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

2016/CC/0010 2016/CC/0011

BETWEEN:

STEVEN KATUKA (Suing as Secretary General of the United Party for National Development) — 2nd PETITIONER

LAW ASSOCIATION OF ZAMBIA — 3rd PETITIONER

AND

ATTORNEY GENERAL — 1ST RESPONDENT

NGOSA SIMBYAKULA & 62 OTHERS — 2ND – 64TH RESPONDENTS

Coram: Chibomba, PC, Sitali, Mulenga, Mulembe and Munalula JJC on 22nd November 2016 and 17th November, 2017

For the 2nd Petitioner: Mr K Mweemba of Messrs Keith Mweemba Advocates and Mr G Phiri of Messrs PNP Advocates

For the 3rd Petitioner: Mr J Sangwa S.C., of Simeza Sangwa and Associates

For the Respondents: Mr L Kalaluka, S.C., Attorney General and Mr F.K. Mwale, Senior State Advocate, Attorney General's Chambers with Major C Hara, Ag Chief State Advocate and Ms L Kasonde State Advocate

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JUDGMENT

Munalula, JC, delivered the judgment of the Court

Cases referred to:

1. Adams v Adams [1970] 3 All E.R. 572
2. Taylor and Another v Lawrence and Another [2002] 2 All E.R. 353
3. Kapoko v The people 2016/CC/23
4. Nkumbula and Kapwepwe v UNIP (1978) Z.R. 378
5. Attorney General and Spalding Rural District Council v Garner and Another [1907] K.B. 480
6. Wyld v Silver [1962] 3 All E. R. 309

Legislation referred to:

Constitution of Zambia, Chapter 1 of the Laws of Zambia, Articles 14(1) and (2), 28
Constitution of Zambia (Amendment) Act No.2 of 2016, Articles 1(1) and (3), 7, 118, 127, 128, 134, 177 and 267(4)
State Proceedings Act, Chapter 71 of the Laws of Zambia, s. 12
Constitutional Court Rules, S.I. 37 of 2016

Works referred to:
Rules of the Supreme Court, 1999 Edition (White Book) Order 2/2, 14A/1/2 and 33/3
Black's Law Dictionary 9th Edition
Osborn's Concise Law Dictionary 6th Edition

At the hearing of a notice of motion filed by the 1st Respondent (henceforth referred to as the Attorney General), seeking to re-open **Stephen Katuka v Attorney General Petition No. 2016/CC/0010** and **Law Association of Zambia v Ngosa Simbyakula and 62 Others Petition No. 2016/CC/0011**(consolidated) decided on 8th August 2016 (henceforth referred to as "the ministers' case"), the learned counsel for the 2nd and 3rd Petitioners informed the Court that they had, respectively, filed notices to raise preliminary issues which they requested the Court to first hear and determine before the notice of motion filed by the Attorney General was heard.

This judgment therefore relates to the two notices to raise preliminary issues filed by the Petitioners to dismiss with costs the motion filed by the Attorney General. The learned counsel for the respective parties relied on the skeleton arguments filed, which they augmented with spirited viva voce submissions. We will not repeat the oral submissions except to the extent necessary to appreciate the reasoning of the Court in coming to this judgment.

The brief history to the filing of the two preliminary applications is as follows: On 8th August, 2016 this Court rendered judgment in the ministers' case. Under the judgment, the ministers holding office at the time and constituting the 2nd to 64th Respondents were found not qualified to continue occupying their offices following dissolution of Parliament. They were ordered to vacate office and to refund to the State all salaries and allowances paid to them from 12th May, 2016 when Parliament was dissolved to the date of judgment.

It is against the order to repay emoluments that the Attorney General sought to re-open the ministers' case. On 3rd October, 2016, he moved this Court under Articles 118 and 128 of the **Constitution of the Republic of Zambia** as amended by the **Constitution of Zambia (Amendment) Act No. 2 of 2016** (henceforth referred to as the Constitution as amended). The Attorney General's motion charged that the portion of the judgment in the ministers' case relating to repayment was made *per incuriam* as it did not take into account various principles and provisions of the law and therefore, the said portion should be vacated. It is against this motion that the Petitioners filed their notices of preliminary issue.

