

SCZ No. 3 of 2008

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 199 OF 2006

HOLDEN AT LUSAKA

SCZ/8/215/06

(CIVIL JURISDICTION)

**IN THE MATTER OF: PROTECTION OF FUNDAMENTAL RIGHTS
REGULATIONS, 1969**

**IN THE MATTER OF: ARTICLES 1, 23, 28, 44, 76 AND 94 OF THE
CONSTITUTION OF ZAMBIA**

**IN THE MATTER OF: SECTION 25 OF THE ELECTORAL ACT NO. 12 OF
2006**

AND

**IN THE MATTER OF: THE ELECTORAL COMMISSION ACT, CHAPTER 17
OF THE LAWS OF ZAMBIA**

BETWEEN:

THE ATTORNEY GENERAL

APPELLANT

AND

THE LAW ASSOCIATION OF ZAMBIA

RESPONDENT

CORAM: SAKALA, CJ., MUMBA AND CHITENGI, JJS

On 18th July, 2007 and 16th January, 2008

For the Appellant: Mr. S. B. Nkonde, SC. Solicitor General with Mr. D. Sichinga,

Chief State Advocate and Ms. S. Wangelani, Chief State

Advocate.

For the Respondent: Mr. B. Mutale, SC. of Ellis & Company;

Mr. W.Mubanga of Permanent Chambers;

Dr. P. Matibini of Patmat Legal Practitioners;

Mr. H. Chanda of H. Chanda and Company;

Mr. W. Mweemba of Mweemba Chanshi and Company;

and Mr. Mwansa of Mwansa and Company.

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J U D G M E N T

Sakala, CJ., delivered the judgment of the Court.

Cases referred to:

Attorney- General v. Lawrence (1985) LRC (**CONST.**) 930

Kalyoto Mahalyo Paluku v. Granny's Bakery Limited, Ishaq Musa, Attorney- General and Lusaka City **Council, SCZ/ 29/2006**

Wandsworth London Borough Council v. Michalak (2002) ALL ER 1136, 1140

People's Union For Democratic Rights and Another v. Minister of Home Affairs (1986) LRC (CONST.)

Bandahuva Mukti Morcha of India (1984) 3 SCC 161, AIR 1984 SC 802

Newplast Industries Limited v. Commissioner of Lands and Another (2001) ZR 51, 54

Patel V. Attorney-General (1969) ZR 97

Zambia National Holdings Limited and Another V. The Attorney-General

(1993-1994) ZR 115

Osatraco (U) Limited V. the Attorney-General HCCS 1380/1986

Dr. James Rwanyarare and Others V. The Attorney-General (Constitutional Application No. 6 of 2002 unreported).

Mifiboshe Walulya V. The Attorney-General (1981) ZR 327

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Godfrey Miyanda (suing on his behalf and on behalf of the Heritage Party) v. Attorney-General and Ronald Banda and Nelson Nzowa SCZ No. 9 of 2005.

This is an appeal against part of the ruling of the High Court dismissing three out of the four preliminary issues raised by the Appellant. There is also a cross- appeal against part of the ruling that the relief of an injunction is not available against the President and the State even when the Court is moved for remedies pursuant to the provisions of **Article 28 (1) of the Constitution.**

For convenience, the Appellant will be referred to as the Respondent and the Respondent will be referred to as the Petitioner, which designations the parties were in the Court below.

The history of this appeal is that the Petitioner, the Law Association of

Zambia, filed, into court, a petition pursuant to the following provisions: the **Protection of Fundamental Rights Regulations of 1969; Articles 1, 23, 28, 44, 76 and 94 of the Constitution of Zambia, Cap. 1 of the Laws of Zambia; Section 25 of the Electoral Act No. 12 of 2006; and the Electoral Commission Act, Cap. 17 of the Laws of Zambia.**

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The Petition contained detailed grounds and thirty-four paragraphs of reliefs sought. The Petitioner prayed for declarations that **Section 25(1) of the Electoral Act No. 12 of 2006**, to the extent of which it purports to confer power on the President to determine the polling day, when Parliament is dissolved in line with the provisions of **Article 88 of the Constitution**, violates and continues to violate **Articles 23, 44 and 76(1) of the Constitution** and hence null and void. The Petitioner also prayed for an **Order that Section 25(1) of the Electoral Act No. 12 of 2006**, to the extent to which it violates **Articles 23, 44 and 76(1) of the Constitution** is invalid, hence null and void; a declaration that the power vested in the Electoral Commission under **Article 76(1) of the Constitution** to conduct elections includes the power to set polling dates; and the Petitioner also prayed for an interim order restraining the President from exercising the powers conferred on him under **Section 25(1) of the Electoral Act No. 12 of 2006** until after the final determination of the matter or until further order of the Court.

