IN THE HIGH COURT FOR ZAMBIA **2016/HP/1738**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

IN THE MATTER: **OF SECTIONS 1, 101, 103, 105 AND 267 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016**

IN THE MATTER OF: **THE HEARING OF THE PRESIDENTIAL ELECTION PETITION IN RELATION TO THE PRESIDENTIAL ELECTION HELD ON 11TH AUGUST 2016**

IN THE MATTER OF: **ARTICLE 28 OF THE CONSTITUTION**

AND

IN THE MATTER OF: **THE CONTRAVENTION OF ARTICLE 18 OF THE CONSTITUTION OF ZAMBIA**

BETWEEN:

HAKAINDE HICHILEMA	**1st Petitioner**
GEOFREY BWALYA MWAMBA	**2nd Petitioner**
AND	
EDGAR CHAGWA LUNGU	**1ST Respondent**
INONGE MUTUKWA WINA	**2ND Respondent**
ELECTORAL COMMISSION OF ZAMBIA	**3RD Respondent**
THE ATTORNEY GENERAL	**4TH Respondent**
THE CHIEF JUSTICE OF ZAMBIA	**5TH Respondent**
THE DEPUTY CHIEF JUSTICE OF ZAMBIA	**6TH Respondent**
THE CONSTITUTIONAL COURT	**7TH Respondent**

CORAM: HONOURABLE JUSTICE MR. MWILA CHITABO, SC

For the Petitioners: *Mr. J.B Sangwa, SC and Mr. R. Simeza of Messrs John Sangwa Simeza & Associates;*

Mr. Jack Mwimbu of Messrs Muleza & Company

Mrs. Nelly Muti of Lukona Chambers

Mr. Gilbert Phiri of Messrs PNP Advocates

Mr. Keith Mweemba of Messrs Keith Mweemba & Associates

Mr. Marshall Muchende of Dindi & Company

Mrs. M. Mushipe of Mesdames Muship & Associates

Mr. H. Haimbe of Messrs Malambo & Company

For the Respondents: *Mr. L. Kalaluka, SC – Attorney General*

R U L I N G

Legislation referred to:

1. *Rules of the Supreme Court of England, 1999 edition White Book*
2. *The Constitution of Zambia, (Amendment) Act No. 2 of 2016*
3. *The Constitution of Zambia Chapter 1 of the Laws of Zambia*

4. *High Court Act Chapter 27 of the Laws of Zambia (1996 Constitution)*

Cases referred to:

1. *Twampane Mining Co-operation Ltd v. L.M Storti Minning Ltd (2011) 3 ZR 67*
2. *Davies Chisopa and Stanley Chisanga Appeal No. 179/2012*
3. *Mobil (Z) Limited v. Msiska (1983) ZR 86*
4. *Zambia Seed Company Ltd v. Chartered International (PVT) Limited (1999) ZR 151*
5. *Access Bank (Z) Ltd and Group Five/Zcon Business Venture (suing as firm)*
6. *Ashmore v. Corporation of Lloyds No. 1 [1992] 1 All ER 486 HL*
7. *United Engineering Group v. Markso Mungalu (2007) ZR 30*
8. *Faustine Mwenya Kabwe, Aaron Chungu, John Sangwa v. Judicial Complaints Commissioner & Attorney General 2009/HP/0996*

Other Works

1. *The Holy Bible New International Version*

The legend of this application to raise notice of intention to object to notice of motion to raise preliminary issue is that on 7th December, 2016 the Respondent launched notice of motion to raise preliminary issues pursuant to Order 14A and Order 33 Rule 3 of the Rules of the Supreme Court.

The Respondent sought the Court to determine the following issues:-

(i) That in view of the original and final jurisdiction of the Constitutional Court in interpreting the constitution and dealing with the election of the President and Vice President, whether the Honorable Court can interpret otherwise than in accordance with interpretation of the Constitutional Court in respect to the time frame within which the Presidential Election Petition may be heard;

(ii) Whether the determination of Presidential Election is a civil right so as to bring it within the scope of Article 18 (9) of the Constitution;

(iii) Whether this Court can inquire into a question of fair hearing when the Presidential Election in issue herein was never heard on account of the negligence and inertia or the Petitioners as can be seen from the majority Judgment and the two dissenting Judgments.

The notice to raise preliminary issue was supported by skeleton arguments. For brevity of time I will not replicate the skeleton arguments but will summarize.

(1) **Background**

The genesis of the Petition was narrated by the Respondent. It was recalled that on 6th September, 2016 the Petitioners filed a Petition and other related documents into Court seeking the following substantive reliefs:-

(a) An order that Article 101 (2) and 103 (2) of the Constitution of Zambia[1] to the extent to which they have been construed by the 7th Respondent to literally mean that the 7th Respondent "*shall hear an election petition relating to the President elect within fourteen (14) days of the filling of the Petition*" are ultra vires Article 18 (9) of the Consitution[2];

(b) An order that the decision of the 7th Respondent made on 5th September, 2016 to the effect that the Petitioners had until 24 hours on 2nd September, 2016 to prosecute their petition before the 7th Respondent under cause No. 2016/CC/0031 is and was ultra vires Article 18 (9) of the constitution[3] and hence null and void;

(c) An order that the Ruling of the 7th Respondent made on 5th September, 2016 dismissing the Petitioners Petition under cause No. 2016/CC/0031 for want of prosecution is ultra vires Article 18 (9) of the Constitution[3] and hence null and void;

(d) An order directing the 7th Respondent to hear and determine the Petitioners Petition independently fairly and within

reasonable time in line with the provisions of Article 18 (9) of the Constitution;

(e) An order that the Respondents herein bear costs of and occasioned in this petition.

It was further recalled that the Respondents on various dates applied for the misjoinder of then 1st, 2nd, 3rd, 5th, 6th and 7th Respondents from the proceedings which culminated in this Court's Ruling delivered on 29th November, 2016, this Honourable Court misjoined the aforesaid Respondents from the proceedings herein leaving only the Attorney General as the sole Respondent.

(2) **Anticipatory Arguments**

(i) Order for directions provided for leave to apply

It was submitted that the petitioners might advance an argument that there has been inordinate delay in making the application because order for directions issued on 22nd September, 2016set the 29th September, 2016 as the date for filing interlocutory motions together with the supporting heads of argument.

It was submitted that the said order for directions gave each party liberty to apply.

