

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

2023/CCZ/0021

IN THE MATTER OF: ARTICLE 2, 47 AND 106(3) OF THE CONSTITUTION OF  
ZAMBIA (AMENDMENT) ACT NO 2 OF 2016

IN THE MATTER OF: SECTION 7 OF ACT NO. 1 OF 2016

IN THE MATTER OF: SECTION 2 OF ACT NO. 1 OF 2016

IN THE MATTER OF: REPEALED ARTICLE 35 OF THE CONSTITUTION OF  
ZAMBIA 1991 AS AMENDED

IN THE MATTER OF: THE EFFECT OF THE NOW REPEALED ARTICLE 35 OF  
THE CONSTITUTION OF ZAMBIA (AS AMENDED) ON  
EDGAR LUNGU'S FIRST TERM AS PRESIDENT

BETWEEN:

MICHELO CHIZOMBE

AND

EDGAR CHAGWA LUNGU

ELECTORAL COMMISSION OF ZAMBIA

THE ATTORNEY GENERAL



PETITIONER

1<sup>st</sup> RESPONDENT

2<sup>nd</sup> RESPONDENT

3<sup>rd</sup> RESPONDENT

Coram: Munalula PC, Shilimi DPC, Musaluke, Mulongoti, Mwandenga,  
Kawimbe and Mulife JJC on 7<sup>th</sup> October, 2024 and 10<sup>th</sup> December,  
2024.

For the Petitioner: Mr M. Moono of Messrs L. J. Michaels Legal  
Practitioners

For the 1<sup>st</sup> Respondent: Mr B. C. Mutale, SC of Messrs Ellis & Co.

Mr M. Zulu and Mr J. Zimba of Messrs Makebi Zulu  
Advocates



For the 2<sup>nd</sup> Respondent: Ms T. Phiri and Mr M. Bwalya – In house Counsel

For the 3<sup>rd</sup> Respondent: Mr M. Kabesha SC, Attorney General, Mr M. Muchende SC, Solicitor General, Mr C. Mulonda, Principal State Advocate, Mr N. Mwiya, Principal State Advocate, Ms M. Katolo, Senior State Advocate and Mr M. Mutwena, Senior State Advocate.

Amicus Curiae: Mr J. Sangwa, SC

---

## J U D G M E N T

---

**Shilimi – DPC, delivered the judgment of the Court**

**Cases referred to-**

1. Steven Katuka and Law Association of Zambia v The Attorney General, and Ngosa Simbyakula and 63 Others, CCZ Selected Judgment No. 29 of 2016.
2. Zambia National Commercial Bank Plc v Martin Musonda and 58 others, CCZ Selected Judgment No. 24 of 2018.
3. Legal Resources Foundation Limited and 2 Others v Edgar Chagwa Lungu and The Attorney General, CCZ Selected Judgment No. 27 of 2021.
4. Mutembo Nchito v The Attorney General, 2016/CCZ/009.
5. Harja Import & Export Limited v Zambia Revenue Authority (2000) ZNSC 109
6. Daniel Pule and Others v The Attorney General and Others, 2017/CCZ/004.
7. Bampi Aubrey Kapalasa and Another v The Attorney General, (CCZ 11 of 2021; CCZ 14 of 2021) [2021] ZMCC 7.
8. Hussein Safieddinne v The Commissioner of Lands, and Others, SCZ Selected Judgment No. 36 of 2017.
9. Chick Masters Limited and Another v Investrust Bank Plc, SCZ Appeal No.74 of 2014.
10. Zambezi Portland Cement Limited & Another v Stanbic Bank Zambia Limited, (2010) 2 Z.R. 479.
11. Ituna Partners v Zambia Open University Limited (2014) ZMSC 54.
12. Martin Nyambe v The Attorney General, Appeal Number 2 of 2022.
13. Gleeson v J. Wippell (1977) WLR. 510.



14. Taylor and Another v Lawrence and Another, v 2002 EWCA CIB 90.
15. Bizwayo Newton Nkunika v Lawrence Nyirenda, and Electoral Commission of Zambia, 2019/CCZ/005.
16. Charles Maboshe v Stephen Nyirenda, Lucy Changwe and Electoral Commission of Zambia, 2021/CCZ/0031.
17. Attorney General & Another v Lewanika & Others, SCZ Judgment No. 2 of 1994.
18. Zambia Consolidated Copper Mines Limited v Jackson Munyika Siame and 33 Others, (2004) Z.R. 193 (SC).
19. Match Corporation Limited and Development Bank of Zambia v The Attorney General, SCZ Judgment No. 3 of 1999.
20. Interim Independent Electoral Commission number 2 of 2011, KESCY (ALR) 2011.
21. Maxwell Mwamba & Stora Solomon Mbuli v The Attorney General of Zambia, (1993) 3 LRC 166.
22. Camps Bay Ratepayers' and Residents' Association and PS Booksellers (Pty) Ltd v Gerda Yvonne Ada Harrison and Municipality of Cape Town [2010] ZACC 19.
23. Vuyile Jackson Gcaba v Minister for Safety and Security, National Commissioner for the South African Police Service, Provincial Commissioner of the South African Police Service, Eastern Cape, Morgan Govender and Vakala Moyake [2009] ZACC 26.
24. Amalgamated Trustees Limited v Associated Discount House Limited (2007) LPELR 454.
25. Fredrick Otieno Outa v Jared Odoyo Okello, Independent Electoral and Boundaries Commission, Returning Officer, Nyando Constituency and ODM Party, Petition No. 6 of 2014.
26. President of the Senate and 2 Others v Innocent Gonese and 3 Others, Judgment No. CCZ 01/21.
27. Dobbs State Health Officer of the Mississippi Department of Health, et al v Jackson Women's Health Organisation et al, US Supreme Court 597 US 215 (2022).
28. Davis Jokie Kasote v The People (1997) Z.R. 75.



29. Finsbury Investments Limited and Rajan Mahtan, and Joan Craven and David P.K. Kanaganayagam v Antonio Ventriglia and Manuela Ventriglia, SCZ Judgment No 17 of 2013.
30. Fidelitas Shipping Case [1966]1 QB 630, 640.
31. Molaudzi v S [2015] 2 SACR 341.
32. Benard Kanengo v The Attorney General, and Electoral Commission of Zambia, 2022/CCZ/0024.
33. Lucas Haamatowe & Others v Zambia Postal Services Corporation 2022/CCZ/0015.
34. Lucky Mutambo v Attorney General 2023/CCZ/007.

#### **Legislation referred to-**

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

The Constitution of Zambia Act, 1991 as amended by the Constitution of Zambia (Amendment) Act No. 18 of 1996.

The Constitutional Court Act No. 8 of 2016.

The Constitutional Court Rules, Statutory Instrument No. 37 of 2016.

#### **Works Referred to-**

The Rules of the Supreme Court of England 1999 Edition (White Book)

Halsbury's Laws of England 5<sup>th</sup> Ed. Vol. 11.

Hector Fix-Fierro and Pedro Salazar-Ugarte Presidentialism in Michel Rosenfeld and Andras Sajó (editors) The Oxford Handbook of Comparative Constitutional Law, 2012.

Black's Law Dictionary, 10<sup>th</sup> edition

1<sup>st</sup> and final Draft Reports of the Technical Committee on drafting the Zambian Constitution.



## 1.0 The Petitioner's Case

1.1 The Petitioner Michelo Chizombe filed a Petition on 9<sup>th</sup> October, 2023 in his capacity as a Zambian citizen. In his Petition, he alleged the following contraventions of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution) on the part of Edgar Chagwa Lungu, the 1<sup>st</sup> Respondent and the Electoral Commission of Zambia, the 2<sup>nd</sup> Respondent:

- i. That the 1<sup>st</sup> Respondent contravened the Constitution when he participated in the August 2021 presidential elections, and
- ii. That the 2<sup>nd</sup> Respondent contravened the Constitution when it firstly accepted the 1<sup>st</sup> Respondent's nomination; secondly, by putting the 1<sup>st</sup> Respondent on the presidential ballot paper for the August, 2021 presidential elections and lastly by enabling him to participate in the August 2021 presidential elections.

1.2 The Petitioner thus seeks the following remedies:

- i. **A declaration that the Electoral Commission of Zambia's (ECZ) inclusion of the 1<sup>st</sup> Respondent on the 2021 ballot was unconstitutional;**
- ii. **A declaration that the 1<sup>st</sup> Respondent's participation in the August, 2021 election was unconstitutional;**
- iii. **A declaration that the 1<sup>st</sup> Respondent is not eligible to contest a Presidential election under the current Constitution as read with the now repealed 1991 Constitution (as amended);**



- iv. **Combined interpretation of Section 7 of Act No. 1 of 2016 and Section 2 of the same Act;**
- v. **Interpretation of Section 7 of Act No. 1 of 2016;**
- vi. **Interpretation of Section 2 of Act No. 1 of 2016;**
- vii. **A declaration that the entire Article 106 of the Constitution did not apply to the 1<sup>st</sup> Respondent's Presidential term between 25<sup>th</sup> January, 2015 and 13<sup>th</sup> September 2016;**
- viii. **An interpretation as to whether Section 7 and Section 2 of Act No. 1 of 2016 had the effect of saving Article 35 of the 1991 Constitution (as amended) in regard to the 1<sup>st</sup> Respondent's Presidential term between 25<sup>th</sup> January, 2015 and 13<sup>th</sup> September, 2016.**
- ix. **A declaration that the 1<sup>st</sup> Respondent is not eligible to seek Presidential office for a third term and;**
- x. **Any other relief the court may deem fit.**

1.3 The Petition is supported by an Affidavit verifying facts sworn by the Petitioner dated 9<sup>th</sup> October, 2023. The Petitioner deposed chiefly that the 1<sup>st</sup> Respondent had been twice elected and has twice held the office of President, thereby making him ineligible to participate in the August, 2021 presidential elections and any future elections to the office of the Republican President of Zambia

1.4 The Petitioner also relied on his Affidavit in opposition to the Notice of Motion for determination of questions of law and skeleton arguments dated 19<sup>th</sup> December, 2023.

