

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

2021/CCZ/0051

**IN THE MATTER OF: ARTICLE 128(1)(a) OF THE CONSTITUTION OF  
ZAMBIA**

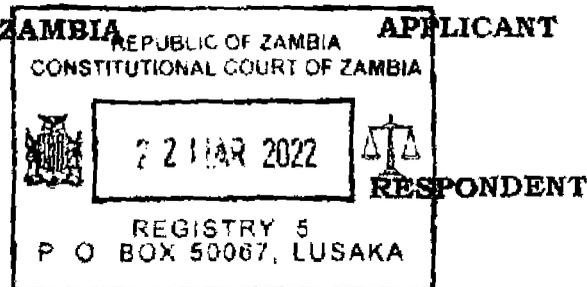
**IN THE MATTER OF: THE INTERPRETATION OF ARTICLES 72(2)(h) AND  
73(1)(2) AND (4) OF THE CONSTITUTION OF  
ZAMBIA**

**BETWEEN:**

**THE LAW ASSOCIATION OF ZAMBIA** **APPLICANT**

**AND**

**THE ATTORNEY GENERAL**



**Coram: Chibomba PC, Mulenga, Mulonda, Munalula and Mulongoti JJC  
on 31<sup>st</sup> January, 2022 and 22<sup>nd</sup> March, 2022**

**For the Applicant:**

**Mr. A. J. Shonga Jnr SC of Messrs.  
Shamwana & Company; Ms Theotis  
and Ms J. Mutemi of Mesdames  
Theotis Mutemi Legal Practitioners**

**For the Respondent:**

**Mr. M. Muchende - SC, Solicitor  
General, Mr. F. Imasiku - Deputy Chief  
State Advocate, Mr. J. Sianyau -  
Deputy Parliamentary Counsel, Mrs. L.  
S. Chibowa - Principal State Advocate  
of the Attorney General's Chambers**

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## **JUDGMENT**

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**Mulonda, JC, delivered the Judgment of the Court**

**Cases referred to:**

**1. Margaret Mwanakatwe v Charlotte Scott and 2 Others,**

2016/CCZ/A018

2. **Sakala & Another v Fert Seed and Grain Pty Limited & Another, Appeal No. 85 of 2015 (SCZ)**
3. **Philip Mutantika & Mulyata v Kenneth Chipungu (SCZ) Judgment No. 13 of 2014**
4. **Milford Maambo and Others v The People CCZ, Selected Judgment No. 31 of 2017**
5. **Faustin Mwenya Kabwe and Aaron Chungu v Justice Ernest Sakala, Justice Peter Chitengi and the Attorney General SCZ Judgment No. 25 of 2012**
6. **Attorney General and Another v Akashambatwa Mbikusita Lewanika and others SCZ No. 2 of 1994**
7. **Rafiu Rabiu v S (1981) NC & R 293**
8. **Attorney General of Botswana v Unity Dow Civil Appeal No. 4/91**
9. **Steven Katuka and Law Association of Zambia v Attorney General and others CCZ Judgment No. 29 of 2016**
10. **Godfrey Malembeka (Suing as Executive Director of Prisons Care and Counselling Association) v Attorney General and Another CCZ Selected Judgment No. 34 of 2017**
11. **Government of the Republic of Namibia & Another v Cultural 2000 and Another CSA 2/92)1993 NASC1**
12. **Governance Elections Advocacy Research Services Initiative Zambia Limited v Bowman Lusambo – 2021/CC/0050**
13. **Isaac Mwanza v The Electoral Commission of Zambia & Attorney General. 2020/CCZ/0008**
14. **Kelvin Hang'andu (a firm) v Webby Mulubisha (2008) Z.R. 83**
15. **BP Zambia PLC v Interland Motors Limited (2001) Z.R. 37**
16. **Sonny Paul Mulenga & Vismer Mulenga v Chainama Hotels Limited & Others – SCZ Judgment No. 15 of 1999**
17. **Mundia Sikatana v Attorney General (1982) Z.R. 109)**
18. **Clement Kungu Waibara v Anne Wanjiku Kibeh & Another (2020) EKLR**

19. **Jabir Singh Rai & 3 Others v Tarlochan Singh Rai Estate of & 4 Others (2013) EKLR-PETITION 4 OF 2012, Kenya Law Reports;**
20. **Tinyefuza v Attorney General, (1997) UGCC 3 (25 April, 1997)**
21. **South Dakota v North Carolina (1940) 192 USA 268, 48 ed 448**
22. **Daniel Pule and others v Attorney General and Others 2017/CCZ/004**

**Legislation Referred to:**

1. **The Constitution of Zambia (Amendment) Act No. 2 of 2016**
2. **The Constitutional Court Act No. 8 of 2016**
3. **The Constitutional Court Rules, Statutory Instrument No. 37 of 2016**
4. **The Electoral Process Act No. 35 of 2016**

**Other works referred to:**

1. **Rules of the Supreme Court of England, 1999 Edition (White Book)**
2. **Stephen H. Gufis, Byron's Dictionary of Legal Terms, 5<sup>th</sup> Edition, 2016**
3. **Standing Orders of the National Assembly, 2021**

**[1.0] INTRODUCTION**

This judgment is on the Amended Originating Summons filed pursuant to Order 4 Rule 2 of the Constitutional Court Rules Statutory Instrument No. 37 of 2016 and section 8(1)(a) of the Constitutional Court Act No. 8 of 2016 by the Law Association of Zambia, the Applicant.

