IN THE CONSTITUTIONAL COURT OF ZAMBIA 2024/CCZ/0022
IN THE CONSTITUTIONAL COURT REGISTRY
(CONSTITUTIONAL COURT JURISDICTION)

IN THE MATTER OF: ARTICLE 1(1), 1(3), 1(5), 2,5(2)(a) and 128(1)(b) AND 128(3)(b) OF THE CONSTITUTION OF ZAMBIA CHAPTER 1, OF THE LAWS OF ZAMBIA AS READ TOGETHER WITH SECTION 11(2)(b) OF THE CONSTITUTIONAL COURT ACT NO.8 OF 2016

IN THE MATTER OF: INTERPRETATION OF ARTICLE 72(2)(c) OF THE CONSTITUTION OF ZAMBIA AS READ TOGETHER WITH STANDING ORDER 223 OF THE STANDING ORDERS OF THE NATIONAL ASSEMBLY OF ZAMBIA OF 2024, SECTION 96(1)(b) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016 AND ARTICLES 72 (8) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA

REPUBLIC OF ZAMBIA
CONSTITUTIONAL COURT OF ZAMBIA
27 AUG 2025
REGISTRY 5
P O BOX 50067, LUSAKA

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 5(2), 72(2), 79, 119 AND 134(a) AS READ TOGETHER WITH SECTION 96(1)(b) OF THE ELECTORAL PROCESS ACT NO.35 OF 2016 BY DETERMINING THE EXISTENCE OF AND CREATION OF AN ADDITIONAL GROUND FOR A VACANCY IN THE OFFICE OF A MEMBER OF PARLIAMENT BY THE 1st RESPONDENT

IN THE MATTER OF: THE PARLIAMENTARY AND MINISTERIAL CODE OF CONDUCT ACT, CHAPTER 16 OF THE LAWS OF ZAMBIA AND THE NATIONAL ASSEMBLY (POWERS AND PRIVILEGES) ACT, CHAPTER 12 OF THE LAWS OF ZAMBIA.

IN THE MATTER OF: ACTION, MEASURE AND DECISION OF THE SPEAKER OF THE NATIONAL ASSEMBLY AND THE NATIONAL ASSEMBLY DATED 19th NOVEMBER, 2024 TO PURPORT TO CREATE A GROUND FOR A VACANCY IN THE OFFICE OF A MEMBER OF PARLIAMENT FOR PETAUKE CONSTITUTENCY.

BETWEEN:

ISAAC MWANZA (suing as a member and in the interest of the Zambia Civil Liberties Union) — PETITIONER

AND

THE NATIONAL ASSEMBLY OF ZAMBIA — 1st RESPONDENT

THE ATTORNEY GENERAL — 2nd RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA — 3rd RESPONDENT

Coram: Munalula, PC, Shilimi, DPC, Musaluke, Chisunka, Mulongoti, Mwandenga, Mulife, JJC on the 9th April, 2025 and 27th August, 2025

For the Petitioner : In person

For the 1st and 2nd Respondent : Mr. C Watopa, Senior State Advocate, Attorney General Chambers

For the 3rd Respondent : Mr. M. Bwalya, In House Counsel

JUDGMENT

Mwandenga, JC delivered the judgment of the Court.

Cases referred to:

1. Dr. Daniel Pule, Wright Musoma, Pastor Peter Chanda & Robert Mwanza v The Attorney General, Davies Mwila (In his capacity as Secretary General of the Patriot Front, The Law Association of Zambia & Steven Katuka (In his capacity as Secretary General of the United Party For National Development) Selected Judgment No. 60 of 2018
2. The Attorney General v E.B. Jones Machinists Limited SCZ Judgment No.26 of 2000
3. Electoral Commission of Zambia v Belemu 2024/CCZ/0017
4. Joseph Malanji and Bowman Lusambo v the Attorney General & Electoral Commission of Zambia (2022/CCZ/0018)
5. The Gambia v Momodou Jobe [1984] 3 WLR, 174, PC
6. Tuffuor v Attorney General [1980] GLR 637

7. Fredson Kango Yamba v The Principal Resident Magistrate, Anti-Corruption Commission and the Attorney-General 2023/CCZ/003
8. Kemrajh Harrikissoon v Attorney General [1980] AC 265
9. Re: Application by Bahadur [1986] LRC (Const)297
10. Gabriel Mutava, Elizabeth Kwini and Mary Masyuki (the Joint Administrator of the Estate of Joseph M. Indo (Deceased) v the Managing Director Kenya Ports Authority & the Kenya Ports Authority [2016] eKLR
11. Llyod Chembo v Attorney General 2017/CCZ/0011
12. Conservation Advocates Zambia Limited v Attorney General 2023/CCZ/0018
13. Kabisa Ngwira v National Pensions Scheme Authority 2019/CCZ/17

Legislation referred to:

1. The Constitution of Zambia (Amendment) Act No.2 of 2016
2. The Constitutional Court, Act No.8 of 2016
3. The Constitutional Court Rules, Statutory Instrument No. 37 of 2016
4. The Electoral Process Act, No. 35 of 2016
5. The Electoral Process (General) Regulations Statutory Instrument No.63 of 2016
6. The Parliamentary and Ministerial Code of Conduct Act No.35 of 1994
7. The National Assembly (Powers and Privileges) Act, Chapter 12 of the Laws of Zambia
8. The State Proceedings Act, Chapter 71 of the Laws of Zambia
9. The Penal Code, Chapter 87 of the Laws of Zambia

Other works referred to:

1. The National Assembly of Zambia, Standing Orders, 2024

Introduction

[1] This judgment decides an amended Petition dated 6th February, 2025, which in the words of the Petitioner, alleges contravention of the Constitution of Zambia (Amendment) Act, No.2 of 2016 (the Constitution) as follows:

(a) That the act, measure or decision by the National Assembly of Zambia, by resolution referred to in paragraph 13 to give the Petauke Central lawmaker seven days within which to attend business of the House, failing which the Speaker's Office would invoke Article 72(8) of the Constitution of Zambia by informing the Electoral Commission of Zambia of the occurrence of a vacancy in the Petauke Central Parliamentary seat amounts to introducing another ground on how a vacancy is created thereby amending Article 72(2) and 79 of the

Constitution by a mere resolution in contravention of both Article 72(2) and Article 79 of the Constitution;

(b) That the act and decision by the Privileges and Absences Committee of the National Assembly to hear the breaches of the Code of Conduct is allocating power to itself which has not been allocated by the Constitution and the law in contravention of Article 5(2) of the Constitution as read with Article 72(2)(c) and section 13 and 14 of the Parliamentary and Ministerial Code of Conduct Act; and

(c) The act, measure and decision by both the Parliamentary Committee on Privileges and Absences as well as the National Assembly of Zambia to hear and resolve that the Petauke Parliamentary seat shall become vacant within 7 days from the 19th November, 2024 usurps the unlimited and original jurisdiction of the High Court to hear civil matters under Articles 119 and 134(a) of the Constitution as read together with Section 96(1)(b) of the Electoral Process Act, in contravention of Article 134(a) of the Constitution.

Parties

[2] The Petitioner is one Isaac Mwanza who describes himself as the Executive Director of the Zambia Civil Liberties Union (ZCLU), a member of the Global Council for Strategic Litigation, engaged in promotion of civil liberties, human rights for all, constitutionalism and humanitarian justice in Zambia and brings this action in defence of the Constitution as a member of and in the interest of a group referred to as ZCLU.

[3] The 1st Respondent is the National Assembly of Zambia, a legislative organ of the State, established by Article 62 of the Constitution and mandated to consider and pass Bills for enactment, ensure equitable distribution of national resources, appropriate funds for expenditure, scrutinize public expenditure, approve public debt, and approve international agreements.

[4] The 2nd Respondent is the Attorney General of the Republic of Zambia who is the Chief Legal Advisor of the Government of the Republic of Zambia (the Government) as established and pursuant to Article 177 of the Constitution with the authority to represent the Government generally and is sued subject to section 12 of the State Proceedings Act, Chapter 71 of the Laws of Zambia.

[5] The 3rd Respondent is the Electoral Commission of Zambia, an Electoral Management body established pursuant to Article 229 of the Constitution with the mandate of, amongst others, managing and implementing the electoral process in Zambia.

