

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

2022/CCZ/0020

**IN THE MATTER OF: ARTICLE 128(1)(a) OF THE CONSTITUTION OF
ZAMBIA AMENDMENT ACT NO. 2 OF 2016**

**IN THE MATTER OF: THE INTERPRETATION OF ARTICLE 52(6) OF THE
CONSTITUTION OF ZAMBIA**

BETWEEN:

**GOVERNANCE ELECTIONS ADVOCACY RESEARCH
SERVICES INITIATIVE ZAMBIA LIMITED**

APPLICANT

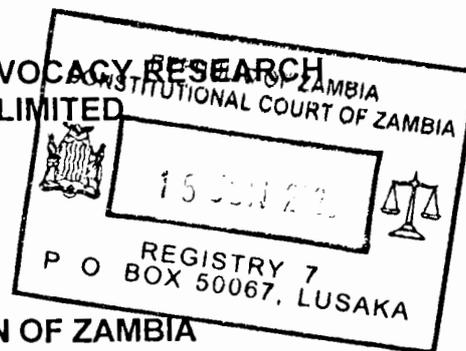
AND

THE ATTORNEY GENERAL

1stRESPONDENT

THE ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT



**CORAM: Sitali, Mulonda, Mulenga, JJC on 8th November, 2022, and 16th
June, 2023**

**For the Applicant : Mr. M. M. Batakathi
and
Ms. V. M. Nyundwe of
Muyatwa Legal Practitioners**

**For the 1st Respondent : Mr. J. Simachela, Chief State Advocate
Mr. N. Mwiya, Assistant Senior State Advocate
Ms K. Mumba, Assistant Senior State Advocate
Ms. N. Nkazi, State Advocate of
Attorney General's Chambers**

**For the 2nd Respondent : Mrs T. Phiri
In-House Counsel, Electoral Commission of Zambia**

J U D G M E N T

Sitali J.C delivered the judgment of the Court.

Cases cited:

- 1. Milford Maambo and Other v The People, Selected Judgment No. 31 of 2017**
- 2. Riggs v Palmer 115. N. Y. 506 (1889)**

3. **Stephen Katuka and Law Association of Zambia v The Attorney-General, Ngosa Simbyakula and 63 Others Selected Judgment No. 29 of 2016**
4. **Jonas Zimba v the Attorney-General 2022/CCZ/007**
5. **Danny Pule and Others v The Attorney-General and Others Selected Judgment No. 60 of 2018**
6. **Stephen Katuka (in his capacity as Secretary General of the United Party for National Development – UPND) v Electoral Commission of Zambia 2016/CC/0025**
7. **Michael Mbuyu Mutwena v The Attorney General 2021/CCZ/0038**
8. **Zambia National Commercial Bank Plc v Martin Musonda and 58 Others, Selected Judgment No. 24 of 2018**
9. **South Dakota v North Carolina(1904) 192 US 268 LED 448 at 465**
10. **Nafiu Rabi v S (1981) 2 NCLR 293**
11. **Ifezu v Mbadugha (1984) 1 SC NLR 427;5 SC 79**

Legislation referred to:

1. **The Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016.**
2. **The Electoral Process Act, No. 35 of 2016**
3. **The Constitutional Court Rules, Statutory Instrument No. 37 of 2016**

Other works cited:

1. **Black's Law Dictionary, 9th Edition, West Publishing Co., St Paul (USA) 2009**
2. **The Report of the Technical Committee on Drafting the Zambian Constitution. December 2013.**

1.0 INTRODUCTION AND BACKGROUND

1.1 By originating summons filed into Court on 13th September, 2022, the Applicant seeks the determination of the following questions:

1. Whether Article 52(6) of the Constitution of Zambia is applicable where an independent candidate in a parliamentary election withdraws his or her candidature after the close of the nominations and before the election date.
2. Whether under Article 52(6) of the Constitution and section 31(2) of the Electoral Process Act No. 35 of 2016, the Electoral Commission of Zambia is obligated to cancel the election and call for fresh nominations when an independent candidate withdraws

from the election after the close of nominations but before the election date.

- 1.2 The background to this action is that on 25th August, 2022, the Electoral Commission of Zambia (ECZ) held nominations for the Kabushi constituency parliamentary by-election scheduled to be held on 15th September, 2022. Four candidates were declared as validly nominated by the ECZ.
- 1.3 On 12th September, 2022, an independent candidate Alfred Yombwe wrote a letter to the ECZ and informed the Commission that he had resigned as a candidate from the by-election. As a result of that resignation, there were calls from members of the public for the ECZ to cancel the by-election and call for fresh nominations based on the provisions of Article 52(6) of the Constitution. The Applicant therefore commenced this action seeking an interpretation of Article 52(6) of the Constitution in light of the foregoing situation.