Before the petition could be heard, the Petitioner filed an Ex parte application pursuant to **Article 28 of the Constitution** for an interim order to restrain the President from exercising the power to set polling dates conferred on him by **Section 25(1) of the Electoral Act No. 12 of 2006**. The application

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was supported by an affidavit. The Court, however, decided to hear the application inter parties.

But before the application for an interim order could be heard inter parties, the Attorney-General filed a notice to raise four preliminary issues; namely: (1) that **Act No. 12 of 2006** is not in force and consequently no cause of action has been disclosed against the Respondent; (2) that the restraining order or injunctive relief being sought is not tenable in view of **Section 16 (i) (ii) of the State Proceedings Act, Cap. 71 of the Laws of Zambia**; (3) that the Petitioner herein has no **locus standi** to proceed under **Article 28 of the Constitution** because there is no discrimination against it in terms of **Article 23 of the Constitution**, further that the petition does not fall within public interest litigation; and (4) that the Petitioner ought to have commenced an action for statutory interpretation by way of an Originating Summons and not

by petition. On the basis of the preliminary issues set out in (1), (2), (3) and (4) above, the Respondent applied for the dismissal of the application for a restraining order or injunctive relief and the dismissal of the whole petition for incompetence.

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The learned Judge heard and considered the arguments and submissions on the preliminary issues. He dismissed the preliminary issues on the validity of the **Electoral Act No. 12 of 2006**; on the **locus standi** of the Petitioner and on the commencement of the action by an originating summons.

The Court upheld the preliminary issue that the restraining order or injunctive relief being sought was not tenable in view of **Section 16(i) and (ii) of the State Proceedings Act, Cap 71 of the Laws of Zambia**.

The Respondent appealed against the dismissal of the three preliminary issues, while the petitioner cross-appealed on the preliminary issue upheld by the trial Judge.

The Respondent filed a memorandum of appeal containing three

grounds; namely: (1) that the trial Judge misdirected himself when he held that the Petitioner is any person described in **Article 28(1) of the Constitution** and it therefore featured that the Petitioner had **locus standi** to commence the action under **Article 28(1) of the Constitution**, but in the same vein hold that whether there is discrimination against the Petitioner to warrant it commencing the proceedings is an issue that could be determined during the hearing of the main action; (2) that the trial Judge below erred in law when he held that

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since the matters raised by the Petitioner are constitutional or touch on the Constitution, the action was properly commenced by way of petition; and (3) that the trial Judge misdirected himself when he held that the petition was properly commenced by way of a petition because the Petitioner was also seeking declaratory orders.

The Respondent filed written heads of argument and authorities based on the three grounds of appeal.

The gist of the written heads of argument on ground one, relating to

locus standi of the Petitioner, was that **Article 28(1(a) of the Constitution** as couched was in clear terms that a person must demonstrate that he or she has been or is likely to be directly affected by the right alleged to be infringed or violated under **Articles 11 to 23 of the Constitution**; and that in the present case, the right being alleged is the right not to be discriminated against under **Article 23 of the Constitution**. It was submitted that the discrimination was, on the face of the record, not demonstrated by the Petitioner.

On the question of being directly affected, the case of **Attorney- General v. Lawrence (1)** was cited in which the Court of Appeal of St. Christopher and Nevis Court held, **inter alia** that:

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“No one but whose rights are directly affected by a law can raise the question of the constitutionality of that law. A corporation has a legal entity separate from that of its shareholders. Hence, in the case of a corporation, whether the corporation itself or the shareholders would be entitled to impeach the validity of the statute will depend upon the question whether the rights of the corporation or of the shareholders have been affected by the impugned statute.”

It was submitted that the Petitioner was not **directly affected by Section 25(1) of Act No. 12 of 2006**.

Further or in the alternative, it was argued that it was necessary for the trial

court to have determined or inquired into the issue of discrimination vis a viz **locus standi** at the preliminary stage with the possibility of the petition ending there and then if found that discrimination against the Petitioner was not present.

