

IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA

2022/CCZ/0019

(Constitutional Jurisdiction)

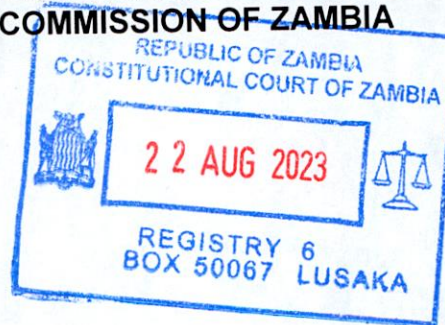
IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA (AMENDMENT)
ACT NO. 2 OF 2016 OF THE LAWS OF ZAMBIA
IN THE MATTER OF: THE ELECTORAL COMMISSION OF ZAMBIA ACT
NO. 25 OF 2016 AS AMENDED BY ACT NO. 5 OF
2019
IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 3, 8
AND 92(1) AS READ TOGETHER WITH ARTICLES
216 AND 242 OF THE CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF 2016 OF THE LAWS
OF ZAMBIA
IN THE MATTER OF: ALLEGED CONTRAVENTION OF SECTION 5(3)
AND SECTION 6(1) OF THE ELECTORAL
COMMISSION OF ZAMBIA ACT NO. 25 OF 2016
AS AMENDED BY ACT NO. 5 OF 2019
IN THE MATTER OF: ACTS BY THE PRESIDENT OF THE REPUBLIC OF
ZAMBIA AS REGARDS THE REMOVAL OF THE
VICE CHAIRPERSON OF THE ELECTORAL
COMMISSION OF ZAMBIA

BETWEEN:

EMILY JOY SIKAZWE

AND

ATTORNEY-GENERAL



PETITIONER

RESPONDENT

CORAM: Sitali, Mulonda, Kawimbe, JJC on 18th April, 2023 and on 22nd
August, 2023

For the Petitioner:

Mr. S. Sikota, SC
and Mr. K. Khanda of
Central Chambers

For the Respondent:

Mr. M. Muchende, SC
Solicitor General

Mr. S. Mujuda
Principal State Advocate

Mr. P. Shambulo
Principal State Advocate

Mr. K. Chipulu
Assistant Senior State Advocate

J U D G M E N T

Sitali, JC delivered the Judgment of the Court.

Cases referred to:

1. **Attorney General v Delson Chibaya and Others, SCZ Appeal No. 70 of 2011**
2. **Isaac Mwanza v The Electoral Commission of Zambia, 2020/CCZ/008**
3. **Mbololwa Subulwa v Kaliya Mandandi, Selected Judgment No.25 of 2018**
4. **Benjamin Mwelwa v the Attorney General and Others, 2020/CCZ/007**
5. **Jayesh Shah and Another v The Attorney General, 2021/CCZ/0017**
6. **Phillip Mutantika and Another v Chipungu (2014) Vol.1 Z.R 352**
7. **Khalid Mohamed v. The Attorney- General (1982) ZR 49**
8. **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa (2005) Z.R.38**

Legislation Cited:

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, Articles 216 242 and 270.**
2. **The Electoral Commission of Zambia Act No. 25 of 2016 as amended by the Electoral Commission of Zambia (Amendment) Act No. 5 of 2019, sections 5 (1) and (3) and 6 (1).**
3. **The Statutory Functions Act, Chapter 4 of the Laws of Zambia, section 9.**
4. **The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia, sections 9 and 26.**

[1.0] **INTRODUCTION AND BACKGROUND**

[1.1] By petition filed into court on 9th September, 2022, the Petitioner seeks the following remedies: (a) an order that the decision by the Republican President to pre-maturely terminate the employment of the petitioner as Vice-Chairperson of the Electoral Commission of Zambia is null and void and devoid of merit; (b) an order that the President contravened Articles 216 and 242 of the Constitution read with sections 5(3) and 6(1) of the Electoral Commission of Zambia Act No. 25 of 2016 as amended by Act No. 5 of 2019; (c) damages against the Respondent for misfeasance in public office; (d) costs; and (e) any other relief the Court may deem fit.

[1.2] The petition was accompanied by an affidavit verifying facts sworn by the petitioner, Emily Joy Sikazwe who stated in her petition that she was appointed as a commissioner of the Electoral Commission of Zambia (ECZ) for a period of seven years from 17th June, 2015 to 17th June, 2022, which appointment was ratified by the National Assembly on 17th June, 2015. Before the expiration of her term of office as a commissioner, the President at that time, Dr. Edgar Chagwa Lungu, by letter dated 16th June, 2020, appointed her as Vice-Chairperson of the ECZ, which appointment was ratified by the National Assembly on 30th September, 2020. She stated that

subsequently on 7th October, 2020, a contract of employment was executed between the ECZ and her, which contract stipulated, that her tenure of office would run from 6th October, 2020 to 5th October, 2027.

[1.3] The petitioner further averred that by letter dated 7th June, 2022, the incumbent President of Zambia in contravention of her contract of employment notified her that her appointment, which was allegedly expiring on 17th June, 2022 would not be renewed for another term and directed her to immediately proceed on leave.

[1.4] The petitioner alleged that the President had breached Articles 216 and 242 of the Constitution and sections 5(3) and 6(1) of the Electoral Commission of Zambia Act as amended by the Electoral Commission of Zambia (Amendment) Act No. 5 of 2019 (henceforth referred to as the Act).

[1.5] Further, that the President's action had raised the following constitutional questions:

- (i) Whether the independence of the Electoral Commission of Zambia had been maintained as envisaged by Article 216 of the Constitution;
- (ii) Whether the President has unfettered powers extending to sending officers of the ECZ on leave;
- (iii) Whether Presidential interference in the running and term of office of ECZ Commissioners breaches Article 92 (1) of the Constitution,

which requires the President to perform his functions with dignity, leadership and integrity;

- (iv) Whether the President's interference with the workings of ECZ negated the promotion of conditions conducive to free, fair, credible and transparent elections or conversely raises an act of intimidation on the ECZ being independent and not in fear or favour of the President.
- (v) Whether the President can override clear provisions in the Constitution such as Article 242 of the Constitution as read with section 5(3) of the Act on term of office.
- (vi) Whether the ECZ Chairperson is estopped from entering into a contract with his juniors and following section 6(1) of the Act.
- (vii) Whether this jurisdiction is bound by the international agreements we enter into with regional and international election bodies.
- (viii) Whether the President did not breach the supremacy of the Constitution inclusive of Article 3 by over throwing, suspending or illegally abrogating the Constitution in issuing his letter dated 7th June, 2022 to the petitioner; and
- (ix) Whether the President in issuing the said letter dated 7th June, 2022 to the Petitioner did not breach Article 8 of the Constitution by not following the national values and principles of good governance and integrity.