1.5 The Petition is further supported by skeleton arguments dated 9<sup>th</sup> October, 2023. In his skeleton arguments, the Petitioner called upon the Court, in considering his Petition, to interpret the Constitution in



accordance with Article 8 on national values, principles and economic policies, Article 9 on the application of national values and principles and Article 267 of the Constitution which requires the Constitution to be interpreted in accordance with the Bill of Rights and in a manner that promotes its purposes, values and principles, among others.

- 1.6 The Petitioner also referred the Court to the case of **Steven Katuka and Law Association of Zambia v The Attorney General and Ngosa Simbyakula and 63 Others**<sup>1</sup> in which the Court took an interpretation which acknowledges the broad objectives and values of an underlying subject matter. He also referred the Court to the case of **Zambia National Commercial Bank Plc v Martin Musonda and 58 Others**<sup>2</sup> in which this Court held that when interpreting the Constitution, all relevant provisions bearing on the subject for interpretation should be considered together as a whole in order to effect the objective of the Constitution.
- 1.7 He finally, on the issue of constitutional interpretation, made reference to the case of **Legal Resources Foundation Limited and 2 Others v Edgar Lungu and The Attorney General**<sup>3</sup> in which this Court stated that when interpreting provisions of the Constitution, the starting point is to consider the literal meaning of the words unless the literal meaning results in absurdity or causes conflict among other constitutional provisions subject for interpretation.



1.8 The Petitioner anchored his Petition on the provisions of Section 2 and 7 of Act No. 1 of 2016 (the Act) and their effect on the repealed Article 35 of the Constitution in relation to the 1<sup>st</sup> Respondent's first Presidential term. The Petitioner also addressed the effect of Article 106 of the Constitution on the 1<sup>st</sup> Respondent's second Presidential term. He argued that based on the holistic reading of these provisions, the Constitution bars the 1<sup>st</sup> Respondent from contesting for a third term as President.

1.9 The Petitioner submitted that the Act contains adequate transitional provisions and referred the Court to its decision in **Mutembo Nchito v The Attorney General**<sup>4</sup> where it held that:

**Act No. 1 of 2016 is the enabling or effecting Act of the Constitutional amendments and in it are all the relevant provisions for ensuring a seamless transition from one constitutional order to another.**

1.10 He argued that the Act addressed how the transition process would affect the office of the President and the incumbent President at the time. Reference was made to Section 7 of the Act which provides:

**(1) The President shall continue to serve as President for the unexpired term of that office as specified by the Constitution in accordance with the Constitution.**

1.11 It was the Petitioner's submission that section 7(1) of the Act unambiguously states which constitutional regime applies to the transition period in question. He referred the Court to Section 2 of the Act which provides that the applicable constitutional regime referred



to in Section 7 is the repealed Article 35 of the Constitution. Section 2 of the Act provides as follows:

**“Constitution” means the Constitution of Zambia, 1991, in force immediately before the effective date.**

1.12 It was further argued on behalf of the Petitioner that the transitional clauses do not provide for the retroactive application of the Constitution. He submitted that Sections 2 and 7 of the Act clearly identify the applicable Constitution to the 1<sup>st</sup> Respondent’s first term.

1.13 With regard to Article 106 of the Constitution, it was the Petitioner’s submission that since Sections 2 and 7 of the Act ensured that the repealed Article 35 of the Constitution applied to the 1<sup>st</sup> Respondent’s first presidential term, it follows that the second presidential term was subject to Article 106 of the Constitution.

1.14 Counsel submitted that the 1<sup>st</sup> Respondent served his first presidential term from 25<sup>th</sup> January, 2015 to 13<sup>th</sup> September, 2016, which was considered a full term, as per the repealed Article 35, of the Constitution. That the 1<sup>st</sup> Respondent thereafter served the second presidential term from 13<sup>th</sup> September, 2016 to August 2021 under Article 106 of the Constitution and he cannot consequently serve a third presidential term as that would be unconstitutional. Counsel further argued that the consequence of this was also that the



1<sup>st</sup> Respondent in effect contravened the Constitution through his nomination and participation in the 2021 elections.

1.15 With regard to the principle of *per incuriam*, it was submitted that as a general rule, *per incuriam* generally refers to a judgment rendered in ignorance or forgetfulness of a relevant statute, provision or other authority binding on the Court. That in these circumstances, the Court is tasked with correcting these errors through the principle of *per incuriam*.

1.16 The Petitioner referred the Court to the case of **Harja import & Export Limited v Zambia Revenue Authority**<sup>5</sup> in which the Supreme Court held that:

It is a well-established principle that this Court is bound by its decisions except where there are two conflicting decisions or where a previous decision was *per incuriam*.

1.17 It was argued that the **Legal Resources Foundation**<sup>3</sup> case was rendered *per incuriam*, as the Court omitted to read section 2 with section 7 of the Act which requires that the repealed Article 35 of the Constitution be applied to the 1<sup>st</sup> Respondent's first presidential term.

1.18 Counsel argued on the basis of the above submission that the Court should depart from the majority decision in the **Legal Resources Foundation**<sup>3</sup> case.

1.19 With regard to the 1<sup>st</sup> Respondent's argument that the action before this Court is *res judicata*, this Court having previously pronounced



itself three times on the same matter, specifically in the cases of **Daniel Pule and Others v Attorney General and Others**<sup>6</sup>, **Bampi Aubrey Kapalasa and Another v The Attorney General**<sup>7</sup> and **Legal Resources Foundation**<sup>3</sup>, the Petitioner opposed this claim as there was a clear distinction between this matter and the three above stated previous cases.

1.20 He argued that whereas the previous cases were mainly focused on Article 106 (3) of the Constitution, the present case is about the interpretation of Sections 2 and 7 of the Act as read with the repealed Article 35 of the Constitution. He noted that whereas the doctrine of *res judicata* prevents a party from relitigating a matter that has already been resolved by a court of competent jurisdiction, the rationale being to promote finality of judgments, conserving judicial resources, and protecting litigants from vexatious litigation, this doctrine was inapplicable in the present case.

1.21 He also referred this Court to the Supreme Court decision in **Hussein Safieddinne v The Commissioner of Lands and Others**<sup>8</sup> which laid down three essential elements of *res judicata* as follows: Firstly, there must be an earlier decision on the issue, secondly, there must be a final judgment on the issue and thirdly, there must be an involvement of the same parties or parties in privity with the original parties in the same cause.



1.22 The Petitioner argued that this matter bears a clear difference with the previous cases as the Petitioner was not a party to the previous cases. He on this basis argued that the matter cannot therefore be deemed *res judicata*: He further argued that the doctrine of *res judicata* is not an absolute principle as there are several exceptions to its application. He listed the exceptions as lack of jurisdiction, the presence of fraud or collusion, material changes in the law or facts, and mistake or *per incuriam* where a judgment was based on a mistake or omission of relevant facts or law, rendering it potentially worth review.

1.23 With regard to the claim of abuse of court process by the 1<sup>st</sup> Respondent, the Petitioner referred this Court to **Order 18/19 of the Supreme Court Rules of England (White Book)** and the cases of **Chick Masters Limited and Another v Investrust Bank Plc<sup>9</sup>**, and **Zambezi Portland Ltd v Stanbic Bank Zambia Limited<sup>10</sup>** and submitted that in the case at hand, the Petitioner had not relitigated the matter and this case does not amount to abuse of court process.

1.24 On the claim by the 1<sup>st</sup> Respondent that the Court is in this matter *functus officio*, the Petitioner referred the Court to **Halsbury's Laws of England** which defines *functus officio* as:

An instance where justice or indeed the Court has discharged all its judicial functions in a case.



1.25 He also referred the Court to the case of **Ituna Partners v Zambia Open University Limited**<sup>11</sup> where the Supreme Court held *inter alia* that:

**A Court becomes functus officio when all the substantive issues in the cause are determined by it. If such matters are not determined by the Court, like in the case of Jack Lwengu, then the Court is not functus officio.**

1.26 Based on the above authorities, counsel submitted that the Court did not rule on the issues raised in this matter and more importantly that the *functus officio* argument only applies where an issue is sought to be raised in the same action where a court has already rendered a final judgment which is not the case in this matter.

1.27 With regard to the 1st Respondent's submission that the Petition is out of time and that the Court lacks jurisdiction to hear the matter, the Petitioner submitted that this Petition is not premised on Articles 101 (4) to (7) of the Constitution as he is not disputing the eligibility of the winning presidential candidate and neither is he disputing the election of a President nor the nullification of the outcome of the presidential election.

1.28 In orally augmenting his written submissions, the Petitioner's counsel submitted that the Court was essentially being asked to interpret the meaning and effect of sections 7 and 2 of the Act and whether a combined reading of the two provisions does not preserve the 1<sup>st</sup>



Respondent's first presidential term under the repealed Article 35 of the Constitution.

1.29 He further submitted that the 1<sup>st</sup> Respondent did not qualify to participate in the 2021 presidential election and neither does he qualify to participate in any future presidential election in Zambia under the Constitution. This, he argued, was because he has served two full terms and will be in violation of the Constitution if he attempted to seek a third term.

