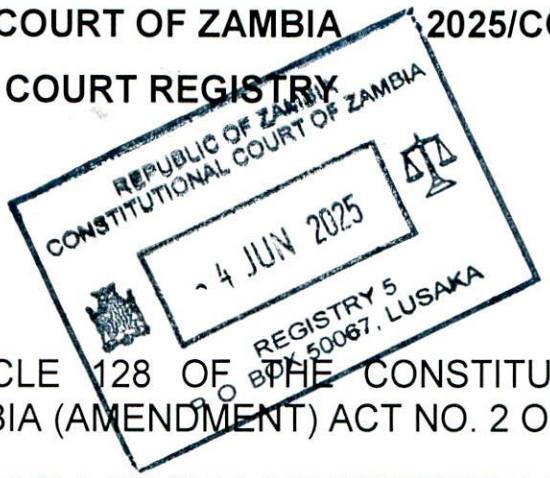
IN THE CONSTITUTIONAL COURT OF ZAMBIA **2025/CCZ/0011**

AT THE CONSTITUTIONAL COURT REGISTRY

HOLDEN AT LUSAKA

(Constitutional Jurisdiction)



IN THE MATTER OF: ARTICLE 128 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016.

IN THE MATTER OF: ARTICLE 2 OF THE CONSTITUTION CHAPTER 1 OF THE LAWS ZAMBIA, DUTY TO DEFEND THE CONSTITUTION

IN THE MATTER OF: ARTICLE 120 OF THE CONSTITUTION OF ZAMBIA, (AMENDMENT)ACT NO. 2 OF 2016

IN THE MATTER OF: ARTICLE 72 (2) (b) AS READ WITH ARTICLE 70 (2) (F) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLE 120 OF THE CONSTITUTION OF ZAMBIA, (AMENDMENT)ACT NO. 2 OF 2016

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLE 72 (2) (b) AS READ WITH ARTICLE 70 (2) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016

IN THE MATTER OF: THE JURISDICTION OF THE CONSTITUIONAL COURT TO HEAR A MATTER THAT ALLEGES CONTRAVENTION THE CONSTITUTION.

IN THE MATTER OF: THE DECISION OF THE CONSTITUTIONAL COURT IN THE CASE OF THE PEOPLE V ATTORNEY GENERAL (EX-PARTE NICKSON CHILANGWA) 20224/CCZ/R001

IN THE MATTER OF: DISQUALIFICATION AND VACATION FROM OFFICE AS MEMBER OF PARLIAMENT

IN THE MATTER OF: THE PER INCURIAM DECISION OF THE COURT DATED 10TH FEBRUARY 2025

BETWEEN:

MUNIR ZULU PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

THE SPEAKER OF THE NATIONAL ASSEMBLY 2ND RESPONDENT

ELECTORALCOMMISSION OF ZAMBIA 3RD RESPONDENT

BEFORE HON. MR. JUSTICE KENNETH MULIFE IN CHAMBERS ON THE 14TH MAY, 2025 AND 4TH JUNE, 2025.

For the Petitioner: Mr. J. Chirwa and Mr. C. Mwenge of Messrs Joseph Chirwa and Company.

For the 1st and 2nd Respondent: Mr. Mundia Mukelabai, Senior State Advocate of Attorney General's Chambers.

For the 3rd Respondent: No appearance

RULING

Cases referred to:

1. Linotype-Hell Finance Ltd v Baker [1992] 4 All ER 887.
2. Nyampala Safaris Zambia Limited and Others v Zambia Wildlife Authority and Others SCZ/8/179/2003.
3. Zambia Revenue Authority v The Post Newspaper, SCZ Judgment No.18 of 2016.
4. South African Broadcasting Corporation v National Director of Public Prosecutions 2007 (1) SA 523 (CC).
5. S v Zuma 2006 (2) SACR 191 (W).
6. Chishimba Kambwili v The Attorney General 2019/CC/009.

7. Shell Limited v Kibiru and Another 1986 KLR 410
8. Wilson v Church No. 2 [1879] 12 Ch Div.
9. Matta and Another v Rono and Another 2024 KEHC 2799 (KLR).
10. The People v The Attorney General (Ex Parte Nickson Chilangwa) 2024 /CCZ/R001.
11. Mokone v Tassos Properties 2017 (5) SA 456 (CC)
12. Moi High School, Kabarak and Another v Malcom Bell Petition Nos. 6 and 7 of 2013.
13. Bowman Chilosha Lusambo v Bernard Kanengo and Others 2023/CCZ/A002.
14. Isaac Mwanza v National Assembly of Zambia and Other 2024/CCZ/0022.
15. Bizwayo Newton Nkunika v Lawrence Nyirenda and Electoral Commission of Zambia, 2019/CCZ/005.
16. Margaret Mwanakatwe v Charlotte Scott, Electoral Commission of Zambia and Attorney General 2016/CC/A018
17. Electoral Commission of Zambia v Belemu Sibanze 2024/CCZ/0017.

