

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

2019/CCZ/002

**IN THE MATTER OF: ARTICLES 1(5) AND 128(1)(a) OF THE
CONSTITUTION OF ZAMBIA, CHAPTER 1 VOLUME 1
OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: INTERPRETATION OF ARTICLE 153 OF THE
CONSTITUTION OF ZAMBIA, CHAPTER 1 VOLUME 1
OF THE LAWS OF ZAMBIA AS READ TOGETHER
WITH SECTION 17 OF THE LOCAL GOVERNMENT
ACT, CHAPTER 281 VOLUME 16 AS AMENDED BY
THE LOCAL GOVERNMENT (AMENDMENT) ACT NO.
6 OF 2010**

**IN THE MATTER OF: INTERPRETATION OF ARTICLE 154 OF THE
CONSTITUTION OF ZAMBIA, CHAPTER 1 VOLUME 1
OF THE LAWS OF ZAMBIA AS READ TOGETHER
WITH SECTION 17 OF THE LOCAL GOVERNMENT
ACT, CHAPTER 281 VOLUME 16 AS AMENDED BY
THE LOCAL GOVERNMENT (AMENDMENT) ACT NO.
6 OF 2010**

BETWEEN:

MARTIN CHITONDO

OBERT TEMBO

ROLAND HAMAIMBO

IGNATIUS HANG'OMBE

SIMEON ZIMBA

AND

THE ATTORNEY GENERAL



1st APPLICANT

2nd APPLICANT

3rd APPLICANT

4th APPLICANT

5th APPLICANT

RESPONDENT

Coram: Sitali, Mulembe and Musaluke, JJC

On 16th April, 2019 and 17th May, 2019

For the Applicants: Mr. B. Luo of Messrs. Palan and George Advocates

**For the Respondent: Mr. J. Simachela, Chief State Advocate and Mr. C.
Mulonda, Senior State Advocate**

JUDGMENT

MULEMBE, JC delivered the Judgment of the Court

Cases referred to:

1. **Steven Katuka and another v The Attorney General and others (2016) Z.R. 226 (Volume 2)**
2. **Dan Pule and others v Attorney General and others Selected Judgment No. 60 of 2018**
3. **Zambia Consolidated Copper Mines Investments Holding Plc v Woodgate Holdings Limited (2011) Z.R. 110 (Volume 3)**

Legislation referred to:

1. **The Local Government Act Chapter 281 of the Laws of Zambia**
2. **The Local Government Act No. 2 of 2019**
3. **The Constitution of Zambia Act No. 18 of 1996**
4. **The Constitution of Zambia (Amendment) Act No. 2 of 2016**
5. **The Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia**
6. **The Acts of Parliament Act Chapter 3 of the Laws of Zambia**

By Originating Summons filed on 8th February, 2019 the Applicants seek the Court's interpretation of the following:

1. **Whether section 17 of the Local Government (Amendment) Act No. 6 of 2010 is consistent with Articles 153 and 154 of the Constitution of Zambia Chapter 1 Volume 1 of the Laws of Zambia.**
2. **In the event that section 17 of the Local Government (Amendment) Act No.6 of 2010, is held to be consistent with Articles 153 and 154 of the Constitution of Zambia Chapter 1 Volume 1 of the Laws of Zambia, whether the incumbent Deputy Mayors and Vice Council Chairpersons are eligible to re-contest the position of Deputy Mayor.**

In the Affidavit in Support sworn by Martin Chitondo, it was averred, among other things, that by a letter dated 23rd January, 2019, the Acting Permanent Secretary in the Ministry of Local Government wrote to all councils notifying them to hold elections for deputy mayors and deputy council chairpersons pursuant to

section 17 of the Local Government (Amendment) Act No. 6 of 2010 (hereinafter "the Local Government (Amendment) Act) on 22nd February, 2019. That on 4th February, 2019 through a media article attributed to the Minister of Local Government, it was reported that current deputy mayors and deputy council chairpersons were not eligible to contest the elections of deputy mayors and deputy council chairpersons slated for 22nd February, 2019. It was averred that it was against that background that the Applicants were seeking interpretation on the constitutionality of the impending elections and their eligibility to re-contest the elections for deputy mayor and deputy council chairperson slated for 22nd February, 2019.