1.30 It was argued that to attempt to apply Article 106 of the Constitution to the 1<sup>st</sup> Respondent's first presidential term would be unconstitutional as it has no retrospective effect. He referred the Court to the Supreme Court decision in the case of **Martin Nyambe v The Attorney General**<sup>12</sup> in which it held that laws have no retrospective effect unless the amendments explicitly so provide.

1.31 With regard to the plea of *res judicata*, Counsel submitted that the reliefs that he seeks in this matter are different from the matters that have previously been before this Court. He further stated that the Petitioner has never been a party to any previous proceedings before this Court. Counsel argued further that there can be no *res judicata* in a matter where a party argues that a judgment has been delivered in ignorance or forgetfulness or omission of an important provision of the law.



1.32 With regard to the 1<sup>st</sup> Respondent's argument that this Court is *functus officio*, Counsel reiterated that the Court can only be *functus officio* in a matter it had heard on its merits and rendered a final judgment, noting that this matter had just commenced. That this matter cannot therefore, be said to be *functus officio*, and neither can it be argued that the proceedings are an abuse of court process as the Petitioner is not relitigating.

## **2.0 1<sup>st</sup> Respondent's case**

2.1 The 1<sup>st</sup> Respondent filed an Answer to the Petition and Affidavit verifying Answer both dated 17<sup>th</sup> November, 2023. The Affidavit verifying Answer was sworn by Edgar Chagwa Lungu in which he succinctly averred that he would rely on the contents of the Answer.

2.2 He also relied on the Affidavit in support of Notice of Motion for determination of questions of law and skeleton arguments in support of the Notice of Motion for determination of questions of law both dated 30<sup>th</sup> November, 2023.

2.3 In his Answer to the Petition, the 1<sup>st</sup> Respondent contended that this Court had already pronounced itself on the issues being raised by the Petition and that he had not served two terms. He further stated that this Court had thoroughly reviewed all legal provisions including the repealed Article 35 of the Constitution and that the majority



decision was not made in ignorance of any applicable law. He finally urged this Court to embrace the principle of finality in legal decisions, considering the potential adverse consequences of setting aside a decision that was rightfully made in his favour.

2.4 The Affidavit verifying Answer repeated the contents of the Answer.

2.5 The 1<sup>st</sup> Respondent's case was further supported by skeleton arguments. Therein and with regard to the doctrine of *res judicata*, the Court was referred to the cases of **Chick Masters Limited**<sup>9</sup> and **Hussein Saffieddine**<sup>8</sup> in which the Supreme Court held that the objective of the doctrine of *res judicata* was to discourage re-litigation of the same issues definitively settled by judicial decision except by means of an appeal.

2.6 It was argued that the issues raised in the Petition, that is the interpretation or consideration of Article 106 (3) of the Constitution, and the determination of the 1<sup>st</sup> Respondent's eligibility to stand as a presidential candidate in 2021 had already been settled by judicial decision or judgment.

2.7 With regard to the issue of involvement of same parties or parties in privity, the Court was referred to the English case of **Gleeson v J. Wippell**<sup>13</sup> in which it was held that:

**The requisite privity is said to be a privity either of blood, of title or of interest.**



- 2.8 It was argued in this respect that the Petitioner shares a similar interest with the Petitioners in the three previously decided cases of **Daniel Pule<sup>6</sup>, Bampi Kapalasa<sup>7</sup> and Legal Resources Foundation<sup>3</sup>**. It was further argued that the similarity arises from this Petition's foundation on the 1<sup>st</sup> Respondent's eligibility, and seeking the interpretation of Article 106 (3) of the Constitution among other pertinent matters.
- 2.9 It was also submitted that this Court having interpreted Article 106 (3) of the Constitution in the said three previously decided cases, lacks jurisdiction to hear and determine this Petition, as it has become *functus officio*.
- 2.10 It was further submitted that since the current Petition seeks to indirectly challenge or involves the presidential election of 2021, the process for challenging election results, as per Article 101 (4) (a) and (b) of the Constitution should have been followed and pursued within the designated time-frame and process.
- 2.11 The 1<sup>st</sup> Respondent further argued that the challenge regarding the 2021 election or his eligibility to run in those presidential elections, based on the claim that he has previously held the presidential office twice, should have been brought forth following the prescribed procedure. That reopening this issue through a separate Petition is legally unsound and exceeds the Court's jurisdiction.



2.12 In orally augmenting the written submissions, the 1<sup>st</sup> Respondent submitted that the Petition is incompetent on the ground that it challenges his nomination as a presidential candidate in the 2021 elections as well as his candidacy in the same elections. He argued that this Court has no jurisdiction to entertain this Petition as Article 52 (4) of the Constitution provides that a challenge to the nomination of a candidate may only be made within seven days of the close of nomination. That the nominations for the 2021 elections were held more than three years ago and an attempt to challenge his nomination at this late stage is misconceived.

2.13 With regard to the presidential election, it was submitted that Article 103 of the Constitution provides a mechanism for the challenge of the election of a President-elect. It was further submitted that what was before the Court was unique as the Petitioner has petitioned a losing candidate noting that there is no provision in the Constitution for the challenge of a losing candidate and the Petition was to that extent misconceived.

2.14 It was also submitted that the provisions of the repealed Article 35 of the Constitution, Section 7 and Section 2 of the Act were considered in the **Legal Resources Foundation**<sup>3</sup> case in the dissenting judgment and that the Court was therefore aware of these



provisions. Further that the doctrine of *per incuriam* does not therefore apply.

2.15 With regard to the doctrine of *res judicata*, it was argued that the issue before the Court had already been dealt with three times and the doctrine of issue estoppel and cause of action estoppel therefore apply. It was further argued that in a matter such as this, where a Court has come to the final conclusion having heard the matter on its merits, there is nothing further that can be done.

2.16 It was finally submitted that the mode of requesting this Court to review its own decision is wrong and the Court should therefore not entertain this matter. In this respect, the Court was referred to the English case of **Taylor and Another v Lawrence and Another**<sup>14</sup>.

### 3.0 2<sup>nd</sup> Respondent's case

3.1 The 2<sup>nd</sup> Respondent filed an Answer to the Petition, Affidavit in support of Answer to the Petition and skeleton arguments all dated 16<sup>th</sup> November, 2023. It also relied on its Affidavit in opposition to Notice of Motion for determination of questions of law and skeleton arguments in support of Affidavit in Opposition to Notice of Motion for determination of questions of law both dated 19<sup>th</sup> December, 2023.



- 3.2 In its Answer to the Petition, the 2<sup>nd</sup> Respondent submitted that in the performance of its functions it is guided by relevant electoral laws including the Constitution, the Electoral Process Act No. 35 of 2016, the Electoral Commission of Zambia Act No. 25 of 2016 and the Regulations promulgated under these laws.
- 3.3 It was also submitted that the Constitution obliges the 2<sup>nd</sup> Respondent to either accept or reject nomination papers filed by a candidate wishing to contest presidential elections. It was further submitted that it abided by all the requisite laws for processing the nominations for the presidential candidates.
- 3.4 The Affidavit in support of the 2<sup>nd</sup> Respondent's Answer sworn by Mr Brown Kasaro, the Chief Electoral Officer, essentially repeated the contents of the Answer.
- 3.5 The 2<sup>nd</sup> Respondent's case was further supported by skeleton arguments in which it was submitted that it did not breach the Constitution when it accepted the nomination of the 1<sup>st</sup> Respondent as it followed all the electoral laws related to the nomination referred to in the Petition.
- 3.6 The Court was referred to the case of **Bizwayo Nkunika v Lawrence Nyirenda and Electoral Commission of Zambia**<sup>15</sup> in which we guided on the mandate of the 2<sup>nd</sup> Respondent in relation to Article 52 (2) of the Constitution that:



the 2<sup>nd</sup> Respondent's mandate was to either out-rightly accept or reject the nomination based on the qualifications submitted by the candidate.

3.7 The Court was also referred to the case of **Charles Maboshe v Stephen Nyirenda, Lucy Changwe and Electoral Commission of Zambia**<sup>16</sup> in which this Court guided on the steps for challenging a nomination filed in accordance with Article 52 of the Constitution.

3.8 It was finally submitted that the nominations for the 2021 general elections conducted from 17<sup>th</sup> May, 2021 to 20<sup>th</sup> May, 2021 were conducted in accordance with the requisite laws and did not breach any provisions of the law during that process.

3.9 At the hearing, the 2<sup>nd</sup> Respondent relied entirely on its written submissions.

#### 4.0 3<sup>rd</sup> Respondent's case

4.1 The 3<sup>rd</sup> Respondent filed an Answer to the Petition, Affidavit in opposition and skeleton arguments on 16<sup>th</sup> November, 2024. The 3<sup>rd</sup> Respondent also relied on the Affidavit in opposition to the 1<sup>st</sup> Respondent's Notice of Motion for determination of questions of law and skeleton arguments in opposition to the 1<sup>st</sup> Respondent's Notice of Motion for determination of questions of law both dated 19<sup>th</sup> December, 2023.



- 4.2 In his Answer to the Petition, the 3<sup>rd</sup> Respondent contended that this Court should vacate its decision in the **Legal Resources Foundation**<sup>3</sup> case as Article 106 of the Constitution does not operate retrospectively.
- 4.3 The Affidavit in opposition sworn by the Attorney General, Mr Mulilo Dimas Kabesha, essentially repeated the contents of the Answer.
- 4.4 In his skeleton arguments, the 3<sup>rd</sup> Respondent submitted that the first step in construing or interpreting the law is the literal rule and referred the Court to the **Black's Law Dictionary** at page 45 which defines the literal rule as the interpretation according to the narrowest, most literal meaning of the words without regard for context.
- 4.5 The Court was also referred to the cases of **Attorney General & Another v Lewanika & Others**<sup>17</sup> and **Steven Katuka**<sup>1</sup> which essentially adopted this principle as the primary principle in interpreting the Constitution unless it leads to absurdity when other principles of interpretation may be resorted to.
- 4.6 It was argued that had the Court taken into consideration sections 2, 6 and 7 of the Act as read together with the repealed Article 35 of the Constitution, it would not have arrived at its decision in the previous cases of **Daniel Pule**<sup>6</sup>, **Bampi Kapalasa**<sup>7</sup> and **Legal Resources Foundation**<sup>3</sup>.