[1.6] In her affidavit, the Petitioner added that after she received the incumbent President's letter notifying her of the non-renewal of her contract, her lawyers, Messrs Central Chambers, by letters dated 9th June,

2022 and 17th June, 2022, respectively, requested the President to withdraw the letter, but to no avail. The Attorney-General, in a letter dated 20th June, 2022, asserted that her appointment as Vice-Chairperson of the ECZ did not give rise to a fresh tenure of office but was a continuation of her initial contract as a commissioner. The petitioner asserted that the respondent's assertion was not based on the law or the contract of employment. She contended that the President's action had no legal authority as it was against the provisions of the law and the terms and conditions of her contract of employment.

[1.7] She prayed that she be granted the reliefs she seeks.

[2.0] RESPONDENT'S CASE

[2.1] The respondent filed an answer to the petition together with an opposing affidavit sworn by Mr Oliver Kalabo, in his capacity as Acting Deputy Secretary to the Cabinet, at that time. The respondent admitted the contents of paragraphs 1 to 4 as well as paragraphs 5 and 6 of the petition to the extent that the former President, Dr Edgar Chagwa Lungu, appointed the petitioner as Vice-Chairperson of the ECZ and specifically took judicial notice of the fact that her tenure of seven years had run for five years. That her letter of appointment, therefore, specifically stated that her appointment would take effect on the date of ratification and expire on 17th June, 2022.

The respondent stated that the petitioner's contract came to an end and was not renewed by the President.

[2.2] The respondent added that contrary to established tradition and procedure for constitutional appointees, the petitioner's conditions of service were communicated to her by the Chairperson of the ECZ and not by Cabinet Office, through the Secretary to the Cabinet. This, according to the respondent, was a breach as the ECZ Chairperson had no authority or constitutional power to communicate conditions of service to the petitioner and to extend the contract for an extra five years.

[2.3] The respondent asserted that the President did not contravene the provisions of Articles 216 and 242 of the Constitution and sections 5(3) and 6(1) of the Act, as he acted within the provisions of the law when he did not renew the petitioner's contract. The respondent thus contended that the petitioner is not entitled to any of the reliefs she seeks.

[2.4] In its opposing affidavit, the respondent essentially reiterated its averments in the answer.

[3.0] PETITIONER'S REPLY

[3.1] In reply to the answer, the petitioner asserted that the respondent's contention that the President took judicial notice that her initial contract had run for five years was erroneous at law. The petitioner contended that she

entered into a fresh contract in her appointed capacity as Vice-Chairperson of the ECZ and that her term of office was seven years effective from the date of her ratification by Parliament on 30th September, 2020 to a date in 2027. She added that the President cannot take judicial notice of any fact.

[3.2] The petitioner denied that her contract expired and was not renewed by the President and reiterated that she was appointed as a commissioner of the ECZ for seven years from 17th June, 2015 to 17th June, 2022. Before her term expired, she was appointed by the former President as Vice-Chairperson of the ECZ on 16th June, 2020 and was ratified in that position by the National Assembly on 30th September, 2020.

[3.3] She executed a contract of employment with the ECZ for a further period of seven years to run from 6th October, 2020 to 5th October, 2027. She denied that her contract was extended for an extra five years but stated that the contract, which appointed her as Vice-Chairperson of the ECZ stated that her term of office was seven years in line with the provisions of the Act.

[3.4] The petitioner denied that it was unlawful for the Chairperson of the ECZ to communicate to her the conditions of employment as none of the commissioners appointed with her were communicated to by the Secretary to the Cabinet. She thus asserted that no breach was occasioned.

[3.5] The petitioner further denied the contents of paragraph 7 of the answer and stated that under section 5(8) of the Act, the President may only remove a member of the ECZ from office for incompetence or misconduct and that since neither of these reasons was stated as the reason for her removal from office, she was illegally and unlawfully removed from her position as Vice-Chairperson of the ECZ. She asserted that the respondent was estopped by action from denying that she was working under a valid contract as other commissioners appointed in similar fashion were still working as commissioners.

[4.0] TRIAL

[4.1] At the trial of the petition, the petitioner relied on the witness statement which she filed on 6th February, 2023. She adopted the statement as her evidence-in-chief except for paragraphs 12, 13(b) and 14, which were expunged from the witness statement. In that statement, the petitioner reiterated the contents of her petition regarding her appointment as Vice-Chairperson of the ECZ and the circumstances in which she ceased to hold that office in June, 2022.

[4.2] The petitioner explained that she was appointed as a commissioner of the ECZ for a three-year term on 14th April, 2015 and ratified on 17th June, 2015. That term was renewed for a further three years. On 16th

June, 2020, the former President appointed her as Vice–Chairperson of the ECZ, which appointment was ratified by Parliament on 30th September, 2020.

[4.3] She further stated that following her ratification, the ECZ and she executed a contract on 7th October, 2020. That at the time of her appointment as Vice-Chairperson of the ECZ, the tenure of office of members of the ECZ had been altered from three years to seven years. The petitioner stated that the oversight regarding the tenure of office in her new role was dealt with in her contract of employment with the ECZ, which contract expressed that her engagement would run from 6th October, 2020 to 5th October, 2027.

[4.4] The petitioner stated that on 7th June, 2022, she was shocked to receive a letter from the incumbent President stating that her contract which would expire on 17th June, 2022 was being terminated and instructing her to proceed on leave upon receipt of the letter. She reiterated that her lawyer's effort to have the President withdraw the letter proved futile.

[4.5] The petitioner added that as Vice-Chairperson of the ECZ, she was aware that Commissioners of the ECZ were appointed in a similar fashion to her appointment.

[4.6] In cross-examination, the petitioner insisted that there was no mismatch between the appointment letter written to her by the President which stated that her appointment as Vice-Chairperson would expire on 17th June, 2022 and clause 2 of her contract of employment which stated that her tenure of office would expire on 5th October, 2027. When asked to explain what she meant when she said in paragraph 8 of her witness statement that the oversight regarding the tenure of office in her new role was dealt with in her contract of employment with ECZ, the petitioner said the oversight she referred to was the fact that the Act states that a member's tenure of office is seven years.

[4.7] The petitioner conceded that there was no letter from the former President as the appointing authority which extended her tenure of office beyond 17th June, 2022. She further conceded that the expiry date of her term of office as Vice-Chairperson was stated as 17th June, 2022 in both the letter of appointment dated 16th June, 2022 and the letter written by the incumbent President regarding the non-renewal of her appointment as Vice-Chairperson dated 7th June, 2022.

[4.8] She reiterated that the incumbent President interfered with the independence of the ECZ when he asked her to proceed on leave for which

she was paid but conceded that the President is the appointing authority of the ECZ Vice-Chairperson.

[4.9] In further cross-examination the petitioner admitted that the appointment letter as Vice-Chairperson, dated 16th June, 2020, came first while the contract of employment came second. She, however, insisted that her contract was not based on the appointment letter issued to her by the former President but was based on the law enacted by Parliament. She further conceded that she served the ECZ for a total period of seven years and that as Vice-Chairperson she was a member of the ECZ.

