

**IN THE CONSTITUTIONAL COURT OF ZAMBIA  
HOLDEN AT LUSAKA  
(CONSTITUTIONAL JURISDICTION)**

**2022/CCZ/0023**

**IN THE MATTER OF: ARTICLE 2(a)(b) AS READ TOGETHER WITH ARTICLE 128(1)(a)(b) and 128(3)(b)(c) OF THE CONSTITUTION OF ZAMBIA**

**IN THE MATTER OF: ARTICLE 1, 3, 8, 9(1)(a)(b), 45(2)(a)(c)(e) AND 267(1) OF THE CONSTITUTION OF ZAMBIA**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 52(6) AS READ TOGETHER WITH ARTICLE 57(1) OF THE CONSTITUTION OF ZAMBIA**

**IN THE MATTER OF: OMISSION BY THE ELECTORAL COMMISSION OF ZAMBIA TO CANCEL BY-ELECTIONS UPON RECEIPT AND ACCEPTANCE OF RESIGNATIONS OF CANDIDATES IN KWACHA AND KABUSHI PARLIAMENTARY CONSTITUENCIES BY THE COMMISSION**

**IN THE MATTER OF: OMISSION BY THE ELECTORAL COMMISSION OF ZAMBIA TO HOLD FRESH NOMINATIONS UPON RECEIPT AND ACCEPTANCE OF RESIGNATIONS BY THE COMMISSION OF CANDIDATES IN KWACHA AND KABUSHI PARLIAMENTARY CONSTITUENCIES IN CONTRAVENTION OF ARTICLE 52(6) AS READ TOGETHER WITH ARTICLE 57(1) OF THE CONSTITUTION.**

**BETWEEN:**

**PETER CHAZYA SINKAMBA**

**ISAAC MWANZA**

**AND**

**ELECTORAL COMMISSION OF ZAMBIA**



**1<sup>ST</sup> PETITIONER**

**2<sup>ND</sup> PETITIONER**

**RESPONDENT**

**CORAM: Sitali, Mulenga and Mulongoti, JJC on 5<sup>th</sup> October, 2022  
and on 17<sup>th</sup> October, 2022**

**For the 1<sup>st</sup> Petitioner : In Person**

**For the 2<sup>nd</sup> Petitioner : In Person**

**For the Respondent : Ms. T. Phiri and Mr M. Bwalya  
In-House Counsel, Electoral  
Commission of Zambia**

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**ABRIDGED J U D G M E N T**

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**Sitali JC delivered the abridged majority Judgment of the Court.**

Cases Cited:

1. Joseph Malanji and Bowman Lusambo v Attorney General and Electoral Commission of Zambia, 2022/HP/1327
2. Mazoka and Others v Mwanawasa and Others (2005) ZR 138
3. Isaac Mwanza v Electoral Commission of Zambia and Attorney General, 2020/CCZ/0008
4. Steven Katuka and Law Association of Zambia v Ngosa Simbyakula and 63 Others, 2016/CCZ/0011

Legislation referred to:

1. The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016

## 2. The Electoral Process Act No. 35 of 2016

### **Background**

[1] This is the abridged majority judgment of the Court. We shall deliver our full reasoned judgment on a date to be notified to the parties.

[2] The Petition relates to the pending parliamentary by-elections for Kabushi and Kwacha constituencies which fell vacant on 28<sup>th</sup> July, 2022 and 3<sup>rd</sup> August, 2022, respectively following this Court's decisions to uphold the nullifications on appeal. The Respondent subsequently set 15<sup>th</sup> September, 2022 as the date for by-elections in the two constituencies and conducted nominations on 25<sup>th</sup> August, 2022. Among the persons who filed nominations were Alfred Yombwe in respect of the Kabushi Constituency and Lawrence Kasonde in respect of the Kwacha constituency.

[3] On 12<sup>th</sup> and 13<sup>th</sup> September, 2022 Alfred Yombwe and Lawrence Kasonde, respectively resigned as candidates for the elections. On 14<sup>th</sup> September 2022, the Respondent acknowledged the resignations and announced an indefinite suspension of the Kwacha and Kabushi Parliamentary by-elections citing the order to stay the conduct of the by-elections granted by the High Court on 13<sup>th</sup> September, 2022 in the case of



**Joseph Malanji and Bowman Lusambo v Attorney General and Electoral Commission of Zambia<sup>1</sup>.**

**Petitioners' case**

[4] The Petitioners allege that the Respondent has contravened Article 52(6) as read with Article 1 (2), (3) and (4) of the Constitution by its omission or failure to cancel the Kabushi and Kwacha parliamentary by-election. That Article 52(6) requires that the Respondent should cancel the election upon a resignation of a candidate and call for fresh nominations. Further, that the new election date ought to fall within the ninety (90) days prescribed in Article 57(1) of the Constitution and that the 90 days period is due to expire on 27<sup>th</sup> October, 2022 and 2<sup>nd</sup> November, 2022 for Kabushi and Kwacha constituencies, respectively.