## **[2.0] BACKGROUND**

The genesis of the matter is a decision by the Speaker of the National Assembly following a point of order raised by the Member of Parliament for Solwezi East, Dr. Katakwe, seeking a ruling on whether the Member of Parliament for Kabushi Constituency Mr. Bowman Lusambo, was in order to remain in the House following the nullification of his seat by the High Court sitting at Ndola.

**[3.0]** The Speaker, following the point of order, delivered a ruling on the 7<sup>th</sup> December, 2021 to the effect that once the High Court has nullified the election of a Member of Parliament, the affected Member of Parliament cannot continue to hold the seat or to attend the sittings of the National Assembly and to draw allowances. To this effect, she then ordered all Members of Parliament whose seats were nullified to stay away from the National Assembly until their appeals were determined by the Constitutional Court.

**[4.0]** It is on the basis of the position arrived at by the Speaker and the ensuing public debate that the Law Association of Zambia, seeks an interpretation of Articles 72(2)(h) and 73(4) of the Constitution.

## **[5.0] APPLICANT'S CASE**

The applicant invites the Court to determine the following questions:

- 1. Whether Article 72(2)(h) of the Constitution of Zambia is applicable where a seat held by a Member of Parliament becomes vacant after an election has been nullified following the hearing and determination of an election petition in line with Article 73(1) and (2) of the Constitution of Zambia;**
- 2. Whether under Article 73(4) of the Constitution of Zambia a Member of Parliament whose seat has been nullified by the High Court and who has appealed to the Constitutional Court against such nullification can continue to hold their seat in the National Assembly pending the outcome of the appeal.**

**[6.0]** In its affidavit in support of the Amended Originating Summons, the applicant through its Honorary Secretary, Sokwani Peter Chilembo, deposes that Article 72(2)(h) alludes to a Member of Parliament's seat becoming vacant when that Member of Parliament is disqualified because of a decision of the Constitutional Court. That Article 73(4) concerns a Member of Parliament holding their seat pending determination of an election petition.

**[7.0]** The applicant further avers that several interpretations of Articles 72(2)(h) and 73(4) now exist following the ruling of a single Judge of this Court, Mulembe JC, in the matter of **Margaret Mwanakatwe v Charlotte Scott and 2 others<sup>1</sup>**.

In that matter, the seat for the Member of Parliament (MP) for Lusaka Central Constituency was declared vacant following an election petition. The affected MP applied for a stay of execution of the decision in which application was denied by the High Court. The application was renewed before a single Judge of this Court who went on to state that there was no need for an application for a stay as the same came into effect by operation of the law.

**[8.0]** That on the one hand, there is an argument that the Speaker's ruling is sound and in line with the law that an appeal does not operate as a stay of the judgment of the lower Court and further that Article 73(4) relates only to an election petition in the High Court and not to an appeal against the judgment of the High Court to this Court.

**[9.0]** That on the other hand, it has also been argued that Article 73(4) of the Constitution when read together with Article 72(2)(h) of the Constitution must be understood to include an appeal to this Court with the implication that the seat of a Member of Parliament only becomes vacant upon this Court determining the appeal.

**[10.0]** The applicant argues that Article 73(4) of the Constitution is

**Faustin Mwenya kabwe and Aaron Chungu v Justice Ernest Sakala, Justice Peter Chitengi and the Attorney General<sup>5</sup>**, and **Attorney General and Another v Akashambatwa Mbikusita Lewanika and others<sup>6</sup>** were highlighted to underscore the primary principle of literal interpretation. The case of **Rafiu Rabi v S** was also cited on the same principle from outside the jurisdiction and so was the case of **Attorney General v Dow<sup>8</sup>** cited to emphasize the principle of constitutional interpretation that all relevant provisions touching on the subject for interpretation should be considered together as a whole in order to discern the intent of the framers of the constitution.

**[14.0]** The applicant agreed with the principle elucidated by the above authorities that the starting point in interpreting the Constitution is to use the literal interpretation where the words used in the text are clear and unambiguous and that other principles of interpretation could only be referred to if the literal rule led to an absurdity.

**[15.0]** It was the applicant's position that a literal interpretation of Article 72(2)(h) of the Constitution would mean that the office of Member of Parliament becomes disqualified as a result of a decision of the Constitutional Court. To qualify

couched in mandatory terms by the use of the word “shall”. To underscore this point, the case of **Sakala and Another v Fert Seed and Grain Pty Limited & Another**<sup>2</sup> was cited wherein the Supreme Court had this to say:

**The section uses the word “shall” which means that the Rule is couched in mandatory terms”.**

[11.0] Further reliance was placed on the case of **Philip Mutantika and Mulyata v Kenneth Chipungu**<sup>3</sup> wherein the Supreme Court once again opined as follows:

**“...our response is that Rules 70(1) of the SCR and 58(5) as amended by Statutory Instrument No. 26 of 2012 are mandatory. Both provisions are couched in mandatory manner as each uses the word “shall”. The two Rules are therefore not regulatory as they do not give the Court discretionary power”.**

[12.0] The applicant drew our attention to the fact that there are several canons of interpretation but that this jurisdiction through the Supreme Court of Zambia has tended to focus on two canons namely, the literal and purposive approaches respectively. That this Court too, has adopted a similar approach in its judgments.

