

I.T

IN THE CONSTITUTIONAL COURT

2021/CCZ/0047

HOLDEN AT LUSAKA

(CONSTITUTIONAL JURISDICTION)

IN THE MATTER OF: ARTICLE 1(2)(5), 2 AND 128 (3)(b)(c) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: ARTICLE 52(3) OF THE CONSTITUTION OF ZAMBIA AS READ TOGETHER WITH SECTION 30(1)(C) OF THE ELECTORAL PROCESS ACT NO.35 OF 2016 AND REGULATIONS 11(6) AND 20(2) OF THE ELECTORAL PROCESS (GENERAL) REGULATIONS 2016, STATUTORY INSTRUMENT NO 063 OF 2016

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 52(3) AS READ TOGETHER WITH ARTICLE 100(1)(H)

IN THE MATTER OF: RELEASE OF DECLARATION OF ASSETS AND LIABILITIES BY PRESIDENT HAKAINDE HICHILEMA

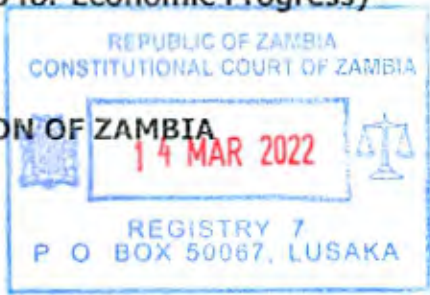
BETWEEN:

SEAN TEMBO (Suing in his capacity as party President of the Patriots for Economic Progress)

PETITIONER

AND

ELECTORAL COMMISSION OF ZAMBIA
ATTORNEY GENERAL



1STRESPONDENT

2ND RESPONDENT

CORAM: Mulenga, Mulonda, Munalula, Musaluke, Chisunka, JJC.
On 9th December, 2021 and 14th March, 2022

For the Petitioner: In Person

For the 1st Respondent: Mr. M. Bwalya, Legal Officer (In House)

For the 2nd Respondent: Mr. M. Muchende SC, Solicitor General and
Mr. P. Shambulo, Principal State Advocate

MAJORITY JUDGMENT

Mulenga, JC delivered the majority decision of the Court.

Cases cited:

1. *Wypych v Poland* Application No. 2428/2005 (October 25, 2005)
2. *Union of India v Association for Democratic Reforms and People's Union for Civil Liberties* Appeal Civil Appeal No. 7178 of 2001
3. *Secretary, Ministry of Information and Broadcasting, Government of India and Others v Cricket Association of Bengali and Others* (1995) 2 SCC 161
4. *Nkandu Luo v Doreen Sefuke Mwamba and Attorney General* CCZ Selected Judgment No. 51 of 2018
5. *Abuid Kawangu v Elijah Muchima* CCZ Appeal No. 8 of 2017
6. *Benjamin Mwelwa v The Attorney General and Others* 2020/CCZ/007
7. *Dipak Patel v The Minister of Finance and The Attorney General* 2020/CCZ/005
8. *Christopher Lubasi Mundia v Sentor Motors* (1982) Z. R. 66

Legislation referred to:

1. *The Constitution of Zambia (Amendment) Act No. 2 of 2016*
2. *The Constitution of Zambia (Amendment) Act No. 18 of 1996*
3. *The Constitution of Zambia Act No. 1 of 2016*
4. *The Electoral Process Act No. 35 of 2016*
5. *The Electoral Process (General) Regulations Statutory Instrument No. 63 of 2016*
6. *The Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia*
7. *The Electoral Act No. 12 of 2006*
8. *The Electoral (General) Regulations Statutory Instrument No. 92 of 2006*

Other Materials referred to:

1. Wild, S. E. *Wester's New World Law Dictionary*, 7th Edition, 2006
2. *Black's Law Dictionary*, revised 4th Edition
3. *Black's Law Dictionary*, 11th Edition
4. Bennion, F *Statutory Interpretation* (1992) 2nd Edition

INTRODUCTION

[1] This Petition was filed on 27th September, 2021, by Sean Tembo (Petitioner) in his capacity as party president of the Patriots for Economic Progress (PEP), a registered political party, against the Electoral Commission of Zambia (1st Respondent) and the Attorney General (2nd Respondent). The Petitioner is seeking the following reliefs:

- i. A declaration that the failure by the Commission to publish the statutory declaration of assets and liabilities for President Hakainde Hichilema in the 2021 general Election contravenes the Constitution and is illegal;
- ii. Statutory declaration of assets and liabilities for President Hakainde Hichilema as filed in the 2021 General Election nomination process; (sic)
- iii. An order that costs for the Petition be borne by the 1st Respondent to this cause; and
- iv. Any other reliefs the Court may deem necessary.

PETITIONER'S CASE

[2] The Petition states that following the passing of the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution), the Electoral Process Act No. 35 of 2016 was enacted prescribing for the statutory declaration of candidate's assets and liabilities.

[3] It is further stated that on 9th August, 2016, the 2nd Respondent issued the Electoral Process (General) Regulations Statutory Instrument No. 63 of 2016 containing the statutory declaration of assets and liabilities form referred to as GEN 5 to be completed by presidential candidates. That on 12th August, 2021 the general election was conducted without the 1st Respondent publishing the statutory declaration of assets and liabilities for presidential candidates.

[4] On 20th September, 2021, the Petitioner wrote to the 1st Respondent to release the statutory declaration of assets and liabilities for Mr. Hakainde Hichilema who was elected as Republican President in the general election. The Petitioner

outlined the provisions of Article 52 (3) of the Constitution, section 30 (1) (c) of the Electoral Process Act and regulations 11 (6) and 20 (2) of the Electoral Process (General) Regulations, 2016 as the provisions of interest. The Petitioner averred that it is mandatory for the 1st Respondent to publish a presidential candidate's statutory declaration of assets and liabilities and the failure to do so is a breach of the Constitution, hence the reliefs sought.