- 4.7 It was the 3<sup>rd</sup> Respondent's argument that in line with the literal interpretation of statutes, the 1<sup>st</sup> Respondent's presidential term between 25<sup>th</sup> January, 2015 to 13<sup>th</sup> September, 2016 was governed by the repealed Article 35 of the Constitution.
- 4.8 With regard to the doctrine of *per incuriam*, it was submitted that this doctrine is an exception to the legal principle of *stare decisis*. The Court was thus requested to declare its judgment in the **Daniel Pule**<sup>6</sup> case *per incuriam* as it was arrived at without considering other relevant pieces of law namely; Sections 2, 6 and 7 of the Act. It was further submitted that the Court in fact wrongly, applied Article 106 of the Constitution in interpreting the 1<sup>st</sup> Respondent's first term of office of President as the said Article 106 did not have retrospective effect. The case of **Zambia Consolidated Copper Mines Limited v Jackson Munyika Siame and 33 Others**<sup>18</sup> was cited in support of this contention.
- 4.9 The 3<sup>rd</sup> Respondent also submitted that he agreed with the 1<sup>st</sup> Respondent's reliance on the case of **Hussein Safieddinne**<sup>8</sup> which laid down the three grounds to succeed in the defence of *res judicata*. He however, denied that the matters in this Petition are *res judicata* on the basis that the Petitioner was neither a party to the three previous decisions referred to by the 1<sup>st</sup> Respondent nor was he privy to the parties therein. It was further argued that even though the issue



of eligibility is raised in this Petition, it is from a very different constitutional perspective, one that was not considered in the previous cases and that as such, this Petition deserved to be heard on its merit.

4.10 With regard to the issue of whether this Court can depart from its previous decisions, it was submitted that this Court being the apex Court in constitutional matters, has the jurisdiction to review and overrule its previous decisions. In support of this submission, reliance was put in the case of **Match Corporation Limited and Development Bank of Zambia v The Attorney General**<sup>19</sup>.

4.11 The 3<sup>rd</sup> Respondent also submitted that this Petition, based on the arguments above, is not an abuse of court process. That the Petitioner and his Advocates were neither parties nor involved in the previous decisions of the Court referred to by the Petitioner. It was argued that the matters herein are not the same as those that were the subject of the said previous decisions.

4.12 With regard to the constitutional concept of mandatory alternation, it was submitted that at the core of it, the concept entails that democratic political power must be limited by only allowing a person to hold office of President for a determined period and after that a different person must be elected. That in Zambia Article 106(3) of the Constitution is the hallmark of the concept of mandatory alternation.



- 4.13** It was further submitted that the said Article 106(3) of the Constitution provides that a person who has “twice held” the office of President is not eligible for election as President, and that the meaning of that provision is that a person is only allowed by the Constitution to hold the office of President twice or in other words a person can only be sworn into office as President twice, and no more than that.
- 4.14** It was also submitted that the Constitution, was largely based on the combination of the findings of the Mung’omba, Mwanakatwe and Mvunga Constitutional Review Commissions and that the will of the people as referred to in the three Commissions’ reports is unequivocal, in that they wanted the office of the president to have a limited tenure attached to it. That the will of the people was reflected in the National Constitutional Conference’s initial report.
- 4.15** With regard to the argument put forward by the 1<sup>st</sup> Respondent that this Petition is incompetent as it has allegedly been brought outside the time frame for challenging the validity of an election, and candidacy of a presidential candidate, it was submitted that nothing stops this Court from enquiring into an alleged contravention of the Constitution. This it was argued, was notwithstanding the time frame provided for to challenge the validity of an election and candidacy of a presidential candidate under Article 101 of the Constitution. In support of this submission, the Court was referred to the decision of



this Court in the case of **Bizwayo Nkunika v Lawrence Nyirenda and Electoral Commission of Zambia**<sup>15</sup>.

4.16 In orally augmenting the submissions, the 3<sup>rd</sup> Respondent submitted that in the class of eligibility cases, this Petition is *sui generis*. That it is the first of its kind in the jurisprudential history of the Constitutional Court in that it has brought in an angle which has never been determined by the Court, and that is to contextualise the effect of Section 2 of the Act as read with the transitional provisions in Section 7 of the said Act. Further, that, ultimately, it is asking this court to look at the effect of the repealed Article 35 of the Constitution on the 1<sup>st</sup> Respondent's first presidential term.

4.17 It was argued that the Court in the **Daniel Pule**<sup>6</sup>, **Bampi Kapalasa**<sup>7</sup> and **Legal Resources Foundation**<sup>3</sup> cases did not pay particular attention to nor did it take into consideration Section 2 of the Act which defines the operative Constitution which applied on the effective date of the 2016 amendments to the Constitution. That the **Daniel Pule**<sup>6</sup> case in its entirety was purely centred on Article 106 of the Constitution and there was no contextualising in all these cases the effect of Section 2 of the Act. Hence the Court ended up making wrong inferences that the framers of the Constitution did not provide for transitional provisions relating to the 1<sup>st</sup> Respondent's first presidential term.



- 4.18 It was submitted that there was no need to provide for a transitional provision in Section 7 of the Act because the issue at hand was catered for in Section 2 of the Act. Further that the repealed Article 35 of the Constitution is very clear, in that it provides for twice elected and not holding office.
- 4.19 It was further submitted that ultimately, whether this issue has been pleaded or not, the Court is being called upon to invoke the *per incuriam* rule as the Court had already decided on that issue and it is being asked whether to sustain its decision in the **Legal Resources Foundation**<sup>3</sup> case or not.
- 4.20 On the issue of jurisdiction of this Court to review its decision, the 3<sup>rd</sup> Respondent referred the Court to the Kenyan authority of **Interim Independent Electoral Commission**<sup>20</sup> in which the Court held that its jurisdiction is clothed from either the Constitution or legislation or both. It was submitted that Order 1 Rules 1 and 2 of the Constitutional Court Rules SI No. 37 of 2016 (the Rules) accords this Court with requisite jurisdiction to re-open its decision by adopting the practice under **Order 59/1/144 of the White Book** to revisit its decisions that were rendered *per incuriam*.



## 5.0 Petitioner's reply

5.1 In his Reply the Petitioner referred the Court to the case of **Match Corporation Limited v Development Bank of Zambia and Attorney General**<sup>19</sup>, in which the Supreme Court emphasised that the highest Court has power to relook at its position on a point of law, and to vacate it if that position is wrong.

5.2 It was also submitted that the principle of *stare decisis* is not an absolute rule. In the case at hand, it was argued that the Court omitted, ignored or forgot to apply important provisions of the law in its three previous judgments herein before referred to and that on that basis, the Court was not required to follow its reasoning in those decisions.

5.3 It was the Petitioner's further submission that section 2 of the Act provides for the operative Constitution which was applicable on the date on which the 2016 amendment to the Constitution came into effect. That the reading of the Act and in particular Section 2, leads to the conclusion that only the repealed Article 35 of the Constitution could apply to the 1<sup>st</sup> Respondent's presidential term during the transition period, and that the Court in the **Legal Resources Foundation**<sup>3</sup> judgment went outside of the written law to reach its own conclusion.



**6.0 *Amicus curiae's* brief**

6.1 Mr John Sangwa, SC made an application to be admitted as a friend of the Court pursuant to Section 12 of the Constitutional Court Act No. 8 of 2016, (CCA) which provides as follows:

**The Court may allow a person with expertise in a particular matter which is before the Court to appear as a friend of the Court.**

6.2 Based on Mr Sangwa's consistent involvement as an advocate and litigant in the 1<sup>st</sup> Respondent's presidential eligibility litigation, he was admitted as *amicus curiae* or friend of the Court on 24<sup>th</sup> September, 2024. He subsequently filed his brief on 25<sup>th</sup> September, 2024.

6.3 In his brief, Mr Sangwa, SC submitted that the Constitution has not conferred this Court with the jurisdiction to interrogate the eligibility of a losing presidential candidate to take part in the election, post-election. He argued that what exists is authority to establish one's eligibility to take part in the election, before the election is held.

6.4 Further, he argued that even if the Court decides that it has authority to entertain this Petition, that the authority was circumscribed by Article 118 of the Constitution which provides for Principles of judicial authority.

6.5 He submitted that the import of this provision is firstly, that the exercise of the power must result in accountability and not anarchy.



- That, therefore, where the converse will be the outcome, the Court must decline to exercise its authority.
- 6.6 It was further submitted that, in the exercise of its adjudicative authority, this Court must protect and promote the national values and principles set out in Article 8 of the Constitution.
- 6.7 It was argued that Article 118 (2) (f) of the Constitution is reinforced by Article 9 (1) (a) of the Constitution which provides that the national values and principles shall apply to the interpretation of this Constitution. That it follows therefore, that if the exercise of the Court's authority will result in undermining the national values and principles, this Court must decline to do so and dismiss the application.
- 6.8 It was also argued that a declaration that the 1<sup>st</sup> Respondent was not eligible to take part in the 2021 presidential election would have profound implications for the governance of this Country. That it's impact will affect the legality of the 2021 presidential election that included the unqualified candidate noting that a valid presidential election is one that involves qualified presidential candidates.
- 6.9 Mr. Sangwa, SC further submitted that a decision of this Court in favour of the Petitioner will affect not only the 1<sup>st</sup> Respondent but all those who took part in the presidential election of 2021.



