IN THE CONSTITUTIONAL COURT OF ZAMBIA **2026/CCZ/003**
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

IN THE MATTER OF: **ARTICLE 1(5), 2, 92, 95, 128, 234, 249, 252 AND 259 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016**

IN THE MATTER OF: **SECTIONS 1, 2 AND 6(2) OF THE PUBLIC AUDIT ACT NO. 29 OF 2016**

IN THE MATTER OF: **SECTIONS 1, 4 AND 5 OF THE STATE AUDIT COMMISSION ACT NO. 27 OF 2016**

IN THE MATTER OF: **THE APPOINTMENT OF AN UNQUALIFIED PERSON AS THE AUDITOR GENERAL AND THE CONTINUED EXERCISE OF THE FUNCTIONS OF THE AUDITOR GENERAL WITHOUT RATIFICATION BY THE NATIONAL ASSEMBLY**

IN THE MATTER OF: **THE ALLEGED CONTRAVENTION OF ARTICLES 1(2), 2(b), 92, 95(1)(2) AND 3, 249, 252(1) AND 259(1)(a) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016, SECTIONS 1, 2 AND 6 OF THE PUBLIC AUDIT ACT NO. 29 OF 2016 AND SECTIONS 1, 4, AND 5 OF THE STATE AUDIT COMMISSION ACT NO. 27 OF 2016**

REPUBLIC OF ZAMBIA
CONSTITUTIONAL COURT OF ZAMBIA
21 AUG 2026
REGISTRY 3
P.O. BOX 50067, LUSAKA.

BETWEEN:

LAW ASSOCIATION OF ZAMBIA **PETITIONER**

AND

THE ATTORNEY GENERAL **1ST RESPONDENT**

RON MWAMBWA MWAMBWA 2ND RESPONDENT

CORAM: Munalula-PC, Shilimi-DPC, Musaluke, Mulongoti, and Siloka, JJC on 21st July, 2026 and 21st August, 2026

For the Petitioner:	Mr. M. M. Batakathi and Mr. S. L. Mweene of Messrs. Malisa & Partners
For the 1st Respondent:	Mr. M. Muchende Solicitor Genetral (SC; Ms. N. Chongo and Mr. N. Chinyonga from Attorney General's Chambers
For the 2nd Respondent:	Mr. M. M. Liweleya from MML Legal Practitioners

JUDGMENT

Siloka, JC, delivered the Judgment of the Court.

Cases referred to:

1. Gift Luyako Chilombo v Biton Manje Hamaleke 2016/CC/A004
2. Zambia National Commercial Bank Plc v Martin Musonda and Others CCZ Selected Judgment No. 24 of 2018
3. Milford Maambo and Others v The People 2016/CCZ/051
4. Public Protector of the Republic of Zambia v Indeni Petroleum Refinery Company Limited 2018/CCZ/001
5. Faustine Mwenya Kabwe and Aaron Chungu v Justice Ernest Sakala Justice Peter Chitengi and Attorney General SCZ Selected Judgment No. 25 of 2012
6. Zambia Democratic Congress v Attorney General SCZ Judgment No. 37 of 1995
7. Legal Resources Foundation Limited v Attorney General 2025/CCZ/0020
8. Steven Katuka & Law Association of Zambia v Attorney General & Ngosa Simbyakula and 63 Others CCZ Selected Judgment No. 26 of 2016
9. Mputa Ngalande v Attorney General 2025/CCZ/0019

Legislation referred to:

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

The State Audit Commission Act No. 27 of 2016

The Public Audit Act No. 29 of 2016

INTRODUCTION

[1] This Judgment concerns a petition filed by the Law of Association of Zambia (LAZ), the Petitioner, on the 23rd of March, 2026.

[2] The Petitioner was prompted to file the Petition following a Press Release by the Chief Communications Specialist at State House that the President had appointed Dr. Ron Mwambwa Mwambwa (2nd Respondent herein) as the Auditor General pursuant to Article 249(1) of the Constitution.