Legislation referred to:

1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment)Act No. 2 of 2016
2. The Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment)Act No.18 of 1996.
3. Constitutional Court Rules, Statutory Instrument No. 37 of 2016.
4. Rules of the Supreme Court of England, 1965, 1999 Edition, White Book.

INTRODUCTION

[1] This Ruling is in respect of Mr. Munir Zulu's (Applicant) summons for an order to stay the decision of the 2nd Respondent to declare the Lumezi Parliamentary seat vacant in Lumezi Constituency, and the subsequent decision of the 3rd Respondent to commence the process for holding a by-election to fill up the stated vacancy.

[2] The summons was filed *ex parte* on 6th May 2025. It is accompanied by an affidavit in support (affidavit in support) sworn by the Applicant and skeleton arguments as well as a list of authorities. It was filed pursuant to Order IX, Rule 20 and Order X, Rule 2 of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 (CCR) as read with Order 59/13/2 of the Rules of the Supreme Court of England (White Book), 1999 Edition (White Book).

[3] I ordered that the summons be heard *inter partes* and it was so heard on 14th May, 2025.

THE APPLICANT'S CASE

[4] Antecedents to the summons are outlined in the affidavit in support; Cause No. 2025/CCZ/0011, the main matter (the petition) filed by the Applicant into this Court on 29th April 2025; and, an affidavit in support of the petition. They are as follows: whilst a Member of

Parliament for Lumezi Constituency, the Applicant was, on 7th April 2025 convicted and sentenced to twelve months imprisonment, on three counts of the offence of libel, by the Subordinate Court of the First Class sitting at Lusaka.

[5] Following the Applicant's conviction, the 2nd Respondent declared the Lumezi Parliamentary seat vacant, and the 3rd Respondent initiated the process of conducting a by-election.

[6] On his part, the Applicant, filed a notice of appeal against the judgment of the subordinate court. The notice of appeal is marked exhibit "**MZ2**", in the affidavit in support.

[7] Further, on 29th April 2025, the Applicant instituted the petition before this Court, challenging the legality of his trial before the subordinate court and the aforesaid decisions of the 2nd and 3rd Respondents. The petition seeks remedies reproduced below:

> i. **A Declaration that the judgment in the matter of *The People v Attorney General (Ex-parte Nickson Chilangwe) 2024/CCZ/R001* was entered *per incuriam* and therefore unconstitutional, null and void and of no effect as Article 72(2)(b) as read together with Article 70(2)(f) of the Constitution does not entitle the 2nd and 3rd Respondent to declare a seat of a Member of Parliament vacant upon conviction without exhaustion or abdication of the appeal process;**

ii. **A Declaration that the decision by the Respondent to declare the Petitioner's seat vacant upon conviction of the Petitioner by the Subordinate Court is unconstitutional, null and void as it violates Article 120 of the Constitution which provides for a hierarchy of courts in Zambia;**

iii. **An Order directing the 2nd and 3rd Respondent to rescind their decision to declare the Lumezi parliamentary seat vacant;**

iv. **An Order restraining the 3rd Respondent from holding a by-election for the Lumezi Constituency Parliamentary Seat;**

v. **Costs;**

vi. **Any other relief the Court may deem fit.**

[8] Relevant to this Ruling, the Applicant filed this summons in which he is contending that if the actions of the 2nd and 3rd Respondents are not stayed, he will suffer grave injustice should the appellate courts or this Court find in his favour in the appeal and petition, respectively. Further, that his actions before other courts challenging his conviction would be rendered nugatory as they would be mere academic exercises.

[9] In his brief skeleton arguments and list of authorities which he amended on 9th May 2025, the Applicant submitted that this Court is bestowed with discretionary power to stay the impugned decisions and actions of the 2nd and 3rd Respondents. Reliance for this proposition was placed on the provisions of Order IX, Rule 20(1)

and Order X, Rule 2 (1) and (2) of the CCR, which respectively provide as follows:

[10] Order IX, Rule 20(1) of the CCR: '**An interlocutory application under the Act shall be made by summons or notice of motion, as the case may be'.**

[11] Order X, Rule 2 (1) and (2) of the CCR:

> **(1) Despite any provision to the contrary, the Court may hear and determine an application for an interim order.**
>
> **(2) An application under subrule (1) may be made *exparte* and the Court may grant such order *exparte* on such terms as the Court may consider reasonable.**

[12] Reliance was also placed on Order 59/13/2 of the White Book, which provides as follows:

> **Normally the appeal should be set down before the stay of application is made, but if the urgency warrants it, an application for a stay can be made in advance of the appeal being set down...**

[13] Further, I was referred to the following cases: **Linotype-Hell Finance Ltd v Baker**[1] regarding the financial and personal ruin an unsuccessful litigant may suffer if execution is not stayed; **Nyampala Safaris Zambia Limited and Others v Zambia Wildlife Authority and Others**[2] where the Supreme Court clarified the standard for granting a stay of execution; and, **Zambia Revenue Authority v The Post Newspaper**[3] which sets out the guiding

principles on which judicial discretion to stay execution must be based.