2 (ii) **Preliminary issue not an interlocutory application**

It was the right Attorney General and State Counsel's further argument that the notice of motion to raise preliminary issues is not infact an interlocutory application as the same has potential to

dispose of the matter wholly at this stage. He called in aid Order 14A/2/8 of the Rules of the Supreme Court of England[1] which provides as follows:-

> *"Proceedings under Order 14A are not interlocutory proceedings since by its nature the application will decide the rights of the parties and will terminate the action or otherwise finally dispose of it....."*

2 (iii) **Party at liberty to raise preliminary issue at any stage of proceedings**

It was his further submission that a party to proceedings is at liberty to raise an issue on a point of law at any stage of the proceedings. Attention of the Court was drawn to Order 14/A Rule 1 (1) of the Supreme Court Rules of England[1] which pronounces that:-

> *"The Court may upon application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:-*
>
> *(a) such question is suitable for determination without a full trial of the action, and*
>
> *(b) such determination will finally determine (subject to any possible appeal) the entire cause or matter on any claim or issue therein"*

2 (iv) **Order 33 Rule 3 of the Supreme Court rules of England**[1]

In support of the above legal proposition the learned State Counsel and right Attorney General pointed at Order 33 Rule 3 of the above Order which provides as hereunder:-

> *"The Court may order any question or issue arising in a cause or matter whether of fact or law or partly of fact and partly of law and whether raised by pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated"*

The Court was then alerted to the landmark and celebrated case of the Court of the last resort (the Supreme Court) of ***Admark Limited v. Zambia Revenue Authority***[1] ***(2006) ZR 42*** wherein it was held that:-

> *"A party may at the trial raise a point of law even though it was not pleaded in the defence"*

Prime reliance was also placed on the High Court case of ***Josiah Tembo and Henry Jawa v. peter Mukuka Chitambala (sued as the Administrator of the estate of the late Frank Makarious Chitambala 2005/HP/0208***.

3. **Substantive grounds of motion**

Ground 1

3 (i) *That in view of the original and final jurisdiction of the Constitutional Court in interpreting the Constitution and dealing with the election of President and vice President, whether the Honourable Court can interpret otherwise than in accordance with interpretation of the Constitutional Court in respect to the time frame within which the Presidential Election Petition may be heard*

It was submitted that this Courts' jurisdiction is anchored from Article 134 of the Constitution[2] which bestows unlimited jurisdiction in civil and criminal matter subject to Article 128 of the Constitution2 which stipulates that:-

> *"Subject to Article 28 of the Constitutional court has original and final jurisdiction*
>
> *(a) to hear a matter relating to the interpretation of this constitution, and*
> *(b) to hear a matter relating to a violation or contravention of the Constitution.*

It was submitted that Article 128 of the amended Constitution[2] is further subjected to Article 28 of the 1996 Constitution[3]. The grudnom of which is that

> *"Subject to clause (5) if any person alleges that any of the provisions of Articles 11 – 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 t the same matter which is lawfully available, that person may apply for redress to the High court which

(a) shall hear and determine any such application;

(b) determine any question arising in the case of any person which is referred to in pursuance of clause (2); and which may make such order, issue such writs and give such direction as may consider appropriate for purpose of enforcing or securing the enforcement of any of the provisions of Articles 11 – 26 inclusive.

It was State Counsels' submission that gleaning at Articles 28 of the 1996 Constitution[3], Articles 128 and 134 of the amended Constitution the High Court has no jurisdiction to interpret the Constitution.

He went on and pointed out that after the ushering in or the new consitution[2], the High Court has no jurisdiction to interpret any of the provisions of the Constitution inclusive of the Bill of Rights.

It was his further submission that the only jurisdiction that has been reserved for the High Court is with regards to enforcement of the Bill of Rights.

3 (ii) *Contention that this Court ought to interpret the provisions of Articles 101 (5) and 103 (2) of the Constitution*

It was submitted that this Court in its Ruling of 29th November, 2016 in this very same case in casu had occasioned to disclose its mind to Article 128 vis-à-vis Article 28 of the Constitution[3] and held that:

> *"Whereas it is correct that Article 28 (i) has not been transferred to the Constitutional Court, it does not follow that the Court (i.e the Constitutional Court) is stripped of pronouncements and interpretations of the Constitution inclusive of the Bill of Rights"*

3 (iv) *Dismissal of petition in cause No. 2016/CC/0031*

It was propounded by learned State Counsel and Attorney that the Constitutional Court having dismissed the Petition on 5th September, 2016 that Court put it to rest the issue of whether the fourteen days as provided for in Articles 101 (5) and 103 (2) of the amended Constitution can be extended beyond the prescribed period, a fortiori, this Court has no jurisdiction to change what the Constitutional Court has already settled.

3 (v) *Multiplicity forum shopping*

It was further submitted that pressing this Court to make an order pronouncing on the status of the Petition in the face of an Order of the Constitutional Court dismissing the Petition will open an avenue for forum shopping and abusing Court process as they seek to relitigate issues that have already been determined.

State Counsel further buttressed his argument by summoning the Ruling in the case of ***Hakainde Hichilema and Geofrey Mwamba v. Edgar Chagwa Lungu, Inonge Mutukwa Wina and Attorney General (Supra)*** dated 31st October, 2016 where Madam Justice Mulenga S, Const. traversed the issues of multiplicity, relitigation, abuse of Court process and dismissed what she described as a veiled attempt to relitigate and set aside the originating summons for irregularity and abuse of Court process with costs.

He wrapped up his submissions by asserting that by the doctrine of *stare – decis* which this court was bound by the decisions of a Superior Court and its decisions pronounced in the same case.

4. *Ground 3*

Whether the determination of Presidential Election Petition is a civil right so as to bring it within the scope of Article 18 (9) of the Constitution

It was canvassed by the Learned Sate Counsel (and Respondent in this matter) that Article 18 (9) of the Constitution[3] provides as follows:-

> *"Any Court or other adjudicating authority prescribed by law for determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial and where proceedings for such a determination are instituted by any person before such a Court or other*

adjudicating authority, the case shall be given a fair hearing within a reasonable time"

It was discerned that the Petitioners place capital on the above article and they contend that the Ruling of the Constitutional Court of 5th September, 2016 abrogated or indeed breached the provisions of Article 18 (9). This view came under serious assault. It was pointed out the from the wording of Article 18 (9), that a Petition can only be brought in the High Court under the said Article if there was something to do with the determination of the existence of any civil right or obligation.

It was further advanced that the Petition before this Court do not emanate from determination of existence of any civil rights or obligation but emanates from the Ruling of the Constitutional Court delivered on 5th September, 2016 dismissing the Petitioners Petition for want of prosecution.