[3] The Petition was filed pursuant to Articles 1(5), 2, 92, 95, 128, 234, 249, 252 and 259 of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

[4] The Petition was accompanied by an Affidavit verifying facts sworn by Lungisani Zulu in his capacity as President of the Petitioner, list of authorities and Skeleton Arguments.

[5] The 1st Respondent is the Attorney General cited pursuant to Article 177 of the Constitution of Zambia. The 2nd Respondent is Mr. Ron Mwambwa Mwambwa, a Zambian citizen who is alleged to have occupied the office of the Auditor General from about May, 2023 to date.

[6] By virtue of the 2nd Respondent's occupation of the office of Auditor General, the Petitioner alleges that the Constitution has been violated and seeks the following reliefs:

(i) A declaration that the purported appointment of the 2nd Respondent as Auditor General by the President is ultra vires of Article 249(1), 259(1)(a) as read with Article 252(1) of the Constitution, hence illegal and void.

(ii) A declaration that the taking of, and continued occupation by the 2nd Respondent of the office of Auditor General, being a person above the retirement age without a recommendation from the State Audit Commission and without parliamentary ratification is ultra vires Articles 1(2), 2(b), 95 and 249(1) of the Constitution as read with Section 2 of the Public Audit Act, hence illegal.

(iii) A declaration that the failure or neglect by the Minister of Finance and National Planning to issue commencement orders for the State Audit Commission Act No. 27 of 2016 and the Public Audit Act No. 29 of 2016, is a violation of Articles 1(2), 1(3) and 234 of the Constitution as read with section 1 of the State Audit Act and Section 1 of the Public Audit Act.

(iv) An order that the 2nd Respondent forthwith ceases to perform the functions of and vacates the office of the Auditor General of the Republic of Zambia.

(v) An order that all the salaries, allowances and all other emoluments drawn by the 2nd Respondent from the revenue of the Republic of Zambia by virtue of his occupying the office of Auditor General, be forthwith paid back to the coffers of the Republic of Zambia.

(vi) Any other relief that the Court may deem fit.

THE PETITIONER'S CASE

[7] It is the Petitioner's case that the purported appointment of the 2nd Respondent to the office of the Auditor-General by the President is a violation of Articles 249(1), 252(1) and 259 (1)(a) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act

No. 2 of 2016 (Constitution) as read with Section 2 of the Public Audit Act No. 29 of 2016 in that the 2nd Respondent was ineligible for appointment by virtue of age as he was 64 years old at the time of the appointment.

[8] The Petitioner further averred that by virtue of the 2nd Respondent accepting his appointment and continued occupation of the office of Auditor General while well aware that he is above the retirement age breached Article 2(b) and Article 252(1) of the Constitution as read with Section 2 of the Public Audit Act.

[9] The Petitioner also averred that despite Parliament enacting both the State Audit Commission Act No. 27 of 2016 and the Public Audit Act No. 29 of 2016 on the 7th of June, 2016, the Minister of Finance has to date not issued the commencement order required to operationalise both pieces of legislation.

[10] Further, the Petitioner averred that the failure and/or neglect by the Minister of Finance and National Planning to issue the Commencement Order for both the State Audit Commission Act No. 27 of 2016 and the Public Audit Act No. 29 of 2016 almost 10 years after being passed by the National Assembly and receiving presidential assent is a violation of Article 234 of the Constitution.

[11] In its Skeleton Arguments filed on the 7th of April, 2026, the Petitioner submitted that the appointment of the 2nd Respondent as Auditor-General as per exhibit "21" was unconstitutional, unlawful and *void ab initio* as it was made in direct contravention of Articles 252(1), 259(1)(a) and 249(1) of the Constitution as read together with Section 2 of the Public Audit Act.

[12] According to the Petitioner, the 2nd Respondent's appointment was unconstitutional because it was made in the absence of the requisite qualifications as stipulated by Article 252(1) of the Constitution.

