

**IN THE HIGH COURT FOR ZAMBIA  
2013/HP/1159  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)**

**IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA, CHAPTER 1, and  
VOLUME 1 OF THE LAWS OF ZAMBIA**

**AND IN THE MATTER OF: ORDER 53 OF THE RULES OF THE SUPREME COURT 1965  
(RSC), WHITE BOOK, (1999 EDITION) VOLUME 1 AND  
VOLUME 2**

**AND IN THE MATTER OF: ARTICLES 64 AND 65, OF THE CONSTITUTION OF  
ZAMBIA, CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA**

**AND IN THE MATTER OF: SECTION 22, 104 (6), 104 (7), AND 104 (8) OF THE  
ELECTORAL ACT NO. 12 OF 2006**

**AND IN THE MATTER OF: SECTION 12 OF THE STATE PROCEEDINGS ACT, CHAPTER  
71, VOLUME 6, OF THE LAWS OF ZAMBIA**

**AND IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF: A PURPORTED DECISION OF THE JUDICIARY OF THE  
REPUBLIC OF ZAMBIA ISSUED BY THE PUBLIC RELATIONS  
OFFICER OF THE JUDICIARY MADE ON THE 8<sup>TH</sup> DAY OF  
AUGUST, 2013 BY WAY OF PRESS RELEASE DATED THE 8<sup>TH</sup>  
DAY OF AUGUST, 2013.**

**AND IN THE MATTER OF: A PURPORTED DECISION OF THE ACTING REGISTRAR OF  
THE HIGH COURT MADE ON THE 9<sup>TH</sup> DAY OF AUGUST,  
2013 CONTAINED IN A LETTER ADDRESSED TO THE  
DIRECTOR OF THE 2<sup>ND</sup> RESPONDENT DATED THE 9<sup>TH</sup> DAY  
OF AUGUST, 2013.**

**AND IN THE MATTER OF: A DECISION OF THE DIRECTOR OF ELECTIONS OF THE  
ELECTORAL COMMISSION OF ZAMBIA DATED THE 9<sup>TH</sup>  
DAY OF AUGUST, 2013 TO POSTPONE THE FILING OF  
NOMINATIONS IN THE BY ELECTIONS FOR PETAUKE  
CENTRAL CONSTITUENCY NO. 55, MALAMBO  
CONSTITUENCY NO. 51 AND MULOBESI CONSTITUENCY  
NO. 148.**

**AND IN THE MATTER OF:**

**A DECISION OF THE DIRECTOR OF ELECTIONS OF THE ELECTORAL COMMISSION OF ZAMBIA DATED THE 10<sup>TH</sup> DAY OF AUGUST, 2013 PURPORTING TO DISQUALIFY THE 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> APPLICANTS FROM FILING THEIR RESPECTIVE NOMINATIONS IN THE BY ELECTIONS TO BE HELD IN PETAUKE CENTRAL CONSTITUENCY NO. 55, MALAMBO CONSTITUENCY NO. 51 AND MULOBESI CONSTITUENCY NO. 148 RESEPECTIVELY TO BE HELD ON 5<sup>TH</sup> SEPTEMBER, 2013.**

**BETWEEN:**

**DORA SILIYA (FEMALE SOLE)**

**1<sup>ST</sup> APPLICANT**

**MAXWELL MOSES BOMA MWALE (MALE)**

**2<sup>ND</sup> APPLICANT**

**HASTINGS SILILO (MALE)**

**3<sup>RD</sup> APPLICANT**

**AND**

**THE ATTORNEY GENERAL**

**1<sup>ST</sup> RESPONDENT**

**THE ELECTORAL COMMISSION OF ZAMBIA**

**2<sup>ND</sup> RESPONDENT**

**Before the Honourable Mrs. Justice M. S. Mulenga on the 3<sup>rd</sup> day of September 2013 in Open Court at 09:00 hours.**

**For the Applicants:**

**Mr. Jack Mwiimbu of Mwiimbu, Muleza & Company.**

**Mrs. Martha Mushipe and Mr. Keith Mweemba of Mushipe and Associates.**

**Mr. Eric Silwamba SC, Mr. J. Jalasi and Mr. L. Linyama of Eric Silwamba, Jalasi and Linyama Legal Practitioners.**

Mr. Paul G. Katupisha of Milner Katolo and Associates

Mr. S. Lungu and Mr. A.G. Shonga SC - Messrs Shamwana and Company.

Mr. Gilbert Phiri of PNP Advocates.

For the 1<sup>st</sup> Respondent:

Mr M Malila SC Attorney General

Mrs M Kombe - Chief State Advocate

For the 2<sup>nd</sup> Respondent:

Mr. Eric M. Kamwi Legal Counsel

Mrs. Mulemba Mulenga in-house Counsel for the Respondent.

# J U D G M E N T

## Cases cited:

1. **Zambia Wildlife Authority and Others v Muteeta Community Resources Board**  
Development Co-operative Society SCZ Judgment No. 16 of 200.
2. **Chikuta v Chipata Rural Council (1974) ZR 241**
3. **New Plast Industries v Commissioner of Lands and Attorney General (2001) ZR 51**
4. **Godfrey Miyanda and others v the Attorney General and others 2001/HP/1174**
5. **Zambia National Holdings Limited and United National Independence Party (UNIP) v. The Attorney General (1994) S.J. 22 (S.C)**
6. **Council of Civil Servants Unions and others v Minister for Civil Service [1984] 3 All ER 935**
7. **R Vs Crown Court at Reading, Ex. P Hutchison and Another [1998] 1 ALL ER 333**
8. **Jere Vs, Ngoma (1969) Z.R 106**
9. **O'Reilly v Mackman (1983) 2 A C 237**

10. **Paul John Firmino Lusaka v John Cheelo (1979) ZR 214**
11. **Aaron Micheal Milner v Denny Kafundula 1979/HP/EP/11(Unreported)**
12. **Amok Isreal Phiri v John Chiwala Banda 1978/HP/EP/3 (Unreported)**
13. **Charles Banda v Nicholas Banda 2006/HP/EP/007(unreported)**
14. **Micheal Mabenga v Sikota Wina and others (2003) ZR 10**
  
15. **Derrick Chitala (Secretary of the Zambia Democratic Congress) v Attorney General (1995/1997) ZR 91**
16. **Sinkamba v Doyle (1974) ZR 1 (CA)**
17. **Miyanda v Handahu S.C.Z. Judgment No. 6 of 1994**
18. **General Nursing Council of Zambia v Ing'utu Milambo Mbangweta (2008) ZR 105 (SC)**
19. **Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and others (2005) ZR 138 (SC)**
20. **Matilda Mutale v Emmanuel Munaile (2007) ZR 118 (SC)**
21. **Lazarus Mumba v Zambia Publishing Company (1980) ZR 144**
22. **Caltex Oil Zambia Limited v Teresa Transport Limited (2002) ZR 97 (SC)**
23. **Nyampala Safaris (Z) Limited and others v Zambia Wildlife Authority and others (2004) ZR 49**
24. **Fredrick J T Chiluba v The Attorney General (2003) ZR 153 at 171-173**
25. **Civil Service Union v Minister for Civil Service [1984] 3 All ER 935**
26. **Communications Authority v Vodacom Zambia Limited (2009) ZR 196**

**Legislation referred to:**

1. **Electoral Act No. 12 of 2006, Sections 3, 22, 93, 94, 98 and 104**
2. **Electoral (General) Regulations 2006, regulation 16(4)**
3. **Rules of the Supreme Court White Book, 1999 Edition, Orders 14A and 53**
4. **Representation of the People Act 1951 of India, sections 98, 99, 116A and 116B**

5. **National Elections Act No. 1 of 1985 (Cap 343 RE 2010) of Tanzania, sections 113 and 114**
6. **Supreme Court Act Cap 25, sections 9 and 25**
7. **Constitution Cap 1, Article 66**

**Works referred to:**

1. **Halsbury's Laws of England Fourth Edition Volume 15, paragraphs 948, 950**
2. **B A Garner (Editor in Chief) Black's Law Dictionary 9<sup>th</sup> Edition Thomson West**
3. **Grahame Aldous and John Alder, Applications for Judicial Review: Law and Practice of the Crown Office, Second Edition, Butterworths**

This is an application by the Applicants for judicial review pursuant to Order 53 Rules of the Supreme Court of England (RSC), White Book 1999 Edition seeking orders of Certiorari, Prohibition, Mandamus and Declaration against the decision of the 2<sup>nd</sup> Respondent dated 10<sup>th</sup> August 2013 and two purported decisions of the Judiciary.

