

**IN THE CONSTITUTIONAL COURT
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



1ST PETITIONER

2ND PETITIONER

RESPONDENT

CORAM: Sitali, Mulenga and Mulongoti, JJC on 5th and 17th October, 2022, and on 19th December, 2023.

For the 1st Petitioner : **In Person**
For the 2nd Petitioner : **In Person**
For the Respondent : **Ms. T. Phiri and Mr M. Bwalya
In-House Counsel, Electoral
Commission of Zambia**

J U D G M E N T

Sitali JC delivered the majority Judgment of the Court.

Cases Cited:

1. Isaac Mwanza v Electoral Commission of Zambia and Attorney General 2020/CCZ/0008
2. Hakainde Hichilema and Another v Edgar Chagwa Lungu and 2 Others (2016/CCZ/0031)
3. Joseph Malanji and Bowman Lusambo v Attorney General and Electoral Commission of Zambia 2022/HP/1327
4. Aristogerasimos Vangelatos v Demetre Vangelatos and Others (2005) ZR 132
5. Attorney General and Electoral Commission of Zambia v Joseph Malanji and Bowman Lusambo CAZ/08/385/2022
6. Governance Elections Advocacy Research Services Initiative Zambia Limited v. The Attorney-General and the Electoral Commission of Zambia, 2022/CCZ/0020

7. Steven Katuka and Law Association of Zambia v Ngosa Simbyakula and 63 Others 2016/CCZ/0011

Legislation referred to:

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

Background

[1] This is the majority judgment of the Court following the abridged majority judgment which we delivered on 17th October, 2022.

[2] The Petition in this matter related to the pending parliamentary by-elections for Kabushi and Kwacha constituencies which fell vacant on 28th July, 2022 and 3rd August, 2022, respectively following this Court's decisions to uphold the nullifications on appeal. The Respondent subsequently set 15th September, 2022 as the date for by-elections in the two constituencies and conducted nominations on 25th 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 12th and 13th September, 2022 Alfred Yombwe and Lawrence Kasonde, respectively resigned as candidates for the elections. On 14th

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 13th September, 2022 in the case of **Joseph Malanji and Bowman Lusambo v Attorney General and Electoral Commission of Zambia**¹.

Petitioners' case

[4] The Petitioners alleged that the Respondent 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 following the resignation of the duo. 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 needed to fall within the ninety (90) days prescribed in Article 57(1) of the Constitution and that the 90 days period was due to expire on 27th October, 2022 and 2nd November, 2022 for Kabushi and Kwacha constituencies, respectively.

[5] The Petitioners thus sought the following reliefs:

- 1. A declaration that the omission by the Respondent to cancel the elections due to have taken place on 15th September 2022 in Kabushi and Kwacha Constituencies contravened the Constitution, and was thereby illegal;**
- 2. A declaration that nominations held by the Respondent on 25th August 2022 in Kabushi and Kwacha Constituencies were invalid, and any election held on the premise of the said nominations would contravene the Constitution, and would thereby be illegal, null and void;**
- 3. A declaration that the Respondent was obliged to hold fresh nominations for Kabushi and Kwacha Constituencies before 27th October 2022 and 2nd November 2022 respectively;**
- 4. A declaration that the Respondent was obliged to hold fresh elections for Kabushi and Kwacha Constituencies before 27th October 2022 and 2nd November 2022 respectively;**
- 5. A declaration that the nominations and elections held in Kabushi and Kwacha Constituencies after 27th October, 2022 and 2nd November, 2022 respectively, would be unconstitutional, illegal, null and void;**
- 6. An order compelling the Respondent to conduct fresh nominations and elections in Kabushi and Kwacha Constituencies by 27th October 2022 and 2nd 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 11th August, 2022 setting 15th September, 2022 as the date of the by-elections in the two constituencies, the two letters written to

the Respondent by Alfred Yombwe and Lawrence Kasonde indicating their withdrawal of candidacy, the Respondent's press statement of 14th September, 2022 suspending the elections set for 15th September, 2022 and the Respondent's letter also dated 14th September, 2022 acknowledging receipt of the duo's resignation letters.