[13.0] To this end the applicant cited several authorities from within and outside our jurisdiction on the primacy of the literal rule in statutory and Constitutional interpretation. The cases of **Milford Maambo and Others v The People**<sup>4</sup>,

this view, the definition of disqualification as defined by **Stephen H. Gufis, Byron's Dictionary of Legal Terms, 5<sup>th</sup> edition, 2016** at page 168 was defined as follows:

**"the inability to perform some act due to the existence of factors rendering the performance improper or inappropriate. For instance, a judge may be disqualified from hearing a particular case because of having previously represented one of the parties involved."**

[16.0] That in the case *in casu*, this would mean that the office of a Member of Parliament becomes vacant as soon as the Constitutional Court renders a decision declaring a Member of Parliament as unable to perform some act. It was acknowledged though that the Constitution does not offer a definition of disqualification but that this could be gleaned from the provisions of Article 70 of the Constitution which provides for eligibility and disqualification. The applicant's contention is that Article 73(4) of the Constitution does not deal with a disqualification of an office of a Member of Parliament.

[17.0] The applicant posited that a literal meaning of Article 73(4) of the Constitution would mean that a Member of Parliament whose election is petitioned shall hold their seat in the House while the petition is being determined by the High

Court which is clothed with jurisdiction to hear an election petition. That one advocating the literal approach would find nothing ambiguous or absurd about Article 73(4) of the Constitution as Article 73(1) and (2) of the Constitution makes it clear that an election petition is filed in the High Court and heard and determined in the High Court. That under such an approach the literal rule would be adequate.

[18.0] In the alternative, it was the applicant's view that if the Court was of the view that the provisions brought for interpretation cannot be appropriately determined by the literal approach, the applicant offered the Court a possible purposive interpretation.

[19.0] In rendering its view on the purposive approach, the applicant submitted that all provisions touching on the subject for interpretation ought to be considered together and that no provision should be read in isolation from the other. Our decision in **Steven Katuka and Law Association of Zambia v Attorney General and Others**<sup>9</sup> case was cited where we guided that regard to the context and historical origins of the particular constitutional provision should be ascertained to establish the meaning and purpose of the provision in question.

[20.0] The applicant submitted that in interpreting any provision of the Constitution according to the purposive approach, the following Articles of the Constitution are instructive namely:

**21.1 Article 267 on Interpretation of the Constitution;**

**21.2 Article 1 on Supremacy of the Constitution;**

**21.3 Article 8 on National Values and Principles; and**

**21.4 Article 9 on Application of National Values and Principles.**

[21.0] In addition, our decision in the **Godfrey Malembeka (suing as Executive Director of Prisons Care and Counseling Association) v Attorney General and Another**<sup>10</sup> case was cited where we stated that if there has to be any limitations in a constitutional provision, these are to be within the confines of the Constitution.

[22.0] The applicant was of the view that the provisions cited in paragraph [20.0] above, set out what this Court must consider when interpreting a constitutional provision. That position was supported by the dissenting views of our sister Munalula JC, in the case of **Milfred Maambo and Others v The People**<sup>4</sup>. In that case Munalula JC. was of the view that Article 267 of the Constitution requires that it be interpreted in a manner that broadens rather than narrows

fundamental human rights; strengthens the democratic tenets of the governance system; and grows our jurisprudence.

[23.0] A similar view from the Namibian jurisdiction in the case of **The Government of Namibia and Another v Cultura**<sup>11</sup> was cited wherein the Court emphasized the organic nature of a Constitution and its uniqueness from ordinary legislation when interpreting its provisions, which call for a broad, liberal and purposive approach.

[24.0] It was the applicant's position that an advocate for the purposive approach of the constitutional interpretation particularly Articles 72(2)(h) and 73(4) of the Constitution would view the application of the literal rule of interpretation of the two articles above as potentially leading to absurdity. That this is so because the High Court is not a final Court of record in view of section 8 of the Constitutional Court Act, which clothes this Court with final jurisdiction to determine appeals relating to the election of Member of Parliament.

[25.0] Further that, section 25 of the Constitutional Court Act, empowers this Court upon hearing an appeal, to confirm, vary, amend or set aside the judgment appealed against. The applicant submitted that Article 73(4) of the

Constitution when read together with Article 72(2)(h) of the Constitution must be interpreted to include an appeal to this Court or that Article 73(2) which states that an election petition must be heard within 90 days cannot include an appeal to this Court as that would exceed the 90 days.

[26.0] Further, the applicant submitted that it would be impotent to know what effect a stay of execution would have on the constitutional provisions in question namely, Articles 72(2)(h) and 73(4). It was the applicant's position that the effect of an order for stay of execution pending appeal following the determination of the election petition by the High Court would be to stay execution of the judgment nullifying the election of a Member of Parliament. A definition of stay of execution was quoted from **Byron's Dictionary of Legal Terms**, as being where a judgment is precluded from being executed for a specific period.

[27.0] That therefore, the Member of Parliament would maintain his or her seat until the Court either confirms or sets aside the judgment of the High Court. That from a purposive perspective, this was the intention of the Legislature that a Member of Parliament holds his or her seat until the Constitutional Court hears and determines the appeal.

[28.0] In augmenting its written submissions, the applicant represented by Ms. Theotis, argued that the action was commenced by the Law Association of Zambia (LAZ) pursuant to its mandate under the LAZ Act. Counsel went on to place on record that LAZ was not tendering its opinion on what ought to be the correct position of the Constitution. It was Counsel's position that the interpretation of the law was a preserve of this Court and that it was imperative in the interest of the public, that this Court renders an interpretation of Article 72(2) (h) and Article 73(4) of the Constitution respectively.

[29.0] Ms. Theotis submitted that the applicant was aware of a ruling by a single Judge of this Court Mulembe JC, in the **Margaret Mwanakatwe**<sup>1</sup> case touching on the issue before this Court. Counsel went on to state that the said ruling does not amount to a ruling of this Court as envisaged under section 8(a) of the Constitutional Court Act and that this was alluded to by the Judge himself. That section 5 of the Constitution Court Act precludes a single Judge from exercising the power vested in the Court and as such only the full Court enjoys jurisdiction to interpret any provision of the Constitution. In winding up, Ms. Theotis brought to

the Court's attention the issue of multiplicity of actions raised by the respondent in its heads of argument and informed the Court that this had been settled by a single Judge of this Court.