[4.10] In re-examination, the petitioner stated that the oversight regarding the tenure of office referred to in paragraph 8 of her witness statement was dealt with by Judge Chulu. Further, that she was a member of the ECZ for six years plus and not seven years as she testified in cross-examination.

[4.11] PW2 was Kryticous Patrick Nshindano who also relied on his witness statement which was filed on 7th February, 2023 and admitted in evidence as his examination-in-chief after paragraphs 7, 8 and 9 of the statement were expunged. In that statement, PW2 said he was formerly the Chief Electoral Officer of the ECZ and served from 7th August, 2019 to 7th August, 2022. He stated that the petitioner initially served as a commissioner of the ECZ and subsequently as the Vice-Chairperson.

[4.12] PW2 explained that prior to his appointment, contracts of employment for all staff, including the commissioners of the ECZ, were executed between the Chief Electoral Officer on one hand and the employee or commissioner on the other hand. That it was during his tenure that contracts of employment for commissioners and the Vice-Chairperson were signed by the Chairperson of ECZ on one hand and the Commissioner or Vice-Chairperson, on the other. He added that only the Chairperson's contract was executed by a representative from Cabinet Office. ECZ are all nominated by the President and ratified by Parliament.

[4.13] In cross-examination, PW2 stated that he was not aware if the petitioner challenged the tenure of office stated by the President in her appointment letter as Vice-Chairperson of the ECZ dated 16th June, 2020, which tenure was to run from the date of ratification by the National Assembly to 17th June, 2022. Position of a person in the person is ratified by Parliament.

[4.14] He conceded that there was a mismatch between the tenure of office stated in the petitioner's appointment letter and clause 2.0 of the contract which provided that the contract would expire in 2027. He also agreed that the expiry date stated by the former President in the appointment letter dated 16th June, 2020 corresponded with the expiry date cited by the

incumbent President in the letter notifying the petitioner of the non-renewal of her contract as Vice-Chairperson of the ECZ.

[4.15] In re-examination, PW2 stated that there was a contradiction between the tenure of office stated in the petitioner's appointment letter as Vice-Chairperson of the ECZ and the Act which provides that the tenure of a member shall be seven years and renewable for a further and final term of seven years. He further stated that members and the Vice-Chairperson of the ECZ are all nominated by the President and ratified by Parliament; that when an existing member is appointed as Vice-Chairperson, the full process of nomination is followed as though it were a fresh nomination. The member is nominated by the President and ratified by the National Assembly again. Once ratified, the person ceases to be an ordinary member and takes up the position for which the person is ratified. PW2 stated that the two positions are exclusive.

[4.16] That marked the close of the petitioner's case.

[4.17] The respondent did not call any witness but opted to rely on the answer, opposing affidavit and arguments filed by the respondent which are in the consolidated record of proceedings.

[5.0] **PETITIONER'S SUBMISSIONS**

[5.1] The petitioner filed written submissions on 2nd May 2023 in which Counsel for the petitioner suggested what from the petitioner's stand point the case is about. After setting out the evidence adduced by the petitioner and her witness, it was submitted that the starting point regarding this matter is what the provisions of the Electoral Commission Act of 1996 provided regarding the tenure of office of the members, Vice-Chairperson and Chairperson of the ECZ as distinguished from the amendments introduced by the Electoral Commission of Zambia (Amendment) Act No. 5 of 2019, which touched on the members' tenure of office.

[5.2] Counsel submitted that it was not disputed that the petitioner was initially appointed as a member of the ECZ and was ratified in that position. Further, that it was demonstrated that the petitioner prior to the expiry of her tenure as member of the ECZ was appointed as Vice-Chairperson of the ECZ in 2020 and underwent the ratification process notwithstanding the portfolio she was serving in at the time of her appointment.

[5.3] Counsel cited the provisions of section 5 of the repealed Electoral Commission Act 1996, which provided that a member of the Commission would be appointed for a term not exceeding seven years subject to renewal and ratification by the National Assembly. Further, that the first

members would be appointed for periods ranging from two to five years in order to facilitate for retirement by rotation. Counsel referred to the Electoral Commission of Zambia Act No. 25 of 2016, which under section 5 (1) provided that the Commission would consist of the Chairperson, the Vice-Chairperson and three other members appointed by the President subject to ratification by the National Assembly and who would hold office for a term of seven years and could be re-appointed for a further seven years.

[5.4] It was submitted that section 5 of the Electoral Commission of Zambia Act No. 25 of 2016 was amended by the Electoral Commission of Zambia Act No. 5 of 2019 and that the law cited was consistent with the testimony of PW2 who stated that prior to the enactment of Act No. 25 of 2016 and Act No. 5 of 2019, the appointing authority under the Electoral Commission Act, 1996 would elect a period for which a member would serve on the Commission except that such tenure would not exceed seven years. It was submitted that this explained why the petitioner was initially appointed for terms of three years. That when the Petitioner was appointed as Vice-Chairperson of the ECZ on 16th June, 2020, she was serving as a member of the ECZ.

[5.5] It was also submitted that the regime under which the petitioner's appointment as Vice-Chairperson was made was Act No 5 of 2019 which the President referred to in the appointment letter, which expressed her tenure to be two years and would expire on 17th June, 2022. It was submitted that the tenure stipulated in the petitioner's appointment letter was taken care of by the contract of employment, which was handed to the petitioner, which contract recognized the fact that under section 5(3) of Act No. 5 of 2019, a person appointed as member, Vice-Chairperson and Chairperson of the ECZ was assured of a seven-year tenure of office as prescribed by the law. It was further submitted that the expression of a tenure of office of two years in the petitioner's appointment letter was misconceived as the law dictates the tenure of office of a member of the ECZ.

[5.6] The case of **Attorney General v Delson Chibaya and Others** ⁽¹⁾ was cited in aid, wherein the Supreme Court held that parties cannot contract outside a statutory provision. It was contended that in this case, the statutory provision provided for a tenure of seven years, whereas the petitioner's letter of appointment prescribed a tenure of two years.

[5.7] It was further submitted that in upholding the law, this Court should hold that the petitioner's tenure of office as Vice-Chairperson of the ECZ

was to run from the date of ratification in the role of Vice-Chairperson from 6th October, 2020 to 5th October, 2027. It was contended that the Chairperson of the ECZ gave effect to the law and correctly expressed in her contract of employment that the petitioner's tenure would expire on 5th October, 2027. The petitioner asserted that he, thus, dealt with the oversight regarding the tenure.

[5.8] It was further submitted that the incumbent President expressed his desire to terminate the petitioner's contract as Vice-Chairperson of the ECZ by purporting to notify her that her appointment, which was expiring on 17th June, 2022, would not be renewed and further sending her on forced leave prior to the expiry of her appointment. It was submitted that the letter was misconceived as it attempted to usurp the law, which provided the petitioner with a tenure of seven years, by erroneously prescribing a tenure of two years of office against the provisions of the Act.