[13] The Petitioner further submitted that Article 251(1) of the Constitution is mandatory in nature and that as per our guidance in **Chilombo v Hamaleke**[1], the appointing authority has no discretion to depart from the constitutional requirements set forth in Article 251(1) of the Constitution.

[14] Flowing from the above, it was the Petitioner's submission that a person who has already attained or exceeded the prescribed retirement age, such as the 2nd Respondent who was 64 years old at the time of appointment, lacks the legal capacity to hold office and is therefore disqualified from being appointed.

[15] In persuading the Court to appreciate the unconstitutionality of the 2nd Respondent's appointment as Auditor-General, the Petitioner urged the Court to adopt a holistic interpretation of the Constitution as per our holding in **Zambia National Commercial Bank Plc v Martin Musonda and Others**[2] while adopting a literal interpretation of the Constitution as guided in the cases of **Milford Maambo and Others v The People**[3], **Public Protector of the Republic of Zambia v Indeni Petroleum Refinery Company Limited**[4], **Faustine Mwenya Kabwe** and **Aaron Chungu v Justice Ernest Sakala, Justice Peter Chitengi and the Attorney General**[5].

[16] It was the Petitioner's submission that the appointment of the 2nd Respondent or any person to the Office of Auditor-General is constitutionally provided for under Article 249 of the Constitution. This Article provides a strict constitutional and legal framework governing appointment to the office of Auditor- General. Pertinently, Article 249(1) of the Constitution provides as follows:

> **249(1) There shall be an Auditor-General who shall be appointed by the President on the recommendation of the State - Audit Commission subject to ratification by the National Assembly**

[17] Relying on the above Article, the Petitioner submitted that the 2nd Respondent could only be lawfully appointed by the President upon

receiving a recommendation from the State Audit Commission, followed by mandatory ratification by Parliament as provided in Article 95 of the Constitution. According to the Petitioner, these procedural steps constitute fundamental legal requirements that must be adhered to in ensuring the constitutionality of the 2nd Respondent's appointment as Auditor-General.

[18] The Petitioner submitted that the appointment of the 2nd Respondent as Auditor - General was neither preceded by a recommendation from the State Audit Commission nor was the 2nd Respondent's appointment subjected to National Assembly for ratification.

[19] It was the Petitioner's further submission that the deliberate or negligent omission to subject the appointment of the 2nd Respondent to parliamentary scrutiny undermines the doctrine of Separation of Powers, erodes the constitutional role of the National Assembly as a check on executive authority, as was emphasized in the case of **Zambia Democratic Congress v Attorney General**[6], where the Supreme Court emphasised the critical role of Parliament in governance in the following terms:

> **The Constitution of Zambia itself gives Parliament powers to make laws. Parliament cannot be equated to an Inferior tribunal or body when it is exercising its legislative powers. Therefore, Parliament occupies a central role in the governance framework and cannot be bypassed in matters where the Constitution expressly requires its participation**

[20] Further, the Petitioner submitted that Parliament enacted the State Audit Commission Act No. 27 of 2016 and the Public Audit Act No. 29 of 2016 (herein after referred to as the two Acts) for purposes of establishing *inter alia* the operation of the State Audit Commission and supplementary functions of the Auditor-General with regards to overseeing the independence, autonomy and operations of the National Audit Office.

[21] According to the Petitioner, in spite of the enactment of the two Acts, the Ministry of Finance and National Planning has failed to issue commencement orders for the operationalisation of the two Acts which constitutes a violation of Article 234 of the Constitution as we held in the case of **Legal Resources Foundation Limited v The Attorney General**[7] where at page 35, we held as follows:

> **Article 1(2) of the Constitution declares that any act or omission inconsistent with the Constitution is illegal. An omission to legislate under Article 60(4) of the Constitution, in the face of a clear constitutional mandate, constitutes a direct inconsistency with that provision and frustrates the Constitutional architecture governing the regulation of political parties.**

