

IN THE CONSTITUTIONAL COURT OF ZAMBIA

2025/CCZ/0011

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 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) (f) OF THE
CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF
2016

IN THE MATTER OF:

THE JURISDICTION OF THE
CONSTITUTIONAL COURT TO
HEAR A MATTER THAT ALLEGES
CONTRAVENTION OF THE
CONSTITUTION

IN THE MATTER OF:

THE DECISION OF THE
CONSTITUTIONAL COURT IN
THE CASE OF THE PEOPLE V
THE ATTORNEY GENERAL (EX
PARTE NICKSON CHILANGWA
2024/CCZ/R001

IN THE MATTER OF:

DISQUALIFICATION AND
VACATION FROM OFFICE AS
MEMBER OF PARLIAMENT

IN THE MATTER OF:

THE PER INCURIUM DECISION
OF THE COURT DECISION

DATED 10TH FEBRUARY, 2025

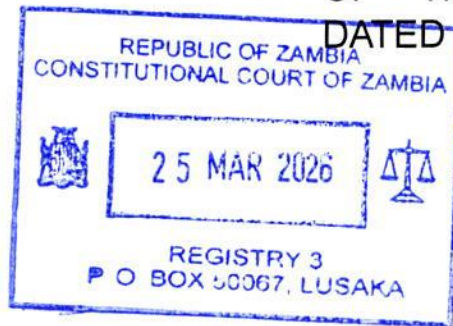
MUNIR ZULU

AND

THE ATTORNEY GENERAL

THE SPEAKER OF THE NATIONAL ASSEMBLY

THE ELECTORAL COMMISSION OF ZAMBIA



PETITIONER

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

**Coram: Shilimi DPC, Musaluke, Mwandenga, Kawimbe and Mulife
JJC on 13th February, 2026 and 25th March, 2026.**

For the Petitioner: Mr. J. Chirwa and Mr. L.C. Kabwata of Joseph Chirwa and Company.

For the 1st and 2nd Respondents: Mr. C. Watopa - Principal State Advocate, Mr. L.C. Butale - Senior State Advocate and Mr. A. B. Isiteketo - State Advocate

For the 3rd Respondent: Ms. T. Phiri, Mr. A. Musoka and Mr. C. Siame - In House Counsel

JUDGMENT

Musaluke JC, delivered the Judgment of the Court.

Cases referred to:

1. *The People v The Attorney General (Ex-Parte Nickson Chilangwa) 2024/CCZ/R001*
2. *Electoral Commission of Zambia v Belemu Sibanze 2024/CCZ/0017*
3. *Munir Zulu v The Attorney General and 2 Others 2025/CCZ/0010*
4. *Maureen Mabonga v The Attorney General and 2 Others 2025/CCZ/0014*

Legislation referred to:

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

The National Assembly (Powers and Privileges) Act Chapter 12 of the Laws of Zambia

The Constitutional Court Rules Statutory Instrument No. 37 of 2016

[1] **Introduction**

- [2] The petition before Court arises from the conviction and subsequent imprisonment of the Petitioner by the Subordinate Court for the offence of criminal libel. At the time of his conviction, the Petitioner was serving as the elected Member of Parliament (MP) for Lumezi Constituency. Following the conviction and imprisonment of the Petitioner, the 2nd Respondent notified the 3rd Respondent of a vacancy in the Lumezi Constituency which led to the conduct of a by-election.
- [3] The Petitioner asks us to state whether Parliamentary immunity attaching to MPs extends to words spoken outside formal proceedings of Parliament but within the physical precincts or grounds of Parliament.
- [4] The Petitioner also challenges the declaration of his seat as vacant on the basis that he had already lodged an appeal to the High Court against his conviction and sentence.
- [5] The Petitioner further challenges this Court's decision in **The People v The Attorney General (Ex Parte Nickson Chilangwa)**¹ wherein we held *inter alia* that imprisonment of an MP results in an automatic

vacation of the parliamentary seat as a matter of law and that such a vacancy by operation of law necessitates the holding of a by-election.