The facts

[6] The facts pertinent to this matter can be deciphered from the amended Petition and the amended affidavit verifying the facts relating thereto dated 13th January, 2025, the 1st and 2nd Respondents' Answer and Affidavit in Support of the Answer dated 14th February, 2025 and the 3rd Respondent's Answer and Affidavit in Support of the Answer dated 13th February, 2025 as well as the Court's record and matters which are in the public domain. From the said documents and information, it is palpably clear that the foundation of this matter lies in the events surrounding the manner in which the

Member of Parliament (MP) for Petauke Central Constituency, one Hon. J.E. Banda vacated his seat in the National Assembly. (In this Judgment the MP will be referred to as the then MP.) The facts which are not in dispute are as set out below.

[7] The then MP was elected as an MP on the 12th August,2021.

[8] On the 20th June, 2024 the Zambia Police Service Public Relations Officer announced the formal arrest of the then MP for the offences of aggravated robbery and attempted murder contrary to sections 294 and 215 of the Penal Code Act, Chapter 87 of the Laws of Zambia. The then MP was subsequently detained at Namuseche Prison in Chipata.

[9] While in lawful custody the then MP escaped when he had been taken to Chipata Central Hospital for medical treatment.

[10] On the 15th October, 2024 one Dr. Clement Andeleki an MP for Katombora Constituency raised a point of order in the National Assembly to find out the status of the then MP following his escape from the Hospital and his continued absence from the sittings of the National Assembly.

[11] The matter was referred to the Committee on Privileges and Absences of the National Assembly (the Committee) for determination of the status of the then MP.

[12] The Committee later made recommendations, one of which was that the then MP be given seven days within which to attend business of the House, failing which the Honourable Speaker should invoke Article 72(8) of the Constitution by informing the 3rd Respondent of the occurrence of a vacancy in the Petauke Central Parliamentary seat.

[13] The recommendation was made against the backdrop that the Committee, among other findings, had found that the then MP had been absent from sittings without permission since 4th August, 2024 and that his absence without permission breached the prescribed Code of Conduct namely, Standing Order 223 of the National Assembly of Zambia Standing Orders, 2024 (the Standing Orders).

[14] On the 19th November, 2024 upon the Speaker calling the House to pass a resolution on the course of action to be taken against the then MP, the House resolved by a division of 42 votes, voting to give the then MP seven days within which to attend the business of the House, failing which the Speaker's Office would invoke Article 72(8) of the Constitution by informing the 3rd Respondent of the occurrence of a vacancy in the Petauke Central Parliamentary seat while 25 voted against the resolution and three abstained.

[15] Following the passing of the Resolution, the Speaker then addressed the then MP in absentia and gave him seven days within which to attend business of the National Assembly and that should he fail to do so, that the Speaker would inform the 3rd Respondent of the occurrence of a vacancy in the Petauke Central Parliamentary seat.

[16] The then MP did not attend the business of the National Assembly within the stipulated period.

[17] On the 26th November, 2024 the Petitioner filed a petition in this matter.

[18] On the 27th November, 2024 the Speaker notified the 3rd Respondent of a vacancy in the National Assembly, following the absence of the then MP.

[19] On the 10th December, 2024 the Petitioner applied for an interim conservatory order to prevent the by-election for the Petauke Central Parliamentary seat taking place pending hearing of the Petition.

[20] The 3rd Respondent by Statutory Instrument, set the 7th January, 2025 as the date for nominations and 6th February, 2025 as the poll day for the by-election for Petauke Central Parliamentary seat.

[21] The 90-day period for holding the by-election was scheduled to expire on the 25th February,2025.

[22] On the 10th January,2025 the Petitioner filed an amended petition in this matter.

[23] On the 20th January, 2025 a single Judge of the Court delivered a ruling dismissing the application for an interim conservatory order.

[24] The by-election for Petauke Central Parliamentary seat took place on the 6th February,2025.

The reliefs sought

[25] The reliefs sought by the Petitioner are couched as follows:

(i) A declaration that pursuant to Articles 72(2) and 72(8) of the Constitution as read with Section 96(1) of the Electoral Process Act, a seat of an elected Member of Parliament becomes vacant upon the determination by the High Court for Zambia of the question of whether a seat has become vacant and Speaker's duty is limited to informing the Electoral Commission of the existence of a vacancy.

(ii) A declaration that the prescribed Code of Conduct referred to in Article 72(2)(c) refers to the Parliamentary and Ministerial Code of Conduct whose enforcement is done by a complaint filed with the Chief Justice by any person and determined by the properly constituted Tribunal appointed by the Chief Justice.

(iii) A declaration that the office of a Member of Parliament does not become vacant when a member is perpetually absent by virtue of a determination made by the Parliamentary Committee on Privileges and Absences by virtue of standing Order 223 of the Standing Orders of the National Assembly of Zambia, including or Section 28 of the Powers and Privileges (Power and Privileges) Act.

(iv) A declaration and order that the act, measure and decision by the National Assembly of Zambia dated the 19th November, 2024 to resolve that the Petauke Central Parliamentary Seat will fall vacant if the Member of Parliament does not attend business in 7 days amounts to adding grounds to and amending Article 72(2) of the Constitution for

vacancy in the office of a Member of Parliament in contravention of Article 72(2) and 79 of the Constitution.

(v) A declaration and order that the act and decision by the Privileges and Absences Committee of the National Assembly of Zambia to hear the breaches of the Code of Conduct amounted to allocating to itself power which has not been allocated by the Constitution and the law, in contravention of Article 5(2) of the Constitution as read together with Article 72(2) (c) and Section 13 and 14 of the Parliamentary and Ministerial Code of Conduct Act.

(vi) A declaration and order that the act, measure and decision by both the Parliamentary Committee on Privileges and Absences as well as the National Assembly to hear and resolve that the Petauke Parliamentary Seat shall become vacant within 7 days from the 19th November, 2024 usurped the unlimited and original jurisdiction of the High Court to hear civil matters under Articles 119 and 134(a) of the Constitution as read with Section 96(1)(b) of the Electoral Process Act, in contravention of Article 134(a) of the Constitution.

(vii) An interim relief for issue of the conservatory order restraining the Respondents from including taking any further action, including holding or taking any measure or act or decision incidental to holding a by-election in Petauke Central Parliamentary Constituency, pending the hearing and determination of the Petition.

(viii) Any further reliefs that this Honourable Court may deem just and appropriate.

The Petitioner's arguments

[26] The Petitioner in his skeleton arguments dated 3rd December, 2024 dealt with the brief background of the matter and preliminary matters concerning or touching on the jurisdiction of the Court, the Petitioner's *locus standi* and mode of commencement. We shall however, not rehash arguments concerning or touching the jurisdiction of the Court and the mode of commencement as they do not have any bearing on the conclusion that we

have reached in this Judgment. We shall however deal with arguments on *locus standi* before dealing with the rest of the arguments.

[27] Concerning the Petitioner's *locus standi* in these proceedings the Petitioner argued that he was suing as a member of the ZCLU and also a citizen of Zambia who had brought this Petition pursuant to Articles 2, 43(2)(a) and 128(3)(b) of the Constitution as read with section 11(2)(b) of the Constitutional Court Act, No.8 of 2016 (CCA) which provide as follows:

> Constitution of Zambia
> **(Defence of the Constitution)**
> **2. Every person has the right and duty to-**
> **(a) defend the Constitution; and**
> **(b) resist or prevent a person from overthrowing, suspending or illegally abrogating this Constitution.**
>
> Responsibilities of citizen
> **43. (2) A citizen shall endeavour to-**
> **(a) acquire basic understanding of this Constitution and promote its ideals and objectives;**
> **...;**
>
> Jurisdiction of Constitutional Court
> **128. (3) Subject to Article 28, a person who alleges that-**
> **(a) ...;**
> **(b) ...; or**
> **(c) an act, or omission or measure or decision by a person or authority;**
> **contravenes this Constitution, may petition the Constitutional court for redress.**
>
> Constitutional Court Act
> **11.(2) Subject to subsection (1), a Court proceeding may be instituted by-**
> **(a) ...;**
> **(b) a person acting as a member of, or in the interest of group or class of persons;**

(Emphasis supplied by the Petitioner)

[28] The Petitioner then wrongly refers to Article 267 of the Constitution (instead of Article 266 thereof) as providing for the definition of the word "person" as meaning *"an individual, a company or an association, whether corporate or unincorporate"* and argues that as a person who is a citizen and acting as a member of the ZCLU he has sufficient *locus standi* to bring an action before the Court in defence of the Constitution according to him to prevent any person, including the 1st Respondent from suspending or illegally abrogating the Constitution.