[22] Concerning the issue of appointment of an Acting Auditor- General and tenure of the Auditor General, the Petitioner submitted that the Constitution provides a clear and limited framework regarding the

temporary discharge of the functions of the office of the Auditor-General. In this regard, the Petitioner relied on Article 251 of the Constitution which provides that:

> **Where the Auditor-General is absent from Zambia or is unable to perform the functions of the office due to illness or other cause, the President shall appoint a person <u>qualified</u> to perform the functions of the Auditor-General until that appointment is revoked or until the Auditor-General returns to the office.**

[23] According to the Petitioner, using the purposive interpretation of the Constitution as guided in **Steven Katuka & Law Association of Zambia Vs The Attorney General**[8] reveals that the Constitution does not create or recognise the office of an "Acting Auditor-General" as a stand-alone or substantive office. Rather, it permits only a temporary and conditional delegation of functions, strictly limited to specific circumstances, namely (i) absence from jurisdiction or (ii) inability to perform functions due to illness or similar cause.

1ST RESPONDENT'S CASE

[24] In response to the Petition, the 1st Respondent filed an Answer which was supported by an Affidavit in Opposition sworn by the Attorney General in his capacity as Chief Legal Advisor to the Government of the Republic of Zambia.

[25] The 1st Respondent averred that the office of the Auditor-General is a constitutional office mandated to audit the accounts of state organs, state institutions, provincial administration, local authorities and institutions financed from public funds.

[26] The 1st Respondent also averred that a press release was issued announcing changes in Government. However, Counsel contended that the 2nd Respondent, as per exhibit "RMM2" was not appointed as a substantive Auditor-General but was appointed in an Acting capacity pending the fulfilment of constitutional requirements.

[27] The 1st Respondent also averred that the State Audit Commission had not been constituted at the material time necessitating the appointment of the 2nd Respondent as Acting Auditor-General to ensure continuity in the discharge of constitutional functions, negating the requirement for ratification.

[28] It was the 1st Respondent's averment that the age of the 2nd Respondent is not in dispute but denied that the same renders the acting designation unconstitutional or unlawful.

[29] In his Skeleton Arguments, the 1st Respondent submitted that the petition before this Honourable Court is fundamentally misconceived both in fact and in law as it proceeds on the erroneous assumption that the 2nd Respondent was appointed as a substantive Auditor-General contrary to the Constitution of Zambia.

[30] According to the 1st Respondent, at no material time was the 2nd Respondent substantively appointed as Auditor-General in the constitutional sense contemplated under Articles 249 and 250 of the Constitution. Rather the 2nd Respondent was designated to act in the office on an interim basis pending the fulfilment of the constitutional and statutory processes necessary for the substantive appointment of an Auditor-General.

[31] The 1st Respondent emphasized that at the point of appointment of the 2nd Respondent, the State Audit Commission, which is constitutionally contemplated as part of the appointment process relating to the office of Auditor-General, had not yet been constituted. Consequently, the institutional mechanism necessary to facilitate recommendations and the eventual completion of the constitutional appointment process for a substantive Auditor-General was not yet in existence.

[32] It was Counsel's submission that the Petitioner has deliberately conflated an acting administrative designation with a substantive constitutional appointment. A substantive appointment contemplates the completion of all constitutional procedures including recommendation and ratification where applicable.

[33] In the present matter the process had not crystallized into a substantive appointment as such appointment had not yet been completed.

[34] The 1st Respondent also argued that the Petitioner's reliance on Article 252 of the Constitution is equally misplaced as the said provision relates specifically to tenure of the office and not to temporary administrative arrangements necessitated by exceptional institutional circumstances.

[35] It was the 1st Respondent's submission that the plain wording of Article 252 of the Constitution merely regulates retirement, resignation and removal from office. It does not expressly prohibit the temporary designation of an individual to discharge the functions of the office pending completion of constitutional processes.

[36] The 1st Respondent further submitted that the qualifications relating to the office of Auditor-General are specifically contemplated under

Article 249(3) of the Constitution and Section 6(2) of the Public Audit Act No. 29 of 2016.