It was the further submission by the Respondent that the contention of the Petitioners that the conclusion reached upon by the Constitutional Court is ultra - vires the provisions of Article 18 (9) of the Constitution[3]. This view was faulted. It was instead argued that if this Court was to uphold the position taken by the Petitioners, it would in effect be saying that the provisions of Articles 101 (5) and 103 (2) of the amended Constitution[2] are unconstitutional for abrogating the provisions of Article 18 (9) of the same Constitution.

It was pointed out that this Court has no jurisdiction to make such a pronouncement because the jurisdiction to interpret any constitutional provision vest in the Constitutional Court by virtue of Article 128 of the current Constitution[2].

4 (i) *Interpretation of the Articles of the Constitution as a whole purposeful*

It was further submitted that the provisions of the Constitution have to be read as whole to ensure that no singular provision should swallow or vanquish other provision(s). The ultimate result should be to achieve the interpretation that brings about the synergy between individual provisions of the Constitution in Order to promote the general legislative purpose underlining such provisions.

Learned State Counsel then sought refuge in the foreign case of ***South Dakota v. North Carolina (1940) 192 USA 268: 48 ED 448*** wherein Justice White of the Supreme Court of the United States at page 465 put it this way:-

> *I take it to be an elementary construction that no one provision of the Constitution is to be segregated from all others, and to be considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to the effect the great purpose of the instrument"*

To consolidate his submission, State Counsel enlisted from foreign jurisdiction this time from ***Botswana in the case of Attorney General v. Don (1994) (B) BCL R1*** where it was held that:

> *"The very nature of a constitution requires that a broad and general approach be adopted in the interpretation of its provisions; that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the constitution"*

By way of conclusion under this limb, the Court was invited to visit the case of the Court of last resort in constitutional matters of ***Reverend Dr. Timothy Njoya v. Attorney General [2004] 1 KLR 232*** referred to a page J58 of the Judgment by the Constitutional Court in the case of ***Stephen Katuka and Law Association of Zambia v. Ngosa Simbyakula and 63 others 2016/CC/0010***; ***2015/CC/0011*** selected Judgment No. 29 of 2016 where the Court stated:-

> *"The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other so as to effectuate the great purpose of the instrument"*

It was thence finally submitted that the attempts by the Petitioners that Article 18 (9) of the Constitution[3] is superior to the other provisions of the Constitution is untenable.

(5) Ground III

Whether this Court can inquire into a question of fair hearing when the Presidential Petition in the issue herein was never heard on account of negligence an inertia of the Petitioners as can be seen from the majority Judgments and the two dissenting Judgments

(i) Equity assisting the vigilant and not the indolent

Reference was made to the Judgment of the Constitutional Court in the often quoted case of ***Hakainde Hichilema and another v. Edgar Chagwa Lungu and another v. Electoral Commission of Zambia v. The Attorney General 2016/CC/0031*** where in the majority Judgment it was stated as follows at page 9:-

> *"This Court was ready to hear the Petition within the prescribed fourteen days but the Petitioners instead chose to concentrate on interlocutory applications at the expense of ensuring that the petition was heard within the prescribed time. This was their right to do and so they only have themselves to blame when time ran out on them. Even equity cannot assist the Petitioners because equity does not assist the indolent"*

State Counsel pointed out that it cannot be argued that the Petitioners were not afforded a fair hearing when the circumstances that led to the expiry of time were self imposed.

(ii) *Ignoring Rules of the Court is at that Party's peril*

To fortress the above proposition State Counsel found comfort in the case of ***Twampane Mining Co-operative Limited*** where it was pronounced that:-

> *"It is important to adhere to Rules of the Court in Order to ensure that matters are heard in an orderly and expeditious manner and that those who choose to ignore Rules of Court do so at their own peril"*

He capped his submission by stating that the Petitioners by not observing the time limit in which to present their Petition that is within 14 days they acted at their own peril.

(iii) *Findings of fact when can they be reversed*

It was submitted that the Petitioners appear to be advancing an attack the findings of fact by the Constitutional Court when it stated that the Presidential Petition was never heard due to the Petitioners' own indolence. He maintained that it is a well espoused and propagated legal proposition that Courts cannot delve into findings which were found by a trial Judge.

To concretise this legal proposition commandeered the celebrated case of ***Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172 (SC)*** where Ngulube DCJ as he then was held:-

> *"The Appellate Court will only reverse the findings of fact made by a trial Court if it is satisfied that the findings in question*

were either perverse of made in the absence of any relevant evidence or upon misapprehension of facts"

State Counsel then supplemented his authorities by enlisting the case of ***Kenmuir v. Hattingh (1974) ZR 162 (SC)*** where it was pronounced in the following manner:-

"Where questions of credibility are involved in Appellate Court which has not had the advantage of seeing and hearing the witness will not interfere with the findings of fact made by the trial Judge unless it is clearly shown that he has fallen in error"

In conclusion the Learned Right Attorney General and State Counsel submitted that applying the cases mutatis mutandis, the Presidential Election Petition was not heard on account of the delinquent conduct of the Petitioners and not the Constitutional Courts' conduct.

It was his very last submission that this Court was not privy to the circumstances as noted by the majority Judgment. To this end, he submitted this Court will not be right placed to determine the fairness of the proceedings in the Constitutional Court. He thus prayed that the Petition be dismissed with the attending costs.

It is these submissions anchored on the notice to raise preliminary issues that provoked the Notice of intention to object by Petitioners which was filed on 14th December, 2016 which was served on the Attorney general at 14 hours on the even date.

They advanced four grounds:-

(1)That the notice to raise Preliminary Issues is not consistent and violates the consent order for directions made on 22nd September, 2016.

(2)That further that entertaining the application would to all intents and purposes amount to setting aside or otherwise varying the consent order without following the due process.

(3)That in any event the application is merely dilatory as the matters subject thereto can be canvassed at trial of the Petition; and

(4)Further and without prejudice to the foregoing that the application is abuse of the process of the Court as the Respondent is deploying its grievance in a piecemeal fashion notwithstanding that the matters it now seeks to raise have been known to it from the date of commencement of the action and therefore to raise them now is an attempt to frustrate the expeditious disposal of the Petition contrary to the letter and spirit of the consent order.

At the hearing of the Respondents notice of motion, the issue of whether the Petitioners notice of intention to raise objection to preliminary issue should be treated as an objection to the notice of motion and thus to proceed as such. It was resolved by the parties that the Petitioners notice be heard first since it would have the

effect of terminating the Respondents motion and to commence hearing of the substantive Petition.