[5] The Petitioners thus seek the following reliefs:

- 1. A declaration that the omission by the Respondent to cancel the elections due to have taken place on 15<sup>th</sup> September 2022 in Kabushi and Kwacha Constituencies contravene the Constitution, and is thereby illegal;**
- 2. A declaration that nominations held by the Respondent on 25<sup>th</sup> August 2022 in Kabushi and Kwacha Constituencies are invalid, and any election held on the premise of the said nominations contravene the Constitution, and thereby is illegal, null and void;**

- 3. A declaration that the Respondent is obliged to hold fresh nominations for Kabushi and Kwacha Constituencies before 27<sup>th</sup> October 2022 and 2<sup>nd</sup> November 2022 respectively;**
- 4. A declaration that the Respondent is obliged to hold fresh elections for Kabushi and Kwacha Constituencies before 27<sup>th</sup> October 2022 and 2<sup>nd</sup> November 2022 respectively;**
- 5. A declaration that the nominations and elections held in Kabushi and Kwacha Constituencies after 27<sup>th</sup> October, 2022 and 2<sup>nd</sup> November, 2022 respectively, will be unconstitutional, illegal, null and void;**
- 6. An order compelling the Respondent to conduct fresh nominations and elections in Kabushi and Kwacha Constituencies by 27<sup>th</sup> October 2022 and 2<sup>nd</sup> November 2022 respectively;**
- 7. Any other reliefs the Court may deem fit.**

[6] In the affidavit verifying facts, the Petitioners reiterated the facts set out in the Petition. They also produced copies of the media release by the Respondent dated 11<sup>th</sup> August, 2022 setting 15<sup>th</sup> September, 2022 as the date of the by-elections in the two constituencies, the two letters from Alfred Yombwe and Lawrence Kasonde indicating their withdrawal of candidacy, the Respondent's press statement of 14<sup>th</sup> September, 2022 suspending the elections set for 15<sup>th</sup> September, 2022 and the Respondent's letter also dated 14<sup>th</sup> September, 2022 acknowledging receipt of the duo's resignation letters.

[7] The Petitioners also filed skeleton arguments in support of the Petition which we shall not set out in this abridged judgment. At the hearing of the Petition, the Petitioners maintained that the omission by the Respondent to cancel the elections for the Kabushi and Kwacha constituencies and to call for fresh nominations following the resignation of the two independent candidates contravenes Article 52(6) of the Constitution.

### **Respondent's case**

[8] The Respondent opposed the Petition on the premise that it suspended the two by-elections following the High Court Ruling in the case of **Joseph Malanji and Bowman Lusambo v Attorney General and Electoral Commission of Zambia**<sup>1</sup> delivered on 13<sup>th</sup> September, 2022 which stayed or suspended the holding of the by-elections. That the High Court action related to the challenge of the nominations held on 25<sup>th</sup> August, 2022 for which the High Court granted a stay of elections in the two constituencies pending its determination of the petition relating to the nominations.



[9] Further, that the High Court proceedings had since been stayed by the Court of Appeal pending the determination of an interlocutory appeal which was scheduled to be heard on 20<sup>th</sup> October, 2022. The Respondent thus denied contravening the Constitution and reiterated that it was prevented from acting as required by the court orders.

[10] The Respondent also filed an affidavit and skeleton arguments in opposition to the petition which we shall not set out here.

[11] At the hearing, learned counsel for the Respondent submitted that the Respondent had not omitted to carry out its duty under the Constitution but that it was bound by the stay granted by the High Court. They added that the order of stay granted by the High Court was to subsist until the determination of the Petition before the High Court and that the Respondent could not take any further steps regarding the Kabushi and Kwacha by-elections until the order was discharged.