[7] In skeleton arguments in support of the Petition, the Petitioners firstly argued on the strength of Article 57 (1) of the Constitution that a parliamentary by-election ought to be held within 90-days upon the occurrence of a vacancy in the office of Member of Parliament. They contended that the timeframe given by the Constitution runs from the time of the vacancy as this Court stated in **Isaac Mwanza v ECZ & Attorney General**¹ and that the prescription of the time within which the vacancy must be filled was meant to accord the constituents their right to representation in the shortest period of time.

[8] Further, that in this case, the ninety (90) day timeframe would expire on 27th October, 2022 for Kabushi Constituency and 2nd November 2022 for Kwacha Constituency. The Petitioners cited our decision in **Hakaide Hichilema and Another v Edgar Chagwa Lungu and 2 Others**² to the effect that the timeframe set out in the Constitution is binding. They thus

urged us to intervene and enforce the timeframe set by the Constitution for the holding of by-elections once a vacancy occurs.

[9] Citing Article 52(6) of the Constitution, the Petitioners argued that the resignation of the two candidates required the Respondent to cancel the election, call for fresh nominations and thereafter conduct by-elections within thirty (30) days from the date of filing fresh nominations. The Respondent's failure or omission to do so was, in the Petitioners' view, unconstitutional.

[10] At the hearing of the Petition, the 1st Petitioner reiterated 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 candidates contravened Article 52(6) of the Constitution.

[11] Addressing the Respondent's position that they could not act as required by Article 52(6) because of the court orders, the 1st Petitioner contended that the High Court did not have power to suspend timeframes set by the Constitution. That the indefinite suspension pronounced by the Respondent had that effect and was not tenable. The 1st Petitioner

highlighted the imminent lapse of the ninety (90) day period and the urgency of the Petition. He thus urged us to intervene by granting the reliefs sought in the Petition.

[12] The 2nd Petitioner added that the order of the High Court staying or suspending the by-elections did not bar the Respondent from performing its constitutional duties arising after the resignation of a candidate, that is, cancelling the election and calling for fresh nominations. He further submitted that the Court of Appeal had no jurisdiction to determine matters relating to the nomination or election of Members of Parliament. He argued that no court order could halt the timeframe set by the Constitution and that it was not tenable for the Respondent to rely on such a court order. The 2nd Petitioner further pressed the point that by virtue of the resignations, the initial nominations conducted by the Respondent in respect of the Kabushi and Kwacha constituencies had been invalidated and no elections could be validly held on those nominations.

Respondent's case

[13] 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 Zambia³ delivered on 13th September, 2022 which stayed or suspended the by-elections. That the High Court action related to the challenge of the nominations held on 25th 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.

[14] 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 20th October, 2022. The Respondent thus denied contravening the Constitution and reiterated that it was prevented from acting as required by the court orders.

[15] In opposing the Petitioners' affidavit, the Respondent reiterated the facts set out in its Answer and exhibited copies of the High Court Ruling of 13th September, 2022 staying the election, the ensuing order and the Court of Appeal *ex parte* order staying the High Court proceedings dated 16th September, 2022.

[16] In the skeleton arguments in opposition to the petition, the Respondent stated that the Respondent through a statutory instrument set 25th August,

2022 as the date for nominations and 15th September, 2022 as the poll day for the by-elections for Kabushi and Kwacha constituencies.

[17] The Respondent stated that two aspiring candidates for Kabushi and Kwacha constituencies, Bowman Lusambo and Joseph Malanji respectively, challenged the Respondent's decision to reject their nominations before the High Court in accordance with Article 52(4) of the Constitution.

[18] In the proceedings before the High Court, the two candidates applied to have the elections that were scheduled to be held on 15th September, 2022 stayed/suspended pending the determination of the matter. On 13th September, 2022 the High Court stayed/suspended the by-elections in Kabushi and Kwacha constituencies which were scheduled to be held on 15th September, 2022 pending hearing and determination of the petition.