[6] In response, the Respondents argue that the 2nd Respondent acted within the bounds of the law in notifying the 3rd Respondent of the vacancy and that the 3rd Respondent in turn adhered to the prescribed legal framework and legitimate procedures in conducting the by-election.

[7] **Petitioner's case**

[8] The Petitioner asserts that he was the duly elected MP for Lumezi Constituency following the 2021 general elections and that his tenure was prematurely terminated when his seat was declared vacant pursuant to his conviction for the offence of criminal libel. That upon conviction, he was subsequently sentenced to a term of twelve months' imprisonment on 7th April, 2025.

[9] The Petitioner contends that following his conviction and subsequent imprisonment, he lodged an appeal in the High Court challenging both the conviction and the sentence which appeal is pending determination. He further avers that he has instituted a petition before this Court under Cause No. 2025/CCZ/0010 wherein he challenges the

jurisdiction of the Subordinate Court to conduct the criminal proceedings that culminated in his conviction and sentence of imprisonment.

- [10] In the skeleton arguments filed on 24th April, 2025, the Petitioner argues that Article 120 of the Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution) establishes a hierarchy of courts in the Republic of Zambia. That the implication of this hierarchy is that an individual who is convicted of a criminal offence in a lower court can appeal to a court sitting higher in hierarchy and in certain instances have the judgment of the lower court overturned.
- [11] The Petitioner submits that having appealed both the conviction and sentence to the High Court, the Respondents' decision to declare the Lumezi Constituency seat vacant was null and void and in contravention of Articles 70(2)(f) and 72(2)(b) of the Constitution.
- [12] He further contends that this Court should depart from its holding in the **Chilangwa**¹ case where it was determined that the imprisonment of an MP automatically results in the vacation of the parliamentary seat and triggers a by-election. The Petitioner argues that this position was reached *per incuriam*, as it failed to consider that a conviction by a

lower court may be overturned on appeal. Accordingly, the Petitioner maintains that declaring a parliamentary seat vacant before the appeal process is exhausted produces absurd results and unjustly deprives constituents of their duly elected representative.

[13] As a result, the Petitioner prays for the following relief and declarations:

- i) **A Declaration that the judgment of *The People v The Attorney General (Ex Parte Nickson Chilangwa) 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 Respondents to declare a seat of a Member of Parliament vacant upon conviction without exhausting or abdication of the appeal process;**
- ii) **A declaration that the decision by the Respondent to 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 Respondents 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.**

[14] 1st and 2nd Respondents' case

[15] The 1st and 2nd Respondents filed their answer to the petition on 24th June, 2025 denying the Petitioner's assertions. They contend that upon the Petitioner's conviction and sentence of imprisonment by the Subordinate Court, the Speaker of the National Assembly was constitutionally mandated to declare the parliamentary seat vacant. This obligation, they argue, flows directly from the Constitution and gives the Speaker no discretion.

[16] The 1st and 2nd Respondents further state that the lodging of an appeal against conviction and sentence does not operate to stay or defer the constitutional process. In their view, the constitutional imperative to declare a seat vacant and to facilitate a by-election remains unaffected by appellate proceedings as the Constitution does not subordinate its commands to the pendency of appeals.

[17] On the Petitioner's assertion that the **Chilangwa**¹ decision was rendered *per incuriam*, the 1st and 2nd Respondents firmly disagree. They maintain that the Court in **Chilangwa**¹ considered all relevant facts and the law before arriving at its determination. They emphasize

that the decision has not been vacated, overturned, or otherwise set aside and therefore continues to bind this Court as precedent.

[18] In their skeleton arguments, the 1st and 2nd Respondents cite Articles 70(2)(f), 72(2)(b), 72(8) and 57(1) of the Constitution together with this Court's decision in the **Chilangwa**¹ case to emphasize that imprisonment of an MP automatically results in the vacation of the parliamentary seat as a matter of law. They further contend that the vacation of the seat by constitutional operation triggers the holding of a by-election as a matter of law.