The first notice was filed on 2nd November, 2016, by the 3rd Petitioner seeking the dismissal of the Attorney General's motion on two grounds. First, that in making the application on behalf of the

Respondents, the Attorney General had infringed Article 177 of the Constitution as amended as he had no *locus standi* to act on the former ministers' behalf. Secondly, that this Court has no jurisdiction to review its own judgment pursuant to Articles 118 and 128 of the Constitution as amended.

On 9th November, 2016 the 2nd Petitioner filed a notice raising a preliminary issue on the Attorney General's motion; first on the ground that this Court lacks jurisdiction over the Bill of Rights and secondly, that the Attorney General lacks *locus standi* to bring the motion before the Court. We shall consider the Petitioners' applications in the order in which they were filed and subsequently argued before the Court.

In the skeleton arguments in support of the motion to raise preliminary issues, the 3rd Petitioner pursued two arguments. The first relates to the question whether the Attorney General, was performing the functions of his office when he filed the motion on behalf of the 2nd to 64th Respondents. It is argued that the Attorney General has no authority to bring the motion in issue in the light of Article 177. The 3rd Petitioner averred that under Article 177, the functions of the office of Attorney General are to be chief legal adviser to the Government; to be head of the Attorney General's chambers; to sign Government Bills; to represent Government in civil proceedings to which Government is a party; and to

perform any other prescribed functions. That the former ministers were sued and were party to the action in their personal capacity. As such, the Attorney General was not a party to the 3rd Petitioner's original proceedings. That he was joined to the action at the instance of the Court in order to safeguard the interests of the State.

The 3rd Petitioner stated that the Constitution as amended does not empower the Attorney General to extend legal services to private individuals. And that the motion does not disclose the Attorney General's interest in the matter. The 3rd Petitioner concluded that by making the application, the Attorney General would offend the Constitution and therefore, the application cannot be sustained or continued through the representation of the Attorney General. Further, that since all state organs and institutions are bound by the Constitution by virtue of Article 1(3) of the Constitution as amended, this Court has a constitutional duty to ensure that the Attorney General complies with his constitutional mandate.

The second argument relates to whether this Court has the jurisdiction to hear the Attorney General's motion pursuant to Articles 118 and 128. The 3rd Petitioner contended that Articles 118 and 128 do not support the application that this Court reviews its own judgment and vacates the portion on refunding emoluments. That Article 118 merely

stipulates the source of judicial authority and does not give the Court power to revisit its own judgment and vacate certain portions of the decision, at the instance of any party to the proceedings. That Article 128 sets out the jurisdiction of the Constitutional Court which is created in Article 127. That the jurisdiction spelt out does not include the power to do what the Attorney General was asking for. Further, that the Attorney General has not demonstrated how the said Articles support the application before the Court. It was the 3rd Petitioner's submission that the application is improperly before this Court as the Court has no power to entertain such an application.

The 2nd Petitioner's notice raised a preliminary issue on the Attorney General's motion pursuant to Order 14A rule1 and Order 33 rule 3 of the **Rules of the Supreme Court, 1999 (White Book)**. The 2nd Petitioner submitted that the Attorney General's motion need not be heard and determined by this Court as it is irregularly before it; that it is unsustainable and ought to be dismissed with costs. Two grounds were recited. First, that the Constitutional Court has no jurisdiction to interpret and enforce Article 14(1) and (2) of the Bill of Rights (Part III of the Constitution). Second, that the Attorney General has no mandate and *locus standi* to act as a private attorney for the 2nd to 64th Respondents.

In their skeleton arguments in support, the 2nd Petitioner submitted that the Attorney General had anchored his motion on Article 14 (1) and (2) of the Bill of Rights, which prohibits slavery and forced labour thereby asking this Court to pronounce itself on the Bill of Rights contrary to the manifest intention of Articles 28 and 128 of the Constitution as amended. The 2nd Petitioner averred that under Article 28, it is the High Court which should hear and determine any question of contravention of the Bill of Rights at first instance, and the Supreme Court on appeal. That the Constitutional Court's jurisdiction under Article 128, in its entirety, is subject to Article 28. Consequently, that the Attorney General's motion which is anchored on a provision of the Bill of Rights leaves the Court without jurisdiction to hear the application.