6.10 He submitted that none of the remedies sought by the Petitioner can be granted without this Court hearing the persons that are likely to be affected by the said decisions. In this respect, he referred the Court to the Supreme Court decision in the case of **Maxwell Mwamba and Stora Solomon Mbuzi v Attorney General of Zambia**<sup>21</sup> in which the Supreme Court held that:

Although the motion ostensibly questioned whether there was dignity and leadership in the exercise by the President of his Constitutional power to appoint the two Ministers, the blows were landing on two individuals who have never been heard and who stood to be condemned unheard and stripped of office. No Court of justice can be called upon to make a declaration, which is always a discretionary remedy, when obvious injustice would be visited upon persons who have not been heard but who would be directly affected by a declaratory order in proceedings to which they have not been made parties.

6.11 It was then argued that similarly, in this case, this Court cannot entertain this Petition and grant the relief sought without affording the presidential candidates in the 2021 presidential elections the opportunity to be joined and heard in support of or against this Petition.

## **7.0 Issues for Determination**

7.1 We have considered the Petition herein with its accompanying affidavit verifying facts, the Respondents' Answers and affidavits in opposition, the Petitioner's Reply and the 1<sup>st</sup> Respondent's Affidavit



in support of Notice of Motion for determination of questions of law, the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondent's Affidavits in opposition to the 1<sup>st</sup> Respondent's Notice of Motion for determination of questions of law as well as the 1<sup>st</sup> Respondent's Reply. We have also considered the arguments both written and oral advanced by the parties.

7.2 We have equally considered the brief filed by the *amicus curiae*, Mr. Sangwa, SC.

7.3 We note that the parties in making their respective arguments both in support of and against the Petition raised a number of issues. Arising from the reliefs sought, the main issues for determination as we see them are:

- (i) **Whether or not this Court has jurisdiction to determine this Petition.**
- (ii) **Whether or not the 1<sup>st</sup> Respondent was eligible to contest the August 2021 presidential elections in light of sections 2 and 7 of the Act, the repealed Article 35, and Article 106 of the Constitution; This relates to relief (i),(ii) and (iii).**
- (iii) **Whether or not the 1<sup>st</sup> Respondent is eligible to contest future presidential elections. This relates to relief (iv)(v)(vi)(vii)(viii) and (ix).**

## **8.0 Consideration and Decision**

8.1 We begin by restating the jurisdiction of this Court as provided for in Article 128 of the Constitution as follows:



128 (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear—

(a) a matter relating to the interpretation of this Constitution;

(b) a matter relating to a violation or contravention of this Constitution;

(c) a matter relating to the President, Vice-President or an election of a President;

(d) appeals relating to election of Members of Parliament and councillors; and

(e) whether or not a matter falls within the jurisdiction of the Constitutional Court

(2) Subject to Article 28 (2) where a question relating to this Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court.

(3) Subject to Article 28, a person who alleges that –

(a) an Act of Parliament or statutory instrument;

(b) an action, measure or decision taken under law; or

(c) an act, omission, measure or decision by a person or an authority;

Contravenes this Constitution, may petition the Constitutional Court for redress.

(4) A decision of the Constitutional Court is not appealable to the Supreme Court.

8.2 The Petitioner alleges that the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent contravened the Constitution when the 1<sup>st</sup> Respondent participated and was allowed to participate in the 12<sup>th</sup> August, 2021 presidential elections respectively. He also seeks interpretation of



the Constitution as to whether sections 2 and 7 of the Act had the effect of saving the repealed Article 35 of the Constitution and whether Article 106 can be applied retrospectively.

8.3 As is our practice, we shall begin with the interpretation approach. Article 267(1) of the Constitution gives clear guidance on how the Constitution must be interpreted, that is, in accordance with the Bill of Rights and in a manner that promotes its purposes, values and principles, permits the development of the law, and contributes to good governance.

8.4 In the case of **Zambia National Commercial Bank Plc v Martin Musonda and 58 Others**<sup>2</sup> we held that:

**When interpreting the Constitution, all the relevant provisions bearing on the subject for interpretation should be considered together as a whole in order to effect the objective of the Constitution.**

8.5 In determining issues in this matter, we will therefore, look at the relevant provisions bearing on the issues in contention as a whole in order to give effect to the objectives of the Constitution.

Whether this Court can depart from its previous decisions

8.6 The issues and arguments raised by the parties have invariably compelled us to consider the question whether this Court can depart from its previous decisions.



- 8.7 It was submitted by the Petitioner that there are instances in which the court may forget or omit a statutory provision or point of law when rendering judgment. That in such circumstances, the court has the power to correct these errors through the principle of *per incuriam*.
- 8.8 The 3<sup>rd</sup> Respondent supported the Petitioner's position on this issue and further submitted that the doctrine of *per incuriam* is an exception to the legal principle of *stare decisis*. It was also submitted that this Court being the apex court in constitutional matters, has jurisdiction to review and overrule its previous decisions.
- 8.9 The 1<sup>st</sup> Respondent on the other hand submitted that this Court has stated its position on his eligibility to contest the presidency on three occasions. It was further argued that the mode of reopening the matter for the court to review its decision was wrong and that the court therefore has no jurisdiction to entertain this Petition. The 2<sup>nd</sup> Respondent did not make any submissions on this issue.
- 8.10 To address the issue we begin with the doctrine of precedent, often expressed by the Latin maxim *stare decisis et non quieta movere* ('to stand by decisions and not disturb settled matters') which requires that a legal principle that has been established by a superior court must be followed in other similar cases by that court and other courts. It should be noted that a court departing from its previous decision is a different legal concept from a court reviewing its own decision. The



former refers to a court taking a different position in another different matter while the latter refers to a court reviewing its position in the same matter. In the case at hand, the Court is being asked to depart from its previous decisions.

8.11 In order for us to adequately address the issue of whether this Court can depart from its previous decisions, it is helpful to do a comparative analysis with other jurisdictions and also consider the position in Zambia before the 2016 amendments to the Constitution.

8.12 Apex courts in Africa, the Commonwealth and beyond have had to confront the issue regarding their jurisdiction on departing from previous decisions. Persuasive insights are deducible from various court decisions from other jurisdictions, as well as ours, regarding this question. We therefore now proceed to recite some of these decisions in an endeavor to determine the position of this Court on the issue.

**(I) The South African position**

(a) The South African Constitution provides under Section 173 that:

**The Constitutional Court, Supreme Court, Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.**

(b) In the case of **Camps Bay Ratepayers' and Residents' Association and PS Booksellers (Pty) Ltd v Gerda**



**Yvonne Ada Harrison and Municipality of the City of  
Cape Town<sup>22</sup>, the Constitutional Court stated that:**

This argument raises issues concerning the principle that finds application in the Latin maxim of *stare decisis* (to stand by decisions previously taken) or the doctrine of precedent. Considerations underlying the doctrine were formulated extensively by Hahlo and Kahn. What it boils down to, according to the authors, is: 'certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*'. Observance of the doctrine has been insisted upon, both by this Court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These Courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong (emphasis ours).

(c) Further, and in the case of **Vuyile Jackson Gcaba v  
Minister for safety and Security and 4 others<sup>23</sup>**, the

Constitutional Court of South Africa stated as follows:

...The doctrine imposes a general obligation on a Court to follow legal rulings in previous decisions. Moseneke J acknowledged the recognized exceptions to the *stare decisis*, namely 'where the Court is satisfied that its previous decision was wrong or where the point was not argued or where the issue is in some legitimate manner distinguishable'... A higher court of appeal - and this Court in particular - has to be especially cautious as far as adherence to or deviation from its own previous decisions is concerned. It is the upper guardian of the letter, spirit and values of the Constitution... This Court must not easily and without coherent and compelling reason deviate from its own previous decisions, or be seen to have done so. One exceptional instance where this principle may be invoked is when this Court's earlier decisions have given rise to controversy or uncertainty...

**(II) The Nigerian Position**

(a) In Nigeria, there is no Constitutional provision which expressly vests the Supreme Court, with powers to



review and depart from its own decisions. Article 235 of the Constitution of the Federal Republic of Nigeria provides that;

**Without prejudice to the powers of the President or the Governor of a State with respect to prerogative of mercy, no appeal shall lie to any other body or person from any determination of the Supreme Court.**

(b) However, and notwithstanding the express prohibition, in the case of **Amalgamated Trustees Limited v Associated Discount House Limited**<sup>24</sup>, the Court made the following pronouncement:

The Supreme Court as is the practice in other superior courts of record possess inherent power to set aside its judgment in appropriate cases. Such cases are as follows:

- (i) When a judgment is obtained by fraud or deceit;
- (ii) When the judgment is a nullity such as when the Court itself was not competent; or
- (iii) When the Court was misled into giving judgment under a mistaken belief that the parties had consented to it; or
- (iv) When judgment was given in the absence of jurisdiction; or where the procedure adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication.