[14] It was prayed that the decision of the 2nd Respondent to declare the Lumezi Parliamentary seat vacant and the holding of a by-election in the Constituency by the 3rd Respondent, be stayed.

[15] Respondents did not file affidavits in opposition.

HEARING

[16] When the matter came up for hearing on 14th May 2025, only Counsel for the Applicant, Mr. J. Chirwa and Mr.C. Mwenge, were before Court. I permitted Mr. Chirwa and Mr. Mwenge to proceed in the absence of the Respondents upon confirming that the Respondents were duly served with the requisite court process but had not tendered any justification for their absence.

[17] On behalf of the 1st and 2nd Respondents, Mr. Mundia Mukelabai, a Senior State Advocate, appeared in the midst of the hearing and well past an hour after the scheduled time for the hearing. He applied *viva voce* to file an affidavit in opposition stating that the State had yet to obtain instructions.

[18] The application was declined for being unprocedural as the hearing of the matter had already commenced, and on account of time being

of the essence, given the nature of the main matter and the present application. However, Counsel was granted liberty to address the Court *viva voce* on points of law during the hearing or to file written skeleton arguments. He opted for the latter.

[19] There was no appearance on behalf of the 3rd Respondent.

[20] Reverting to the Applicant's oral submissions, Mr Chirwa, informed me that the Applicant would rely on the summons, affidavit in support and skeleton arguments. Counsel augmented by first referring to the case of **South African Broadcasting Corporation v National Director of Public Prosecutions**[4] wherein he submitted that at paragraph 36, the Constitutional Court of South Africa guided that the primary purpose for the exercise of the power to grant a stay is to ensure fairness in the proceedings before the Court and that a stay will be granted where there are similar proceedings either before the same Court or another Court. It was Mr. Chirwa's submission that a petition is lying before this Court whose outcome may prove nugatory or illusory should the sought stay not be granted. Therefore, that it is imperative that the *status quo* is maintained by staying the decisions of the 2nd and 3rd Respondents until the final determination of the petition before this Court.

[21] He also cited the case of **S v Zuma**[5], where the Constitutional Court of South Africa stated that stays may be granted in constitutional matters to protect the status quo and human rights.

[22] Mr Chirwa went on to submit that this Court found itself in a similar position in the case of **Chishimba Kambwili v The Attorney General**[6]. That in that case, this Court allowed an election to proceed in the Roan Constituency and later on, found that the declaration of the seat as vacant by the 2nd Respondent, was unconstitutional. Counsel argued that effectively; by refusing to stay those proceedings, this Court allowed an injustice to proceed. That this Court had an opportunity to grant a stay in the **Chishimba Kambwili case**[6] to avoid putting itself in what he termed as a quagmire upon finding that the removal of the Petitioner in that case was unconstitutional, stating that these are matters that go to public confidence in the Judiciary.

[23] It was Mr. Chirwa's submission that the Applicant has already appealed against his conviction by the subordinate court and that there is a petition lying before the full bench of the Constitutional Court. In the circumstances, that I should consider the implications of what will become of the Lumezi Parliamentary seat in the event

that the Applicant is acquitted or should the full bench of the Constitutional Court find in his favour in the petition.

[24 It was submitted that a stay does not nullify a decision but merely pauses it. Hence, that this Court granting a stay will not terminate the decisions of the 2nd and 3rd Respondents but rather only pause them temporarily. The Kenyan cases of **Shell Limited v Kibiru and Another**[7] and **Wilson v Church**[8] were cited in support of the position that a stay should be granted if refusing it would render proceedings nugatory.

[25] I was referred to another Kenyan decision in the case of **Matta and Another v Rono and Another**[9]wherein it was submitted that the court stated that taking all relevant factors into consideration and in order not to render an intended appeal or proceedings illusory, a stay ought to be granted.

[26] It was Mr. Chirwa's submission that in considering this application, I should not be swayed by the decision of the full bench of this Court in the case of **The People v The Attorney General (Ex Parte Nickson Chilangwa)**[10]**.** That this is because the said judgment was entered per incuriam and it would be so argued in the petition that is before the full bench.

[27] I was referred to the decision of the Constitutional Court of South Africa in the case of **Mokone v Tassos Properties**[11]particularly paragraph 17 that constitutional litigation is not a game of win/lose in which winners must be identified for reward, and losers for punishment and rebuke. That that court guided that it is a process in which litigants and the courts assert the growing power of the Constitution by establishing its meaning through contested cases.

[28] It was Mr Chirwa's submission that in contrast to the present petition, the **Nickson Chilangwa case**[10] was not contested as no parties were called to be heard. Therefore, that the decision of the full bench in the **Nickson Chilangwa case**[10] was more or less an opinion than a judgment which is an outcome of people arguing in the adversarial system.

[29] Mr. Chirwa referred me to the judgment in the Kenyan case of **Moi High School, Kabarak and Another v Malcom Bell**[12] which he submitted, establishes the principles in which a constitutional court or indeed any court, will grant a stay in matters as the one involving the Applicant. These were outlined as, whether an appeal or in this case, the petition, is arguable; whether denial of the order for stay will render the proceedings nugatory; and, whether it is in the public interest to grant the order for stay. In response to these, counsel

submitted that the petition before this Court is meritorious as it raises serious constitutional issues that are yet to be raised in this jurisdiction.