[19] The 1st and 2nd Respondents submit first that the Petitioner's argument that the **Chilangwa**¹ case was decided *per incuriam* cannot be sustained for this Court is the final authority on constitutional interpretation and its pronouncements remain binding. Second, they argue that the disqualification in issue arises not merely from the fact of conviction but from the status of imprisonment itself which at the material time the Petitioner is undergoing.

[20] The 1st and 2nd Respondents further rely on the decision of this Court in **Electoral Commission of Zambia v Belemu Sibanze**² wherein it was guided that the ninety-day period prescribed under Article 57(1) of the Constitution for the holding of a by-election commences from the

date the vacancy occurs and cannot be paused or extended. On that authority, they contend that the issues raised by the Petitioner premised on the filing of an appeal against conviction and sentence as a basis for halting the declaration of a vacancy and the subsequent conduct of a by-election cannot be entertained.

[21] The 1st and 2nd Respondents pray that the petition be dismissed with costs.

[22] 3rd Respondent's case

[23] The 3rd Respondent filed its answer and skeleton arguments in opposition to the petition on 19th May, 2025. The 3rd Respondent asserts that it is constitutionally mandated to conduct elections whenever a vacancy arises in the office of MP and that such election must be held within ninety days of the occurrence of the vacancy. It further contends that the Petitioner's alleged appeal against conviction and sentence bears no relevance to the 3rd Respondent's duty to discharge its constitutional mandate as the obligation to hold a by-election within the prescribed ninety-day period remains unaffected.

[24] In its skeleton arguments, the 3rd Respondent contends that Article 57(1) of the Constitution gives it the mandate to conduct elections within ninety days of the occurrence of a vacancy in the office of MP. It

maintains that the period so prescribed is fixed by the Constitution and cannot be enlarged by any person or authority.

[25] The 3rd Respondent prays that the petition be dismissed with costs.

[26] **At the hearing**

[27] At the hearing, counsel for the Petitioner Mr. J. Chirwa and Mr. L.C. Kabwata, argued that the matter engages serious constitutional issues. We note that in their oral submissions, Counsel argued on matters that were not pleaded in the petition. Specifically, they relied on the doctrine of exclusive cognizance and the constitutional immunity accorded to MPs under Articles 76 and 78 of the Constitution. Counsel emphasized that words spoken within the precincts of the National Assembly fall under parliamentary privilege, citing Standing Orders, 2024 and the National Assembly (Powers and Privileges) Act Chapter 12 of the Laws of Zambia (the Act) as authority for this proposition.

[28] Counsel submitted that sanctions for breach of privilege are internal to Parliament and not criminal in nature. Counsel cited comparative Commonwealth practices to emphasize that MPs have absolute immunity for words spoken within Parliamentary precincts.

[29] Counsel further submitted that the judgment in the **Chilangwa**¹ case was rendered *per incuriam* and is therefore, unconstitutional, null and

void. His main concern is that the decision was delivered without affording Mr. Chilangwa a hearing contrary to the fundamental rule that no court may determine a matter without hearing the parties. Counsel contended that, in so doing, this Court breached Article 119 (2) (b) of the Constitution by purporting to render judgment without giving Mr. Chilangwa an opportunity to be heard.

[30] Mr. C. Watopa, Mr. L.C. Butale and Mr. A.B. Isiteketo, appearing on behalf of the 1st and 2nd Respondents, opposed the petition. They reiterated the arguments contained in their written skeleton submissions and further contended that certain reliefs sought had been overtaken by events, particularly in light of the Petitioner's conviction and imprisonment.

[31] It was further argued that the Petitioner's contention that there was no hearing in the **Chilangwa**¹ case is flawed and without legal basis. Counsel submitted that the matter was brought before this Court by way of reference under Article 128 (2) of the Constitution, a provision which does not stipulate that a hearing must be conducted. On this basis, Counsel for the 1st and 2nd Respondents urged that the petition be dismissed.

