisfied, on any proven facts, that a candidate was not validly elected or indeed that the relevant laws were not complied with, so as to negate the legitimacy of the election, it will void such an election."**

Counsel for the petitioners submitted that on the basis of the holding in the cited case, the three grounds that were raised by the 4th respondent fly in the teeth of this authority.

He further cited the authority of **WYNTER KABIMBA v THE ATTORNEY GENERAL & OTHERS** where the High Court held *inter alia* as follows:

**"That the supreme law of the land, the Republican Constitution has expressly made provision for all questions related to election to the office of president to be determined by the Supreme Court. By so doing, the Constitution has by necessary implication ousted the jurisdiction of the High**

**Court from hearing any matters related to Article 34 of the Constitution.”**

He submitted that Article 41(1) and (2) of the Constitution have limited application to the Supreme Court and that, therefore, it is not the proper Court to determine the questions relating to the 20<sup>th</sup> January, 2015 elections. It is further Counsel for the petitioners' contention that the Supreme Court is not the court of first instance with jurisdiction to determine the issues raised such as those of discrimination. He respectfully submitted that the petition is properly before this court and he prayed that this court allows the petition to be determined on the merits.

In response to Counsel for the petitioners' submission that the Supreme Court is not a court of first instance, the 4th respondent submitted that that position would be correct if there were no contrary statutes or laws that were in force. He reiterated that the full bench of the Supreme Court is the court of first instance where presidential elections are concerned.

The 4th respondent distinguished Counsel's submissions on the case of **GODFREY K. MIYANDA v THE HIGH COURT** from the current case by submitting that in the 1980s the article referred to in his summons to dismiss the petition was non-existent. To fortify his submissions he relied on the case of **WYNTER KABIMBA v THE ATTORNEY GENERAL &**



1(2) in the explanatory notes the application of Order 14A is clearly spelt out at page 163 where the learned authors state as follows:

**"..... if a suitable question of law or construction arises which can finally determine the whole action, an application under Order 14A should be made....."**

Therefore, the respondents are perfectly in order by bringing the application so that the matter can be disposed of a point of law. This type of application is proper so long as the points of law or grounds are stated as the respondent have done.

With regard to Counsel's contention that the 3rd respondent was required to give notice of intention to defend which amounts to filing an Answer, which was not filed, I find that this issue was adequately addressed by the 3rd respondent through Counsel, Mr. James Banda's submissions when he stated that in the case of originating summons or petitions there is no requirement to file a Notice of Intention to Defend or an Answer and his submission is supported by Order 10, Rule 5(2) of the Rules of the Supreme Court, 1999 Edition.

The issues relating to the alleged non-compliance with the provisions of Order 14A having been addressed, I turn to the grounds relied on by the Counsel for the 3rd respondent.

The first ground relates to the issue of the petitioners' lack of interest or *locus standi* in the petition they lodged. According to the paragraphs 18 and 19 of their petition, the petitioners claim to have voted in the 20<sup>th</sup> January, 2015 Presidential elections and to have interest in the Constitutional governance of Zambia as Zambian citizens.

I had occasion to peruse the contents of Articles 11 to 26 of the Constitution and like the 3rd respondent's advocates and 4th respondent, I do not see how those provisions have been, are being and/or are likely to be contravened in relation to the petitioners because they have not disclosed. As Mr. James Banda rightly submitted, Article 23(3) defines the expression "**discriminatory**" as affording different treatment to persons on the basis of race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

According to Counsel's observation the petitioners have not indicated the category they fall in. In my considered view the petitioners have used the term loosely as it is not attached to any category and as such they are unable to demonstrate their interest or *locus standi*.

In the circumstances, in the absence of the petitioners' demonstration of their interest in the matter by disclosing how they are



likely to be affected by the alleged discrimination in terms of Article 23(3) of the Constitution, I find that they have no *locus standi* in this matter.

I turn to the 3rd respondent's ground two wherein it is alleged that the petitioners have brought a representative action on behalf of the Republican President His Excellency, Mr. Edgar Chagwa Lungu. This assertion was strongly denied by Counsel for the petitioners who proceeded to define relator action in terms of Order 15, Rule 11(3) of the Rules of the Supreme Court, 1999.