On the question of determination of actions on the preliminary issue either in part or whole if the preliminary point is upheld and especially if it goes to the root of the matter, the subject of the proceedings, the case of **Kalyoto Mahalyo Paluku v. Granny's Bakery Limited, Ishaq Musa,**

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Attorney- General and Lusaka City Council,(2) was cited. It was submitted that it was patently clear from the record that the President, who exercises a statutory function under **Section 25(1) of Act No. 12 of 2006**, was not in a situation analogous to that of the Petitioner for discrimination to stand and for the Petitioner to have **locus standi** under **Article 28 of the Constitution.** The case of **Wandworth London Borough Council v. Michalak(3)** was cited in support of the submissions. It was further submitted that the Petitioner was and is not a political party with the right to participate in an election envisaged in **Section 25(1) of Act No. 12 of 2006.**

It was contended that from the foregoing submissions, the petitioner did not have **locus standi;** and that the Petition did not also qualify as a public interest litigation as no persons, belonging to a socially and economically weaker section of society, complaining of violation or likely violation of their

fundamental rights by virtue of **Section 25(1) Act No. 12 of 2006**, for whose benefit the petition was brought, were disclosed. The case of **People's Union For Democratic Rights and Another v. Minister of Home Affairs(4)**, citing the case of **Bandahuva Mukti Morcha of India(5)**, was cited in support of these contentions. In that case, it was stated that:

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“where a person or class of persons to whom legal injury is caused by reason of violation of a fundamental right is unable to approach the court for judicial redress on account of disability of socially or economically disadvantaged position, any member of the public acting bona fide can move the court for relief under Article 32 and fortiori also under Article 226, so that the fundamental rights may become meaningful not only for the rich and well-to-do who have the means to approach the court but also for the large masses of people who are living a life of want destitution and who are by reason of lack of awareness, assertiveness and resources unable to seek judicial redress.”

It was submitted that from the foregoing, too, the Petitioner did not have **locus standi** either in its own right or through public interest litigation; and that a petition is not an application for Judicial Review in which mere sufficient interest creates **locus standi**.

On ground two, relating to proper commencement of an action by way of a petition, the gist of the written heads of argument was that what determines the mode of commencement of an action is not the issues raised therein; or

prayers/reliefs sought. The case of **Newplast Industries Limited v. Commissioner of Lands and Another(6)**, was cited in support of ground two. In that case, this Court stated:

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“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 of any action is generally provided by the relevant statute,”

It was submitted that with no discrimination directly affecting or likely to affect the Petitioner, this case was then basically about statutory interpretation of **Article 76 of the Constitution**; on whether or not the power to conduct and supervise elections vested in the Electoral Commission of Zambia under **Article 76**, including the power to determine the polling date for such elections; and that therefore, the mode of commencement ought to have been by an originating summons pursuant to **Order 6(2)** as read together with **Order 30(12)(c)** of the High Court Rules. It was argued that at the time these proceedings began, **Act No. 12 of 2006** had not yet come into operation.

On ground three of appeal, the Respondent repeated the written heads on ground two.

In the brief oral submissions, Mr. Nkonde, SC., then, Solicitor General,

while repeating the written heads of argument, argued that on the question of **locus standi**, the issue is not whether the Petitioner is a person in law or not

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but that the infringement must relate to a person. He submitted that the Petitioner, on the facts of this case, was acting as an **officious** busy body, but that this was not a matter for Judicial Review.

On behalf of the Petitioner, written heads of argument were filed in response to the Respondent's written heads of argument on all the three grounds.

In response to arguments and submissions on ground one, the Petitioner first set out the relevant provisions of **Article 28(1)**; then set out the reliefs the petitioner was seeking in the main action. It was contended that the right being alleged to have been violated was **Article 23 of the Constitution** which guarantees protection from discrimination on the grounds of race, tribe, sex, place of origin, marital status, political opinions, colour or creed.

It was pointed out that the juristic nature or character of the Petitioner, in terms of **Section 3 of the Law Association of Zambia Act, Cap 31 of the Laws of Zambia**, is that it is a body corporate capable of suing and being sued. It was submitted that the Petitioner, on the basis of the objects as per **Section 4 of the Act**, by law, clearly engaged a very broad mandate; that the Petitioner has the mandate to further the development of the law, identify itself

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with the citizenry, avail its skills and training in their service; remove imperfections in the existing law; and advance the rule of law and the rights and liberties of the individual.

It was pointed out that the Petitioner, in terms of **Article 139 of the Constitution**, which defines a person to include, “any company or association or body of persons corporate or incorporate” qualified as a person and that the Respondent’s argument on the issue of personality of the Petitioner was misconceived.