[29] The Petitioner concludes his arguments on *locus standi* by drawing the attention of the Court to the fact that it had previously addressed the issue of *locus standi* for citizens in constitutional matters in the case of **Dr. Daniel Pule, Wright Musoma, Pastor Peter Chanda & Robert Mwanza v The Attorney General, Davies Mwila (In his capacity as Secretary General of the Patriot Front, The Law Association of Zambia & Steven Katuka (In his capacity as Secretary General of the United Party For National Development)**[1]. In that case the Court said:

> **As regards locus standi, the modern approach to constitutional matters supports the extended as opposed to the narrow "own interest" standing favoured by the common law...In our considered view, one of the ways in which citizens can acquire this understanding and be able to promote ideals and objectives is by**

seeking authoritative interpretation of the provisions in the Constitution...It follows that whether the litigants in any particular case have sufficient standing is a matter of both fact and law that must be determined on a case-by-case basis. In the present case, the issue raised being the interpretation of Article 106 brought under Article 128(3) of the Constitution as amended is one of public interest.

[30] Further without specifically dealing with the reliefs sought, the Petitioner made arguments in general terms and the same can be summarised as follows below.

[31] According to the Petitioner, the Speaker and the 1st Respondent erred in interpreting that the *"prescribed Code of Conduct"* under Article 72(2)(c) of the Constitution refers to Standing Orders. Further according to the Petitioner, the correct reference was the Code of Conduct Act enacted by Parliament in 1994 (i.e., the Parliamentary and Ministerial Code of Conduct Act, Chapter 16 of the Laws of Zambia (the PMCCA)).

[32] It was argued that by engaging in the interpretation of the Constitution, the Speaker overstepped her mandate and failed to refer the matter to the Court, which has the competent jurisdiction to provide such interpretation.

[33] It was also argued that the action and decision of the Speaker and 1st Respondent to determine the question whether the seat of an elected MP for Petauke Central Constituency had become vacant, amounted to usurpation of the functions and power of the judiciary, particularly the

power of the High Court to determine such a question. According to the Petitioner, such actions contravene Articles 119 and 134(a) of the Constitution as read with section 96(1) (b) of the Electoral Process Act No.35 of 2016 (EPA).

[34] It was argued that the decision by the Speaker and the 1st Respondent to treat the perpetual absence of an MP from sittings of the National Assembly as a ground for declaring the seat vacant constitutes an unlawful alteration or introduction of a provision into Article 72(2) of the Constitution and the prescribed code of conduct in the Constitution (the Code of Conduct). According to the Petitioner such an amendment can only be lawfully made through a Bill, following the procedures outlined in Article 79 of the Constitution. Further the alteration or introduction aforesaid contravened both Articles 72(2) and 79 of the Constitution.

[35] It was argued that the decision of the Speaker and the 1st Respondent to assume the power to declare a vacancy based on absenteeism usurped the sovereign authority of the people, who alone hold the power to amend the Constitution through a review or referendum. According to the Petitioner, this action was in direct contravention of Article 5(2) of the Constitution.

[36] It was argued that a breach of the Standing Orders or the Immunities and Privileges Act [sic] which derive their authority from the Constitution, cannot constitute a valid ground for declaring a parliamentary seat vacant. This, according to the Petitioner, was because under the current legal framework neither the Standing Orders nor the Immunities and Privileges Act [sic] were encompassed within the Code of Conduct. It was argued that until such time as the law was amended to explicitly extend the application of the Code of Conduct to the Standing Orders, they remain subordinate to the Constitution and the Code of Conduct Act.

[37] It was further argued that while acknowledging that there exists a *lacuna* in Article 72(2) of the Constitution and the PMCCA regarding the fate of an MP who is perpetually absent from the National Assembly, the appropriate course of action for any person or authority, including the 1st Respondent, would have been to seek interpretation and resolution from the court of competent jurisdiction.

[38] It was also argued that courts were bound by the principle of judicial restraint and have always restrained themselves from legislating from the bench to amend statutory laws which according to the Petitioner was a function

reserved exclusively for Parliament which should have been done in a proper manner.

[39] The Petitioner concluded his skeleton arguments by arguing that the PMCCA does not provide for the seat of an MP to fall vacant due to perpetual absence from the National Assembly. According to the Petitioner until such time as the PMCCA or the Constitution was lawfully amended, it constituted a contravention of the Constitution for the Speaker of the National Assembly or the 1st Respondent to determine that a vacancy had been created in the Office of an MP.

[40] The Petitioner then went on to argue that even if it were established that the Code of Conduct allowed for such a ground, the authority to determine breaches of the Code of Conduct rested solely with a properly constituted Tribunal appointed by the Chief Justice. It was also argued that the action of the 1st Respondent to unilaterally decide the question of a vacancy usurped the jurisdiction and authority of the High Court, which was constitutionally mandated to make such determinations.

[41] It was the Petitioner's prayer that the Court should find that the actions, measures, and decisions taken by the 1st Respondent on the 19th November, 2024 contravened Articles 5(2), 72(2), 119 and 134(a) of the Constitution as

read with section 96(1)(b) of the EPA. Consequently, the Petitioner prayed that the Court declares the actions unconstitutional, illegal, null and void and therefore grant the reliefs sought in the Petition.

The 1st and 2nd Respondent's case and arguments

[42] The 1st and 2nd Respondents filed their joint Answer on the 17th December, 2024 which does not dispute most of the averments in the Petition save to say (a) that in reference to the point of order averred in paragraph 9 of the Petition, the point of order was premised on Article 72(2)(b) and (c) of the Constitution;(b) in response to paragraphs 10 and 11 of Petition it was averred that the reference of the matter to the Committee was made in line with Standing Order 223(1) of the Standing Orders, 2024 and the recommendations by the Committee were made in accordance with section 28(5) of the National Assembly (Powers and Privileges) Act, Chapter 12 of the Laws of Zambia respectively.

[43] It was further averred in the Answer that paragraph 34 (i) and (ii) of the Petition were not constitutional issues and that in relation to paragraph 34(iii) and (iv) the 1st and 2nd Respondents averred that the Speaker acted within the law.

[44] It was also averred that in relation to paragraphs 35(a)-(c) and 36 of the Petition that the acts of the Speaker and 2nd Respondent were within the law and therefore the Petitioner was not entitled to any reliefs claimed.

[45] In the skeleton arguments dated 14th February, 2025 the 1st and 2nd Respondents did not address the issue of the *locus standi* of the Petitioner in this matter but it was argued that the Petitioner had not shown how the Speaker and the 1st Respondent had acted outside or in contravention with the Articles identified by the Petitioner.

[46] It was argued that the 1st Respondent had been given power by the Constitution to regulate its own procedures. In this regard Article 77 of the Constitution was called in aid. The provision states that:

> **77.(1) Subject to this Article and Article 78, the National Assembly shall regulate its own procedure and make Standing Orders for the conduct of its business.**

[47] According to the 1st and 2nd Respondents, Hon. Dr. Clement Andeleki, MP used the above provision to raise a point of order on the status of the then MP following his absence from the House after he disappeared from Chipata Central Hospital.

[48] It was argued that the Hon. Madam First Deputy Speaker in line with Standing Order 223 (1) of the Standing Orders, 2024 ruled on the point of

order and referred the matter to the Committee for determination and to make appropriate recommendations by the 15th November, 2024. Standing Order 223(1) provides that:

> **223(1)** **If, during a session, a Member is absent for four or more consecutive sittings of the National Assembly without permission, in writing, from the Government Chief whip or the speaker, the matter shall stand referred to the Committee on privileges and absences for hearing and determination.**

[49] Therefore, according to the 1st and 2nd Respondents the Speaker was within the law to refer the matter to the Committee as provided for in the Standing Orders.

[50] According to the 1st and 2nd Respondents, the Committee made recommendations on the matter in line with section 28(5) of the National Assembly (Powers and Privileges) Amendment Act, No.13 of 2016 which provides that:

> **(5)** **The Speaker may refer a case of breach of privilege or contempt of the Assembly to the committee of privileges to examine the case and make appropriate recommendations to the Assembly.**

[51] It was argued that the Speaker informed the National Assembly on the 19th November, 2024 of the recommendations. In this regard reliance was placed on an extract from the Hansard of the 11th December, 2024.