The learned authors of the **HALSBURY'S LAWS OF ENGLAND, Fourth Edition, Re-Issue, Volume 41** at page 704 and paragraph 915 define a relator action in the following terms:

**"A relator action may be brought to restrain interference with a public right, whether committed or threatened, or to compel the performance of a public duty to abate a public nuisance, and in such an action the Attorney General is a necessary party. The action is brought in the name of the Attorney General at the relation of the person or body seeking to prevent the commission or continuation of the public wrong."**

After considering this definition and the definition in Order 15 Rule 11(3) of the Rules of the Supreme Court, I am inclined to agree with Counsel for

the petitioners and I do agree with him that the petitioners' actions does not fall within the definitions of relator actions.

The other description of the petitioners' action by the 3rd respondent is a representative action. The learned authors of **HALSBURY'S LAWS OF ENGLAND, Fourth Edition, Re-Issue, Volume 41** at page 704 and paragraph 914 define a representative action as follows:

**"Where more than one person has the same interest in a claim, the claim may be begun, or the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest. The court may direct that a person may not act as a representative, and any party may apply to the court for such an order."**

A further definition of representative action by the learned authors of **HALSBURY'S LAWS OF ENGLAND, Fourth Edition, Re-Issue, Volume 6** at page 277 and paragraph 658 is set out in the following terms:

**"Under the Rules of the Supreme Court one or more of numerous persons having the same interest in one cause or matter, may sue or be sued, or may be authorised by the court to defend, on behalf of all persons so interested, but**



**care has to be taken in deciding what classes can be represented."**

In my considered view the two definitions of representative actions are more suited in describing the petition than the earlier one of relator action. My reasoning is based on the petitioners' claim in paragraph 39 of their amended petition, that President Edgar Lungu's rights and freedom have become collective rights of the voters and supporters and that they are being discriminated by the law by the reduction of President Edgar Lungu's tenure of office to the remaining tenure of the National Assembly.

It is the petitioners' claim to vague collective rights and that they are being infringed that Counsel for the 3rd respondent are opposed to. From the contents of the petition it is apparent that the petition has been brought in a representative capacity on the behalf of the President under the guise of having assumed his rights and freedoms as collective rights and freedoms. The question that begs an answer is how his decision to contest or not to contest as Republican President can be a collective decision. The petitioners have failed to demonstrate through their assertions in the petition how they are likely to be affected or disadvantaged in terms of infringement of their rights if President Edgar Lungu only serves the remaining term of the late President Michael Chilufya Sata's term of office.

Upon perusal of the petition, and particularly paragraphs 13, 14, 15, 21, 22, 30, 33, 39, 41, 48(b)(c) and (g) I totally agree with Mr. Musa Mwenye, SC's submission that they concern President Edgar Lungu's rights. I am, therefore, not satisfied that the petitioners have established their interest in this matter to legally entitle them to bring an action in representative capacity on behalf of the Republican President. As earlier submitted by State Counsel, the Attorney General would be best suited to bring this petition to represent public rights and interest that are being claimed as collective rights.

In the circumstances, I find that the petitioners have no *locus standi* to bring this petition on behalf of the Republican President despite the fact that their Counsel tried to convince the court that they have *locus standi* as demonstrated by the restrictions in the Constitutional provisions referred to in paragraph 34 of the amended petition, namely Articles 35(4)(c) and 88(6)(a).

The petitioners' assert that the aforementioned Constitutional provisions are restrictive and discriminatory on the five years tenure of office of President who is elected following the death or resignation of an incumbent President as his tenure is for the remainder of the life of the National Assembly. Consequently, they seek an order that the said Articles 35(1)(4)(c) and 88(6)(a) be expunged or removed from the Constitution based on their advocates' argument that the court has unlimited jurisdiction under Article 94 of the Constitution.



It is the 3rd respondent's contention that the petitioners' claims for an order that the named Constitutional provisions be expunged or removed, is not tenable at law for reasons that they advanced.

I will revert to consideration of this ground after considering the 4th respondent's grounds.

I also considered the 4th respondent's grounds, submissions and authorities which have been of great assistance to the court.

In considering the first ground that the commencement of this petition in the High Court is *ultra vires* Article 41(2) of the Constitution of Zambia I had occasion to look at the said provisions which confers jurisdiction on the Supreme Court to determine any question relating to the election of a President to office. Counsel for the petitioners had relied on the **MAZOKA** case which is considered to be supportive of the 4th respondent's argument that it is the Supreme Court that is conferred with jurisdiction to hear matters pertaining to the President's election.