The facts are not in dispute as evidenced by the affidavits filed by all the parties. These are briefly that the Applicants are all members of opposition political parties. Following the 2011 tripartite elections, the Applicants had their seats petitioned by losing candidates from the Patriotic Front party. The High Court dismissed the petitions against the 1<sup>st</sup> and 3<sup>rd</sup> Applicants and upheld that against the 2<sup>nd</sup> Applicant and his election was accordingly nullified. All the three cases went on appeal to the Supreme Court which confirmed the nullification of the election of

the 2<sup>nd</sup> Applicant and overturned the decisions of the High Court in respect of the 1<sup>st</sup> and 3<sup>rd</sup> Applicants and consequently also nullified their election. The nullification of all the three seats was based on corrupt and illegal practices which were found to have been proved to the required standard for election petitions. The standard of proof is above the balance of probabilities which generally applies to civil cases but below that of beyond reasonable doubt required in criminal proceedings.

The 2<sup>nd</sup> Respondent set the dates for nominations and by-elections in the three respective constituencies of Petauke Central, Malambo and Mulobezi. The Applicants all intended to contest in by-elections whose date for filing of nominations was set for 9<sup>th</sup> August, 2013. On 8<sup>th</sup> August, 2013, the Judiciary of Zambia issued a press statement through its Public Relations Officer, one Terry Musonda. The statement purported to opine on the provisions of section 104 (6) and (7) of the Electoral Act No. 12 of 2006 (hereinafter referred to as the Act) that the requirement to render a Report by the High Court as envisaged by the above sections of the Electoral Act was “overtaken” once there was an appeal to the Supreme Court of Zambia.

The 2<sup>nd</sup> Respondent requested for a formal notification regarding reports from a judicial officer. On 9<sup>th</sup> August 2013, the Acting Registrar of the High Court of the Judicature for Zambia, Chilombo Maka Phiri, rendered a purported report to the 2<sup>nd</sup> Respondent

advising that the requirements by the High Court to render a report in line with Section 104 (6) and (7) of the Electoral Act, did not extend its application to the Supreme Court of Zambia.

Following the said letter from the Judiciary, the 2<sup>nd</sup> Respondent issued letters to all political parties on 10<sup>th</sup> August, 2013 stating its decision not to allow nomination papers to be filed by candidates affected by the nullification of elections by the Supreme Court. The decision was said to be premised on the official communication received from the Judiciary to the effect that ***“the judgment of the Supreme Court reigns supreme and no report from the High Court is required.”***

The Applicants were thus effectively barred from filing their nominations and hence this application for judicial review. The leave was granted ex-parte and was to operate as a stay of the 2<sup>nd</sup> Respondent’s decision.

Before the hearing, the 1<sup>st</sup> Respondent raised preliminary issues by way of notice pursuant to Order 14A RSC and I directed that I shall consider them at the same time in this Judgment. I will therefore begin by considering the preliminary issues.

### **Preliminary Issues**

The 1<sup>st</sup> Respondent’s application to raise preliminary issues is made pursuant to Order 14A of the Rules of the Supreme Court of England (RSC), White Book, 1999 Edition. Order 14A provides for

final determination of a cause or matter on points of law at any stage of the proceedings. The preliminary issues by the 1<sup>st</sup> Respondent are on points of law that the judicial review proceedings are incompetent as they should have been brought by way of petition as provided in the Act and in the alternative, that the judicial review proceedings are premature as there is no decision of a final nature and the Applicants were not named in any of the statements in issue.

The Applicants contended that the procedure of raising preliminary issues by notice is not provided for in Judicial Review matters and was unequivocally proscribed in the Supreme Court case of **Zambia Wildlife Authority and Others v Muteeta Community Resources Board Development Co-operative Society SCZ Judgment No. 16 of 2006**, where it was held that:

***“When impeaching an application for Judicial Review, an Applicant cannot do that by way of a preliminary application. An Applicant has to file summons to give sufficient notification to the other side in order to have the whole matter fully adjudicated upon by the court. The application by way of notice was improper and misconceived.”***

That the Supreme Court further took the view that it was now mandatory in matters of judicial review for the High Court to strictly follow the practice and procedure laid out in Order 53 RSC.



That the 1<sup>st</sup> Respondent's application has lamentably failed to meet the barest minimum of the requirements under Order 53 RSC and that the preliminary issues raised should thus not be entertained by this Court for procedural impropriety following the authority of **Chikuta v Chipata Rural Council (1974) ZR 241** and **New Plast Industries v Commissioner of Lands and Attorney General (2001) ZR 51.**

In the arguments in reply, the 1<sup>st</sup> Respondent stated that the **Zambia Wildlife Authority** case relied upon by the Applicants neither intended nor abrogated the express and clear provisions of Order 14A RSC allowing for disposal of a case on a point of law. That the case did not also proscribe the raising of preliminary issues in judicial review proceedings nor oust the applicability of general rules of procedure to judicial review except those set out in Order 53 RSC. Therefore there was no procedural impropriety in invoking the provisions of Order 14A RSC.

I have considered the submissions by both parties and the Supreme Court decision in the **Zambia Wildlife Authority** case. At pages 167 and 169 the Supreme Court stated that:

***“..it is desirable that the Court should not delve into the question of whether the applicant has “sufficient interest” or locus standi as a preliminary issue. ....in order to impeach the application for judicial review, the applicant cannot do that by way of***

***preliminary application. The applicant has to file summons to give sufficient notification to the other side in order to have the whole matter fully adjudicated upon by the Court.”***

The Supreme Court never stated that the High Court erred in considering the preliminary issue and the tenor of the above quoted statements does not proscribe the raising of preliminary issues but merely states that this should be done by way of summons to give the other party sufficient time to respond so that the Court can adjudicate on all the matters fully. I thus find in line with the 1<sup>st</sup> Respondent’s arguments that preliminary issues for final disposal of a matter on points of law may be raised in judicial review proceedings. I note that the 1<sup>st</sup> Respondent did not follow the guidance in that case to raise the preliminary issues by summons but did so by notice. I do not find this defect fatal in that it is curable and to do justice at this hour, I shall still consider the same as the Applicants were given sufficient notice to respond to them and have in fact done so.

Four preliminary issues have been raised with the last three being in the alternative. For convenience, I will consider the preliminary issues consecutively as presented.

The first issue is whether the proceedings before this Court are not incompetent for having been brought by way of judicial review rather than petition.

It was submitted that the proceedings were wrongly commenced by judicial review contrary to the provisions of section 93 of the Electoral Act. Further, that section 94 of the same Act also outlines the guidance on who may commence an action challenging an election. It was argued that the Applicants for judicial review in this case clearly fall under the category of applicants under section 94(b) and as such the only mode of commencement should have been by way of petition and not judicial review.

The 1<sup>st</sup> Respondent also cited Article 94(1) of the Constitution and section 9 of the High Court Act, Cap 27 of the Laws of Zambia which recognises the unlimited jurisdiction of the High Court in civil proceedings. It was however argued that the jurisdiction is limited by subject matters and mode of commencement as by law prescribed. Section 10 of Cap 27 was cited to support this assertion as indicating the practice and procedure to be used in different matters. It was added that section 93(1) of the Electoral Act falls squarely within section 10 of Cap 27.

The 1<sup>st</sup> Respondent further contended that the High Court and Supreme Court have confirmed in many cases that where the

mode of commencement is provided for by statute, litigants have no choice but to follow the prescribed mode of commencement of an action. They cited the case of **Chikuta V. Chipata Rural Council** where the Supreme Court held that the practice and procedure in the High Court is laid down in the High Court Rules, and where the same are silent or not comprehensive, recourse should be had to the English White Book. They also cited the case of **New Plast Industries v. Commissioner of Lands and Attorney General** to further support his argument on practice and procedure to be used in the High Court. In that case, it was held that a litigant had no choice on the mode of commencement of an action where legislation or statutes have provided for a specific mode of commencement. It was further held that since the matter was brought to the High Court by way of judicial review instead of appeal as provided in the Lands and Deeds Registry Act, the Court had no jurisdiction to grant the reliefs sought.