[30] It was Mr. Chirwa's submission that should a by-election be held in the subject constituency, the proceedings before the full bench of the Constitutional Court would be rendered nugatory.

[31] Lastly, that it is in the public interest that the stay be granted because the Applicant was elected by thousands of electorates in Lumezi constituency. Therefore, that to nullify the seat on a misconception of the law would not be in the public interest. That the impugned steps being taken towards holding a by-election in Lumezi Constituency should be halted until the full bench of the Constitutional Court pronounces itself on the petition.

[32] Mr. Chirwa submitted that the interpretation of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (Constitution) or the granting of orders seeking the interpretation of the Constitution, are guided by three important articles of the Constitution. These being, Article 9(1)(b) which he submitted compels this Court to interpret the Constitution through the lens of national values as provided for under Article 8; Article 125(3) which he submitted, has empowered this Court to create

jurisprudence or to depart from earlier decisions in the interest of justice and in the development of jurisprudence; and Article 267(1) which he submitted compels me to interpret the Constitution in light of the Bill of Rights such as the Applicant's right to hold office.

[33] On the basis of the foregoing provisions, Counsel urged me to depart from the restrictive and narrower view of constitutional interpretation and approach to constitutional issues which the Constitutional Court has applied since its establishment in 2016. He implored me to adopt what he termed as the model envisaged in the Constitution and its framers under Articles 9(1)(b), 125(3) and 267(1). Therefore, that the approach must be to expand constitutionalism, democracy and human rights.

[34] Mr. Chirwa argued that there will be no prejudice suffered by the people of Lumezi Constituency in waiting for the outcome of the petition because they elected the Petitioner. Therefore, that the full bench of the Constitutional Court should pronounce itself in the main matter before a by-election is held in the Lumezi Constituency. Equally, that in light of Article 18 of the Constitution which guarantees him the presumption of innocence until proven guilty, the Applicant should be allowed to exhaust all constitutional

channels of appealing against the impugned judgment of the subordinate court.

[35] Mr. Mwenge also augmented. He submitted that I have jurisdiction to stay an unconstitutional decision made by any person, state institution or any lower court. For this, he cited the case of **Bowman Chilosha Lusambo v Bernard Kanengo and Others**[13].

[36] Counsel informed me that the Applicant's efforts to stay the impugned proceedings in the subordinate court by raising a constitutional question, were fruitless as the court proceeded to convict the Applicant.

1ST AND 2ND RESPONDENTS' LIST OF AUTHORITIES AND SKELETON ARGUMENTS

[37] The 1st and 2nd Respondents filed their list of authorities and skeleton arguments on 21st May 2025 in which they submitted that the Applicant's summons is misconceived.

[38] It was submitted that Order X, Rule 1 and 2 of the CCR confers me with broad discretionary powers to grant interim measures, including a stay, in the interest of justice. That however, such awards are not a matter of right; are guided by principles of law, equity and public

interest. It was submitted that the Applicant has failed to satisfy the threshold required for the award of the sought order of stay.

[39] I was referred to Articles 70(2)(f), 72(2)(b), and 72(8) of the Constitution as amended by Act No. 2 of 2016. My attention was also drawn to the following holding of the full bench in the **Nickson Chilangwa case**[10]:

> **The imprisonment of a Member of Parliament triggers the automatic vacation of the parliamentary seat as a matter of law. The vacation of the seat then triggers a by election also by operation of law...a vacancy of a seat upon disqualification is a constitutional consequence.**

[40] On the basis of the foregoing, it is the 1st and 2nd Respondents' submissions that what triggered the vacancy and the pending by-election for the Lumezi parliamentary seat, is not their actions but the Applicant's subject conviction and sentence.

[41] The 1st and 2nd Respondents contested the suggestion by the Applicant that the full bench's judgment in the **Nickson Chilangwa case**[10] was made *per incuriam*. That this is because the Applicant misapprehended Article 70(2)(f) of the Constitution which enacts that a prison sentence and not the outcome of an appeal thereof, automatically disqualifies a person from holding a parliamentary seat.

[42] Further, that the Applicant's argument pertaining the **Nickson Chilangwa case**[10] is flawed because: the Constitutional Court is the final authority on constitutional interpretation and its decisions are binding. Further, that the Applicant is currently serving a prison sentence.

[43] It was submitted that the **Nickson Chilangwa case**[10] rightly affirmed that the mere filing of an appeal or petition does not suspend the operation of the Constitution. That allowing otherwise would paralyse constitutional enforcement.

[44] It was submitted that the principle laid down in the **Nickson Chilangwa case**[10] is not that a conviction could never be overturned, but that legal and constitutional consequences must follow. That to allow otherwise would create a constitutional vacuum where convicted persons could indefinitely delay the enforcement of the disqualification under Article 70(2)(f) of the Constitution by merely filing an appeal against a conviction or a petition without the conviction or sentence being overturned by the Court.