### (III) The Kenyan Position

(a) Article 163(7) of the Kenyan Constitution provides that:

**All Courts, other than the Supreme Court, are bound by decisions of the Supreme Court.**



- (b) In the case of **Fredrick Otieno Outa v Jared Odoyo Okello and 3 Others**<sup>25</sup>, the Supreme Court in its Ruling had this to say concerning the said provision:

It is clear to us that Article 163(7) of the Constitution can only be invoked by a litigant who is seeking to convince this Court, to depart from its previous decision, on grounds for example, that such decision was made *per incuriam*, or that, the decision is no longer good law, and so on. This provision cannot be invoked by a losing party as a basis for the Court to review its own judgment, decision or Order. Nor, can it confer upon the Supreme Court, jurisdiction to sit on appeal over its own judgment. In our view, reviewing a judgment or decision, is not the same as departing from a previous decision by a Court. (emphasis ours)

- (c) That Court in this matter, held as a general rule, that it has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions. That, however, in exercise of its inherent powers, the Court may, upon application by a party, or on its own motion, review, any of its judgments, rulings or orders, in exceptional circumstances, so as to meet the ends of justice.

#### (IV) The Zimbabwean Position

- (a) The Constitution of Zimbabwe is silent on the Constitutional Court's power to review its own decisions. However, Section 5(4) of the Constitutional Court Act clearly provides that the Constitutional Court is not bound by its own decisions.



(b) It is noteworthy, however, that even before the Zimbabwean Constitutional Court Act was enacted, the Constitutional Court of Zimbabwe had taken a position on the power to review its own decisions as well as the power to depart from its own decisions.

(c) In the case of **President of the Senate and 2 Others v Innocent Gonese and 3 Others**<sup>26</sup>, the Court stated thus:

Whilst the Constitutional Court Act is yet to be promulgated, the absence of the equivalent of Section 26 of the Supreme Court Act for the Constitutional Court is of no impact. The words of the Chief Justice in Lytton Investments case (supra) on the finality of decisions of the Supreme Court on non-constitutional matters apply with equal force to the finality of the decisions of this court on all Constitutional matters. A decision of the Constitutional Court on a constitutional matter is final. No court has power to alter the decision of the Court. Only this Court can depart from its previous decisions, rulings, or opinions. I venture to add for emphasis that only this Court, in a future and appropriate constitutional matter, may overrule or depart from its previous order. (emphasis ours)

#### (V) The United States of America (USA) Position

(a) In a landmark decision of the USA Supreme Court in **Dobbs; State Health Officer of the Mississippi Department of Health, etal v Jackson Women's Health Organisation etal**<sup>27</sup>, in which the court overruled its earlier decisions in both **Roe v Wade 1973** and **Planned Parenthood v Cassey 1972**, the Court stated that:



We have long recognised, however that *stare decisis* is not an inexorable command and it is at its weakest when we interpret the Constitution. It has been said that it is sometimes more important that an issue be settled than that it be settled right. But when it comes to the interpretation of the Constitution – the great charter of our liberties – we place a high value on having the matter settled right.

- (b) The USA Supreme Court further went on to state that:

When one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. Therefore, in appropriate circumstances, we must be willing to reconsider and, if necessary, overrule constitutional decisions.

#### (VI) The Zambian Position

- (a) Article 125(3) of the Constitution provides that the Supreme Court is bound by its decisions, except in the interest of justice and development of jurisprudence. There is no similar provision with regard to the Constitutional Court.
- (b) Prior to the 2016 amendments, the Supreme Court was the only apex Court in Zambia and had final jurisdiction over all constitutional and non-constitutional disputes in the country. The provisions of the Constitution then were silent on the Supreme Court's power to review or depart from its previous decisions. However, in exercise of its inherent jurisdiction as an apex court, the Supreme Court reviewed and departed from its earlier decisions in exceptional circumstances.



8.13 Thus, in the case of **Davis Jokie Kasote v The People**<sup>28</sup>, the Supreme Court stated as follows:

The Supreme Court being the final Court in Zambia adopts the practice of the House of Lords in England concerning previous decisions of its own and will decide first, whether in its view the previous case was wrongly decided and secondly, if so, whether there is sufficiently strong reason to decline to follow it.

8.14 Further and in the case of **Finsbury Investments Limited and 3 Others v Antonio Ventriglia and Another**<sup>29</sup>, the Supreme Court stated as follows:

Clearly, as the foregoing authorities establish, this Court has unfettered inherent jurisdiction and in appropriate cases, it can reopen its final decisions. This Court will not however, reopen its decision merely on the ground that a party to that decision is dissatisfied with it and wants a more favourable decision. In our considered view, the power of this Court to reopen its decision can only be invoked in exceptional circumstances where the interest of justice demands that to be done.

8.15 Considering the above authorities, it is clear that apex courts in common law and other jurisdictions enjoy unfettered inherent power to review or depart from their previous decisions in exceptional circumstances. The courts have however, been careful to state that they will only review or depart from their previous decisions in exceptional, and compelling circumstances so as to meet the ends of justice such as where the previous decision was clearly wrong. This is a delicate balance for the courts between the need for finality in litigation and the overriding duty of the court to dispense justice where circumstances so demand.



8.16 There is no legal provision which divests this Court of its inherent jurisdiction to depart from a previous decision in exceptional circumstances.

8.17 It is thus, our position that whereas this Court as the guardian of the letter, spirit and values of the Constitution, has to be circumspect as far as adherence to or deviation from its previous decisions is concerned, it shall not hesitate to depart from its previous decision where it is satisfied that the decision is clearly wrong or where the interest of justice demands that to be done.

8.18 In our considered view, departure from precedent must however only be taken in the most exceptional circumstances.

8.19 We therefore, find the argument that this Court has no power to review or depart from its previous decisions fundamentally flawed. It in effect would entail the Court divesting itself of powers that flow from its standing as an apex court.

Whether the Petition is *res judicata*

8.20 We note the arguments and cases cited by the parties on *res judicata* and they all agree on the principles that govern *res judicata* and we agree with them.



8.21 It was submitted by the 1<sup>st</sup> Respondent that the Petition brought before this Court is *res judicata*, this Court having previously pronounced itself three times on the same matter.

8.22 The Petitioner and the 3<sup>rd</sup> Respondent however argued that this matter is not *res judicata* as this case is *sui generis*. It was submitted that the action has brought out a context that has never been determined by this Court. That is the effect of sections 2 and 7 of the Act, as read with the repealed Article 35 of the Constitution.

8.23 *Res judicata* is defined on page 1504 of **Black's Law Dictionary (10<sup>th</sup> edition)** by *Bryan A. Garner* thus:

(Latin 'a thing adjudicated') 1. Any issue that has been definitively settled by judicial decision. 2. An affirmative defence barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit. The three essential elements are:

- (i) An earlier decision on the issue;
- (ii) A final judgment on the merits; and
- (iii) The involvement of the same parties, or parties in privity with the original parties.

8.24 The doctrine of *res judicata* is however not an absolute principle and there are several exceptions including (1) lack of jurisdiction, (2) presence of fraud or collusion, (3) material changes in the law or facts, and (4) mistake or *per incuriam*. Comparative jurisprudence also shows that, the doctrine is not absolute.



8.25 In the English case of **Fidelitas shipping**<sup>30</sup>, Lord Denning M.R., as he then was, said:

The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances. (emphasis ours)

8.26 The Constitutional Court of South Africa in the case of **Molaudzi v S**<sup>31</sup>, also affirmed the development away from the strict application of common law of *res judicata*, and stated as follows:

Since *res judicata* is a common law principle, it follows that this Court may develop or relax the doctrine if the interest of justice so demand. Whether it is in the interest of justice to develop the common law or the procedural rules of a Court must be determined on a case-by-case basis. Section 173 (of the Constitution) does not limit this power. It does however, stipulate that the power must be exercised with due regard to the interest of justice. Courts should not impose inflexible requirements for the application of this section. Rigidity has no place in the operation of Court procedures.

8.27 That court further held that it could depart from the doctrine of *res judicata* where the case at hand demonstrated 'exceptional circumstance' that cry out for flexibility on the part of the court.

8.28 It is *trite* that where the doctrine of *res judicata* is sought to be relied upon as a defence, the purpose of the principle is to balance the public interest in finality of litigation with the public interest of ensuring a just result on the merits.



8.29 In light of the foregoing authorities, we are of the firm view that the doctrine of *res judicata* is not an absolute principle. It is subject to exceptions which, relevant to the present Petition as shall be determined in due course, include circumstances where the previous decision was made *per incuriam*.

Whether the 1<sup>st</sup> Respondent was eligible to contest the August 2021 Presidential Elections.

8.30 In his submissions, the 1<sup>st</sup> Respondent urged the Court to uphold its previous decision in the **Legal Resources Foundation**<sup>3</sup> case that he was eligible to contest the 2021 elections. It was further argued that this Petition is incompetent as in essence, it seeks to challenge the nomination of the 1<sup>st</sup> Respondent outside the time frame prescribed in Article 52 of the Constitution.

8.31 On their part, the Petitioner and the 3<sup>rd</sup> Respondent submitted that the Court interprets the combined meaning of sections 2 and 7 of the Act as well as the repealed Article 35 of the Constitution, and urged the court to find that the inclusion of the 1<sup>st</sup> Respondent on the 2021 presidential ballot was unconstitutional. The second Respondent did not submit on this issue.



8.32 We have taken into account the varying positions taken by the parties on this issue. In the **Legal Resources Foundation**<sup>3</sup> case, in which the 1<sup>st</sup> Respondent's eligibility to contest the 12<sup>th</sup> August, 2021 elections was challenged, we stated as follows on pages J77 and J78:

..., we find that Article 106 (3) of the Constitution does not bar the 1<sup>st</sup> Respondent from contesting the forthcoming Presidential election scheduled for 12<sup>th</sup> August 2021. For that reason, we hold that the 1<sup>st</sup> Respondent's nomination which was accepted by the Returning Officer on 17<sup>th</sup> May, 2021 is valid and that the 1<sup>st</sup> Respondent, Edgar Chagwa Lungu, is qualified and entitled to stand for election as President on 12<sup>th</sup> August, 2021.