[5.9] Counsel cited Article 216 of the Constitution and submitted that the incumbent President by directing the petitioner to proceed on leave attempted to usurp the independence of the ECZ to regulate its own procedure as expressed under section 6(1) of the Act. Counsel further cited Article 242 of the Constitution and submitted that the import of that Article

read with section 5 of the Act is that the Commission prescribes, among others, the tenure of office of its members which is enshrined in the Act.

[5.10] He thus, urged us to hold that the President's interference with the appointment of, and carrying out of duties by, the petitioner including directing her to go on immediate leave, was in breach of the Constitution and the independence of the ECZ, which ought to regulate its own procedure.

[5.11] In conclusion, the petitioner submitted that a failure to proffer an explanation and or answer to an allegation is capable of amounting to evidence against a silent party; and that this must be the case, in the present case, as there was no explanation through testimony of the respondent regarding the allegations made against it. It was contended that the evidence of the petitioner and her witness had not been contradicted by any evidence by the respondent and that there was nothing to weigh against that evidence. It was further contended that the respondent did not have its answer and opposing affidavit admitted in evidence.

[5.12] Counsel submitted that the petitioner had made out her case and prayed that the Court grants her, among other things, damages for her removal from office in the manner it was done, which damages, according

to Counsel, should be in the form of salaries and perks which she would have earned up to the end of her contract on 5th October, 2027. Counsel further submitted that this Court should pronounce itself on the breaches of the Constitution and the law perpetrated by the President, and lastly, that the petitioner should be awarded the costs of this action.

[6.0] **RESPONDENT'S SUBMISSIONS**

[6.1] The Respondent began by giving a background to the matter as stated in the petition and submitted that the dispute stems from the mismatch in the tenure of office stated in the petitioner's appointment letter as Vice-Chairperson of the ECZ and the contract that signified that appointment. That on one hand, the respondent relied on the letter of appointment dated 16th June, 2020 by which the President appointed the petitioner to the position of Vice-Chairperson of the ECZ and stated that her tenure of office was to expire on 17th June, 2022. That the petitioner on the other hand, sought to assert the right stemming from the contract of employment entered into between herself and the Chairperson of the ECZ, which contract gave her a tenure as Vice-Chairperson of the ECZ from 6th October, 2020 to 5th October 2027. It was submitted that the petitioner contended that the tenure specified in the contract was aligned with section

5 of the Act, which gives a member of the ECZ a tenure of seven years renewable.

[6.2] Counsel submitted that the legal issues that require our determination are as follows:

- (a) Whose hand signifies the discharge of functions of the President in general and in particular, the appointments of persons as by law required.
- (b) Whether the appointment of the petitioner by the Republican President was properly signified by the contract between herself and the Chairperson of the ECZ.
- (c) If not, whether the petitioner can assert rights from the said contract;
- (d) Whether the appointment of the petitioner as Vice-Chairperson had extinguished her tenure as member of the ECZ from the accrued period since 2015 and commenced *de novo* from 2020 for a new period of seven years vide section 5(3) of the Act.

[6.3] It was submitted that it is undisputed that the appointing authority for the position of Vice-Chairperson occupied by the petitioner was the President going by the combined effect of Articles 92(e), 229 and 242 of

the Constitution as read with section 5(1) of the Act. That the letter of appointment dated 16th June, 2020 from the President to the petitioner attests to this fact and the position of the law; and that the letter expressly mentioned that the appointment of the petitioner was to expire on 17th June, 2022. It was submitted that the petitioner was a full-time member of the ECZ from as far back as 2015, and was to serve as a member of the ECZ for a continuous period of seven years by 17th June, 2022, albeit as Vice-Chairperson from the date of the ratification of her appointment as such by the National Assembly.

[6.4] It was submitted that according to section 9 of the Statutory Functions Act, Chapter 4 of the Laws of Zambia, where the President is vested with any statutory function such as appointing persons, as required by the Constitution under Article 92(e) as read with section 5(1) of the Act, the discharge of such functions by the President may be signified under the hand of the Vice-President, a Minister, the Secretary to the Cabinet, the Attorney General, the Deputy Minister or Permanent Secretary. It was submitted that the import of this provision is that contracts which signify the appointments made by the Republican President can only be signed by the officials mentioned in section 9 of the Statutory Functions Act, Chapter 4 of the Laws of Zambia and no one else. It was submitted that it follows that

any contract signed or signified by a person other than those mentioned in section 9 of the Statutory Functions Act, in reference to presidential appointees, is null and void. It was contended that a violation of a rule neither changes the rule nor makes it disappear. To that effect, the respondent cited the case of **Attorney General v Delson Chibaya and Others**⁽¹⁾ wherein the Supreme Court held that the parties cannot contract out of a statutory provision.

[6.5] In response to the petitioner's assertion that the tenure mentioned in her letter of appointment dated 16th June, 2020, was inconsistent with section 5(3) of the Act because the expiry of tenure was stated as 17th June, 2022, the respondent argued that the petitioner's tenure as Vice-Chairperson had essentially extinguished because she had served the full term of seven years from the date of ratification of her appointment as Vice-Chairperson. Counsel went on to submit that section 5(3) of the Act must not be read in isolation from section 5(1) of the Act, and cited the case of **Isaac Mwanza v The Electoral Commission of Zambia**⁽²⁾ in support of that submission. Counsel further cited the case of **Mbololwa Subulwa v Kaliya Mandandi**⁽³⁾ wherein we emphasized the need to examine, consider and read a statute as a whole when interpreting it in accordance with

section 9 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia.

[6.6] Counsel submitted that the import of section 5(1) and (3) of the Act is that the ECZ consists of 5 full time members who include the Chairperson, Vice-Chairperson and three others. It was contended that it follows, therefore, that a person who is already a member and is appointed to the position of chairperson or vice-chairperson cannot be said to be a new member. That as such, the elevation of a person who is an ordinary member to the position of Chairperson or Vice-Chairperson is a continuation of membership. The respondent cited section 5(7) of the Act which states as follows:

Whenever the office of a member becomes vacant before the expiry of term of office, the President may appoint another person to be a member in place of the member who vacates the office for the unexpired term of that office.

[6.7] Counsel also submitted that the provisions of section 5(7) of the Act cited above show that the Republican President is mandated to appoint the members of the ECZ including the Vice-Chairperson. That in this case, the petitioner was appointed as a full-time member in 2015, and before the expiration of her tenure of office, the President appointed her as Vice-Chairperson of the ECZ, and indicated in her appointment letter that her

appointment would take effect on the date of ratification and expire on 17th June, 2022. Hence, Counsel contended that there was no ambiguity in the President's letter of 16th June, 2020.