In the skeleton arguments in support of the Originating Summons filed on 15th February, 2019, it was submitted that the letter from the Acting Permanent Secretary instructing all councils to hold elections for deputy mayor and deputy council chairperson dissatisfied the Applicants, leading to the institution of this action.

The Applicants began by giving a brief history on the law pertaining to mayors, council chairpersons, deputy mayors and deputy council chairpersons. That during the One-Party State, the said positions were done away with and replaced with Governors.

It was further submitted that with the return to pluralism, the positions were reinstated and the Local Government Act Chapter 281 of the Laws of Zambia ("the Local Government Act") was amended accordingly. The Applicants submitted that the Constitution of Zambia as amended by Act No. 18 of 1996 provided that:

"109. (1) There shall be such system of local government in Zambia as may be prescribed by an Act of Parliament.

(2) The system of local government shall be based on democratically elected councils on the basis of universal adult suffrage."

It was submitted that the prescribed Act referred to in Act No. 18 of 1996 was the Local Government Act, 1991. That sections 16 and 17 of the said Act provided as follows:

"16. (1) There shall be –

- (a) for every city or municipal council, a mayor, deputy mayor;**
- (b) for every township or district council, a chairman and vice chairman; who shall be elected by the council from among persons who are Councillors.**

Provided that a councillor who is a member of Parliament or a chief shall not be eligible for the office of Mayor, Deputy Mayor, Chairman or Vice-Chairman of the council.

(2) The mayor, deputy mayor, chairman or vice-chairman of a council shall be elected annually at the first ordinary meeting of council held after the 1st September in that year.

(3) No person shall hold office as mayor, deputy mayor, chairman or vice-chairman of a council for more than two consecutive terms and where a person has held any such office for two consecutive terms he may not be elected to that office until after the expiration of two years from the date on which he last held such office.

17. The mayor, deputy mayor, chairman and vice chairman of a council shall, subject to the provisions of this Act, hold office until his successor is elected."

The Applicants submitted that the Local Government Act was amended by Act No. 6 of 2010, with section 17(1) providing that:

"17. (1) A mayor, deputy mayor, chairperson and vice chairperson of a council shall, subject to the provisions of this Act, hold office for a period of two and a half years from the date of election."

It was submitted that the Constitution of Zambia (Amendment) Act No. 2 of 2016 ("the Constitution as amended") further altered provisions relating to councils, with particular reference to Articles 153 and 154 to which we refer later in this Judgment. Suffice to state that the Applicants contended that whereas the term for mayors and council chairpersons was clearly stated, Article 154(3) did not state the tenure of deputy mayors and deputy council chairpersons; that because of that the Respondent was seeking refuge in the Local Government Act, 1991 which was not the correct position of the law. The Applicants argued that in trying to discern the term of office for a deputy mayor and deputy council chairperson, a purposive interpretation of the Constitution must be employed, with the aid of extrinsic aids and by going into the history of the law relating to deputy mayors and deputy council chairpersons. The position of the Applicant was that it was evident that the terms for mayors, council

chairpersons, deputy mayors and deputy council chairpersons ran *pari passu* or were similar as shown in the Local Government Act.

The Applicants proceeded to argue that since there was a lacuna in the law, employing any other method other than the purposive approach would result in writing into the law thereby creating an absurdity, citing **Steven Katuka and another v The Attorney General and others**¹ and **Dan Pule and others v Attorney General and others**² for authority. That the lacuna should be resolved in favour of the party who is not responsible for the lacuna and the matter interpreted in favour of the Applicant, citing **Zambia Consolidated Copper Mines Investments Holding Plc v Woodgate Holdings Limited**³ for support.

The Applicants wound up their submissions by stating that resorting to the Local Government Act was misconceived and, as such, *ultra vires* the law.