[30.0] In orally closing the applicant's submission, State Counsel Mr. Shonga Jnr., stated that the matter before us was purely public interest litigation. State Counsel went on to focus on the **Margaret Mwanakatwe**<sup>1</sup> case as it was his view that the case was on all fours with the case *in casu* more particularly that they both have to do with the nullification of a parliamentary seat.

[31.0] State Counsel argued that the ruling of a single Judge of this Court in the **Margaret Mwanakatwe**<sup>1</sup> case is important to these proceedings because the Court found that Article 72(2) (h) had application to Article 73(2). That Article 72 particularly 72(2) (h) while providing for instances when a seat becomes vacant, nullification of an election does not appear as one of these instances and yet nullification of an election does cause or trigger a vacancy.

[32.0] State Counsel Shonga concluded by stating that the intricacies of interpretation of the two Articles 72(2)(h) and 73(4) and perhaps even more articles lies with this Court

exercising its jurisdiction under Article 128(1) (a) of the Constitution. It was State Counsel's view that the interpretation by this Court may perhaps bring the public debate over this issue to a close.

### **[33.0] THE RESPONDENT'S CASE**

The respondent began by placing on record that there is an active matter before us revolving around the same issues and constitutional provisions as this matter. This is the case of **Governance Elections Advocacy Research Services Initiative Zambia Limited v Bowman Lusambo and Others.**<sup>12</sup> However, as will be made clear later, this concern and its attendant arguments was abandoned and we will not dwell on it.

**[34.0]** The respondent relied on its affidavit in opposition and accompanying arguments where it acknowledged the public importance of the matter before us to interpret Articles 72(2)(h) and 73(4) of the Constitution given the recent High Court judgments nullifying eight (8) parliamentary elections. However, the respondent made it clear that the Speaker of the National Assembly did not invoke Article 72(8) of the Constitution to declare the affected seats vacant but only

directed that the affected members stay away from parliamentary business and consequently forego their stipend until their appeals are disposed of by this Court.

[35.0] The respondent in similar fashion to that of the applicant, began by outlining the canons of interpretation. For brevity, we shall not repeat the submissions in detail save to highlight some authorities. In this regard, the case of **Isaac Mwanza v Electoral Commission of Zambia**<sup>13</sup> was cited wherein we guided in reference to our decision in the **Steven Katuka and LAZ v Attorney General and Others**<sup>9</sup> case that the starting point for interpretation was a consideration of the literal or ordinary meaning of the words or articles that touch on the issue or provision in contention.

[36.0] Further, Article 267 of the Constitution which enjoins the interpretation of the Constitution, in accordance with the Bill of Rights and in a manner that promotes its purposes, values and principles, permits the development of the law; and contributes to good governance, was cited to underscore the purposive approach to interpretation. The circumstances under which the purposive approach can be invoked were restated as cited in the **Steven Katuka**<sup>9</sup> case by the applicant.

[37.0] In addition to authorities cited above, other authorities from other jurisdictions were cited and in particular the Kenyan case of **Clement Kungu Waibara v Anne Wanjiku Kibeli & Another**<sup>18</sup> wherein the following interpretation principles were outlined as follows:

**34.1 that constitutional provisions should be given liberal construction, unfettered with technicalities due to the changing circumstances of a progressive society,**

**34.2 that the entire constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other;**

**34.3 that the words of the written Constitution prevail over all unwritten commentaries, precedents and practices.**

[38.0] It was also submitted that the celebrated US Supreme Court case of **South Dakota v North Carolina**, outlined the principle that:

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

[39.0] In submitting on the interplay between Article 72(2)(h) and Article 73 of the Constitution, within the context of the questions raised for determination by the applicant, the respondent was of the view that Article 72(2)(h) provides for the vacation of office of Member of Parliament where such

member is disqualified as a result of a decision of the Court. That sub-Article (8) of the Constitution provides that once a vacancy has occurred, the Speaker is obliged to inform the Electoral Commission of Zambia within seven days of such occurrence which triggers the holding of a by-election in accordance with Article 57 of the Constitution.

**[40.0]** It was the respondent's submission that Article 72 of the Constitution is the only provision that speaks to instances where a Parliamentary seat can be declared vacant and that none of the permissible provisions include where the High Court has nullified an election of a Member of Parliament pursuant to Article 73(1) and (2) of the Constitution.

**[41.0]** That there is a lacuna in the entire Constitution in general and Article 72 in particular which does not provide for instances where the High Court nullifies an election, particularly where there is no appeal pending before the Constitutional Court.

**[42.0]** The respondent argued that applying the principles of interpretation referred to above, the noted 'gap' in the Constitution is filled up by reading into section 108(4) of the Electoral Process Act that provides as follows:

**"Where the High Court or a Tribunal determines that the**

**respondent was not duly elected, at the election concerned, the vacancy in the membership of the National Assembly or a council in respect of which the election was held shall be deemed to continue until duly filled.”**

**[43.0]** On the other hand Article 73 was quoted with emphasis on clauses (3) and (4) which make provision for an appeal against a decision of the High Court to the Constitutional Court and the continued holding of a seat in the National Assembly pending the determination of an election petition respectively. It was submitted that the provision allows an election petition to be heard and determined within 90 days before the High Court with further provision to appeal against the decision of the High Court to this Court. That it is within the context of Article 73(4) of the Constitution that all Members of Parliament whose elections were nullified continued to enjoy privileges including the drawing of allowances while their matters were being determined by the High Court.