2.0 APPLICANT'S ARGUMENTS

- 2.1 In its skeleton arguments, the Applicant begun by submitting that this Court has the requisite jurisdiction to interpret the constitutional provision in issue and that the matter had been properly commenced

by way of originating summons in line with Order IV rule 2(2) of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016.

2.2 The Applicant went on to submit that in answering the questions raised in the Originating Summons, this Court must interpret Article 52(6) of the Constitution and its effect and interplay with section 31(2) of the Electoral Process Act, No. 35 of 2016 (EPA). The Applicant cited a portion of Alfred Yombwe's letter which it submitted was of interest to this action and reads:

I write to inform you that pursuant to Article 52(6) of the Constitution of Zambia, I have resigned and withdrawn my candidature from the forthcoming Kabushi Constituency scheduled for the 15th September, 2022.(Emphasis added by Applicant)

2.3 The Applicant stated that the candidate in the above excerpt, while citing Article 52(6) of the Constitution, used the words “resigned” and “withdrawn” in the same sentence, thereby causing confusion among members of the public. The Applicant therefore submitted that the question that this Court ought to answer is whether the withdrawal from an election after the close of nominations is provided for under Article 52(6) of the Constitution. It contended that the answer to that

question would determine whether the election ought to be cancelled following such withdrawal.

- 2.4 The Applicant further submitted that in interpreting Article 52(6) of the Constitution, we should first apply the literal rule of interpretation to the text and only if that results in absurdity should we resort to other rules of interpretation as we stated in the case of **Milford Mambo and Others v The People.**⁽¹⁾
- 2.5 The Applicant argued that a literal interpretation of Article 52(6) would entail that the ECZ should cancel an election and call for fresh elections when a candidate dies, resigns or becomes disqualified in accordance with Articles 70,100 or 153 of the Constitution or when a court disqualifies a candidate for corruption or other electoral malpractice. The Applicant added that the word “resigns” in Article 52(6) was of interest in this action because the candidate used the word in his letter to the ECZ and therefore that this Court should consider the ordinary meaning of the word.
- 2.6 The Applicant submitted that according to the Oxford Advanced Learners’ Dictionary, the Cambridge English Dictionary as well as Black’s Law Dictionary, the word “resign” or the act of “resignation” connote the formal act of one communicating one’s decision to give

up or vacate an office that one previously held. The Applicant submitted that the definition raises the question whether being nominated as a candidate in an election can be considered as holding an office that one can resign from.

2.7 It was submitted that if the Court answers the question in the affirmative, then Article 52(6) applies to independent candidates and consequently, the ECZ ought to cancel the election and call for fresh nominations and hold an election within thirty days of the filing of fresh nominations.

2.8 The Applicant argued that if on the other hand, on a literal interpretation of the word “resigns”, the Court concludes that candidature is not an office or position that one can resign from in order to invoke Article 52(6), recourse should be made to section 31(2) of the EPA which specifically provides for a withdrawal from an election.

2.9 The Applicant further submitted that taking a literal approach, the Black’s Law Dictionary defines withdraw as follows:

“Withdraw, vb. 1. (VT) To take back (something presented, granted, enjoyed, possessed, or 2, (VT.) To retract (One’s words) <withdraw the objection>.3 (vt.) to refrain from prosecuting or proceeding with (an action).

2.10 The Applicant submitted that taking the plain and ordinary meaning of the definitions of "resign" and "withdraw" would not lead to an absurdity. Further, that by adopting a literal reading of the definitions of the two words, this Court will conclude that the word "resign" as used in Article 52(6) envisages a situation where one resigns from a political party and that it is distinct from a withdrawal envisaged under section 31(2) of the EPA. The Applicant argued that resignation cannot be applied to an independent candidate. The Applicant therefore contended that a resignation and a withdrawal from an election do not mean the same thing and thus cannot be used interchangeably.

2.11 Thus, the Applicant urged us to interpret Article 52(6) of the Constitution in order to bring clarity and finality to the public debate.

2.12 At the hearing of the originating summons, Mr. Batakathi, Counsel for the Applicant, relied on the Applicant's affidavit in support of the originating summons and skeleton arguments which he augmented. He submitted that the action arose from an incident where a candidate in the Kabushi by-elections supposedly resigned and withdrew his candidature after the close of nominations and before the election date. Counsel submitted that the question which had

arisen in light of section 31(2) of the EPA was whether Article 52(6) of the Constitution is applicable to an independent candidate. According to Counsel, a literal interpretation of section 31(2) means a candidate is not permitted to withdraw his or her nomination after the close of nominations and can only so do before the expiry of the period set for nominations.