At the hearing of the matter on 16th April, 2019 learned counsel for the Applicants, Mr. Luo, stated that the Applicants were relying on the affidavit in support of the application and the skeleton arguments filed into court. Mr. Luo submitted that the matter hinged on the canons of interpretation and reiterated the argument proffered in the skeleton arguments that employing the

purposive approach in interpreting the Constitution would take into consideration the historical origins as well as the context. Counsel contended that a cursory perusal of the law, starting from previous Acts, showed that the terms for mayor, deputy mayor, council chairperson and deputy council chairperson always run *pari passu*. He argued that resorting to the Local Government Act in its current form would result in absurdity as the term for mayor and council chairperson at present would be five years and that for their deputies two and half years. That the Constitution clearly provides that there will be the office of mayor and council chairperson which would run for five years and that there will be a council whose lifespan is five years. Therefore, that for the terms of the deputies to run for two and half years was illogical as it was absurd. Mr. Luo further submitted that the holding of elections every two and half years would necessitate the expenditure of scarce resources which would not be in the public interest.

In opposing the application, the Respondent filed its Affidavit in Opposition to the Originating Summons and Skeleton Arguments on 22nd February, 2019. In the affidavit in opposition deposed to by Amos Malupenga, it was averred, among other

things, that the Minister of Local Government was merely restating the position of the law.

In its skeleton arguments, the Respondent submitted that Article 154 of the Constitution which recognises the offices of mayor, council chairperson, deputy mayor and deputy council chairperson uses the words “as prescribed” which, in terms of Article 266 of the Constitution means “provided for in an Act of Parliament”. That the offices stated under Article 154(1) aforesaid are prescribed in the Local Government Act as amended by Act No. 6 of 2010 in sections 16 and 17. Citing our decision in **Dan Pule and others v Attorney General and others**,² it was contended that the law on interpretation of the Constitution was well settled and that this Court should adopt the literal rule in interpreting Article 154(1) as no absurdity arises. Further, that following the enactment of the Constitution as amended, it is now the law that the tenure of mayor and council chairperson is five years. That, hence, the provisions of sections 16 and 17 of the Local Government Act do not apply to the mayor and council chairperson as the Constitution already provides for the tenure, and that sections 16 and 17 are void to that extent, citing Article 1(1) of the Constitution.

The Respondent contended that Article 154(1) did not affect the tenure of deputy mayor and deputy council chairperson and that section 17 of the Local Government Act was still in operation as regards the tenure of deputy mayor and deputy council chairperson. To buttress this point, we were referred to section 6 of the Constitution of Zambia Act No. 1 of 2016 which states as follows:

"6.(1) Subject to the other provisions of this Act, and so far as they are not inconsistent with the Constitution as amended, existing laws shall continue in force after the commencement of this Act as if they had been made in pursuance of the Constitution as amended, but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution as amended."

The Respondent pressed the point that section 17(1) of the Local Government Act was still applicable in part to the extent of the tenure of deputy mayor and deputy council chairperson. That section 17 is consistent with Articles 153 and 154 of the Constitution as amended in so far as it relates to the office of deputy mayor or deputy council chairperson and the tenure of the said offices is two and half years. Further, that a deputy mayor or deputy council chairperson may only contest the position after five years elapse from the last time they held office.

To augment, Mr. Simachela, Chief State Advocate, also relied on the Respondent's affidavit in opposition and skeleton arguments filed. Calling in aid the case of **Dan Pule and others v Attorney General and others**,² it was Mr. Simachela's contention that the law on interpretation of the Constitution was well settled and that this Court had always adopted the literal rule when no absurdity arose. He submitted that the procedure for appointment of mayors and council chairpersons was different from that of their deputies; that the mayors and council chairpersons are directly elected by the people while the deputy mayor and deputy council chairperson are elected from amongst the councillors themselves.

Mr. Simachela argued that Article 154(2) of the Constitution clearly provided for the tenure of office for the mayor and council chairperson while for their deputies, the tenure was prescribed by section 17(1) of the Local Government Act. He contended that section 17 was consistent with Articles 153 and 154 of the Constitution and that, as the law currently stood, the tenure of office for the deputy mayor and deputy council chairperson is a maximum of two and half years. Further, that the deputies may only contest their positions after five years elapse, citing section

16(4) of the Local Government Act. His prayer was for this Court to dismiss the application with costs to the Respondent.

In reply, Mr. Luo contended that this Court in the **Dan Pule**² case did state that it would resort to the purposive approach of interpretation if the ordinary meaning led to absurdity. That it was absurd for the mayor and chairperson to hold office for five years while their deputies term was two and half years. Mr. Luo argued that there was no justification for such a law and that it was illogical as, ordinarily, the two offices should run concurrently. His prayer was for this Court to sustain the application.