[5] The Petitioner in his affidavit verifying facts essentially repeated the contents of the Petition. The Petitioner further stated that he officially requested the 1st Respondent to release the statutory declaration of the assets and liabilities for President Hakainde Hichilema as per exhibited letter marked "SET1" but that the 1st Respondent has not published it.

[6] In skeleton arguments in support of the Petition dated 2nd November, 2021, the Petitioner argued that during the nomination process, candidates are required to file a nomination paper and an affidavit showing that they qualify to vie for office in accordance with Article 52 (1) as read together with Article 100 of the Constitution. The nomination paper and the affidavit take the form prescribed in the Electoral Process (General) Regulations, 2016. Further, that part of the information required in the affidavit is an attachment of the statutory declaration of assets and liabilities of candidates.

[7] The Petitioner submitted that since Article 52 (3) mandates the 1st Respondent to publish the information in the nomination paper and affidavit filed by candidates, this extends to the declaration of assets and liabilities. He argued that Article 52 (3) is couched in mandatory terms and thus the 1st Respondent is mandated to make known to the public the contents of the statutory declaration since it is attached to the affidavit. The Petitioner made reference to paragraph 8 of the affidavit, form GEN 4, of the Electoral Process (General) Regulations, 2016 to augment his position. Reference was also made to Webster's New World Law Dictionary which defines "publish" as "to make generally known to the public; to make known to people who might or would not have known without the person having so acted."

[8] The Petitioner contended that publishing declared assets and liabilities of candidates enhances transparency, accountability and good governance. Further, that it also helps in preventing abuse of power, illicit enrichment from public resources and reduces corruption. Armed with such information, the public can verify or challenge the nomination of a candidate based on Article 52 (4) from an informed position.

[9] The Petitioner further urged this Court, based on Article 267, to interpret Article 52 (3) on publishing, in line with Article 20 of the bill of rights which recognises every citizen's right to information. The Petitioner argued that every citizen of Zambia is entitled to the information touching on the assets and liabilities of

presidential candidates and this aids in their participation in the governance of the nation. That this is even more applicable to the Republican President.

[10] In so arguing, the Petitioner called in aid decided cases from other jurisdictions in which courts have had occasion to pronounce themselves on the rationale behind the declaration of assets and liabilities. That in **Wypych v Poland**¹, the European Court of Human Rights ruling on the admissibility of a complaint raised by a municipal leader asserting that the requirement to furnish his financial information was an unjustifiable infringement of his right to privacy, opined as follows:

Finally, with regard to public access to the declarations...the Court considers that this is a safeguard to ensure that the obligation to make declarations available is subject to public scrutiny. The general public has a legitimate interest in ascertaining that local politics are transparent and internet access to the declarations makes access to such information effective and easy. Without such access, the obligation would have no practical importance or genuine incidence on the degree to which the public is informed about the political process.

[11] In **Union of India v Association for Democratic Reforms and People's Union for Civil Liberties**² the Supreme Court of India observed that voters and the public have a right to know relevant particulars of candidates in an election. Further, that this included information on assets and liabilities of candidates contesting elections to parliament.

[12] The Petitioner also cited the national values of democracy, constitutionalism, good governance and integrity outlined in Article 8 of the Constitution. He argued that openness and transparency

are key to building accountability and trust which in turn strengthens democracy and constitutionalism. The Petitioner quoted the sentiments of the Supreme Court of India in the case of **Secretary, Ministry of Information and Broadcasting, Government of India and Others v Cricket Association of Bengai and Others**³ wherein it was observed that:

True democracy cannot exist unless all citizens have a right to participate in the affairs of the politics of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisations.

[13] In the Petitioner's view, openness demands that important information such as declared assets and liabilities are not hidden from the voting public who are supposed to know antecedents including assets and liabilities of the candidates contesting in an election for president.

[14] At the hearing, the Petitioner in augmenting his skeleton arguments submitted that while the Respondents' argument was that Article 52 (3) required that there should be a laid down procedure in the subsidiary legislation of how the declaration of assets and liabilities should be published, the 1st Respondent published the declaration of assets and liabilities for candidates at constituency, district and ward levels based on Regulation 20 (2) of the Electoral Process (General) Regulations, 2016. He contended that Regulation 20 (2) merely stated that the information contained

in a nomination paper and affidavits relating to candidates in a constituency, district or ward shall be published. That this did not set out a prescribed procedure for publishing the information. It was therefore the Petitioner's contention that there is no prescribed procedure for publishing the information in the nomination papers and affidavits for candidates at all levels whether presidential, constituency, district or ward in either the Constitution, subsidiary legislation or regulations and yet, the 1st Respondent chose to publish the information for the other levels of elections but refused to do so for candidates at presidential level. He argued that this is a clear self-contradiction and that based on Article 52 (3) there was no further need for additional procedure or guidance in terms of how that publishing was to be done because the word publish was self-explanatory.

[15] The Petitioner's other argument was that based on Article 4 (3) of the Constitution, Zambia is a democratic state and accountability is the cornerstone of democracy and further that transparency is the cornerstone of accountability. It was submitted that the declaration of assets and liabilities is the transparency that gives opportunity to common citizens to assess whether the wealth accumulated by the Republican President while in office was reasonable or not. He added that after three successful transfers of power in 1991, 2011 and 2021 this Court should uphold the country's status as a beacon of democracy by granting the remedies sought.

[16] In response to the question by the Court on why the Petition only singled out the Republican President and not all the 16 presidential candidates in the 2021 General Election, the Petitioner submitted that while the 1st Respondent needed to publish the information in issue for all the candidates, the weight of publishing the information for the Republican President who holds public office was greater.