On the Respondent’s argument that the Petitioner was not “**directly affected**” by the vesting of the power to decide the polling day in the President, it was submitted that such interpretation of **Article 28** was an interpolation of **Article 28** because the Article in question does not require a person to demonstrate that the matter complained of should directly affect him, her or it. It was also submitted that in the instant case, the Petitioner need not be a political party

or indeed a participant in the electoral process in order to challenge the constitutionality of **Section 25 of Electoral Act**; and that the **locus standi** of the Petitioner was essentially premised on **Section 4 of the Law Association of Zambia Act**.

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On “**public interest litigation**”, it was pointed out that reliance on the case of **The Peoples Union for Democratic Rights and Another(4)**, was misplaced because the Zambian Constitution has no clause relating to “**public interest litigation**”; but that the Zambian Constitution, by **virtue of Article 28**, confers upon the High Court the powers of Judicial Review. It was submitted, on the authority of the case of **Lawrence**, that whenever determining the constitutionality of a statute, what the Court is concerned with is the competence of the legislature to make it; and that the Court has to examine the provisions being impugned in the light of the relevant provisions of the Constitution. It was submitted that the trial Judge was on firm ground when he held that the question of discrimination was related to the main action and could not be disposed of as a preliminary issue. It was further submitted that there was need to adopt a broad and flexible approach to the question or issue of **locus standi**.

In response to the Respondent’s arguments and submissions on ground two, it was argued that the gist of the petition is that **Section 25 of the Electoral Act**, by conferring the power to determine the polling day in the President is discriminatory in effect and thereby violates **Article 23 of the Constitution**; and that the proper body that should be vested with the

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discretion to determine the polling day is, in terms of **Article 76 of the**

Constitution, the Electoral Commission of Zambia, which is in any event empowered by the Constitution to conduct Presidential and Parliamentary elections. It was submitted that to the extent that **Section 25 of the Electoral Act** may be discriminatory in effect, the Petitioner, in challenging its constitutionality, properly commenced this action by way of a petition.

It was contended that the foregoing submission was fortified by **regulation 2 of the Protection of Fundamental Rights Rules** contained in **Statutory Instrument No. 156 of 1969**, which provides that an application under **Article 28 of the Constitution** shall be made by way of a petition. It was further submitted that following the decision in the case of **Patel V. Attorney-General(7)**, the trial Judge was on firm ground when he held that the matters raised by this action were constitutional in nature and consequently this action was properly commenced by way of petition. The case of **Newplast Industries Limited(6)** was cited to support the proposition that the mode of commencement of any action is not dependent on the relief sought; but rather is generally provided by the relevant statute. It was pointed out that in the context of the present case, the relevant statute that prescribes the mode of commencement of the action is the Constitution, pursuant to **Statutory**

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Instrument No. 156 of 1969, which also, in any event, conforms with both the spirit and letter of **Section 10 of the High Court Act, Cap 27 of the Laws of Zambia**.

On behalf of the Petitioner, Mr. Mutale, Mr. Mubanga and Dr. Matibini made brief oral submissions on the personality of the Petitioner in law and on the **locus standi** of the Petitioner. The oral submissions were essentially a repetition of the written responses.

At this stage, we propose to dispose of the arguments and submissions on the main appeal before we deal with the cross-appeal.

We have considered the arguments and submissions on ground one of appeal. In ground one, the gist of the contention on behalf of the Respondent is that the trial Judge misdirected himself to hold that the Petitioner is ‘**any person**’ described in **Article 28 of the Constitution**; that the Petitioner had **locus standi** to commence the action under **Article 28 (1) of the Constitution**; but that in the same vein hold that whether there is discrimination against the Petitioner to warrant it commencing the proceedings was an issue that could be determined during the hearing of the main action.

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The arguments and submissions on behalf of the Respondent were that **Article 28(1)(a) of the Constitution** as couched was in clear terms that a person must demonstrate that he has been or is likely to be directly affected by the right alleged to be infringed or violated under **Articles 11 to 23**; that in the present case the right being alleged is the right not to be discriminated against under **Article 23**; but that the discrimination was, on the face of the record not demonstrated by the Petitioner; that the Petitioner was not directly affected; and that the Petitioner did not also qualify as a public interest litigation.

It was finally submitted on ground one that the Petitioner did not have **locus standi** either in its own right or through public interest litigation; and that a petition is not an application for Judicial Review in which mere sufficient interest creates **locus standi**.