Learned Counsel for the Petitioners then made oral submissions. The gist of which were that grounds 1 and 2 will be argued contemporaneously as one.

It was submitted that the consent dated 22nd of September, 2016 provided for the disposed of interlocutory applications ultimately by the 10th November, 2016 thereafter the pleadings would be closed and matter set for trial. There was no variation of the said consent order nor was there a subsequent consent order to vary the same; and therefore the Attorney Generals notice of motion violates the consent order. Any application thus filed outside the prescribed time should be deemed to have lapsed and therefore the hearing of the Petition had to commence.

It was pointed out that a consent order can only be set aside by a separate action. In support of this legal proposition reliance was placed on diverse judicial precedents notable amongst which is ***Zambia Seed Company Limited v. Chartered International (PVT) Limited 1999 ZR 151***.

It was further pointed out that in any event the issues being raised by the Respondent had been known to the Respondent and ought to have been canvassed much earlier or at the trial. It was his contention that the Respondents motion was merely dilatory and an abuse of Court process.

He concluded by saying that the motion was improperly before the Court and in terms of Order 2 Rule 2 of the Supreme Court[1] and should not and ought not to be entertained.

Learned State Counsel Mr. Sangwa in his submission adopted the submissions of senior Counsel Mr. Haimbe. The gravamen of his submissions were that though the motion purports to have been made under Order 14A and 33 (3) of the Supreme Court Rules[1] of 1965, the motion does not come under the ambit of these rules.

According to State Counsel, an application cannot be made under Order 14A in proceedings by or against the State. Reliance was placed o Order 77 Rule 7 (i) (c) which provides as follows:-

> *"No application shall be made under Order 14A in proceedings against the State or by the crown"*

It was his conclusion therefore that Order 14 is therefore only where the State is not party to the proceedings.

The second ground advanced was that the motion does not come under the ambit of Order 33 (3) which envisages a two phase approach.

The first stage is for the interested party to move the court on the issues of fact or law that have to be tried. Once the Court is convinced, then the Court will issue an Order and in that will specify the issues that may be tried and it may specify that the issues that the issues are tried before, during or after the main trial.

It was pointed out that under Rule, no party can proceed as a right to frame the issues. As the matter stands the Court has never framed the issues. Reliance was placed on Order 33/3/1 at pages 643 – 644 of the White Book[1] explanatory notes.

Invited by the Court to address it on the provisions of Article 118 (2) (e) of the Constitution[2], it was State Counsels submissions that the provisions were intended to protect the Petitioners who had moved the Petition who are seeking justice. That in any event, it is the Respondent infact who is seeking to rely on a technicality to terminate the Petitioners Petition thus preventing the Petitioners to have their Petition heard.

It was pointed out that the way the issues have been framed in the motion if any of the questions is answered in the affirmative, then the Petition is over on a technicality.

It was his submission that it is the Respondents motion which offends Article 118 (2) (e) and Order 14 A and Order 33 (3) of the Supreme Court Rules and Practice. It was pointed out that the Petitioners had not offended any of the provisions referred to in the immediate preceding paragraph.

Further if the issues raised in the motion are substantive issues which amount to a defence which can be propagated at trial of the Petition. It was submitted that the motion in one of the grounds alleges negligence in the management of time in the Constitution. The issue of negligence can only be dealt with at trial. By way of illustration, it was pointed out that there was over 397 pages of

proceedings and for the Respondent to succeed they have to prove negligence. That if the motion was refused, the Respondent will still have its day in Court at trial.

The learned senior Counsel Simeza adopted the arguments and augumented the same by submitting that a reading of Order 14 A (2) (e) are not applicable to Petitioners, but only to actions commenced by writs and motions. He submitted that reference to Order 14 A (2) (e) which makes reference to filing of defence and in default entry of Judgment may ensure. In his view the proceedings herein are not summary proceedings. Refuge was sought in Order 18/19/3 which expressly provides applications will also apply to notice, writ of summons, originating summons and motions.

The Learned Right Attorney and State Counsel Mr. Kalaluka parried the submissions. He submitted that he cannot read in Order 18/19/3 that Petitions are excluded by that Order as is being suggested by the Petitioners that since the notice has to be served or given to the Defendant, there being no Defendant in these proceedings, it follows the Order does not apply. Learned State Counsel sought to floor the Petitioners submission by pointing out that the term Defendant includes a Respondent.

It was his submission that in these proceedings the Respondent had filed an answer and that in essence is the notice of intention to defend envisaged under Order 14/A/2/3.

The Court was invited to consider Article 118 (2) (e) and to hold that matter should not be floored on a technicality such as the one being

canvassed by the Petitioner that is on the omission of the word Respondent in the Order 14A.

Turning to Order 77 (7) of the White Book the same reads as follows:-

"No application shall be made against the crown

(c) *in any proceedings by or against the State"*

In his view, the prohibition or shield is given to the State and not the other litigant. In the circumstances the State is not inhibited or prohibited from taking advantage of Order 14A in launching a preliminary issue or issues under the Order.

Reacting to Order 33 (3) and the Petitioners submissions that the Court did not frame the issues in a particular format and did not issue order for directions, it was the Respondents submission that the fact that the Court had given a return date means that the Court was happy and directed that the issues be heard on the appointed date.

State Counsel also sought sanctuary under Article 118 (2) (e) pointing out that it is a procedural technicality to argue that since the Court did not give the Order for directions, the motion should fail on that account. It was pointed out that the Article prohibits undue regard to procedural technicalities which may resolve the issues on the basis of law without the full length of trial.

In respect of the Petitioners argument that anything done outside the order for directions given on 22nd September, 2016 was a

nullity, it was pointed out that the submission was a double edged sword. Learned State Counsel refreshed the Courts memory by reference to direction number 3 which states as follows:-

> *"The interim or interlocutory applications shall be heard on 31st October, 2016"*

By the 31st November, 2016 the Respondent had not filed in the responses to the Respondents applications to disjoin the Respondent other than the Attorney General. The skeleton arguments in opposition to the misjoinder were only filed on 22nd November, 2016.

Direction No. 6 provided as follows:-

> *"The Ruling shall be delivered on 10th November, 2016 at 08:45 hours ....."*

Due to the adjournment at the instant of the Petitioners on 31st October, 2016 delivery of the Ruling was only made on 29th November, 2016.