[52] It was argued that by the continued absence of the then MP, even after the notice was issued by the Speaker, the then MP caused a vacancy in the

Petauke Central Parliamentary seat under Article 72(2)(b)(c) of the Constitution which provides that:

> **72.(2) The office of Member of Parliament becomes vacant if the member-**
> **(a) resigns by notice, in writing, to the Speaker;**
> **(b) becomes disqualified for election in accordance with Article 70;**
> **(c) <u>acts contrary to a prescribed code of conduct.</u>** (Emphasis supplied by the 2nd Respondent)

[53] It was posited that the question that fell to be answered related to what the prescribed code of conduct was, which the then MP breached. According to the 1st and 2nd Respondents the answer lies in the definition of the word *"prescribed"* under the Constitution which means *"provided for in an Act of Parliament."* In this regard they sought solace in the PMCCA, which provides under section 3(1) as follows:

> **3.(1) The provisions of this Part shall constitute part of the code of conduct for Members for the purposes of the Constitution, a breach of which results in the vacation of the seat of the Member concerned.**

[54] It was argued that the PMCCA constitutes part of the code of conduct for MPs for purposes of the Constitution and the other part comprises the Standing Orders, 2024 as enshrined under Article 77 of the Constitution. Article 77 of the Constitution provides that:

> **77.(1) Subject to this Article and Article 78, the National Assembly shall regulate its own procedure and make Standing Orders for the conduct of its business.**

[55] The 1st and 2nd Respondents canvassed arguments vis-à-vis the power of the 2nd Respondent to establish Housekeeping Committees one of which was the Committee of Privileges and Absences (which hitherto has been referred to as "the Committee" and will continue being referred to as "the Committee"). According to the 1st and 2nd Respondents the Committee's function includes assisting the Speaker in considering matters relating to privileges and discipline of Members. Standing Order, 202(3) provides as follows:

> **(3) Committee on privileges and absences**
> **(a) The committee shall:**
>
> **(i) assist the speaker in considering matters relating to the privileges and discipline of the Members; and**
>
> **(ii) subject to approval by the Standing Orders Committee, make rules for determining a disciplinary matter of a member.**

[56] It was argued that the matter of the then MP's absence from the National Assembly was referred to the Committee in keeping with section 28(5) of the National Assembly (Powers and Privileges) Act, Chapter 12 of the Laws of Zambia and Standing Order 223(1) of the Standing Orders, 2024 which according to the 1st and 2nd Respondents grant the Committee authority to inquire into the matter and make appropriate recommendations to the National Assembly.

[57] It was argued that MPs were required to seek written permission if they intended to be absent from the proceedings of the National Assembly which the then MP never sought to date. Standing Order 243(1) provides that:

> **(1) a member seeking to be absent from a sitting of the House shall seek written permission of the Government Chief Whip or speaker in such form as the Speaker may determine, stating the period of absence, the reason and any other relevant information.**

[58] Regarding the Petitioner's allegation that interpreting Article 72(2)(c) of the Constitution as referring to Standing Orders made by the 1st Respondent was *ultra vires* and in asserting that a breach of Standing Orders 243 and 223 would result in a vacancy of a Parliamentary seat, it was argued that the Petitioner had not shown how Article 119 of the Constitution had been breached.

[59] It was argued that Article 77 of the Constitution empowered the National Assembly to regulate its own procedures for the conduct of its business. According to the 1st Respondent this was what was known as *"exclusive cognizance"* and that this doctrine was embodied in section 34 of the National Assembly (Powers and Privileges) Act, Chapter 12 of the Laws of Zambia which provides that:

> **Neither the Assembly, the Speaker nor any officer shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Assembly, the Speaker, or such officer by or under the constitution, the standing orders and this Act.**

[60] It was argued that Standing Orders were the prescribed code of conduct for purposes of Article 72 of the Constitution.

[61] It was argued that the 1st Respondent did not by its resolution of 19th November, 2024 declare the Petauke Central Parliamentary seat vacant. Instead, the seat automatically fell vacant by operation of the law, namely Article 72(2)(c) of the Constitution after the then MP, was found to have breached the prescribed code of conduct namely Standing Order 223 of the Standing Orders, 2024.

[62] It was argued that the Speaker complied with the provisions of Article 72(8) of the Constitution by informing the 3rd Respondent of the occurrence of the vacancy in accordance with the law. Article 72 (8) of the Constitution provides that:

> **(8) 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.**

[63] Consequently it was argued that the National Assembly and the Speaker did not usurp the powers of the Court.

[64] It was the 1st and 2nd Respondent's prayer that the Petition should be dismissed with costs.

The 3rd Respondent's case and arguments

[65] The 3rd Respondent filed an Answer and affidavit in support thereof on the 13th February, 2025 through which it did not dispute most of the averments in the Petition but also puts the Petitioner on other averments to strict proof thereof. But in the main the 3rd Respondent averred that on the 27th November, 2024 the Speaker of the National Assembly notified it of a vacancy having occurred following the absence of the then MP.

[66] It was averred that following the notification, the 3rd Respondent through a Statutory Instrument set the 7th January, 2025 as the date of nomination and 6th February, 2025 as the poll day for the by-election for Petauke Central Constituency. The 90 days period for holding the by-election was scheduled to expire on the 25th February, 2025.

[67] It was averred that the 3rd Respondent conducted the election in compliance with the Constitution and within the 90 days as prescribed by the Constitution.

[68] The 3rd Respondent denied that the Petitioner was entitled to any reliefs and prayed that the Petition be dismissed with costs.

[69] The affidavit of the 3rd Respondent's witness essentially repeats what is averred in the Answer and therefore there is no need to rehash the contents.

[70] The 3rd Respondent filed its skeleton arguments on 13th February, 2025. In the skeleton arguments the 3rd Respondent did not deal with the issue of whether the Petitioner had *locus standi* in these proceedings.

[71] It was however, argued in the skeleton arguments that the election to fill a vacancy in the office of MP was prescribed under the Constitution, the EPA and the Electoral Process (General) Regulations Statutory Instrument No.63 of 2016.

[72] It was argued that it was part of the functions of the 3rd Respondent to prescribe the date for holding of nominations and the poll day.

[73] According to Article 57(1) of the Constitution it was argued, that the 3rd Respondent was required to hold by-elections within 90 days of the occurrence of the vacancy in the Office of MP. Article 57(1) of the Constitution provides that:

> **(1) Where a vacancy occurs in the office of <u>Member of Parliament</u>, mayor, council chairperson or councillor, <u>a by-election shall be held within ninety days of the occurrence of the vacancy</u>.** (Emphasis supplied by the 3rd Respondent)

[74] It was argued that the power to set the place, time and date when a by-election was to be held was a Constitutional mandate of the 3rd Respondent in keeping with Article 57(3) of the Constitution which provides that:

(3) **<u>The Electoral Commission shall, by regulation, set the place where and the date and time when, a by-election is to be held.</u>** (Emphasis supplied by the 3rd Respondent)

[75] It was argued that section 28 of the EPA also mandated the 3rd Respondent to set the date and time of the poll.

[76] It was thus argued that the mandate to set the election date and the time as well as develop the election timetable were a statutory function of the 3rd Respondent.

[77] It was argued that the Petitioner cannot stop the 3rd Respondent from performing its statutory functions. In this regard the 3rd Respondent called in aid the case of the **Attorney General v E.B. Jones Machinists Limited**[2] where the Supreme Court of Zambia said:

> **Where a statute enacted for the benefit of a section of the public imposes a duty of a positive kind, the person charged with the performance of the duty cannot by estoppel be prevented from exercising his statutory powers.**

[78] Relying on the case of the **Electoral Commission of Zambia v Belemu Sibanze**[3] it was argued that the 3rd Respondent was bound to obey the Judgment of the Court which guided that:

> **The election process once triggered by a 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.**
>
> **Further, the Court also guided that once the Electoral Commission of Zambia 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 as specified in Article 57.

[79] It was argued that the Petition lacked merit and ought to be dismissed accordingly.

The Petitioner's arguments in reply

[80] The Petitioner filed his amended Reply to the skeleton arguments by the Respondents on 20th February, 2025.

[81] In reply to the 1st and 2nd Respondents' arguments that the amended Petition does not disclose the alleged constitutional breaches, the Petitioner argued that the amended Petition does so and summarizes the breaches under two heads namely: - (a) Unlawful usurpation of judicial authority by the 2nd Respondent; and (b) Unconstitutional alteration of Constitutional or Statutory grounds for a vacancy in Parliament.