The 1<sup>st</sup> Respondent also relied on the case of **Godfrey Miyanda and others v the Attorney General and others 2001/HP/1174** to augment the position that where a decision has to do with election petitions, judicial review may not be the correct mode as was in that case where the nomination of a presidential candidate and the High Court's jurisdiction in presidential election matters were in issue. Another case relied on is **Zambia National Holdings Limited and United National**

**Independence Party (UNIP) v. The Attorney General (1994) S.J. 22 (S.C)** where the Supreme Court specifically dealt with the issue of “jurisdiction” of the High Court to hear different matters and how this jurisdiction depends on the subject matter and the prescribed mode of commencement of a particular action. It was thus submitted that this instant matter be dismissed on the basis of having been wrongly commenced.

The Applicants’ main argument in response is that there was no election being challenged to warrant an election petition since the elections in the affected Constituencies are in *futori*. Further, the Applicants did not file their nominations before a returning officer so as to set in motion the provisions of regulation 16 (4) of the Electoral (General) Regulations since the nominations were in fact postponed to a later date.

The Applicants’ further response was that the case of **Godfrey Miyanda and others v Attorney General and others** relied on by the 1<sup>st</sup> Respondent could be distinguished from the instant case. That in the **Godfrey Miyanda** case, the electoral process had advanced to a stage where all that was left was the announcement of the result and thus the provisions of the Electoral Act had fully taken effect. While in the case in *casu* the returning officers for the Petauke Central, Malambo and Mulobezi Parliamentary Constituencies have not made a decision on the validity of any nomination papers but the 2<sup>nd</sup> Respondent has

made a decision that the Applicants are not eligible to contest the said by elections and as such challenge by way of election petition as envisaged by the Electoral Act and the Electoral Regulations is not tenable. Further that the laws applicable to presidential nomination and election and the parliamentary nomination are fundamentally different.

That regulation 16 (4) of the Electoral (General) Regulations (which was wrongly cited as section 16 (4) of the Act) provides that:

***“The determination of the returning officer that a nomination is valid or invalid shall not be questioned save by way of an election petition presented in accordance with the provisions of the Act.”***

The Applicants thus submitted that for avoidance of doubt, what is being challenged is a purported decision promulgated through a press release by the Judiciary to the effect that a person can be disqualified from contesting an election in the absence of a report prepared in compliance with the provisions of Section 104 (6) and (7) of the Electoral Act.

That the Electoral Act has no provision on the mode of commencement of actions challenging pre-nomination decisions and therefore the decisions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents cannot

be challenged by way of an election petition but rather through judicial review.

I have considered the arguments on this important issue. It is not in dispute that section 93 (1) and 94 (b) provide for the mode of challenging elections and the categories of people who may present election petitions, respectively and read as follows:

***“93.(1) No election of a candidate as a member of the National Assembly shall be questioned except by an election petition presented under this Part.***

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

***(b) a person claiming to have had a right to be nominated as a candidate or elected at the election to which the election petition relates.*** (emphasis mine)

It is apparent that section 93 (1) provides for the mode of commencement of actions challenging elections which have already taken place and it would be absurd to interpret it otherwise. The question then is, has there been an election for which this challenge by the Applicants can be brought by way of an election petition? The answer is a clear and outright NO.

Section 94 (b) outlines two different instances on the persons eligible to present an election petition. The first is where one claims to have had a right to be nominated as a candidate and

the second is where one claims to have had a right to be elected at the election. The 1<sup>st</sup> Respondent's argument is that this provision applies to the Applicants and therefore the judicial review proceedings have been wrongly commenced contrary to section 93.

My perception of the two sections quoted above and as shown by my emphasis is that they are only applicable where nominations and elections have already taken place. As rightly argued by the Applicants, the said sections do not apply to pre-nomination decisions as is the case in *casu*. Section 94 (b) is plainly in the past tense and cannot be interpreted otherwise.

Section 94 (b) on the issue of nominations has to be read with paragraph 16(4) of the Electoral (General) Regulations concerning the determination made by the returning officer to declare a nomination valid or invalid. The construction of section 94 (b) of the Act presupposes that one is petitioning after the election has already been conducted.

In this case the Applicants are challenging a decision by the 2<sup>nd</sup> Respondent that is effectively barring them from filing nominations based on a statement by the Judiciary on the interpretation of section 104 of the Electoral Act with regard to Supreme Court Judgments. The 1<sup>st</sup> Respondent's argument that the Applicants must wait for the concerned elections to be held



before challenging the decision complained of is unreasonable, to say the least.

I have not had sight of the case of **Godfrey Miyanda v Attorney General and others** but I note that it had to do with a presidential election and thus could be distinguished on that basis. It is also apparent that the circumstances in this instant case are different from that case. I have considered the other authorities cited on the mode of commencement of actions in particular the case of **New Plast Industries** cited by both parties where it was held that ***“it is not entirely correct that the mode of commencement of any action largely depends on the reliefs sought. The correct position is that the mode of commencement is generally provided by the relevant statute.”*** In light of the fact that the Electoral Act and Regulations do not provide for the specific mode of challenging pre-nomination decisions of the 2<sup>nd</sup> Respondent such as the subject of these judicial review proceedings, the Applicants are not bound to wait for the election so as to present a petition.

I therefore find that judicial review is the correct mode of commencement in these proceedings and the preliminary issue accordingly fails.

The second issue in the alternative is whether the application for judicial review is not in fact premature since no decision has been

taken by any public body or officer to bar the Applicants from filing in their nominations. That the press statement by the public relations officer of the judiciary, and/or the letter of the Acting Registrar of the High Court and/or the statement of the Electoral Commission of Zambia referred to in the Applicants Notice of Motion and Statements in Support of the judicial review application, do not constitute, in law, a decision assailable through judicial review.

The 1<sup>st</sup> Respondent submitted that there was no decision made in the sense contemplated by the principles of judicial review, therefore the application for judicial review was premature. It was argued that the press statement and letter by the Acting Registrar were not decisions in the legal sense, they merely outlined in general terms the law set out in the Electoral Act. The Court's attention was drawn to the definition of "decision" on page 467 of **Black's Law Dictionary**, 9<sup>th</sup> edition as ***"a judicial or agency determination after consideration of the facts and law; especially, a ruling, order, or judgment pronounced by a Court when considering or disposing of a case."***

The 1<sup>st</sup> Respondent further submitted that a decision which should be amenable to judicial review should be final in nature or one made after all issues have been considered by a public body or agency. That the statements from the Judiciary and the 2<sup>nd</sup>

Respondent do not indicate that a decision has been made. To support this assertion, the case of **Council of Civil Servants Unions and others v Minister for Civil Service [1984] 3 All ER 935** was cited and the Court was invited to solicit an answer to the question of whether the facts as presented in the present circumstances reach the standards set in the above case. It was argued that the standards have not been met and nothing has altered the rights or obligations of the Applicants.

It was further contended that if the Court found that the statements amounted to decisions, the same would be interlocutory in nature, whereas judicial review is usually not available in respect of interlocutory decisions regarding the process that leads to a final decision. They also cited the case of **R v Crown Court at Reading, Ex. P Hutchison and Another [1998] 1 All ER 333** where Lloyd LJ stated that judicial review is not to be used as a means for obtaining a decision on a question of law in advance of the hearing.

That hence the application is premature as section 93(1) requires that a challenge to the conduct of elections ought to be brought before Court after an election has been held.

Further that if the Applicants were aggrieved by any reason, they should have, in terms of section 94(b) of the Electoral Act, waited for the by-elections in their respective constituencies to be held for them to bring any action challenging the said elections before

this Court claiming that the election was void in terms of section 95 of the Electoral Act. The case of **Jere v Ngoma (1969) Z.R 106** was cited in support where Justice Magnus held that:

***“where evidence shows that a candidate for election to Parliament was prevented, by the misconduct of other persons, from lodging his nomination papers with the returning officer, such misconduct essentially makes an election in the particular constituency void.”***

The Applicants responded that the press release by the Judiciary was a decision to bar the Applicants from filling in their nominations and this decision was, in fact, acted upon by the 2<sup>nd</sup> Respondent who decided to bar the Applicants and postpone the date of nominations to a later date to allow the affected political parties to look for alternative candidates.

That paragraph 16 of the 2<sup>nd</sup> Respondent’s Affidavit deposed to by Priscilla Mulenga Isaac states:

***“(16) That I verily believe that the letter from the Acting Registrar of the High Court for Judicature amounted to a judicial standing and directive to the 2<sup>nd</sup> Respondent on the matter of reports.”***

That the application cannot be said to be premature in the face of the statement from the Judiciary which was contrary to the spirit

and tenor of section 104 (6) and (7) of the Act and which was considered a directive by the 2<sup>nd</sup> Respondent and, therefore, is subject to judicial review.