- 2.13 Mr Batakathi submitted that the second limb of the Applicant's argument is that Article 52(6) of the Constitution does not provide for a withdrawal but only provides for death, resignation or disqualification by a court. He argued that the words "resign" and "withdraw" do not mean the same thing as resignation entails giving up an office or position while withdrawal means changing one's mind about putting oneself in contention for a position.
- 2.14 From that stand point, Mr. Batakathi submitted that the resignation envisaged under Article 52(6) means giving up an office or position in a political party. He argued that an independent candidate therefore cannot resign but can only withdraw because a candidate is simply a person running for office and cannot resign.
- 2.15 Mr Batakathi invited us to consider the Final Report of the Technical Committee on Drafting the Zambian Constitution at pages 195 to 198

and submitted that the Technical Committee recommended a mixed-member electoral system which consisted of a first-past-the-post and a proportional representation system in the election of Members of Parliament, which system was political party dominated. Counsel proffered that Article 52(6) was drafted with a political party in mind and not an individual. He argued that it follows that where a candidate resigns from a political party which nominated that candidate, the political party must be given an opportunity to nominate another candidate who should undergo the same nomination process.

2.16 In Counsel's view, Article 52(6) was intended to protect the interest of a political party which sponsored the candidate. Mr. Batakathi submitted that Article 52(6) does not include the expulsion of a candidate from a political party, which fact, in Counsel's view, buttresses his argument that Article 52(6) provides for unforeseen situations and not a deliberate act such as the expulsion of a candidate by a political party or the withdrawal of an independent candidate from an election.

2.17 Mr. Batakathi reiterated that the words "resign" and "withdraw" cannot be used interchangeably as to do so would lead to absurdity. He

contended that it could not have been the intention of the legislature that the voluntary withdrawal from an election by an independent candidate, who does not represent any political party, should turn the entire electoral process on its head.

2.18 Counsel urged us to search for the social purpose of legislation as a step towards a purposive construction of the Constitution. He added that in doing so, we should take into account the totality of the laws, institutions, moral standards and goals of society and interpret Article 52(6) in its best political and moral light and settle the question with a single right answer.

2.19 Counsel cited the US case of **Riggs v Palmer**⁽²⁾ in support of his submission that we should look at and protect the public interest. He contended that to allow an independent candidate to withdraw in order to cause the cancellation of elections would be against public policy and that the need to protect the electoral system and public funds outweighs the interest of an individual politician.

2.20 Mr Batakathi further submitted that in answering the second question, we should hold that the ECZ is not required to cancel an election and hold fresh nominations when an independent candidate withdraws after the close of nominations because section 31(2) of the EPA does

not permit a withdrawal after the close of nominations. Further, that Article 52(6) does not envisage a withdrawal. Therefore, that there is no requirement for the ECZ to cancel an election except for the reasons of death or resignation from a political party or disqualification of a candidate by a competent Court.

3.0 1ST RESPONDENT'S RESPONSE

- 3.1 In response, the Attorney General as the 1st Respondent filed an affidavit in opposition to the originating summons sworn by Josiah Simachela, the Chief State Advocate in the Attorney General's Chambers. He agreed with the factual basis of this action as given by the Applicant in his affidavit in support of the originating summons and asserted that the Attorney General, as a protector of public interest and defender of the Constitution, was of the view that the questions set out for determination in the originating summons were ripe for interpretation owing to the events that had transpired in the Kwacha and Kabushi Constituencies.
- 3.2 In his skeleton arguments in opposition, the Attorney General began by submitting that this Court has jurisdiction to hear this matter as it relates to the interpretation of Article 52(6) of the Constitution and does not raise contentious or personalised issues; and further that

the matter is properly before us as the mode of commencement is an originating summons.