[82] Under head "a" it was argued that the 2nd Respondent unlawfully exercised judicial authority which was vested in the Judiciary under Article 119 of the Constitution by:

(i) assuming jurisdiction to determine matters concerning the vacancy of a parliamentary seat, contrary to Article 119 as read with Article 134(a) of the Constitution and section 96(1)(b) of the EPA; and

(ii) deciding whether an MP had breached the Code of Conduct, leading to the creation of a vacancy in the National Assembly in violation of Article 119 of the Constitution, as read with sections 13 and 14 of the PMCCA.

[83] Under head "b" it was argued that:

(i) the 2nd Respondent unlawfully altered the permissible grounds under Article 72(2) of the Constitution that result in a vacancy in the office of an MP by introducing perpetual absenteeism, in contravention of the amendment procedures mandated under Article 79 of the Constitution; and

(ii) Assuming perpetual absenteeism were to be inferred as part of the Code of Conduct, a determination of the breach of Article 72(2)(c) of the Constitution must be made by the courts or judicial tribunal as provided for under section 96(1)(b) of the EPA and sections 13 and 14 of the PMCCA and not by the 2nd Respondent.

[84] According to the Petitioner, this Court in the case of **Joseph Malanji and Bowman Lusambo v the Attorney General & Electoral Commission of**

Zambia[4] settled the question of what is referred to as *"a prescribed code of conduct"* when it inter alia held:

> **[92] ...The vacancy created under Article 72(2)(c) is where a Member acts contrary to a prescribed Code of Conduct... We find it necessary to consider what is referred to by this Code of Conduct. Article 71 of the 1996 Constitution contained a similar provision which provided for a vacancy that arises when a member acts contrary to the Code of Conduct. In the light of this provision we had occasion to consider the Parliamentary and Ministerial Code of Code Act. No.35 of the Laws of Zambia...**
>
> **[93] It is evident from the title, that this Act was an Act to also provide for a code of Conduct for Members of Parliament that was contemplated in Article 71 which provided for members vacating office under that Constitution. We note that there was a change in the wording of Article 72(2) (c) which is phrased as follows:**
>
> **"acts contrary to "a" prescribed Code of Conduct"**

[85] It was argued in keeping with the **Malanji**[4] case that the prescribed code in Article 72(2)(c) of the Constitution referred to the PMCCA.

[86] It was argued that the office of an MP can only be deemed vacant upon a formal determination of breach by a competent court or judicial tribunal.

[87] It was argued that the 3rd Respondent can only initiate the election process to fill a vacancy once a competent authority had made a determination confirming the breach of the Code of Conduct and the lawful existence of a vacancy. Additionally, according to the Petitioner, it was only upon such a determination that the 90-day period for conducting a by-election becomes applicable.

[88] It was argued that the action by the 1st Respondent in determining the breach of the Code of Conduct usurped the judicial authority vested in the judiciary through the courts and judicial tribunals, in clear violation of Articles 119 and 134(a) of the Constitution, as read together with sections 13 and 14 of the PMCCA and section 96(1)(b) of the EPA. Consequently, according to the Petitioner such an action was manifestly illegal.

[89] It was argued that as the election itself was concluded on the basis of an action that was illegal, it cannot be deemed constitutional merely because the 3rd Respondent received a notification from the 1st Respondent. The Petitioner urged the Court to find that the election in question was tainted by the illegal actions taken *ab initio.*

[90] It was argued that the Court had the power to issue a declaration that the actions of the 1st Respondent to exercise judicial functions not allocated to it contravened the Constitution and were consequently illegal.

[91] It was argued that the Court possesses inherent jurisdiction to refer the matter to a lower court or judicial tribunal for determination of whether the office of MP for Petauke Central Constituency had become vacant due to a breach of the Code of Conduct. According the Petitioner, in such a case the

tribunal would be constitutionally required to make its determination within 45 days from the date of its constitution by the Chief Justice.

[92] The Petitioner prayed that all reliefs sought be granted, including any other reliefs deemed appropriate by the Court, which according to the Petitioner, may include the reference of this matter to a judicial tribunal for the determination of whether the Code of Conduct had been breached by the then MP.

The hearing

[93] At the hearing the Petitioner informed the Court that he was relying on the amended Petition filed on the 6th February, 2025, the amended Affidavit verifying the facts filed on 13th February, 2025, the list of authorities and skeleton arguments filed on the 3rd December, 2024, the Reply and the Affidavit in support of the Reply filed and list of Authorities and Arguments in Reply filed on the 6th December, 2025 as well as the supplementary amended Reply and arguments filed on the 20th February, 2025.

[94] The Petitioner, however, in augmentation stated that he was no longer desirous of pursuing the alleged contravention of Article 5(2) of the Constitution.

[95] It was submitted that the matter before the Court stemmed from the actions of the 1st Respondent in making a resolution to declare a seat of an MP vacant for breach of the Constitution and the Petitioner went on to submit on the same lines as set out in his written arguments. Therefore, we shall not rehash the submissions but it should be put on record again that the Petitioner did not speak specifically to each of the declarations that he sought.

[96] The Petitioner, however, prayed that the Court, should find that the 1st Respondent was in breach of the Constitution by determining the existence of a vacancy in the office of an MP and grant the reliefs prayed for.

[97] Mr. Watopa on behalf of the 1st and 2nd Respondents informed the Court that he would rely on the Answer and Affidavit in support thereof filed on the 17th December, 2024, Skeleton Arguments and List of Authorities filed on the 14th February, 2025 but that he wished to augment the same.

[98] By way of augmentation Mr. Watopa submitted with respect to the 1st, 2nd and 3rd reliefs that the National Assembly had been given power in the Constitution to regulate its own procedure. Therefore, it was submitted that the Speaker was within the law to refer the matter to the Committee as provided for in the Standing Order 223(1) of the Standing Orders, 2024.

[99] The rest of the submissions were essentially a repeat of the 1st and 2nd Respondents' written arguments. Therefore, the same shall not be rehashed.

[100] Mr. Bwalya Counsel for the 3rd Respondent stated that the 3rd Respondent had filed its Answer and Affidavit in support thereof on the 13th February, 2025 and that the 3rd Respondent would rely on them but he wished to make one observation. The observation was that the reliefs sought by the Petitioner had not alleged any breach against the 3rd Respondent.

[101] The Petitioner in reply agreed with the 3rd Respondent that the reliefs had not alleged any breach by the 3rd Respondent save that the 3rd Respondent conducted a by-election based on the notification of a vacancy from the 1st Respondent and that that notification was what was being challenged. According to the Petitioner he had no issue with the 3rd Respondent performing its statutory function. However, the 3rd Respondent could only perform that function if a vacancy had truly occurred or had truly been triggered by operation of the law and that any election conducted based on an illegality itself should be null and void.

[102] In reply to the submissions of the 1st and 2nd Respondents that the 1st Respondent had the power to regulate its own procedures through Standing Orders, the Petitioner submitted that Standing Orders were rules of

procedure and were different from the code of conduct which was a prescribed code of conduct as per Article 72(2)(c) of the Constitution. According to the Petitioner Standing Orders were not an Act of Parliament.

[103] In response to the 1st and 2nd Respondents' arguments that the Petitioner had failed to demonstrate how Article 119 of the Constitution had been breached, the Petitioner submitted that the power to hear any matter on the Constitution vis-à-vis any breach lies in the Judiciary through the courts and the tribunal.

[104] According to the Petitioner the issue in the Petition was the determination of a vacancy and creation of a new ground for vacancy.

[105] The Petitioner prayed that the 1st and 2nd Respondents' submission that the Petition be dismissed be dismissed.

Determination

[106] We have considered the amended Petition, the amended Affidavit verifying facts in the amended Petition, the Respondents' Answers and the Respondents' Affidavit in support of the Answers, the Affidavit in Reply and the rival written and oral arguments by and for the parties. We have deliberately captured the arguments in great detail so that we bring to the fore the fact that apart from the 1st and 2nd Respondents (who made some

submissions albeit feeble ones only on the 1st, 2nd and 3rd declarations sought by the Petitioner) none of the parties (the Petitioner included) made any specific arguments on the declarations sought by the Petitioner. The Petitioner, we surmise approached the Petition as if it were about answering questions for interpretation that he set out in the Petition. On the contrary it was not. We shall explain why later in this judgment. In the circumstances therefore, the Court may consider only the allegations fit for determination by Petition should it be necessary.

[107] The Petition on its face appears to allege contravention of Articles 5(2), 72(2),79 and 134(a) of the Constitution as read together with section 96(1)(b) of the EPA and Article 72(8) of the Constitution. It should, however, again be pointed out that at the hearing, the Petitioner made it clear that he was no longer alleging contravention of Article 5(2) of the Constitution.