[19] That an *ex parte* application was filed before the Court of Appeal for leave to appeal the interlocutory ruling and stay the proceedings before the High Court. On 16th September, 2022, the Court of Appeal granted an *ex-parte* order staying the High Court proceedings under cause number 2022/HP/1327. The said *ex-parte* order was confirmed by the full bench of the Court of Appeal on 22nd September, 2022 under cause number

CZA/8/383/2022. The Court of Appeal also set the 20th October, 2022 as the date for hearing the appeal.

[20] It was contended that there were two orders for stay issued by two different courts in relation to the Kwacha and Kabushi by-elections. The first one being the High Court Order dated 13th September, 2022 where the High Court ordered that the Kabushi and Kwacha parliamentary by-elections set for 15th September, 2022 be stayed/suspended pending the hearing and determination of the election petition. Accordingly, before the High Court could determine the matter, the Court of Appeal on 16th September, 2022 granted an *ex-parte* order staying the proceedings before the said Court.

[21] The Respondent submitted that the effect of the grant of a stay, was that it rendered the proceedings in the petition inactive, pending determination of the appeal. The Respondent further submitted that where a stay of execution is granted the intention of the court is to maintain the status quo of the parties, which position has been stated in a plethora of cases in Zambia.

[22] It was submitted that the Order dated 13th September, 2022 which stayed/suspended the Kabushi and Kwacha Parliamentary by-elections set for 15th September, 2022 meant that no further action could be taken relating to the said election until the High Court determined the petition before it. That the High Court in its Ruling dated 13th September, 2022 stated in no uncertain terms that the order was granted **"in order to avoid any prejudice that may be occasioned to the Petitioners or their petition being rendered academic."**

[23] The Respondent submitted that the effect of the order for Stay/Suspension therefore was that the Respondent was precluded from taking any further steps relating to the election until the High Court determined the petition before it. That this included the alleged cancellation of the election pursuant to Article 52(6) of the Constitution as that could amount to changing the status quo. It was further submitted that Article 52(6) of the Constitution empowers the Respondent to cancel an election in the event that a candidate resigns, dies or becomes disqualified by the Courts.

[24] The Respondent submitted that in order to comply with the provisions of Article 52(6) of the Constitution, there must be an act of cancelling an

election, in this case the election that was scheduled to be held on 15th September, 2022. That only after the election was cancelled, could the Respondent call for fresh nominations. The Respondent submitted that the action of cancelling the election would mean that the Respondent would be taking further steps contrary to the court order that stayed/suspended the election of 15th September, 2022.

[25] It was submitted that this action could be contemptuous and the Respondent would run the risk of being cited for contempt of court. That it therefore followed that since calling for fresh nominations required the cancellation of the election from which the candidates had allegedly resigned, Article 52(6) could not be effected as the High Court had stayed/suspended the election that had to be cancelled by the Respondent before calling for fresh nominations.

[26] The Respondent submitted that it was fortified by the holding in the case of **Attorney General and Electoral Commission of Zambia v Joseph Malanji and Bowman Chilocha Lusambo CAZ/08/385/2022** where the single Judge of the Court of Appeal held *inter alia* that:

“In this case, I granted a stay of proceedings in the High Court. The effective date for this stay was Friday, the 16th of September, 2022. The time therefore in the court below, as provided in Article 52(4) of the Constitution to hear the case stops running. The time will only start running after the stay is discharged by this Court. I am therefore of the considered view that the High Court will still have jurisdiction to deliver its judgment because the time will resume as soon as this Court discharges the stay.”

[27] It was submitted that the stay/suspension order had rendered the election inactive and maintained the status quo that existed at the time the said order was granted.

[28] The Respondent extensively submitted on the effect of the orders for stay. Citing a number of cases which included **Aristogerasimos Vangelatos v Demetre Vangelatos and Others**⁴, the Respondent posited that an order for stay is intended to maintain the status quo between the parties. It was the Respondent’s position that by virtue of the High Court order, it was precluded from taking further action relating to the Kabushi and Kwacha by-elections until the High Court determined the Petition.