**[44.0]** The respondent submitted that the applicant's view that Article 73(4) of the Constitution allows members whose seats are nullified to continue sitting in Parliament pending determination of their appeals by this Court is not either expressly or impliedly supported by Article 73(4). That

Article 73(4) of the Constitution only makes an exception to the retention of a seat pending the determination of the election petition by the High Court.

**[45.0]** The question of what constitutes an “election petition” was submitted to be central in establishing whether an appeal to this Court falls within the definition. It was the respondent’s position that an appeal does not fall within the definition either logically or by legal interpretation.

**[46.0]** It was submitted that the Constitution does not define an election petition and as such Article 272 of the Constitution which permits Parliament to enact legislation to give effect to an Article or provision of the Constitution lends support. In this regard the Electoral Process Act No.35 of 2016 was said to give effect to provisions on election petitions in section 2 of the said Act which defines an election petition to mean “an election petition related to a presidential, parliamentary or local government election as specified in the Constitution”.

**[47.0]** The respondent submitted that of all the three types of petitions under the Constitution namely, presidential, parliamentary and local government, none encompasses an appeal and that both the Constitution and the Electoral

because an appeal has been entered.

[50.0] The provisions of Order 59 Rule 13 of the Rules of the Supreme Court and the explanatory notes thereto were outlined to re-echo the point that an appeal does not operate as a stay of execution and the fact that the Court does not make a practice of depriving a successful litigant of the fruits of his litigation ..... That the respondent considers it a legal requirement in our jurisdiction to expressly obtain a stay of execution to preclude a judgment from being enforced or executed and a judgment of the High Court in an election petition is no exception.

[51.0] The case of **Margaret Mwanakatwe v Charlotte Scott and the Attorney-General**<sup>1</sup> was cited by the respondent for the sole purpose of emphasizing the point that it is only this Court that can settle the debate of the interplay of Article 72(2)(h) and 73(4) of the Constitution.

[52.0] In further canvassing its point on the absence of a provision allowing members whose seats are nullified by the High Court to continue sitting in Parliament pending an appeal before this Court, the Kenyan jurisdiction was referred to. It was submitted that under the Kenyan Elections Act, specific provision is made for the status of a Member of Parliament

whose seat has been nullified and is pending appeal before their Court of Appeal.

[53.0] Section 86A of the Kenyan Elections Act was quoted in the following terms:

**86A (1) An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of the County Governor shall lie to the Court of Appeal on matters of law only and shall be heard and determined within six months of the filing of the appeal.**

**(2) An appeal under Subsection (1) shall act as a stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined.**

[54.0] It was submitted that the above Kenyan provision is very clear and establishes a proper process for election petitions and subsequent appeals. It was further submitted that the provision equally sets out a specific time frame within which an appeal on an election should be disposed of by the appellate court.

[55.0] Contrasting the Kenyan position above, the respondent stated that - our jurisdiction has no specific timeframe within which to hear and determine an appeal on an election petition. That as such, this creates a situation of imbalance between the right of representation and the public interest not to have a representative whose seat has been nullified to

serve for an indefinite period.

**[56.0]** The respondent submitted that based on the above arguments, the Speaker's ruling is and was in line with the spirit of the Constitution and further within her constitutional mandate under Article 77 (1) of the Constitution as read with Standing Order No. 239. Article 77 of the Constitution which was reproduced clearly provides that the National Assembly shall regulate its own procedure and make Standing Orders for the conduct of its business.

**[57.0]** **Standing Order No. 239** of the National Assembly, 2021 was cited which states that-

**Speaker to decide on cases not provided for:**

- (1) where a procedural question arises on a matter that is not expressly provided for by these Standing Orders or by other Orders of the House, the speaker shall decide the question.**
- (2) A decision made in paragraph (1) of the Standing Order shall be based on the Constitution of Zambia, Statute law and the usages, precedents, customs, procedures, traditions and practices of the Parliament of Zambia and other jurisdictions.**

**[58.0]** The respondent is of the view that the Speaker under the circumstances of this case acted equitably by not invoking Article 72(8) of the Constitution as read with section 108(4) of the Electoral Process Act given that there is no stay of the judgments appealed against.

**[59.0]** That the ruling directed the affected members whose seats were nullified to stay away from participating in parliamentary business and drawing an allowance until final determination of their appeals by this Court. This, in the respondent's opinion, was commendable as it strikes a balance between the right to representation and the public interest not to have a member of parliament whose seat is nullified by a Court of competent jurisdiction continuing sitting indefinitely.

**[60.0]** In conclusion, the respondent submitted that the combined effect of Article 72(2) (h), Article 72(8) and Article 73(4) of the Constitution, section 108(4) of the Electoral Process Act and Order X1 Rule 7 of the Constitutional Court Rules, S.I. No. 37 of 2016 means that a Member of Parliament whose election is nullified by the High Court cannot continue to sit in the National Assembly. Therefore, this places an urgent burden on the affected Member of Parliament to apply for a stay of the Judgment in default of which the Speaker is at liberty to invoke Article 72(8) of the Constitution as read with section 108 (4) of the Electoral Process Act.

**[61.0]** In orally augmenting the respondent's submissions, the learned Solicitor General, Mr. Muchende, SC, began by

Process Act view an appeal as a separate process from the actual election petition. It was the respondent's view that what Article 73(4) of the Constitution envisages is the continued holding of a Parliamentary seat pending the determination of the petition by the High Court which is the Court of competent jurisdiction under Article 73(1) and (2) of the Constitution.