8.33 At the time of the holding of the 2021 elections, our decision in the **Legal Resources Foundation**<sup>3</sup> case was binding thereby enabling the 1<sup>st</sup> Respondent to stand for election as President on 12<sup>th</sup> August, 2021. This, we affirm against the backdrop of the well settled principle that court decisions and Orders are binding and must be obeyed unless set aside or expire due to effluxion of time. This is the view we took in the case of **Benard Kanengo v The Attorney General and Electoral Commission of Zambia**,<sup>32</sup>. Therein we held that:

We wish to state that the Court of Appeal does not have jurisdiction to hear appeals to cases whatsoever dealing with Article 52(4) of the Constitution. Nevertheless, that stay order it had issued had to be obeyed even though erroneously issued and remains in force until discharged or set aside.



8.34 The declaratory reliefs (i),(ii) and (iii) sought by the Petitioner urging this Court to declare that the Electoral Commission of Zambia's inclusion of Edgar Chagwa Lungu on the 2021 ballot and his participation in the August 2021 election unconstitutional are therefore hereby dismissed.

Amicus Curiae

8.35 We now wish to refer to the brief filed by the friend of Court, Mr Sangwa SC. A review of his filed Brief reveals that the gist of Mr Sangwa's submission is that there is no provision in the Constitution that vests authority in this Court to interrogate the eligibility of a losing presidential candidate to take part in the election, post the election, which he has lost. He further submitted that a decision of the Court in favour of the Petitioner in that respect will not only affect the 1<sup>st</sup> Respondent but all those who took part in the 2021 elections without the Court hearing them. Further, that it would also question the legality of the 2021 presidential election that included an unqualified candidate.

8.36 However, and in view of our finding that the 1<sup>st</sup> Respondent was cleared to stand for election as President in accordance with the decision of this Court, Mr Sangwa's submissions and arguments are of no consequence.



Whether the 1<sup>st</sup> Respondent is eligible to participate in any future Presidential elections.

- 8.37 In his submissions, the Petitioner submitted that the 1<sup>st</sup> Respondent does not qualify to participate in any future elections under the Constitution. This, he argued, is due to the fact that he has served two full terms and will therefore be in violation of the Constitution if he attempted to seek a third term.
- 8.38 It was submitted that the 1<sup>st</sup> Respondent participated and won a presidential election in 2015 which culminated into his first term under the repealed Article 35 of the Constitution. Further that, for the second term, he was elected under the Constitution as amended in 2016 and that this Constitution did not apply to his first term as it has no retrospective application. The Court was urged to depart from its decision in the **Legal Resources Foundation**<sup>3</sup> case as it had completely omitted to take into account the provisions of Section 2 of the Act and was therefore *per incuriam*.
- 8.39 The 1<sup>st</sup> Respondent however submitted that the majority decision in the **Legal Resources Foundation**<sup>3</sup> case comprehensively dealt with his status. That the said decision upheld the decision in the **Daniel Pule**<sup>6</sup> case in which it was held that the first term cannot be considered as a full term for purposes of Article 106 (3) of the



Constitution and that therefore Article 106 of the Constitution did not bar the 1<sup>st</sup> Respondent from contesting the August 12<sup>th</sup>, 2021 election and by extension future elections.

8.40 It was also submitted by the 1<sup>st</sup> Respondent that the **Legal Resources**<sup>3</sup> case was not *per incuriam* as the dissenting judgment made reference to Section 2 of the Act, which meant that the judges were aware of this provision.

8.41 It was further argued that this Petition was wrongly before this Court as it had not come by way of an appropriate motion for review of the Court's earlier decision. The Court was called upon to uphold its earlier decision in the **Legal Resources Foundation**<sup>3</sup> case.

8.42 The 1<sup>st</sup> Respondent is urging us to uphold our decision in that case as the decision was correct and binding.

8.43 In its submissions, the 2<sup>nd</sup> Respondent relied entirely on the Answer, Affidavit in support and skeleton arguments filed on 16<sup>th</sup> November, 2023.

8.44 In his submissions, the 3<sup>rd</sup> Respondent submitted that the **Legal Resources Foundation**<sup>3</sup> case did not pay particular attention to nor did it take into consideration section 2 of the Act.

8.45 It was further submitted that there was no need to provide for a transitional provision in section 7 of the Act as the issue at hand was catered for in section 2 by the definition of which constitutional



provision applied on the effective date. Further that the repealed Article 35 of the Constitution was clear in speaking to “twice elected” and not “holding office”. That the 1<sup>st</sup> Respondent was therefore deemed to have twice held office and was barred from participating in any future elections.

8.46 It was also submitted that ultimately, whether the issue has been pleaded or not the Court is being called upon to invoke the *per incuriam* rule.

8.47 This Court in its majority decision in the **Legal Resources Foundation**<sup>3</sup> case asked itself a question as to whether the framers of the Constitution in the transitional provisions under the 2016 Constitutional amendments made provision for what was to happen to the incumbent President’s term of office which according to the Court straddled two constitutional regimes.

8.48 The Court then looked at the provisions of Section 7 (1) of the Act and came to the conclusion that the said provision showed that although the Act provided for the continuation of the President in the office of President, it made no provision for how the period served from January, 2015 to September, 2016 was to be treated in view of the change in the constitutional provisions from the limitation based on being “twice elected” to “holding office” for two terms. The Court then proceeded to draw inferences on what the



framers of the Constitution must have intended and based on the provisions of Article 106 of the Constitution concluded that Article 106 (6) of the Constitution regarding the full term must be applied to defining what is meant by twice held office in Article 106 (3) in interpreting the provisions of that Article.

8.49 Based on the above, the Court then proceeded to conclude that the term served by the 1<sup>st</sup> Respondent from 25<sup>th</sup> January, 2015 to 13<sup>th</sup> September, 2016 was an inherited term and not a full term as defined by Article 106 (6) of the Constitution. Consequently, it was held that Article 106 (3) of the Constitution did not bar the 1<sup>st</sup> Respondent from contesting the 12<sup>th</sup> August, 2021 elections.

8.50 We have carefully considered the arguments by all Parties in this Petition. First, we wish to correct the misconceived view suggested by the 1<sup>st</sup> Respondent, that this matter is an application for review. To the contrary, our firm view is that the petition is beseeching us to depart from or overrule our previous decision in the **Legal Resources Foundation**<sup>3</sup> case as it was arrived at *per incuriam*.

8.51 We note further that in that decision, there was no reference to Section 2 of the Act throughout the majority judgment and a combined interpretation of Sections 2 and 7 of the Act read together with the repealed Article 35 of the Constitution was never made.



8.52 It is not in dispute that the 1<sup>st</sup> Respondent was elected and sworn into office of President on 25<sup>th</sup> January, 2015 under the repealed Article 35 of the Constitution. With regard to term limits, the repealed Article 35 (1) and (2) of the Constitution provided that:

- Article 35**
- (1) **Subject to clauses (2) and (4) every President shall hold office for a period of five years**
- (2) **Notwithstanding anything to the contrary contained in this Constitution or any other law, a person who has twice been elected as president shall not be eligible for re-election to that office (emphasis ours)**

8.53 In 2016, the Constitution was again amended. The question therefore is: with the coming into effect of the 2016 amendments, what happened to the office of the President since his term was continuing up to September, 2016? The answer to this question lies in the Preamble to the Act which states:

**An Act to provide for the printing and publication of the Constitution; to provide for the savings and transitional provisions of existing state organs, state institutions, administrations, offices, institutions and laws ... (emphasis ours)**

8.54 From the wording of the above provision, it is clear that the framers of the 2016 amendments had in mind transitional provisions or clauses to guide the administration of state affairs including those relating to state organs including the office of the President so as not to create a vacuum.

8.55 With regard to the office of President, Section 7 (1) of the Act provides that:



7 (1) The President shall continue to serve as President for the unexpired term of that office as specified by the Constitution in accordance with the Constitution.

8.56 The question that arises from the above provision is which Constitution does Section 7 (1) refer to? The answer to this question is to be found in Section 2 (1) of the Act which *inter alia* provides as follows:

“Constitution” means the Constitution of Zambia, 1991 in force immediately before the effective date; and

“Effective date” means the date of commencement of this Act and the Constitution as amended as provided in section four.

8.57 From the above provisions, it is our considered view that quite clearly the 1<sup>st</sup> Respondent’s first term which ran from 2015 to 2016 was “saved” by the transitional clauses and in particular Sections 2 and 7 of the Act and continued in accordance with the repealed Article 35 of the Constitution. In terms of the term limits, the repealed Article 35 was therefore applicable to his first term. Article 106 of the Constitution did not apply in retrospect contrary to the holding in the **Legal Resources Foundation**<sup>3</sup> case. The decision is therefore *per incuriam*. We accordingly depart and vacate that decision and previous decisions which made similar findings contrary to the well settled principle of the law that the law does not operate in retrospect unless it expressly states so.

8.58 There is no provision that provides for the retrospective application of Article 106 of the Constitution. As we clearly stated in the case



of **Lucas Haamatowe & Others v Zambia Postal Services Corporation**<sup>33</sup> when we said:

It is trite that the law does not operate retrospectively unless there is a specific provision providing for the retrospective effect of the law and there is abundant case law on this principle in this jurisdiction.

8.59 Further, we said in the case of **Lucky Mutambo v Attorney General**<sup>34</sup> that:

If this Court were to grant the Petitioner's wish, it would be retrospectively applying the provisions of the Constitution as amended unreasonably, without any lawful basis and ignoring the provisions of the Act No. 1 of 2016. It is our conclusion that prayers (a) and (b) must fail. They are accordingly dismissed.