1ST RESPONDENT'S CASE

[17] The 1st Respondent in its Answer dated 13th October, 2021 stated that in the performance of its functions, it is guided by the relevant electoral laws including the Constitution, the Electoral Process Act, the Electoral Commission of Zambia Act No. 25 of 2016 and the regulations promulgated under these laws.

[18] It was averred that while the repealed Article 34 (5)(b) of the Constitution as amended in 1996 expressly subjected the declared assets to public inspection, the current Constitution as amended in 2016 does not have such a provision. Further, that there is no constitutional provision that compels the 1st Respondent to publish declared assets and liabilities of presidential candidates.

[19] The 1st Respondent further posited that contrary to the contents of the Petition, Article 52 (3) of the Constitution, section 30 (1)(c) of the Electoral Process Act and Regulation 11 (6) and 20 (2) of the Electoral Process (General) Regulations, 2016 do not require the 1st Respondent to publish presidential candidates'

assets and liabilities as alleged. It was further averred that Regulation 20 (2) requires the returning officer to publish the information contained in nomination papers and affidavits relating to candidates but not presidential candidates. Furthermore, that Regulation 22 allows for inspection of nomination papers for parliamentary and local government candidates but does not extend to presidential candidates.

[20] The 1st Respondent admitted receiving a letter from the Petitioner demanding the publication of President Hakainde Hichilema's declared assets and liabilities to which it responded. In conclusion, it was stated that the 1st Respondent had not breached any provision of the Constitution as alleged and that there is no provision of the law that compels the 1st Respondent to publish a presidential candidate's declared assets and liabilities.

[21] The affidavit in support of the Answer, deposed to by Mr. Kryticous Patrick Nshindano, the Chief Electoral Officer, essentially repeated the averments in the Answer and we will therefore not repeat them.

[22] In its skeleton arguments, the 1st Respondent submitted that the repealed Article 34 (5)(b) of the Constitution as amended in 1996 provided for inspection of statutory declarations for presidential candidates. However, that this is not the case in the Constitution as amended in 2016 because Article 52 (3) of the Constitution provides that the information contained in a

nomination paper and affidavit shall be published, as prescribed. It was posited that the term "prescribed" required that the publication of the contents of the nomination papers and affidavits be done pursuant to an Act of Parliament but that there was currently no such Act of Parliament.

[23] The 1st Respondent contended that the closest provision requiring publication of nomination papers and affidavits is contained in regulation 20 (2) of the Electoral Process (General) Regulations, 2016 and relates to parliamentary and local government candidates and not presidential candidates.

[24] The 1st Respondent further argued that the burden of proof rests on the Petitioner to prove that the 1st Respondent breached the Constitution and specify the provision that has been breached. In support of this proposition, the cases of **Nkandu Luo v Doreen Sefuke Mwamba and Attorney General**⁴ and **Abuid Kawangu v Elijah Muchima**⁵, were cited where this Court reiterated that the person alleging must adduce cogent evidence to prove the allegation.

[25] At the hearing Mr. Bwalya, learned counsel for the 1st Respondent submitted that the gist of the matter rests on the definition of the word "prescribed" in Article 52(3) which word is defined in Article 266 of the Constitution.

2ND RESPONDENT'S CASE

[26] The 2nd Respondent filed an Answer on 19th October, 2021 and stated that the provisions of Article 52 (3) of the Constitution,

section 30 (1)(c) of the Electoral Process Act and Regulations 20 (2) of the Electoral Process (General) Regulations, 2016 do not place a mandatory responsibility on the 2nd Respondent to publish the presidential candidates' statutory declaration of assets and liabilities and is therefore not in breach of the Constitution. Further, that an omission to publish statutory declarations of the candidates' assets and liabilities did not contravene the Constitution. Accordingly, that the Petitioner is not entitled to the reliefs sought.

[27] The 2nd Respondent's affidavit in support of the Answer was deposed to by Mr. Josiah Simachela, the Chief State Advocate, who reiterated what was outlined in the Answer.

[28] In the skeleton arguments, the 2nd Respondent submitted that the 1st Respondent had not breached the Constitution because it is not mandated to publish the information in the nomination papers and affidavits of presidential candidates.

[29] It was the 2nd Respondent's position that it was not in contention that the publication of the relevant information about a candidate enhances transparency, accountability and good governance but that in this matter, Article 52 (3) provides that the information in the nomination paper and affidavit should be published as prescribed. That the word "prescribed" was defined in the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia as made under the written law. The definition of

prescribed in Black's Law Dictionary 11th Edition was cited as meaning to assert a right or title to the enjoyment of a thing. The explanatory note in Black's Law Dictionary was outlined as follows:

In modern statutes relating to matters of administrative nature, such procedure, registration etc., it is usual to indicate in general terms the nature of the proceedings to be adopted, and to leave the details to be prescribed or regulated by rules or orders to be made for that purpose in pursuance of an authority contained in the Act.

[30] It was thus contended with respect to Article 52 (3) that the issue is that the procedure for publishing is not found in either the Constitution or the Act of Parliament, being the Electoral Process Act and the regulations. The 2nd Respondent argued that the provisions of the Electoral Process Act and Electoral Process (General) Regulations, 2016 relied upon by the Petitioner did not assist his case. In particular, that: section 30 (1) of the Electoral Process Act only mandates presidential candidates to submit statutory declaration forms of assets and liabilities to the returning officer; regulation 11 (6) provides for the form for the statutory declaration which is form GEN 5; and regulation 20 (3) mandates the returning officer to publish information in the nomination paper and affidavits relating to candidates for the constituency, district and ward. That in the absence of prescribing the procedure for publishing the presidential nomination paper and affidavit the same cannot be published.