The 2nd Petitioner further questioned whether the Attorney General has the mandate and *locus standi* to act as a private attorney for the 2nd to 64th Respondents. The 2nd Petitioner also recited the Attorney General's functions under Article 177 to support the argument that the Attorney General cannot act as private attorney to citizens as the function of the office is to represent the Government in civil proceedings to which the Government is a party.

To further shore up their claim that the Attorney General is not a private attorney, the 2nd Petitioner relied on the definition of government,

as "**the political organs of a country regardless of their function or level and regardless of the subject matter they deal with**"; a definition they sourced from **Bryan A Garner, Black's Law Dictionary, 9th edition, West Publishing 2009**. Counsel also relied on section 12 of the **State Proceedings Act, Chapter 71 of the Laws of Zambia** which provides that **civil proceedings by or against the State shall be instituted by or against the Attorney General, as the case may be**. Chapter 71 defines the State as "**the Sovereign Republic of Zambia**".

The 2nd Petitioner argued that, whilst the Attorney General may act for a public officer or any Government Department, the 2nd to 64th Respondents were in the Court's judgment of 8th August 2016 found to have ceased to hold office upon dissolution of Parliament, hence, they were not discharging the functions of their offices to entitle them to any payments. That once the ministers ceased to hold office they became private citizens and therefore could no longer be represented by the Attorney General. That the ministers ought to retain the services of private counsel to represent them as the Attorney General has no *locus standi* to do so.

The Attorney General relied on the skeleton arguments filed on 18th November, 2016 which he augmented with oral submissions. He responded to Ground 1 of the 2nd Petitioner's notice to raise preliminary

issue together with ground 2 of the 3rd Petitioner's notice to raise preliminary issue. He addressed ground 2 of the 2nd Petitioner's notice to raise preliminary issue together with ground 1 of the 3rd petitioner's notice to raise preliminary issue.

With regard to the question whether the Attorney General has *locus standi* or is acting *ultra vires* by representing the 2nd to 64th Respondents, the Attorney General began by referring to Order 2/ 2 of the White Book. It was contended that the Petitioners had in the course of hearing the original consolidated petition in the ministers' case acquiesced to the Attorney General acting for the 2nd to 64th Respondents and the Petitioners did not object to the Notice of Appointment of the Attorney General as Advocates for the 2nd to 64th Respondents and that they in fact addressed their respective skeleton arguments and replies, and all other documents to the Attorney General in that capacity. Further that the consent order to consolidate the two cases was executed on the same basis. Consequently, the Petitioners had waived any perceived irregularity and are estopped at this late stage from objecting to the Attorney General representing the 2nd to 64th Respondents.

It was averred that notwithstanding the above submission, the Attorney General brought the motion in question on his own behalf as Attorney General and not on behalf of the 2nd to 64th Respondents. To

support this, reference was made to the documentation on record. It was submitted that the Attorney General has *locus standi* in the motion filed and that he has not infringed the provisions of Article 177 of the Constitution as amended.

He further averred that it is also common knowledge that the Attorney General is a party to the proceedings having been joined by the Court in a manner that set no limits on the extent of joinder so as to preclude him from making certain applications. Hence, where the Attorney General forms the view that the Court would have arrived at a different decision had certain authorities been brought to its attention, it is the job of the Attorney General as chief protector of public interest to bring the issues before the Court. The fact that such action would benefit private individuals is not a ground for inaction. In support of the above contention the case of **Adams v Adams**[1] was cited as authority for the intervention of the Attorney General in a private matter where the Executive desires to bring to the attention of a court its views on a question of public policy.

In response to the substantive question whether this Court can review its judgment, the Attorney General urged us, as a final court of appeal, to borrow from the Supreme Court practice. He submitted that the Supreme Court has reviewed its own judgment in cases where it found its decision to have been made *per incuriam.* He referred us to the case

of **Taylor and Another v Lawrence and Another**[2], an English authority holding that the Court of Appeal has "**residual jurisdiction in exceptional circumstances to reopen an appeal which it had already determined in order to avoid real injustice. The Court in that case held that it had implicit powers to do that which is necessary to achieve the dual objectives of an appellate court, namely to correct wrong decisions so as to ensure justice between litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law...**"

The Attorney General submitted that the 2nd Petitioner's claim that this Court has no jurisdiction over Article 14(1) and (2) of the Bill of Rights was misguided. He argued that under Article 128, this Court has the power to interpret and deal with violations of the Constitution as a whole, subject only to Article 28 which confines to the High Court, enforcement, and securing of enforcement, of Articles 11 to 26. Consequently, both the Constitutional Court and the High Court have power over the Bill of Rights and that a distinction is made only in the extent of the power of each court over the Bill of Rights.