We are grateful to the parties for their oral and written submissions as well as the affidavit evidence to which we have paid careful consideration. As noted at the beginning of this Judgment, the Applicants in this matter are seeking this Court's interpretation as to whether section 17 of the Local Government Act is consistent with Articles 153 and 154 of the Constitution as amended. Further, that in the event that section 17 is consistent with Articles 153 and 154 aforesaid, whether the incumbent deputy mayors and deputy council chairpersons are eligible to re-contest the position of deputy mayor and deputy council chairperson.

In their written submissions filed into court and in their oral arguments at the hearing of this matter on 16th April, 2019, the parties articulated their respective positions on the relationship between section 17 of the Local Government Act and Articles 153 and 154 of the Constitution as amended. The central issue was the tenure of the deputy mayors and deputy council chairpersons and whether deputy mayors and deputy council chairpersons are eligible to re-contest their seats in the impending elections for deputy mayors and deputy council chairpersons. The gist of the Applicants' position was that while the Constitution as amended expressly stated the tenure of mayors and council chairpersons to be five years, Article 154(3) did not indicate the tenure of deputy mayors and deputy council chairpersons. Urging this Court to employ a purposive interpretation of the relevant constitutional provisions, the Applicants contended that the tenure of mayors, council chairpersons, deputy mayors and deputy council chairpersons ran *pari passu*, that is, for five years and that section 17(1) of the Local Government Act was not consistent with Article 154 of the Constitution as amended.

The Respondent's opposing argument was to the effect that Article 154(1) of the Constitution as amended, which recognises

the offices of mayor, council chairperson, deputy mayor and deputy council chairperson uses the words “as prescribed”; that the offices are prescribed in the Local Government Act in sections 16 and 17. The Respondent urged this Court, on the authority of the **Dan Pule**² case, to adopt the literal rule in interpreting Article 154(1) as no absurdity arises from a literal interpretation. It was argued that Article 154(1) aforesaid did not affect the tenure of deputy mayor and deputy council chairperson and that section 17 of the Local Government Act was consistent with the Constitution and still in operation as regards the tenure of deputy mayor and deputy council chairperson. Also, that pursuant to section 16(4) of the Local Government Act, a deputy mayor or deputy council chairperson may only contest their positions after the elapse of five years from the last time they held office.

We have considered the rival submissions. Before we proceed, we wish to bring to the fore an important development having direct impact on this matter. As already noted earlier, this Court heard the oral arguments in this matter on 16th April, 2019. As is clearly evident from both the written and oral submissions, the parties anchored their positions on their respective understanding of sections 16 and 17 of the Local Government Act

in relation to the tenure of deputy mayors and deputy council chairpersons and also their eligibility to recontest their positions in the forthcoming elections for deputy mayor and deputy council chairperson.

In the course of writing this Judgment, we have since become aware that there is now new legislation, the Local Government Act No. 2 of 2019 (hereinafter “the Local Government Act, 2019”). The Local Government Act, 2019 was assented to on 11th April, 2019, that is five days before this matter was heard by this Court, and has repealed and replaced the Local Government Act, 1991. Thus, in accordance with the date of publication and also in terms of section 10(1) of the Acts of Parliament Act Chapter 3 of the Laws of Zambia, the Local Government Act, 2019 commenced on 11th April, 2019. Section 10(1) aforesaid is couched in these terms:

“10(1) Subject to the provisions of this section, the commencement of an Act shall be such date as is provided in or under the Act, or where no date is so provided, the date of its publication as notified in the Gazette.”

It is, therefore, trite that at the time of the hearing of this matter on 16th April, 2019 the Local Government Act, 2019 was the applicable law in relation to local government and related matters and that as at that date, the Local Government Act 1991 was no longer in force following its repeal and replacement.