- 3.3 Regarding the interpretation of Article 52(6), the Attorney General submitted that as we held in the case of **Steven Katuka and Law Association of Zambia v Attorney-General and Ngosa Simbyakula and 63 others**⁽³⁾, words or provisions of the Constitution must not be read in isolation but that the Constitution must be read as a whole in order to give effect to the objective of the Constitution. He further submitted that it is only when the ordinary meaning of the words leads to absurdity that the purposive approach should be resorted to. The Attorney General thus submitted that the starting point in interpreting Article 52(6) of the Constitution is to consider the plain and ordinary meaning of that Article. That in order to understand the plain and ordinary meaning of the words used in Article 52(6), all relevant provisions relating to Article 52(6) must be read together as we held in the case of **Jonas Zimba v the Attorney-General**⁽⁴⁾.
- 3.4 The Attorney General cited the definition of candidate in Article 266 of the Constitution which defines a candidate as a person contesting a presidential, parliamentary or local government election and submitted that when Article 52(6) of the Constitution is read with

Article 266 of the Constitution, Article 52(6) can be understood to mean that where "any person" contesting a presidential, parliamentary or local government election dies, resigns or becomes disqualified in accordance with Article 70, 100 or 153 or a court disqualifies a candidate for corruption or malpractice, after the close of nominations and before the election date, the ECZ shall cancel the election and require the filing of fresh nominations by eligible candidates and elections shall be held within thirty days of the filing of fresh nominations.

- 3.5 The Attorney-General submitted that since "any person" in the literal interpretation of Article 52(6) also includes an independent candidate, it raises the question whether an independent candidate can resign from a political party since an independent candidate does not belong to any political party. The Attorney-General argued that applying a literal interpretation of Article 52(6) of the Constitution creates an absurdity as an independent candidate cannot resign from a political party. The Attorney-General therefore contended that a purposive interpretation must be applied to Article 52(6) in order to adopt a constructive interpretation. The case of **Pule and Others v The Attorney General and Others**⁽⁵⁾ was cited in support.

- 3.6 The Attorney General cited the case of **Stephen Katuka (in his capacity as Secretary General of the United Party for National Development – UPND) v Electoral Commission of Zambia⁽⁶⁾** and the case of **Michael Mbuyu Mutwena v The Attorney General⁽⁷⁾** and submitted that while this Court had an opportunity to interpret Article 52(6) of the Constitution when an independent Member of Parliament was alleged to have resigned, the facts of those two cases can be distinguished because the factual basis therein did not afford the Court an opportunity to interpret Article 52(6).
- 3.7 The Attorney-General further submitted that the Applicant's arguments that if on a literal interpretation of the word "resign" in Article 52(6) the Court concludes that candidature is not an office or position from which a person can resign in order to invoke Article 52(6), recourse should be had to section 31(2) of the EPA, are misconceived. The Attorney General contended that section 31(2) is not applicable in this case as the candidate withdrew after the close of nominations and argued that Article 52(6) is the only applicable provision as it provides for a resignation after the close of nominations but before the elections.

- 3.8 The Attorney General concluded by submitting that having interpreted Article 52(6) as above, the ECZ can cancel an election where an independent Member of Parliament resigns from his or her candidature before elections.
- 3.9 At the hearing, Mr. Simachela, Counsel for the Attorney-General submitted, firstly, that the Attorney-General did not agree with the Applicant's submission that the Court should take recourse to section 31(2) of the EPA. He argued that, in his understanding, Article 52(6) provides for resignation after the close of nominations while section 31(2) of the EPA provides for a withdrawal before the close of the nominations, which are two different issues.
- 3.10 Secondly, Mr. Simachela submitted that the Attorney General was alive to the respective decisions of this Court in the **Katuka**⁽⁶⁾ and **Mutwena**⁽⁷⁾ cases but argued that the facts in those cases were different from the facts of this case. On that premise, Mr. Simachela stated that the Attorney General agreed with the Applicant that this Court must interpret the provisions of Article 52(6) within the context of the facts before it and deal with any absurdity that may arise.
- 3.11 Mr. Simachela urged us to deal with the respective questions conclusively in order for justice to be served in the future.

4.0 2ND RESPONDENT'S RESPONSE

- 4.1 In response to the Originating Summons, the 2nd Respondent (ECZ) filed an affidavit in opposition sworn by Bob Mwenya Musenga, the Acting Chief Electoral Officer who essentially stated that in the performance of its functions, the ECZ is guided by the relevant electoral laws which include the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016, the EPA and the regulations promulgated under the Act. Further, that this Court has power to interpret the provisions of the Constitution and therefore the ECZ would defer to the Court to determine the questions posed by the Applicant in its originating summons.
- 4.2 In its skeleton arguments, the ECZ submitted that the facts in this action are not contentious and that the Applicant had posed the questions to this Court in the public interest given the conflicting interpretations in the public domain regarding the meaning of Article 52(6) of the Constitution.
- 4.3 The ECZ cited the case of **Stephen Katuka (in his capacity as Secretary General of the United Party for National Development – UPND) v Electoral Commission of Zambia⁽⁶⁾**, wherein we expressed the view that a candidate in that case who had purportedly

resigned needed to have formally written to the ECZ and advised the Commission of the resignation and that without such resignation in writing by the candidate in question, the Respondent was on firm ground when it declined to cancel the National Assembly elections in the Petauke Central Constituency. We further stated that:

Although Article 52(6) is silent on the form the resignation of a candidate standing for elections should take, it is our considered view that it was not the intention of the framers of the Constitution that candidates should resign from standing for elections after the closure of nominations without giving formal notification to the Respondent to that effect. To imply otherwise would be a recipe for anarchy in the management of elections and in the electoral system in general.

4.4 The ECZ submitted that this Court in the *Katuka*⁽⁷⁾ case cited above gave guidance on resignations done pursuant to Article 52(6) of the Constitution. In conclusion, the ECZ submitted that this Court should determine the questions posed by the Applicant as it interprets Article 52(6) and guide the parties accordingly.

4.5 At the hearing, Ms. Phiri in-house Counsel at the ECZ relied entirely on the 2nd Respondent's affidavit in opposition to the Originating Summons and skeleton arguments in opposition and did not make any oral submissions.

5.0 APPLICANT'S ARGUMENTS IN REPLY

- 5.1 In reply, Mr Batakathi submitted that the Court was referred to section 31(2) in order to underscore that a withdrawal and a resignation are not the same thing. He argued that if the framers of the Constitution intended to include "withdrawal" under Article 52(6), they would have provided for it in that clause as they did under section 31(2) of the EPA. He reiterated that section 31(2) clearly states that a person can only withdraw from an election before the expiry of the period for lodging nomination papers and not afterwards as a withdrawal is voluntary. He added that in terms of section 31(2), one cannot withdraw after nominations are closed. Therefore, that section 31(2) does not contradict Article 52(6) as it provides for withdrawal during the nomination period while Article 52(6) provides for resignation, death and disqualification after the close of nominations and before the date of elections and has a political party in mind as the situations provided for are not of the political parties' doing particularly with regard to a resignation.
- 5.2 Counsel emphatically reiterated that all the situations provided for under Article 52(6) do not relate to an independent candidate as there is no need to replace an independent candidate in an election as he

does not represent any political party which would need to replace its candidate. Finally, Mr. Batakathi reiterated that we should take into account the social purpose of legislation when interpreting Article 52(6).

6.0 INTERPRETATION

- 6.1 We have duly considered the questions raised in the Originating Summons as well as the written arguments and oral submissions made by counsel on both sides and the authorities cited. We begin by restating the principles applicable to the interpretation of the Constitution and which are relevant to this action. We consider it necessary to do so in order to lay a proper foundation for our determination of the questions before us.
- 6.2 In the case of **Steven Katuka and Others v Attorney-General and Others⁽³⁾** and in **Milford Maambo and Others v The People⁽¹⁾** we stated that when interpreting the Constitution, the primary principle of interpretation is that the meaning of the text should be derived from the plain meaning of the language used. Where the words of any provision are clear and unambiguous, they must be given their ordinary meaning unless this would lead to absurdity or be in conflict with other provisions of the Constitution. Other principles of

interpretation should only be resorted to where there is ambiguity in the text or where a literal interpretation would lead to absurdity or conflict with other provisions of the Constitution.

- 6.3 A further principle of constitutional interpretation which we enunciated in the case of **Zambia National Commercial Bank Plc v Martin Musonda and Others**⁽⁸⁾ is that when interpreting the Constitution, all the relevant provisions bearing on the subject for interpretation should be considered together as a whole in order to give effect to the objective of the Constitution. This means that no single provision of the Constitution should be segregated from the other provisions and considered alone.
- 6.4 Courts in other jurisdictions have similarly pronounced themselves on the principles to be followed in the construction of a Constitution. In **South Dakota v North Carolina**⁽⁹⁾ White J. of the Supreme Court of the United States made the following remarks:

I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all others, and to be considered alone, but all the provisions bearing upon a particular subject are to be brought into view to be so interpreted as to effectuate the great purpose of the instrument.
(Emphasis added)

6.5 In *Nafiu Rabi v S*⁽¹⁰⁾, Sir Udo Udoma of the Supreme Court of Nigeria said:

I do not conceive it to be the duty of this Court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends. (Emphasis added)