Direction No. 6 provided as follows:-

> *"The parties shall file in their respective bundle of pleadings as the case might be by the 7th November, 2016"*

The Petitioners filed their bundles on 12th and 18th November, 2016. It was submitted no leave to extend time in which to file in the bundles of documents was applied nor was there consent by the parties to file the same out of time. Therefore the submission goes

if Mr. Haimbe's submission that anything done outside the order for directions is null and void, it follows that all the documents filed outside the consent order are a nullity and the Petition should forthwith be terminated.

It was State Counsel's further submission that direction No. 8 provided as follows:-

> *"Trial shall commence on 21st to 24th November, 2016 at 09:00 hours and 14 hours of each day"*

Going by Mr. Haimbes' submissions the trial not having been conducted on the appointed time, a fortiori the Petition has elapsed.

Additionally, it was argued that if the argument is that the Court had amended the order of 22nd September, 2016 then the Court also amended the order to file the motion.

It was State Counsel's further submission that the Petitioners arguments is that a consent order can only be set aside by another action. It follows therefore that since there was no such fresh action to set aside the consent order for directions then there infact was no such variation and therefore the Petitioners ought to commence fresh proceedings to set aside the consent order.

The Learned State Counsel further submitted that in the unlikely event that the Court is to decline the invitation that the proceedings have lapsed the Court should refer to direction of the consent order for directions which provides as follows:-

> *"All parties shall be at liberty to apply"*

On the basis of that direction, the Respondent and indeed the Petitioners are at liberty to apply.

It was argued in the alternative that should the Petitioners argue that the liberty to apply aforesaid applies to the motion (which is denied); the direction does not apply to the motion since the motion under consideration is not an interlocutory application.

For this proposition, reference was made to Order 14/A/2/8 which reads in part

> *"Proceedings under Order 14A are not interlocutory proceedings since by its nature the application will decide the rights of the parties and will terminate the action or otherwise dispose of it"*

It was thence submitted that *"clearly proceedings under Order 14A are not interlocutory applications and are not covered under 'consent order'"*.

In respect of the proposition that a motion can be raised at any point in time in a Petition pursuant to Order 14A, the Court invited to visit the case of ***Faustine Mwenya Kabwe and others v. Judicial Service Complaints Authority and Attorney General 2009/HP/0996*** a High Court Judgment.

As to the timing of the motion, it was submitted that an application can be made at any stage of the proceedings. Under order 33/3 it is provided that questions of law can be tried before at or after trial.

State Counsel then enlisted the aid of the case of ***Admark Ltd v. Zambia Revenue Authority (2006) ZR 43***.

In his reply and in so far as the submissions were not repetitive Counsel Haimbe argued that since the Order for directions provided for mode of receiving evidence and dates of hearing were set, it follows that the parties envisaged a trial.

In respect of the variations of the consent it was submitted that the parties had agreed at all stages as the record will reflect.

Learned Mr. Sangwa in his rounding up session submitted that the case of ***Admark Ltd v. Zambia Revenue Authority*** *(cited by the Attorney)* to the effect that a party may at the trial raise a point of law even if it was raised in its defence does not help the Attorney General on the premises that it has not been shown how the case assists the Respondent. It was pointed out that the issue before Court is one of procedure that is the motion that is being canvassed cannot be brought under the said orders.

It was argued that the dispute in that matter was in respect of construction and interpretation of some provisions of the Constitution[3] and the Judicial Code of Conduct. Act No. 15 of 1999, parties had consented to have the issues determined by the Court.

In respect of the submission that the Petition has lapsed, State Counsel pointed out that under Order 30 Rule 3 of the High Court Rules Chapter 27 of the Laws of Zambia, it was incumbent on the

Respondent to file a proper application before the Court by summons if it sought a determination which summons should be served on the opponent.

In respect of Order 14A, it was submitted that the issues raised involve both questions of law and fact thus removing the Respondent's motion under the realm of Order 14A.

State Counsel finally submitted that the motion ought to be dismissed with costs.

I am indebted on the researchful industry of both State Counsel and Senior Counsel engaged in this legal contest. I propose to deal with all the issues raised item by item as they unfolded during the hearing.

(1) **Notice / Motion to raise preliminary issue not being consistent with and in violation of the consent order for directions made on 22nd September, 2016**

A scrutiny of the Courts record reveals that the consent order directed and required the parties under direction 1 to 3 to complete filing of all documents touching on the misjoinder application to be completed by 13th October, 2016.

Direction 4 provided for the hearing of interlocutory applications on 31st October, 2016.

By the 31st October, 2016, the Petitioners had not filed in any responses. They only did so on 16th and 18th November, 2016 without any prior leave or consent of the parties. On 31st October,

2016 hearing of interlocutory applications was aborted by the Petitioners when they informed the Court that the lead Counsel for the Petitioners was indisposed.

There was no notice or motion to adjourn as required by Practice Direction No. 13 dated 2nd January, 1969.

The Respondent in his generosity did not object to the on the floor application for an adjournment in a matter the Petitioners are desirous of determining as expediently as possible.

I do not and cannot therefore accept Mr. Haimbe's submission that the Respondent is being dilatory calculated to delay the determination of the matter. The delay and intransigence can be traced right at the door steps of the Petitioners Advocates.

It is trite law that litigants and Advocates who choose to ignore Court orders do so entirely at their own peril. The Supreme Court of the Realm had occasion to pronounce itself on the subject in the case of ***Twampane Mining Cooperative Limited v. E.M Storti Mining limited***[1] when they observed in holding 6 that:-

> *"Those who choose to ignore Rules of the Court do so at their own peril"*

1 (ii) <u>*Delay in launching of Respondents motion*</u>

It was canvassed by the Petitioners Attorneys that the Respondent ought to have filed his challenge or motion earlier in the proceedings.

Whereas it is permitted that an application to raise a preliminary issue can be raised at any stage of the proceedings, it is desirable that the same is made timeously and promptly.

The Petitioners have faulted the Respondent for not swiftly launching their motion earlier in the proceedings. I have already alluded to the lapses on the part of the Defendants Attorney to file various documents. This amounts to finding fault whilst deliberately electing to be oblivious of their own defaults and faults.