[31] It was also argued that the Petitioner had not set out the facts, in sufficient detail, which are the basis for his entitlement to the reliefs sought. The case of **Benjamin Mwelwa v Attorney**

General and Others⁶ was cited in support of the need for the Petitioner to set out facts of the alleged breach in sufficient detail to warrant consideration by this Court. Further, that the constitutional enjoyment guaranteed under Article 20 of the Constitution does not exist in a vacuum and that an individual's access to information has to be conferred by law.

[32] In responding to the cases relied on by the Petitioner, the 2nd Respondent argued that the case of **Wypych v Poland**¹ is distinguishable from this matter in that the financial information that was required to be disclosed was imposed by legislation while in *casu*, there, is no law which imposed a duty on the 1st Respondent to publish presidential candidate's nomination information save for candidates at constituency, district and ward levels. Further, that the case of **Union of India v Association for Democratic Reforms and People's Union for Civil Liberties**² was distinguishable from the matter in *casu* in that in the former, there was no legislation requiring that country's electoral commission to collect background information for candidates on behalf of the citizens. However, that in this matter, legislation requires the 1st Respondent to collect background information for presidential candidates on behalf of the citizens but the issue is that the publishing is required to be prescribed in an Act of Parliament or regulations. Further, that the prescribing has not been done.

[33] The Learned Solicitor General, Mr. Muchende, SC, in his oral submissions in support of the 2nd Respondent's position argued that

the reliefs sought must fail as Article 52(3) ends with the word prescribe. Further, that the word "prescribe" is defined in Article 266 to mean provided for in an Act of Parliament. Our decision in the case of **Dipak Patel v The Minister of Finance and the Attorney General**⁷ was cited on what is required when the Constitution provides that something should be prescribed. Therefore, that since there is no Act of Parliament that speaks to or brings the Electoral Process Act into conformity with Article 52 (3), the publishing of the statutory declaration of assets and liabilities for presidential candidates could not be done.

[34] Mr. Muchende, SC further submitted that it was unfortunate that Parliament has been oblivious to the provisions of section 6 (2) of the Constitution of Zambia Act No. 1 of 2016 which requires Parliament to set a time frame within which laws should be brought into conformity with the Constitution as amended. He stated that there was lack of political will by the previous administration to give effect to Article 52 (3) and that the current administration will kick start the process, in conjunction with the 1st Respondent, to bring the Electoral Process Act into conformity with the constitutional provision because they agree with the Petitioner that transparency and accountability are very important for people to make informed decisions. He however added that there was nothing to suggest that there was a breach of the Constitution as alleged. It was posited that Regulation 20(2) relied upon by the Petitioner did not speak to presidential candidates.

[35] The Learned Solicitor General, in addressing the second relief, argued that it was poorly drafted and vague and must not be granted. Further, that the surreptitious attempt to amend it in the Petitioner's skeleton arguments was untenable based on the case of **Christopher Lubasi Mundia v Sentor Motors**⁸ wherein it was held that pleadings cannot be deemed or treated to be amended but must be amended in fact. That doing otherwise would amount to ambushing and taking the opposite side by surprise.

[36] On the issue of costs, Mr. Muchende, SC submitted that costs should be awarded to the Respondents because the Petitioner had singled out one candidate requiring the publication as opposed to addressing the fundamental principle underpinning Article 52 (3) of the Constitution.

PETITIONER'S REPLY

[37] In his reply to the 1st Respondent's Answer, the Petitioner cited, among others, Article 173 (1)(h) on promotion of timely dissemination of public information and section 3 (c) of the Electoral Process Act on the 1st Respondent's need to ensure transparency and credibility in the conduct of elections. The Petitioner added that even assuming that there was no law expressly imposing an obligation to publish the declaration of assets by presidential candidates, the 1st Respondent, as a public institution having a huge stake in democracy, had an obligation to uphold democratic principles which require dissemination of

information of interest to the public. Therefore, that the refusal to provide information relating to the declaration of assets by President Hakainde Hichilema to the Petitioner was in conflict with the spirit and tenor of the Constitution and the Electoral Process Act. The Petitioner concluded that the 1st Respondent has no exclusive rights to hold on to the information in issue as if it was private information.

[38] In reply to the 1st Respondent's oral submissions, the Petitioner repeated that Article 52 (3) hinges on the word "publish" and not "prescribed".

[39] Addressing the 2nd Respondent's submission that in the absence of the procedure for publishing being prescribed the declaration of assets and liabilities could not be published, the Petitioner argued that the 1st Respondent published the information for candidates at constituency, district and ward levels in the absence of a procedure for publishing the same. Therefore, that the argument on requirement for the procedure was self-contradictory. The Petitioner reiterated his earlier reasons on why the Petition focuses on the Republican President.

CONSIDERATION AND DECISION

[40] We have considered the Petition, the Answers, the affidavits, the skeleton arguments and the oral submissions by the parties. While the Petition appears to be only focused on the declaration of assets and liabilities of the current Republican President, the

provisions invoked generally relate to all presidential candidates in the 2016 general elections and future elections. It is with this view in mind that we shall consider the Petition.

[41] Before we consider the issues raised, we wish to address the arguments by the 2nd Respondent that the second relief was poorly drafted and vague and that the surreptitious attempt to amend it in the Petitioner's skeleton arguments would amount to ambushing and taking the other party by surprise. Our short answer is that indeed the second relief indeed is poorly drafted in the Petition and we will thus not consider it. We further wish to caution parties, especially litigants who are not represented, to ensure that their documents are properly drafted so that all their issues can be appropriately determined on their merits.

[42] The Petition raises two pertinent issues: First; whether the 1st Respondent contravened Article 52 (3) by failing to publish declared assets and liabilities for President Hakainde Hichilema, and second; whether this Court can order the 1st Respondent to publish that information in the absence of legislation prescribing the same.