6.6 In *Ifezu v Mbadugha*⁽¹¹⁾, Bello JSC of the Nigeria Supreme Court further said:

The fundamental principle is that such interpretation as would serve the interest of the Constitution and would best carry out its objects and purpose should be preferred. To achieve this goal its relevant provisions must be read together and not disjointly ... where the provisions of the Constitution are capable of two meanings the court must choose the meaning that would give force and effect to the Constitution and promote its purpose.(Emphasis added)

6.7 We are guided by the above principles as we consider the questions before us. As we address the questions raised in the Originating Summons, we are mindful that Article 267 of the Constitution enjoins us to interpret the constitutional provisions in accordance with the Bill of Rights, and in a manner that promotes the Constitution's purposes, values and principles; permits the development of the law; and contributes to good governance. Article 8 of the Constitution

stipulates the national values and principles which we must consider. In our view, the national values which directly apply in this case are those stated in Article 8(c), namely democracy and constitutionalism.

6.8 In the first place, the Applicant seeks a determination of the question whether Article 52(6) of the Constitution is applicable where an independent candidate in a parliamentary election withdraws his or her candidature after the close of nominations but before the election date. This question as phrased presupposes that a candidate in a parliamentary election can withdraw his or her candidature after the close of nominations but before the election date. The question therefore raises two issues for our determination. The first issue is whether a candidate in a parliamentary election can withdraw his or her candidature after the close of nominations but before the election date. The second issue is whether Article 52(6) of the Constitution provides for the withdrawal of a candidate's nomination after the close of nominations but before the election date. We shall address the two issues simultaneously.

6.9 Regarding the question whether a candidate can withdraw his or her candidature in the period after the close of nominations but before the election date, we have holistically examined the relevant provisions of

the Constitution and of the Electoral Process Act No.35 of 2016 on the electoral process and on the subject of nominations. Article 48 of the Constitution provides for the electoral process for electing a President, Member of Parliament or councillor in the following terms:

The electoral process for electing a President, Member of Parliament or councillor shall be prescribed.

6.10 Article 49 of the Constitution further provides that the system of administering elections shall be prescribed. Article 266 of the Constitution defines the word “prescribed” to mean provided for in an Act of Parliament. What this means is that by providing in Article 48 that the electoral process for electing, *inter alia*, a Member of Parliament shall be prescribed, the framers of the Constitution left it to Parliament to prescribe the details relating to the election of a Member of Parliament including what was to happen with regard to nominations for election as a Member of Parliament.

6.11 Pursuant to Articles 48 and 49 of the Constitution, Parliament enacted the Electoral Process Act No. 35 of 2016 (henceforth referred to as ‘the Act’). The long title of the Act sets out the object of the Act, *inter alia*, as follows:

An Act to provide for a comprehensive process for a general election; provide for the conduct of elections by the Electoral

Commission of Zambia and empower the Commission to make regulations in matters relating to elections; provide for the registration of voters and the keeping of voters registers; prescribe the procedures for nominations for elections;...(Emphasis added)

6.12 Of relevance to this action, is that the Act prescribes the procedures for nominations for elections. In that regard, section 31 of the Act provides for nomination for election as a Member of Parliament in the following terms:

(1) A person who applies to be a candidate for election in any constituency shall lodge with the returning officer for that constituency that person's nomination paper and an affidavit in the prescribed manner and form.

(2) A nomination submitted under subsection (1) may be withdrawn at any time before the expiry of the period appointed for lodging nomination papers in respect of the constituency concerned, if the candidate delivers to the returning officer a written notice to that effect. (Emphasis added)

6.13 It is evident to us from the plain language of section 31(2) of the Act, which we have set out above, that the legislature in exercise of its constitutional power under Articles 48 and 49 provided for the withdrawal of candidature for election as a Member of Parliament before the expiry of the nomination period. An examination of the rest of the provisions of the Act on the subject of nominations for election as a Member of Parliament reveals that Parliament did not provide for

the withdrawal of candidature for election as a Member of Parliament after the close of the period allowed for lodging nomination papers.

6.14 That being the case, and in the absence of express provision to that effect in the Act, the presupposition that a candidate for election as a Member of Parliament can withdraw from election as a Member of Parliament in the period after the close of nominations but before the election date as suggested by the Applicant in its first question is not supported by the Constitution, the Act or any other law. In other words, neither an independent candidate nor a political party sponsored candidate for election as a Member of Parliament is authorised by the Constitution or the Act to withdraw their nomination for election as a Member of Parliament after the expiry of the period appointed for lodging nomination papers in respect of a parliamentary election.