[108] On the material before the Court, the central issues that present themselves for our consideration are the following:

(a) Whether the Petitioner has *locus standi* in this matter; and

(b) Whether it was proper for the Petitioner to commence the Petition in the light of the provisions of Article 128 of the Constitution as read with section 96 of the EPA.

We shall also provide guidance concerning or touching on certain aspects of drafting pleadings for use in this Court.

[109] The second issue identified in paragraph 108 was not raised by either party but by the Court itself. We are alive to the fact that, in general, courts are limited to addressing issues raised by the parties in a case. There are however, exceptions where a court might raise or consider issues not explicitly raised by the parties. The exceptions involve matters of public interest, jurisdictional issues, or fundamental legal principles that the court is duty bound to uphold. The second issue identified in paragraph 108 involves a matter of public interest in that the court must use its time and resources to resolve matters that are properly commenced before it. The same also raises a jurisdictional issue.

[110] Concerning the first issue identified in paragraph 108, the starting point has to be the fact that the Petition is anchored on the vacation of the Petauke Central Parliamentary seat by the then MP and yet the Petition has been brought by the Petitioner suing *inter alia* as a member and in the interest of the ZCLU as well as a citizen of Zambia.

[111] The Petitioner has argued that he has the requisite *locus standi* and that he has brought this Petition pursuant to Articles 2, 43(3)(a) and 128(3)(b) of the

Constitution. These provisions have been reproduced in paragraph 27. As pointed out earlier on, the Respondents did not make arguments on the issue of the Petitioner's *locus standi*.

[112] It is trite that *locus standi* at common law refers to the legal right or ability of a person to bring a lawsuit in court. It establishes a person's standing or right to initiate a legal action in a case. *Locus standi* is therefore a critical legal concept as it determines who has the capacity to sue or to be sued in the courts. Therefore, the plaintiff or applicant or petitioner for a judicial remedy must normally satisfy the court that he or she has right or interest in the matter. That his or her personal interest has been or will be immediately adversely affected; or put in another way, that he or she has sustained or is in danger of sustaining an injury to himself or herself or to some other person or authority which he or she can legitimately represent. The object of the rule of *locus standi* is to prevent persons from commencing legal proceedings in matters that do not concern or affect them. The point being that floodgates of litigation should not be opened to busybodies, interlopers, or self-appointed Attorney Generals.

[113] In this case, it is trite that the Petitioner has not pleaded any interest or injury, actual or anticipated, special to himself and flowing from acts or

decisions of the Respondents. In fact, a perusal of the Petition will show that the Petitioner is not even claiming any relief for himself. He therefore does not stand to personally benefit from any of the reliefs that he is actually seeking.

[114] The Petitioner is complaining that particular acts and decisions of the Respondents were or are inconsistent with and contravene certain provisions of the Constitution. In this regard, therefore, in our considered view the issue of whether the Petitioner has *locus standi* to institute these proceedings must be, measured with reference, to the provisions of the Constitution. The question then must be: *does the Constitution allow the Petitioner to commence the Petition?* In this regard, Articles 2 and 128(3) of the Constitution prominently stand out as having a direct bearing on the question whether the Petitioner could constitutionally commence the Petition.

[115] For ease of reference Article 2 of the Constitution provides that:

> **<u>Every person</u> has the right and duty to-**
>
> **(a) defend this Constitution; and**
>
> **(b) resist or prevent a person from overthrowing, suspending or illegally abrogating this Constitution.**

[116] Again for ease of reference Article 128(3) of the Constitution provides that:

> **Subject to Article 28, <u>a person who alleges</u> 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. (Emphasis supplied)

[117] The starting point in this discourse on *locus standi*, in our view, must be Articles 2 and 128(3) of the Constitution. In this regard it will be noted that Article 2 of the Constitution relates to *"every person"* and Article 128(3) of the Constitution relates to a *"person."* Therefore, in order to unravel the issue of *locus standi* in the context of constitutional matters in Zambia we shall have to consider the implications of the fact that the two Articles are specific to *"every person"* or *"a person."*

[118] In interpreting these provisions or indeed any other provision of the Constitution, the Court should always be guided by what Lord Diplock stated in the case **Attorney General of the Gambia v Momodou Jobe**[5] that:

> **"A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are entitled, is to be given a generous and purposive construction."**

[119] Clearly Article 2 of the Constitution creates a legal right and duty for every person in the maintenance and upholding of the constitutional order in the country. A proper reading of Article 2 of the Constitution shows that the right, and with it the duty, for instance to defend the Constitution is imposed

on every person without any qualification or disqualification or conditions. The exercise of such a right or the discharge of such a duty must necessarily include the exercise of a civic right and responsibility to seek judicial redress of what the person believes or perceives to be acts of contravention or violation of the Constitution. Therefore, the approach to *locus standi* under the Constitution should not be viewed from narrow common law perspective. In the case of **Dr. Daniel Pule**[1] the Court said:

> **As regards locus standi, the modern approach to constitutional matters supports the extended as opposed to the narrow "own interest" standing favoured by the common law...**

[120] At this juncture it is opportune for us to look at how the Supreme Court in Ghana dealt with the issue of *locus standi* under a provision the Constitution of Ghana 1979 which is in *pari materia* to our Article 2 of the Constitution. In the case of **Tuffuor v Attorney General**[6] the plaintiff commenced an action against the Attorney General in the Supreme Court, alleging *inter alia*, that the purported vetting and rejection of the then Chief Justice by Parliament was a contravention of the Constitution and therefore null and void. The plaintiff sought a declaration to that effect in an action for interpretation of the relevant provisions of the Constitution of Ghana 1979. The Attorney General objected on the ground, *inter alia*, that the plaintiff was not seeking

any relief for himself and had no interest in the case. He was said to be a mere busy body. The person who had exclusive interest, it was argued, had no community of interest with him and was not in any case a party to the action.

[121] The Supreme Court rejected the preliminary objection. In rejecting the preliminary objection, the Court held (according to the headnote of the case report at pages 639-640) that section 1(3) of the First Schedule to the 1979 Constitution of Ghana, which as indicated earlier is in *pari materia* with Article 2 of our Constitution:

> **...conferred on every citizen of Ghana the right to see to it that the constitutional order was not abolished or sought to be abolished. One method by which it could be determined whether a person was seeking to abolish the constitutional order, was to seek an interpretation of the Constitution as to the meaning or effect of a particular provision or provisions...In the instant case, there was controversy regarding the status of the incumbent Chief Justice, the determination of which would depend upon an interpretation of the Constitution... whether or not "A" was the Chief Justice was not a private right. The interest of the plaintiff was a constitutional right exercisable by all citizens of Ghana by virtue of article 1 of the Constitution. And the plaintiff under article 1, need not have any community of interest with any person or authority. His community of interest was with the Constitution.**

[122] Sowah JSC, delivering the judgment of the Court said at page 650 that:

> **There is a right, a duty cast upon every citizen of Ghana to go to the Supreme Court for determination whether a person or persons, is or are seeking to abolish the constitutional order established by the Constitution. There is a controversy surrounding the status of the incumbent Chief Justice, the determination of which depends upon the interpretation of the Constitution. Once there is controversy, a justifiable issue, we believe that under the wing of interpretation as contained in paragraph (a) of clause (1) of article 118, the court has**

jurisdiction to entertain the issue raised by the plaintiff. And the plaintiff is thus properly before this court.

[123] Our understanding of the **Tuffuor** case (supra), is that the plaintiff did not have to show any interest peculiar to himself in order to enable him institute the action. His right and duty in section 1(3) of the First Schedule to the Constitution, to defend the Constitution of Ghana, was sufficient to clothe him with adequate *locus standi* to institute the proceedings. The decision of the Ghana Supreme Court is of course not binding on this Court as it is only persuasive but we opine that it represents good law.

[124] We would in our considered view therefore, conclude that Article 2 of the Constitution clothes the Petitioner with the adequate l*ocus standi* to institute and/or sustain these proceedings.

[125] At this juncture the discourse on *locus standi* must now lead us to Article 128(3) of the Constitution and/or section 8(3) of the CCA.

[126] Article 128(3) of the Constitution has been reproduced in paragraph 27 and 118 and therefore we shall not rehash it here. Suffice it to state, however, that section 8(3) of the CCA by and large replicates the provisions of Article 128(3) of the Constitution.