[6.8] It was further submitted that the evidence in cross-examination revealed that the petitioner did not take issue with the expiry date contained in the letter of appointment and therefore did not go back to the appointing authority to extend the tenure of office beyond 17th June, 2022. That as the petitioner did not raise her perceived concerns at the time of her appointment, she could not raise them after her tenure had rightly come to an end. According to counsel, the petitioner knew or ought to have known that the appointing authority took into account the period that she had already served as member of the ECZ and was to serve for a period of seven years by the expiry date of 17th June, 2022. In Counsel's view, the petitioner's assertion that the letter of appointment was erroneous was an afterthought, which must not be allowed to be made at this stage as it calls for extraneous and extrinsic evidence.

[6.9] Counsel added that the approach adopted by the petitioner in collusion with the Chairperson to unilaterally alter the tenure of office granted by the appointing authority and to confer powers upon themselves to sign a contract outside the instructions issued in the letter of appointment

by the President left much to be desired. Counsel contended that the decision by the current President to notify the petitioner that her tenure as contained in the appointment letter of 16th June, 2020 had expired was impeccable. That the President exercised the powers vested in him under Article 270 of the Constitution as read with section 26 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia; and that that could not be said to be unconstitutional.

[6.10] Counsel submitted that although the petitioner alleged that the President violated the Constitution or interfered in the operations of the ECZ in violation of Article 216 of the Constitution by requesting her to take leave prior to the expiration of her contract, the fact that the President was the appointing authority of the petitioner as Vice-Chairperson gave him implied power to issue such an instruction pursuant to Article 271 of the Constitution. That the petitioner accepted the instruction and conceded in cross examination that she received the money for the leave taken. Accordingly, that the issue of the petitioner being asked to take leave did not have any bearing on the discharge of functions by the ECZ and therefore the President could not be said to have interfered in the performance of its functions. The respondent thus argued that the petitioner had failed to prove that the President had violated any

constitutional provision. The case of **Benjamin Mwelwa v the Attorney General and Others**⁽⁴⁾ was cited in support wherein we held that:

We hold the firm view that it is not sufficient to allege a breach of a statutory or constitutional provision without setting out the facts, in sufficient detail, which are the basis of the claim against the Respondents and entitle the Petitioner to the reliefs sought.

[6.11] Counsel next contended that a petition must contain a clear and concise outline of the particular constitutional provision allegedly contravened and in what respect the particular constitutional provision is contravened as we stated in the case of **Jayesh Shah and Another v The Attorney General**⁽⁵⁾. Further, that a matter must properly raise constitutional issues for it to come under the jurisdiction of this Court and that there are none in this case. On the issue of interpretation of the contract between the petitioner and the President, Counsel argued that it had no bearing on the allegations of constitutional violations. Further, that the respondent had demonstrated that the purported contract between the Chairperson and the petitioner was executed outside the provisions of the statute and was therefore void *ab initio*. The respondent argued that, as a result, the petitioner cannot assert rights arising from an illegality, as that is not permissible at law.

[6.12] Lastly, the respondent submitted that the incumbent President did not contravene Articles 216 and 242 of the Constitution as read with sections 5(3) and 6(1) of the Act and that as such, the petitioner is not entitled to any reliefs she seeks.

[7.0] PETITIONER'S SUBMISSIONS IN REPLY

[7.1] In reply to the respondent's submissions, the petitioner cited the provisions of Article 92 (2) of the Constitution and submitted that the words "without limiting the other provisions of this Constitution" in Article 92 (2) mean that the President cannot override or limit other provisions of the Constitution, and particularly Article 242 of the Constitution. Counsel further cited section 9(1) of the Statutory Functions Act, Cap. 4 and submitted that section 9 does not apply in this case because the Republican President by his own hand, on his letter at page 10 of the consolidated record of proceedings, discharged his function in accordance with Article 92(2)(e) of the Constitution when he appointed the petitioner as Vice-Chairperson of the ECZ. It was argued that since the President discharged his function by appointing the petitioner as Vice-Chairperson of the ECZ at the time, there was no need for anyone else to signify the performance of that function as it had already been performed by the President himself.

[7.2] It was submitted that in furthering the petitioner's appointment by the President in 2020, the ECZ in regulating itself and exercising the independence conferred on it by Article 216 of the Constitution, the Chairperson appropriately settled the contract of employment with the petitioner on behalf of the ECZ. It was contended that, in the circumstances, the contract executed between the ECZ and the petitioner remained effective, and cannot be said to be null and void. It was further submitted that it is trite that parties cannot contract out of statutory provisions and that even in the absence of the contract set out on pages 11 to 14 of the consolidated record of proceedings, the President could not appoint the petitioner for a term of office which is not prescribed by statute.

[7.3] Counsel submitted that following her ratification, the petitioner was subject to the provisions of section 5(3) of the Act, which Act provides that a member shall hold office for a term of seven years and may be re-appointed for a further term of seven years. Counsel cited the case of **Phillip Mutantika and Another v Chipungu**⁽⁶⁾ and argued that the use of the word "shall" in section 5(3) of the Act regarding the tenure of office of appointed members of the ECZ, means that the stipulated term of office cannot be substituted by any other period, even by the President.

[7.4] It was further submitted that at her appointment as Vice-Chairperson, which position was expressly provided for in the Act, the petitioner's appointment attracted the prescribed statutory tenure of seven years and not any other tenure. That this is because the petitioner was appointed as Vice-Chairperson of the ECZ after the amendment of section 5 of the Act by the Electoral Commission of Zambia (Amendment) Act, 2019, which provision applied to the petitioner. It was emphasised that her role as Vice-Chairperson must be distinguished from the role of member that she previously served under. Counsel further contended that the Petitioner's appointment as Vice-Chairperson on 16th June, 2020 was subject to section 5(3) of the Act. Counsel urged us to adopt this approach in our interpretation of the relevant provisions of the law in question.

[7.5] Counsel proceeded to argue that the incumbent President's action of sending the petitioner on leave, and asserting that her contract would not be renewed contravened Articles 216 and 242 of the Constitution, as he usurped the independence of the ECZ in its performance and subjected it to his control and authority. It was contended that it is the statute which dictates the tenure of members of the ECZ and not the President.

[7.6] Regarding the Respondent's submission that the President had implied power under Article 271 of the Constitution to instruct the petitioner

to proceed on leave as stated in the letter on page 15 of the consolidated record of proceedings, Counsel submitted that Article 271 does not apply to the action taken by the President in that letter. Further, that when Article 271 is read in the light of Article 216 of the Constitution, it is clear that the independence conferred on the ECZ cannot be compromised or impeached.

[7.7] In conclusion, Counsel submitted that it had been demonstrated that the President by his actions taken through his letter on page 15 of the consolidated record of proceedings, had breached Article 216 read with Article 242 of the Constitution and section 5(3) of the Act. Counsel urged us to determine the petition in favour of the Petitioner with costs.