[37] It was the 1st Respondent's submission that neither the Constitution nor the Public Audit Act expressly prohibit the temporary designation of a qualified individual to discharge functions of the office of Auditor General pending the completion of the constitutional process. Equally, that the Constitution does not prevent the temporary discharge of such functions.

[38] Counsel for the 1st Respondent finally submitted that the petition is devoid of merit as the allegations of constitutional illegality are premised upon a misunderstanding of both the factual circumstances and the constitutional framework governing the office of the Auditor General.

2nd RESPONDENT'S CASE

[39] The 2nd Respondent filed his answer on the 9th of April, 2026, supported by an Affidavit in Opposition.

[40] The 2nd Respondent averred that he is a Zambian currently in the employ of the Government of the Republic of Zambia and was

appointed and holds the substantive position of Deputy Auditor-General.

[41] The 2nd Respondent averred that he was appointed by the President of the Republic of Zambia to the position of acting Auditor-General pending the appointment of a substantive Auditor-General.

[42] The 2nd Respondent averred that the Press Release relied upon by the Petitioner does not constitute a letter of appointment of the 2nd Respondent to the alleged position.

[43] The 2nd Respondent further averred that he was duly appointed by the President of the Republic of Zambia to serve as acting Auditor-General pending the appointment of the substantive Auditor-General.

[44] The 2nd Respondent averred that his appointment by the President as acting Auditor-General does not contravene Articles 249(1), 252(1) and 259(1)(a) of the Constitution, as read with Section 2 of the Public Audit Act.

[45] He further averred that the constitutional provisions relating to appointment upon recommendation of the State Audit Commission and prescribed qualifications apply to substantive appointments, and not acting appointments.

[46] The 2nd Respondent also averred that there is no legal provision barring the 2nd Respondent or any other such qualified person from serving in an acting capacity, after attaining the prescribed retirement age, provided the applicable conditions for such acting capacity are satisfied.

[47] No submissions were filed by the 2nd Respondent.

PETITIONER'S REPLY

[48] In Reply, the Petitioner submitted that the 2nd Respondent having allegedly attained the age of the Sixty-four (64) years at the material time, was constitutionally disqualified from appointment as Auditor-General pursuant to Article 252 of the Constitution.

[49] The Petitioner further contended that the 2nd Respondent's designation was unconstitutional on account of the alleged absence of recommendation by the State Audit Commission and the absence of ratification by the National Assembly.

[50] The Petitioner further submitted that the failure by the 1st Respondent to operationalise the State Audit Commission Act No. 27 of 2016 and the Public Audit Act No. 29 of 2016 commencement orders constitutes a violation of Article 234 of the Constitution.

THE HEARING

[51] When the Matter came up for hearing on the 21st July, 2026, Counsel for the Petitioner relied on the Petition, Affidavit verifying facts and Skeleton Arguments filed into Court on the 20th of May, 2026.

[52] In augmenting, Counsel submitted that all the reliefs prayed should be granted save for relief No. 4 which had been overtaken by events.

[53] Counsel in further augmenting contended that the appointment of the 2nd Respondent was unlawful and *void ab initio* because his appointment did not satisfy the constitutional requirements envisaged by Articles 251, 249 and Article 252 of the Constitution.

[54] It was Counsel's submission that the Appointment being *void ab initio* entails that the 2nd Respondent is therefore illegally occupying the office of the Auditor-General and must be ordered forthwith to stop executing the functions of Auditor-General and ordered to pay back the monies to the Government of the Republic of Zambia.

[55] In response, Counsel for the 1st Respondent also relied on the documents filed into Court and briefly augmented.

[56] In augmenting, the Solicitor General submitted that the Petition before Court should be dismissed because it was premature and not ripe to be determined by the Court because the process being challenged had

not crystallised in that no Auditor-General was appointed and that this Court should not rely on misleading press statements indicating that the 2nd Respondent was appointed as Auditor-General.