The Supreme Court had occasion to pronounce themselves on the subject in the case of ***Davies Chisopa and Stanley Chisanga Appeal No. 179/2012*** *(unreported)*[2]. Muyovwe, JS at page J9 put it this way:-

> *"But before we conclude on this segment, we are compelled to react to Counsel for the Respondents response to the allegations relating to the donations of money by the Respondent. It was pointed out that the Appellant had come to Court with heavily soiled hands on account of the fact that he equally made various donations such as 30 bags of cement to a Health center, donation of iron sheets to churches and mono pumps to the community during the campaign period. That the Appellant admitted making these donations. The Learned trial Judge in his Judgment found that these donations could not be termed philanthropic activities since the same were made during the campaign period.*

Clearly the Appellant had not come to Court with clean hands. As the Holy Bible (new International version) in the book of Luke Chapter 6:41 says

> *'Why do you look at the spec of sawdust in your brother's eye and pay no attention to the plank in your own eye? How can you say to your brother, "Brother, let me take the spec out of your eye" when look you yourself fail to see the plank in your own eye'*

In agreeing with the trial Judge, we have found that the appellant was equally guilty of illegal practices contrary to section 93 (2) (c) of the Act"

This case relates to a Parliamentary Election petition. The principle however aptly applies to this case. In the case in casu the truancy of the Petitioners Attorneys or the Petitioners themselves militates against them. They have come to equity with heavily soiled hands.

(iii) <u>*Basis upon which the Notice to object is anchored*</u>

The Respondents did not cite any Order, Rule or Law or Practice Direction on which to anchor their application. It is one of the elementary rules of practice that any application must proclaim in its heading the legal substratum of their application. There was no challenge on this aspect by the Attorney General, therefore the matter cannot be taken any further than that.

(iv) *Effect of Respondent not filing motion promptly within the time frame*

I have already traversed this point and held that an application to raise a preliminary issue can be made at any time of the proceedings. This can be before, at, during or after the proceedings.

(v) *Mode of commence motion to raise preliminary issue*

Order 14A/2/6 informs us that "*great flexibility has been introduced as to the manner in which an application may be made, namely by summons or motion and not withstanding Order 33/1 may be made orally in the case of any interlocutory application to the Court*".

My understanding of interlocutory application is that a liberal construction of the term includes any application made in between from the time an action or petition is commenced up to the very final determination of a matter. I am fortified in my view by the fact that a preliminary issue can be introduced at any stage and it can have the effect of terminating the proceedings.

(vi) *Prayer that motion be dismissed having been filed outside the order for directions*

It was Mr. Haimbe's submission that any application filed out of time is a nullity, the motion having been filed outside the order for direction was thence a nullity. This submission has been effectively and ingenineously countered by the Attorney General and State Counsel to the effect that if the proposition was to be accepted then indeed anything done outside the order for directions is a nullity.

The inevitable and alarming consequence would be that the Petition has lapsed. The predicament in which the Petitioners find themselves in is self inflicting. It can be likened to the Boomerang. A traditional hunting device invented by the early inhabitants of Australia which if launched on a target but misses the target the device moves in a parabola and will navigate itself closest to the point where it was launched and if the launcher does not move from its path it strikes the launcher.

In the case in casu, the sweeping and overly general submission if upheld, then has the effect of terminating the Petition. It is counsel of prudence that Learned Counsel should always forensically interrogate their submissions so as to avoid a calamity visiting them at their invitation.

(vii) Whether motion violates the consent order

The motion is employed to terminate the Petition on the basis of a legal foundation Orders 14A and 33/3 of the Supreme Court Rules. It has been argued that this maneuver is an abuse of Court process and is intended to delay conclusion. I do not agree to this submission. In fact the converse is true that it is infact the Petitioners who are dialatory and have alarming consistency in failure to abide by the Court Orders.

The Supreme Court had occasion to pronounce itself on a similar subject and I visited the case of ***Mobil (z) Limited v. Msiska (1983) ZR 86***[3] where Gardner JS held:-

"(ii) Obtaining a tactical advantage by taking steps which are available at law is not an abuse of Court process"

His Lordship observed at page 92 lines 25 – 29

> *"However, the obtaining of an advantage by taking steps which are available in law is not in itself an abuse of Court process. There is no ground for finding that the Respondents tactical advantage was obtained improperly and the application to strike out the endorsement on the writ is dismissed"*

The legend in the cited case was that in an appeal against a High Court refusing to strike out an endorsement on a writ of summons and to discharge an interlocutory injunction, the Supreme Court dismissed the appeal on the former issue but allowed the later.

Admittedly the case related to striking out an endorsement on a writ of summons. In my view however the principle is applicable to the case in casu and I am obliged and I have applied the same. I therefore hold that the launching of the motion is on permissible grounds of law and I hence hold that the Respondent has merely taken advantage by taking steps which are available at law and as such is not guilty of abuse of Court process.

2. **That entertaining the application would to all intents and purposes amount to setting aside or otherwise varying the consent order without following due process**

It is common cause and the Learned State Counsels are in agreement to the legal proposition that a consent Order can only be

set aside by a fresh action. This was pronounced upon by the Court of last resort in the case of ***Zambia Seed Company Limited v. Chartered International (PVT) Limited[4] (1999) ZR 151***.

It was however submitted by Learned Senior Counsel Mr. Haimbe that on each and every occasion the parties have agreed to vary the consent order except in respect of the motion to which they have taken objection. It was further argued that in any event when steps were taken or not taken by the Respondent there was no objection from the Petitioners thus implying consent.

With respect to senior Counsel, there was never any further subsequent consent order/s. On the contrary the record reveals a track of arbitrary actions on the part of the Petitioner. I have already pointed out in one of the preceding paragraphs that documents were being filed at the whim and pleasure of the Petitioner.

The fact that the Court has paid a blind eye to the indiscretions and indolence of the Petitioner does not mean any act done outside the consent order has been consented to by the parties and endorsed by the Court. The Court in managing this case has always disclosed its mind that in adjudicating it administers both law and equity consecutively pursuant to section 13 of the High Court Act[4]. The Court is also alive to the provisions of Article 118 (2)(e) where the Apex Court had occasion to pronounce itself on in the case of ***Access Bank (Z) Ltd and Group Five/Zcon Business Park Venture (suing as a firm)[5]*** where Malila, JS put it this way:

"In conclusion we are mindful that the issue regarding Article 118 (2) (e) of the Constitution of Zambia was raised by Mr. Silwamba, SC and was not part of his written arguments before us. We do not intend to engage in anything resembling interpretation of the Constitution in the Judgment. All we can say is that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the Courts"

(ii) *ARTICLE 118 (2) E*

It was submitted by Learned Mr. Sangwa, SC that the proviso infact assists the Petitioner as the Respondent is seeking to terminate the proceedings on a technicality. In my view however, the motion does not raise mere issues of technicality but serious points of law that if resolved in favour of the Respondent shall culminate in the summary cessation of the Petition.