[8.0] EVALUATION AND DECISION

[8.1] We have considered the contents of the petition, the answer and the reply to the answer, the affidavits in support of and in opposition to the petition as well as in reply. We have also considered the evidence adduced by the petitioner and her witness and the submissions by the respective parties and the authorities cited.

[8.2] The petitioner seeks an order that the decision by the President to prematurely terminate her employment as Vice-Chairperson of the ECZ is null and void and devoid of merit. She further seeks an order that the

President contravened Articles 216 and 242 of the Constitution read with sections 5(3) and 6(1) of Act No. 25 of 2016 as amended by Act No. 5 of 2019. We shall consider these two claims simultaneously as they are related.

[8.3] We begin by addressing the respondent's assertion that the contract of employment which the petitioner and the ECZ executed, through its Chairperson, was in breach of the law because it was executed by an officer not specified in section 9 of the Statutory Functions Act, Chapter 4 of the Laws of Zambia. Furthermore, that it was wrong for the ECZ Chairperson to sign the contract and to communicate the conditions of service to the Vice-Chairperson as he was not among the officials specified to signify the performance of functions by the President; and that contracts for the members of the ECZ ought to be signed by the Secretary to the Cabinet in line with the provisions of the Statutory Functions Act, Cap.4.

[8.4] Our short answer is that that provision does not apply to the facts of this case and has been quoted out of context because the former President executed the function of appointing the petitioner as Vice-Chairperson of the ECZ by way of his letter to her dated 16th June, 2020, subject to ratification, which letter is exhibited at page 10 of the consolidated record of proceedings. There is no dispute that that letter was signed by the

President who was in office at that time. That being the case, the argument that there was a breach of the Statutory Functions Act, Cap 4 when the Chairperson of the ECZ executed the contract with the petitioner is untenable. We shall address the issue of the tenure of office contained in the contract later on in this Judgment.

[8.5] We further wish to address the petitioner's contention that a failure to proffer an explanation and to answer to an allegation is capable of amounting to evidence against a silent party; and that in the present case, the respondent did not call any witnesses and therefore did not offer any explanation to counter the allegations made against it by the petitioner. The petitioner further contended that in the absence of oral evidence adduced by the respondent, the evidence of the petitioner and her witness had not been contradicted and therefore nothing weighed against that evidence. Furthermore, that the respondent did not have its answer and opposing affidavit admitted in evidence.

[8.6] It is a well settled principle of law in civil matters that the burden of proof lies on the plaintiff or petitioner, as the case may be, as he who alleges must prove. The erstwhile DCJ Ngulube in **Khalid Mohamed v. The Attorney-General**⁽⁷⁾ essentially stated that a plaintiff must prove his case and that if he fails to do so, the mere failure of the opponent's defence

does not entitle him to judgment; that to hold that even if a plaintiff's case has collapsed for some reason or the other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed, would entail that a defendant in such circumstances would not even need a defence. This position of the law has been confirmed in a plethora of other case authorities.

[8.7] Thus, the petitioner's contention that the respondent's failure to call oral evidence meant that the petitioner's evidence had not been contradicted, and that nothing weighed against it, is untenable. We say so because even if the respondent did not adduce any oral evidence, the petitioner nonetheless needed to prove her case, for judgment to be entered in her favour.

[8.8] We are further fortified in making this observation by Order IX rule 17 (1) of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 (the Rules) which provides that:

- (1) If the respondent does not respond within the time stipulated for the answer to a petition, originating notice of motion or originating summons, the Court may hear and determine the petition or application in the respondent's absence.**

[8.9] The requirement for the Court to hear and determine the petition or application in the absence of the respondent means that even where the respondent has not responded to a petition or application, the petitioner must prove the allegations made against the respondent in the petition. Further, Order X rule 1(2) of the Rules provides that:

Except as otherwise provided in these Rules, evidence before the Court may be presented by affidavit or orally.

[8.10] Based on the above provisions, the answer and opposing affidavit filed by the respondent saved as the respondent's response in opposition to the petition. The petitioner's assertion that the answer and opposing affidavit were not admitted in evidence overlooks the settled position of the law that once pleadings are settled, they form the basis of the case which the court must determine regarding the dispute between the parties. To that effect, the Supreme Court in the case of **Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa**⁽⁸⁾ held that:

The function of pleadings is to give fair notice of the case which has to be met and define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have closed, the parties are bound by their pleadings and the court has to take them as such.

The petitioner did not cite any provision of the law to support the contention that there was a requirement for the answer and opposing affidavit to specifically be admitted in evidence before the Court could rely on them.

[8.11] That said, we note that the petitioner in her petition raised a number of questions which in her view were constitutional questions which we ought to determine. However, the main issue we have to determine in this matter is whether the incumbent President breached Articles 216 and 242 of the Constitution when he notified the petitioner that her contract which was expiring on 17th June, 2022 would not be renewed and instructed her to proceed on leave pending the expiry of her term of office.

[8.12] In determining this issue, we have examined the provisions of Articles 216 and 242 of the Constitution and sections 5 and 6 of the Electoral Commission of Zambia Act No. 25 of 2016 as amended by the Electoral Commission of Zambia (Amendment) Act No. 5 of 2019. Article 216 which provides for principles relating to commissions reads as follows:

A commission shall -

- (a) be subject only to this Constitution and the law;**
- (b) be independent and not be subject to the control of a person or an authority in the performance of its functions;**
- (c) act with dignity, professionalism, propriety and integrity;**
- (d) be non-partisan; and**
- (e) be impartial in the exercise of its authority. (Emphasis added)**

[8.13] It is evident from the provisions of Article 216 (a) and (b) of the Constitution, which we have set out above that a commission, such as the ECZ, is subject only to the Constitution and the law and is independent and not subject to the control of any person or authority in the performance of its functions as mandated by the Constitution and the law. In other words, it should carry out its functions without interference from any person or authority.

[8.14] Article 242 of the Constitution provides for the enactment by Parliament of legislation which must prescribe, among other things, the functions, composition, appointment of members and tenure of office of those members. It reads as follows:

The functions, composition, appointment of members, tenure of office of members, processes and procedures, operations, administration, structures, finances and financial management of a commission shall be prescribed. (Emphasis added)

[8.15] Pursuant to Article 242 of the Constitution which is set out above, the Electoral Commission of Zambia Act No. 25 of 2016 was enacted by Parliament. The Act, among other things, provides for the membership of the ECZ and the tenure of office of the members, as stipulated by Article 242. Specifically, section 5 (1) of the Act vests the power to appoint the members of the ECZ, who include the Chairperson and Vice-Chairperson

of the ECZ, in the President and provides for the composition of the Commission. Section 5(3) provides for tenure of office of the members of the Commission.

[8.16] In determining the issue before us, we have examined the evidence regarding the appointment of the petitioner as Vice-Chairperson of the ECZ and the circumstances in which she ceased to hold that office, in light of the provisions of the Constitution and the Act. The petitioner's main contention was that when she was appointed as Vice-Chairperson of the ECZ, she entered into a fresh contract with the ECZ in that capacity and that her term of office was effective from the date of her ratification by the National Assembly on 30th September, 2020 to a date in 2027.