[43] Regarding the first issue above, the Petitioner's position is that Article 52 (3) mandates the 1st Respondent to publish the declarations of assets and liabilities of presidential candidates, and its failure to do so was unconstitutional. It was his contention that this is supported by section 30 (1) (c) of the Electoral Process Act No. 35 of 2016 and regulations 11 (6) and 20 (2) of the Electoral

Process (General) Regulations, 2016. Further, that the publishing of nomination papers and affidavits for candidates at parliamentary and local government levels which is also provided for in Article 52 (3) was done while leaving out the presidential candidates.

[44] The 1st and 2nd Respondents' common position, on the other hand, maintains that Article 52 (3) as read with section 30 (1)(c) of the Electoral Process Act and Regulations 11 (6) and 20 (2) of the Electoral Process (General) Regulations, 2016 do not require the 1st Respondent to publish presidential candidates' declaration of assets and liabilities contrary to the allegation by the Petitioner.

[45] It is their view that prior to the 2016 constitutional amendments, the then Article 34 which dealt with the nomination process of presidential candidates expressly provided for public inspection of declared assets and liabilities. That this is not the case with the current Constitution as amended in 2016 because Article 52 does not so provide.

[46] We note that Article 52 (3) of the Constitution is at the core of this Petition. However, to contextualise the contention in the Petition, we propose to start by reviewing the entire article. Article 52 provides that:

- (1) A candidate shall file that candidate's nomination paper to a returning officer, supported by an affidavit stating that the candidate is qualified for nomination as President, Member of Parliament or councillor, in the manner, on the day, and at the time and place set by the Electoral Commission by regulation.
- (2) A returning officer shall, immediately on the filing of a nomination paper, in accordance with clause (1), duly reject the nomination

paper if the candidate does not meet the qualifications or procedural requirements specified for election to that office.

- (3) The information contained in a nomination paper and affidavit shall be published by the Electoral Commission, as prescribed.
- (4) A person may challenge, before a court or tribunal, as prescribed, the nomination of a candidate within seven days of the close of nomination and the court shall hear the case within twenty-one days of its lodgement.
- (5) The processes specified in clauses (1) to (4) shall be completed at least thirty days before a general election.
- (6) Where a candidate dies, resigns or becomes disqualified in accordance with Article 70, 100 or 153 or a court disqualifies a candidate for corruption or malpractice, after the close of nominations and before the election date, the Electoral Commission shall cancel the election and require the filing of fresh nominations by eligible candidates and elections shall be held within thirty days of the filing of the fresh nominations. (emphasis added)

[47] Article 52 generally provides for the nomination process which is an indispensable step in the electoral process. From clause (1) it is clear that Article 52 applies to all candidates vying for positions of President, Member of Parliament, Mayor and Councillor. Prospective candidates officially make known their intention to contest in upcoming elections by filing nomination papers and affidavits with the returning officer. The nomination papers and affidavits are prescribed in the Electoral Process (General) Regulations, 2016.

[48] With respect to presidential candidates, the nomination paper and affidavit take the formats set out in GEN 2 and GEN 4 forms, respectively, of the schedule to the Electoral Process (General)

Regulations, 2016. A candidate is called upon to furnish the required information and to assert that they qualify for nomination.

[49] The requirement for filing of nomination papers and affidavits is to ensure that the prospective candidates meet the constitutional qualifications set for the various positions. In the case of the presidential candidates, this is as per Article 100(1) of the Constitution. This is apparent from the manner in which the prescribed affidavit filed by presidential candidates is couched. The said Article 100 (1) provides that:

100 (1) A person qualifies to be nominated as a candidate for election as President if that person—

- a. is a citizen by birth or descent;
- b. has been ordinarily resident in Zambia;
- c. is at least thirty-five years old;
- d. is a registered voter;
- e. has obtained, as a minimum academic qualification, a grade twelve certificate or its equivalent;
- f. is fluent in the official language;
- g. has paid that person's taxes or has made arrangements, satisfactory to the appropriate tax authority, for the payment of the taxes;
- h. declares that person's assets and liabilities, as prescribed;
- i. pays the prescribed election fee on, or before, the date fixed for the delivery of nomination papers; and
- j. is supported by at least one hundred registered voters from each Province.(emphasis added)

[50] This catalogue of qualifications in Article 100 (1) mirrors the information that the affidavit, form GEN 4, is designed to communicate. The affidavit spans ten (10) paragraphs with the nine (9) paragraphs, each dealing with a specific qualification. Of relevance in this matter is paragraph 8 of the affidavit which requires a candidate to attest that he has declared his assets and

liabilities and the statement of assets and liabilities is attached to the affidavit and marked as 5. Paragraph 8 of the affidavit provides as follows:

8. I have declared my assets and liabilities and the statement of the assets and liabilities is attached and marked 5.

[51] Form GEN 5 is the statutory declaration of assets and liabilities that is required to be filed by candidates at presidential, parliamentary and local government levels and it provides in part as follows:

I,(full names) being a candidate for the office of the President of the Republic of Zambia/Running Mate* do solemnly and sincerely declare that the statement annexed hereto is made by me for the purposes of Article 100/70* of the Constitution and is a true and complete statement of my assets and liabilities.....

Note: A typed or clearly printed/written statement of assets and liabilities must be annexed to this declaration.

[52] It is our considered view, that paragraph 8 of the affidavit (form GEN 4) amounts to referential incorporation and makes the statement on the declaration of assets and liabilities part and parcel of the affidavit. Referential incorporation is a drafting tool used to incorporate a document into the contents of another document by referring to it. This is commonly used when drafting legislation and contracts so as to avoid voluminous documents. The learned author of Statutory Interpretation (1992) 2nd Edition at page 522 puts it thus:

It is a common device of legislative drafters to incorporate earlier statutory provisions by reference, rather than setting out similar provisions in full. This saves space, and also attracts the case law and other learning attached to the earlier provisions. Its main advantage is a parliamentary one however, since it shortens Bills and cuts down the area for debate.