[48.0] The respondent argued that the privilege of holding a Parliamentary seat comes to an end when the High Court nullifies an election and more so when there is no appeal pending. That the judgment of the High Court takes effect immediately after delivery unless stayed by the Court itself or the Constitutional Court. In this regard our attention was drawn to Order XI Rule 7 of the Constitutional Court Rules S.I. No. 37 of 2016 which provides that:

**"An appeal shall not operate as a stay of execution or of proceedings under the judgment appealed against unless the High Court or Court so orders."**

[49.0] The above position was further underscored by the case of **Sonny Paul Mulenga and Vismer Mulenga v Chainama Hotels Limited and others**<sup>16</sup> where Ngulube, CJ, stated that an appeal does not automatically operate as a stay of execution and it is utterly pointless to ask for a stay solely

placing on the record that the respondent had abandoned its arguments around the issue of multiplicity of actions. That this was so because a single Judge of this Court had since dealt with the concern raised.

**[62.0]** Regarding the substantive matter before us, Mr. Muchende SC, began by agreeing with the applicant that the issue before us is one of great public importance in view of the Judgments of the High Court nullifying nine (9) seats in Parliament following the tripartite elections of 2021. It was State Counsel's position that it is only this Court that can set the record straight, being the Court clothed with jurisdiction to interpret the Constitution, particularly in light of the holding of seats in Parliament by members whose elections were nullified.

**[63.0]** It was argued that what had led to the public debate and this matter is the ruling rendered by a single Judge of this Court, Mulembe JC, in the **Margaret Mwanakatwe**<sup>1</sup> case where an impression was created that one need not apply for stay of execution of Judgment following a nullification of an election provided the Judgment is appealed against and this Court has not yet determined the appeal. Mr. Muchende, SC, argued that the respondent had a different opinion

having scrutinized the whole Constitution which scrutiny revealed that there is no provision to support the view that a Member of Parliament whose seat is nullified can continue to hold the seat pending an appeal before this Court.

**[64.0]** It was further argued that a Judgment of a Court of competent jurisdiction in general, and the High Court in election petitions in particular, is effective from the time of pronouncement unless a stay is obtained. We were referred to Order 36 rule 6 of the High Court Rules, Chapter 27 of the Laws of Zambia. Mr. Muchende, SC, acknowledged the fact that there was no provision in the Constitution that creates a vacancy in the office of Member of Parliament following a nullification of an election by the High Court. That Article 72(2)(b) and (h) of the Constitution, in his view, do not speak to the disqualification of a Member of Parliament and that the two circumstances of disqualification and nullification ought to be distinguished from each other and not used interchangeably.

**[65.0]** Further, to this argument, Mr. Muchende SC stated that the gap or lacuna referred to above is taken care of by Article 272 and Article 72(2)(h), in particular, of the Constitution allowing the Legislature to fill the gap through section 108(4)

of the Electoral Process Act. That the section speaks to the fate of a Member of Parliament whose seat is nullified by the High Court and that a vacancy is deemed to exist retrospectively from dissolution of the last National Assembly until that seat is filled.

**[66.0]** Mr. Muchende SC emphasized that the effect of a nullification of an election by the High Court is the creation of a vacancy in the National Assembly and if there is no appeal, the Speaker is obliged to communicate to the Electoral Commission of Zambia for the holding of a by election. In concluding, it was re-echoed that a Member of Parliament whose seat had been nullified cannot continue to hold that seat in the absence of a stay of the judgment of the High Court that nullified the seat. Mr. Muchende SC, argued that to allow a member to continue their stay in the National Assembly in view of a nullification would render Article 73(1) and (2) nugatory or at worst otiose.

**[67.0] APPLICANT'S REPLY**

In its submissions in reply, the applicant disagrees with the respondent that there is a lacuna within the permissible provisions of Article 72 of the Constitution with regard to the

question of nullification of an election of a Member of Parliament under Article 73(1) and (2) of the Constitution. That this is so because disqualification from holding office under Article 72 is not synonymous with nullification of an election under Article 73 of the Constitution respectively.

**[68.0]** The applicant hastened to correct the respondent's submission that, the applicant had leaned towards a particular cannon of interpretation and to be more specific the purposive approach.

**[69.0]** Further, the applicant submitted that the respondent appears to contradict itself when it states that the election envisaged under Article 73(4) of the Constitution refers only to the continued holding of a parliamentary seat pending determination by the High Court but proceeds to submit that the privilege of holding a parliamentary seat comes to an end when the High Court has nullified a parliamentary seat more so where there is no appeal pending. That the respondent's view that the law considers an appeal as a separate process from the actual election petition is inaccurate as Article 73(4) of the Constitution cannot be read in isolation from Article 128(1)(d) of the Constitution.

**[70.0]** The applicant agreed with the Attorney General that the

absence of a timeframe within which to dispose of an appeal has the potential of creating an imbalance as submitted. That while it is not in the best interest of justice to allow a Member of Parliament whose seat has been nullified by a Court of competent jurisdiction to continue sitting in the House and drawing an allowance, the interest of justice can be compensated by an Order of this Court to a member of Parliament to repay whatever was disbursed while the appeal was pending. The case of **Stephen Katuka and Others**<sup>9</sup> was cited.

[71.0] Orally augmenting the submissions in reply, Mr. Shonga Jnr SC reiterated the fact that the applicant's involvement in this matter was not to take sides but to seek clarity in the public interest and as such would only take note of the position taken by the State. However, Mr. Shonga Jnr SC, pointed out the need for Acts of Parliament to be consistent with the spirit of the Supreme law - the Constitution. In conclusion State Counsel emphasized that the applicant was expectant that the questions posed to this Court would clarify what happens to Members of Parliament whose seats or elections are nullified and decide to appeal to this Court.