Reference was made to Article 134 which, he argued, sets out the Jurisdiction of the High Court and subjects it to Article 128; thereby

subjugating the High Court's jurisdiction to that of the Constitutional Court. He contended that the words in Article 28, "**is without prejudice to any other action relating to the same matter lawfully available**" mean that a litigant is not precluded from seeking redress in any other court including the Constitutional Court. Hence the motion brought is anchored not only on Article 14 in the Bill of Rights but also on the International Covenant on Civil and Political Rights (ICCPR) as well as the African Charter on Human and People's Rights (ACHPR). Finally, that the motion is also anchored on the principle of *quantum meruit*. It was his prayer that the preliminary notices raised have no merit and should be dismissed.

We are grateful to learned counsel for the submissions which in essence gave rise to three questions: First, does the Attorney General have *locus standi* as regards the motion filed? Secondly, does this Court have jurisdiction to hear a matter founded on the Bill of Rights? And thirdly, does this Court have jurisdiction to review its own judgment and vacate a portion thereof? Since the Attorney General's *locus standi* in bringing the motion in question goes to the heart of the Court's jurisdiction, we shall consider it first.

We see several limbs to the question of *locus standi* as it was argued in the case before us. The first is whether the Petitioners are estopped from challenging the Attorney General's *locus standi.* The

second is whether the Attorney General can intervene in private proceedings and/ or represent private persons. The third is whether in the circumstances, the Attorney General is in fact representing his own office and if so, whether the subject matter of the action is such that he has *locus standi*. And the fourth is whether in the peculiar circumstances of this case, the Attorney General's representation of the former ministers in their private capacity is legally justifiable.

We shall first dispose of the question of estoppel. We take note that the issue of estoppel did not originate from the Petitioners hence it was not argued following the normal order. The issue first arose in the Attorney General's written answer and skeleton arguments in response to the Petitioners' preliminary applications. The Petitioners did not file written replies to the Attorney General's answer but they did make oral submissions on the point at the hearing of the matter. We also take note that initially, the Attorney General was a party to the action instituted by the 2nd Petitioner, but not to the action filed by the 3rd Petitioner. The Attorney General was joined to the 3rd Petitioner's proceedings (at the instance of the Court) as the 1st Respondent in order to protect the public interest. And that the two cases were subsequently consolidated.

The Attorney General's submissions and oral arguments were that the Petitioners who had acquiesced to his appointment as counsel for the

2nd to 64th Respondents in the ministers' case, could not now be heard to say that such representation was an irregularity. Further, that the Petitioners did not object to the Notice of Appointment of the Attorney General as Advocates for the 2nd to 64th Respondents, and that the Petitioners had in fact served all ensuing process after the consolidation of the two cases on the Attorney General in his capacity as the representative of the other Respondents. That being the case, the Petitioners had waived any perceived irregularity and were estopped at such a late hour, from objecting to the Attorney General representing the 2nd to 64th Respondents. Order 2/ 2 of the White Book on setting aside for irregularity was cited as authority. Order 2/2 (1) reads:

> **An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken a fresh step after becoming aware of the irregularity.**

That having been joined to the proceedings with no limit placed on the extent of that joinder by the Court, the office of Attorney General was not precluded from making the application to review the ministers' case. More so where he was of the firm view that the Court had acted *per incuriam*. In the circumstances, he submitted, the Attorney General as chief protector of public interest needed to bring the issue to the Court's

attention. The fact that the action would in the process benefit private individuals should not be a deterrent to moving the Court. The case of **Adams v Adams**[1] was cited as authority for the intervention of the Attorney General in a private matter.

In reinforcing the Attorney General's arguments on the importance of the **Adams v Adams**[1] case as an authority in the matter before the Court, Mr. Mwale, Senior State Advocate, quoted extensively from the case of **Kapoko v The People**[3] in which this Court recognised that decisions from the sub-region on provisions identical to Article 118(2) (e) may indeed be relied upon as persuasive authorities.