On behalf of the Petitioner, it was submitted that in terms of **Article 139**, the Petitioner qualified as a person; that **Article 28** did not require a person to demonstrate that the matter complained of should directly affect him; and that the **locus standi** of the Petitioner was premised on **Section 4 of the Law Association of Zambia Act**.

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It was further submitted that the trial court was on firm ground when he

held that the question of discrimination was related to the main action and could not be disposed of as a preliminary issue.

The trial Judge dealt with the issues of the Petitioner's personality, **locus standi**, and discrimination together. According to the trial Judge, the question of **locus standi** ought to be dealt with under the provisions of **Article 28 of the Constitution**, which creates and grants the right to sue. The Court noted that **Article 28 (1)** gives the right to **any person** to make an application to the High Court, like in the present case, where he alleges that any of the provisions of **Articles 11 to 26** inclusive, has been or is being or is likely to be contravened in relation to him.

The trial Judge accepted that the Petitioner falls within the meaning of **Article 139** that defines a person to include; **“any company or association or body of person, corporate or incorporate.”** The Court further accepted that the Petitioner is included under **“any person who can make an application”** described in **Article 28 (1) of the Constitution**.

We are satisfied that on the basis of the provisions of **Article 139 of the Constitution**, which defines a person, the trial Judge cannot be faulted.

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In relation to ground one of appeal, the trial Judge concluded as follows:

“It follows that the Petitioner has locus standi to commence the action herein. As to

whether there is discrimination against it to warrant the Petitioner commence the proceedings is an issue that can be determined during the hearing of the main action.”

Article 28(1) states as follows:

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

hear and determine any such application;

determine any question arising in the case of any person which is referred to it in pursuance of clause (2);

and which may, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions, of Articles 11 to 26, inclusive.”

At the outset, we must agree with the Petitioner that Article 28 does not require a person to **demonstrate** that the matter complained of should **directly affect him**. Having accepted that any person includes the Petitioner in terms

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of **Article 139**, we are satisfied that the Petitioner having regard to their objects as provided in the act had **locus standi**.

We accept that on the facts on record and the nature of reliefs sought, the issue of discrimination could not have been dealt with as a preliminary issue. The trial Judge was, therefore, on firm ground when he held that whether there was discrimination or not against the Petitioner was an issue to be determined during the hearing of the main action.

We, therefore, find no merit in ground one of appeal. It is accordingly dismissed.

On ground two, the complaint is that the trial Judge erred in law in holding that since the matters raised by the Petitioner are constitutional or touch on the Constitution, the action was properly commenced by way of petition.

The short summary of the Respondent's arguments and submissions was that what determines the mode of commencement of an action is not the issues raised therein or prayers/relief sought; but that there being no discrimination directly affecting the Petitioner, this case was basically about interpretation of **Article 76** on whether or not the power to conduct or supervise elections vested in the Electoral Commission of Zambia under **Article 76** including the power to determine the polling date for such election; and that the mode of commencement ought to have been by way of an originating summons. The submissions on ground two also covered ground three. The case of **New Plast Industries Limited(6)** was cited in support of the arguments on ground two.

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The gist of the Petitioner's response to ground two was that **Section 25**

of the Electoral Act No. 12 of 2006, by conferring the power to determine the polling day in the President, was discriminatory in effect and violated **Article 23**; that the Petitioner was challenging the constitutionality of **Section 25 of the Electoral Act**; and that therefore the action was properly commenced by petition and that the case of **New Plast Industries Limited(6)** supported the mode of commencement as provided by statute, namely; **Statutory Instrument No. 156 of 1969**.

In dealing with the mode of commencement of the action, the trial Judge noted that the matters raised in the petition deal with more than mere interpretation; that the petition raised constitutional matters, including whether **Section 25 of the Electoral Act** was constitutionally valid. The Court held that the application referred to in **Article 28(1)**, which must be made, is only by way of petition. In support of this finding, the trial Judge cited the case of **Patel V. Attorney-General(7)**, in which it was held that by virtue of **Rule 2 of the Protection of Fundamental Rights Rules, 1969**, an application under **Article 28(1) of the Constitution** should be made by way of petition.

We have considered the submissions on ground two which also cover ground three. On the authority of the **Patel case**, the trial Judge cannot be faulted when he held that the matters raised in this action are constitutional or touch on the Constitution; and that the action was properly commenced by way of petition. We also find no merits in grounds two and three. They are accordingly dismissed.

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The three grounds having been unsuccessful, the whole appeal is dismissed.

We now turn to the cross-appeal.