[127] Clearly Article 128(3) of the Constitution and/or section 8(3) of the CCA provide the right for a person to access the Court to seek redress for any

jurisdiction to entertain the issue raised by the plaintiff. And the plaintiff is thus properly before this court.

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[127] Clearly Article 128(3) of the Constitution and/or section 8(3) of the CCA provide the right for a person to access the Court to seek redress for any

alleged constitutional contraventions. This right to access the Court is bestowed on a person who alleges a contravention of the Constitution. All that is required is that the person must allege a contravention of the Constitution.

[128] Article 128(3) of the Constitution should also be interpreted generously and purposively so that the right to access the Court is not limited or restricted.

[129] In Article 128(3) of the Constitution and/or section 8(3) of the CCA there is no suggestion that a person should have a particular peculiar interest in a matter over and above that of a member of the general public in order to be competent to institute such an action. In our considered view the essence of Article 128(3) of the Constitution and/or section 8(3) of the CCA is to empower a person, without the necessity of having a peculiar interest or grievance in the matter, to institute proceedings in the Court when *inter alia* a contravention of the Constitution is alleged to have occurred. Further section 11(2)(c) of the CCA provides for the appearance before the Court by a person acting in public interest. Section 11(2)(c) of the CCA provides that:

> **Subject to subjection (1), a court proceeding may be instituted by –**
>
> **...**
>
> **(c) a person acting in the public interest; or**
>
> **....**

[130] Article 128(3) of the Constitution and/or section 8(3) of the CCA must be contrasted with Article 28 of the Constitution pertaining to the enforcement of fundamental rights and freedoms. In the latter case, the applicant for judicial redress must have *locus standi* in the sense of being the actual or potential victim of the contravention or the representative of such a person. Thus, some peculiar interest or representative capacity must be shown in order for the Court to entertain the application for the enforcement of fundamental rights and freedoms. No such limitations or conditions have been attached to complaints for contraventions of the Constitution other than those under Article 28 of the Constitution in relation to fundamental rights and freedoms.

[131] Further it is important to bear in mind that the Petitioner in this matter has approached the Court alleging a contravention of the Constitution. This is a relevant factor to be taken into consideration when discussing the issue of *locus standi*.

[132] A Constitution is not an ordinary piece of legislation. It is the *grundnorm*, a fundamental law of the Republic, the source of legitimacy of all laws and exercise of executive, legislative and judicial power. It is therefore the bedrock of the legal system. The Constitution is also a compact between and

amongst citizens and the State and a statement of how and on the basis of what values people wish to be governed.

[133] The Zambian Constitution is no exception to the foregoing. It is a written Constitution. And despite the fact that it was like any other laws in Zambia promulgated by Parliament it is clear from the preambular paragraphs that the Constitution speaks in the name of *"We the People of Zambia"* and that it emanates from the sovereign will of the people.

[134] Therefore it seems to us legitimate, to conclude from the nature of the Constitution as well as this *"ownership"* of the Constitution by the people that, individually and collectively, they have a right and a duty to monitor and ensure that it is complied with; that is not contravened and all public acts are consistent with its provisions. Access to the Court, free from restrictive technicalities associated with the common law rules of *locus standi*, is a *sine qua non* for the exercise of such a right and the discharge of such a duty. In our considered view, the law cannot and should not regard a person, who wishes to assert his or her right to challenge in the Court what he or she perceives to be a contravention of the Constitution, as an interloper, a stranger to the case, a meddlesome private Attorney General, a busybody who is meddling with what does not concern him or her. It, does,

indeed, legitimately concern him or her and unless there are express constitutional limitations or restrictions, such as those provided for in Article 28 of the Constitution concerning the enforcement of fundamental rights and freedoms. A person's interest as a person is legally sufficient to vest him or her with the competence to institute legal proceedings to challenge alleged contraventions of the Constitution with a view to ensuring respect for constitutional order. No such limitations apply in the instant case.

[135] In keeping with Article 267(1) of the Constitution and what Lord Diplock above stated the duty of the Court is to give a generous and purposive interpretation of Articles 2 and 128(3) of the Constitution so as to promote the effective exercise of the right provided for as well as the effective discharge of the duty provided for. For ease of reference Article 267 of the Constitution provides that:

> **(1) This Constitution shall be interpreted in accordance with the Bill of Rights and in the manner that-**
>
> **(a) promotes its purposes, values and principles;**
> **(b) permits the developments of the law; and**
> **(c) contributes to good governance.**

[136] Accordingly, we hold that the Petitioner, being a person within the provisions of Article 266 of the Constitution, is competent to institute these proceedings alleging contravention of the Constitution without any

requirement of him to show or allege an interest or injury peculiar to himself over and above that of an ordinary person as provided for in the Constitution.

[137] Concerning the second issue identified in paragraph 108, the starting point must be the consideration of the essence of these proceedings. In the circumstances of this case, despite the battery of declarations sought by the Petitioner the bottom line, is that the Petitioner is decrying the manner in which the then MP vacated his Parliamentary seat. In other words, the Petitioner is questioning whether the then MP's Parliamentary seat had become vacant as of the 6th February, 2025. Our holistic reading of Article 128 of the Constitution which sets out our jurisdiction shows that this matter is to be resolved not in this Court but in other fora as laid down by the EPA. It is therefore our considered view, that the EPA under section 96 thereof provides a mechanism or procedure through which the question about the vacancy of an MP's Parliamentary seat can be determined by the High Court or a tribunal and not this Court. In this regard, section 96(1)(2)(b) and (c) and 96(2) of the EPA are material and they provide that:

> **(1)** **A question which may arise as to whether-**
>
> ...
>
> **(b)** **the seat of an elected or nominated Member of Parliament, mayor, council chairperson or councillor, has become vacant,**

other than a question arising from an election of a candidate as a Member of the Parliament; or

(c) a petition may be heard and determined by the High Court or tribunal upon application made by-

(i) <u>any person to whom the question relates</u>; or

(ii) <u>the Attorney General</u>.

...

<u>may be determined by the High Court or tribunal,</u> as the case, may be.

(2) A person who makes an application to the High Court or a tribunal under subsection (1), has a right to appear and be represented before the High Court or tribunal. (Emphasis supplied)

[138] Section 96 of the EPA is domiciled in the Part IX titled *"Election Petitions"* and with a marginal note that reads: *"Application to Members and officers of Parliament."*

[139] Under section 96 of the EPA the High Court therefore has the jurisdiction to determine the question whether the then MP had vacated his seat. In our view therefore, it was for the affected person or the Attorney General to proceed under section 96 of the EPA.

[140] In concluding as we do in paragraph 139, we are not oblivious of the fact that the Petitioner has spiritedly argued, in his written arguments in support of the Petition and in reply to the arguments of the Respondents as well as in his oral arguments, points concerning or touching on the Constitution. In our view (without delving into the merits or otherwise of the arguments) those arguments could still

have been brought before the High Court. If that had happened the High Court would then have been obliged to refer the same to the Constitutional Court for determination. This would be, in keeping with Article 128(2) of the Constitution which provides that:

> **Subject to Article 28, 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.**

[141] The Court has had occasion to pronounce itself on the purport and meaning of Article 128(2) of the Constitution in the case of **Fredson Kango Yamba v The Principal Resident Magistrate, Anti-Corruption Commission and the Attorney-General**[7] when it said:

> **[40] Article 128(2) of the Constitution takes care of a scenario where a constitutional issue arises in any court by providing for referral. <u>In such instances, the court, on its own motion or on application by a party, can refer a constitutional question or issue that arises in that court. Where this is done, the referring court must frame the constitutional question or issue for this Court's determination...</u>** (Emphasis supplied)

[142] With the foregoing matters, in mind the High Court was very well placed to effectively deal with the case questioning the vacation of the then MP's Petauke Central Parliamentary seat.