I am barricaded in this view by the case of ***Ashmore v. Corporation Lloyds[6] No. 1 [1992] 1 All ER 486 HL*** where Lord Roskill of the House of Lords pronounced at page 488 as follows:-

"In commercial Courts and indeed any trial Court, it is the trial Judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried expeditiously and as inexpensively as possible. It is the duties of the advisers of the parties to assist the trial Judge in carrying out his duty. Litigants are not entitled to uncontrolled use of trial Judge's time. Other litigants await their turn; litigants are

only entitled to so much of the trial Judge's time as is necessary for the proper determination of relevant issue"

I am strictly not bound by the Judgments of the House of Lords, but their decisions are very persuasive. In this case the pronouncement is a correct statement of law and it is good law. I adopt it as my very own and I have nothing useful to add.

In our very own jurisdiction, the summit Court in the case of ***United Engineering Group v. Markso Mungalu (2007) ZR 30*** where His Lordship Chirwa, JS as he then was, commended litigants who move swiftly to dispose of an action without further delay, expense or harassment of witnesses when he stated as follows:-

"The objection was rightly taken at the right time not to waste the Courts time to proceed with trial"

(iii) *TERMIANTION OF PETITION AT PRELIMINARY STAGE*

It was argued by State Counsel Sangwa that if any of the 3 issues raised in the Attorney General's motion that will mean the end of the Petition. My understanding of this argument is that even if for instance there was merit in the motion or some issues raised, the Court should nevertheless proceed to full blown trial. In my view this is an incorrect approach. The case should proceed or fail on its merit or demerits anchored on any permissible grounds of law. The very fact that the Learned State Counsel surmises that any answer in the affirmative will mean the end of the Petition is the very

reason being advanced by the Right Attorney General that the motion is well anchored and should be heard on merit so that it fails or succeeds on its merits or demerits. Put differently, the destiny or fate of the Petition will be determined on the basis of the existing material and legislative provisions presently in force.

(3) That in any event is merely dilatory as the matters subject there to can be canvassed at trial of the Petition

I have already traversed this limb of the objection. I have pointed out in some of the preceding paragraphs that the issue is not simply to have a full trial irrespective of the legal requirement that only triable issues should proceed to Court and that matters involving construction of statutes or points of law ought to be determined timeously and promptly to save parties unnecessary costs of litigation if merit is found in the motion.

(4) That further and without prejudice to the foregoing that the application is abuse of Court process of the Court as the Respondent is deploying its grievance in piecemeal fashion not withstanding that the matters it seeks to raise have been known to it from the commencement of the action therefore to raise them now is an attempt to frustrate the expeditious disposal of the Petition contrary to the spirit of the consent order

I have already traversed this limb in the previous paragraphs and I have observed that it has not been demonstrated by the Petitioners that the motion is an abuse of Court process. There is no merit in this limb.

(5)(i) Whether the Court has jurisdiction to hear a preliminary issue in a Petition anchored on Order 14A and 33/3 of the White Book

The learned right Attorney General has placed before the Court the case of ***Faustine Mwenya Kabwe, Aaron Chungu, John Sangwa v. Judicial Complaints Authority and the Attorney General*[8] *2009/HP/0996*** where my brother Chashi J, held in the very last paragraph as follows:-

> *"Since the preliminary issues raised by the Respondents have been answered in their favour, I am compelled to arrive at the ineluctable conclusion that this Petition must be dismissed in its entirety pursuant to Order 14A of the Supreme Court. Costs abide the event and will be taxed in default of agreement. Leave to appeal to the Supreme Court is granted"*

The authority came under serious assault from State Counsel Sangwa who recalled and revealed that infact he had argued the case in his youthful days. His aggrievement was that the issues raised and adjudicated upon was by agreement of the parties and that the case was cited out of context.

Indeed I found a helpful paragraph in the cited case to the following effect:

> *"At the hearing of the preliminary issues the need to clarify the implications of the issues raised by the Respondents arose. Both parties particularly noted that the Court cannot address these issues without dealing with the Petition in its entirety.*

The parties further acknowledged that Order 14A itself is not designed for preliminary issues but to dispose of a case on a point of law where it involves or construction of any documents without a full trial and also where the decision of the Court will determine the entire cause. The parties consequently agreed that in the circumstances, the Court was empowered to dismiss the Petition if the issues raised were decided in favour of the Respondents and to make such Order or Judgment as it thinks fit if they were decided in favour of the Petitioners"

Granted the issues were agreed upon by the parties, but that in itself cannot be the sole ground to hold that consent absent, the Court cannot deal with issues which can be considered and determined on points of law. The issue of points of fact can be interrogated at hearing of the motion to resolve whether a set of given facts can infact constitute points of law or whether issues of mixed law and facts is removed from the ambit of the process of determining preliminary issues.

The critical point of consideration in my view of the ***Aaron Chungu case***[8] is that the Court entertained a preliminary issue under Order 14A.

The doctrine of stare decis demands that I follow the decision of my brother who is of competent and equal jurisdiction unless there exists good cause why I should depart from an earlier decision of the same Court.

I do not find any justifiable reason to hold otherwise. I therefore hold that I will follow the decision of my brother and hold that this Court can hear and determine a preliminary issue under Order 14A. This then rests the issue.

(ii) *Order 33/3*

The said order provides as follows:-

> *"The Court may order any question or issue arising in a case or matter whether of fact or law or partly of fact and partly of law and whether raised in the pleadings or otherwise to be tried before at or after the trial of the cause or matter and may give directions as for the manner in which the question or issue should be determined"*

The notes under this Rule reads in part at page 644

> *"This Rule should be read with Order 14A (Disposal of case on point of law)"*

It was further submitted by State Counsel Sangwa that it is only the Court that can draw up the issues and not the parties. In my view, this not of universal application and is not cast in concrete. The Court may draw up such questions of law.

In my view, I am prepared to hold that the said provision is flexible and ought to depend on the peculiar circumstances of each case. Further, the fact that a motion has been filed and grounds tabulated, the endorsement of such motion signifies that the issues

raised be called on the return date. And if the opponent has been served, then further order for directions may be given.

The service of the motion gives an opportunity to the other party to be heard by filing in an opposition or defence or response as the case might be.

(iii) *Order 77/7*

It was submitted by the right Attorney General and State Counsel Mr. Kalaluka that no application under Order 14A can lie against the State. The Order reads as follows:-

> *"No application shall be made against the crown*
>
> *(c) Under Order 14A Rule 1 in any proceedings by or against the Crown"*

This proviso needs not navigating or interrogating any further. The State is insulated from being subjected to process of Order 14A in preliminary applications. The Attorney general however can launch a preliminary issue against the opponent anchoring it under the said order.