[29] At the hearing of the petition, learned counsel for the Respondent, Mrs Phiri, 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 and the Court of Appeal. She further pointed out that the ninety (90) day timeframe set by the Constitution was yet to elapse and further that the sentiments of the single judge of the Court of Appeal in his Ruling in **Attorney General and Electoral Commission of Zambia v Joseph Malanji and Bowman Lusambo**⁵ were to the effect that the order of stay halted the running of time.

[30] Co-counsel for the Respondent, Mr Bwalya, 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 until the order was discharged.

Petitioners' Reply

[31] 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 and the Court of Appeal were not related to the resignation of the two

candidates and the orders for stay did not stop the Respondent from carrying out its constitutional mandates in line with Article 52(6) of the Constitution.

[32] The Petitioners contended that the order for stay of proceedings granted by the Court of Appeal did not bar fresh nominations from being called for as envisaged under Article 52(6) of the Constitution. They further argued that the Ruling of the single judge of the Court of Appeal sought to dislodge the timeframe specifically set by the Constitution and impeded the timely resolution of the electoral dispute in the present case.

[33] In his brief oral reply, the 2nd Petitioner discounted the Respondent's reliance on the orders issued by the Court of Appeal and the High Court as the basis for not carrying out its constitutional duty. He pointed out that the Respondent had accepted the resignation of the two candidates after the High Court had granted the order for stay or suspension of the by-elections.

[34] The 1st Petitioner submitted that the Respondent appeared to reverse a court order over constitutional provisions, and that this defied the supremacy of the Constitution. He urged us to uphold the Petition so as to

avert the risk of effluxion of the timeframe set by the Constitution for holding a by-election provided in Article 57(1).

Determination

[35] We duly 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 was that the Respondent received resignations from the two candidates on 12th and 13th September, 2022. The Petitioners alleged 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 15th September, 2022.

[36] In the main, the Petitioners sought a declaration that the omission by the Respondent to cancel the elections due to have taken place on 15th September, 2022 in Kabushi and Kwacha constituencies contravened the Constitution and was thereby illegal.

[37] 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 12th and 13th September, 2022. The resignations were duly acknowledged by the Respondent on 14th September, 2022.

[38] The Petitioners thus contended 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 contended that by failing to abide by the stipulation of Article 52(6), the Respondent breached the Constitution and that the omission was illegal. The Petitioners further contended that the failure by the Respondent to cancel the by-election in circumstances where the resignations were delivered and duly noted was a breach of duty imposed on the Respondent to do so by the Constitution.

[39] In opposing this claim, the Respondent confirmed that Alfred Yombwe and Lawrence Kasonde on 12th September, 2022 and 13th 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 14th September, 2022.

[40] The Respondent further stated that on 13th 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 15th September, 2022 pending the hearing and determination of the election petition under cause number 2022/HP/1327.

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

[42] We 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 15th 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 Constituency 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 13th September, 2022 staying the holding of the by-elections in the two constituencies on 15th September, 2022 pending the hearing and determination of the petition.

[43] 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, which resignations the Respondent accepted.

[44] 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 nomination 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.

[45] 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 constituency by-elections 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.

[46] It was not disputed that Alfred Yombwe resigned and withdrew his candidature from the Kabushi parliamentary by-election on 12th September, 2022 as evidenced by this letter to that effect on page 12 of the record of proceedings. It was also not disputed that Lawrence Kasonde resigned and withdrew his candidature from the Kwacha constituency by-election on 13th September, 2022 as evidenced by his letter to that effect to the Respondent on page 13 of the record of proceedings.

[47] As we pointed out earlier in this judgment, the High Court on 13th September, 2022 issued an order staying the holding of elections in the two constituencies scheduled for 15th September, 2022. Pursuant to that order, the Respondent issued a press statement notifying all stakeholders that the two by-elections in Kabushi and Kwacha constituencies would not be held on 15th September, 2022.