### **Petitioners' Reply**

[12] In reply, the Petitioners maintained that the Respondent had ignored the dictates of the Constitution following the resignation of the two candidates. In the Petitioners' view, the proceedings in the High Court

were not related to the resignation of the two candidates and the order for stay did not stop the Respondent from carrying out its constitutional mandate in line with Article 52(6) of the Constitution.

### **Determination**

[13] We have considered the Petition, Answer, affidavits and the respective arguments tendered by the parties. The Petition was triggered by the resignation of two candidates in the impending Kabushi and Kwacha parliamentary by-elections. The factual basis of the petition is that the Respondent received resignations from the two candidates on 12<sup>th</sup> and 13<sup>th</sup> September, 2022. The Petitioners allege that the Respondent contravened Article 52(6) of the Constitution by failing or omitting to cancel the election and call for fresh nominations following the resignation or withdrawal of the two candidates from the elections that were scheduled for 15<sup>th</sup> September, 2022.

[14] In determining this case, we have carefully examined the issues which the Petitioners have raised in their petition and which issues have set out the parameters within which we must determine this matter. We say so being cognisant of the principle that each case must be considered on its



own facts based on the pleadings as held in the case of **Mazoka and Others v Mwanawasa and Others**<sup>2</sup>.

[15] In the main, the Petitioners seek a declaration that the omission by the Respondent to cancel the elections due to have taken place on 15<sup>th</sup> September, 2022 in Kabushi and Kwacha constituencies contravenes the Constitution and is thereby illegal.

[16] In support of this claim, the Petitioners stated that the Respondent received resignations from the independent candidates, Alfred Yombwe and Lawrence Kasonde, in the Kabushi and Kwacha constituencies respectively on 12<sup>th</sup> and 13<sup>th</sup> September, 2022. The resignations were duly acknowledged by the Respondent on 14<sup>th</sup> September, 2022.

[17] The Petitioners thus contend that upon receipt of the resignations from candidature in the two by-elections by the two named candidates, the Respondent was bound to cancel the elections and to call for fresh elections in accordance with the provisions of Article 52(6) of the Constitution. The Petitioners contend that by failing to abide by the stipulation of Article 52(6), the Respondent breached the Constitution and that the omission is illegal. The Petitioners further contend that the failure

by the Respondent to cancel the by-election in circumstances where the resignations were delivered and duly noted is a breach of duty imposed on the Respondent to do so by the Constitution.

[18] In opposing this claim, the Respondent confirmed that Alfred Yombwe and Lawrence Kasonde on 12<sup>th</sup> September, 2022 and 13<sup>th</sup> September, 2022 respectively as candidates for the elections in Kabushi and Kwacha constituencies tendered their resignations in writing to the Respondent, which resignations it duly accepted on 14<sup>th</sup> September, 2022.

[19] The Respondent further stated that on 13<sup>th</sup> September, 2022, the High Court of Zambia stayed the holding of the parliamentary by-elections for Kwacha and Kabushi constituencies which were scheduled to be held on 15<sup>th</sup> September, 2022 pending the hearing and determination of the election petition under cause number 2022/HP/1327.

[20] The Respondent further contended that the effect of the order which stayed the by-election granted by the High Court on 13<sup>th</sup> September, 2022 was that the Respondent was precluded from taking any further steps relating to the elections set for 15<sup>th</sup> September, 2022, until the High Court hears and determines the petition.

[21] We have considered the arguments on both sides. We wish to state at the outset that in seeking a declaration that the Respondent by its failure to cancel the by-election for Kabushi and Kwacha constituencies scheduled for 15<sup>th</sup> September, 2022, contravened Article 52(6) of the Constitution, the Petitioners did not refer to the proceedings commenced by Bowman Lusambo and Joseph Malanji as candidates whose nominations were respectively rejected by the Respondent in respect of the Kabushi and Kwacha constituencies by-elections before the High Court under cause number 2022/HP/1327. They further did not address the effect of the order granted by the High Court on 13<sup>th</sup> September, 2022 staying the holding of the by-elections in the two constituencies on 15<sup>th</sup> September, 2022 pending the hearing and determination of the petition.

[22] Rather, the Petitioners argued that the Respondent breached its constitutional duty under Article 52(6) of the Constitution, when it failed to cancel the election, call for fresh nominations and to conduct by-elections within thirty days from the date of filing fresh nominations, after Alfred Yombwe and Lawrence Kasonde resigned as candidates in the Kabushi and Kwacha parliamentary by-elections, respectively, after the close of the



nominations but before the election date, which resignations the Respondent accepted.