[53] The reference in paragraph 8 of the affidavit to the statement of declared assets and liabilities incorporates the statement in the affidavit. In order to have a holistic appreciation of the contents of the affidavit, one would have to refer to the attached statement. Reading paragraph 8 without the attached statement leaves out some material particulars from the affidavit and defeats the objects of Article 100 (1)(h). Therefore, Article 52(3) which mandates the publishing of nomination papers and affidavits extends to the statement of declared assets and liabilities as well.

[54] We note the 1st and 2nd Respondents' common argument to the effect that the repealed Article 34 of the Constitution as amended in 1996 expressly provided for inspection of declared assets and liabilities while Article 52 (3) of the Constitution requires the prescription in subsidiary legislation before the declaration of assets and liabilities of presidential candidates are subject of public access.

[55] The repealed Article 34 (5) (b) read as follows:

34 (5) A Presidential candidate shall not be entitled to take part in an election unless-

(b) he makes, a statutory declaration, of his assets and liabilities, which shall be open to public inspection at such time and at such place as may be prescribed by or under an Act of Parliament;

[56] This repealed provision left it to members of the public to inspect the statutory declaration of assets and liabilities at the place and time to be prescribed. However, both the Electoral Act No. 12 of 2006 and the Electoral (General) Regulations Statutory

Instrument No. 92 of 2006 did not have a provision specifying the time and place where the statutory declaration of assets and liabilities for presidential candidates were to be inspected. Conversely, regulation 20 of the repealed Electoral (General) Regulations Statutory Instrument No. 92 of 2006 provided for inspection of nomination papers for candidates in the constituency, by registered voters, at a reasonable time at the office of the returning officer. This repealed regulation 20 read as follows:

20. After a returning officer for a constituency has given notice, under regulation 19, and before the day appointed for the taking of the poll in the constituency, any person registered in such a constituency may, at any reasonable time, inspect, at the office of the returning officer, any of the nomination papers of the candidates in that constituency.

[57] Following the 2016 constitutional amendments, Article 52 (3) provides as follows:

The information contained in a nomination paper and affidavit shall be published by the Electoral Commission, as prescribed.

[58] It is clear that Article 52 (3) provides that nomination papers and the affidavits for all candidates at presidential, parliamentary and local government levels must be published, as prescribed. The use of the word 'publish' connotes public access to the nomination paper and the affidavit. **Black's Law Dictionary Revised 4th Edition** defines the word publish as:

"to make public; to circulate; to make known to people in general;...making known something to the public for a purpose"

[59] Public access to such information is therefore still constitutionally recognised. Article 52 (3) of the Constitution mandates the 1st Respondent to publish the information, as

prescribed. The word "prescribed", has been defined in Article 266 to mean that the attendant details of the publishing, including the process, is to be found in an Act of Parliament, that is, legislation promulgated pursuant to the article. In this matter, this is supposed to be in the Electoral Process Act or the Regulations thereunder. This is also in line with section 21 of Act No. 1 of 2016 which provides as follows:

21. **Subject to section six, where an Act of Parliament is required to give effect to an Article of the Constitution as amended, that Article shall come into effect upon the publication of the Act of Parliament or such other date as may be prescribed by, or under, the Act of Parliament.**

[60] A perusal of the Electoral Process Act reveals that it is silent on the issue of publishing nomination papers and affidavits of presidential candidates as well as the other categories of candidates. However, Regulations 20 (2) and 22 of the Electoral Process (General) Regulations, 2016, respectively provide as follows:

20. (2) Where two or more candidates have been validly nominated for a constituency, district or ward, the returning officer shall publish the information contained in the nomination papers and affidavit relating to the candidates.

22. A person registered in a constituency, district or ward may, at any reasonable time, after the returning officer for the constituency, district or ward has given notice of the date of the poll and before the day appointed for the taking of a poll in that constituency, district or ward inspect, at the office of the returning officer, a nomination paper of a candidate in that constituency, district or ward.

[61] Regulation 20 (2) of the Electoral Process (General) Regulations, 2016 provides for the publishing of nomination papers and affidavits for parliamentary, mayoral and local government

candidates but omits the presidential candidates. This regulation is apparently giving effect to Article 52 (3) which mandates the publication of nomination papers and affidavits of candidates. What this means is that while Article 52 (3) of the Constitution provides for the publication of nomination papers and affidavits for all categories of candidates, the Electoral Process (General) Regulations, 2016, however, does not provide for publication of nomination papers and affidavits for presidential candidates out of all the other categories of candidates.

[62] It is not clear why the Electoral Process (General) Regulations, 2016 only provides for the publishing of information for parliamentary, mayoral and local government candidates when Article 52 (3) applies to presidential candidates as well. Thus, we are of the considered view that there was partial effecting of Article 52 (3) of the Constitution by regulation 20 (2) in that one category of candidates, namely, presidential candidates were omitted in the prescription. However, the Petitioner has not raised the issue of regulation 20 (2) being in contravention of Article 52 (3) of the Constitution by reason of the omission or partial effecting of the constitutional provision and the parties did not submit on this issue. We are therefore constrained to comment on it any further. Suffice to state that based on the omission in prescribing for presidential candidates, it follows that in line with the argument by the 1st and 2nd Respondents, there has been no Act of Parliament or regulations giving effect to Article 52 (3) with respect to

presidential candidates. The question then is what is the effect of the non-prescription regarding presidential candidates?