The Petitioner cross-appealed against part of the Ruling where the court decided that the relief of an injunction is not available against the President and the State even when one moves the court according to and seeks the remedies pursuant to the provisions of **Article 28(1) of the Constitution**.

The Petitioner filed an Amended Memorandum of Cross-Appeal containing two grounds of appeal, namely: (1) that the Court below misdirected itself in both law and fact by holding that a restraining Order prayed for against the Respondent or against the State cannot be granted under **Article 28 of the Constitution** and in view of the provisions of **Section 16 of the State Proceedings Act, Chapter 71 of the Laws of Zambia** taking into account the fact that in accordance with the provisions of **Article 1(3) and (4)** as read together with **Articles 11 to 26 of the Constitution**, the Constitution binds all persons in the Republic of Zambia and all Legislative, Executive and Judicial organs of the State at all levels; and (2) that the Court below misdirected itself in law and fact by holding that a restraining Order, prayed for by the Petitioner, against the President or the State, cannot be granted under **Article 28 of the Constitution** in view of **Section 16 of the State Proceedings Act, Chapter 71 of the Law of Zambia** on the premise that the said **Section 16 of the State proceedings Act** does not apply to the Bill of rights i.e. **Articles 11 to 28 of the Constitution of Zambia**.

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We must mention at this stage that before we heard arguments on the cross-appeal, we did point out to Mr. Mutale, State Counsel, and to the other lawyers representing the Petitioner that we take judicial notice that the issues now being raised in the cross-appeal must have been overtaken by events on

account that the Presidential and Parliamentary elections are now since past. Mr. Mutale, State Counsel, requested for an opportunity to confer with his colleagues on the issue. After the Court resumed sitting, Mr. Mutale, State Counsel, had this to say:

“We conferred on the issue raised by the court on the cross-appeal. We are of the view that the cross-appeal raises an issue on which the court must make a ruling, one way or the other. We seek the court’s indulgence to proceed with the cross-appeal.”

The hearing of the cross-appeal, thereafter, proceeded as requested by the State Counsel. On behalf of the Petitioner detailed written heads of argument were filed based on the two grounds of the cross-appeal, which in the heads of argument were argued together as one. Dr. Matibini and Mr. Chanda augmented the written heads of argument with brief oral submissions.

The gist of the arguments and submissions on the cross-appeal is that in refusing to grant the interim injunctive order sought by the Petitioner, the trial Judge relied on **Section 16(i) and (ii) of the State Proceedings Act** which prohibit the issuing of an injunction or an order for specific performance against the State; that after construing **Section 16(i)(ii)**, the court concluded that it was incompetent for a court to grant an order for an injunction against the State or public official, and that although the trial court acknowledged the

contention and the submissions of the Petitioner, the trial court concluded that there is no provision under **Article 28 of the Constitution** for the relief sought.

It was submitted that the trial Judge misdirected himself when he determined that an injunctive relief is not available under **Article 28 (1) of the Constitution**. Firstly, that the trial Judge overlooked the doctrine of Supremacy of the Constitution contained in **Article 1(3) of the Constitution** which provides that the Constitution is the Supreme law of Zambia and if any law is inconsistent with the Constitution that other law shall, to the extent of the inconsistency, be void. Secondly, that the injunctive relief sought under **Article 28** can lie against the President because **Article 1(4)** provides that the Constitution shall bind all persons in Zambia, the Legislature, the Executive and Judicial Organs of the State at all levels; meaning no institution or public officer is above the Constitution. Thirdly, the trial Judge misdirected himself when he held that the power of the High Court to make such orders, issue such writs and give such directions as envisaged in **Article 28** did not include an injunctive relief. Lastly, that the trial Judge observed that the proposition for an “**interlocutory Constitutional Injunction**” against the President was a novel one.

It was pointed out that whilst it may be true that no injunction has previously been issued against the President, this court inadequately considered the interplay or intersection of **Article 28 of the Constitution** and the **State Proceedings Act** in the case of **Zambia National Holdings Limited and Another V. The Attorney-General(8)** in which the trial Judge ruled that he was precluded from making an order of injunction by **Section 16 of the**

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State Proceedings Act, but later, in the judgment delivered after trial, the trial Judge in **obiter** remarks accepted the argument that in a constitutional case,

Section 16 of the State Proceedings Act contravenes **Article 28(1) of the Constitution** and nullified **Section 16(i)(ii)**; but reversed on appeal.