[23] Article 52(4) provides that a person may challenge, before a court or tribunal, as prescribed, the nomination of a candidate within seven days of the close of nominations and the Court shall hear the case within twenty-one days of its lodgement. Pursuant to this Article, the Electoral Process Act No.35 of 2016 prescribed the High Court as the court of competent jurisdiction to hear and determine matters relating to a challenge of the nomination of candidates for parliamentary elections. It was pursuant to that provision that Bowman Lusambo and Joseph Malanji challenged the Respondent's rejection of their nomination as candidates for the Kabushi and Kwacha constituencies, respectively, under cause number 2022/HP/1327.

[24] It was in the process of determining the petition under cause number 2022/HP/1327 that the High Court granted the Petitioners an order which stayed the holding of the Kabushi and Kwacha constituencies by-elections on 15<sup>th</sup> September, 2022, pending the determination of the petition as evidenced by the Ruling of the High Court set out on page 63 of the record of proceedings and the order to that effect on page 65 of the same record.

[25] The issue therefore is whether the Respondent ought to have proceeded to cancel the Kabushi and Kwacha constituencies by-elections set for 15<sup>th</sup> September, 2022 and hold fresh nominations while the order of stay granted by the High Court on 13<sup>th</sup> September, 2022 was still in effect.

[26] We wish to state at the outset that a party to Court proceedings is obligated to obey court orders, unless and until they are set aside, discharged or vacated. Article 52 of the Constitution recognises and makes provision for the Courts to determine nomination challenges before the election in issue can be held. It was thus imperative, in this case, for the Respondent to comply with the High Court order which stayed the holding of the by-elections in the Kabushi and Kwacha constituencies on 15<sup>th</sup> September, 2022.

[27] In the circumstances, the Respondent did not breach its constitutional mandate when it did not cancel the by-elections in the Kabushi and Kwacha constituencies set for 15<sup>th</sup> September, 2022, call for fresh nominations and hold elections within thirty days as stipulated by Article 52(6) of the Constitution after the resignations tendered by the named independent candidates in the two constituencies for two reasons. Firstly, it

was bound to obey the High Court order which stayed the holding of the elections in issue on 15<sup>th</sup> September, 2022. Secondly, Article 52(6) of the Constitution does not give a time frame within which the dictates of clause 52(6) should be implemented by the Respondent so that it can be said that because the Respondent did not cancel the election by such a date, it has breached Article 52(6) of the Constitution. The only time frame which is stipulated in that provision is the requirement for the election to be held within 30 days of the filing of fresh nominations. We make these observations bearing in mind the provisions of Article 274 of the Constitution which provides that a function conferred by the Constitution may be performed as occasion requires. This provision gives flexibility in the performance of the function when it becomes necessary to perform the function in question.

[28] Based on the reasons we have stated above, we decline to grant the declaration that the Respondent contravened the Constitution by its omission to cancel the elections due to have taken place on 15<sup>th</sup> September 2022 in the Kabushi and Kwacha constituencies.

[29] We further decline to grant the declaration that nominations held by the Respondent on 25<sup>th</sup> August, 2022 in the Kabushi and Kwacha



constituencies are invalid and that any election held based on those nominations contravene the Constitution and are illegal and null and void as the High Court which has jurisdiction to hear matters relating to a challenge of the nomination of candidates for parliamentary elections has not made a pronouncement to that effect. We therefore cannot clothe ourselves with the jurisdiction to pronounce ourselves on the validity of the nominations held on 25<sup>th</sup> August, 2022 relating to the election of members of Parliament for the Kabushi and Kwacha Constituency by-elections as to do so would be contrary to the jurisdiction of this Court which is set out in Article 128 of the Constitution. For the avoidance of doubt, the jurisdiction of this Court under Article 128(1)(d) is to hear appeals relating to election of members of Parliament and councillors.

[30] The Petitioners further contend that any election held pursuant to Article 52(6) must be held within the ninety (90) day period provided for in Article 57(1) and that any elections held outside the ninety day period is illegal and unconstitutional. The case of **Isaac Mwanza v Electoral Commission of Zambia and the Attorney General**<sup>3</sup> is cited in support.