8.60 Having considered the provisions of section 2 and 7 of Act No. 1 and the repealed Article 35 of the Constitution, we take the view that the decisions in **Daniel Pule**<sup>6</sup>, **Bampi Kapalasa**<sup>7</sup> and **Legal Resources Foundation**<sup>3</sup> were arrived at *per incuriam* as sections 2 and 7 are clear that the first term that ran from 25<sup>th</sup> January, 2015 to 13<sup>th</sup> September, 2016 was captured by the repealed Article 35 of the Constitution.

8.61 For this reason, we further dismiss the 1<sup>st</sup> Respondent's argument that the question of his eligibility to contest the 2021 elections, and therefore this Petition is *res judicata*. As earlier guided a matter cannot be *res judicata* where a previous case was decided *per incuriam*. On the same footing this Petition cannot be said to be *res judicata*.



8.62 For this reason, reliefs (iv)(v)(vi)(vii)(viii) and (ix) have merit and are hereby granted.

8.63 Before we leave this matter, we feel compelled in the public interest and as guardian of the Constitution, to put to rest a fundamental misconception about Article 106 of the Constitution. The matter before us was premised on the assumption that Article 106 (6) of the Constitution qualifies Article 106 (3) thereby enabling a person who takes up a prematurely vacated presidential term of office to vie for and serve a further two terms in office. This assumption that there is a “third term” in Article 106 (6) has been the source of much public tension and uncertainty hence the need for our intervention.

8.64 In a bid to address the issue, the 3<sup>rd</sup> Respondent submitted extensively on the principle of mandatory alternation as the source of Article 106(3) of the Constitution and its antecedent, the repealed Article 35 of the Constitution. He contended that there was a contradiction between Article 106(3) and 106 (6) of the Constitution which ought to be reconciled or harmonised by ranking the two provisions so that sub-Article (3) is superior to sub-Article (6). That this would ensure that the latter did not essentially destroy the former. Although the point was not responded to nor argued by the other parties to the case, we are of the considered view that its



import ought to be ventilated in the interest of protecting the integrity of the Constitution.

8.65 We wish to elaborate on mandatory alternation firstly, by cross referencing to the submissions recited in paragraph 4.12 and 4.13 at page J24. And secondly, by drawing support from **Hector Fierro** and **Pedro Salazar-Ugarte** whose work entitled **Presidentialism** reads at pages 629-630, of the **Oxford Handbook of Comparative Constitutional Law** as follows:

The source of legitimacy of presidential power lies, then, in a set of rules (laws and institutions) that broadly correspond to the forms of modern democracy. More precisely, these rules provide for the necessary, regular and periodic replacement of the head of the executive power through popular vote...

The renewal of the presidency is provided for in the Constitution and carried out at fixed intervals. Besides exceptional circumstances such as impeachment, death, resignation and the like, the president stays in office for a fixed period (generally between four and six years) with or without the possibility of being elected for more than one term. (emphasis ours)

8.66 The 3<sup>rd</sup> Respondent contended that Article 106 (3) is the hallmark of mandatory alternation. With that in mind we perused the 1<sup>st</sup> and Final Draft Reports of the Technical Committee on Drafting the Zambian Constitution (TCDZC). The 1<sup>st</sup> Draft Report contains draft Article 103 which provides as follows:

- (1) The term of office for a President shall be five years.
- (2) Subject to clauses (3) and (4), a President shall hold office for one term, commencing from the date the President-elect is sworn into office and ending on the date the election results are announced, and shall be eligible to be elected as President for a second term.



- (3) Notwithstanding anything in this Constitution or any other law, a person who has twice been elected as President shall not be eligible for election as President.
- (4) The President may, in writing, signed personally and addressed to the Speaker of the National Assembly, resign from office (emphasis ours)

In the words of the TCDZC:

The rationale for the Article was that it was important to limit the number of terms to be served by a President in line with the current Constitution to avoid the tendency of an individual wanting to be in office in perpetuity. The Committee therefore, resolved to retain the provision in the current Constitution. (emphasis ours)

8.67 The Final report of the TCDZC shows at pages 285 to 286 that draft Article 103 was unanimously adopted by the People's representatives at the District Consultative *fora*, the Provincial Conventions, the Sector Group Convention and the National Convention without any change.

8.68 However, the TCDZC amended the provision to include the issue of a vacancy in office and the 'deeming' of an inherited term. The recommended TCDZC Final draft provision is draft Article 104. As the reason for amending the draft Article the TCDZC said, that it

... amended the Article by providing for circumstances where a Vice President or a new President serves an unexpired term of a President who does not complete his or her term of office. The Committee observed that it was important to make a provision as to whether or not the inherited term should be counted. (emphasis ours)



Draft Article 104 is replicated word for word in Article 106 of the Constitution. For convenience we have set out Article 106 in its entirety. It reads:

106. (1) The term of office for a President is five years which shall run concurrently with the term of Parliament, except that the term of office of President shall expire when the President-elect assumes office in accordance with Article 105.
- (2) A President shall hold office from the date the President-elect is sworn into office and ending on the date the next President-elect is sworn into office.
- (3) A person who has twice held office as President is not eligible for election as President.
- (4) The office of President becomes vacant if the President
- (a) dies;
  - (b) resigns by notice in writing to the Speaker of the National Assembly;
- or
- (c) otherwise ceases to hold office under Article 81,107 or 108.
- (5) When a vacancy occurs in the office of President, except under Article 81
- (a) the Vice President shall immediately assume the office of President; or
  - (b) if the Vice-President is unable for a reason to assume the office of President, the Speaker shall perform the executive functions, except the power to –
    - (i) make an appointment; or
    - (ii) dissolve the National Assembly;
- And a presidential election shall be held within sixty days after the occurrence of the vacancy.
- (6) If the Vice-President assumes the office of President, in accordance with clause (5) (a), or a person is elected to the office of President as a result of an election held in accordance with clause 5(b), the Vice-President or the



**President-elect shall serve for the unexpired term of office and be deemed, for the purposes of clause (3) –**

- (a) to have served a full term as President if, at the date on which the President assumed office, at least three years remain before the date of the next general election; or**
- (b) not to have served a term of office as President if, at the date on which the President assumed office, less than three years remain before the date of the next general election. (emphasis ours)**

Article 106 (3) of the Constitution when read with Article 106 (6) of the Constitution provides that a person may or may not be deemed to have served a full inherited term. In common parlance, 'deeming' relates to viewing or perceiving something in a contrived way. More formally, Black's Law Dictionary, (9<sup>th</sup> ed.) 'gives as the main definition of the verb "deem" to treat something as if (1) it were really something else and (2) it had qualities that it does not have'. Hence deeming allows an inherited term to count or not, depending on the length of time served. In our considered view a contradiction between the two sub-clauses arises if the objective of the deeming is to enable the person who served an inherited term to contest more than one future presidential election as it would create an exception. We have considered the issue on the basis of the well settled principle that constitutional provisions should be interpreted in a manner that harmonises them.

8.69 An exception to the clear prohibition in Article 106 (3) would have to be explicit and cannot be imputed from the language of deeming,



especially in the face of the People's expressed commitment to a maximum of two terms. Hence the deeming can only be consequential as opposed to empowering or permissive. We are of the firm view that the words, "...be deemed for the purpose..." are intended to settle post presidential questions about the legal status and entitlements of a former president as opposed to providing for a person's eligibility to return to the presidency beyond the mandated two terms. On a holistic reading of Articles, 1,5, 8,9,118 and 267 of the Constitution with Article 106 of the Constitution we find that Article 106 (6) of the Constitution does not create a third term.

## **9.0 Final Orders**

9.1 Our combined interpretation therefore of sections 2 and 7 of the Act and the repealed Article 35 of the Constitution is that the 1<sup>st</sup> Respondent's term of office that ran from 25<sup>th</sup> January, 2015 to 13<sup>th</sup> September, 2016 constituted a term of office. The 1<sup>st</sup> Respondent's term which ran from 13<sup>th</sup> September, 2016 to August 2021 constituted his second term. The 1<sup>st</sup> Respondent, Mr. Edgar Chagwa Lungu has therefore been twice elected and has twice held office. Article 106(3) of the Constitution makes the 1<sup>st</sup> Respondent ineligible to participate in any future elections as a presidential candidate.



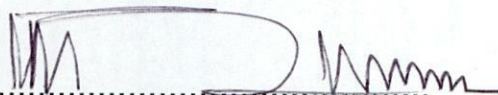
9.2 Our finding in paragraph 8.33 above does not affect the 1<sup>st</sup> Respondent's participation in the August 2021 presidential elections. For this reason, we do not find merit in relief (i)(ii) and (iii) and they are accordingly dismissed.

9.3 Reliefs (iv),(v),(vi), and (viii)(vii) and (ix) have merit and are hereby granted.

9.4 In light of the significant constitutional issues that have been raised in this matter, we order the parties to bear their own costs.



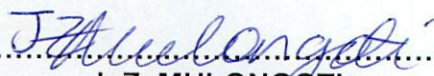
.....  
M. M. MUNALULA, JSD  
PRESIDENT – CONSTITUTIONAL COURT



.....  
A. M. SHILIMI  
D/PRESIDENT-CONSTITUTIONAL COURT



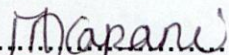
.....  
M. MUSALUKE  
CONSTITUTIONAL COURT JUDGE



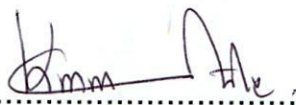
.....  
J. Z. MULONGOTI  
CONSTITUTIONAL COURT JUDGE



.....  
M. Z. MWANDENGA  
CONSTITUTIONAL COURT JUDGE



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



.....  
K. MULIFE  
CONSTITUTIONAL COURT JUDGE