[8.17] On that basis, the petitioner denied that her contract expired on 17th June, 2022 and was not renewed by the incumbent President. She maintained that her contract of employment which gave her a tenure of seven years effective from 6th October, 2020 to 5th October, 2027 was valid. Further, that her service as a member of the ECZ prior to her appointment as Vice-Chairperson terminated when she was appointed into the role of Vice-Chairperson and therefore ought not to be taken into account in computing the tenure of office of seven years which is stipulated by section 5 (3) of the Act. She thus, alleged that the incumbent President breached

Articles 216 and 242 of the Constitution read with section 5 (3) and 6 (1) of the Act when he terminated her contract by letter dated 7th June, 2022 and directed that she proceeds on leave for the remaining ten days to the expiry of her contract on 17th June, 2022.

[8.18] On the other hand, the respondent contended that the President did not contravene Articles 216 and 242 of the Constitution read with section 5 (3) and 6 (1) of the Act as he acted within the law when he did not renew her contract which expired on 17th June, 2022. The respondent further asserted that the petitioner's service as a member of the ECZ from 17th June, 2015 formed part of the seven-year tenure of office stipulated by section 5 (3) of the Act and cannot be severed from her service as Vice-Chairperson. The respondent stated that when the petitioner's service as a member from 17th June, 2015 to 17th June, 2022 is taken together, the petitioner served as a member of the ECZ for seven years.

[8.19] The respondent argued that this was the reason the former President expressly stated that her tenure of office as Vice-Chairperson would run from the date of her ratification as Vice-Chairperson by the National Assembly to 17th June, 2022. The respondent further contended that the petitioner did not challenge the tenure of office stipulated in her letter of appointment dated 16th June, 2020 and therefore cannot purport to do so

when her contract had since expired on 17th June, 2022 which was the date stipulated in that letter.

[8.20] We note from the evidence adduced by the petitioner and her witness as well as the contents of the petition, answer and reply and the affidavits filed by the respective parties, that the dispute in this matter arose from the disparity in the tenure of office stated in the petitioner's appointment letter as Vice-Chairperson of the ECZ dated 16th June, 2020 and the tenure of office stated in clause 2 of the contract of employment, which contract was entered into by the ECZ, represented by the Chairperson, and the petitioner on 7th October, 2020 after her ratification as Vice-Chairperson of the ECZ.

[8.21] The appointment letter which is at page 10 of the consolidated record of proceedings read, in part, as follows:

IN EXERCISE of the power vested in me under section 5 of the Electoral Commission of Zambia Act No. 25 of 2016 as amended by section 4 of the Electoral Commission of Zambia Act No. 5 of 2019, I hereby appoint you as Vice Chairperson of the Electoral Commission of Zambia. Your appointment will take effect on the date of ratification by the National Assembly and will expire on the 17th June, 2022. (Emphasis added)

[8.22] On the other hand, the contract of employment which is set out on pages 11 to 14 of the consolidated record of proceedings stated in clause 2.0 at page 11 as follows:

Your tenure of office shall be from 6th October, 2020 to 5th October, 2027.

[8.23] The petitioner's explanation for the disparity in the tenure of office as stated in her appointment letter and in the contract of employment is given in paragraphs 7 and 8 of her witness statement which read as follows:

7. **It is my understanding that at my appointment as Vice Chairperson of the Commission, the law regarding the tenure of commissioners, the Vice Chairperson and the Chairperson of the Electoral Commission of Zambia had been altered from (3) years to (7) years.(sic)**
8. **The oversight regarding tenure of office in my new role was then dealt with in my contract of employment with the Electoral Commission of Zambia as can be seen from the subject contract which expressed that my engagement would run from 6th October, 2020 to 5th October, 2027.**

[8.24] The evidence on record reveals that the petitioner was appointed from among the members of the Commission, at that time, to hold the position of Vice-Chairperson. Thus, while the petitioner contended that her appointment as Vice-Chairperson meant that she was entitled to hold office as Vice-Chairperson for a term of seven years, pursuant to section 5 (3) of the Act, she did not address the provisions of section 5 (1) of the Act which clearly stipulate that the members of the Commission comprise the

Chairperson, Vice-Chairperson and three other members. For purposes of clarity, we consider it necessary to set out the provisions of section 5 (1) of the Act here. It reads:

- (1) **The Commission consists of the following full-time members appointed by the President, subject to ratification by the National Assembly:**
- (a) **the Chairperson;**
 - (b) **the Vice-Chairperson; and**
 - (c) **three other members. (Emphasis added)**

[8.25] Section 5(3) of the Act then goes on to provide for tenure of office of the members of the Commission as follows:

- (3) **A member shall hold office for a term of seven years, and may be re-appointed for a further and final term of seven years.**

[8.26] A reading of section 5(1) of the Act reveals that the ECZ membership comprises the Chairperson, Vice-Chairperson and three other members. Thus, a reference to member in section 5 (1) of the Act includes the Chairperson and Vice-Chairperson. When sections 5 (1) and 5 (3) are read together, it is evident that the intention of Parliament was that a member of the ECZ, be that member the chairperson, vice-chairperson or an ordinary member, would only serve for a term of seven years in total subject to renewal for another final term. In the present case, the petitioner initially served as an ordinary member of the ECZ from 17th June, 2015 to 16th June, 2020 when she was appointed as Vice-Chairperson of the ECZ,

subject to ratification. Thus, for purposes of section 5 (3) of the Act, the petitioner's term of office commenced on 17th June, 2015 and was to expire on 17th June, 2022.

[8.27] The former President was therefore on firm ground when, in appointing the petitioner as Vice-Chairperson of the ECZ, he specified in his letter dated 16th June, 2020 that she would serve in her new role from the date of ratification by the National Assembly up to 17th June, 2022 making this a period of seven years from 17th June, 2015 when she was first appointed as a member of the ECZ. While the petitioner asserted that the tenure of office as Vice-Chairperson stipulated in the appointment letter was an oversight and that she was entitled to a fresh term of seven years in her position of Vice-Chairperson, the petitioner did not cite any provision of the Act to support that position. She further did not adduce any evidence to support her contention that she was entitled to serve for a fresh term of seven years. In making this observation, we are mindful that the burden to prove her assertions in the petition lies on the petitioner as we stated earlier on in this judgment.

[8.28] Since the former President as the appointing authority, specifically stated that the petitioner's appointment would take effect from the date of her ratification and would expire on 17th June, 2022, the petitioner and the

Chairperson of the ECZ were not at liberty, in the contract they executed, to alter the tenure of office specified by the President. The petitioner's contention that the tenure of office specified in her appointment letter was an oversight on the part of the former President is not supported by any evidence to that effect. In her evidence in cross-examination, the petitioner admitted that she did not revert to the President to seek a clarification on the tenure of office stated in her appointment letter, which she considered to be an oversight as she stated in paragraph 8 of her witness statement.