## **ANALYSIS AND DECISION**

**[72.0]** We have considered the Amended Originating Summons, the Amended Affidavit in Support, the Affidavit in Opposition, the skeleton arguments and oral submissions in support and opposition by the parties and reply by the applicant. What we consider as falling for our determination are two questions namely:

- (i) whether Article 72(2)(h) is applicable to an MP whose seat has been nullified by the High Court and who has appealed to this Court in line with Article 73(3); and**
- (ii) Whether Article 73(4) is applicable to a matter on appeal in this Court**

**[73.0]** The applicant in arguing its case deposes that several interpretations now exist on the above cited provisions following a Ruling by a single Judge of this Court, Mulembe JC, in the case of **Margaret Mwanakatwe v Charlotte Scott and Another**<sup>1</sup>. The two notable arguments are firstly, one supporting the view that an appeal does not amount to a stay of the Judgment appealed against and that Article 73(4) of the Constitution only relates to a pending election petition before the High Court. Secondly, that on the other hand Article 73(4) when read together with Article 72(2)(h) of the Constitution should be understood to include an appeal to this Court with the understanding that the seat only becomes

vacant upon the determination of the appeal by the Constitutional Court where the nullification of the election of a Member of Parliament is upheld.

**[74.0]** That one advocating for the literal approach would argue that there is no ambiguity or absurdity about Article 73(4) of the Constitution as Article 73(1) and (2) of the Constitution make it clear that an election petition is heard and determined in the High Court and as such the literal rule would suffice. However, the applicant is of the mind that should this Court find the literal rule inappropriate it offers a possible purposive interpretation where it cites several authorities already highlighted in this judgment.

**[75.0]** The respondent on the other hand submitted that Article 72 of the Constitution is the only provision that speaks to when a parliamentary seat falls vacant and none of the permissible provisions include the case where the High Court has nullified an election of a Member of Parliament pursuant to Article 73(1) and (2) of the Constitution.

**[76.0]** The respondent to this end is of the view that there is a lacuna in the entire Constitution in general and Article 72 in particular in instances when the High Court nullifies an election and particularly where there is no appeal pending

before this Court. That this identified gap is filled by section 108(4) of the Electoral Process Act which provides that:

**“Where the High Court or a Tribunal determines that the respondent was not duly elected, at the election concerned, the vacancy in the membership of the National Assembly or a Council in respect of which that election was held shall be deemed to continue until duly filled.”**

**[77.0]** We begin by highlighting the provisions of the Articles under consideration namely Article 72 (2) (h) and Article 73. Article 72(2)(h) provides that:

**‘(2) The office of Member of Parliament becomes vacant if the member -  
(h) is disqualified as a result of a decision of the Constitutional Court.’**

**[78.0]** Article 73 on the other hand provides that:

- (1) A person may file an election petition with the High Court to challenge the election of a Member of Parliament.**
- (2) An election petition shall be heard within ninety days of the filing of the petition.**
- (3) A person may appeal against the decision of the High Court to the Constitutional Court.**
- (4) A Member of Parliament whose election is petitioned shall hold the seat in the National Assembly pending the determination of the election petition.**

**[79.0]** Our starting point is the canon of interpretation to deploy in interpreting the provisions laid before us for consideration. As a Court we have had occasion to pronounce ourselves on the canons of statutory and constitutional interpretation.

We, in this regard, stated in the case of **Steven Katuka and Law Association of Zambia v the Attorney General and Ngosa Simbyakula and 63 Others**, at page J63 that:

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

[80.0] Where necessary the consideration will have to go beyond the plain meaning of the Articles in question in order for us to appreciate the full import of the provisions up for interpretation. As we stated in the case of **Daniel Pule and others v Attorney General and Others**<sup>22</sup> at page J63, the purposive approach entails adopting a construction or interpretation that promotes the general legislative purpose which requires the Court to ascertain the meaning and purpose of the provision having regard to the context and historical origins, where necessary, and that this exercise would sometimes require reading into the provision what the Legislature or, in this case, the framers of the Constitution intended.

[81.0] The first question is whether Article 72 (2) (h) is applicable to a Member of Parliament whose seat has been nullified by the High Court and who has appealed to this Court in line with

Article 73(3). In other words, is the decision of this Court on appeal against a decision of the High Court to nullify the election of a Member of Parliament a disqualification under Article 72 (2)(h)? The answer is no. This is because Article 73 (3) relates to an appeal arising from a decision of the High Court following an election petition resulting in the nullification of an election as the route to creating a vacancy in Parliament whereas Article 72 (2)(h) relates to a disqualification as the route to the said vacancy.

[82.0]The two words “nullify” and “disqualify” cannot be used interchangeably as they mean different things. Black’s Law Dictionary defines nullify to mean **“to make void: to render invalid”**. It further defines disqualification to mean inter alia: **“the act of making ineligible; the fact or condition of being ineligible”**. It further defines it as the **“punishment that may be imposed after an official has been impeached and removed from office, precluding the official from holding another office or enjoying any benefits of having held office”**. Therefore, the disqualification which is covered under Article 72 (2)(h) is distinct from the nullification of an election by the High Court following the determination of an election petition or subsequently by the Constitutional Court

on appeal. Further, when Article 72 (2) (h) is read together with Article 70 (2) and Article 72 (4) the implications on disqualification are materially different from nullification of an election.