Having considered the submissions by the parties, what has to be determined is whether there is a decision amenable to judicial review. The 1<sup>st</sup> Respondent has consistently maintained that the Judiciary press statement and the letter containing the same addressed to the 2<sup>nd</sup> Respondent by the Acting Registrar were neither reports in terms of section 104 (6) and (7) of the Act nor decisions amenable to judicial review but were '*mere statements*'. I find in line with the submissions made by the 1<sup>st</sup> Respondent that these were mere statements with no legal force and did not amount to decisions. Therefore, the Applicants' submissions on this point are misconceived.

The only decision subject to these proceedings is that made by the 2<sup>nd</sup> Respondent dated 10<sup>th</sup> August, 2013 on receiving of nominations for the three constituencies in issue. This communication is to the effect that:

***"...the Commission will not receive the nomination papers from aspiring candidates affected by the nullifications by the Supreme Court. .... This is in view of the official notification received by the Commission from the Registrar of the High Court whose interpretation is that; "the judgment of the Supreme Court reigns supreme and no report is required."***

This decision of the 2<sup>nd</sup> Respondent effectively bars the Applicants from filing nominations in their respective constituencies following the nullification of their elections by the Supreme Court. This is a final decision as far as the rights of the Applicants are concerned. The definition of the word 'decision' from Black's Law Dictionary given by the 1<sup>st</sup> Respondent is ***"a judicial or agency determination after consideration of the facts and law"*** and the same dictionary defines 'determination' as ***"a final decision by a court or administrative agency"***. An appealable decision is said to be one that is sufficiently final as to receive appellate review.

Paragraph 14 of the 2<sup>nd</sup> Respondent's affidavit states:

***"14. That on 10<sup>th</sup> August, 2013 the 2<sup>nd</sup> Respondent acting on a letter from the Acting Registrar issued a further press release to members of the public disqualifying the affected aspiring candidates from filing their nomination papers for Mulobezi, Malambo and Petauke Central constituencies."***

This is an admission that a decision of a final nature was taken against the Applicants disqualifying them from filing nominations. I must state that although the Applicants were not specifically

mentioned, they were sufficiently identified and identifiable as they were the ones whose elections were nullified by the Supreme Court giving rise to the by-elections in those same constituencies. The Applicants were hence directly affected by the decision of the 2<sup>nd</sup> Respondent.

Therefore, the arguments advanced by the 1<sup>st</sup> Respondent that there was no decision by the 2<sup>nd</sup> Respondent totally lacks merit and this preliminary issue also fails.

In addition, the case of **Jere v Ngoma** relied on by the 1<sup>st</sup> Respondent wherein it was held that when a candidate is prevented from lodging his nomination papers by misconduct of other persons, such a one can petition the election, is not relevant to this instant case. That authority is distinguishable from the current case because what is in issue is not the conduct of persons or returning officers but the decision of the 2<sup>nd</sup> Respondent disqualifying the Applicants from filing their nominations.

The third and fourth issues will be considered together for the sake of convenience. The third issue is whether having regard to the fact that none of the Applicants is specifically mentioned in the statements construed as decisions by the Applicants, this Court has the *ratione materiae* to proceed further to hear this matter. The 1<sup>st</sup> Respondent contended that none of the

statements made mention of any of the Applicants. Hence the Court is being called upon to decide on speculation and conjecture.

The last preliminary issue is whether these judicial review proceedings are not misconceived and an abuse of Court process since they are premised principally if not exclusively on the perceived non-compliance with the provisions of sections 22 and 104 of the Electoral Act, which provisions do not apply to any of the public officers who took steps which are the subject of the present grievance by the Applicants. And consequently whether any of the four accepted grounds for judicial review applies to the situation presented in this application.

The 1<sup>st</sup> Respondent argued that section 104 of the Act requires that the Court that finds corrupt or illegal practices should make a report of its findings. That this does not apply in this case as no report was made and none needed to be made for matters that were determined by the Supreme Court.

The Applicants' response is that the fact that the Applicants were not mentioned by name in the statements did not mean that they are precluded from commencing this action because the impugned decision infringes rights which the Applicants are entitled to protect under public law and which affected them directly. Thus it was stated in the case of **O'Reilly v Mackman**



**(1983) 2 A C 237**, that a person seeking to establish that his rights under public law have been infringed should proceed by way of judicial review.

I have considered the arguments on the two issues. As already stated when considering the second preliminary issue, I am satisfied that although the Applicants were not specifically mentioned, they were sufficiently identified as the persons whose elections were recently nullified by the Supreme Court for the same constituencies in which the by-elections were to be held. Their affidavits also show that they were all desirous of re-contesting their seats and were thus directly affected by the 2<sup>nd</sup> Respondent's decision to bar them.

With regard to the argument that there was no decision or report in terms of section 104 of the Act to warrant the Applicants to bring this action, the contents of the Judiciary statement and letter were to the effect that the provisions of section 104 of the Act on the report were inapplicable where there were Supreme Court decisions nullifying elections as in the case of the Applicants. The clear acknowledgement by the 2<sup>nd</sup> Respondent is that it was on the basis of the Judiciary directive or statements opining on section 104 of the Act in relation to Supreme Court judgments that it acted to disqualify the Applicants. This decision is manifestly contrary to the provisions of section 22 and 104 of the Act which specify the grounds upon which the 2<sup>nd</sup> Respondent

can bar a candidate. This is namely, where there is a conviction or a report and none of these were present in respect to the Applicants. This fact has been consistently acknowledged by the 1<sup>st</sup> Respondent. I will consider this in detail when it comes to the substantive issue. These two preliminary issues also fail.

All the preliminary issues having failed, I hereby dismiss them as lacking merit.

### **Substantive Application**

Having found that this application for judicial review is competently before me, I now proceed to consider the submissions by the parties. For purposes of the easy flow of the submissions, I will begin with those of the 2<sup>nd</sup> Respondent which were filed first followed by the Applicants and then the 1<sup>st</sup> Respondent.

The 2<sup>nd</sup> Respondents submissions are that it can only act to disqualify a candidate whose seat was nullified on account of corrupt practices or refuse to accept the nomination of an aspiring candidate, if it receives a report from the High Court in accordance with section 104 (6), (7) and (8) of the Act. Further, in accordance with section 22 of the Act, the 2<sup>nd</sup> Respondent can only disallow a person from participating in an election upon evidence of a conviction on a corrupt or illegal practice or a report furnished to it by the Registrar of the High Court.

That in the present case, the 2<sup>nd</sup> Respondent wrote to the Judiciary requesting reports on the seats that had been nullified on account of corrupt practice. It received a notification on 9<sup>th</sup> August, 2013 from the Acting Registrar of the High Court wherein it was stated that since the nullification was by the Supreme Court and the Electoral Act in section 104 (6) and (7) did not stipulate that reports can be done by the Supreme Court, there was no need to prepare the said reports. The 2<sup>nd</sup> Respondent was then requested to rely on the Supreme Court Judgments. The 2<sup>nd</sup> Respondent subsequently proceeded to postpone the filing of nominations for the Mulobezi, Malambo and Petauke Central constituencies on 9<sup>th</sup> August, 2013. Then on 10<sup>th</sup> August, 2013 the 2<sup>nd</sup> Respondent decided to disqualify the affected candidates and estopped them from filing nominations based on the letter of notification received from the Acting Registrar of the High Court which stated *inter-alia* that **“the judgments of the Supreme Court reign supreme and no reports from the High Court are required.”**

The 2<sup>nd</sup> Respondent stated that in its understanding, there was neither a conviction nor a report from the High Court in terms of sections 22 and 104 (6) of the Act. That it had in the past received reports from the High Court Judges in compliance with section 104 (6) in the cases of **Paul John Firmino Lusaka v John Cheelo (1979) ZR 214, Aaron Micheal Milner v Denny Kafundula 1979/HP/EP/ (Unreported), Amok Isreal Phiri v**

**John Chiwala Banda (Unreported) 1978/HP/EP/3** and **Charles Banda v Nicholas Banda 2006/HP/EP/007(unreported)** and the same were exhibited in which the uniform practice was the holding of separate proceedings after trial of the election petition for persons *prima facie* found to have engaged in corrupt practices and illegal acts to show cause why they should not be named in the reports in line with section 104 (6) (b) of the Act. These reports were subsequently signed by the concerned High Court Judges.

It was submitted that the Supreme Court had in the case of **Micheal Mabenga v Sikota Wina and others (2003) ZR 10** emphasized the need for such reports. The 2<sup>nd</sup> Respondent then sought the guidance of the Court on the Judiciary interpretation regarding Supreme Court judgments in relation to section 104 (6) of the Act.