6.15 This leads us to the second issue which is whether Article 52(6) of the Constitution provides for the withdrawal of a candidate's nomination after the close of nominations but before the election date. Article 52 of the Constitution set out in full reads:

(1) A candidate shall file that candidate's nomination paper to a returning officer, supported by an affidavit stating that the candidate is qualified for nomination as President, Member of

Parliament or councillor, in the manner, on the day, and at the time and place set by the Electoral Commission by regulation.

- (2) A returning officer shall, immediately on the filing of a nomination paper, in accordance with clause (1), duly reject the nomination paper if the candidate does not meet the qualifications or procedural requirements specified for election to that office.*
- (3) The information contained in a nomination paper and affidavit shall be published by the Electoral Commission, as prescribed.*
- (4) A person may challenge, before a court or tribunal, as prescribed, the nomination of a candidate within seven days of the close of nomination and the court shall hear the case within twenty-one days of its lodgement.*
- (5) The processes specified in clauses (1) to (4) shall be completed at least thirty days before a general election.*
- (6) Where a candidate dies, resigns or becomes disqualified in accordance with Article 70, 100 or 153 or a court disqualifies a candidate for corruption or malpractice after the close of nominations and before the election date, the Electoral Commission shall cancel the election and require the filing of fresh nominations by eligible candidates and elections shall be held within thirty days of the filing of the fresh nominations.*

6.16 An examination of all the provisions of Article 52 which we have set out above reveals that none of the clauses of that Article provides for the withdrawal of candidature for election as Member of Parliament after the close of nominations or at all. Article 52 (6) of the Constitution, which is the subject of this case, provides for incidents, which if they occur after the close of nominations but before the

election date require the ECZ to cancel the election, call for fresh nominations and hold an election within thirty days of the filing of fresh nominations. These are specified as the death, resignation or disqualification of a candidate in accordance with Articles 70,100 or 153 or by a court for corruption or malpractice.

- 6.17 The use of the word "resigns" in Article 52(6) has led to the contention by the Applicant that that specific situation does not apply to an independent candidate as an independent candidate is not a member of a political party and so cannot resign. It was contended that candidacy is not employment or a position from which one can resign.
- 6.18 The Attorney General on the other hand, seems to argue in paragraph 3.16 of his skeleton arguments on page 8 of the supplementary record of proceedings that the word resign applies to an independent candidate.
- 6.19 Article 266 defines a candidate as a person contesting a presidential, parliamentary or local government election. A literal interpretation of Article 52(6) does not assist us to decipher the intention of the framers of the Constitution with regard to the word resign. Therefore, for us to give a purposive interpretation of what the framers of the

Constitution intended when they provided for a candidate resigning in Article 52(6), we must examine the context in which they used the word resign in other articles of the Constitution which provide for the resignation of a person. This is in keeping with the principle of constitutional construction that a Constitution must be interpreted in a manner that best carries out its object and purpose; and that no one provision of the Constitution is to be segregated from all others, and to be considered alone, but all the provisions bearing upon a particular subject are to be brought into view to be so interpreted as to effectuate the great purpose of the Constitution.

6.20 As this action relates to candidacy for election as a Member of Parliament, we have considered the provisions of Article 72(2)(a) and (d) and (6)(b) of the Constitution relating to a vacancy in the office of Member of Parliament. Article 72(2)(a) and (d) reads:

2. The office of Member of Parliament becomes vacant if the member

-

(a) resigns by notice, in writing, to the Speaker; or

(b) ...

(c) ...

(d) resigns from the political party which sponsored the member for election to the National Assembly.

Article 72(6)(b) goes on to provide that –

6. Where a court determines that an expulsion of a member, as provided in clause (2)(e) was not justified, there shall be no by-election for that seat and the member shall opt to -

(a) remain a member of the political party and retain the seat; or

(b) resign from the political party and retain the seat as an independent member.(Emphasis added)

6.21 That said, we note that Article 72(2)(a) provides for resignation from the office of Member of Parliament. This situation arises after a person is elected as Member of Parliament. Further provision is made in Article 72(2)(d) for a person to vacate the office of a Member of Parliament where such person resigns from the political party which sponsored that person for election to the National Assembly. Clause (6)(b) of Article 72 also refers to a resignation from a political party and retention of a seat as an independent member where a Member of Parliament is expelled from that member's political party whilst the member is in office as Member of Parliament but the Court finds that the expulsion of the member was unjustified.