[45] It was submitted that the Applicant's criticism of the **Nickson Chilangwa case**[10] lacks legal merit and does not justify granting a stay.

[46] As regards the Applicant's contention of prejudice should the by-election be held; it was submitted that reputational injury or political loss is not a basis for interim constitutional relief. Further, that any alleged harm is speculative.

[47] I was referred to the following holdings of the Supreme Court in the case of **Zambia Revenue Authority v Post Newspaper**[3]:

> **i. Interim relief is not a right but a matter of judicial discretion;**
> **ii. Such discretion must be exercised judiciously and not for convenience or sympathy;**
> **iii. Courts may consider the likelihood of success in the substantive matter.**

[48] It was submitted that the Applicant has not demonstrated a compelling likelihood of success in the petition. That the Applicant's entire application rests on undermining existing binding precedents.

[49] Further, it was submitted that the 2nd Respondent's impugned decision aligns with the constitutional obligation arising under Article 70(2)(f) of the Constitution. That against this backdrop, the 2nd Respondent does not exercise personal discretion but performs a constitutional function. That the declaration of a vacancy, where properly grounded in a valid disqualification, is not a political act. Therefore, granting a stay would interfere with the lawful functioning of Parliament and upset the separation of powers.

[50] It was submitted that the matter in *casu* involves a parliamentary seat, which raises an issue of public interest. That the public interest favours the enforcement of disqualification provisions and that Parliament must be composed of persons who meet constitutional requirements.

[51] In support of this proposition, I was referred to the case of **Isaac Mwanza v National Assembly of Zambia and Other**[14] in which a single Judge of this Court held as follows:

> **My considered position is that the public interest, in particular, that of electorates of Petauke Central Constituency, cannot be served if the conservatory order is granted and by-elections for the office of Member of Parliament for Petauke Central Constituency scheduled for 6th February 2025, do not take place. I therefore, do not see any prejudice that might be suffered by the Petitioner that outweighs the public interest in conducting the by-election. I am of the view that it is not in the public interest to grant the conservatory order.**

[52] I was referred to the case **Bizwayo Newton Nkunika v Lawrence Nyirenda and Electoral Commission of Zambia**[15], where the Constitutional Court held that constitutional eligibility standards for Members of Parliament must be upheld rigorously. That failure to adhere to these standards undermines the integrity of the electoral process and public confidence in the rule of law.

[53] It was submitted that staying the 2nd Respondent's impugned declaration, would erode constitutional integrity and public confidence in the rule of law. It was submitted that the Applicant's ongoing sentence of imprisonment is sufficient to invoke the disqualification clause.

[54] In conclusion, the 1st and 2nd Respondents submitted that the Applicant, is on the basis of being a serving convict, disqualified under Article 70(2)(f) of the Constitution from holding the office of Member of Parliament. That the 2nd Respondent acted in fulfilment of constitutional duty under Article 72(8) of the Constitution. Further, that the Petitioner's contention that the **Nickson Chilangwa case**[10] was wrongly decided does not suffice to suspend the Constitution and its binding effect. That the Applicant's summons has no demonstration of irreparable harm and no constitutional prejudice. That the application is not only devoid of merit but also undermines constitutionalism and public interest consideration in the electoral process.

[55] It was prayed that the summons be dismissed with costs.

3RD RESPONDENT'S LIST OF AUTHORITIES AND SKELETON ARGUMENTS

[56] The 3rd Respondent filed a list of authorities and skeleton arguments on 19th May 2025. A perusal of the same reveals that they relate to the Applicant's summons which was withdrawn. As such they are irrelevant to the present summons and shall for this reason, not be considered.

[57] The Applicant did not file a Reply.

DETERMINATION

[58] I have considered the summons; affidavits in support thereof; the Applicant and 1st and 2nd Respondents' skeleton arguments and list of authorities as well as Counsel for the Applicant's oral submissions.

[59] It is not in dispute that the Applicant is currently serving a twelve month prison sentence resulting from his conviction for the offence of libel. It is also not in dispute that the Applicant has appealed against the said conviction and sentence to the High Court. The Applicant has also filed a petition in the Constitutional Court challenging the legality of the proceedings that resulted in his conviction and sentence.

[60] As highlighted already, the summons seeks an order to stay the 2nd Respondent's declaration of the Lumezi Parliamentary seat as

vacant, as well as the 3rd Respondent's decision to commence preparations for a by-election to fill-up the vacancy. In light of this, the fundamental question is whether a stay of the declaration of the 2nd Respondent and the subsequent actions of the 3rd Respondent in a case where a Member of Parliament is serving a prison sentence, is tenable.

[61] As outlined above, the basis of the summons is that the Applicant has lodged an appeal against his conviction and sentence. Further, that he has filed a petition in the Constitutional Court challenging the legality of the proceedings that resulted in his conviction and sentence.