The Applicants in their submissions first endorsed the arguments, at paragraph 5 of the 2<sup>nd</sup> Respondent's skeleton arguments which reveal that the 2<sup>nd</sup> Respondent disqualified the Applicants on account of guidance provided by the Judiciary. Also endorsed was the 2<sup>nd</sup> Respondent's submission that it has always been of the view that it has no jurisdiction to disqualify a candidate in cases where no report, as envisaged by Section 104 (6) and (7) of the Electoral Act has been rendered. The Applicants further endorsed the procedure that the High Court had been using in the

preparation of such reports as exhibited by the 2<sup>nd</sup> Respondent regarding the four High Court cases already cited above.

The Applicants cited the Supreme Court case of **Derrick Chitala (Secretary of the Zambia Democratic Congress) v Attorney General (1995/1997) ZR 91** on the grounds of judicial review relied upon. On procedural impropriety, it was submitted that the decision of the Judiciary through its Public Relations Officer which was later reproduced *ipsisima verba* in the purported report issued by the Acting Registrar of the High Court and the follow up decision by the 2<sup>nd</sup> Respondent dated 10<sup>th</sup> August, 2013 barring the Applicants from filing nomination papers on the 13<sup>th</sup> day of August, 2013, did not comply with and was contrary to the provisions of Section 22, Section 104 (6), (7) and (8) of Electoral Act. That consequently the Applicants are eligible to contest the by-elections.

On the issue of who makes the report, it was submitted that the provisions of Section 104 (6) and 22 of the Electoral Act clearly state that the report has to be made by the High Court that tried the election petition as defined by the Constitution. That the report is to be issued by the High Court Judge and the legislators did not intend the Supreme Court to give reports hence the precise words "*High Court*" and not "*Court*".

That this position is fortified by the decision and practice of the High Court in the four cases cited above by the 2<sup>nd</sup> Respondent. That this was endorsed by the Supreme Court in **Micheal Mabenga v Sikota Wina and others** by clearly stating that the report envisaged under the provisions of Sections 104 (6), (7) and (8) of the Electoral Act should be prepared by the High Court Judge who heard and determined the election petition. The Supreme Court, having noted the failure by the High Court Judge to issue a report, did not proceed to usurp the powers of the High Court Judge to make the report and correctly so. It was added that the role of the Registrar of the High Court is simply to transmit the Report.

It was hence argued that the above interpretation is the literal meaning of the subject provisions and that construing the words in a statute in their literal meaning was endorsed in the cases of **Sinkamba v Doyle (1974) ZR 1 (CA)** and **Miyanda v Handahu S.C.Z. Judgment No. 6 of 1994.** That it was therefore apparent that there was gross failure to comply with the laid down statutory procedure in this case.

On the procedure giving rise to the report, the Applicants submitted that the proviso of Section 104 (6) (b) of the Act clearly states that the person to be named in the report must be given an opportunity to be heard before the High Court Judge who tried the election petition and this was the correct process adopted in the

relevant High Court cases already cited above. The consequences of being named in a report are dire and penal and as such the rules of natural justice demand that before the drastic punishment of being barred from contesting in any election and from exercising their constitutional right to vote is meted out against a person they should be given an opportunity to be heard- ***“audi alteram partem.”*** A couple of English cases were cited in support and it was added that the Applicants were clearly not afforded the opportunity to be heard.

Regarding the role of the Registrar of the High Court in the rendering of a report, it was submitted that in line with section 104(7) of the Act, it was merely to transmit the report prepared by the High Court Judge. That it was therefore procedurally improper for the Acting Registrar of the High Court to purport to issue a report that was in fact not issued by a High Court Judge.

That according, to De Smith on Judicial Review paragraph 5003 at P. 226:

***“The task for the Courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision maker. The instrument will normally be a statute or statutory instrument. The Courts when exercising this power of construction, are enforcing the***

***rule of law by requiring administrative bodies to act within the “four corners of their powers or duties.”***

It was submitted that a cursory perusal of the purported report from the Acting Registrar fails to meet the basic requirements of Section 104 (6) (b) of the Act because it fails to give any proceedings in respect of the corrupt practices and illegal acts and also fails to state the names and particulars of the person by whom the corrupt practice was in the opinion of the Court committed. That it is beyond refute, that both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted in excess of the statutory powers in Section 104 (6) and (7) of the Act and their actions were *ultra vires* in the absence of the report.

The 1<sup>st</sup> Respondent’s response to the Applicants arguments is that there was no illegality, procedural impropriety and unreasonableness as there was no decision amenable to judicial review. That the Applicants application was both premature and premised on the statement by the Public Relations Officer and the letter by the Acting Registrar which did not constitute decisions by any stretch of imagination and were therefore not illegal, unreasonable or procedurally improper. That section 104 of the Act only applied to the High Court that makes the finding and does not extend to the Supreme Court and is thus not applicable in this case and emphasized that **“no report was made”** in respect to the Applicants. Consequently, the Applicants were still



entitled to file their nomination papers subject to the decision of the returning officer on validity.

In considering this application, I will not repeat the submissions or arguments advanced by the parties which have been summarized above and are on record. However, I wish to state that the Applicants' arguments have significantly focused on challenging the fact that the Judiciary press statement and the letter by the Acting Registrar did not meet the requirements of the guilty reports as outlined in section 104 (6) of the Act. This is entirely true but perusal of the same shows that they were not purporting to be reports in compliance with section 104 (6) of the Act but merely an opinion of the 'Judiciary' on the effect of Supreme Court Judgments on section 104 (6). I have deliberately placed the word 'Judiciary' in inverted commas as it is not apparent on the face of the press statement and the letter which Courts or offices comprised the Judiciary whose opinion was being advanced. Further, the submissions by both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are to the effect that the Judiciary statement and letter did not constitute reports in terms of section 104 (6) of the Act.

What therefore falls to be determined in this case is firstly, the construction of section 104(6) of the Act; secondly, whether there were guilty reports in respect of the Applicants and thirdly, the effect of the Supreme Court judgments on section 104(6) of the Act.

On the issue of construction of section 104(6) of the Act, the same is outlined below together with the related section 22 (b) of the Electoral Act as follows:

**“22. In addition to the persons disqualified by the Constitution-**

**(b) any person who is convicted of any corrupt practice or illegal practice or who is reported guilty of any corrupt practice or illegal practice by the High Court upon trial of an election petition under this Act shall not be qualified for election as a member of the National Assembly for a period of five years from the date of the conviction or of the report, as the case may be.**

**104. (6)Where it appears to the High Court upon the trial of an election petition that any corrupt practice or illegal practice has been committed by any person in connection with the election to which the election petition relates, the High Court shall, at the conclusion of the proceedings, prepare a report stating-**

**(a) the evidence given in the proceedings in respect of the corrupt practice or illegal practice;**

**(b) the names and particulars of any person by whom the corrupt practice or illegal practice was, in the opinion of the Court, committed:**

**Provided that the Court shall not state the name of any person under this paragraph unless the person has been given an opportunity of appearing before the Court and of showing cause why that person's name should not be so stated.**

**(7) The Registrar shall deliver a copy of every report prepared by the High Court under subsection (6) to-**

**(a) the Commission; and**

**(b) the Director of Public Prosecutions.”** (emphasis mine)

In these judicial review proceedings, section 22 of the Act is not in contention. What requires interpretation is section 104(6) of the Act. The other provisions have just been included to provide context to the discussions that will follow. It is also common cause that the part on conviction is not in issue but that of the guilty report. **Black's Law Dictionary** defines a report as; **“a formal oral or written presentation of facts or a recommendation for action; A written account of a court proceeding and judicial decision; A published volume of judicial decisions by a particular court or groups of courts; A collection of administrative decisions by one or more administrative agencies.”** In the context of the Electoral Act, it is the first definition that is applicable which is a separate written report or

document subsequent to Court's judgment or decision in the main matter.

On the construction of section 104 (6) of the Act, the general rule on interpretation of statutory provisions is as laid down in the case of **General Nursing Council of Zambia v Ing'utu Milambo Mbangweta (2008) ZR 105 (SC)** that **“the primary rule of construction or interpretation of statutes is that enactments must be construed according to the plain and ordinary meaning of the words used, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to the declared or implied intention of the framers of the law, in which case the grammatical sense of the words may be extended or modified.”**

This authority is clear that the provisions of section 104(6) of the Act in this case, must be construed according to the plain and ordinary meaning of the words used. This court had the opportunity of considering an exact replica of this section which was section 28(6) in the repealed Electoral Act Cap 19. The repealed Cap 19 is the predecessor to the current Electoral Act. The legislature retained the same wording as in the current provision outlined above.