[63] Article 1 (1) speaks of the supremacy of the Constitution and legislation promulgated under it ought to be in furtherance of the constitutional dictates. We accordingly find that there is merit in the Petitioner's argument that the 1st Respondent is mandated to publish the nomination papers and affidavits of presidential candidates by Article 52 (3). However, the same Article 52 (3) requires that this should be prescribed in an Act of Parliament or regulations before the information can be published. In the absence of the prescription for presidential candidates, the 1st Respondent cannot be held to have contravened Article 52 (3) of the Constitution by the non-publication. We reiterate that Parliament was mandated by Article 52 (3) to enact a law to guide this. That law does not currently exist with regard to presidential candidates.

[64] This is a very unfortunate situation. We further note that two general elections, in 2016 and 2021, were held without this issue being brought to the fore. We note the assurances by the 2nd Respondent to address this issue. This is commendable. We consequently urge Parliament to address the lapse and expeditiously bring the Electoral Process Act and the Regulations in full conformity with Article 52 (3) of the Constitution with respect to

presidential candidates. We cannot stress enough that Parliament must take its role, as outlined in sections 6 and 21 of the Constitution of Zambia Act No. 1 of 2016 seriously by quickly bringing the laws in conformity with, or give effect to, the Constitution. This is more so on issues to deal with governance and accountability. This is what we implored in the case of **Dipak Patel v The Minister of Finance and The Attorney General**⁷.

[65] We now proceed to consider the second issue. This is whether this Court should proceed to order that the declared assets and liabilities for President Hakainde Hichilema be published in the absence of the same being prescribed as required by Article 52 (3) of the Constitution. It was the Petitioner's contention that this Court should order the 1st Respondent to release the declared assets and liabilities for President Hakainde Hichilema so as to foster transparency and accountability.

[66] To begin with, we wish to reiterate that we do not condone the targeting of one candidate in the manner that the Petitioner has done in this matter. Constitutional issues are of general application and in this matter, it should have targeted all the 16 presidential candidates who took part in the 2021 general elections, who include the Petitioner, and to whom Article 52 (3) of the Constitution applied. We also implore parties commencing public interest litigation to do so in a timely manner to ensure access to

effective remedies and for the timely addressing of identified lapses.

[67] The purpose of publishing the information is apparent in Article 52 (5) which requires that this information be made known to the public before the elections. The purpose then is to furnish the voters with pertinent information on their presidential candidates so as to aid them make an informed decision.

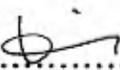
[68] In **Union of India v Association for Democratic Reforms and Another**² a case cited at length by the Petitioner, the Supreme Court of India dealt with a question of whether a voter has a right to relevant information such as assets, qualifications and past criminal behaviour of a parliamentarian. It resolved the question in the affirmative and laid out the purpose as:


For maintaining purity of elections and a healthy democracy, voters are required to be educated and well informed about the contesting candidates. Such information would include assets held by the candidate, his qualifications including educational qualification and antecedents of his life...there is no necessity of suppressing the relevant facts from the voters.

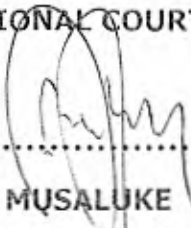
[69] In our case, it is a constitutional requirement that information regarding the declared assets and liabilities of contesting candidates should be made available to the public and this serves its purpose before elections are held. However, Article 52 (3) makes the information on declared assets and liabilities, among others, accessible to the public only upon being prescribed. Thus, the second issue cannot succeed.

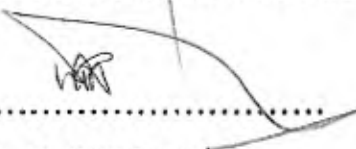
[71] Having found that Article 52 (3) was not given effect in respect of presidential candidates in either the Electoral Process Act of the Regulations in which it was supposed to be prescribed, it follows that the Petitioner has not proved that the failure by the 1st Respondent to publish information on declared assets and liabilities for the Presidential candidates that contested the 12th August, 2021 general elections contravened the Constitution. Therefore, the sought declaration regarding President Hakainde Hichilema, as a presidential candidate, cannot be granted in this Petition as framed.

[72] The Petition fails and it is accordingly dismissed. Each party is to bear its own costs.

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M. S. MULENGA
CONSTITUTIONAL COURT JUDGE

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P. MULONDA
CONSTITUTIONAL COURT JUDGE

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M. MŪSALUKE
CONSTITUTIONAL COURT JUDGE

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M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE

Munalula JC., dissenting:

[73] My dissent is only to the extent necessary to accommodate a finding favourable to the Petitioner under the “catch all” relief number (4) which reads: “Any other reliefs the Court may deem necessary”. Accordingly, I am in agreement with the Majority position on relief number (1), on the impropriety of targeting of an individual and the absence of the prescription required by Article 52(3). I am in full agreement with the position in on reliefs (2) and (3).

[74] I elected to take solace in relief number (4) because of this Court's mandate under the Constitution as the *grundnorm*. This Court is the primary arbiter and guardian of the Constitution. It must protect the spirit as well as the letter of the Constitution.

[75] The Petitioner herein seeks the publication of the incumbent President's declaration of assets and liabilities filed with his nomination papers during the August, 2021 presidential election. The gravamen of his claim is that such publication is mandated by Article 52(3). For their part, the Respondents, take refuge in the claim that there is no law that binds them to publish the declaration of the assets and liabilities of a presidential candidate.

[76] As I considered the parties' arguments, I found it striking that the 2nd Respondent's sentiments captured in paragraph [34] of the Judgment did

in one breath, deny a breach of the Constitution as alleged and in the next breath, lament the failure by Parliament to set a time frame within which laws should be brought into conformity with the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (henceforth "the Constitution").

[77] The 2nd Respondent further committed to "kick starting" the process of bringing the Electoral Process Act No. 35 of 2016 (henceforth "the Act") into conformity with Article 52 (3) of the Constitution while working with the 1st Respondent as the current administration has the necessary political will to do so.