[62] The Applicant also contends that if the 2nd and 3rd Respondents' impugned actions are not stayed, the pending by-election would render his appeal and petition, academic. That this would occasion him grave injustice should he succeed in the appeal and petition as he would have lost the parliamentary seat. Further, that the electorate in Lumezi Constituency would have lost his representation in parliament.

[63] In response, the 1st and 2nd Respondents contend that the sought order of stay is untenable because the declaration of the vacancy is by operation of law namely, Article 72(2)(b) read with Article 70(2)(f)

of the Constitution as amended by Act No. 2 of 2016 which ties a vacancy in a parliamentary seat to an incumbent serving a prison sentence. That accordingly, the Applicant became disqualified to hold the parliamentary seat as he is serving a prison sentence.

[64] The 1st and 2nd Respondents argue that the Constitution as amended by Act No. 2 of 2016 does not contemplate a stay pending appeal or indeed any action before court.

[65] I will begin by addressing the powers of a single Judge of the Constitutional Court when dealing with interlocutory applications that necessarily involve constitutional provisions. This is because the question before me inevitably requires a consideration of constitutional provisions.

[66] Here, I am persuaded by the holding of Mulembe JC (as he then was) in the case of **Margaret Mwanakatwe v Charlotte Scott, Electoral Commission of Zambia and Attorney General**[16], that the interpretation of constitutional provisions is the exclusive preserve of the full bench of this Court. However, a single Judge is not precluded from referring to or noting provisions of the Constitution that have a direct bearing on an interlocutory application, without engaging in their interpretation.

[67] In this regard, I take note of Article 72(2)(b) of the Constitution as amended by Act No. 2 of 2016. The provision provides for the circumstances under which the office of Member of Parliament becomes vacant. It is couched as follows: '***The office of Member of Parliament becomes vacant if the member—(b) becomes disqualified for election in accordance with Article 70'.***

[68] Article 70(2)(f) of the Constitution provides as follows:

> **70(2) A person is disqualified from being elected as a Member of Parliament if that person—**
> ***(f)*** **is serving a sentence of imprisonment for an offence under a written law;**

[69] I further take note of Article 57 of the Constitution as amended by Act No. 2 of 2016. It provides for what follows when there is a vacancy in the office of Member of Parliament as follows:

> **57.(1) Where a vacancy occurs in the office of Member of Parliament, mayor, council chairperson or councillor, a by-election shall be held within ninety days of the occurrence of the vacancy.**

[70] The Constitutional Court, sitting as a full bench, has definitively interpreted these provisions and guided that the vacancy occurs by operation of law, and not as a result of any discretionary or administrative decision by the 2nd or 3rd Respondent. The role of the 2nd Respondent in making the declaration is merely formal and not constitutive of the vacancy. Likewise, the role of the 3rd Respondent

is confined to discharging its constitutional mandate under Article 57 of the Constitution as amended by Act No. 2 of 2016, to conduct a by-election where such a vacancy arises by operation of law. Given the constitutional framework in this country, the authorities and precedents cited by the Applicant in support of the summons do not aid his case because the question of whether a stay can be granted where a vacancy arises, must be determined strictly within the confines of the Constitution as amended by Act No. 2 of 2016.

[71] Equally, I note that the authorities cited by the Petitioner in his skeleton arguments, including **Linotype-Hell Finance Ltd v Baker[1], Nyampala Safaris Zambia Limited and Others v Zambia Wildlife Authority and Others[2],** and **Zambia Revenue Authority v The Post Newspaper[3]** do not apply as they all pertain to applications for a stay of execution of a judgment, not to the decisions of constitutional or administrative bodies such as the 2nd and 3rd Respondents.

[72] In the case of **Electoral Commission of Zambia v Belemu Sibanze[17],** the full bench guided that the ninety-day period for holding a by-election under Article 57(1) of the Constitution begins to run from the date the vacancy occurs and cannot be paused or extended. It further held that the only court process permitted once

a vacancy is declared is a nomination challenge under Article 52 of the Constitution. The Court stated thus:

> **Hence the election process once triggered by the vacancy must run its course until the election and there is no provision for its extension or re-alignment outside the provisions of the Constitution...**
>
> **The import of this is that the law does not contemplate any other processes being undertaken during the 90 days let alone permit those processes to undermine the constitutional time limits. Hence, once the Applicant receives notification of a vacancy having arisen it is under compulsion to set in motion the by-election process and conclude it within the 90 days in Article 57.**

[73] Similarly, in the case of **The People v Attorney General (Ex parte Nickson Chilangwa)**[10], involving a constitutional reference from the High Court, the full bench pronounced itself on the interpretation of Article 72(2)(b) as read with Article 70(2)(f) of the Constitution as amended by Act No. 2 of 2016. In doing so, the Court took into account both contextual and substantial constitutional provisions having a bearing on the impugned provisions. I find it necessary to extensively quote the guidance provided:

> **[7] In our considered view, the purpose of the stated provisions is the promotion of democratic values through effective representation of the People. It is about ensuring that Members of Parliament are actively involved in law-making and providing checks and balances related to the performance of executive functions. If a Member of Parliament is in prison and therefore unable to carry out his or her mandate it is the People's desire that**

the seat is promptly vacated and re-filled. This is in line with Article 68(2) which provides that there shall be 156 directly elected members of the National Assembly, one for each constituency.