The said section 28(6) of the Repealed Act (now section 104(6) of the Act) was subject of interpretation in this Court in the case of **Paul John Firmino Lusaka v John Cheelo** in which Judge Cullinan extensively considered it in relation to the Representation of the People Act 1949 (England) where it was borrowed from. I will not therefore belabour the issue as I entirely agree with the interpretation given in that case. The holding relevant to the current proceedings is that:

**“The provisions of s. 28 (6) apply to any person involved, and emphasis is placed not so much on the liability of the person involved, but the degree of culpability. The provisions of s. 28 (6) (b) of the Electoral Act, Cap. 19, are discretionary, and in a proper case the High Court, in making its report, may decline to state the name of a person found to have committed a corrupt or illegal practice.**

The first part of section 104 (6) of the Act requiring the High Court to prepare a report where it finds that any corrupt or illegal practice has been committed is mandatory while the requirement to name and provide particulars of concerned persons is discretionary. This later part, section 104 (6) (b) of the Act, is done after the High Court has given an opportunity to the concerned persons to show cause why they should not be so mentioned. Hence we have a clear example in the **Lusaka v Cheelo** case where a report was given on a corrupt practice but

the Court declined to name the person. In such an instance, the 2<sup>nd</sup> Respondent cannot act against the person in terms of the sanctions outlined in section 22 but prosecution may be conducted to secure a conviction upon which the 2<sup>nd</sup> Respondent can eventually act.

However, I wish to add that section 3 of the Act provides that the interpretation of the Act should be done in the manner giving effect to the guarantees and responsibilities contained in the Constitution. One of the guarantees is the right for a person to be heard before being found guilty of any offence. It is mandatory that one must be heard before being reported guilty of any corrupt or illegal practice as outlined in section 104 of the Act. The tenor of the provision is that it need not be only the parties to the election petition who can be reported guilty of corrupt or illegal practice but any other person including a witness. This is based on the evidence adduced in Court during the petition.

It should be noted that at a petition hearing, the concerned party may not have addressed their mind to give reasons on why he or she should not be reported. In the case of England as outlined in paragraph 948 of **Halsbury's Laws of England** Fourth Edition Volume 15, the court only gives notice or separate opportunity to be heard on why one should not be named in the report if one was not the principal party to the election petition. This presupposes that the people who are principal parties are heard

or have the opportunity to give their defence to those allegations during the election petition trial. Our legislation does not give that distinction and hence the position that the proviso in section 104 of the Act applies to all including the principal parties to the election petition as found in the case of **Lusaka v Cheelo**.

Paragraph 950 of **Halsbury's Laws of England** Fourth Edition Volume 15 concerning the report states:

**“In order that any person should become subject to any incapacities or disabilities in consequence of the report of an election court, the report must contain or must be equivalent to, a definite finding that he is guilty of the offence or offences entailing such incapacities or disabilities. He does not become subject to them by reason only of a report stating facts from which his guilt may be inferred.”**

This paragraph shows the seriousness attached to the report and the need for the provisions to be fully complied with before one can be subject to the incapacities or sanctions attendant from the report.

From what that has been discussed above, it is clear that the mere fact that the High Court nullifies an election based on corrupt or illegal practice does not in or of itself constitute a guilty report of the candidate whose election was nullified or any person

who committed the same. There must be subsequent proceedings where the High Court has to give opportunity to the person to show cause why he or she should not be named in the report. The consequent report by the High Court must specify the illegal or corrupt practice and the names and other particulars of the person being reported guilty. The 2<sup>nd</sup> Respondent is only mandated to act on the report issued under section 104(6) of the Act to take the action outlined in section 22 of barring the person from contesting for any position and from voting for a period of five years. These sanctions are grave and penal hence the need for the requirements to be strictly followed.

The High Court has in the past followed this procedure of conducting hearings after the determination of the election petition and has reported some people as exhibited in the 2<sup>nd</sup> Respondent's affidavit sworn by Priscilla Mulenga Isaac as PMI 4(a) and PMI 4(f). These respectively relate to the cases of **Aaron Micheal Milner v Denny Kapandula** and **Amock Isreal Phiri v John Chiwala Phiri**. In the **Milner v Kapandula** case, the Court reported two persons. In the **Lusaka v Cheelo** case cited above, the High Court submitted a report on the bribery which was committed by the party to the election petition but declined to name the party who committed the said practice in the report. The more recent case where a hearing was conducted for the purposes of the report under section 104(6) is that of **Charles Banda v Nicholas Banda 2006/HP/EP/007** exhibited as PMI



5(a) and PMI 5(b) but for which there is no copy of the report to the 2<sup>nd</sup> Respondent by the High Court Judge.

In the instant case, the question is whether there was any report issued in terms of section 104 (6) of the Act in respect of the Applicants. In terms of the interpretation above, there was no report by the High Court to the 2<sup>nd</sup> Respondent regarding all the three Applicants. In fact in the case of the 1<sup>st</sup> and 3<sup>rd</sup> Applicants, the High Court petition judgments were in their favour and upheld the elections. The High Court on the other nullified the election of the 2<sup>nd</sup> Applicant on the basis of illegal and corrupt practices. All the three cases went on appeal and the Supreme Court confirmed the High Court verdict in the case of the 2<sup>nd</sup> Applicant and overturned the High Court decisions in the case of the 1<sup>st</sup> and 3<sup>rd</sup> Applicants and found them guilty of illegal and corrupt practices.

This then brings in the issue of the press statement and communication from the Judiciary on the effect of the Supreme Court judgments. Did the press statement and the letter from the Acting Registrar dated 8<sup>th</sup> and 9<sup>th</sup> August 2013, respectively, amount to a report in terms of section 104(6) of the Act? These clearly did not amount to guilty reports as they were not made by any Court following the laid down procedure. These did not even amount to judicial pronouncements.

It has been rightly submitted by the 1<sup>st</sup> Respondent that the press statement by the Judiciary and the letter headed “Reports on nullified Parliamentary Seats” issued by the Acting Registrar are of no legal consequence and are mere statements and opinions of the Judiciary but not the Courts. They also do not amount to decisions which are amenable to judicial review. I will hence not labour on this position which is in line with my finding.

In the history of the Judiciary in Zambia, there has never been occasion where the institution has given interpretations of the law through press statements. As appropriately argued by the 1<sup>st</sup> Respondent, the only competent persons to interpret the law are judges and adjudicators performing their functions as such. The press statement issued by the Public Relations Officer, who is not a judicial officer, cannot be equated to a court judgment or order. The letter by the Acting Registrar is a word for word reproduction of the press statement and is also of no legal consequence because it was not issued in accordance with the provisions of section 104 of the Act which only mandates a High Court judge to prepare reports. The Acting Registrar can only issue judicial pronouncements in the course of judicial proceedings before her. In the case of section 104 of the Act, the duty of the Acting Registrar is merely to convey the reports issued by the High Court and this function of conveying is an administrative and not judicial function. This fact has been acknowledged by the Acting Registrar in the 1<sup>st</sup> Respondent’s affidavit in opposition. Therefore, the

Acting Registrar cannot purport to give interpretation of the law and convey the same while acting in an administrative capacity.

The last aspect is on the effect of Supreme Court judgments generally and in relation to the Electoral Act. The issue for determination is whether a Supreme Court judgment which finds or upholds a finding that there was an illegal or corrupt practice automatically supersedes the requirement for rendering a report under section 104 (6) of the Act.

The Supreme Court judgments are binding on all parties involved as it is the final court of appeal. I must add that this is the status of all judgments of the various courts comprising the Judicature unless the same are set aside or varied on appeal. In the case of the Supreme Court this is more so as there is no further appeal and thus the judgment is final. However, in the case of section 104 of the Act, Parliament in its wisdom did not provide for what should happen on the issuance of the report following an appeal. Considering the Supreme Court judgments in the light of section 104 of the Act, I find that the judgments cannot be said to amount to reports. The Judiciary opinion equating or substituting the Supreme Court judgments for the reports is in effect amending the said section 104 (6) of the Act and the Courts have always been slow in proactively amending legislative provisions. The general view has been that it is the duty of the Legislature and not the Courts to supply omissions in the statutes. Thus were a

gap is discovered, it is for the Legislature to make the amendment.