[57] According to Counsel, the 2nd Respondent was appointed as Acting Auditor-General as such, requirements for recommendations and ratification do not arise.

CONSIDERATION AND DECISION OF THE COURT

[58] We have considered the Petition, the Answer, affidavit evidence adduced and arguments of the parties tendered in support and rebuttal to the issues raised.

[59] The issue for determination is whether or not the 2nd Respondent was appointed as Auditor-General? If so, did his appointment violate the Constitution?

[60] By way of a Press Release dated the 25th of September, 2023, appearing as exhibit "LZ1" on the Record of Proceedings, the President of the Republic of Zambia appointed the 2nd Respondent as Auditor-General pending ratification by the National Assembly. By virtue of that Press Release, Counsel for the Petitioner submitted that the 2nd Respondent was appointed as Auditor-General.

[61] Counsel for the 1st Respondent argued on the contrary that the Press Release was insufficient evidence to confirm that the 2nd Respondent was appointed as Auditor-General. According to Counsel for the 1st Respondent, the 2nd Respondent was appointed as acting Auditor-General as per exhibit "RMM2".

[62] In resolving this contention, we took judicial notice of the fact that constitutional office holders are made aware of their appointments through a Press Release. The Press Release is then followed by parliamentary ratification, swearing in ceremony, followed by issuance of appointment letters.

[63] Therefore, having considered the Press Release, we are satisfied that the process of the 2nd Respondent's appointment as Auditor-General, began but was never concluded as he was not recommended by the State Audit Commission nor ratified by Parliament. In saying this, we are not oblivious of the 2nd Respondent's contention that he was appointed as Acting Auditor-General. We have not been persuaded by this contention because the 2nd Respondent had an opportunity to respond to this by producing evidence of his appointment as Acting Auditor-General but chose not to.

[64] Having established as a fact that the 1st Respondent began the process of appointing the 2nd Respondent as Auditor-General, the next question for determination is whether the 2nd Respondent met the constitutional requirements for the appointment to that office.

[65] For us to determine the question adequately, comfort will be sought from the legal frame work regulating the appointment and retirement of the Auditor-General from the public service as provided in the Constitution.

[66] The constitutional requirements are provided for in Article 249(3) of the Constitution as read with Section 6(2) of the Public Audit Act and Article 252 of the Constitution.

[67] Article 249(3) of the Constitution provides that the following shall be prescribed:

> **a) the qualifications of the Auditor-General;**
> **b) the operations and management of the office of the Auditor-General;**
> **c) the recruitment, supervision grading, promotion and discipline of the staff of the Auditor-General; and**
> **d) the finances of the office of the Auditor-General.**

[68] Section 6(2) of the Public Audit Act No. 29 of 2016 provides as follows:

> **A person qualifies for appointment as Auditor-General if that person:**
> **a) Is a qualified Accountant;**
> **b) Is a member of the Zambia Institute of Chartered Accountants;**
> **c) Has served as an Auditor for at least ten (10) years of which at least five (5) years should have been at senior management level; and**
> **d) At least forty-five (45) years of age**

[69] Article 252 of the Constitution provides:

> **Tenure of office of Auditor-General:**
> 1) **Subject to this Article, the Auditor-General shall retire from office on attaining the age of sixty years;**
> 2) **The Auditor-General may retire with full benefits on attaining the age fifty-five (55) years;**
> 3) **....**
> 4) **....**

[70] Looking at the legal frame work regulating entry, qualification and exit of the Auditor-General from the public service pursuant to Articles 249(3), 252 of the Constitution and Section 6(2) of the Public Audit Act, it is our considered view that the 2nd Respondent did not qualify to be appointed as Auditor-General because he is above the constitutional exit age of 60 years as provided for in Article 252(1) of the Constitution.

[71] Having established that the 2nd Respondent was ineligible for appointment, it follows that the other constitutional requirements to be met became otiose.