(iv) *Order 18/19/3*

The Order provides that though an application can be made at ay stage of the proceedings the same should be made promptly and as a rule before the close of the pleadings.

In my view since there are provisions touching directly on the invocation of Order 14A and providing that the application of a

preliminary nature touching on points of law can be raised at any stage before, during and even after trial Order 18/19/3 is of little or no assistance to the Petitioners.

6. Reserved Ruling as to whether State Counsel could legitimately in reply propound on Order 14A as regards issue of law and fact

It is quite obvious that the Ruling has been dealt with in some of the preceding paragraphs. Indeed the Right Attorney General had in his response generally touched on the said Order though he did not specifically touch the issues of law or fact as a separate limb or argument.

The very fact that the order was mentioned entitled the Petitioners to submit during the reply session to have another and last bite on the cherry. The objection to deny him opportunity to comment on Order 14Ais overruled. Indeed State Counsel Sangwa had actually proceeded to make his last remarks.

(1) Events of 15th December, 2016

Before I conclude, I wish to say a word or two on the events of 15th December, 2016. On 12th December, 2016 I had written to the Attorney General and the Learned state Counsel for the Petitioners that the proceedings and the preliminary issue launched by the Attorney General would be a strictly chamber matter, (though due to the large number of Attorneys involved in the case the proceedings would take place in a closed Court room). I had made

it clear that only the Learned State Counsel and all Attorneys would have admittance to the chambers.

The letter was written in the background and light of some confusion on 29th November, 2016 when cadres and supporters of the Petitioners desired to go in the court when the court room could only accommodate a limited number of members of the public.

It is in public domain and I take judicial notice of the mayhem that ensued during and after the proceedings in the afternoon of 15th December, 2016. The situation was so chaotic public and private property was damaged. The situation was so chaotic that some party cadres presumably trying to escape from the police who were trying to control and manage the apparently irate funs were seen running in the Judges corridors abutting their Chambers. The members of staff and indeed the Judges were subjected to the indignity of having to lock themselves in their chambers lest a calamity occurs and the stray cadres run amok and vent their anger on them.

It is obvious that either the parties had decided to disobey with impunity directing that members of the public were not to attend the chamber hearing or the Petitioners could not control or manage their supporters or cadres.

I did not have to wait until a calamity occurred. It was for those reasons that I directed that the Ruling that was scheduled for 20th December, 2016 was postponed to a date to be notified and that

that Ruling would be posted to the respective parties of the Attorneys and State Counsel once the Ruling was ready.

I did in my communiqué to the Learned Counsel of the Petitioners and Right Attorney General advise that the situation was not conducive to deliver a Ruling on the return date for the reasons I gave and other administrative considerations to include the fact the my Research Advocate had just proceeded on her lawful maternity leave and there was no relief research Advocate to assist me with the research and which I was obliged to personally undertake unaided.

Additionally, the scores of enraged cadres and supporters was extremely intimidatory and I would be forgiven to apprehend that if the matter was to be heard or Ruling delivered on the return date, history might repeat itself.

(2) Letter by Petitioners to the Court

On 27th November, 2016 I received a letter which was generated on 22nd December, 2016 which contained among other things complaint to the Judicial Service Commission. I can therefore not comment on the said letter. I however have to comment on the very act of writing a letter to the Court.

Firstly, the Petitioners are represented by a team of Learned Counsel led by an eminent State Counsel. There is no record that the Petitioners have applied for leave to act for the Petitioners as required by Practice Direction to pave way for the Petitioners to act

in person. Once a litigant has engaged counsel, then it is counsel who should engage the Court by taking out necessary applications as the case might be.

To this end, I visited the case of ***John Chisata v. The Attorney General 1990/1992 ZR 154*** where Gardner, Ag CJ (as he then was) had occasion to pronounce the position of the Supreme Court in the following manner at page 156 paragraphs D to F:-

> *"Be that as it may, what followed must be the subject of comment by the Court. The Appellant's Advocates who disagreed with the order of amendment saw fit to write a letter to the Judge saying that they did not intend to comply with the Order*
>
> *This was a most improper action. The proper cause to be taken in such circumstances is by way of summons, or notice of motion requesting the Court to review its order on the grounds that Counsel had not had the opportunity to argue the matter and had a meaningful argument to put forward.*
>
> *Alternatively, the matter should have been raised at trial. As it was writing of such a letter was impertinent in the extreme and the learned Judge reacted to it accordingly. In the event the order to dismiss the whole action, again without calling upon counsel to argue the matter was irregular and should not have been made because apart from the amendment ordered, there were still claims unaffected by Article 29 (8).*

We cannot stress too strongly what we have said in the past, that such cases should, whenever possible, and where there is no prejudice to either party by some irregularity, be allowed to come to trial so that the issue may properly be resolved. Interlocutory orders which prevent this should be avoided. For these reasons the appeal was allowed"

By referring to this case, I do not by any means suggest that the Petitioners had no right to lodge the complaint with the relevant Commission which in any event is their legitimate right. The concern is for counsel or litigants through their counsel writing to a Judge when aggrieved.

Turning back to the matter at hand, having traversed the arguments and submissions by the Learned Attorneys for the Petitioners and the Respondent and upon a critical analysis and evaluation of the useful authorities availed to the Court, I have come to a final conclusion that the notice to object to the motion by the Petitioners to raise a preliminary issue lacks merit. It fails and it is accordingly dismissed.

The High Court is presently on Christmas vacation and will only be fully operational in the 3rd week of January, 2017. I will also take judicial notice of the fact that Learned Attorneys usually take some time off their busy schedules and proceed on leisurely Christmas holiday.

The matter therefore comes up on 26th January, 2017 at 10:00 hours in chambers for setting a date for hearing and determining the motion to raise preliminary issue.

Ordinarily costs follow the event. The successful litigant gets his costs unless cause is shown why the same should be denied. The costs are however in the discretion of the Court, but in exercising that discretion the Court should do so judiciously. This Petition has understandably and rightly attracted public interest.

It is in public interest that citizens are not constrained by costs when pursuing justice in respect of their rights or perceived rights. The justice of the case is that I make no order as to costs. Put differently the parties shall bear their respective costs.

Leave to appeal is granted.

Delivered under my hand and seal this 27th day of December, 2016

Mwila Chitabo, SC
Judge