[78] In my considered view, the sentiments acknowledge two things: First that the lack of subsidiary law, which gives effect to Article 52(3), amounts to an instance of non-compliance with the Constitution. Secondly, that the responsibility to initiate the process of prescription giving effect to Article 52(3) lies with the 1st and 2nd Respondent. Not only has the prescribing not been done but it is being touted as justification for not doing what Article 52(3) demands. This defence is not tenable for the reasons that follow.

[79] Article 52(3) reads:

(3) The information contained in a nomination paper and affidavit shall be published by the Electoral Commission, as prescribed. (emphasis added)

Riding on the analysis by the Majority Article 52(3) requires the publication of a presidential candidate's declaration of assets and liabilities among other things, in the same manner as candidates at constituency and ward level. This is the purpose Article 52 (3).

[80] The prescribing of the modalities of publishing is relegated to legislation because such modalities are "mere practical detail and minutiae" in comparison to the substantive principle established in Article 52(3). The role of the 1st and 2nd Respondent is therefore to facilitate mechanically, the prescribing process so that the mandatory constitutional requirement is achieved.

[81] It seemed to me that they did not play their part. I thus became concerned that a serious breach of the Constitution might go unacknowledged. My concern deepened with the narration in paragraphs [54] to [56] of the Majority Judgment which relates to the repealed Article 34(5)(b) and its supporting provisions in the repealed Electoral Act and repealed Electoral Regulations as referred to therein.

[82] The narration shows that, not giving effect to the constitutional requirement to facilitate public access to the declaration of assets and liabilities of a presidential candidate by enacting the required provisions of subsidiary law is not happening for the first time. There is need for this

Court to do something about it. Thus relief number (4) is an opportunity to act accordingly.

[83] In my considered view, section 30 (1) (c) of the Act which provides only that a presidential candidate shall deliver to the Returning Officer the prescribed statutory declaration of the candidate's assets and liabilities and says nothing about publishing is incomplete. The Electoral Process (General) Regulations Statutory Instrument No. 63 of 2016 (henceforth "the Regulations") in Regulations 20 (2) and 22 which provide for the publication and inspection of nomination papers filed at constituency, district and ward levels and not the presidential level are equally remiss.

[84] That the omissions are to some extent due to the choices made by the Respondents is evident from a perusal of the contents of the Electoral Commission Bill No. 20 of 2016 and the Report on the Electoral Process Bill No. 35 of 2016 as well as the related Parliamentary Debates of 10th December 2015 and 11th May, 2016, of which I take judicial notice.

[85] Further, it is well understood that the 1st and 2nd Respondents as the Electoral Commission of Zambia and the Attorney General of the Republic of Zambia respectively, play a key role in the process of enacting legislation giving effect to Article 52(3). The Electoral Commission of Zambia, is created in Article 229 with the mandate *inter alia*, to implement the electoral process and to conduct elections. Article 52 (3) directs the

Electoral Commission in so many words to publish the required information. The Preamble to the Act states that, it is an Act to *inter alia*, empower the Commission to make regulations in election matters. The office of the Attorney General of the Republic of Zambia, is created under Article 177 of the Constitution. The Attorney General is the chief legal adviser to the Government and signs Government Bills to be presented to the National Assembly.

[86] It follows that, because of who they are and the role that they perform, in the legislative process in issue, a question arises as to why the Respondents should not be held accountable for their failure to initiate and pursue the enactment of the provision required by Article 52(3) as they played their part in the process of enacting the Act and formulating the Regulations.

[87] The point is fortified by the 2nd Respondent conceding, as a constitutional functionary ought to, that the process of enacting the legislative provision in issue was not attended to and that the Respondents will work together to initiate the process. Given all of the above, I am convinced, that the Respondents must bear some responsibility for the omission of the prescription required by Article 52(3).

Although, no ordinary statute maybe broken, the Constitution has certainly been contravened by the advertent omission on the part of the

Respondents to ensure that the required provision was in place before any elections were held in 2016 and subsequently in 2021.

[88] The Respondents cannot take refuge in what I see as a prior contravention arising from their own omission simply because the said omission was not “pleaded” by the Petitioner in order to deny a consequential breach. The failure to publish which was the Petitioner’s complaint is consequential to the failure to process the enactment of the required legal provision. As opposed to being an escape it compounds the contravention which was alleged. And it does not end there, due to a further aggravating factor.

[89] The Respondents were clearly aware of the pressing need to comply with the constitutional provisions relating to the entire electoral process before any election was held under the Constitution because they did facilitate the passing of the Act and the Regulations before the 2016 elections took place, even though what was passed excluded provision for the publication of the declaration of assets and liabilities of a presidential candidate. The Act and the Regulations were applied in the 2016 and the 2021 elections.

[90] It is of note, that the prescribing of the relevant provision was not open-ended. It had a time frame within which it had to be done, that is, before the first presidential election after the Constitution took effect. I am

fortified in so saying by a holistic reading of Articles 56, 272 and 274.

Relevant portions of the said Articles are as follows:

56. (1) A general election shall be held, every five years after the last general election, on the second Thursday of August.

272. Parliament may enact legislation to give effect to an Article or a provision in this Constitution which—

(b) provides for a process or procedure to be taken, followed or prescribed;

(g) generally requires something to be prescribed.

274. A function conferred in this Constitution may be performed as occasion requires. (*emphasis added*).

[91] For the aforesaid reasons I would have found that the Respondents contravened Article 52(3) by virtue of their omission to initiate and facilitate the timely passing of legislation to give effect to Article 52(3) and as a consequence thereof failing to publish the declaration of assets and liabilities of presidential election candidates.



M.M. Munalula (JSD)
Constitutional Court Judge