[32] Ms. T. Phiri, Mr. Musoka and Mr. Siame, appearing for the 3rd Respondent, argued that the 3rd Respondent acted lawfully in conducting the by-election in Lumezi Constituency after the seat was declared vacant by the 2nd Respondent. Counsel submitted that the 3rd Respondent relied on the authority of the **Belemu**² case in taking this course of action. They further contended that the by-election was conducted in strict compliance with the Constitution and the applicable legal requirements and therefore no constitutional violation occurred.

[33] **Analysis and Determination**

[34] We have considered the petition, supporting affidavit, respective answers and supporting affidavits, skeleton arguments and authorities cited by the parties. We deduce that the Petitioner's case rests on the following contentions:

- a) Whether Parliamentary immunity attaching to MPs extends to words spoken outside formal proceedings of Parliament but within the physical precincts or grounds of Parliament;
- b) Whether the declaration of the Petitioner's seat as vacant was unconstitutional because he had lodged an appeal against his conviction and sentence; and

- c) Whether we should depart from our earlier holding in the **Chilangwa**¹ case as the Petitioner believes we arrived at the decision *per incuriam*.

[35] We will deal with these issues seriatim.

[36] **Parliamentary immunity**

[37] The question is whether Parliamentary immunity attaching to MPs extends to words spoken outside formal proceedings of Parliament but within the physical precincts or grounds of Parliament. The Petitioner herein contends that Parliamentary privilege should shield MPs from liability for utterances made within the chambers of Parliament and physical precincts of Parliament. The Respondents argue that such immunity is confined to proceedings within the National Assembly.

[38] We dealt with this issue in the case of **Munir Zulu v The Attorney General and 2 Others**³. We will therefore, not rehash it here. Suffice to reaffirm what we held in that case, that the immunity accorded to MPs under Article 76 of the Constitution and the Act is not absolute, but is confined to statements made in the course of and relevant to the proceedings of the Assembly or its Committees or directed to persons participating therein. Any utterance falling outside these parameters even if made within the precincts of Parliament, does not attract the

protection of the immunities and privileges contemplated by the Constitution and the Act.

[39] **Declaration of a seat vacant when appeal is pending**

[40] In determining this question, the starting point is the Constitution itself.

Article 72 (2) (b) of the Constitution provides as follows:

**The office of Member of Parliament becomes vacant if the member—
(b) becomes disqualified for election in accordance with Article 70.**

[41] Further, Article 70 (2) (f) of the Constitution disqualifies a person from being elected as a Member of Parliament if they are serving a sentence of imprisonment. Article 70 (2) (f) of the Constitution enacts as follows:

**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.**

[42] These provisions are couched in mandatory terms and admit no discretion. The Speaker of the National Assembly by operation of law is therefore, constitutionally obliged to declare a seat vacant once the condition of imprisonment is met.

[43] The Petitioner argues that the lodging of an appeal should suspend the declaration of vacancy and that Article 120 of the Constitution establishes the hierarchy of courts in Zambia. That the implication is that an individual who is convicted in a lower court can appeal to a

court sitting higher in hierarchy and in certain instances have the judgment of the lower court overturned. That having appealed both the conviction and sentence to the High Court, the Respondents' decision to declare the Lumezi seat vacant was null and void and in contravention of Articles 70(2) (f), 72(2) (b) and 120 of the Constitution.

[44] The Petitioner's contention lacks merit. The Constitution does not envisage the suspension of a declaration of a seat vacant upon the conviction of an MP, nor does it provide for the postponement of a by-election merely because an appeal has been lodged against conviction and sentence. Once the seat is declared vacant, the constitutional process must run its course and the lodging of an appeal does not, in itself, operate to stay or nullify that declaration.

[45] Further, Article 120 of the Constitution which establishes the hierarchy of courts does not subordinate constitutional commands to the pendency of appeals. While it is true that convictions may be overturned on appeal, the constitutional imperative operates on the fact of imprisonment as it exists at the time. To hold otherwise would be to read into the Constitution a mechanism that is not provided for and thereby undermining its clarity and certainty.