It was submitted that while it was not competent for a trial Judge to strike down **Section 16 of the State Proceedings Act** on the ground that it violated **Article 28(1)**, a proper construction of the interface between **Section 16 and Article 28** is that in relation to **Part III of the Constitution**, the protection of fundamental rights and freedoms, a trial court is empowered to grant, **inter alia**, an injunctive relief even against public officials, including the President and the State. This submission was premised on the doctrine of the supremacy of the Constitution as enshrined in **Article 1(3) and (4) of the Constitution**.

It was submitted that it was possible that in a bid to protect fundamental rights and freedoms, it may be necessary to grant an injunctive relief to a Petitioner who apprehends that his rights have been or are to be contravened.

It was pointed out that the net effect of this submission was that the immunity, provided by **Section 16 of the State Proceedings Act**, was not absolute; but qualified by **Article 28 of the Constitution**.

In support of the foregoing submissions, a paragraph from an article entitled “**Review of Major Decisions on Fundamental Rights and Freedoms in Uganda in 2001 and 2002,**” East African Journal of Peace and Human Rights, Vol. 9 No. 2 2003 P. 33 at P.346, by Henry Onoria, was cited.

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The paragraph reads:

“An enduring fact of the remedial recourse before the courts has

been that of the procedural protection afforded to the Government (and its officers) in form of immunities against injunctions, evictions, execution (by attachment) and specific performance. Such procedural protection or immunities have traditionally been afforded under the Government Proceedings Act. The rationale for the protection of the Immunity, as was explained, was to ensure that government machinery is not brought to a halt and not subjected to embarrassment.”

Two Ugandan decisions, one by the High Court and the other by the Constitutional Court were also cited in support of the submissions in which cases it is said that the courts stripped the government the immunities that it had traditionally been clothed with. The High Court decision is the case of **Osatraco (U) Limited v. the Attorney-General(9)** unreported. In that case, the court made the following observation:

“If government is in wrongful occupation of property substantive Justice demands that it be ordered to vacate. A declaratory order, (of proprietorship of property) leaves a successful party at the mercy of Government functionaries as to when he is to enjoy the fruits of a successful action against government. For the declaratory order cannot be enforced. In the present action, the plaintiff is seeking to enforce his right to suit property against wrongful infringement by Government. Right to property is a right protected by the Constitution in Article 26 thereof. Article 50(1) of the Constitution assures such a person redress

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before the Courts. Redress, in my view, refers to effective redress and nothing short of this. A less than appropriate redress is not effective

redress.”

The Court concluded:

“In the circumstances of this case, a declaratory order is less than appropriate relief. It is not effective redress. And the provision of existing law, that is the proviso (b) of Section 15(1) of the Government Proceedings Act that would compel this court to avail only such relief is not in conformity with the Constitution.”

The other case cited is **Dr. James Rwanyarare and Others V. The Attorney-General(10)**

In that case, in rejecting the plea of immunity, the Constitutional Court observed that:

“....There is no sound reason under the Constitution why Government should be given preferential treatment at the expense of an ordinary citizen. That provision of the Government Proceedings Act is an existing law which under Article 273(1) (of the Constitution), should be construed with such modifications and adaptations as may be necessary to bring it into conformity with the Constitution.”

It was finally submitted, on the cross-appeal, in the written heads of argument that in the context of the present matter, **Section 16 of the State Proceedings Act** should also be similarly construed in such a way that it

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conforms with **Article 28 of the Constitution of Zambia**; that is to say, that

the High Court of Zambia should have, in a proper case, and in relation only to **Part III of the Constitution**, the power, to issue an injunction against any public official, including the President or indeed the State.

In the oral submissions on the cross-appeal, both Dr. Matibini and Mr. Chanda substantially repeated the written heads of argument.

The Respondent also filed brief written heads of argument in response to the written heads of argument on the cross-appeal.

The gist of the written response to the cross-appeal is that **Section 16(1) of the State Proceedings Act** has been part of our statutes for a long time now and has never been challenged as being ultra vires any constitutional provision; that its effect is to bar any injunctive relief or any order that would have an effect of an injunctive relief against the State and indeed the President as a public officer. The case of **Mifiboshe Waluya V. The Attorney-General (1981) ZR 126** was cited in support of the submissions. The case of **Godfrey Miyanda (suing on his behalf and on behalf of the Heritage Party) v. Attorney-General and Ronald Banda and Nedson Nzowa(11)** was also cited in support of the submissions in which the court observed:

“.....as against the 1st Respondent (Attorney-General), the order (of injunction) was counter the provisions of Section 16(1) of the State Proceedings Act.”