However, the Supreme Court as well as the High Court has power and authority to amend any offending provision of the law but this needs to be done in a judgment or ruling of a duly constituted court and not through press or other statements issued by judiciary officials in their administrative capacity. In **Lazarus Mumba v Zambia Publishing Company (1980) ZR 144** it was held that **“judicial proceedings mean proceedings of any properly constituted court of justice open to the public.”**

The position on the interpretation of statutory provisions was stated by the Supreme Court in **Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and others (2005) ZR 138 (SC)** when it was held that **“it is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the legislature, that recourse can be had to the other principles of interpretation.”**

Further in the case of **Matilda Mutale v Emmanuel Munaile (2007) ZR 118 (SC)** it was held that **“the fundamental rule of construction of Acts of Parliament is that they must be**

**construed according to the words expressed in the Acts themselves. If the words of a statute are precise and unambiguous, then no more can be necessary than to expound on those words in the ordinary and natural sense. Whenever a strict interpretation of a statute gives rise to an absurdity and unjust situation, judges can and should use their good sense to remedy it by reading words in it, if necessary so as to do what Parliament would have done had they had the situation in mind.”**

The statutory provisions are to be considered in consonance of the whole and the intention of the legislature. Where there are apparent grey areas, the court may read into the same certain provisions in order to arrive at the just interpretation or intention of the legislature. However, the reading in should not go against what is the generally apparent intention in terms of what is clearly provided. In this instant case the provisions of section 104 (6) of the Act are clear and unambiguous and their strict interpretation does not give rise to either absurdity or an unjust situation. I therefore do not find any need to call in aid the other principles of interpretation such as the purposive approach.

If Parliament’s intention was that the 2<sup>nd</sup> Respondent should act based on the findings of corrupt and illegal practices in the judgment, it would have clearly provided so. The fact that it goes beyond the judgment and requires the High Court which tried the

election petition to go further and prepare a report and give opportunity to the concerned party or other persons to show cause why they should not be mentioned in that report, shows that this goes beyond mere finding and as elaborately stated in the **Lusaka v Cheelo** case above, the court must be convinced that the corrupt or illegal practice is of such significance or gravity that the sanctions must follow, hence the naming in the report.

The sanctions of barring a person from contesting and voting for five years are penal or severe and should only be imposed upon a criminal conviction or a report of guilty arising from the trial of the election petition.

In this case in *casu*, two of the elections were upheld by the High Court but nullified by the Supreme Court. The law is silent on how the report is to be transmitted and by whom in such cases. The Applicants are contending that the communication by the Acting Registrar to the effect that the Supreme Court decisions override the need or requirement for the report to be submitted in the manner outlined in section 104 of the Act is not valid.

The provisions of section 104 and 22 of the Electoral Act are clear that after a judgment, there must be a report and the 2<sup>nd</sup> Respondent is only mandated to act on the report and not the judgment. It may be different in the case of the Director of Public

Prosecutions who could still act on both the judgment and the report as the case against the concerned person has to be proved beyond reasonable doubt before one is convicted. This means that the person would have been accorded a fair hearing. In respect of the 2<sup>nd</sup> Respondent, it is bound by the law to mete out the sanctions only on the basis of the report issued in compliance with section 104 of the Act. The authorities cited by the 2<sup>nd</sup> Respondent are clear that the High Court has in the past been following the process as outlined in section 104 of the Act and as discussed in the **Lusaka v Cheelo** case with the most recent being the 2006 case of **Charles Banda v Nicholas Banda** cited above.

This means that in the absence of a report by the High Court which tried the election petition, the 2<sup>nd</sup> Respondent has no authority to act or bar the affected candidates found to have committed illegal or corrupt practices in terms of section 22 of the Act except where there has been a conviction.

I wish to stress that the 2<sup>nd</sup> Respondent is not a proactive party when it comes to sections 22 and 104 (6) of the Act but is meant to be reactive based on either the report or conviction. This in my opinion is cardinal to ensure that the 2<sup>nd</sup> Respondent remains unbiased and not be seen to take sides as that would negatively impact on the conducting of fair elections in a multi-party state. It

is thus for good reason that the 2<sup>nd</sup> Respondent is only required to act on a conviction or a report from the High Court.

In **Micheal Mabenga v Sikota Wina and two others** cited above, the Supreme Court after confirming that there was proof of improper conduct beyond the balance of probabilities and bordering on a criminal nature, merely stated at page 120 that **“the learned trial judge should have recommended to the DPP for possible prosecution in terms of section 29 (current section 104) of the Electoral Act.”** The case was not subsequently referred to the trial judge to act or comply with the requirement for a report in line with section 25 (1) (iv) of the Supreme Court Act Cap 25 nor did the Supreme Court proceed to specifically direct the 2<sup>nd</sup> Respondent to act on the same.

I am of the considered view that this was an ideal case for the Supreme Court to have interpreted or extended the provisions of the section dealing with the reporting, which is the current section 104 of the Act, to do what the concerned statements from the judiciary purportedly sought to achieve.

With regard to the issue of enforcement of Supreme Court judgments, section 9 of the Supreme Court Act Cap 25 provides;

**“9. The process of the Court shall run throughout Zambia and any judgment of the Court shall be**



**executed and enforced in like manner as if it were a judgment of the High Court”**

This provision was reiterated in the case of **Caltex Oil Zambia Limited v Teresa Transport Limited (2002) ZR 97 (SC)** where it was held that Supreme Court judgments and orders are to be enforced in the High Court under the relevant enforcement provisions.

In this case, can it be said that after the Supreme Court judgment the High Court was required to render the report? The statutory provisions as they stand show that there is a lacuna in the law as the legislature apparently did not address itself to the appeal process. This lacuna would need to be addressed by the relevant authorities. I have had opportunity to consider the legislation of other commonwealth countries on this aspect. The Representation of the People Act 1951 of India seems to have been modeled after the Representation of the People Act of England from which we also borrowed in terms of the Electoral Act. This 1951 Act of India has sections 98 and 99 on the decisions of the High Court after hearing an election petition and the subsequent order on the persons found guilty of any corrupt practice, respectively. Section 99 of the 1951 Act of India in particular provides;

**“99.(1) At the time of making an order under section 98 the High Court shall also make an order -**

- **Where any charge is made in the petition of any corrupt practice having been committed at the election, recording-**
  - (i) a finding whether any corrupt practice has or has not been proved to have been committed at the election, and the nature of the corrupt practice; and**
  - (ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of the corrupt practice;.....”**

This 1951 Act further provides for appeals to the Supreme Court in section 116A and the operation of the order of the High Court in section 116B. Section 116B (3) provides;

**“(3) When the operation of an order (under section 99) is stayed by the High Court or, as the case may be, the Supreme Court, the order shall be deemed never to have taken effect under sub-section (1) of section 107; and a copy of the stay order shall immediately be sent by the High Court or, as the case may be, the Supreme Court, to the Election Commission and the Speaker or Chairman as the case may be, of the House of Parliament or of the State Legislature concerned.” (emphasis mine)**

This legislation plainly provides what is to happen following an appeal and that in that case, the Court hearing the election petition appeal has to send the order naming the persons who have been found guilty of the corrupt practice to the relevant institutions. The numbering of section 116A and 116B indicates that these were later insertions in the law which must have happened after it was realized that the law in that country had left a gap. This is essentially the situation that the present case has highlighted in our own jurisdiction.

In Tanzania there is also a similar provision in section 113(1) of the National Elections Act No. 1 of 1985 (Cap 343 RE 2010) which requires the High Court or the Court of Appeal to make the required determinations at the conclusion of the election petition trial or the appeal. Further section 114(2) of the said Act provides for the certification of persons proved guilty of corrupt and illegal practice by either the High Court which tries the petitions or the Court of Appeal after the conclusion of the appeal. The same provides:

**“114 (2) At the conclusion of the trial of an election petition or appeal, the court shall certify to the Director of Elections-**

- **Whether any corrupt or illegal practice has been proved to have been committed by or with the knowledge and consent or approval of any**

**candidate at the election and the nature of such practice, if any; and**

- **The names and other particulars of all persons if any who have been proved to the satisfaction of the court to have been guilty of any corrupt or illegal practice.”** (emphasis mine)

The good practice therefore appears to be that the legislation must specifically also provide on how the report is to be submitted after the determination of the appeal by the Supreme Court. This position once taken would effectively deal with the current lacuna in our Electoral Act.