[46] In the **Belemu**² case, we affirmed that the ninety-day period prescribed under Article 57(1) of the Constitution for the holding of a by-election commences from the date the vacancy occurs and cannot be paused or extended. We hasten to add that neither an individual nor authority is vested with the power to extend or alter the time expressly stipulated in the Constitution. Constitutional timelines and commands are fixed and not subject to suspension by reference to appellate proceedings.

[47] The Petitioner's contention that declaring a seat vacant before the appeal process is exhausted produces absurd results and is not persuasive. We hasten to state that the Constitution balances the rights of individuals with the need for certainty and continuity in parliamentary representation. The automatic vacation provision ensures that constituencies are not left without representation for indeterminate periods while appeals are pending.

[48] It is therefore, our finding that the declaration of the Lumezi parliamentary seat as vacant upon the Petitioner's imprisonment was constitutional and valid. The pendency of an appeal by an MP convicted of a crime and sentenced to imprisonment term does not suspend or defer the constitutional imperative to declare a seat vacant

and holding of a by- election. This is what we reaffirmed in the case of **Maureen Mabonga v The Attorney General and 2 Others**⁴.

[49] Whether we should depart from our earlier holding in the Chilangwa¹ case.

[50] The Petitioner has contended that this Court rendered its decision in the **Chilangwa**¹ case *per incuriam* since it did not afford Mr. Chilangwa a hearing, thereby contravening the fundamental rule of natural justice that no person should be condemned unheard. Counsel has anchored this contention on Article 119 (2) (b) as read with Article 128 of the Constitution, which enjoins courts to hear matters relating to and in respect of, the Constitution.

[51] Our considered view on this issue is that, we must distinguish between the general jurisdictional direction contained in Article 119 (2) (b) of the Constitution and the specific procedural framework established under Article 128 of the Constitution. Article 119 (2) (b) of the Constitution is a broad mandate requiring courts to entertain constitutional matters. It does not, in itself, prescribe the manner in which such matters are to be heard.

[52] Article 128 (2) of the Constitution provides a more precise mechanism. It stipulates that where a constitutional question arises in a court, the

presiding judge must refer that question to this Court for determination of that question. The effect of such a reference is that proceedings in the referring court are stayed until this Court resolves the constitutional question. Importantly, the “hearing” envisaged under Article 128(1) of the Constitution pertains to direct petitions brought before this Court, whereas Article 128(2) of the Constitution contemplates references transmitted from other courts.

[53] In the case of a reference, this Court does not conduct a fresh trial or invite oral submissions from the parties. Rather, the presiding judge frames the constitutional question and transmits it, together with the record, to this Court. Our task is to resolve the constitutional question as framed and remit the matter back to the referring judge for continuation.

[54] Accordingly, the absence of oral submissions in the **Chilangwa**¹ case did not amount to a denial of the right to be heard. The constitutional design is that the parties are heard in the originating court and when a constitutional question arises, it is referred to this Court for resolution on the record. That process satisfies the requirements of Articles 119 (2) (b) and Article 128 (2) of the Constitution.

[55] We find that, this Court did not breach the *Audi alteram partem* rule, nor did it act contrary to Article 119 (2) (b) of the Constitution when it dealt with a constitutional reference in the **Chilangwa**¹ case. The procedure followed was consistent with the Constitution and the jurisdiction conferred upon this Court. We therefore, find that the Petitioner's contention misconceives the nature of constitutional references. Our decision in the **Chilangwa**¹ case is not *per incuriam* and remains binding and applicable.


[56] We accordingly, dismiss the petition for being devoid of merit.

[57] We order each party to bear own costs.



A. M. Shilimi

DEPUTY PRESIDENT - CONSTITUTIONAL COURT



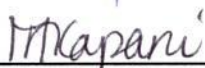
M. Musaluke

CONSTITUTIONAL COURT JUDGE



M. Z. Mwandenga

CONSTITUTIONAL COURT JUDGE



M. M. Kawimbe

CONSTITUTIONAL COURT JUDGE



K. Mulife

CONSTITUTIONAL COURT JUDGE