As noted earlier, the respective positions of the parties in this matter were anchored on their respective interpretation of sections 16 and 17 of the Local Government Act as amended by Act No. 6 of 2010 in relation to the provisions of Article 154 of the Constitution as amended. At this point, we are mindful of the provisions of section 12 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia which reads as follows:

“12. Where any written law which has been amended by any other written law is itself repealed, such repeal shall include the repeal of all those provisions of other written laws by which such first-mentioned written law has been amended.” (emphasis added)

The Local Government Act No. 6 of 2010 had introduced amendments to the Local Government Act, 1991 and was read as one with the said 1991 Act. In view of the clear provisions of the law in section 12 aforesaid, our firm view is that following the repeal and replacement of the Local Government Act, 1991, Act No. 6 of 2010 accordingly ceased to have effect as of the date of publication.

The question that confronts us now is what is the position of this matter in which, at the time of the hearing, the parties laboured on repealed law? To answer that question, we revisit the

provisions of Article 154 of the Constitution as amended. Article 154 provides as follows:

“(1) There shall be a mayor and deputy mayor or council chairperson and deputy council chairperson for every council as prescribed.

(2) A mayor and council chairperson shall be elected-

(a) directly, in accordance with Article 47(3) during elections for councillors, as prescribed; and

(b) for a term of five years and may be re-elected for one further term of five years.

(3) A deputy mayor and a deputy council chairperson shall be elected by the councillors from amongst themselves. (emphasis added)

As noted in the above enactment, the Constitution provides that the positions of mayor, deputy mayor, council chairperson and deputy council chairperson shall be as prescribed. As correctly pointed out by the Respondent, in terms of Article 266 of the Constitution as amended the term “as prescribed” means “provided for in an Act of Parliament.” As of the date of publication the applicable Act of Parliament is the Local Government Act, 2019. The Local Government Act, 2019 covers matters relating to the election and tenure of deputy mayor and deputy council chairperson in sections 10 and 11. Section 10(1)(b)(i) of the said Act reads:

“10. A deputy mayor or deputy council chairperson shall be elected –

(b)subject to this Act, at the first ordinary meeting of the council held immediately after –

(i) the expiry of the term of two and a half years from the date of the last general election;... (emphasis added)

And section 11(1) of same Act reads:

“11(1) Subject to the other provisions of this section, a deputy mayor or deputy council chairperson shall hold office for a term of two and a half years and may be re-elected for one further term of two and a half years.” (emphasis added)

The Local Government Act, 2019 therefore clearly prescribes the tenure of deputy mayor and deputy council chairperson to be two and a half years. Further, section 11(1) aforesaid also prescribes that the deputy mayor and deputy council chairperson may be re-elected for one further term of two and a half years.

This matter has been overtaken by events. With the coming into effect of the new Local Government Act, 2019 it is unnecessary for this Court to proceed to address the constitutionality or otherwise of section 17 of the Local Government Act, 1991 as amended by Act No. 6 of 2010 on the basis of the arguments proffered by the parties and the reliefs sought as that Act is no longer in force following its repeal and replacement.

We are mindful of the provisions of section 82(3) of the Local Government Act, 2019 which reads:

“Subject to the Constitution, the coming into operation of this Act does not affect the tenure of office of a deputy mayor or deputy council chairperson in office immediately before the coming into operation of this Act.”

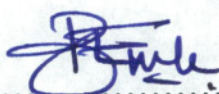
Article 154 of the Constitution does not state the term of office of a deputy mayor and deputy council chairperson. The term of office of a deputy mayor and deputy council chairperson is therefore among the matters to be prescribed by Act of Parliament pursuant to Article 154(1). This has now been done by the Local Government Act No. 2 of 2019. Section 82(3) of the said Act does not restrict a deputy mayor or deputy council chairperson in office immediately before the coming into operation of this Act from seeking re-election to the respective offices. Therefore, a deputy mayor and deputy council chairperson in office before the coming into operation of Act No. 2 of 2019 is eligible to stand for re-election in accordance with the provisions of the said Act.

In sum, the coming into effect of the Local Government Act, 2019 has settled the question of the election, tenure and eligibility for re-election of deputy mayors and deputy council chairpersons.

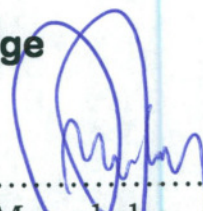
We order that each party bears their own costs.



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A. M. Sitali
Constitutional Court Judge



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E. Mulembe
Constitutional Court Judge



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M. Musaluke
Constitutional Court Judge