[143] Further we are of the considered view that the jurisdiction of the Court is not invocable whenever there is an alleged failure to comply with

the law by an organ of the State or public authority or office especially if there is another mechanism or procedure that can be invoked to redress the alleged failure. In the case of **Kemrajh Harrikissoon v Attorney General**[8] from Trinidad & Tobago, the Privy Council held that:

> **...The notion that whenever there is a failure by an organ of the Government or public authority or public officer to comply with the law necessarily entails the contravention of some fundamental freedom guaranteed to the individual by Chapter 6 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute of normal proceedings for invoking judicial controls of administrative action...**

[144] Again in yet another case from Trinidad & Tobago, **Re: Application by Bahadur**[9] the Privy Council held:

> **... The Constitution is not a general substitute for normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper cause is to bring the claim under that and not under the Constitution.**

[145] In the case of **Gabriel Mutava, Elizabeth Kwini and Mary Masyuki (the Joint Administrator of the Estate of Joseph M. Indo (Deceased) v the Managing Director Kenya Ports Authority & the Kenya Ports Authority**[10] the Court of Appeal of Kenya stated that:

> **The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.**

[146] We are alive to the fact that the cases cited above are not binding on the Court but they are persuasive. Here in Zambia the Court in the case **Llyod Chembo v Attorney General**[11] had occasion to state that:

> **This Court works hand in hand with other courts so that matters before it and others are heard and determined in an orderly and efficient manner. The nature and status of this Court is such that it deals with direct violations of the Constitution. By virtue of Article 1(5) a matter relating to the Constitution is heard by the Constitutional Court. <u>The rest of the law is adequately handled by other courts...</u>** (Emphasis supplied)

[147] Further in the case of **Conservation Advocates Zambia Limited v Attorney General**[12] the Court stated that:

> **[10.9] We...emphasise that it is not within this Court's jurisdiction, as set out in Article 128 of the Constitution, to preside over litigation which remains within the purview of ordinary courts:..**

[148] The ending point under the second issue identified in paragraph 108 is that, as the Petition sought in essence to question whether the seat of the then MP became vacant, recourse by the appropriate parties therefore ought to have been had to the provisions of section 96 of the EPA instead of the Petitioner approaching the Constitutional Court. The High Court as already stated is very well and effectively positioned to determine the question concerning or touching on whether a seat of an MP has become or is vacant under section 96 of the EPA provided of course the same is competently filed and/or is

meritorious. For the avoidance of doubt, it is our conclusion that it was not proper for the Petitioner to commence the Petition in the light of the provisions of Article 128 of the Constitution as read with section 96 of the EPA.

[149] We are alive to the fact that paragraph 34 of the amended Petition is devoted to putting across what the Petitioner has headlined as **"QUESTIONS FOR INTERPRETATION."** In our view, this does not assist the Petitioner as we explain hereunder.

[150] The mode of commencing actions under the Constitution and the CCA is clearly spelt out in the Constitution, the CCA and the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 (CCR).

[151] For purposes of this matter we opine that it is only necessary to refer to the CCR. In this regard Order IV of the CCR is material. Material portions of Order IV of the CCR provide that:

> **1.(1) Except as otherwise provided in the Constitution, the Act and these Rules, all matters under the Act brought before the Court <u>shall be</u> <u>commenced by a petition</u> in Form 1 set out in the schedule.**
>
> **...**
>
> **2.(1) The following matters shall be commenced by originating notice of motion:**

(a) a matter relating to the Republican President or Republican Vice-President, other than the nomination or election of the Republican President or Republican Vice-President;

(b) application to review a decision of the Electoral Commission of Zambia in the delimitation of constituencies and wards.

(2) A matter relating to the interpretation of the Constitution <u>shall be commenced by originating summons</u>.

[152] With the foregoing matters in mind, it is our considered view that the modes of commencement do not permit the co-mingling of matters. Therefore, we opine that it is not proper for a petitioner to include matters for interpretation in a petition alleging contravention of the Constitution. That this is so, will be made certain when the provisions of the Order IV rule 2 of the CCR, which provide for what must be disclosed in a petition, are taken into consideration. Order IV rule 1(2) of the CCR provides that:

A petition shall disclose:

(a) the petitioner's name and address;
(b) the facts relied upon;
(c) the constitutional provision allegedly violated; and
(d) the relief sought by the petitioner.

[153] As drafted, Order IV rule 1(2) of the CCR does not provide for the disclosure of questions for interpretation in a petition. Matters that require interpretation, strictly speaking, must be commenced by

originating summons in keeping with Order IV rule 2(2) of the CCR. Therefore, the inclusion of questions for interpretation in the Petition was and is surplusage. In a legal context *"surplusage"* refers to unnecessary or irrelevant language within a legal document especially a pleading, that can be ignored or struck out. In this case therefore questions for interpretation set out in the Petition can be ignored or struck out.

[154] Before concluding this judgment, we shall revert to the issue of *surplusage vis-à-vis* the manner in which certain other paragraphs in the Petition were drafted.

[155] However, it should be noted that the consideration and determination of a petition alleging contravention of the Constitution may nonetheless involve an attendant interpretation of a provision or provisions of the Constitution for the Court to arrive at a decision as to whether the provision or provisions has or have been contravened or not. The Court recognised this position in the case of **Kabisa Ngwira v National Pensions Scheme Authority**[12] when it said:

> **...Further, except as otherwise provided in the law, all matters brought before this Court ought to be commenced by way of petition. This applies to matters that contain a combination of issues arising from an alleged breach or contravention of the Constitution <u>and an attendant</u>**

> **interpretation of constitutional provisions, because this Court will go through the rigorous process of interpreting a provision in dispute before arriving at a decision as to whether the provision has been contravened or not.** (Emphasis supplied)

This however, does not mean that a petition should specifically set out the attendant questions for interpretation. The attendant questions will be deciphered from the petition, answer and reply as well as the parties' written and/or oral arguments.

[156] In this matter therefore, the questions for interpretation in the Petition should and shall be ignored.

[157] We have not lost sight of the fact that the Petitioner in his reply to the 3rd Respondent's arguments had *inter alia* submitted that the 3rd Respondent conducted a by-election based on the notification received from the 1st Respondent which according to the Petitioner was illegal and that *"an election conducted based on an illegality should itself be null and void."*

[158] Our quick response to the Petitioner's position set out in paragraph 157 is that, the position is neither here nor there. This is on account of the fact that a perusal of the Petition will reveal that the Petitioner did not seek any relief seeking a declaration that the by-election was null and void on grounds of illegality. The fact that the Petition includes as

claim "viii" a claim for *"Any further reliefs that this Honourable Court may deem just and appropriate"* does not in this regard help the Petitioner. Further this is on account of the fact that a perusal of the Petition will reveal that the pleaded factual basis of the Petition does not include averments that concern or touch on the by-election that took place to fill the vacancy in the Petauke Central Parliamentary seat or matters incidental or connected thereto. Simply put the Petitioner did not plead anything about the by-election or matters connected or incidental to the by-election. In the circumstances of this case therefore, there is no basis upon which the Court can grant any relief concerning or touching the by-election even if the Petitioner seeks the said claim "viii" in the Petition.

[159] It would be remiss on our part, if we did not further point out that as drafted, the Petition contains other matters that should not have been included therein. In this regard we have in mind paragraphs 15-31 of the Petition which merely set out various provisions of the law (constitutional and statutory) and paragraphs 32-33 which merely set out some provisions of the Standing Orders,2024. As drafted Order IV rule 2 of the CCR does not provide for the disclosure of various

provisions of the law (constitutional or statutory) and/or standing orders relied upon by the Petitioner but must disclose constitutional provisions allegedly breached or contravened. In this regard therefore, paragraphs 15-33 of the Petition are merely but surplusage and should and shall therefore be ignored.

[160] With matters adumbrated in paragraphs 150, 151,152,153 and 159 hereof we wish to emphasise that those who resort to the processes of this Court, should when crafting their documents include therein only relevant material or information that is required by the CCR. This is on account of the fact that a petition in essence is a formal written document which outlines the petitioner's claim. The petition defines the issues in the case and serves as a public record of the case it relates to. The petition is crucial for ensuring that the respondent understands the petitioner's case and for narrowing down the issues to be decided by the Court. Therefore, the inclusion of irrelevant material or information serves no useful purpose but merely overburdens the petition and does not in any way enhance the petitioner's chances of succeeding.

Conclusion

[161] With the foregoing matters in mind, we come to the ineluctable conclusion that the Petition is not properly before the Court and is therefore dismissed.

[162] There shall be no order for costs made.

M.M. MUNALULA, JSD
PRESIDENT OF THE CONSTITUTIONAL COURT

A.M. SHILIMI
DEPUTY PRESIDENT OF THE CONSTITUTIONAL COURT

M.MUSALUKE
CONSTITUTIONAL COURT JUDGE

M.K. CHISUNKA
CONSITUTIONAL COURT JUDGE

J.Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE

M.Z. MWANDENGA
CONSTITUTIONAL COURT JUDGE

K. MULIFE
CONSTITUTIONAL COURT JUDGE