Article 52(6) of the Constitution 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."

[48] It will be observed that where any of the events set out in Article 52(6) of the Constitution occurs, the Respondent is required to cancel the election and require the filing of fresh nominations by eligible candidates and to hold elections within thirty days of the filing of fresh nominations. We make this observation subject to what we stated in our judgment in the

case of **Governance Elections Advocacy Research Services Initiative Zambia Limited v. The Attorney-General and the Electoral Commission of Zambia**⁽⁶⁾ that a reference in Article 52(6) to a candidate resigning does not apply to an independent candidate. This is because in terms of Article 51 of the Constitution, a person is eligible for election as an independent candidate for a National Assembly seat, if the person is not a member of a political party and has not been a member of a political party for at least two months immediately before the date of the election.

[49] In the present case, however, the purported resignation from the election in Kabushi by Alfred Yombwe on 12th September, 2022 and that of Lawrence Kasonde from the election in Kwacha coincided with the order granted by the High Court staying the holding of the elections in the two constituencies. The Respondent thus argued that in the face of the High Court order staying the elections in the two constituencies, it could not take any further steps regarding the two elections until the order to stay was vacated or set aside.

[50] It is clear that while the High Court proceedings were anchored on clause (4) on challenging nominations, the Petition before us was anchored

on clause (6) regarding the death, resignation or disqualification of a candidate. Therefore, the proceedings before the High Court and this Court both sought to enforce constitutional provisions touching on nominations.

[51] Further, both proceedings related 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 suspending or staying the Kabushi and Kwacha elections had been granted on 13th September, 2022.

[52] Paragraph 8.43 of the High Court's Ruling at page 63 of the record of proceedings read as follows:

In order to avoid any prejudice that may be occasioned to the Petitioners, or their petition being rendered academic, we find that this is a fit and proper case for the by-elections in the Kwacha and Kabushi constituencies which are scheduled to be held on Thursday 15th September, 2022 to be suspended or stayed pending determination of the

petition, and we accordingly grant the stay with costs in the cause.

[53] The stay of the election was granted on 13th September, 2022 while the purported resignations by the two candidates were communicated to the Respondent on 12th and 13th September, 2022. It will be observed from the paragraph of the High Court Ruling set out above, that the holding of the by-elections in the Kabushi and Kwacha constituencies was suspended or stayed pending the determination of the petition in the High Court. However, before the High Court could determine the matter before it, the proceedings before the court were stayed by the Court of Appeal.

[54] We wish to emphasise that the Respondent was obligated to obey court orders, unless and until they were 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 for the Respondent to comply with the High Court order which stayed the holding of elections on 15th September, 2022.

[55] In the circumstances, our view is that the Respondent did not breach its constitutional mandate when it did not cancel the election, call for fresh

nominations and hold elections within thirty days as stipulated by Article 52(6) of the Constitution for two reasons. Firstly, it was bound to obey the High Court order which stayed the holding of the elections in issue on 15th 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. 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.

[56] On the facts of this case as they stood, we declined to grant the declaration that the Respondent contravened the Constitution by its omission to cancel the elections due to have taken place on 15th September 2022 in the Kabushi and Kwacha constituencies.

[57] We further declined to grant the declaration that nominations held by the Respondent on 25th August, 2022 in the Kabushi and Kwacha constituencies were invalid and that any election held based on those nominations would contravene the Constitution and would be illegal and null and void as the High Court which had jurisdiction to make that determination had not made a pronouncement to that effect.

[58] The Petitioners' further contended that any election held pursuant to Article 52(6) needed to be held within the 90-day period provided in Article 57(1) and that any election held outside the original 90 days would be illegal and unconstitutional. The case of **Isaac Mwanza v Electoral Commission of Zambia and the Attorney General**¹ was cited in support. Our view is that while Article 57(1) sets the timeframe within which by-elections are to be held following the occurrence of a vacancy, Article 52(6) provides for holding elections during the period after initial nominations for elections or by-elections are cancelled as a result of death, resignation or disqualification of a candidate.