In his brief oral submissions on the cross-appeal, the Solicitor-General submitted that the trial Judge properly directed himself in refusing the injunctive relief in view of **Section 16 of the State Proceedings act**.

The Solicitor-General contended that on the facts of this case, it is not only an academic exercise; but unnecessary to determine the issue especially that it is notorious that there is an ongoing debate to which the Petitioner can make appropriate representation.

We have anxiously addressed our minds to the spirited and forceful arguments and submissions advanced for and against the cross-appeal. On account of the view we take of the cross-appeal and bearing in mind the history of the case and the facts, we do not intend to delve into the arguments and submissions in great detail. But we want to acknowledge that there is great force in the arguments on the cross-appeal. But in our view, the issues raised cannot be decided on a preliminary issue or a preliminary hearing. We do not have full facts of the Ugandan cases; but from the paragraphs cited, it appears to us that the remarks were made **obiter dicta**. Suffice it to say, however, that the arguments were well taken; but since the main relief sought is not the interim injunction and not the interpretation of **Section 16 of the State Proceedings Act viz-aviz Article 28(1) of the Constitution**, we find this not to be a **proper case** to determine the issues raised in the cross-appeal.

In the instant case, we take Judicial Notice that the interim order that was being sought was to restrain the President from exercising the power conferred on him under **Section 25(1) of the Electoral Act, No. 12 of 2006** in

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relation to announcing the date for holding the Presidential and Parliamentary Elections.

It is a notorious fact that the elections are since gone. Even if the Petitioner was to be successful on the cross-appeal, it is quite clear that the order would serve no purpose apart from being unnecessary academic exercise. This Court frowns upon making academic orders.

In dealing with the preliminary issue leading to the cross-appeal, the learned trial Judge acknowledged that the proposition that the court should grant an interlocutory **“Constitutional”** injunction against the President was a novel one as none had been granted previously. As the law presently stands in Zambia, this observation was correct, bearing in mind the provisions of **Section 16(1) of the State Proceedings Act.**

The Court, however, noted that **Article 28 of the Constitution**, being prayed in aid, was that where an application has been made for the enforcement of the protective provision, the Court:

“may hear and determine the application upon which the Court may make such order, issue such writs and give such directions it may consider appropriate for the purpose of enforcing or securing the enforcement of any provision of Articles 11 to 26 inclusive.”

According to the trial Judge, the import of the above provision is that the Court **must** hear and determine the application first; and only after hearing and determining of the application could the Court proceed to grant the relief being

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sought. That the Court should not, by way of an interlocutory order, grant the relief before hearing and determining the matter. The Court observed that interlocutory reliefs are provided by various statutes and that under **Article 28**, there is no provision for the interlocutory relief. The Court noted that the main relief that was being sought was not the announcement of the election date but who should make the announcement between the President under **Section 25 of the electoral Act No. 12 of 2006 or the Electoral Commission of Zambia under Article 76(1) of the Constitution.**

The Court concluded that the restrictive order or injunctive relief being sought was not tenable at law in view of **Section 16(i)(ii) and (2) of the State Proceedings Act** or under **Article 28 of the Constitution.** On that basis he upheld the preliminary issue.

What is clear from the ruling of the trial Judge is that he found that **Article 28(1)** did not provide for interlocutory injunction; and that the main relief being sought was not the announcement of the date of the election but as to who should do it. We agree with the trial Judge in his analysis of the wording of **Article 28** that it makes no provision for interim orders and that the application **must first** be determined before an order, writ or direction are issued **“for purpose of enforcing or securing the enforcement of any provision under Articles 11 to 26 inclusive.”**

Since the interlocutory relief that was being sought has since been overtaken by events of the elections having passed, we find it undesirable to make an academic pronouncement on an interlocutory relief overtaken by

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events as opposed to the main relief. On the facts of this case, the cross-appeal was academic and unnecessary. It is, accordingly, dismissed.

We also take Judicial Notice that the issues raised in the petition are the very issues which will be discussed in the National Constitutional Conference established under the National Constitutional Conference Act. It would appear to us that the whole petition may, in the end, be rendered an academic exercise.

In conclusion, the appeal as well as the cross-appeal, are both dismissed. On account of the issues raised and discussed, each party will bear its own costs.

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E. L. Sakala

CHIEF JUSTICE

.....

F.N.M. Mumba

SUPREME COURT JUDGE

.....

P.Chitengi

SUPREME COURT JUDGE