In his oral submissions, Mr. Sangwa, S.C., on behalf of the 3rd Petitioner stated his objection to the defence of estoppel. Mr Sangwa S.C., also objected to the resort to Order 2/2 of the White Book to set up the defence on the grounds that the provision like the rest of the White Book relates to matters of procedure, while the question before the Court was one of the substantive authority of the Attorney General. He observed that the defence of estoppel set up by the Attorney General under Order 2/ 2, arose from the Petitioners' inaction to challenge the Attorney General's Notice of Appointment as Advocates for the 2nd to 64th Respondents in the ministers' case. He observed that the reason for the

joinder of the Attorney General at the Court's behest in the ministers' case was to protect the interests of Government, should they arise.

In response to the submission by the Attorney General that the Petitioners had waived their right to object to the Attorney General continuing representing the 2nd to 64th Respondents, State Counsel Sangwa argued that the 3rd Petitioner did not waive their right as argued by the Attorney General. He further argued that there is a fundamental distinction between being made a respondent in the ministers' case and appointing oneself as advocates for the former ministers as done in the motion to review the Court's judgment. He submitted that the Petitioners could not have acquiesced to the Attorney General filing Notice of Appointment of Advocates for the said Respondents, thereby transiting from his role as protector of public interest at the invitation of the Court, to the new role of self-appointed private attorney. Hence, the said joinder in the ministers' case was not a licence to file a new action on the former ministers' behalf.

After due consideration, we find no merit in the defence of estoppel. The ministers' case was heard and determined on the merits and the judgment was delivered. A new action has been commenced asking us to review our judgment. There is no case continuing under which the issue of estoppel can arise. The estoppel objection is therefore without basis.

We dismiss it forthwith and move on to consideration of the second limb to the question of *locus standi.*

The second question is whether the Attorney General can participate in private proceedings and/ or represent private persons. The Petitioners are in essence saying that the office of Attorney General, instituted, without right, a motion, on behalf of the former ministers who were the subject of the judgment in the ministers' case in a bid to review and vacate a portion of the final judgment in the case. They claim that under Article 177, the role of the Attorney General as chief legal adviser to the Government, is to represent the Government and public officers in their official capacity. They state that his authority stems from the public interest. Further, that no law supports his representation of the former ministers in the motion before this Court and so he has no *locus standi.* Hence, the motion is incompetent.

The sum of the Attorney General's response on this issue is that his powers of legal representation under Article 177 broadly encompass public interest wherever it lies including private litigation. And that, given the principle in **Adams v Adams**[1], his actions are in the public interest and are therefore supported by legitimate *locus standi.* That the case of **Adams v Adams**[1] is in support of participation by the office of the Attorney General in private matters.

We have considered the issue. Article 7 of the Constitution which sets out the sources of law in Zambia places the Constitution at the top of the hierarchy of sources. The role of the Attorney General of the Republic of Zambia in litigating matters before the courts is set out in Article 177 of the Constitution as amended, which reads in full:

> **177. (1) There shall be an Attorney-General, who shall be appointed by the President, subject to ratification by the National Assembly.**
>
> **(2) The Attorney-General shall not hold another public office.**
>
> **(3) The Attorney-General shall be a person qualified to be appointed as a judge.**
>
> **(4) The Attorney-General shall not be subject to the direction or control of a person or an authority in the performance of the Attorney-General's functions.**
>
> **(5) The Attorney-General is the chief legal adviser to the Government and shall—**
>
> > **(a) be head of the Attorney-General's Chambers;**
> >
> > **(b) sign Government Bills to be presented to the National Assembly;**
> >
> > **(c) represent the Government in civil proceedings to which Government is a party;**
> >
> > **(d) give advice on an agreement, treaty or convention to which Government intends to become a party or in**

respect of which the Government has an interest before they are concluded, except where the National Assembly otherwise directs, and subject to conditions as prescribed; and

(e) perform other functions, as prescribed.