**[83.0]** In sum, Article 72(2)(h) provides for one instance where a vacancy occurs in the National Assembly through a disqualification of a Member of Parliament by a decision of this Court as distinct from a decision of this Court on appeal pursuant to Article 73 (3) read with Article 128 (1) (d) of the Constitution.

**[84.0]** It is evident from the foregoing that while Article 72(2) of the Constitution provides for instances when the office of Member of Parliament becomes vacant, it does not provide for a vacancy triggered by the nullification of an election by the High Court where there is no appeal. It also does not provide for the occurrence of a vacancy in the National Assembly following a decision of this Court to uphold the nullification of an election by the High Court or by the reversal of a decision of the High Court not to nullify the election of a Member of Parliament, as the case may be. The argument therefore that section 108(4) addresses the lacuna is untenable in view of Articles 57, 73(3) and 128(1)(d) of the

Constitution. In our view the failure by the framers of the Constitution to provide for a vacancy occurring following the nullification of an election by the High Court where there is no appeal within the prescribed time as well as following a decision of this Court on appeal is a lacuna that requires addressing by the Legislature to provide in clear terms for these two instances and must be addressed with the urgency it deserves.

**[85.0]** The second question is whether Article 73(4) is applicable to a matter on appeal in this Court. Put differently, does a Member of Parliament whose seat is nullified continue to hold his seat pending the determination of the appeal before this Court by virtue of Article 73(4)? Our answer is in the affirmative for reasons given below.

**[86.0]** Taking the literal rule of interpretation as argued by the respondent would mean that an appeal to this Court would not forestall a by-election under Article 57 of the Constitution following the High Court's nullification of an election petition. In this scenario the possibility would arise of a new Member of Parliament being elected into office while the appeal was pending determination by this Court. This in our view would result in absurdity and cannot be what the framers of the

Constitution intended. The fact remains that the 90 day period for a by-election provided for in Article 57, where a vacancy occurs, starts running either where the High Court has nullified an election and no appeal has been filed by the end of the prescribed period or after this Court's determination of the appeal where a nullification of an election is upheld or pronounced by this Court. It follows therefore that the literal rule of interpretation of Article 73(4) does not suffice in this case. We therefore will resort to the purposive interpretation of Article 73 (4) in addressing the question posed by the applicant.

**[87.0]** A reading of Article 73(3) opens an avenue of appeal beyond a decision of the High Court to nullify or uphold the election. When this avenue is pursued by way of appeal the question is whether the seat of a Member of Parliament whose election is nullified can be declared vacant if there is no stay of execution of judgment notwithstanding the appeal. The answer is no.

**[88.0]** Our view is that, since all the Articles of the Constitution touching on a subject matter ought to be read together, Article 73(4) must be read in full view of Article 73 (3) which makes provision for an appeal following a decision of the High

Court under clauses (1) and (2).

**[89.0]** Articles 73(3) and 73(4) provide that:

**“(3) A person may appeal against the decision of the High Court to the Constitutional Court.**

**(4) A Member of Parliament whose election is petitioned shall hold the seat in the National Assembly pending the determination of the election petition.”**

**[90.0]** The clauses of Article 73 of the Constitution bring out three main positions which are; that an election when petitioned will be heard within ninety days, clauses (1) and (2); that the decision of the High Court may be appealed against, clause (3) and that a member of Parliament whose election is petitioned shall hold the seat in the National Assembly pending the determination of the election petition, clause (4). As a whole, deploying the literal canon of interpretation, and reading clauses (1) and (2) of Article 73 confirms a petition before the High Court. Clause (3) brings out the possibility of an appeal. Clause (4) provides for the holding of a seat in the National Assembly pending the determination of the election petition.

**[91.0]** Article 73 (4) clearly does not in a literal sense state what becomes of a parliamentary seat whilst a matter is before this Court on appeal. This is unlike the situation obtaining in Kenya where the Elections Act cited by the respondent,

provides under section 86(A) that an appeal acts as a stay of the decision of the High Court until the appeal is heard and determined.

**[92.0]** Article 73(4) should be read in light of the provisions of Articles 73(3), 57 and 128(1)(d) of the Constitution. This is to ensure that Article 73 (3) is made effectual and not rendered nugatory where a by-election may follow a nullification by the High Court while the appeal is pending before this Court and which appeal may result in setting aside the decision of the High Court

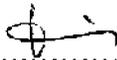
**[93.0]** It is our considered view that Article 73 (4) which provides for the retention of a seat in the National Assembly pending the determination of an election petition should also have expressly provided for the retention of the seat pending the determination of an appeal to this Court. We are fortified by the fact that after the High Court nullifies an election there is a decision which can be executed and which may trigger a by-election under Article 57. Hence, the need for a purposive interpretation of Article 73(4) to apply to the appeal stage. We urge the Legislature to make appropriate amendments to the law to cater for the appeal stage in clear terms.

[94.0] That said, on a purposive interpretation of Article 73(3) and (4) read with Articles 128(1) (d) and 57 of the Constitution, we hold that a Member of Parliament whose election has been nullified by the High Court and appeals to this Court, by operation of law retains the seat in Parliament pending the determination of the appeal.

[95.0] We order that each party bears its own costs.



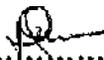
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**H. Chibomba**  
**PRESIDENT, CONSTITUTIONAL COURT**



.....  
**M.S. Mulenga**  
**CONSTITUTIONAL COURT JUDGE**



.....  
**P. Mulonda**  
**CONSTITUTIONAL COURT JUDGE**



.....  
**M.M Munalula, JSD**  
**CONSTITUTIONAL COURT JUDGE**



.....  
**J. Z Mulongoti**  
**CONSTITUTIONAL COURT JUDGE**