[31] In determining this issue, we wish to reiterate the principle on the interpretation of the Constitution which we stated in the case of **Steven**

**Katuka and Law Association of Zambia v Ngosa Simbyakula and 63 Others<sup>4</sup>** that when interpreting the Constitution, a provision should not be considered in isolation but should be considered in light of the other provisions touching on the same subject in order to ascertain the intention of the framers of the Constitution. In this matter, Articles 57(1) and 52(6) of the Constitution must be read together because they both contain mandatory provisions regarding the time frames within which a by-election should be held when a vacancy in the office of Member of Parliament, among other offices, occurs.

[32] Article 57(1) of the Constitution provides that where a vacancy occurs in any of the offices stipulated in that provision, a by-election shall be held within ninety (90) days of the occurrence of the vacancy. However, Article 52(6) provides that 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.

[33] It is evident from the foregoing that once Article 52(6) is triggered, the ninety day period for holding a by-election stipulated by Article 57(1) may be affected depending on the timing of the death, resignation or disqualification of a candidate after the close of nominations but before the election is held. It therefore follows that the by-election in those circumstances may be held outside the ninety day period stipulated by Article 57(1) of the Constitution.

[34] The Petitioners acknowledge that Article 57(1) may be affected by the timing of the occurrence of the events referred to in Article 52(6). Accordingly, where the thirty day timeframe stipulated in Article 52(6) takes the holding of the by-election beyond the ninety day period stated in Article 57(1), the by-election would be valid because the ninety day timeframe has been extended by the Constitution itself and not any other law or body. Thus, there is no contravention of the Constitution by the Respondent on that aspect as well.

[35] We therefore decline to grant the declaration that the Respondent is obliged to hold fresh nominations for Kabushi and Kwacha constituencies before 27<sup>th</sup> October, 2022 and 2<sup>nd</sup> November, 2022 respectively. We further decline to grant an order compelling the Respondent to conduct fresh



nominations and elections in Kabushi and Kwacha constituencies by 27<sup>th</sup> October, 2022 and 2<sup>nd</sup> November, 2022, respectively.

[36] In sum, the petition wholly fails and is dismissed. Each party will bear their own costs.



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**A. M. SITALI**  
**CONSTITUTIONAL COURT JUDGE**



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**J. Z. MULONGOTI**  
**CONSTITUTIONAL COURT JUDGE**

### **Mulenga, JC Dissenting**

[37] I have read the decision taken by the majority. I however do not agree with the conclusion that the Respondent did not breach its constitutional duty under Article 52(6) by its failure or omission to cancel the elections and call for fresh nominations following the resignation of the two independent candidates.

[38] Before I address the Petitioners' claim, I wish to deal with two issues that were canvassed by the parties on the jurisdiction of the Court of Appeal in election matters including the challenge to nominations under Article 52(4) of the Constitution and the prescribed timeframe for holding a by-election under Article 47(1) of the Constitution.

[39] In terms of the jurisdiction of the Court of Appeal, I agree with the submissions made by the Petitioners that the Court of Appeal does not have jurisdiction to hear matters relating to nomination of Members of Parliament. I say so in relation to the proceedings before the Court of Appeal in which an order was granted staying the proceedings before the High Court that were premised on Article 52(4) of the Constitution. Article 52(4) provides that a person may challenge the nominations before a court or tribunal as prescribed. Pursuant to that provision, the Electoral Process Act prescribes

the High Court as a court of competent jurisdiction in election matters relating to the parliamentary elections, including matters touching on the validity of nominations or lack thereof. Further, Article 128(1)(d) of the Constitution gives this Court exclusive jurisdiction to deal with appeals relating to election petitions from the High Court.

[40] As regards the prescribed timeframe for holding by-elections, I agree with the majority position that Articles 57(1) and 52(6) must be read in light of each other as they both contain mandatory provisions on timeframes. It is my considered view that the framers of the Constitution were alive to the 90-day period in Article 57(1) when setting the timeframes in Article 52(6). It follows that once Article 52(6) is triggered, the 90 days in Article 57(1) may be affected based on the timing of the death, resignation or disqualification in issue.

[41] I now turn to consider the main issue for determination which is whether the Respondent has contravened Article 52(6) of the Constitution by not cancelling the election following the resignation of the two candidates.

[42] The Petitioners allege that the Respondent contravened Article 52(6) of the Constitution by failing or omitting to cancel the elections due to have



taken place on 15<sup>th</sup> September, 2022 in Kabushi and Kwacha constituencies and call for fresh nominations following the resignation or withdrawal of the two candidates from the elections.