...

[13] Article 70(2)(f) as read with Article 72(2)(b) connects the imprisonment of a Member of Parliament with the loss of his or her seat. Thus Article 72(2)(b) provides that a seat becomes vacant if a person is disqualified under Article 70. Under Article 70(2)(f) in particular, a person is disqualified if they are serving a sentence of imprisonment for an offence under a written law.

[14] There is no qualification of this disqualification portended by an appeal against conviction or sentence. Neither is there provision for judicial review proceedings staying or challenging the vacancy which is inevitably triggered by the imprisonment. It follows that the vacancy is conclusive and self-executing.

[15] There is good reason for this arrangement. It excludes judicial review and thereby curtails its dilatory effect on the process of re-filling a vacant seat. It also prevents the subjection of constitutional functionaries to unnecessary litigation. We say so having taken judicial notice of the multiple challenges in various High Courts which are not just about the vacancy of a seat but also seek to prosecute officers that oversee the vacancy and related by-election process. We wish to elaborate on these two points.

[16] Our elaboration is from the understanding that there is a distinction between the constitutional issue that is the vacating of a parliamentary seat (a public office held in a representative capacity with its own constitutional and prescribed processes) and the appeal process launched under the criminal procedure with a view to overturning the imprisonment. Each has its own goal and proceeds separately from the other. The appeal therefore can have no effect on the vacated seat.

[17] The vacation of the seat being settled upon imprisonment triggers a further process of a by-election which is equally settled under Article 57(1) ...

[24] The automatic triggering of the vacancy and by-election by operation of law takes the decision as to whether a vacancy has arisen and a by-election should follow out of the hands of those involved in the administration of elections. A seat is vacated and a by-election triggered not by the decisions or actions of the Electoral Commission of Zambia (ECZ) and the Speaker but by operation of law.

[25] The ECZ and Speaker's roles are therefore mechanical. They announce a vacancy which has already occurred and conduct the related by-election which has also already been set in motion by the Constitution and the law. This is the mandate that is spelt out by Article 57(1) above and (3) below which reads:

The Electoral Commission shall by regulation, set the place where and the date and time when, a by-election is to be held.

Further, Article 72(2)(8) reads:

Where a vacancy occurs in the National Assembly, the Speaker shall within seven days of the occurrence of the vacancy, inform the Electoral Commission of the vacancy, in writing and a by-election shall be held in accordance with Article 57.

[26] If respected, the provisions ensure that the ECZ and the Speaker of the National Assembly are not put in the awkward position of having to choose between a court ordered stay (clearly erroneous in the circumstances) and their constitutional obligations. Challenging the manner of announcing the vacancy and the by-election is in the circumstances an exercise in futility.

[27] The final point we wish to make is that the strict timelines that apply to the vacation of a seat and the process of a by-election serve to further underscore the need for the vacated seat to be filled as soon as possible. The 90 days in which the by-election must take place is instructive and must be strictly adhered to in accordance with the law on constitutional timelines which was settled in Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu, Inonge Mutukwa Wina, Electoral Commission of Zambia and Attorney General and Bernard Kanengo v Attorney

General and Electoral Commission of Zambia v Belemu Sibanze cases. The entire process of a by-election must run its course within the timelines set by the Constitution to avoid the risk of triggering a constitutional crisis.

...

[29] In view of the foregoing, we are of the firm view that for an imprisoned former Member of Parliament to seek to halt and for a court to grant a stay of the vacation of a seat in order to question the validity of the loss of the seat and consequently stop the triggered by-election from taking place would be tantamount to challenging the Constitution and the law as such a course of action is not provided for in the Constitution or the law. The Constitution is the Supreme law of the land. It is so stated in Article 1, which goes on to bind all persons, and all State organs and institutions. As such, the exercise of a court's power is subject to the Constitution.

[30] It follows that, the answer to the referred constitutional question is that when Article 72(2)(b) is read with Article 70(2)(f), the imprisonment of a Member of Parliament triggers the automatic vacation of the parliamentary seat as a matter of law. The vacation of the seat then triggers a by-election also by operation of law. There is no provision for any judicial review process during the by-election other than a nomination challenge. An appeal which is lodged has no effect on the vacation of the seat and the ensuing by-election."

[74] In summation, the Court's guidance in the **Nickson Chilangwe case**[10] is that the purpose of the said constitutional provisions, is to uphold democratic representation and ensure active legislative participation; that once a Member of Parliament is imprisoned, the seat is vacated automatically by operation of law, and an appeal or

judicial review does not suspend or nullify this constitutional consequence; that the said constitutional provisions intentionally exclude judicial review and other legal challenges from interfering with the constitutional timelines for by-elections; and, there is a distinction between the criminal appeal process and the constitutional process for vacating a parliamentary seat. The two proceed independently of each other.