In the alternative, it can be taken that once the Supreme Court finds or upholds a finding that there was an illegal or corrupt practice committed by a particular person, the Supreme Court may remit the case to the High Court with the necessary instructions for the submission of the report under section 104(6) of the Electoral Act in line with the provisions of section 25 (1) (b) (iv) of the Supreme Court Act.

Nevertheless, the ideal situation would be for the Electoral Act to plainly provide for the specific action to be taken by the Supreme Court in the legislation itself. I thus strongly recommend to the concerned institutions to effectively address this issue with clear provisions on what should happen on the issue of the report after

the determination of the appeal by the Supreme Court as some jurisdictions have done, namely India and Tanzania.

Section 98 of the Act provides for the Chief Justice to make rules on the practice and procedure regarding election petitions under the Act. This is another apparent forum through which the procedure for submission of the reports could be further clarified such as to include specific timeframes within which the reports should be submitted in deserving cases. In the English case, the legislation makes it mandatory for the court to render a report upon the conclusion of every election petition including one stating that there is no illegal practice or corrupt practice being reported in the particular case.

Having established that there were neither convictions nor reports in respect of the Applicants in terms of sections 22 and 104 (6) and that Supreme Court judgments could not be used to circumvent the statutory requirements, the question is whether the decision of the 2<sup>nd</sup> Respondent to disqualify and bar the Applicants from filing nominations is legal, reasonable and procedurally proper.

The scope of judicial review was restated by the Supreme Court in the case of **Nyampala Safaris (Z) Limited and others v Zambia Wildlife Authority and others (2004) ZR 49** that:

**“The remedy of judicial review is concerned not with the merits of the decision, but the decision making process itself. The purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subject and that it is not part of the purpose to substitute the opinion of the Judiciary or of individual judges for that of the authority constituted by law to decide the matter in question.”**

The grounds advanced by the Applicants are illegality, procedural impropriety and unreasonableness. In **Fredrick J T Chiluba v The Attorney General (2003) ZR 153 at 171-173** the Supreme Court outlined what must be shown to prove the grounds of judicial review and cited with approval the case of **Civil Service Union v Minister for Civil Service [1984] 3 All ER 935** that to succeed under illegality, the applicant has to prove that the decision **“contravened or exceeded the terms of the law which authorized the making of that decision or that the decision pursues an objective other than that for which the power to make the decision was conferred. By looking at the wording of the power and the context in which the power is to be exercised, the court’s ultimate function is to ensure that the exercise of the power is within or intra-vires the statute.”** In the case of procedural impropriety, it is the failure to observe procedural rules expressly

laid down in the legislation or instrument conferring the jurisdiction and *Wednesbury* unreasonableness refers to a decision which is **“so outrageous in its defiance of logic or of accepted moral standards that no sensible tribunal which had applied its mind to the question to be decided could have arrived at it.”**

On illegality, the Applicants contention is that the decision of the Judiciary published as a press statement and the decision of the Acting Registrar purporting to issue a report pursuant to section 104 (6) of the Act were illegal and void *ab initio* and the consequent decision of the 2<sup>nd</sup> Respondent based on the same was also illegal. The decision of the 2<sup>nd</sup> Respondent dated 10<sup>th</sup> August 2013 purporting to disqualify the Applicants from contesting the by-election was stating that **“it wishes to inform all political parties and aspiring candidates for the National Assembly by-elections to be held in Mulobezi, Malambo and Petauke Central Parliamentary Constituencies to be held on the 5<sup>th</sup> day of September, 2013 will not receive nomination papers from aspiring candidates affected by the nullification by the Supreme Court”** is illegal and void *ab initio*. It was further stated that the issuance of the press statement by the Judiciary and the issuance of the purported report by the Acting Registrar contrary to section 104 (6) of the Act was procedurally improper as it was not issued by the Courts that tried the election petitions. By extension that

the decision of the 2<sup>nd</sup> Respondent to act on the purported report was also procedurally improper being contrary to section 104 (6) of the Act. The last was that the 2<sup>nd</sup> Respondents decision in the letter of 10<sup>th</sup> August 2013 premised on the Acting Registrar's letter was *Wednesbury* unreasonable.

I have conveniently considered these three grounds together as they are premised on the same facts and I have already found above as follows:

- That there was no report of guilty from the High Court in respect of all the three Applicants as required by section 22 (b) and 104 (6) of the Electoral Act.
- That the Judiciary press statement by the Public Relations Officer and the letter by the Acting Registrar which was *ipssima verba* the press statement, both opining on section 104 (6) of the Act have no legal basis or force whatsoever and were also not in compliance with section 104 (6) of the Act and did not amount to a report as envisage by sections 22 and 104 of the Act.
- That the Judiciary opinion on the effect of the Supreme Court Judgments on section 104 (6) of the Act is of no legal force and is not a judicial pronouncement of any Court.
- Consequently and logically, that the 2<sup>nd</sup> Respondent's decision based on the said opinion contravened the clear provisions of sections 22 and 104 (6) of the Act and was



therefore illegal, procedurally improper and *Wednesbury* unreasonable.

The Applicants have proved their case and I enter Judgment in their favour. The reliefs sought are orders of certiorari, orders of prohibition and declarations. An order of certiorari is one which quashes the original decision found wanting. The learned authors of the book **Applications for Judicial Review: Law and Practice of the Crown Office**, Second Edition at page 58 states that among these remedies which are also outlined in Order 53 RSC **“certiorari is preeminent and prohibition and mandamus are, therefore, likely to be issued only to serve the purposes that cannot be achieved by certiorari.”**

Paragraphs (a) and (b) seek for orders of certiorari to quash the decision of the Judiciary Public Relations Officer made by way of press release on 8<sup>th</sup> August, 2013 and the decision of the Acting Registrar in a letter dated 9<sup>th</sup> August, 2013 addressed to the 2<sup>nd</sup> Respondent. I decline to grant these orders based on my findings above that these did not amount to decisions but were mere statements with no legal force or basis. Paragraph (c) seeking for an order to quash the decision of the 2<sup>nd</sup> Respondent dated 9<sup>th</sup> August postponing the filing of nominations for the concerned three constituencies and paragraph (g) seeking an order of prohibition restraining the 2<sup>nd</sup> Respondent from conducting the

filing of nominations on 13<sup>th</sup> August, 2013, have both been overtaken by events and are therefore not granted.

The Applicants seek six (6) declarations outlined in paragraphs (h) to (m). The sought declarations are that the provisions of section 22 as read with section 104 (6) of the Act require that a report be rendered by the High Court that presided over the election petition and that the Court is required to give an opportunity to a person to be mentioned in the report to show cause why he should not be so mentioned. Further declarations that the purported report issued by the Acting Registrar did not conform to the provisions of the Act; that the press statement by the Public Relations Officer was of no legal effect and that in accordance with Articles 92 and 41 of the Constitution, the Supreme Court was effectively *fuctus officio* in this matter.

Declarations are usually granted in the most deserving of cases and they must not be granted where they will not serve any useful purpose or where they are of no practical consequence. The guidance of the Supreme Court in the case of **Communications Authority v Vodacom Zambia Limited (2009) ZR 196** is that a declaration is a discretionary remedy which must be granted judiciously and further that **“a Court will not grant a declaration when no useful purpose can be served or when an obvious alternative and adequate remedy such as damages is available.”** I have considered the sought declarations and decline to grant them as they will not

serve any useful purpose as the legislation speaks for itself and the orders granted hereunder are adequate in the circumstances.

I hereby grant an order of Certiorari to remove into this Court for the purpose of quashing the decision of the Director of Elections of the 2<sup>nd</sup> Respondent dated 10<sup>th</sup> August, 2013 disqualifying the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants from filing their respective nominations in the by elections to be held in Petauke Central, Malambo and Mulobezi Parliamentary constituencies. I forthwith quash the said decision as prayed.

Further an order of Mandamus shall issue forthwith compelling the 2<sup>nd</sup> Respondent to perform its statutory functions under Article 66 of the Constitution and section 33 of the Electoral Act and to accept the nominations from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants on the dates to be appointed for filing nominations for the concerned three Parliamentary constituencies.

For avoidance of doubt, it is further still ordered that the 2<sup>nd</sup> Respondent is prohibited from barring the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants from filing their nomination papers on the nomination dates to be appointed for Petauke Central, Malambo and Mulobezi Parliamentary constituencies.

Costs follow the event and are to be taxed in default of agreement.

**Dated this 3<sup>rd</sup> day of September 2013**

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**M.S. MULENGA  
HIGH COURT JUDGE**