[59] We stated in the case of **Steven Katuka and Law Association of Zambia v Ngosa Simbyakula and 63 Others**⁷ 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 real intention of the framers of the Constitution. In this matter, Articles 57(1) and 52(6) must be read in light of each other as they both contain mandatory provisions on timeframes. It is evident 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).

[60] It follows that once Article 52(6) is triggered, the 90 days in Article 57(1) is affected based on the timing of the death, resignation or disqualification in issue. The Petitioners acknowledged that Article 57(1) is affected by the time the events in Article 52(6) happen. Accordingly, where the 30-day timeframe in Article 52(6) goes beyond the 90 days set in Article 57(1), those elections would be valid because the 90-day timeframe has been extended by the Constitution itself and not any other provision outside the Constitution. For that reason, we held that there was no contravention of the Constitution on that aspect as well.

[61] We therefore declined to grant the declaration that the Respondent was obliged to hold fresh nominations for Kabushi and Kwacha constituencies before 27th October, 2022 and 2nd November, 2022 respectively. We further declined to grant an order compelling the Respondent to conduct fresh nominations and elections in Kabushi and Kwacha constituencies by 27th October, 2022 and 2nd November, 2022, respectively.

[62] We were further of the view that a declaration that the Respondent was obliged to hold elections for Kabushi and Kwacha constituencies by 27th October, 2022 and 2nd November, 2022 respectively, and a declaration

that nominations and elections held in Kabushi and Kwacha constituencies after 27th October, 2022 and 2nd November, 2022 respectively, would be unconstitutional, illegal, null and void was untenable and would serve no useful purpose on the facts of this case. In sum, the petition wholly failed and was dismissed.

[63] Each party was ordered to 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

[64] I have read the majority decision and I am essentially in agreement with the interpretation of Article 52(6) and 57(1) of the Constitution as regards the cancellation of elections and the timeframes for holding by-elections, respectively.

[65] I first wish to briefly add, on the 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 57(1) of the Constitution.

[66] 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.

[67] 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.

[68] Generally, in such a case, 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) of the Constitution. This is premised on one of the triggers of Article 52 (6) being the resignation of candidates after nomination but before the election or by-election which is subsequent to the Article 52(4) proceedings. It does not matter whether the challenged nominations are found to be valid or invalid by the High

Court under the proceedings under Article 52(4), as Article 52(6) requires that the election based on those nominations should be cancelled and fresh nominations held. This position regarding the triggering of Article 52(6) has since been partially affected, in relation to independent candidates, by the subsequent decision of this Court in **Governance Elections Advocacy Research Services Initiative Zambia Limited v The Attorney General and the Electoral Commission of Zambia**⁽⁶⁾ to the effect that the reference to a candidate in Article 52(6) does not apply to independent candidates.

[69] My point of departure from the majority position was based on the facts of the case as they stood at the time of the delivery of the Abridged Judgment.

[70] On the facts of this case and as correctly advanced by the Respondent, it 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 was to be maintained until a court of competent jurisdiction pronounced itself on the status of those proceedings.

[71] In this matter however, the Respondent did not maintain the status quo as required in light of the fact, which fact was also placed on record,

that the Respondent proceeded to set 21st October, 2022 as the date for the by-election in the two constituencies based on the nominations of 25th August, 2022 without first complying with the provisions of Article 52(6). This was 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 was unfortunate in light of the Respondent's contention that it could not cancel the elections and call for fresh nominations 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 and justice systems.

[72] It was thus based on the facts of this case as they stood, 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, that I was of the considered view that the Respondent had 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 were still subsisting. This was in line with this Court's decision in the case of **Isaac Mwanza v Electoral Commission of Zambia and Attorney General**³ on resignations.

[73] Hence, that the Petition had merit in that respect.



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M.S. MULENGA
CONSTITUTIONAL COURT JUDGE