(6) The Attorney-General's Chambers shall be devolved to the Provinces and progressively to districts. (emphasis ours)

The provision is clear. Article 177(5) (a) and (c) in particular, spell out the litigation function. The Attorney General has only one client, the Government of the Republic of Zambia. The office performs the following functions; heading the Attorney General's Chambers; preparing bills for Parliamentary action; advising on contracts and other agreements; and most pertinent in this case, representing the Government in civil proceedings to which the Government is a party. Any other functions must be prescribed by an Act of Parliament.

Be that as it may, we have given due consideration to the Attorney General's averment, using English common law, that his litigation mandate goes beyond representation of the Government *per se* to include public interest generally. Osborn's Concise Law Dictionary, 6th Edition, Sweet and Maxwell defines an attorney as **"a person appointed by another to act in his place or represent him"** and Attorney-General as **"[t]he principal law officer of the Crown and the head of the Bar...Civil**

proceedings by or against the Crown may be instituted by or against the Attorney-General in lieu of the appropriate Government Department..." A perusal of the White Book, specifically the note to Order 15/6/10 confirms the principle in **Adams v Adams**[1] that **"the Attorney General has a right of intervention in a private suit wherever it may affect the prerogative of the Crown".** It is clear that the Attorney General's role in private litigation is that of intervener in order to protect the public interest.

The principle relating to intervener is laid out in Order 15 of the White Book. An intervener is a person who is not a party to an action but who is entitled to intervene and to be joined as a party provided the would-be intervener has some interest **"directly related or connected with the subject matter of the action"**. In such situations the Attorney General is an intervener and not a party *per se*, nor is he representing a party other than his client, the Crown (in our case the Government). Further, the subject matter must relate to the Crown's (Government's) interests. Channell J in **Attorney General and Spalding Rural Council v Garner**[5] at page 486 states that:

> **...the presence of the Attorney General does not prevent the necessity of bringing any individuals before the Court, who have interests peculiar to themselves, and independent of**

those, which they hold in common with all the rest of the community. In respect of the latter" (that is, interests in common with all the rest of the community) such persons are represented by the Attorney General; but in respect of the former, they must appear on their own behalves.

Further in the case of **Wyld v Silver**[6] the Court drew a distinction between a situation involving the public interest in which the Attorney General is a necessary party, as he or she must be the plaintiff (or defendant for that matter) from one in which they are a competent but unnecessary party to the proceedings.

And in **Adams v Adams**[1], the court said:

...[T]he Attorney-General has a right of intervention in a private suit whenever it may affect the prerogatives of the Crown...and he certainly has in such circumstances a locus standi at the invitation of the court...or with the leave of the court...I think that the Attorney General also has the right of intervention at the invitation or with the permission of the court where the suit raises any question of public policy on which the executive may have a view which it may desire to bring to the notice of the court. Public policy is a matter of which the courts take direct judicial cognisance, and they do not allow evidence on the point...

There is little Zambian jurisprudence on the interests that the Attorney General represents in litigation. Although decided under the

repealed 1973 Constitution, the case of **Nkumbula and Kapwepwe v UNIP**[4] is useful. The case dealt with the question whether the Attorney General can represent a political party within the context of the One-Party State prevailing at the time. Even though the relevant provision of the Constitution at the time - Article 57(1) did not spell out the litigation function of the Attorney General in the way the current Constitution does, the court held that the paramount consideration for the Attorney General's participation in litigation is the "State interest". Therefore, in the peculiar circumstances of the One-Party State, the Attorney General could represent the Party only because of the close knit relationship between the Party and the Government and only in a situation in which the interests of the State might be affected by the outcome of any proceedings involving the Party. In arriving at that decision, the Court in the **Nkumbula and Kapwepwe v UNIP**[4] case relied on the English cases already cited above.

We are therefore of the considered view that as an intervener, the Attorney General may indeed participate in litigation involving private parties if public or more specifically, governmental interest so demands. But only as intervener and only in the public/ government interest. The Attorney General cannot institute proceedings and act on behalf of private

entities. In order to broaden the functions of the Attorney General set out in Article 177, legislation must prescribe accordingly.

The third question is whether in the circumstances, the Attorney General is in fact representing his own office and if so that the subject matter of the action is such that he has *locus standi*. The Attorney General, arguing in the alternative, denied acting on behalf of the former ministers and stated quite forcefully that the office of Attorney General is acting in its own capacity, driven by concern over the injustice purportedly wrought by this Court's decision in the ministers' case. To support the claim, he pointed to the wording of the motion filed which according to him, does not, on the face of it, state that he is acting for the 2nd to 64th Respondents. That in the motion before this Court, he is acting on his own behalf and not that of the 2nd to 64th Respondents.