Although the questions before this court do not relate to the President's election to office, I consider the issue of tenure of his office or service of the remainder of the term of office to fall within the same category as they relate to the Republican President.

Therefore, I am of the considered view that the correct position of the law in view of Article 41(2) of the Constitution is that this court lacks jurisdiction. Consequently, the commencement of this action or filing of the petition in the High Court is irregular as it is a contravention of Article 41(2) of the Constitution.

The third ground relied on by the 4th respondent is tied up with the first ground. It is my considered view that if the petition is not properly before this court on the basis that this court lacks jurisdiction I am inclined to agree and I do agree that the commencement of this action is an abuse of the court process.

The 4th respondent also dealt with the issue of the petitioners' *locus standi*. He was of the view that the petitioners cannot claim interest or legal standing in this matter merely because of being supporters and voters for President Edgar Lungu and move this court to determine allegations of discrimination.

I have considered the question of the petitioners' status in the petition and ruled that they have no *locus standi*. Therefore, the 4th respondent's contention that they are strangers to the petition is the correct position of the law in view of my earlier comments on the matter.

Before proceeding to analyse and evaluate the arguments on the 3rd respondent's ground three I wish to consider some definitions of



Constitution in order to emphasize the importance of and role of such document in any nation or state.

In addition to the definition of a written Constitution from the Court of Appeal of Botswana, the learned author, Bryan Garner in **BLACK'S LAW DICTIONARY, Eighth Edition** at page 330 defined the Constitution in the following terms:

**"the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties."**

A further definition is that of the United States Constitution which is described as follows:

**"a rigid Constitution whose terms cannot be altered by ordinary forms of legislation, only by special amending procedures. It cannot be changed without the consent of three fourths of the state legislatures or through a constitutional convention (US Constitution Article V)."**

From the contents of the definitions it is indisputable that the Constitution of any country or nation is the supreme law of the land as it establishes

government institutions, defines governmental sovereign powers and provides for the protection of an individual's civil rights and liberties.

The Zambian Constitution establishes the judicature, the legislature and executive and defines their powers. Therefore, the judicature is a creation of statute, that is, of the Constitution. The High Court's unlimited jurisdiction under Article 94(1) is however not limitless as the court is required to exercise its jurisdiction in accordance with the law as held by the Supreme Court in the **ZAMBIA NATIONAL HOLDINGS LTD** case.

In view of the fact that this court is a creation of the Constitution and has limitless powers, it cannot be called upon to expunge or remove provisions from the supreme law of the land, the Constitution just merely because a few individuals find them unfavourable or offensive to their secret or hidden political agenda. The four petitioners out of a population of millions of people can be compared to a drop in the ocean. We as courts are not vested with power to alter or amend provisions of the Constitution. The legislature is the arm of government that is vested with that power. This is evident from the recent Constitutional amendment to the old Constitution it was not done by the courts but by the Zambian people through recommendations to the legislature.

Therefore, it is a misconception on the part of the petitioners for them to believe that they can move this court to expunge or remove Constitutional provisions they consider discriminatory or offensive on a



whim. If the courts would allow such ill-conceived applications, this country would cease to have a stable Constitution as individuals would wake up any day and demand that the Constitution to be stripped of its provisions until it becomes a skeleton. Instead of the petitioners promoting their alleged interest in the Constitutional governance of the country, they would be promoting and encouraging the country to be ungovernable.

The petitioners further seek an order that the Electoral Commission of Zambia 1st respondent herein be stopped from conducting the 2016 Presidential elections so that President Edgar Lungu can serve a five year term of office. As submitted by the 3rd respondent's Counsel, Mr. Landilani Banda, on the authority of **SOUTH DAKOTA v SOUTH CAROLINA** this court cannot be invited to interpret Constitutional provisions in a manner that contradicts them. The 4th respondent also further submitted that he with other presidential candidates of the 20<sup>th</sup> January, 2015 election including President Edgar Lungu were aware that the term of office in question was the remainder of the late President Michael Chilufya Sata's term of office.

In conclusion, for the reasons aforesaid, I allow the 3rd and 4th respondents' application to dismiss the matter on points of law. The petition is accordingly dismissed with costs for the respondents.

In default of agreement, costs to be taxed.

Leave to appeal within the specified period is granted.

DATED this <sup>31<sup>st</sup></sup>..... day of March, 2016 at Lusaka.



.....  
**F. M. Lengalenga**  
**JUDGE**