[43] In opposing this claim, the Respondent stated that it was constrained by the High Court order of 13<sup>th</sup> September, 2022, staying the holding of the parliamentary by-elections for Kwacha and Kabushi constituencies pending the hearing and determination of the election petition under cause number 2022/HP/1327.

[44] I note that the matter before the High Court and the Petition before this Court are both premised on Article 52 of the Constitution which provides as follows:

**(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)

[45] This article provides for the procedures relating to nominations. In this matter, it is clear that while the High Court proceedings are anchored on clause (4) on challenging nominations, the Petition before this Court is anchored on clause (6) regarding the death, resignation or disqualification of a candidate. Therefore, the proceedings before the High Court and this Court both seek to enforce constitutional provisions touching on nominations.

[46] Further, both proceedings relate to the same elections or constituencies. The proceedings in the High Court, which is the court of competent jurisdiction for proceedings under Article 52(4), were commenced earlier and pursuant to which an order staying the Kabushi and Kwacha by-elections pending the determination of the nomination challenge had been granted on 13<sup>th</sup> September, 2022.



[47] The resignation by the two candidates were communicated to the Respondent on 12<sup>th</sup> and 13<sup>th</sup> September, 2022, respectively and the Petitioner commenced this action on 26<sup>th</sup> September, 2022.

[48] I agree with the majority position that Article 52 of the Constitution recognizes and makes provision for the courts to determine nomination challenges before the election in issue can be held. Hence, the Respondent was obligated to comply with the High Court order which stayed the holding of the by-elections until it was set aside, discharged or vacated. This entailed that the status quo immediately after the grant of the stay by the High Court must be maintained until a court of competent jurisdiction pronounces itself on the status of those proceedings and after which the Respondent must proceed to comply with the dictates of Article 52 (6), whatever might be the outcome of the nomination challenge under Article 52(4).

[49] This is premised on the trigger of Article 52 (6) in this matter being the resignation of candidates after nomination and before the by-election which is subsequent to the Article 52(4) proceedings. It does not matter whether the nominations held on 25<sup>th</sup> August, 2022 are found to be valid or invalid by the High Court under the proceedings under Article 52(4), Article 52(6) requires that the election based on those nominations should be cancelled



and fresh nominations held. Thus, once Article 52(6) is triggered, the Respondent cannot hold elections based on the nominations of 25<sup>th</sup> August, 2022.

[50] I am alive to the fact that Article 52(6) does not provide a timeframe within which the Respondent is to cancel the election and Article 274 states that a function may be performed as occasion requires. Therefore, the Respondent is also required to take into account the substantive provisions on the timeframes for holding the elections.

[51] In this matter however, the Respondent has not maintained the status quo as required. I take judicial notice of the fact, which fact was also placed on record, that the Respondent had since proceeded to set 21<sup>st</sup> October, 2022 as the date for the by-election in the two constituencies based on the nominations of 25<sup>th</sup> August, 2022 without first complying with the provisions of Article 52(6). It is trite that matters which are not pleaded but are placed on record by a party may be taken into account by the court in determining the issues.

[52] The Respondent set 21<sup>st</sup> October, 2022 as the date for the by-elections in the two constituencies in disregard of the very High Court stay order it

argued had constrained it to act in line with Article 52(6) and whilst being fully aware of the proceedings before this Court wherein the legality of the failure or omission to cancel the election was yet to be determined. This conduct undermines the integrity of the judicial processes and is unfortunate in light of the Respondent's contention that it could not cancel the elections as required by Article 52(6) because of the High Court order of stay. Such conduct by an institution tasked with the responsibility of conducting elections based on the constitutional and statutory provisions is unacceptable and has the potential to breed anarchy and chaos in the electoral system.

[53] On the facts of this case, and in light of the Respondent's action of proceeding to set the election date without following the mandatory provisions of Article 52(6) of the Constitution, I am of the considered view that the Respondent has breached Article 52(6) by its failure or omission to cancel the by-elections and call for fresh nominations, following the resignations of the two candidates which resignations are still subsisting in line with this Court's decision in the case of **Isaac Mwanza v Electoral Commission of Zambia and Attorney General**<sup>3</sup>.

[54] It follows that the date of elections of 21<sup>st</sup> October, 2022 which it announced is illegal based on the dictates of Article 52(6) of the Constitution.

[55] I am therefore of the view that the Petition has merit in that respect.



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**M.S. MULENGA**  
**CONSTITUTIONAL COURT JUDGE**