[8.29] Instead, she and the Chairperson of the ECZ decided to alter the tenure of office in the contract of employment which they executed on 7th October, 2020, without recourse to the appointing authority. It is significant to note that while the petitioner contended that the alleged oversight in the tenure of office, which was stated in her appointment letter, was taken care of by the Chairperson of the ECZ in the contract of employment which she signed, the tenure of office stated in clause 2 of the contract set out at page 11 of the consolidated record of proceedings, did not commence on 30th September, 2020, which was the date of ratification by the National Assembly as stated in her letter of appointment dated 16th June, 2020. Instead, the contract stated that her tenure of office would commence from 6th October, 2020 to 5th October, 2027.

[8.30] The petitioner did not proffer any explanation for the tenure of office stated in clause 2 of her contract nor did she adduce any evidence to prove that her appointment letter as Vice-Chairperson of the ECZ dated 16th June, 2020 was withdrawn by the President. That being the case, her term of office remained as stated in the appointment letter. It took effect on 30th September, 2020, which was the date on which she was ratified in the position of Vice-Chairperson of the ECZ by the National Assembly, according to paragraph 5 of the petitioner's witness statement, and was due to expire on 17th June, 2022.

[8.31] In arriving at this position, and bearing in mind that no provision of a statute or the Constitution should be considered in isolation from the rest of the provisions which touch on the subject matter in issue, we have considered holistically the provisions of section 5(1) and (3) of the Act as the President in his appointment letter to the petitioner clearly stated that he was exercising the power vested in him by section 5 of the Act when he appointed her as Vice-Chairperson of the ECZ.

[8.32] We note that contrary to the petitioner's contention that the stated tenure of office in her appointment letter was an oversight in light of the provisions of section 5(3) of the Act, the former President did not cite any specific subsection of section 5 of the Act in his appointment letter,

meaning that he was cognisant of the provisions of section 5 as a whole when he appointed the petitioner as Vice-Chairperson and restricted her tenure of office to run from the date of her ratification as Vice-Chairperson by the National Assembly to expire on 17th June, 2022.

[8.33] The petitioner also argued that the President by directing her to proceed on leave attempted to usurp the independence of the ECZ to regulate its own procedure as expressed under section 6(1) of the Act and thus contravened Article 216 of the Constitution. In our view this argument is misconceived. Section 6(1) of the Act provides as follows:

Subject to the other provisions of this Act, the Commission may regulate its own procedure.

[8.34] The procedure which the ECZ is entitled to regulate for itself, in this context, refers to, for instance, how it conducts its meetings. The appointment of a member of the ECZ and the instruction to proceed on leave by the appointing authority is not an incidence of procedure so that it can be said that the President attempted to usurp the Commission's independence contrary to Article 216 of the Constitution.

[8.35] The petitioner also contended that the President unlawfully terminated her contract by his letter dated 7th June, 2022 because her

contract had not expired. That as a result, the President by that action interfered with the independence of the Commission as provided in Article 216(b) of the Constitution. The respondent denied that the contract was unlawfully terminated and contended that the President had power reposed in him by Article 270 of the Constitution read with section 26 of the Interpretation and General Provisions, Cap 2 of the Laws of Zambia to take the action not to renew the petitioner's contract. That his action of notifying the petitioner that her contract would not be renewed was therefore not unconstitutional.

[8.36] In considering the petitioner's above contention, we have examined the provisions of Article 270 of the Constitution which provides as follows:

In this Constitution, unless a contrary intention is expressed, power to appoint a person to hold or act in an office includes the power to confirm appointments, to exercise disciplinary control over the person holding or acting in the office and to remove that person from office. (Emphasis added)

[8.37] Article 270 of the Constitution which is set out above is couched in clear and unambiguous terms. A person vested with power to appoint a person to hold or act in an office is also bestowed with the power to, amongst other things, exercise disciplinary control over the person holding or acting in the office in question and even to remove that person from office.

[8.38] Pursuant to the provisions of Article 270 of the Constitution, read with Article 242 of the Constitution which provides for legislation on commissions, section 5 (8) and (9)(a) of the Act provide as follows:

(8) The President may remove a member from office for incompetence or gross misconduct.

**(9) The President may initiate the removal of a member from office on –
(a) the President's own motion; (Emphasis added)**

[8.39] A holistic reading of Article 216, 242 and 270 reveals that while the ECZ is independent in its operations and in the performance of its functions, when the President exercises power to discipline or remove a member of the ECZ from office under Article 270 read with section 5(8) and (9)(a) of the Act, he cannot be said to interfere with the independence of the ECZ as the Constitution itself gives him that power.

[8.40] In this case, however, the President did not remove the petitioner from office or terminate her contract as ECZ Vice-Chairperson as she alleged. The contract expired and was not renewed as revealed by the evidence.

[8.41] That being the case, we find that the incumbent President acted within the law when he notified the petitioner in the letter dated 7th June, 2022 which is on page 15 of the consolidated record of proceedings, that her appointment as Vice-Chairperson of the ECZ would not be renewed for

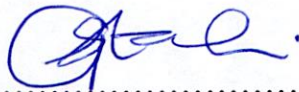
another term and instructed her to proceed on paid leave pending the expiration of her tenure of office on 17th June, 2022. The incumbent President's decision not to renew the petitioner's tenure of office as Vice-Chairperson of the ECZ was in accordance with the provisions of section 5 (3) of the Act.

[8.42] Based on the evidence brought before us, and in view of the clear provisions of section 5(1) and 5 (3) of the Act, we hold that the incumbent President was entitled to make the decision he made not to renew the petitioner's appointment. He cannot be faulted for exercising the power vested in him by the law. We further hold that contrary to the petitioner's assertion, the incumbent President did not prematurely terminate her appointment as Vice-Chairperson of the ECZ as the contract had expired as per appointment letter dated 16th June, 2020. Furthermore, the President did not contravene Articles 216 and 242 of the Constitution read with sections 5(3) and 6(1) of Act No. 25 of 2016 as amended by Act No. 5 of 2019 or the provisions of Articles 3, 8 and 92 as alleged.

[8.43] In the circumstances, we decline to grant the order that the decision by the President to prematurely terminate her employment as Vice-Chairperson of the ECZ is null and void. We also decline to grant an order that the President contravened Articles 216 and 242 of the Constitution

read with sections 5(3) and 6(1) of the Act. The claims for damages and costs similarly fail. In sum, the petition wholly fails and is dismissed.

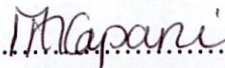
[8.44] Each party shall bear own costs.



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A. M. SITALI
CONSTITUTIONAL COURT JUDGE



.....
P. MULONDA
CONSTITUTIONAL COURT JUDGE



.....
M. M. KAWIMBE
CONSTITUTIONAL COURT JUDGE