[72] In view of what we have stated above, we find that the appointment of the 2nd Respondent as Auditor-General violates Article 252(1) of the Constitution because the 2nd Respondent was ineligible for appointment as a result of age.

[73] Having established that the 2nd Respondent was ineligible for appointment as Auditor-General because of age, it follows that the 2nd

Respondent could not be appointed as Acting Auditor-General. Our position is anchored on Article 251 of the Constitution. This Article provides:

> **Where the Auditor-General is absent from Zambia or is unable to perform the functions of the office due to illness or other causes, the President shall appoint a person <u>qualified</u> to perform the functions of the Auditor-General until that appointment is revoked or until the Auditor-General returns to the office. (emphasis added)**

[74] In our reading of Article 251 of the Constitution, we note that the emphasis before any appointment is made, be it substantive or acting is that the appointee must meet the qualification. In *casu*, the 2nd Respondent as established above is not qualified to be appointed as Acting Auditor-General because of age. Therefore, the argument by Counsel for the 1st Respondent that constitutional requirements do not apply to an appointee appointed in an acting position lacks merit. Further, we must also emphasise that the appointment of an acting Auditor-General pursuant to Article 251 of the Constitution is situation specific and must be for a short period of time.

[77] The Petitioner also sought an order that the 2nd Respondent forthwith ceases performing functions of, and vacates office of the Auditor-General.

[78] Having found that the appointment contravened the Constitution, it is our considered view that the 2nd Respondent cannot proceed to continue performing the functions of Auditor-General. Allowing him to do so will amount to this Court perpetuating an illegality and failure to uphold the protection of the Constitution which is our mandate. We accordingly order that the 2nd Respondent immediately ceases performing the functions of and vacates office of Auditor-General.

[79] The Petitioner further sought an Order that all salaries, allowances and emoluments drawn by the 2nd Respondent be paid back forthwith.

[80] It was vehemently argued by Counsel for the Petitioner that the 2nd Respondent must be ordered to pay back all the monies received if we find that the 2nd Respondent occupied the office of Auditor-General illegally. Counsel for the 2nd Respondent urged us to decline granting the order as prayed because the 2nd Respondent was appointed lawfully as acting Auditor-General.

[81] We have considered the arguments of both parties.

[82] In resolving this question, we find sanctuary in **Mputa Ngalande v Attorney General**[9] where a similar question arose for determination. In that case we held as follows:

> **Regarding the order for payment of allowances and emoluments, we note that the Petitioner did not substantiate this claim for us to**

properly adjudicate on it. The Affidavit verifying facts and exhibits only speak to facts of suspension.

[83] Following our guidance in **Mputa Ngalande**[9], we decline to grant the relief prayed for because the Petitioner has failed to substantiate his claim on affidavit evidence that the 2nd Respondent received the said monies and emoluments. In the absence of such proof this Court cannot fill in the gaps on behalf of the Petitioner to grant the relief sought.

CONCLUSION

[84] In light of what we have stated above, the petition has succeeded in part and we grant the following relief:

(i) **A declaration that the purported appointment of the 2nd Respondent as Auditor-General by the President is *ultra vires* Article 249(1), 259(1)(a) as read with Article 252(1) of the Constitution, hence unconstitutional.**

(ii) **A declaration that the taking of, and continued occupation by the 2nd Respondent of the office of Auditor General, being a person above the retirement age contravenes Article 249(1) of the Constitution and is null and void.**

(iii) An order that the 2nd Respondent forthwith ceases to perform the functions of and vacates the office of the Auditor General of the Republic of Zambia.

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

....
M. M. Munalula (JSD)
PRESIDENT CONSTITUTIONAL COURT

....
A.M.Shilimi
DEPUTY PRESIDENT CONSTITUTIONAL COURT

....
M.Musaluke
CONSTITUTIONAL COURT JUDGE

....
J.Z. Mulongoti

CONSTITUTIONAL COURT JUDGE

....
S.V.Siloka

CONSTITUTIONAL COURT JUDGE