[75] Based on the foregoing guidance, it is clear that the actions of the 2nd and 3rd Respondents are constitutionally mandated once the conditions under Article 70(2)(f) and 72(2)(b) of the Constitution as amended by Act No. 2 of 2016 are met and that the ninety days prescribed under Article 57(1) for holding a by-election cannot be halted or altered. The vacancy arises by operation of law, once the sentencing court imposes a custodial sentence.

[76] I take due cognisance of the Applicant's argument that the presumption of innocence under Article 18 of the Constitution as amended by Act No. 2 of 2016 should apply until the appellate process is concluded. However, this presumption is specific to criminal proceedings and does not preclude the independent constitutional consequences that attach to a conviction and

sentence in relation to a vacancy of a parliamentary seat as guided in the cases of **Sibanze Belemu**[17] and **Nickson Chilangwa**[10].

[77] Furthermore, I have taken judicial notice of the hierarchy of the courts and the availability of appeal mechanisms, including the possibility of the Applicant succeeding in his pending appeal. However, the framers of the Constitution were undoubtedly aware of these legal processes when they enacted the disqualification clauses under Article 70(2)(f) and the automatic vacancy provision under Article 72(2)(b) of the Constitution as amended by Act No. 2 of 2016. They nonetheless chose to allow such consequences to take effect upon conviction and sentencing, and not upon exhaustion of the appellate process.

[78] At this stage, I find it appropriate to take note of the legislative history of Article 70 (2)(f) of the Constitution as amended by Act No. 2 of 2016. The requisite law prior to the said Article 70(2)(f) of the Constitution as amended by Act No. 2 of 2016, was Article 71(2)(e) of the Constitution as amended by Act No. 18 of 1996. Article 71(2)(e) of the Constitution as amended by Act No. 18 of 1996 similarly provided for circumstances that could trigger a vacancy in a parliamentary seat. These included where an incumbent is serving a prison sentence. However, the provision expressly provided for a

stay of the vacancy, where there is an appeal against the conviction and sentence. For the avoidance of doubt, I hereunder reproduce the provision:

> **71. (2)(e) A member of the National Assembly shall vacate his seat in the Assembly if he is sentenced by a court in Zambia to death or to imprisonment, by whatever name called, for a term exceeding six months...**
> **(3) Notwithstanding anything contained in clause (2), where any member of the National Assembly has been sentenced to death or imprisonment...appeals against the decision... the decision shall not have any effect for the purpose of this Article until the final determination of such appeal or application:**
>
> **Provided that –**
>
> **such member shall not, pending such final determination, exercise the functions or receive any remuneration as a member of the National Assembly**

[79] On the contrary, the remedy of a stay is omitted from the current law on the subject - Article 70(2) of the Constitution as amended by Act No. 2 of 2016. In my view, this omission is a clear display of the framers' intention to abolish the remedy of a stay from the Constitution.

[80] With the foregoing background, it would be an usurpation of legislative power for me to suspend or defer the constitutional effect of a vacancy on the basis of a potential outcome of the appeal.

[81] I would also like to state that a single Judge of the Constitutional Court (such as I am sitting in the determination of the present summons), has no power to overturn or disregard the decision of the full bench of the Court. This position relates to the invitation by Mr. Chirwa, for me to disregard the decision of the full bench in the case **of The People v The Attorney General (Ex Parte Nickson Chilangwa)**[10]. I accordingly decline Counsel's invitation as it is procedurally and jurisprudentially incompetent.

[82] Further, I do not find merit in Mr. Chirwa's suggestion that the **Nickson Chilangwa case**[10] ought to carry lesser weight because it was unopposed or arose by way of a reference This argument lacks merit because the validity and binding effect of a judgment of the Constitutional Court, does not depend on whether the matter was contested or the route through which it reached the Court. What is fundamental is that the judgment was a product of the Court's engagement with its jurisdiction and this was the position in the Nickson Chilangwa case. The ruling therein resulted in the Court's engagement with its referral jurisdiction bestowed by Article 128(2) of the Constitution as amended by Act No. 2 of 2016.

[83] I accordingly dismiss Mr. Chirwa's argument.

[84] Finally, I am of the considered view that public interest considerations weigh heavily against the grant of the sought order of stay. If granted, the people of Lumezi Constituency would be left without representation in the National Assembly for an unknown period, contrary to the democratic principles that underpin representative democracy. In a representative democracy, such a vacuum cannot be justified on the speculative possibility that a conviction may be overturned on appeal.

CONCLUSION

[85] In conclusion, I find the summons not only misconceived but also, frivolous because at the time it was launched, the petitioner was aware about the full bench's decisions in the cases of **Belemu Sibanze**[17] and **Nickson Chilangwa**[10], on the subject matter of the summons. Further, his Counsel was aware or ought to have been aware that as a single Judge, I do not have the liberty to disregard judgements of the full bench. I accordingly dismiss the summons.

[86] Parties shall bear their respective costs.

DATED AT LUSAKA THIS 4TH DAY OF JUNE,2025.

.....

KENNETH MULIFE

CONSTITUTIONAL COURT JUDGE.