6.22 It is evident from the constitutional provisions we have cited that the context in which the framers used the word resign in Articles 72(2)(a) and (d) as well as clause 6(b) of that Article that they had in mind resignation from the office of Member of Parliament or resignation

from a political party, respectively. That being the case, on a purposive interpretation of Article 52(6) read in tandem with Article 72(2)(a) and (d) and (6)(b) of the Constitution, it is evident that the reference in Article 52(6) to a candidate resigning does not apply to an independent candidate. We say so because it is a mandatory constitutional stipulation in Article 51 of the Constitution that a person is eligible for election as an independent candidate for a National Assembly seat if the person is not a member of a political party and has not been a member of a political party for at least two months immediately before the date of the election and meets the qualifications specified in Article 70 for election as a Member of Parliament.

6.23 Further, at the stage of nominations which is provided for in Article 52(6), a candidate nominated for election as a Member of Parliament does not as yet occupy the office of Member of Parliament and therefore cannot purport to resign from that office. Similarly, being an independent candidate as stipulated by Article 51 of the Constitution, that candidate being independent and not a member of a political party cannot resign for purposes of Article 52(6).

6.24 In light of the clear constitutional provisions of Article 72(2)(a) and (d) and (6)(b) read with Article 52(6), we determine in answer to the Applicant's first question that Article 52(6) does not apply to an independent candidate who files nomination papers for election as a Member of Parliament in accordance with Article 52(1) of the Constitution. We further determine that the framers of Article 52(6) had a political party in mind when they provided that where a candidate resigns after the close of nominations but before the election date, the ECZ must cancel the election and require the filing of fresh nominations by eligible candidates and thereafter hold elections within thirty days of the filing of the fresh nominations.

6.25 We are fortified in our conclusion that Article 52(6) does not apply to an independent candidate by the provisions of Article 102 (1), (2) and (4) relating to presidential candidates during the second ballot where the issue of resignation of candidates is also provided for. This is due to the fact that Article 52(6) applies to presidential candidates during the first ballot; and the issue is for us to determine what the framers of the Constitution had in mind when they provided for resignation of candidates in Article 52(6).

6.26 While the Final Report of the Technical Committee on Drafting the Zambian Constitution does not reveal any deliberations on the intention behind Article 52(6), the deliberations on pages 266-271 of the Report show that when similarly providing for instances of death, resignation and disqualification in relation to the second presidential ballot in the current Article 102, the reasoning of the Technical Committee on the subject of resignation, among others, was that this was to ensure that political parties were not disadvantaged by circumstances beyond their control. This reasoning therefore shows that what the framers of the Constitution had in mind was the need not to disadvantage political parties and supports the purposive interpretation that the resignation provided for in Article 52(6) applies to candidates who are sponsored by political parties and does not apply to independent candidates.

6.27 We say so because when a political party's candidate resigns from the political party, that candidate's nomination is invalidated as the candidate can no longer represent that political party in the election. The political party therefore must be given an opportunity to field another candidate for the election which is why the ECZ is required to cancel the nominations and call for fresh nominations from eligible

candidates before the election can be held in terms of Article 52(6) of the Constitution.

6.28 Turning to the second question which is whether under Article 52(6) of the Constitution and section 31(2) of the Act, the ECZ is obligated to cancel the election and call for fresh nominations when an independent candidate withdraws from the election after the close of nominations but before the election date, our short answer is that, as we have already stated earlier on in this judgment, the Constitution and the Act do not provide for the withdrawal from an election after the close of nominations but before the election date. That being the case, the question whether an independent candidate can withdraw after the close of nominations but before the election date does not arise.

6.29 Since the Legislature which in Article 48 of the Constitution was given the power to legislate on issues relating to the electoral process and to prescribe the nomination procedures, did clearly stipulate in section 31 of the Act that a candidate can only withdraw from election as Member of Parliament before the close of the nomination period, neither an independent candidate nor a political party sponsored

neither an independent candidate nor a political party sponsored candidate for election as Member of Parliament can withdraw their candidature after the close of nominations.

6.30 For the avoidance of doubt, we wish to state that in terms of Article 52(6) of the Constitution, where a political party sponsored candidate for election as a Member of Parliament resigns after the close of nominations but before the election date, the Electoral Commission is obligated to cancel the election and call for fresh nominations from eligible candidates and call for fresh elections in accordance with Article 52(6).

6.31 In conclusion, our answer to both the first and second questions posed by the Applicant in the Originating Summons is in the negative.

6.32 As this matter has raised important constitutional issues, each party will bear their own costs of this matter.



.....
A.M. SITALI
CONSTITUTIONAL COURT JUDGE



.....
P. MULONDA
CONSTITUTIONAL COURT JUDGE



.....
M.S. MULENGA
CONSTITUTIONAL COURT JUDGE