He further argued that he is motivated to act in the public interest in accordance with the mandate of his office and the benefit thereby accruing to private individuals as a result should not compromise the necessity to take action. The Attorney General reiterated that he is acting in accordance with Article 177 and representing the Attorney General's office in its own right.

We have perused the documents filed herein. Admittedly, the Notice of Motion filed on 3rd October, 2016, refers to **"...an application on the part of the 1st Respondent..."** Furthermore, the accompanying skeleton arguments are entitled **"1st Respondent's Skeleton Arguments in Support of Notice of Motion"**. In these initial paragraphs, there is no mention of the 2nd to 64th Respondents. However, the body of the Notice of Motion filed on 3rd October, 2016 states that **"...the Respondents..."** (in plural) "...**shall move the Court...**" and the full text of the motion says it seeks to

> **"...re-open the Petition as regards the ruling of this honourable Court that the 2nd to 64th Respondents do refund to the State, all salaries and allowances which they have been paid from 12th May 2016 after dissolution of Parliament to date of judgment AND THAT it be determined that the said ruling is per incuriam, on the following grounds:**
> **i) It did not take into account the principle of "no work without pay" which is a fundamental axiom in industrial relations and prohibits forced labour.**
> **ii) It did not take into account the principle of quantum meruit.**
> **iii) It creates an injustice and an absurdity whereby it seeks to punish the 2nd to 64th Respondents for the ambiguous and obscure provisions of the Constitution..."**

In our view, the motion will benefit the 2nd to 64th Respondents substantially. As long as the judgment in the ministers' case stands, the motion cannot further the interests of government in any foreseeable way. The 3rd Petitioner captured the Attorney General's difficulty when they observed that the documents filed do not disclose the interest of the Attorney General therefore the motion can only be intended to benefit the former ministers. We agree. We hold that the Attorney General cannot protect the public interest if he proceeds as stated in the motion before us, as doing so would be representing the interests of the ministers in their capacity as private persons.

The final question raised is whether the Attorney General, notwithstanding our findings, is legally justified in representing the former ministers given the peculiar history and circumstances of this case. It is undisputed that the Attorney General was initially the sole Respondent in the proceedings in the action commenced by the 2nd Petitioner and that the Attorney General was joined to the 3rd Petitioner's action at the Court's behest and that he acted for the other Respondents in that matter without hindrance.

However, the situation before judgment in the ministers' case was passed is distinguishable from the present arrangement. The Attorney General's role in the ministers' case was to represent Government which

at the time included the 2nd to 64th Respondents as they were still in office. The Attorney General's connection to the ministers ended when the ministers' case was concluded and they vacated their offices.

The motion filed in fact seeks to reopen a concluded case. The Attorney General would if permitted to proceed be taking a proactive role as attorney for the other Respondents. In the ministers' case, he did not initiate the action or prosecute it in the manner he seeks to do in this motion. The Attorney General has not brought to our attention any statutory provision that currently empowers him to initiate an action on behalf of private persons no matter how well-meaning his intentions are. As the Attorney General would not be acting as an intervener in the interests of the public or the Government of the Republic of Zambia, he has no *locus standi.*

The Petitioners' preliminary applications succeed in this respect. We order that the notice of motion filed by the Attorney General as 1st Respondent be and is hereby dismissed, for want of *locus standi* on the part of the Attorney General.

Having found that the Attorney General has no *locus standi* to represent the former ministers in their private capacity, we shall not consider the rest of the issues raised by the Petitioners asking the Court to dismiss the Attorney General's notice of motion to review the judgment

in question and restate the Court's jurisdiction over the Bill of Rights as they have become otiose.

Since the notices to raise preliminary issues have raised an important constitutional question, each party shall bear their own costs.

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H. Chibomba
President
Constitutional Court

.....
A. M. Sitali
Constitutional Court Judge

.....
M. S. Mulenga
Constitutional Court Judge

.....
E. Mulembe
Constitutional Court Judge

.....
M.M. Munalula
Constitutional Court Judge